STATE OF MICHIGAN

IN THE COURT OF APPEALS

ON APPEAL FROM THE MICHIGAN/WORKERS' COMPENSATION APPELLATE COMMISSION

ERIC D. MOORE,

Plaintiff-Appellee,

v

C.A. NO.: 313440 & 313478
L.C. NO.: MCAC 09-000085
WCAC 05-000346

NOLFF'S CONSTRUCTION and
TRAVELERS INDEMNITY COMPANY,

Defendants-Appellants,

and

WANDELL'S WORKING CREW, INC., and
LIBERTY MUTUAL INSURANCE COMPANY;
MOORE QUALITY ROOFING & REPAIR and
AMERISURE MUTUAL INSURANCE COMPANY,

Defendants.
_____/

DEFENDANTS'-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE COURT'S JURISDICTION

This is an appeal by leave granted on an application filed by Defendants-Appellants, Nolff's Construction and Travelers Indemnity Company (hereafter referred to as Nolff's, unless otherwise specified), in Court of Appeals Docket Number 313440.

Nolff's appealed the October 26, 2012 final decision and order of the Michigan Compensation Appellate Commission (the Commission). (**ATTACHMENT A**, *Moore v. Nolff's Construction, et al.*, 2012 ACO # 92). Plaintiff also filed an Application for Leave to Appeal the Commission's decision. COA Docket No. 313478.

In an order dated September 4, 2013, this Court granted Nolff's Application for Leave to Appeal in Docket No. 313440 and Plaintiff's Application for Leave to Appeal in Docket No. 313478 pursuant to MCR 7.205(D)(4) "limited to the issues raised in the application[s]." (**ATTACHMENT B**). The Court's order also consolidated the two appeals pursuant to MCR 7.216(A)(7).

Pursuant to MCR 7.203(B)(3), which governs jurisdiction of the Court of Appeals, this Court "may grant leave to appeal from…a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals and the Supreme Court." MCL 418.861a(14), in turn, provides this Court with authority to review "questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules."

On November 21, 2012, Nolff's filed a timely Application for Leave to Appeal from the Commission's October 26, 2012 final order. By virtue of its September 4, 2013 order granting Nolff's application, this Court has exercised its discretionary jurisdiction over the 2012 "final"

order of the Commission. MCL 418.861a(14); *Boggetta v. Burroughs Corp.*, 368 Mich. 600 (1962).

Therefore, this Court has jurisdiction over this appeal pursuant to MCL 418.861a(14) and MCR 7.203(B)(3).

QUESTION PRESENTED

WHETHER THE COMMISSION COMMITTED LEGAL ERROR IN REVERSING THE MAGISTRATE'S DETERMINATION PLAINTIFF WAS AN "INDEPENDENT CONTRACTOR" RATHER THAN AN "EMPLOYEE" AS DEFINED BY MCL 418.161(1)(l) AND (n) OF THE MICHIGAN WORKERS DISABILITY COMPENSATION ACT (WDCA), WHERE THE MAGISTRATE FOUND PLAINTIFF SATISFIED ALL THREE ELEMENTS OF THE LATTER SUBSECTION: AT THE TIME OF HIS INJURY PLAINTIFF WAS PROVIDING A SERVICE TO NOLFF'S (ROOFING WORK) WITH RESPECT TO WHICH HE [1] MAINTAINED A SEPARATE ROOFING BUSINESS (MOORE QUALITY ROOFING AND REPAIR); [2] HELD HIMSELF OUT TO AND RENDERED THAT SERVICE TO THE PUBLIC; AND [3] WAS ALSO CONSIDERED AN EMPLOYER SUBJECT TO THE WDCA?

Nolff's asserts the answer to this question is "Yes."

Plaintiff asserts the answer is "No."

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a straightforward issue of statutory interpretation and application of a provision of the Michigan Workers Disability Compensation Act (WDCA) defining and delineating "employees", who are entitled to workers' compensation benefits, and "independent contractors", who are unable to avail themselves of such benefits.

At the time of Plaintiff's injury[1] MCL 418.161(1)(n) defined an "employee" covered by the protections of the WDCA as follows:

> As used in this act, "employee" means:…[e]very 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 out to and render service to the public, and is not an employer subject to the act." (emphasis added).

Plaintiff was an "independent contractor" performing roofing services for Nolff's at the time of his injury. Plaintiff maintained a separate roofing company (Moore Quality Roofing & Repair), which was actually a named Defendant-Employer at one point in this case.[2] Plaintiff did

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[1] In 2011, the WDCA was amended to provide a new "test" to determine the relationship between employers and employees. Relationships that commenced prior to January 1, 2013 continue to be governed by the prior statutory "test" and factors (some of which continue to be developed by case law, see discussion *infra* at pp. 8 to 21, and footnote 5), that define the employer / employee relationship. Employment relationships that are entered into on or after January 1, 2013 are governed by a new "test". For employment relationships commencing on or after January 1, 2013, this section requires use of the standards derived from IRS Rev. Rule 87-41. This rule, known as the "20-factor" test, uses standards developed by common law to determine whether an employer-employee relationship exists. No single factor is dispositive of a finding of an employer-employee relationship. The rule's focus is primarily upon principals of control, i.e., the amount of control the ostensible employer has over the ostensible employee.

[2] Plaintiff's roofing company was represented in the litigation by its workers' compensation insurer, which was added to the litigation by a petition for a determination of rights filed with the Workers' Compensation Agency on October 25, 2004. (**ATTACHMENT C**, Magistrate Brennan's Opinion, mailed November 4, 2005, at p. 1). It was stipulated that Moore Quality Roofing & Repair was an "employer" subject to the WDCA. *Id*. at 2. Plaintiff testified he

hold himself out to and did render *that service*, i.e., roofing, to the public. And, finally, Plaintiff was also "an employer" as that term is specifically defined by the WDCA – Plaintiff had other employees working for his roofing business.

