

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

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HENRY LEON,  
PLAINTIFF,

STATE AUTO PROPERTY & CASUALTY  
INSURANCE COMPANY,  
INTERVENING PLAINTIFF,

V

DOCKET #06-0106

A-3, INCORPORATED,  
UNINSURED,  
DEFENDANT.

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APPEAL FROM MAGISTRATE QUIST.

PLAINTIFF, PRO SE,  
JOHN M. KARAFI FOR INTERVENING PLAINTIFF,  
STEVEN C. BERRY AND  
MARY JO BOERMAN FOR DEFENDANT.

OPINION

PRZYBYLO, COMMISSIONER, DISSENTING

Defendant appeals the decision of Magistrate G. Jay Quist, mailed April 7, 2006, that found defendant employed plaintiff. On appeal, defendant challenges that finding and the magistrate's jurisdiction to make that finding.<sup>1</sup>

**FACTS**

The parties do not dispute the essential facts, or the magistrate's recitation of the facts. Therefore, we should also accept the magistrate's recitation of the facts and adopt it as our own under MCL 418.861a(10). His recitation of the facts includes the following:

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<sup>1</sup> Defendant also challenges State Auto's right to reimbursement under the Michigan No-Fault Act. That issue clearly exceeds the jurisdiction of the Appellate Commission. Even if we possessed the jurisdiction to decide the issue, the parties agreed to adjudicate only the issue of plaintiff's employment status. Thus, we can only decide that issue on appeal.

Henry Leon was called as the first witness at trial. He was born on September 20, 1958, making him 47-years-old at the time of trial. He resides in the Grand Rapids area. In approximately 1990, Mr. Leon was employed as a salesman for A-3, Inc., owned by Chris Cortese. Mr. Leon then went to Chicago for a period of time. In October 2002, he became re-employed with A-3.

A-3 is a distributor or franchisee of Kirby Vacuum Cleaners. Mr. Leon was hired by Chris Cortese in October 2002 as a dealer to sell Kirby Vacuum Cleaners to residential customers. Mr. Leon's income was based strictly on sales commissions. The cost of the vacuum cleaners to Mr. Leon was fixed, but he could bargain with customers regarding the retail price. Mr. Leon's sole income in 2002 and 2003 was derived from selling Kirby vacuum cleaners. He did not advertise in the yellow pages. He never set up a separate d/b/a, corporation, or limited liability company. However, he did have a business card which provided his home phone number.

Mr. Leon considered himself to be a dealer hired by A-3. A-3 has an office in Grand Rapids with approximately 3,000 square feet of space. A-3 hired several dealers, including Mr. Leon, to sell vacuum cleaners. Chris Cortese runs A-3. His wife, Lisa, performs secretarial work for the company.

This case arises out of a motor vehicle accident which occurred on April 8, 2003. Mr. Leon started his workday at the Grand Rapids office of A-3. He obtained supplies and vacuums. He was supplied a 1991 Chevy Astro Van which was owned by A-3. Mr. Leon would take the van home and was free to use it for his personal use from October 2002 through April 8, 2003.

Mr. Leon also considered himself to be a crew leader. Crew leaders would recruit dealers and could obtain additional commissions from the dealers' sales. When a customer purchased a vacuum, financing was available through a separate financing company. Mr. Leon would be paid on the sale once the financing was verified and the three-day right of recession had passed. Mr. Leon received checks directly from A-3. Occasionally, he would get cash advances on his sales. He had meetings with Mr. Cortese occasionally. Mr. Leon verified that he did not have any employees of his own.

On April 14, 2003, the plaintiff was interviewed while he was in the hospital by an adjuster from Plaintiff State Auto. At that time, the [sic] Mr. Leon indicated that he was an employee of A-3, Inc.

On cross-examination, Mr. Leon testified that he was probably under medication at the time he was interviewed by the State Auto adjuster. Mr. Leon's sole source of income in 2003 and 2004 was from his sales through A-3. He did not receive any compensation for working in A-3's office. Mr. Leon's wife performed work for Mary Kay and Avon. However, Mr. Leon never worked for them. Mr. Leon was not required to limit his employment to A-3. Mr. Leon picked the sale locations. He was not required to use the van to make sales. No tax withholdings were collected by A-3. Mr. Leon files his taxes as a self-

employed person. A distributor, such as A-3, can recommend that a dealer be promoted to a distributorship. Training or sales meetings were not mandatory. Mr. Leon had no territorial restrictions or time restrictions imposed by A-3. He could have advertised and hired employees if he wanted to. However, he did neither. Mr. Leon did not have any fringe benefits. He had to pay for gas and paid \$50.00 per week for the use of the van owned by A-3. Mr. Leon did not have an office at A-3. He considered his place of work his van or his home.

