

BEFORE THE
STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the contribution liability, :
or status, under Chapter 108, Stats., of : Hearing No. 9101, S
NATIONAL SAFETY ASSOCIATES INC, Appellant :
Account : SEE ENCLOSURE AS TO TIME
 : LIMIT ON FURTHER APPEAL.

On August 1, 1990, the Department of Industry, Labor and Human Relations (the department) issued an initial determination finding that the appellant's sellers were employes not independent contractors. The employer timely appealed and a hearing was held before an appeal tribunal which affirmed the initial determination. The appellant timely petitioned for commission review. On September 20, 1991, the commission set aside the appeal tribunal decision and remanded the matter to the appeal tribunal for further testimony on the appellant's method of compensating these individuals. Further hearing has been held and the matter is now ready for disposition.

Based on the applicable law, records and evidence in this case, including the evidence taken at the remand hearing, the commission makes the following:

MODIFIED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The appeal tribunal decision issued December 28, 1990 and subsequently set aside is hereby reinstated and incorporated herein by reference.

National Safety Associates, Inc., (NSA) manufactures and sells a line of water filters, air filters and water carbonation units for the home. It markets and sells these primarily through a direct sales organization rather

than through retail outlets. This sales force is divisible into two distinct classes. The first class consists of dealers. These sellers are recruited by distributors and trained to make in-person sales calls to home owners and small businesses to sell water treatment products. The NSA's preferred sales approach is to demonstrate the product on the consumer's own water system such as the kitchen sink. The distributors who recruit the dealers are responsible for placing all of the dealers' orders for merchandise with the appellant. The dealers do not have any direct contact with the appellant after they sign their initial contract. Dealer compensation is made up of two parts. The first is the dealer's retail margin which is the difference between the amount he pays the distributor for the product and the amount the consumer buys it for. The second is a rebate or after the fact discount on his purchase price from the distributor. This rebate is based on the prior month's purchase volume. If the dealer purchases more than a certain dollar amount of products in a given month, he will be entitled to a rebate bonus and consequently a higher percentage return on each sale he makes. With increased volume come increased rebates.

The second class of sellers consists of direct distributors, car qualified direct distributors, sales coordinators, fifth dimension sales coordinators, and national marketing directors. During the period covered by the initial determination, most of these sellers' income was made on the basis of "wholesale purchase volume to the down line." They received a percentage of the inventory sales to dealers and other distributors below them. This compensation was not related to any sales to an ultimate consumer. Under NSA's

buy back procedure and also under the Wisconsin consent decree, inventory returned to NSA from the dealers did not require, upper level distributors to give up any compensation based on that sale.

The issue before the commission is whether sec. 108.02 (15)(k)16., Wis. Stats., the direct sellers exclusion of the Wisconsin Unemployment Compensation Act, applies in this case. That provision provides that covered employment does not include service: "by an individual whose remuneration consists solely of commissions, overrides, bonuses, or differentials directly related to sales or other output derived from in-person sales or solicitation of orders from ultimate consumers, primarily in the home." The statute has two main focuses: first, that the compensation be directly related to sales and second, that such sales be to ultimate consumers in the home.

The dealers clearly fall within the exclusion. All of their compensation is derived from a percentage of the sales price of in-person sales to ultimate consumers primarily in the home. The department argues that the rebates which form a part of the dealers' compensation are not based on an actual sale but on the volume of merchandise purchased as inventory. This is true. However the dealer does not derive compensation until he sells that merchandise to an ultimate consumer. He has not accomplished any sales at the time he purchases inventory. The rebate lowers his costs and thereby increases his commission percentage on the sale. Therefore, all of this compensation is a percentage of a retail sale to an ultimate consumer and thus qualifies the dealer as a direct seller.

The second class of sellers derive income both from direct sales and also from a percentage of inventory sales to dealers and other distributors down the line. Except for their direct sales, their compensation is not related to any retail sales the dealers may make to ultimate consumers. While the statute clearly contemplates overrides, and other commissions paid to managerial personnel on a percentage of sales made by subordinates, the compensation in this case is not a percentage of a sale to a consumer but on a sale to a retailer. It is a wholesale sale. All of the levels above the dealer by definition have at least partial compensation derived from wholesale sales to other dealers and distributors rather than retail sales to ultimate consumers. Therefore, they are not covered under the statute since the compensation must be solely from qualifying commission sales. If in fact their compensation was derived from overrides or differentials from retail sales, then each piece of returned merchandise should have caused a commensurate diminution of the upper levels' compensation. However, sellers in these upper levels testified that when inventory was returned to the company, they were never required to give up any of their compensation that was based on those wholesale sales.