In her 2005 opinion, Magistrate Brennan concluded, based on the record presented, Plaintiff maintained a separate roofing business, was himself an employer subject to the WDCA, and was providing roofing services to Nolff's at the time of his injury. (**ATTACHMENT C**) Plaintiff did not challenge the Magistrate's factual findings on appeal to the Michigan Compensation Appellate Commission (the Commission). This is not insignificant. Absent a challenge to factual findings by Plaintiff, and a remand by the Commission (which also did not occur with respect to the Magistrate's conclusion Plaintiff was an "independent contractor"), the Commission was without authority to address or change the Magistrate's factual findings. MCL 418.861a(8); MCL 418.861a(11).

In its 2007 opinion, the Commission explicitly agreed with the Magistrate's findings that Plaintiff maintained a separate roofing business and that Plaintiff was an "employer" under the WDCA. (**ATTACHMENT D**, *Moore v. Nolff's Construction, et al.*, 2007 ACO # 211, at pp. 6, 11). The Commission also acknowledged Plaintiff was providing "roofing services" to Nolff's at the time of Plaintiff's injury, i.e., he was injured while performing roofing work for Nolff's. *Id*. (Plaintiff started to slip off the roof, and, in the process of righting himself, shot a nail into his big toe). The Commission also noted Plaintiff's roofing company "was working on a different job at a different location" at the time of Plaintiff's injury. *Id*. at 6.

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obtained a separate workers' compensation policy for his company. *Id*. at 4.

However, the Commission, over the pointed dissent of Commissioner Przybylo, misinterpreted the statute's meaning to conclude Plaintiff was "an employee" of Nolff's, rather than an "independent contractor". In this regard, the Commission majority concluded Plaintiff was not performing services to Nolff's as a roofing company employer, but rather was performing individual services to Nolff's as a roofer. This circular reasoning was error. It was also contrary to the entire purpose of this provision.

The statute explicitly provides: "Every person performing service *in the course of the trade…of an employer at the time of the injury*…." As explained by the Supreme Court in *Reed v. Yackell*, 473 Mich. 520, 537 (2005), to be considered an "employee", rather than an "independent contractor", the first part of the statute requires that the claimant alleging he or she is an "employee" must *not* have been performing *the same service* to the employer that the employee furnishes through another business he or she operates on the side. The exemplar provided by the Court to prove the point was as follows: "Thus, for example, if the service that the person performs for the employer is roofing, to be an independent contractor and, thus, be ineligible for worker's compensation, the person must maintain a separate roofing business, which roofing business he holds himself or herself out to the public as performing." *Id*. This is directly applicable to the case *sub judice*. Plaintiff, who was injured while performing roofing work for Nolff's, maintained a separate roofing business known as Moore's Roofing & Repair. Therefore, Plaintiff was an "independent contractor". The Commission majority's conclusion to the contrary is incomprehensible when applying the law to the facts of this case.

BACKGROUND

A. Procedural Background

The basis of Nolff's appeal arises from a 2007 decision by the Commission which, in a 2-1 opinion (Commissioner Przybylo dissenting), reversed a decision by Magistrate Brennan, mailed November 4, 2005 (**ATTACHMENT C**), in which she denied Plaintiff's claim for workers' compensation benefits from Nolff's on the basis that Plaintiff was an "independent contractor" rather than an "employee" under MCL 418.161 of Michigan's Workers Disability Compensation Act (WDCA). (**ATTACHMENT D**, *Moore v. Nolff's Construction*, 2007 ACO # 211). While reversing the Magistrate's denial of Plaintiff's claim, the Commission remanded the case to the Board of Magistrates for a determination of Plaintiff's average weekly wage, and a consequent calculation of the proper benefit rate. *Id*. at p. 17. The Commission did not retain jurisdiction.[3]

On remand, a new magistrate, Magistrate Baril, addressed the question of which average weekly wage provision would apply to Plaintiff's claim for benefits under MCL 418.371 of the WDCA. The Magistrate found Plaintiff's proofs lacking, and agreed with Nolff's on the question of determining which subsection of MCL. 418.371 applied for purposes of calculating Plaintiff's average weekly wage. (Magistrate Baril's Opinion, mailed March 26, 2009).

The case returned on appeal to the Commission, which again remanded the case allowing additional proofs on the question of Plaintiff's average weekly wage. *Moore v. Nolff's*

[3] While it continued to litigate the issues concerning Plaintiff's average weekly wage and the calculation of his benefits, Nolff's filed an interlocutory application for leave to appeal in this Court from the Commission's 2007 decision. In an order dated April 8, 2008, this Court denied Defendant's application on jurisdictional grounds as premature because the Commission's 2007 decision was not a final order. See MCL 418.861a(14). COA Docket No. 281368.

Construction, et al., 2010 ACO # 60. In an opinion dated January 6, 2011, Magistrate Turner issued a ruling favorable to Plaintiff on the question of which subsection of MCL 418.371 would apply to calculate Plaintiff's average weekly wage. Magistrate Turner's Opinion, mailed January 6, 2011.

Once again, the case returned to the Commission on appeal. The Commission reversed the decision of Magistrate Turner and *affirmed* Magistrate Baril's March 26, 2011 decision applying the proper subsection governing wage loss. (**ATTACHMENT A**, *Moore v. Nolff's Construction, et al.*, 2012 ACO # 92). This was the "final" decision and order of the Commission for purposes of seeking discretionary appellate review of all prior interim rulings, including that of the 2007 Commission decision, which is the subject of Nolff's appeal. MCL 418.861a(14).