On redirect, Mr. Leon verified that he never worked as a Mary Kay or Avon dealer. He performed a little work in the office at A-3, but he was not compensated for this work.

Chris Cortese was briefly called as a witness by defense counsel. He is the owner of a Kirby distributorship known as A-3, Incorporated, located in Grand Rapids. Mr. Cortese considers Mr. Leon an independent dealer of Kirby vacuums. Mr. Cortese has a direct agreement with the Kirby Company. Mr. Cortese then enters into agreements with dealers to sell the Kirby vacuum cleaners. An in-home demonstration is required to sell the Kirby vacuum cleaner. Kirby promotes people from dealers to distributorships based on recommendations from distributors like Mr. Cortese. However, Mr. Cortese emphasized that a dealer, such as Mr. Leon, could do whatever he wanted. Mr. Leon could even represent competitors of Kirby vacuum cleaners.

On cross-examination, Mr. Cortese testified that both he and Mr. Leon decided together that Mr. Leon would be a crew leader. Crew leaders receive commissions from dealers who are under them.

Plaintiff's Exhibit 1 is an Application for No-Fault Benefits completed by Mr. Leon on April 28, 2003. In that application, Mr. Leon listed his employer as "Mr. and Mrs. Cortese (A-3, Inc., 3645 Linden, S.E., Grand Rapids, MI)."

Plaintiff's Exhibit 2 is a registration form at Spectrum Health dated April 8, 2003. It lists Mr. Leon's employer as "Kirby Center."

Plaintiff's Exhibit 3 is a Wage, Salary and Benefits Verification Form for the purposes of Michigan No-Fault Insurance Law. It was completed by Karen Jacobson, a former secretary at A-3, Inc. It lists Mr. Leon as a full-time employee of A-3, Inc.

Plaintiff's Exhibit 4 is a health insurance claim form dated January 26, 2004. Plaintiff's employer is listed as A-3, Inc.

Plaintiff's Exhibit 5 is a health insurance claim form dated February 28, 2004. In that form, the plaintiff's employer is listed as "Kirby Center."

Plaintiff's Exhibit 6 contains checks made payable to Henry Leon from A-3, Inc., prior to the injury on April 8, 2003.

Defendant's Exhibit A is a Kirby Independent Dealer Agreement dated October 21, 2002. A-3, Inc., is listed as the distributor in the agreement. Henry Leon is listed as the dealer in the agreement. The document verifies that the plaintiff was considered an independent contractor by both parties and that Mr. Leon was engaged in his own business of buying and re-selling Kirby vacuum systems. Mr. Leon understood through the document that he was a self-employed individual and not an agent or employee of A-3, Inc.

Defendant's Exhibit B is a 1099 Form indicating that Mr. Leon earned \$18,776.00 through his relationship with A-3, Inc., in 2004.

Defendant's Exhibit C is a 1099 Form indicating that Mr. Leon earned \$7,730.00 through his relationship with A-3, Inc., in 2003.

## LAW

The Worker's Disability Compensation Act requires the Appellate Commission to perform two essential functions when reviewing a magistrate's decision under two entirely different standards. First we examine the magistrate's fact findings under the substantial evidence standard. We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After our review of the record, we must determine whether a reasonable person would find the evidence adequate to support the magistrate's findings. MCL 418.861a(3). We expounded on these statutory mandates in *Isaac v Masco Corp*, 2004 ACO #81, where we wrote the following:

The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.

The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. [Footnotes Omitted.]

In addition to our review of the magistrate's fact findings, we also examine the magistrate's statements and applications of the law. We do so under a de novo standard. The de novo standard applies when deciding whether a worker provides services as an employee.

The Worker's Disability Compensation Act defines "employee" and also forbids employee status to three classifications of employees. MCL 418.161(1)(l) mandates that to obtain employee status, a person must show that they provide service under a "contract of hire". If a worker can show a contract of hire, then MCL 418.161(1)(n) grants employee status to the worker, "if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this Act."

