STATE OF MICHIGAN

COURT OF APPEALS

JOHN LOCKARD,

Plaintiff-Appellant,

v

PIONEER CONSTRUCTION COMPANY, TRANSAMERICA INSURANCE COMPANY PROGRESSIVE CONSTRUCTION COMPANY, ACCIDENT FUND OF MICHIGAN and DUAL EMPLOYMENT FUND,

Defendants-Appellees.

UNPUBLISHED
July 19, 1996

No. 184234
L.C. No. 92-000050

Before: Cavanagh, P.J., and Hood and J.J. McDonald,* JJ.

PER CURIAM.

Plaintiff appeals an order of the Worker's Compensation Appellate Commission (WCAC) affirming a magistrate's decision to deny plaintiff's claim for benefits because he was an independent contractor and not an employee. We affirm.

Plaintiff contends that the magistrate and WCAC used the wrong legal standard in deciding that he was an independent contractor rather than an employee. We disagree. In *Amerisure Ins Cos v Time Auto Transportation, Inc*, 196 Mich App 569, 573-574; 493 NW2d 482 (1992), this Court held that an individual is an employee under §161(1)(d) only if he satisfies the requirements of that section. This Court also held that the statute must be construed in conjunction with the economic reality test. Although the precise manner in which the statutory and common-law tests are to be used together was not explained in *Amerisure*, this Court affirmed a trial court decision which utilized the economic reality test to determine whether an alleged employee maintained a separate business within the meaning of the statutory test. We believe that this is a reasonable way of interpreting the statute, which does not define the phrase "maintain a separate business." Because the Legislature may be presumed to have been aware of the judicially created economic reality test and to have chosen not to explicitly overrule it in amending §161, it is reasonable to infer that the Legislature meant that test

---

* Circuit judge, sitting on the Court of Appeals by assignment.

to inform the inquiry whether a claimant maintains a separate business. See *McCaw v T & L Operations, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 181804, issued 6/11/96), slip op p 4.

Although plaintiff also argues that the record does not support a finding that he maintained a separate business, we agree with the WCAC that the magistrate did not err in concluding that plaintiff was an independent contractor. The economic reality test requires an examination of the totality of the circumstances surrounding the performed work, with no single factor given controlling weight, and all applied on the basis of common sense. *Tucker v Nowago Co*, 189 Mich App 637, 639-640; 473 NW2d 706 (1991); see also *McKissic v Bodine*, 42 Mich App 203, 209; 201 NW2d 333 (1972). The goal of the economic reality test is to establish a rational framework within which to consider and weigh factors in a manner consistent with the purpose of the Worker's Disability Compensation Act. *Williams v Cleveland Cliffs Iron Co*, 190 Mich App 624, 627; 476 NW2d 414 (1991).

In the instant case, the magistrate properly identified a variety of circumstances which support the conclusion that plaintiff was an independent contractor and not an employee. For example, plaintiff was paid on the basis of the job done, not the amount of time taken to do the job. Plaintiff furnished his own equipment, including trucks and ladders and special devices. It is uncontested that plaintiff had previously been in the eave and siding business, whereas such work was not part of the normal business of Pioneer or Progressive. No deductions were made from payments to plaintiff for social security or other withholding taxes, and all parties treated the payment other than as wages. Plaintiff was allowed to employ his own assistants. Although plaintiff claims that he did so only after his injury because he was unable to complete the job without help, he testified at the hearing before the magistrate that he occasionally employed his sons and paid them for their efforts prior to the injury.

Although plaintiff may not have held himself out to render services to the public in general, and may not have been an "employer" as defined in the Act, we hold that the WCAC did not err in affirming the magistrate's finding that plaintiff was in the business of subcontracting to do siding and eave work for other contractors. He therefore failed to satisfy all of the conditions for being an "employee" within the meaning of the statute. *Amerisure, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Harold Hood
/s/ John J. McDonald