B. Factual Background

> (Unless otherwise indicated, numbers in parentheses preceded by "I" refer to the transcript of the September 22, 2005, trial proceedings before Magistrate Brennan. Numbers preceded by "II" refer to the transcript of the January 7, 2009, trial proceedings before Magistrate Baril. Numbers preceded by "III' refer to the transcript of the March 5, 2009, trial proceedings before Magistrate Baril. Numbers preceded by "IV" refer to the transcript of the remand hearing before Magistrate Turner. Numbers preceded by "L" refer to the transcript of the deposition of Ronald Lederman, M.D. Numbers preceded by "S" refer to the transcript of the deposition of Bruce Skolnik, M.D.)

The relevant facts are few. On June 6, 2003, the alleged date of injury, Plaintiff maintained his own business, Moore Quality Roofing & Repair (I 158). At that time, he and his employees were working on a job for Wandell's Working Crew (I 158). Wandell's was a residential roofing business owned by David Wandell (I 26-28). Plaintiff had at one time worked

for Wandell's as an hourly employee (I 29-30). Sometime in 2001, Wandell's ceased to use employees and began using only "independent contractors" to do its roofing work (I 28-30). Mr. Wandell confirmed that, on the date of injury, Plaintiff was doing a job for Wandell's under this arrangement (I 42, 45).

Additionally, Defendant-Nolff's, also a roofing business, was doing a second job for Wandell's on the alleged date of injury (I 44-45; 67-68). Robert Nolff, now owner/operator of Nolff's Construction, had also previously been an hourly employee of Wandell's (I 38-39).

Mr. Nolff testified that he did 90% of Nolff's Construction's work, though, at times, he had to call in employees (I 67-68). On the job in question, he had called in a crew of his employees (I 74). One employee was Thomas Vitito (I 76). The second, Jason Opal, was having problems showing up for work on a regular basis (I 74). Mr. Vitito and Mr. Opal were paid on an hourly basis (I 79-80).

As a result of Mr. Opal's attendance problems, Mr. Nolff contacted Plaintiff about contracting to do a particular piece of the Wandell's job that involved installing some flashing and shingles (I 74-75). Mr. Nolff and Plaintiff negotiated a $100.00 flat fee (I 75-76). Plaintiff admitted that, whenever he did a job for Wandell's, it was likewise on a flat fee arrangement (I 159).

Nolff's Construction did not consider Plaintiff an employee, but, rather, an independent contractor – Mr. Nolff contracted Plaintiff to do one piece of work for a fixed price (I 87). In fact, part of the reason Mr. Nolff hired Plaintiff was because Plaintiff would be able to do the job entirely without Mr. Nolff having to watch him, unlike his employee, Mr. Opal, who had previously done that particular work for him (I 95).

With regard to the alleged injury, Plaintiff testified that he was almost done with the job when he started to slip off the roof, and, in the process of righting himself, he shot a nail into his big toe (I 127).

Magistrate Brennan found that Plaintiff sustained an injury and suffered disability as a result. However, the Magistrate also concluded Plaintiff was an "independent contractor" under MCL 418.161(n) and, thus, he was excluded from coverage as an employee under the WDCA. (**ATTACHMENT C**, Magistrate Brennan's Opinion, mailed November 4, 2005, pp 6-7).

In a split decision, the Commission reversed. The majority concluded Plaintiff was not an independent contractor, despite the unchallenged facts that he maintained his own separate roofing business, was an employer himself subject to the Act, and was performing roofing work. Commissioner Przybylo dissented. He challenged the majority's interpretation of the term "service" in the first phrase of MCL 418.161(1)(n).

STANDARD OF REVIEW

This Court's standard of review requires the Court to determine whether the Commission has legally erred and, with respect to factual matters, determine whether there is any competent record evidence to support the Commission's findings. Mich. Const. 1963, art. 6, § 28; MCL 418.861a(14); *Mudel v. Great Atlantic & Pacific Tea Co*, 462 Mich. 691, 732 (2000).

The Commission's legal rulings are subject to reversal if the Commission's decision was based on erroneous legal reasoning. *DiBenedetto v. West Shore Hospital*, 461 Mich. 394 (2000); *Taylor v. Second Injury Fund*, 234 Mich. App. 1, 13 (1999). The question of whether an individual is an "employee" or an "independent contractor" under the WDCA is a question of law subject to review *de novo*. *McCaul v. Modern Tile and Carpet, Inc*, 248 Mich. App. 610,

615 (2002), citing *Oxley v. Department of Military Affairs*, 460 Mich. 536, 540 (1999).

ARGUMENT AND ANALYSIS

I. PLAINTIFF WAS AN "INDEPENDENT CONTRACTOR" RATHER THAN AN "EMPLOYEE" AS DEFINED BY MCL 418.161(1)(l) AND (n) OF THE MICHIGAN WORKERS DISABILITY COMPENSATION ACT (WDCA), WHERE THE MAGISTRATE FOUND PLAINTIFF SATISFIED ALL THREE ELEMENTS OF THE LATTER SUBSECTION: AT THE TIME OF HIS INJURY PLAINTIFF WAS PROVIDING A SERVICE TO NOLFF'S (ROOFING WORK) WITH RESPECT TO WHICH HE [1] MAINTAINED A SEPARATE ROOFING BUSINESS (MOORE QUALITY ROOFING & REPAIR); [2] HELD HIMSELF OUT TO AND RENDERED THAT SERVICE TO THE PUBLIC (MOORE'S CREW WAS DOING A ROOFING JOB AT ANOTHER LOCATION); AND [3] HE WAS CONSIDERED AN EMPLOYER SUBJECT TO THE WDCA

The core issue as it pertains to Defendant-Appellant's appeal concerns the Commission's legal conclusion reversing the Magistrate's determination Plaintiff was *not* an employee, and therefore, not entitled to workers' compensation benefits under the WDCA. In this brief, Travelers argues Plaintiff was *not* an employee because under the facts of the case as developed by the record, Plaintiff satisfied *all three elements* required to be shown under that subsection to prove that an individual is an independent contractor.