The Michigan Supreme Court has held that the Legislature intended section 161 to supersede the common law economic realities test previously employed to determine employee status. In *Hoste v Shanty Creek Management Inc*, 459 Mich 561 (1999), the Court discussed the implication of statutory reform of MCL 418.161. The Court concluded that the Legislature intended to discard the economic realities test in favor of a two-part statutory test. First, the Legislature required a worker to show that he provided services under a “contract of hire.” That requirement necessitates a two-part analysis. First, the worker must prove that he made a contract with the prospective employer. Then, the worker must prove that the contract satisfies the “of hire” portion of the statute. To do so, the worker must show that he provided services in exchange for “real, palpable, and substantial consideration.” *Hoste*, at 575. If a worker can prove that he provides services under a contract of hire, then the Court mandated examination of subsection (n) to determine whether the worker provided the services as an employee or as an independent contractor. The Court reiterated that section 161 superseded the economic realities test when making that determination. The Court found that the statute disqualified a worker from employee status if he: (1) maintained a separate business; or (2) held himself out to the public to render the same service; or (3) satisfied the statutory definition of employer. It recognized that any one of the three MCL 481.161(1)(n) disqualifications would deny employee status. Finally, the Court held that magistrates may utilize the factors from the economic realities test to determine whether a party proves any of the statutory disqualifications from employee status.

Following *Hoste, Id.*, the Appellate Commission addressed tax status implications on the “maintaining a separate business” exclusion. In *Wheelock v X-Cel Transport Inc*, 1999 ACO #508, Mr. Wheelock elected individual tax status to maximize his expenses as deductions. His election constituted maintaining a separate business according to the Appellate Commission.

The Michigan Supreme Court reiterated the *Hoste* analysis in *Reed v Yackell*, 473 Mich 520 (2005) but also discussed the jurisdiction of the Appellate Commission to decide whether a worker satisfies the section 161 definition of employee. While the justices agreed that the Legislature granted the Appellate Commission jurisdiction to determine whether a worker satisfies the statutory definition of employee, they did not decide whether the jurisdiction was exclusive or concurrent.

## **APPLICATION**

We affirm the magistrate’s conclusion that plaintiff and A-3 formed a contract of hire. Clearly, all parties agreed that plaintiff and A-3 formed a contract. While A-3 argues that the contract does not satisfy the “of hire” requirement, it provides no support for its argument. Instead, it stresses that plaintiff performed services as an independent contractor. In so doing, A-3 conflates subsection (l) with subsection (n). It fails to recognize that even independent contractors actually form contracts of hire. A-3 presents absolutely no argument that it did not provide plaintiff consideration for the services he performed.

However, I find the magistrate's analysis of subsection 161(1)(n) flawed. More specifically, the magistrate's reasoning to support his conclusion that plaintiff did not maintain his own business fails to analyze the critical facts. The magistrate supported his conclusion with two facts. First, the magistrate stated that plaintiff did not form a separate legal entity to perform the services for A-3. The magistrate also stated that plaintiff derived his sole income from selling Kirby vacuums for A-3.

The magistrate ignored the overwhelming evidence that plaintiff intentionally created an independent contractor relationship between himself and A-3. The terms of the contract unambiguously state that plaintiff agreed to perform services as an independent contractor. Plaintiff controlled his hours. Plaintiff established his sales territory. Plaintiff could hire salespeople to perform the actual vacuum sales. Plaintiff leased a van under terms that allowed him to use it as he pleased. Plaintiff filed tax forms declaring his independent contractor status. These facts, under the *Hoste* and *Reed* standards, mandate the conclusion that plaintiff performed services for defendant as an independent contractor.

### **CONCLUSION**

Therefore, I would reverse the magistrate's decision and conclude that plaintiff performed services for defendant as an independent contractor.

Gregory A. Przybylo

Commissioner

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WILL, COMMISSIONER, CONTROLLING

We affirm the decision of the magistrate in its entirety. We agree with the lead opinion that the parties do not dispute the magistrate's recitation of the facts and we join with the lead opinion in accepting the magistrate's recitation of the facts as authorized by MCL 418.861a(10).

The lead opinion has done an excellent job of reciting the applicable law. However, it is in the application of the law to the facts of this case that we part company with the lead opinion.

