Appeal Docket No. L80-03459-ROl-1683
Employer No. 674-892

STATE OF MICHIGAN

COURT OF APPEALS

CAPITAL CARPET CLEANING AND DYE COMPANY, INC.,

Plaintiff-Appellant,

v

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendant-Appellee.

/

Published

No. 80709

Lower Court No. 82 245 702 AE

William G. Wolfram (P22509)
FAINTUCK, SHWEDEL & WOLFRAM
Attorneys for Plaintiff-Appellant

FRANK J. KELLEY, ATTORNEY GENERAL
FOR THE STATE OF MICHIGAN
LOUIS J. CARUSO, SOLICITOR GENERAL
Counsel of Record
By: GEORGE M. BLATY (P10879)
Assistant Attorney General
Attorneys for Defendant-Appellee

/

OPINION

BEFORE: M. H. Wahls, P.J., S. J. Bronson and T. C. Megargle, JJ.*

PER CURIAM

The issue in the instant case is whether or not certain carpet cleaners are employees of plaintiff, a carpet cleaning company operated out of the City of Ferndale, Oakland County, Michigan. It is plaintiff's position that the carpet cleaners are independent contractors. It is the defendant's position that the carpet cleaners are employees and that plaintiff must, therefore, pay employment security taxes based on "remunerations" made to these "employees."

On January 30, 1980, the Michigan Employment Security Commission (hereinafter referred to as MESC) issued a redetermination finding that certain carpet cleaners were employees of plaintiff. On June 19, 1980, testimony was taken before the MESC Referee Division. On May 12, 1981, the referee mailed a decision affirming the redetermination. The Michigan Employment Security Board of Review affirmed the referees' decision in a split opinion. Plaintiff appealed to Oakland County Circuit Court pursuant to MCL 421.38; MSA 17.540. Oakland County Circuit Court affirmed the board of review. Plaintiff now appeals by right to this Court.

---

* Former Circuit Court Judge sitting on the Court of Appeals by assignment.

Paul Umlauf, Mike Talarchio, Charles Guthrie, and Murray Kahrnoff were all carpet cleaners, or former carpet cleaners, working under a contractual agreement with plaintiff. They were required to report to plaintiff's business place every morning and receive work assignments for the day. After receiving the invoices for carpet cleaning jobs to be performed they made appointments with customers out of plaintiff's office, as these carpet cleaners had no business offices of their own.

The carpet cleaners received a 50-percent commission on write-up business they obtained from plaintiff and a 60-percent commission for additional sales made to customers provided by plaintiff. The carpet cleaners had an opportunity to receive a $100 bonus for the most monthly sales. All income was turned over to plaintiff and the carpet cleaners were given a paycheck on Fridays. Income and social security taxes were not withheld from these checks.

The carpet cleaners rented equipment and purchased necessary chemicals from plaintiff. The cost of supplies was deducted from their weekly paychecks. If they chose, the carpet cleaners could purchase their own equipment. A certain chemical had to be purchased from plaintiff because of "special techniques" involved in cleaning carpets under plaintiff's systems.

The carpet cleaners were in control of the jobs themselves and were not supervised by plaintiff. If a problem arose that the carpet cleaners could not handle, the company would often take care of it without deduction from the carpet cleaners' commission. The carpet cleaners were responsible for hiring and paying their own help. Some carpet cleaners testified that they carried worker's compensation insurance to cover their employees.

The carpet cleaners were encouraged, but not required, to wear plaintiff's T-shirts and pass out plaintiff's cleaning cards purchased from plaintiff. The carpet cleaners represented themselves as associated with plaintiff's business and promoted that business.

There was a division in the testimony as to whether the carpet cleaners could do outside carpet cleaning work. At least three testified they all believed that they could not do carpet cleaning work for another company or on their own. One thought he could do outside work although he had not done so.

The carpet cleaners all signed written agreements with plaintiff shortly after they began working. There was a division in the testimony as to whether or not they were required to sign the written agreements. The agreement was, however, terminable at will by either party.

The president of plaintiff's company, Michael Voorhees, testified that the carpet cleaners were independent contractors and entirely on their own. He testified he had no control over the independent contractors when they were not working for the plaintiff; that they could do work on the side if they chose. Mr. Voorhees testified he would not set aside work for a carpet cleaner, however, if that individual was not showing up to work in the morning.

Based basically on this testimony the referee issued a decision finding the carpet cleaners were employees of plaintiff. This decision was affirmed by a divided Michigan Security Board

of Review. Plaintiff appealed to the Oakland County Circuit Court which affirmed the board of review in an opinion dated September 7, 1984, in which the judge stated "even though plaintiff does not exercise direct hour-to-hour control over the carpet cleaners operation, plaintiff does control the overall direction of the carpet cleaners employment situation. Accordingly, the referee and board of review's holding that the services performed by the carpet cleaners for plaintiff do constitute employment within the meaning of the Michigan Employment Security Act is affirmed."

Plaintiff contends the record does not support a finding that an employer-employee relationship existed between plaintiff and the carpet cleaners, and that the parties have by contract done everything possible to establish an independent contractor agreement.

This Court cannot disturb an order or decision of the board of review unless the order or decision is contrary to law or not supported by competent, material, and substantial evidence on the record as a whole. MCL 421.38(1); MSA 17.540(1), Const 1963, art VI, § 28, Allied Building Service Co v MESC, 93 Mich App 500; 286 NW2d 895 (1979).

MCL 421.42; MSA 17.541, provides in part:

"(1) 'Employment' means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

* * *

"(5) Services performed by an individual for remuneration shall not be deemed to be employment subject to this act, unless the individual is under the employer's control or direction as to the performance of the services both under a contract for hire and in fact. Service performed by an individual for remuneration under an exclusive contract which provides for the individual's control and direction by a person, firm, or corporation possessing a public service permit or by a certificated motor carrier transporting goods or property for hire shall be deemed employment subject to this act."

Common law applied a "right of control" to determine whether or not an employer-employee relationship existed. Powell v Employment Security Commission, 345 Mich 455; 93 NW2d 233 (1956). In Goodchild v Erickson, 375 Mich 289; 134 NW2d 177 (1965), a worker's compensation case, the Supreme Court declared that the "control" test had been abandoned as the "exclusive criterion by which the existence of an employee-employer relationship for the purpose of remedial social legislation is determined." In Industro-Motive Corp v Wilke, 6 Mich App 708; 150 NW2d 544 (1967), this Court held that based upon Goodchild, supra, the Supreme Court had abrogated the use of the common law "control" test in interpreting social legislation "which we hold includes employment security legislation as well as workmen's compensation legislation." Control is only one of the many factors to be considered. The test now is based on "economic reality". McKissic v Bodine, 42 Mich App 203; 201 NW2d 333 (1972).

Under the economic reality test, among the relevant factors to be used are (1) control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal. Askew v Macomber, 398 Mich 212, 217-218; 247 NW2d 288 (1976).

As the circuit court specifically found, plaintiff controlled the overall direction of the carpet cleaners' employment situation. Moreover, plaintiff paid their wages, and the work done by the carpet cleaners was so integral to plaintiff's business that it appears that neither could exist without the other. Thus, the finding of the referee and the board of review, when considered in the light of the principles of the "economic reality" theory, was clearly supported by competent, material, and substantial evidence on the record as a whole. MCL 421.38; MSA 17.540. The circuit court did not err in upholding that ruling.

Affirmed.

/s/ Myron H. Wahls
/s/ S. Jerome Bronson
/s/ Thomas C. Megargle

Dated: May 2, 1985