As of the date of this Brief on Appeal, it should be noted the Court of Appeals recently issued a published decision after a conflict resolution panel was impaneled in the case of *Auto Owners Ins. Co. v. All Star Lawn Specialists, Inc., et al.*, ___ Mich. App. ___ (released December 3, 2013) (Docket No. 307711 (**ATTACHMENT E**). There, a conflict panel of this Court held MCL 418.161(1)(n) is "conjunctive" in nature, requiring that each of the three elements in that statute be satisfied in order to classify an individual as an independent contractor as opposed to an "employee". *Id.* The Court thereby overruled *Amerisure Insurance Companies v. Time Auto Transportation, Inc.*, 196 Mich. App. 569 (1993).

One of Nolff's arguments in its Application for Leave to Appeal was, consistent with the principal holding in *Amerisure*, *supra*, the statutory elements were "disjunctive", that is, that if *one* is found to be satisfied, then the individual under consideration is an "independent contractor" rather than an "employee". The precise statutory language of MCL 418.161(1)(n), which led to this Court's recent decision is less than clear. Each of the three "elements" or "factors" is preceded by the word "not". Thus, according to the statute, an "employee" is "[e]very 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 out to and render service to the public, and ***is not*** an employer subject to the act." (emphasis added). The fact that the statute does not expressly state that *all*, or *only one*, of the factors must be found to remove a person from "employee" status led to interpretive speculation that culminated in this Court's decision in *All Star Lawn*, *supra*.

One camp, the majority in that case, felt the presence of the word "and" separating the "factors", with no further specification that they were *not* disjunctive meant that all three needed to be satisfied before a person could be removed from "employee" status and characterized as having acted as an "independent contractor". The other camp, represented by the dissent in *All Star Lawn*, concluded the presence of the words "not" preceding each of the three factors consecutively, meant that if *one factor* was found to be affirmatively satisfied, then the person would be acting as an "independent contractor" and not an "employee".

There was no qualifying language preceding the three factors. Language like "if each of the following is found…" or a simple word such as "unless" preceding the list may have dispensed with the need for litigation that spanned at least 21 years (the *Amerisure* case, which

All Star Lawn recently overruled was released for publication in 1993). But, the Legislature did not clarify the language in its most recent amendments.[4] Application of this particular provision will expire by attrition because employment relationships that commence on or after January 1, 2013 are governed by an entirely new test. See footnotes 1 and 5. Employment relationships prior to this date, as in the case *sub* judice, continue to be governed by pre-2011 MCL 418.161(1)(n).

Without conceding the argument that the factors are, in fact, *disjunctive* in nature, and thus, proof of one removed Plaintiff in this case from status as an "employee" under the WDCA, Defendant acknowledges this Court's decision in *All Star Lawn*, *supra*, overrules *Amerisure*, *supra*, holding the elements in MCL 418.161(1)(n) are "conjunctive". This Court is bound to follow the reasoning and conclusions of the Court in *All Star Lawn*, unless or until the Supreme Court rules otherwise. See MCR 7.215(J)(1) and (6).

However, Nolff also asserted in its Application for Leave to Appeal and in its appeal below, the Commission's interpretation of the statute's language preceding the three factors was in itself legal error, notwithstanding whether the "factors" are "conjunctively" or "disjunctively" required to be proved. Further, Nolff argued that *all elements* of MCL 418.161(1)(n) were satisfied by the record in conjunction with the Magitrate's 2005 findings and ruling and the Commission's own acknowledgement in its 2007 opinion. See Nolff's Application for Leave to Appeal, pp. 9 and 11-15.

That is, the Commission affirmed the Magistrate's finding that Plaintiff maintained a

[4] The WDCA was significantly amended effective December 2011. Injuries occurring prior to that date are governed by the prior statutory scheme. As noted, the new version of MCL 418.161(1)(n) applies to employment relationships that commence on or after January 1, 2013.

separate business and that he was also an employer subject to the act. MCL 418.161(1)(n). **ATTACHMENT D**, 2007 ACO # 211, p. 11. In this regard, the Commission ruled, as a matter of law, "plaintiff has a separate business and he is an employer subject to the Act." *Id.* The Commission also noted that at the time of his injury, Plaintiff's roofing company was performing roofing work at another location. *Id.* at 6. The Commission ruled, however, that Plaintiff was not performing the *same service to* Nolff as an "employer" providing the service of that separate business. *Id.* As pointed out by the dissenting Commissioner, the majority's legal error was in interpreting the language preceding the factors required for proof a person is not an *employee*, but rather is an *independent contractor*. That language is emphasized here: "*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 out to and render service to the public, and is not an employer subject to the act." MCL 418.161(1)(n) (emphasis added).

The plain language of the statute when applied to the facts demonstrates Plaintiff was performing the exact same "service" for Nolff's as he would have been engaged in had he been performing the service of his own business, which the Commission found existed separately, was performing another roofing job at a separate location, and which the Commission also found to be "an employer" subject to the WDCA. Plaintiff therefore satisfied all three elements of the provision at the time of his injury. This is the most direct, common-sense, and *plain* application of the statutory language. It comports with the principles of basic statutory construction. It is supported by case law. And, it is in accord with the intent of the provision.

