

STATE OF MICHIGAN
COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

FOR PUBLICATION
December 3, 2013

v

No. 307711
Macomb Circuit Court
LC No. 2010-004817-CK

ALL STAR LAWN SPECIALISTS PLUS, INC,
and JEFFERY A. HARRISON,

Defendants,

Advance Sheets Version

and

JOSEPH M. DERRY,

Defendant-Appellee.

Before: K. F. KELLY, P.J., and CAVANAGH, O'CONNELL, FORT HOOD, BORRELLO, STEPHENS,
and M. J. KELLY, JJ.

BORRELLO, J. (*dissenting*).

My colleagues in the majority have aptly stated the facts and procedural history in this case; thus they need not be repeated here. As the majority correctly states, the issue presented to this conflict panel is whether under the Michigan Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, defendant Joseph M. Derry was an "employee" of defendant All Star Lawn Specialists Plus, Inc., at the time he was injured. Resolution of this issue turns on the interpretation and application of MCL 418.161(1), a provision of the WDCA that defines when an individual should be considered an employee under the act. Contrary to the majority's reading of § 161(1), I would conclude that a person who does not meet all three of the criteria set forth in § 161(1)(n) cannot be considered an employee for purposes of the act. This contrasts with the majority's conclusion that the criteria must be satisfied in order for a person to be "*divested*" of his or her employee status and therefore considered an independent contractor. The WDCA does not refer to "independent contractors," nor does it contain a divesting provision. Therefore, I respectfully dissent.

I agree with the majority that resolution of this issue requires the interpretation and application of § 161(1) of the WDCA, which provides in relevant part as follows:

As used in this act, "employee" means:

* * *

(l) Every person in the service of another, under any contract of hire, express or implied

* * *

(n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. [MCL 418.161(1).]

I further agree that subdivisions (l) and (n) “ ‘must be read together as separate and necessary qualifications in establishing employee status.’ ” *Ante* at 4, quoting *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 573; 592 NW2d 360 (1999). Indeed, one of the fundamental tenets of statutory interpretation is that statutory provisions must be read together as a whole and not in isolation. See *In re Moiles*, 303 Mich App 59, 68; 840 NW2d 790 (2013). As then Justice TAYLOR explained in *Hoste*, this holds true with respect to subdivisions (l) and (n) of § 161(1):

[Sections 161(1)(l) and 161(1)(n)]^[1] . . . *must be read together as separate and necessary qualifications in establishing employee status.* . . . [I]t is plain that every individual claiming employee status under [subdivision (l)] must also be examined under [subdivision (n)]. Said another way, once an association with a private employer is found under [§ 161(1)(l)], the characteristics of that association must meet the criteria found in [§ 161(1)(n)]. [*Hoste*, 459 Mich at 573 (emphasis added).]

Reading subdivisions (l) and (n) together indicates that a person is an “employee” under the WDCA when that person is “in the service of another, under any contract of hire” and the person:

- (1) does not maintain a separate business,
- (2) does not hold himself or herself out to render services to the public, and
- (3) is not an employer subject to the WDCA.

This was the precise and correct result reached by this Court in *Amerisure Ins Cos v Time Auto Transp, Inc*, 196 Mich App 569, 574; 493 NW2d 482 (1992), wherein this Court explained that “each provision [in MCL 418.161(1)(n)] must be satisfied *for an individual to be an employee.*” (Emphasis added.)

¹ At the time of the injury in *Hoste*, what is now subdivision (l) was codified as subdivision (b) and what is now subdivision (n) was codified as subdivision (d). See 1985 PA 103.

There is no dispute that Derry was in the service of All Star and under a contract of hire; however, as the majority correctly notes, at the same time Derry maintained a separate business and held himself out to render services to the public. The inquiry should have ended there. Derry could not satisfy all three criteria under MCL 418.161(1)(n); therefore, he could not claim employee status under the act.

Accordingly, I reject the interpretation given by the prior panel in this case and accepted by the majority. I would therefore affirm the trial court's holding that Derry was not an employee under the WDCA.

/s/ Stephen L. Borrello
/s/ Karen M. Fort Hood
/s/ Michael J. Kelly