

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE COUNTY OF ST. JOSEPH

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CITY OF STURGIS, )  
 )  
 Appellant, )  
 )  
 v )  
 )  
 ANN MESSNER and MICHIGAN )  
 EMPLOYMENT SECURITY COMMISSION, )  
 )  
 Appellees. )  
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FILE NO. 78-590

OPINION OF THE COURT

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The Court has carefully examined the transcript of the proceedings before Referee Richard M. Brewer at 202 East West Street, Sturgis, Michigan, on Monday, June 13, 1977 wherein Ann M. Messner, nee Thiele, a former nurse anesthetist at the Sturgis Hospital was a claimant for unemployment benefits by reason of her having terminated her connection with the Sturgis Hospital. She claims she was entitled to such unemployment benefits because she was an employee, whereas the hospital opposed such because it claimed she was an independent contractor.

The Court appreciates the briefs and oral arguments of counsel in support of their respective positions.

In the course of her testimony in these proceedings, it was apparent that she stated that she was not entitled to any more unemployment benefits because she had a job (T. 50) but that she was entitled to those few weeks compensation she had already received and that was the issue. This Court has reviewed all of the cases cited by counsel in their briefs, including the factors to be considered, on the issue, and finds that the cases relied on by the appellees are not in point with the peculiar fact situation in the instant case.

Aside from the comments of the referee, who appeared to be more an advocate for the claimant Messner at the hearing instead of an impartial official, this Court finds that it is clear from all of the testimony and evidence that claimant Messner was at all times an independent contractor; that she was not an employee; that she had a

free choice of whether she would be an employee or an independent contractor and she, after consulting with independent legal counsel of her choice, opted to be an independent contractor instead of choosing to be an employee; that over and aside from her acknowledging that she was and her choosing to be an independent contractor above her written signature, all of the evidence establishes that that is exactly what she was, along with another nurse anesthetist named Thaddeus Juszckak; that she had the right to perform her services at other hospitals and was not restricted to the Sturgis Hospital; that in the opinion of this Court this case is not at all close on the facts as to whether she was an independent contractor or an employee.

As to tools or investment, she is in no different position than the anesthesiologist, radiologist, pathologist, or surgeon performing the operations. She had to have specialized training for her duties. In the opinion of this Court, the "economic reality" doctrine has no application to personnel of this type, or to the facts in this case. She was no more subject to control than the above-mentioned specialized personnel.

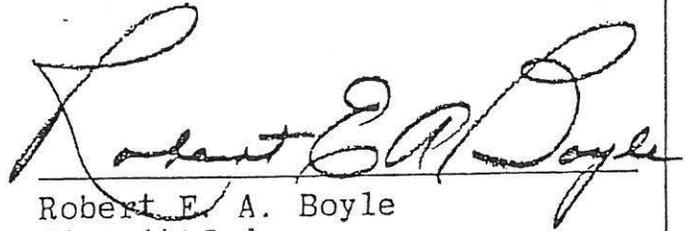
While this Court recognizes the tendency of the Michigan Employment Security hearing officers to find claimants to be employees, sometimes on tenuous grounds and evidence, a review of all the facts and circumstances in this case convinces this Court that there was no basis for such a finding with respect to Ann Thiele Messner.

Unlike a workmen's compensation case involving negligence or injury, or where there is no written agreement, the clear facts and testimony require no forced or strained construction or interpretation of the independent contractual relationship. Accordingly, the decided cases relied on by the parties with respect to qualifications for such benefits are not in point with the facts and circumstances of this case. There seems to be a dearth of authority with respect to this specific factual situation. The Court, in the course of extensive research, has been able to find only the case of Fisher v Sydenham Hospital, 26 NYS 2d 389 (1941) at 390, also involving the question whether a nurse was an employee or independent contractor. The Court stated in pertinent part:

". . . The nurses were engaged by the Hospital as special nurses at the request of the plaintiff and were paid by the Hospital and their wages collected from the plaintiff along with other charges. The nurses, therefore, were to be considered as independent contractors, and not as employees of the Hospital, and if negligence of

the nurses had been established by the testimony,  
the Hospital would not be liable. . ."

In sum, this Court finds that the decision of the Board of Review is contrary to law and is not supported by competent, material or substantial evidence on the whole record. The decision of the Employment Security Board of Review is reversed, and the decision of the three member panel of the Michigan Employment Security Board of Review finding that the claimant was an independent contractor and not an employee is affirmed.



Robert E. A. Boyle  
Circuit Judge

DATED:

*February 27, 1979*

A True Copy - Date 2-27-79

Beverly J. Burnham  
St. Joseph County Clerk

by *Andrea K. Peck*  
Deputy