A. The Plain Language of the Statutory Provision Was Satisfied

It is undisputed that Plaintiff maintained a separate roofing business and was providing roofing services to Nolff's at the time of his injury. The Commission also acknowledged Plaintiff was an "employer" under the WDCA. Yet, the Commission's wayward majority abjectly misconstrued MCL 418.161(1)(n) by concluding Plaintiff was an employee.

The majority's confounded reasoning is exacerbated by the manner in which it is randomly dispersed throughout its opinion. The thrust of its errant conclusion, however, is that because Nolff's hired Plaintiff as an "individual" rather than hiring Plaintiff's business, Plaintiff was an "employee". (**ATTACHMENT D**, 2007 ACO # 211 at p. 12). In this regard, the Commission stated: "That an individual has a business on the side in a similar line of work cannot exclude the individual from being hired as an employee. An employer subject to the Act must be able to hire individuals as an employee, without, if it so chooses and it clearly did so here, hiring the employee's business." *Id*.

The majority arrived at this conclusion by misconstruing the first phrase in the statutory definition. It provides: "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury….". MCL 418.161(1)(n). The majority reasoned that the phrase "of an employer at the time of the injury" somehow referred to the "person performing service", i.e., the putative "employee" who is seeking workers' compensation benefits, rather than to the relevant employer from whom workers' compensation benefits are being sought. Thus, as its twisted logic proceeds, the majority panel reasoned that because Plaintiff was not performing the service to Nolff's as "an employer" at the time of his

injury, but was rather performing the service as an individual employee, he was an "employee" entitled to seek workers' compensation benefits from Nolff's.

However, this circular logic collapses upon itself when the structure and language of the *entire* statutory provision is construed and applied in accordance with its plain and unambiguous meaning, and within the broader framework of the WDCA as a whole. It is clear that the first part of this phrase identifies the "employee" as the "person performing service", and the second part identifies the "employer" from whom compensation benefits are being sought. Instead of this evident and plain meaning, the majority somehow construed the phrase "of an employer at the time of the injury" to refer *back* to the plaintiff employee who is seeking benefits such that it is made to appear that if the person seeking benefits is not himself or herself *performing service as an employer* in the same trade or business, then he or she is providing service as an employee.

This construction renders the statute nonsensical. The majority concludes that if a person is not acting in his or her capacity as "an employer providing services" to another "employer", then he or she is an "employee" within the meaning of the WDCA. But this ignores the requirement of similarity in the services being provided by the claimant where he or she maintains a separate business performing the same services as that of the employer from whom benefits are being sought.

The statute explicitly provides: "Every person performing service *in the course of the trade…of an employer at the time of the injury*…." This means, as the Supreme Court noted in *Reed v. Yackell*, 473 Mich 520, 537 (2005), in order to be considered an "employee", rather than an "independent contractor", the first part of the statute requires that the claimant alleging he or she is an "employee" must *not* have been performing *the same service* to the employer that the

employer ordinarily furnishes at the time of the claimant's injury. A roofer who maintains a separate roofing business, but who is injured while doing roofing work for another roofing company, is the exact example of an "independent contractor" used by the Supreme Court in *Reed*, *supra*, when it was interpreting this provision. That example is directly applicable to the case *sub judice*. Plaintiff, who was injured while performing roofing work for Nolff's, maintained a separate business known as Moore's Roofing & Repair. Plaintiff was an "independent contractor". The Commission majority's conclusion to the contrary is incomprehensible when applying the law to the facts of this case.

Moreover, the majority's circular reasoning would make the remainder of the provision useless superfluity. If the only requirement to be considered an employee was to be acting in one's individual capacity doing any type of work for someone else at the time of the injury, rather than acting as a business entity at that very precise moment, then it would not matter whether the claimant also maintained a separate business for performing that precise type of work. There would be *no instances* in which a "person performing services" "of an employer" would *not* be an "employee" when injured while working for another employer. Such reasoning dispenses with the remaining factors to be considered by the provision. Reduced to its absurdity, the majority's reasoning is that if an individual is injured while acting as an "employee" and not an "employer" under the WDCA, then he or she is an employee.

This would, of course, be the case if the three factors identifying the classic "independent contractor" were not a part of the critical inquiry. As explained in the next section, however, these factors are the Legislature's attempt to distinguish between those who should be covered by the WDCA because they are unprotected, true employees performing work when injured, and

those who are not so protected because they are performing trade-specific work as an "independent contractor", as Plaintiff was here.

B. The Legislative Purpose of Distinguishing Between Employers and Employees is Frustrated by the Commission's Conclusion of Law

The Commission's reasoning, and its conclusion, is also inconsistent with the legislative purpose and intent behind the WDCA provisions delineating "employees", "employers", and "independent contractors". In this latter regard, the statute directly addresses a situation in which a person, although performing the exact same service for another entity than that service he or she provides while maintaining a separate business as an "employer" therein engaged, can step out of the designation as an "independent contractor" and claim themselves to be an "employee" in order to avail themselves of the workers' compensation insurance policy of the putative employer. It is not always the case that an "employer" and/or its insurance carriers necessarily *want* the legal designation that a particular individual is an employee rather than an independent contractor. This is because, in the latter case, while the employer is not subject to the obligations imposed by the WDCA, and, therefore, its workers' compensation insurance carrier does not have to provide workers' compensation insurance coverage for the injury to the "independent contractor", the latter can then proceed to bring a civil liability claim against the employer in a court of law. The employer is no longer insulated by the exclusive remedy provision of the WDCA.