In this connection, *Reed v Yackell*, 473 Mich 520 (2005) serves as a firm foundation for the magistrate's decision that plaintiff herein is an employee and not an independent contractor within the meaning of the Act. We agree with the lead opinion that a contract of hire was entered by plaintiff and A-3. We also agree with the lead opinion that a contract of hire, in and of itself, does not make plaintiff an employee.

The lead opinion correctly indicated that in addition to a contract of hire, one who seeks to establish an employer-employee relationship in relation to the service performed pursuant to MCL 418.861(1)(n) must show that the prospective employee "does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this Act."

In this case the barrier to establishing that plaintiff is an employee is a determination that plaintiff maintained, at the time of injury, a separate business in relation to the services performed for A-3. In resolving this issue, we look to *Reed, supra*, for guidance wherein the Chief Justice set forth an analysis of 161(1)(n) which we believe is a basis for affirming the magistrate:

Reed's argument, adopted by the Court of Appeals, is that he is an independent contractor because he maintained a separate business and held

himself out to the public as a day laborer. Even assuming that Reed had a separate business and held it out to the public, these facts do not establish enough to meet the statutory requirement of subsection 161(1)(n). The first requirement is that the service held out and provided by the separate business be “this service,” i.e., the same service that he performed for the employer. It is not enough under the statute that he has any business and holds it out. The reason is that such a reading fails to give effect to all the words in the statute. This we cannot do because we are bound by oath to give meaning to every word, phrase, and clause in a statute. Said conversely, we cannot render parts of the statute surplusage and nugatory. *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich 142, 146, 644 NW2d 715 (2002). Yet, it is this the plaintiff requests, and this we cannot grant.

Therefore, contrary to the conclusions of the trial court and the Court of Appeals, the “service” performed by the person cannot be placed in such broad and undefined classifications as general labor. Rather, it 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. 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. Accordingly, in this case where the most Reed can point to is that he was a house painter at times, the tests to take him out of the worker's compensation system are not met. [473 Mich 536-537, footnote omitted and emphasis supplied.]

We do recognize that only two other Justices signed the Chief Justice's opinion and an additional two Justices concurred in result only. However, Justice Corrigan began her dissenting opinion with the following, which we believe is also consistent with a determination that plaintiff herein is an employee as determined by the magistrate:

CORRIGAN, J. (*dissenting*).

I respectfully dissent from the lead opinion's determination that plaintiff is an “employee” within the meaning of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* Although I agree with the lead opinion's analysis of this substantive issue, and would also conclude that plaintiff was Mr. Food's employee at the time of his accident, I believe that we should first address the question of our jurisdiction. It appears that the Worker's Compensation Bureau (WCB) has exclusive jurisdiction over consideration of plaintiff's employment status. I would specifically direct the parties to brief the important jurisdictional question presented in the amicus brief of the Workers' Compensation Law Section of the State Bar of Michigan. [473 Mich 541-542, footnotes omitted.]

Accordingly, we believe that the magistrate's finding, based on the evidence presented that plaintiff was an employee, must be affirmed because the fact that plaintiff did not maintain a separate legal entity and did not derive income from any source other than defendant, is competent, material and substantial evidence of an employer-employee relationship between plaintiff and A-3. We also believe that plaintiff's Exhibit 3, wage and salary benefits verification signed by

defendant's administrative assistant, also serves as evidence supporting the employee status of plaintiff. Our interpretation of *Reed, supra*, is such that the magistrate's decision on this issue is legally appropriate.

Defendant has raised two other issues on appeal:

- II THIS COURT IS WITHOUT JURISDICTION OVER PLAINTIFF'S CLAIMS, BECAUSE PURSUANT TO §641, THIS ACTION MUST BE MAINTAINED IN THE CIRCUIT COURT.
- III STATE AUTO HAS NO RIGHT TO REIMBURSEMENT UNDER THE MICHIGAN NO-FAULT ACT.

Initially, we agree with the lead opinion that these two issues are not properly before the Commission as set forth in footnote 1 of the lead opinion, because the parties agreed to only adjudicate the issue of plaintiff's employment status, but we would also add, pertaining to issue II, that the Board of Magistrates has, at least, concurrent jurisdiction to adjudicate plaintiff's employment status. *Reed, supra*.

