STATE OF MICHIGAN

COURT OF APPEALS

STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiff-Appellee, v A-3, INC., Defendant-Appellant.	UNPUBLISHED May 22, 2008 No. 279554 WCAC LC No. 06-000106

Before: White, P.J., and Hoekstra and Smolenski, JJ.

HOEKSTRA, J., *(dissenting)*.

I respectfully dissent.

In this case, I would conclude that the WCAC majority erroneously applied MCL 418.161(1)(n) and the "substantial evidence" standard of review. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). A review of the record evidence reveals overwhelming evidentiary support for the conclusion that Leon maintained a separate business within the meaning of § 161(1)(n). Leon voluntarily and intentionally entered into a Kirby Independent Dealer Agreement with Cortese. Paragraph 5 of the agreement indicates that a "Dealer is and at all times will operate as an independent merchant and is not subject to direction and control by Distributor with respect to his/her selling activities." Further, paragraph 6 identifies the relationship between Leon and defendant as "that of vendor and vendee and all work and duties to be performed by Dealer shall be performed by him/her as an independent contractor, and Dealer shall not be treated as an employee with respect to any services for federal, state, [and] local taxes and workers' compensation purposes." Additionally, defendant never withheld taxes or FICA, SACA, or FUTA from Leon's commission checks. Defendant did not supply Leon with a Form W-2 at the end of the year, but did supply a Form 1099. Leon files his federal income tax as a self-employed person. He is free to hire individuals to work with him, as long as he compensates those individuals himself. He is also free to advertise at his own expense. Leon is free to sell competitor's vacuum systems or other products without defendant's permission. He pays any fees associated with soliciting licenses required by municipalities. Leon decides his hours of work and his sales territory. He leased a van from defendant, which he could use for both work and personal uses. Finally, Leon takes defendant's product on consignment and sells the product door-to-door.

Under these circumstances, plaintiff cannot satisfy all of the requirements of § 161(1)(n) and, thereby, demonstrate that Leon was an employee as defined by both that subsection and MCL 418.161(1)(l). *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 570; 592 NW2d 360 (1999). Consequently, the evidence established Leon's status as independent contractor for purposes of the WDCA.

/s/ Joel P. Hoekstra