The Court in *Reed*, *supra*, focused on the language "in relation to this service" in the statute precisely because it appreciated the necessity of the distinction made by the entire WDCA between an "employee" and an "independent contractor". In that case, the claimant was injured while helping the defendant deliver meat products. The claimant maintained a full-time business

as a house painter. He supplemented this income by occasionally helping defendant with deliveries.

The claimant filed suit in circuit court proceeding against the defendant under ordinary tort theories. The circuit court characterized the claimant's separate business as a house painter broadly, concluding that it was that of a day laborer. Given this general categorization of the claimant as a "laborer", the trial court concluded he was performing general labor for the defendant and was thus acting as an independent contractor, who could therefore pursue a civil action against defendant, rather than be confined to the jurisdiction of the Workers' Compensation Agency.

In an unpublished opinion, the Court of Appeals affirmed, holding the claimant had "a separate business in which he held himself out for the performance of the same service he was performing for" the defendant. Thus, the Court agreed with the rial court that the claimant was acting as an "independent contractor".

The Supreme Court disagreed, holding that MCL 418.161(1)(n) requires that "'this service', i.e., [be in] the same service that he performed for the employer. It is not enough under the statute that he has any business". This service "must be classified according to the most relevant aspects identifiable to the duties performed in the course of the employer's trade, business, profession, or occupation." *Reed,* 473 Mich. at 537 (footnote omitted).

The *Reed* Court stated that a broad interpretation of the "service" "would inescapably mean that any moonlighting worker, say an industrial worker at General Motors, Ford, or DaimlerChrysler, who has a janitorial service, lawn care business, a Mary Kay distributorship, or even serves as a compensated choir director at her church, would be without worker's

compensation when injured at her day job." *Id*. at 537-38. And, ironically, the very example the Court used to properly construe the statute *is* the case at bar: "Thus, for example, if the service that the person performs for the employer is roofing, to be an independent contractor and, thus, be ineligible for worker's compensation, the person must maintain a separate roofing business". *Id*. at 537. Plaintiff in the case *sub judice* maintained a separate roofing business: Moore Quality Roofing & Repair.

This Court must appreciate the difference in these examples. Someone who is "moonlighting" is working in a service that is *different* from his or her day job – a painter doing delivery work, an assembler with a janitorial service, a pipefitter with a lawn care business, a quality assurance inspector with a Mary Kay distributorship, an accountant who is a choir director – are all employees. Contrast – a plumber doing plumbing, a painter doing painting, and a roofer doing roofing; these are independent contractors. Applying *Reed* to the case *sub judice*, the Magistrate reached the correct conclusion given the undisputed facts that Plaintiff maintained a separate roofing business, was an employer of roofers himself subject to the Act, and was injured while doing roofing work.

The Appellate Commission's majority concluding otherwise on these facts not only defies precedent, but defies logic. The Appellate Commission's majority claimed that Plaintiff:

> … is not an employer, *not one with a separate business to render the service he rendered to Nolff*, and in no event did he hold himself out to the public. …
>
> * * *
>
> This leaves Nolff with the argument on appeal that plaintiff has a business and is an employer subject to the Act. Both of these allegations are true, but not in relation to the specific service

plaintiff was contracted to perform for Nolff.

[ATTACHMENT D, pp 16-17. (emphasis added).]

That statement is simply wrong, as well as illogical. The undisputed facts are that Plaintiff maintained a separate roofing business, employed others to do roofing, and he was in Nolff's service as a roofer at the time of the injury.

Yet, the Appellate Commission's majority reasoned: "Certainly, plaintiff has a separate business and he is an employer subject to the Act. These elements were irrelevant, however, to this service plaintiff provided to Nolff. That is, 'in relation to this service' that plaintiff provided to Nolff, plaintiff was not an employer nor did he maintain a separate business. The service plaintiff render to Nolff was not as an employer nor as a business." (**ATTACHMENT D**, p 11).

Again, the simple facts are as follows. Plaintiff maintained a roofing business. Plaintiff provided roofing services to Nolff's. The service Plaintiff performed for Nolff's was the same service he performed in his own separately maintained business in which he was an employer himself subject to the Act. Inexplicably, the Appellate Commission's majority further concludes of Plaintiff that he was "the moonlighting worker identified by the Supreme Court in *Reed*, *supra* at 537-538." *Id*. at 17. That is simply an inaccurate statement. Plaintiff falls squarely within the independent contractor example given by the *Reed* Court.

In closing, it is worth noting that the job Plaintiff was doing for Nolff's bears the traditional earmarks of independent contractor work. Plaintiff was hired for his expertise: "I needed it done and if I knew that Mr. Moore was on it, I didn't have to watch over him, I could be on something else productive myself." (I 95). Plaintiff was brought in to do one particular job for a flat fee (I 74-76, 159). Plaintiff confirmed that this is how he is paid when he does a job

for Dave Wandell (I 159). While Plaintiff was being paid a flat fee, Mr. Vitito and Mr. Opal were paid on an hourly basis by Nolff's (I 79-80).

Given the time pressures of construction work, and the need for a reliable person to furnish roofing services, it was financially beneficial to Nolff's that Plaintiff, an obviously experienced roofer, complete the specialized flashing work. It was also beneficial to Plaintiff to peel off other jobs, which he had other employees performing anyway, to go and do the job for Nolff's for a fixed fee. By agreeing to that flat fee he could maximize his income because he had experience – in theory he could complete the job in less time and get more value for that time. The facts clearly demonstrate that Plaintiff was working as an independent contractor.