Pertaining to issue III, we agree with State Auto, the no-fault carrier, that it is an equitable subrogee of A-3's employee and therefore, it has a claim under Michigan law for reimbursement against A-3, defendant herein. In this connection, we believe that *Auto Owners Insurance Company v Amoco Production Company*, 468 Mich 53 (2003) is applicable, and further, that because A-3 is uninsured, that State Auto may proceed against A-3 pursuant to *Perez v State Farm Mutual Automobile Insurance Company*, 418 Mich 634 (1984) where the injured worker has not elected to bring his own claim.

### **Conclusion**

We affirm the decision of the magistrate. The magistrate's finding that plaintiff is an employee and not an independent contractor is supported by competent, material and substantial evidence on the whole record. We believe such finding is consistent with *Reed, supra*.

Rodger G. Will

Commissioner

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GLASER, CHAIRPERSON, CONCURRING

I concur with Commissioner Will in his affirmance of the magistrate's decision. I acknowledge that we are required to follow the Court of Appeals' interpretation of MCL 418.161(1)(n) as announced in *Amerisure Insurance Companies v Time Auto Transportation, Inc*, 196 Mich App 569, (1992), because the Supreme Court has not, as of yet, given any further guidance.

The Court of Appeals initially addressed the interpretation of section 161(1)(n) [formerly 161(1)(d)] in the *Amerisure* case. That Court held that if any one of the three criteria set forth in section 161(1)(n) is met, an individual is determined to be an independent contractor and not an employee. Section 161(1)(n) reads as follows:

(n) 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 or herself out to and render service to the public, and is not an employer subject to this act.

MCL 418.161(1) defines the term "employee" as used in the act. There are fourteen subsections describing what an "employee" includes. Subsection (n) like all the other thirteen, defines what an employee is and not what an independent contractor is. In coming to its conclusion in *Amerisure*, the Court explained:

Our research has found that no published case has interpreted this section. Plaintiff argues that the correct interpretation of §161(1)(d) is that a person is an employee if he performs a service in the course of business of an employer, *unless* (1) the person maintains a separate business, (2) holds himself out to and renders service to the public, and (3) is an employer subject to the act.

Plaintiff has disregarded the use of the word “not.” Thus, under plaintiff’s interpretation, all three provisions must be satisfied for an individual to be an independent contractor and not an employee. Plaintiff argues that, because the evidence does not satisfy all three provisions, the six drivers were employees of defendant and defendant must therefore pay the additional premium.

The trial court, however, interpreted §161(1)(d) to mean that each provision must be satisfied for an individual to be an employee. The trial court then found that the evidence indicated that six of the drivers maintained a separate business and thus were independent contractors and not employees.

We believe that the trial court’s interpretation is correct. The Legislature is presumed to have intended the meaning it plainly expressed. *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744, 453 NW2d 301 (1990). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Id.* The plain and ordinary meaning of the language of the statute involved in this case is clear. The latter portion of the statute is drafted in the negative, employing the word “not” before each provision: “provided the person in relation to this service does *not* maintain a separate business, does *not* hold himself or herself out to and render service to the public, and is *not* an employer subject to this act.” By so employing the word “not,” the Legislature intended that once one of these three provisions occurs, the individual is not an employee. Thus, each provision must be satisfied for an individual to be an employee. If the Legislature had intended otherwise, it would have drafted the statute as plaintiff suggests. [*Amerisure, supra*, 573-574.]

I believe the *Amerisure* Court put too much emphasis on the word “not” with no consideration of the word “and”. Section 161(1)(n) is not ambiguous. No one disputes that the three clauses are to determine an exception to employee status. The clear meaning of the section as a whole is that all three criteria must be met in order to take a worker out of employee status.

In a recent Supreme Court case, *Karaczewski v Farbman Stein & Co*, \_\_\_ Mich \_\_\_ (2007) (Docket #129825), the Court reviewed seventy years of precedence in the interpretation of MCL 418.845, which had held that Michigan would have jurisdiction over out-of-state injuries where the injured worker was a resident of Michigan or the contract of hire was made in Michigan with a resident employer.<sup>1</sup> In reversing that holding, the Court stated, “Plainly the use of the conjunctive term ‘and’ reflects that *both* requirements must be met before the bureau has jurisdiction over an out-of-state injury.”

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<sup>1</sup> 418.845 Out of state injuries; jurisdiction, benefits.

