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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

JACOB J. AND DAVID T. OLSEN
D/B/A OLSEN SEAWALL CONSTRUCTION
COMPANY

APPELLANT

v

CIRCUIT COURT FILE 79-13578-AE

DAVID WIGGERS AND MICHIGAN
EMPLOYMENT SECURITY COMMISSION

OPINION OF THE COURT

APPELLEE

JOHN B. OLSEN (P18481)
ATTORNEY FOR APPELLANT

ROBERT O. CHESSMAN (P24961)
ATTORNEY FOR CLAIMANT-APPELLEE

FRANK J. KELLEY, ATTORNEY GENERAL
OF THE STATE OF MICHIGAN
By: JAMES H. WHITE (P22254)
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR APPELLEE
MICHIGAN EMPLOYMENT SECURITY COMMISSION

THIS MATTER HAVING BEEN BRIEFED AND ARGUED, AND THE COURT HAVING REVIEWED THE TRANSCRIPT AND THE EXHIBITS ATTACHED THERETO, THE COURT DOES RULE AS FOLLOWS:

THE MICHIGAN EMPLOYMENT SECURITY BOARD OF REVIEW, IN ITS DECISION, DID DETERMINE THAT THE CLAIMANT, DAVID WIGGERS, WAS AN EMPLOYEE AND THE APPELLANTS, JACOB J. OLSEN AND DAVID T. OLSEN, D/B/A OLSEN SEAWALL CONSTRUCTION COMPANY, WERE EMPLOYERS.

THE BOARD OF REVIEW, IN ITS DECISION, RELIES HEAVILY UPON THE DETERMINATION THAT TOM NELSON WAS PAID BY OLSEN ON AN HOURLY BASIS FOR HIS TIME SPENT ON THE JOB. THIS IS MENTIONED IN THE DECISION FOUND ON P 164 OF THE TRANSCRIPT AND REPEATED ONCE AGAIN ON P 165, STATING THAT "NELSON HIMSELF WAS PAID ON AN HOURLY BASIS FOR HIS WORK AND NOT ON A COST PLUS PROFIT PERCENTAGE FOR THE JOB. NELSON'S METHOD OF BEING PAID WAS INCONSISTENT WITH THE CONCEPT OF AN INDEPENDENT CONTRACTOR."

REGARDING THE SCOPE OF REVIEW WHICH THE CIRCUIT COURT HAS IN MATTERS OF THIS KIND, THAT BEING LIMITED TO WHETHER OR NOT THE HOLDING OF THE MESOC BOARD OF REVIEW IS SUPPORTED BY COMPETENT AND MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD, THE COURT DOES DETERMINE AND FIND THAT THAT PORTION OF THE DECISION IS NOT SUPPORTED BY COMPETENT EVIDENCE AND IT IS A CRUCIAL PORTION OF THE DETERMINATION MADE BY THE BOARD OF REVIEW. THE TESTIMONY FROM THE WITNESSES PRESENT WHO HAD PERSONAL KNOWLEDGE OF THE FACTS WAS THAT MR. NELSON WAS PAID THE LABOR COSTS WHICH WAS FIGURED AT \$6 PER FOOT. FROM THIS LABOR COST, NELSON RECEIVED THE BALANCE REMAINING AFTER HE PAID THE LABORERS AND IS IN FACT CONSISTENT WITH AN INDEPENDENT CONTRACTOR AND THERE IS NOT COMPETENT TESTIMONY APPEARING ON THE RECORD WHICH SUPPORTS THE CLAIM THAT MR. NELSON WAS PAID BY THE HOUR. TESTIMONY IS THAT THE WORKERS, AFTER 1974, WERE COMPLETELY HIRED AND FIRED BY MR. NELSON AND UNDER HIS DIRECTION FOR THE ENTIRE TIME. THE OLSEN SEAWALL COMPANY WAS STILL THE ONE THE COTTAGE OWNER DEALT WITH AND OLSEN DID INDICATE WHERE TO PUT THE SEAWALL AND HOW LONG IT WAS TO BE. THERE IS TESTIMONY THAT ON OCCASION THE PER FOOT COSTS WERE CHANGED, AND THESE WERE DISCUSSED WITH MR. NELSON, WHICH WOULD BE CONSISTENT WITH AN INDEPENDENT CONTRACTOR SINCE IF HE IS TO OBTAIN THE LABOR COST AS HIS PORTION OF THE CONTRACT THEN HE WOULD BE CONSULTED, AND IF HE WERE PAID ON AN HOURLY BASIS THERE WOULD BE NO BASIS FOR CONSULTING WITH HIM. IT WAS TESTIFIED THAT THIS WAS VARIED WHEN THE JOBS WERE DIFFICULT OR EASY. THIS IS ALSO CONSISTENT WITH THE INDEPENDENT CONTRACTOR. THE FACT THAT THE TOOLS ARE OWNED BY THE OLSENS AND THE FACT THAT THEY PAID FOR THE LUMBER AND ADDITIONAL NUTS AND BOLTS WHICH WERE INCLUDED IN THE BID AND THE PRICING METHOD, IS NOT INCONSISTENT WITH THE CONCEPT OF THE INDEPENDENT CONTRACTOR; AND THE FACT THAT ONE OF THE OLSENS WOULD OCCASIONALLY ASSIST WHEN HE WAS PRESENT AT THE WORK-SITE, IS NOT INCONSISTENT WITH AN INDEPENDENT CONTRACTOR RELATIONSHIP.

IN CONSIDERING THE WHOLE RECORD AND APPLYING THE ECONOMIC REALITY TEST, AND SINCE THE BOARD OF REVIEW DECISION IS BASED UPON FACTS WHICH ARE NOT SUPPORTED BY COMPETENT EVIDENCE IN THE TRANSCRIPT, IT IS THE OPINION OF THIS COURT THAT THE DECISION OF THE MICHIGAN EMPLOYMENT SECURITY BOARD OF REVIEW IN THIS MATTER BE REVERSED AND THE WELL REASONED OPINION OF THE REFEREE IS HEREBY REINSTATED.

/s/ R. MAX DANIELS
JUDGE R. MAX DANIELS (P12484)
14TH JUDICIAL CIRCUIT

DATED: APR 21 1980