It should also be noted, and this Court is well aware that, basic grammar and rules of statutory construction notwithstanding, in many, many instances each term and phrase used in the WDCA carries significant *legal meaning* that has to do more with the purpose and intent of workers' compensation law and policy than perhaps language used in other statutory provisions. And, Nolff's admits these laws and policies do change, sometimes slower than the realities of the world around them.[5] However, the nuances cannot be understated. Thus, when each of the three

[5] See footnote 1, *supra*, explaining that the very provision that the Court of Appeals is construing in this case, with respect to an injury that occurred in 2003, and litigation, at least with respect to the precise issue, that concluded in 2005, and over which the Commission ruled in 2007, was changed in 2011, effective January 1, 2013. However, even this "new" law is dated. See opposing counsel's excellent summary of the apparent lag in the Legislature's consideration of the law as applied to current realities of business. Welch & Royal, Workers' Compensation in Michigan: Law and Practice, February 2013 Update. As noted in his treatise, the IRS has moved away from a rote application of the 20-factor test. *Id*., § 2.8 at pp. 21-22. As noted, the IRS has stated "some of the twenty common law factors listed in [Rev Rul 87-41] are no longer as relevant as they once were." *Id.*, citing Department of the Treasury, Internal Revenue Service, *Independent Contractor or Employee? Training Materials*, at 2-4 (1996). Relatively more recent is the Office of General Counsel's intimation of a similar distancing between the IRS and adherence to the common-law 20-factor test. *Id*. The OGC noted "[b]ecause of the difficulty in

applicable elements here is reviewed, each carries with it a meaning that must be fully appreciated by the interpreting panel.

Why is it important that the "independent contractor" who is performing work for another at the time of his or her injury be one that maintains a separate business doing that precise type of work; holds that business out to the public as a business entity that does that precise type of work; and is itself a business considered an "employer" subject to the Act? The answer is because the Legislature sought to protect "employers" and "employees" at the same time. In drafting the WDCA, the Legislature had to consider situations in which an individual should be entitled to seek workers' compensation benefits because he was an "employee", but too, which "business entities" had to comply with worker's compensation law (primarily by supplying its own employees workers' compensation coverage) so that they could not escape those obligations by subterfuge and manipulation.

So, for example, just as an "employer" may seek to denounce the number of true employees he or she has to avoid (1) paying workers' compensation premiums, (2) being considered an employer subject to the requirements to procure such insurance, and/or (3) to avoid fines, penalties, and potentially criminal prosecution for attempt to evade same, when such an individual proprietor of such an entity is himself or herself injured while performing work for another such entity, he or she may have an interest in seeking benefits from the workers' compensation carrier of the entity for which he or she was performing such work. Should this be

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applying the twenty-factor test and ***because business trends have changed over the years***, the Service has recently begun using a new approach with respect to worker classification. Rather than listing items of evidence under the twenty factors, the approach now is to group the items of evidence into the following three main categories: behavioral control, financial control, and the relationship of the parties." *Id*., citing OGC Memorandum Letter, IRS at 3, dated December 4,

allowed if he or she has his own workers' compensation insurance coverage?

Second, and importantly, it is not always a benefit to an "employer", or his or her insurers providing multiple lines of insurance coverage, e.g., no-fault automobile insurance, general liability, etc., that an individual injured while performing work for the employer *not be considered an employee*. Indeed, the *Amerisure* case that this Court recently overruled in *All Star Lawn* was a declaratory action in which the workers' compensation insurer sought to charge and recover premiums from an insured on the basis of the number of employees the insurer claimed the insured had in its employ. See 196 Mich. App. 569 (1993). The employer sought to denounce that he had a certain number of employees and the insurer sought to claim them as "employees" for purposes of placing them on the employer's schedule for underwriting and premium rate setting purposes.

On the other hand, in *All Star Lawn, supra*, the dispute concerned which line of insurance coverage would be "on the risk" for the plaintiff's injuries. If the injured party was an "employee" then he could only access workers' compensation benefits. The WDCA is the *exclusive* remedy for true employees under the WDCA. Such employees are barred from proceeding against his or her employer in circuit court. MCL 418.131(1) ("The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease…."). If the injured party was, on the other hand, an "independent contractor", then he could proceed in circuit court implicating the assets available under the employer's no-fault automobile and general liability insurance policies. Presumably, under the latter scenario, he could recover more in the way of damages

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1998 (emphasis supplied).

available in a tort action, as long as he could satisfy the other prerequisites attendant to such claims in circuit court.

Another detail of significance in the realm of the WDCA and the inquiry of the different treatment of "employees" and "independent contractors" is the requirement in MCL 418.161(1)(n) that the individual be an "employer" subject to the WDCA. This is because "[e]very employer…shall be subject to the provisions of [the WDCA]." MCL 418.111. Section 115 further defines employers who are covered, including private employers. It provides as follows:

> **Sec. 115.** This act shall apply to:
>
> **(a)** All private employers, other than agricultural employers, who *regularly employ* 3 or more employees at 1 time.
>
> **(b)** All private employers, other than agricultural employers, who regularly employ less than 3 employees *if at least 1 of them has been regularly employed by that same employer for 35 or more hours per week for 13 weeks or longer during the preceding 52 weeks*.

[MCL 418.115 (emphasis added).]

Further, MCL 418.121, provides an "opt in" provision, which allows an entity to assume it is an employer subject to the WDCA. In this way, the entity can purchase a valid workers' compensation insurance policy and thereby insulate itself from any other personal injury liability brought by putative or statutory employees in the form of a tort action. As a result of such an arrangement, employees of that employer would only be able to file a claim for workers' compensation benefits (lost wages, medical and rehabilitation benefits, etc.). In other words, these individuals would only be able to file a claim in the workers' compensation agency for wage loss, medical and other statutory benefits, rather than a lawsuit in court to recover personal injury damages. So, even if an entity might not be an "employer" as defined in the WDCA, it

may choose to avail itself of the protections of the exclusive remedy provision.[6]

As mentioned, "employers" as defined by the WDCA are obligated by law to maintain workers' compensation insurance. Employers who attempt to "keep" only a minimum staff, or who attempt to keep no staff as "employees" can be guilty of a misdemeanor. MCL 418.125 ("Any employer otherwise subject to the provisions of this act who consistently discharges employees within the minimum time specified in this chapter and replaces such discharged employees without a work stoppage will be presumed to have discharged them to evade the provisions of this act and is guilty of a misdemeanor.").