Sec. 845. The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act.

Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, is an employee, so long as such person does not: 1) maintain a separate business; 2) hold himself or herself out to and render service to the public **and**: 3) is not an employer subject to this act.

The Court does not explain why it reads the word “and” which is inclusive, as something that is selective. It seems logical that if the Legislature wanted each criteria in and of itself to establish an exception to the general definition of “employee”, then it would certainly have used the word “or” instead of “and”.

The Court of Appeals in *Amerisure* relied on the common law interpretation of independent contractor to interpret 161(1)(n), incorporating the “economic reality test” into its analysis:

“In determining whether an individual is an employee under the Workers’ Disability Compensation Act, we believe that §161(1)(d) is to be construed in conjunction with the economic reality test”. [*Amerisure, supra.*]

In *Hoste v Shanty Creek Management Inc*, 459 Mich 561 (1999) and *Reed v Yackell*, 473 Mich 520 (2005), the Supreme Court expressed its frustration with the Court of Appeals’ continued reliance on the economic reality test, where section 161 superseded that judicially created concept. It should be noted that the term “independent contractor” is nowhere to be found in this act.

Our Supreme Court has defined an independent contractor as follows:

“An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. Generally, the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results.” *Marchand v Russell*, 257 Mich 96, (1932), citing *Zoltowski v Ternes Coal & Lumber Co*, 214 Mich 231, (1921), and 26 Cyc p 1546. *Caramagno v Tuchel*, 173 Mich App 167 (1988).

Note that the definition from the Supreme Court is not the same as the exclusionary clauses of 161(1)(n). Our act defines employees and does not specifically exclude independent contractors from that description unless such independent contractors: 1) maintain a separate business; 2) hold themselves out to and render service to the public **and**: 3) are employers subject to this act. It has been difficult for us to divorce ourselves from the long held understanding that if an injured worker is determined to be an independent contractor, he or she

is not an employee covered by and subject to the act. A determination that an injured worker is an independent contractor is wholly irrelevant to the issue of whether he or she is covered by and subject to the act. That prior holding has been superseded by section 161 of the act.

In *Reed*, the Supreme Court phrased the issue as turning on the three criteria listed in section 161(1)(n):

We thus turn to the three criteria required for the exception in subsection 161(1)(n): whether Reed, in relation to the service he provided for Mr. Food, (1) maintained a separate business offering *the same* service, (2) held himself out to and rendered *the same* service to the public, and (3) is an employer subject to the WDCA.

While the *Reed* case ultimately was focused on whether the injured worker's services were the *same* type in his own business as the work he was performing when injured, that concern only addressed the first two of the three-prong criteria. Was Mr. Reed an employer subject to the Act? If the *Amerisure* interpretation is correct, then there would necessarily have to have been such an inquiry. It is clear that once the Court determined he did not meet the criteria for either of the first two prongs, there was no need to examine the third. It would be impossible to be exempt from the exclusive remedy of the Act without establishing all three prongs of section 161(1)(n).

Using what the Legislature has given us, there is no reason to ever employ the economic reality test. The criteria are not ambiguous. I would submit that the meaning is not ambiguous either. In order for an injured worker to be exempted from the exclusive remedy provisions<sup>2</sup> of the act, he or she must prove that he or she maintained a separate business, held him or herself out to and rendered service to the public **and** that he or she is an employer subject to this act. If an injured worker can establish all three criteria, then there is not a bar to a tort action, by the

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<sup>2</sup> 418.131 Exclusive remedy; exception; "employee" and "employer" defined.

Sec. 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. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

(2) As used in this section and section 827, "employee" includes the person injured, his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and "employer" includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract.

exclusive remedy provision of this act. If all three criteria are not established then the injured worker is limited to the exclusive remedy, just as his or her employer is subject to the act.

I am simply unable to discern any logic or legal reasoning or common sense in the approach the Court of Appeals took in *Amerisure*, nor do I understand why such an unsupported reading of the statute has continued to remain unaddressed.

In the instant case, defendant failed to establish any one of the criteria, and therefore, plaintiff is entitled to proceed under the act.

Martha M. Glaser

Chairperson

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This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate G. Jay Quist's order, mailed April 7, 2006, finding plaintiff to be an employee of defendant. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Rodger G. Will

Commissioner

Martha M. Glaser

Chairperson