The direct sellers exclusion was not designed to exclude wholesalers. It was created in response to Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 330 N.W. 2d 169 (1983), which found that direct sellers who solicited orders from consumers in their homes and were compensated by a percentage of the retail sale price were employees. Although the employer argues that the result in Princess House was in error, it remains the law in Wisconsin. Sellers in

direct sales organizations like Princess House and the instant case must meet the same independent contractor test as any other putative employee. NSA failed to meet that burden for the reasons stated in the appeal tribunal decision.

The critical issue before the commission is whether that employment is excluded from coverage under the direct sellers exclusion. Given the remedial nature of the Unemployment Compensation Act, exceptions and exclusions to coverage must be narrowly construed. Although the employer argues that all of the appellant's merchandise is designed for use by ultimate consumers and this should exclude the entire sales organization, the commission concludes the statute will not permit such a reading. The statute is clear that compensation must be solely of the types listed. Although NSA believes that the inclusive "or other output derived from" will exclude its wholesalers, this reads the in-person sale requirement out of the statute. For sales or solicitations to be excluded under this section, they must be made to the person who will actually use the product or benefit from the actual use of the product. The sellers' compensation must be solely from commissions related to those sales or percentages related to the commissions derived from a solicitation or direct sale to an ultimate consumer in the home. Since the appellant's organization permits compensation other than that related to sales to ultimate consumers, any individual sellers who derive such compensation are not excluded under section 108.02 (15)(k)16, Stats.

The commission therefore adopts the findings and conclusions of the appeal tribunal with regard to the employer's status under section 108.02 (12) of the statutes as its own.

The commission further finds that those individuals who provide services as dealers are employes under section 108.02 (12) of the statutes, but their employment is excluded employment under section 108.02 (15)(k)16, Stats.

The commission further finds that those individuals who provide services as direct distributors, car qualified direct distributors, sales coordinators, fifth dimension sales coordinators and national marketing directors are employes under section 108.02 (12) of the statutes, and their employment is not excluded employment under section 108.02 (15)(k)16, Stats.

DECISION

The appeal tribunal decision is hereby reinstated and modified to conform with the foregoing and, as modified, is affirmed. Accordingly, National Safety Associates, Inc., is a covered employer in Wisconsin. Services performed by dealers are performed in excluded employment. This matter is remanded to a department representative for further proceedings consistent with this decision.

Dated and mailed

September 30, 1993

178-CD1033

ET 3463

/s/

Pamela I. Anderson, Chairman

/s/

Richard T. Kreul, Commissioner

/s/

James R. Meier, Commissioner

MEMORANDUM OPINION

During the initial hearing held in this matter, the employer argued that its sellers were independent contractors, not employees for unemployment compensation purposes. However, they were subject to direction and control over the style of their sales pitches and what claims they were permitted to make concerning the product. While there may have been good business reasons for this, it established direction and control over the operation of the sellers' "businesses". Furthermore, although they had some characteristics of an independently established business such as an investment in inventory, they were forbidden to advertise or use any promotional materials which were not expressly approved by the employer. Nor did the record demonstrate that they could freely sell or give the dealership away without NSA approval. The appeal tribunal correctly concluded that these individuals performed their services as employees not as independent contractors.

In the employer's petition to the commission, it changed legal theories. For the first time, the employer argued that the employees were excluded under the direct sellers exclusion at section 108.02 (15)(k)16, Stats. Although a finding that this employment is excluded employment under the above section does not invalidate the prior finding that these sellers were employees, the commission concluded that it was preferable to resolve the exclusion issue at the commission level rather than remand for a departmental investigation and determination. Consequently, the decision was set aside and the matter was remanded for supplementary testimony on how the employees were compensated.

Given the remedial nature of the unemployment compensation statute, provisions which exclude coverage under the act must be strictly construed. In this case, the commission believes that the compensation system in effect during the period covered by the initial determination does not meet the definition of the direct sellers exclusion. The employer was unable to adduce any persuasive evidence on the percentage of its wholesale receipts which ever actually got into the hands of an ultimate consumer. Since the statute clearly requires all such remuneration be related to a sale or solicitation of an order from an ultimate consumer, any member of its sales force above the dealer level must by definition derive some percentage of his compensation from disqualifying sources. Given this fact, the commission cannot conclude that any level above the dealer falls within the statutory exclusion.

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ENFORCEMENTS

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