Many cases exist in which certain industries or occupations are more susceptible to manipulation than others. Moreover, if an individual wanted to profit from a certain trade by operating a business model providing a labor force, but did not want to maintain workers' compensation insurance for those workers, he or she could presumably claim to have no "employees" at all. He could require each of the individuals that do work for him to themselves maintain workers' compensation insurance; to themselves declare they are not "employees" but rather are independent contractors; to themselves structure their own businesses around a similar model. Such was the business model apparently employed by Wandell's in this case.

Some entities can legitimately take advantage of a total permissive exclusion under the WDCA. For example, when MCL 418.151(b) is read in conjunction with MCL 418.161(3) and

[6] MCL 418.121 provides: "Any private employer not otherwise included by sections 115 and [MCL 418.]118 [applicable only to situations involving domestic servants] may assume the liability for compensation and benefits imposed by this act upon employers. The purchase and acceptance by an employer of a valid compensation insurance policy, except in the case of domestics and agricultural employees, constitutes an assumption by him of such liability without any further act on his part, which assumption of liability shall take effect from the effective date of the policy and continue only as long as the policy remains in force, in which case the employer

(5), certain members of limited liability companies, or other entities, can voluntary exclude themselves from the protections of the WDCA as "employees" and the entity can then declare itself not to be an "employer" subject to the WDCA. In such circumstances, the entity must certify that it has met the statutory requirements to be exempt as an "employer" and the employees have to provide voluntary waivers. Moreover, the entity attempting to take advantage of this exclusion must ensure that each of the other entities and/or individuals that are performing work for it are themselves "employers" providing workers' compensation insurance policies for their own "employees".

It is evident when reviewing the record here, and in reading the Magistrate's 2004 opinion and the Commission's 2007 opinion, that this is precisely what was going on in the instant case with respect to Wandell's. Nolff, Wandell and Moore each testified that they had worked for the other in the past. They explained that Wandell had gotten rid of all "employees" and required those who continued to do work for him to maintain their own workers' compensation insurance. Nolff and Moore did actually maintain such insurance.

All this to say there is much nuance and subtlety in determining whether an individual is an "independent contractor" or an "employee" than can be discounted by simply trying to apply the basic language of the statute in a vacuum.

Plaintiff, in this case, seeks to benefit as an "employee". He was, however, an "employer" subject to the WDCA in this instance; he was maintaining a separate business (no matter how viable it was); he was holding that business out to the public as a provider of roofing services (which the Commission acknowledged his company was actually performing at another

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shall be subject to no liability other than workmen's compensation as provided for in this act.

location at the time of his injury); and he was, at the time of his injury, himself performing roofing work for Nolff's. Plaintiff was an "independent contractor" in every sense of that term and not an "employee".

CONCLUSION

The Commission's decision that Plaintiff was an "employee" rather than an independent contract was legal error. Plaintiff fulfilled all three requirements of the statutory provision defining independent contractors who are not themselves to be considered "employees" under the WDCA for purposes of assessing another employer's workers' compensation protection. Plaintiff was performing roofing work for Nolff's when he was injured. Plaintiff maintained a separate roofing company, Moore's Quality Roofing & Repair, which had its own workers' compensation insurance policy. Plaintiff's company was, at the time of his injury, doing roofing work at another location. Plaintiff was irrefutably also an "employer" within the meaning of the WDCA. Thus, even under this Court's most recent interpretation of MCL 418.161(1)(n), Plaintiff was not an "employee" within the meaning of the WDCA.

Further, to sanction the Commission's ruling that Plaintiff was an "employee" would frustrate the precise intent of the Legislature in delineating "employees" from "independent contractors". Each "employer" in this case entered into separate business transactions to *minimize* their workers' compensation insurance coverage. When an "employer" has no, or few, employees, then they do not have to pay higher workers' compensation insurance premiums, which is overhead that cuts into their day-to-day profits. Thus, it is *always* more economical for an "employer" to minimize the number of "employees" he or she has working for him.

Because the undisputed facts are that Plaintiff maintained a separate business and was

himself an employer subject to the Act in the very service he was engaged in for Nolff's at the time of his injury, Plaintiff was an independent contractor and not covered by the Act. The majority's ruling to the contrary must be reversed. The Commission's majority was without authority to reverse any of the Magistrate's factual findings and its legal ruling was error that must be corrected by this Court.

REQUEST FOR RELIEF

WHEREFORE, Defendants-Appellants, Nolff's Construction and Travelers Indemnity Company, respectfully request that this Honorable Court reverse the Commission's 2007 decision and affirm Magistrate's Brennan's denial of benefits for the reasons stated herein and the arguments presented in its Application for Leave to Appeal.

In the alternative, Defendants-Appellants would request the Court to at least remand the case to the Commission for application of the Court's recent pronouncement in *Auto-Owners Ins. Co. v. All Star Law Specialists Plus, Inc., et al.*, ___ Mich. App. ___ (2013), as the record and facts of this case indicate Plaintiff fulfilled all requirements under the WDCA to be considered an "independent contractor" rather than an employee.

Respectfully submitted,

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/S/ Carson J. Tucker

BY: _____

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