

**STATE OF VERMONT
DEPARTMENT OF LABOR**

S. C.)	Opinion No. 57-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Keith Taruski)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. W-01616

Pretrial conference held on March 28, 2005
Hearing held on July 6, 2005
Record closed on August 1, 2005

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant
Robert Farrar, Esq., for the Defendant

ISSUE:

Was the claimant Keith Taruski's employee within the meaning of the Workers' Compensation Act at the time of his injury on April 16, 2004?

EXHIBITS:

- I: Medical Records
- II: Medical Bills
- III: Invoice from Default Builders
- IV: Invoices from Sticks & Stuff
- V: Invoice from Swanton Lumber
- VI: NWMC Record of April 16, 2004
- VII: Record from Dr. Archambault

FINDINGS OF FACT:

1. Keith Taruski owns a business called Innovations, Inc. that sells video game accessories and toys.
2. Taruski has a warehouse in St. Albans where he stores equipment and supplies.
3. Before he moved to Vermont, Taruski contracted with a general contractor to prepare the warehouse for the business.

4. In early April 2004, after Taruski had moved to Vermont, he let word out that he was looking for help in his warehouse. Claimant heard about the opportunity and approached Taruski.
5. Claimant and Taruski agreed that claimant would work in the warehouse to help clean, do odd jobs and organize inaccessible goods stacked on pallets.
6. Claimant did not have a key to the warehouse. He generally worked from 9:00 to 5:00 p.m., not a schedule that Taruski ever required. In fact, claimant was often waiting for Taruski to arrive in the morning to unlock the door.
7. Claimant worked for Taruski 40 hours per week at \$7.00 per hour, paid in cash daily. He helped organize material in the warehouse at Taruski's direction.
8. When Taruski mentioned that he needed to hire someone to do sheet rocking, claimant volunteered that he had the skill and could do the work less expensively than others. He and Taruski agreed on pay of \$10.00 per hour for the sheet rocking. Claimant brought a friend to help him with the sheet rocking work.
9. Taruski bought the material for the sheet rocking work, except for the screw gun which claimant brought to the site because Taruski's was not adequate.
10. On April 16, 2004, claimant was in the warehouse putting up sheetrock when he fell from a tall ladder. He was working alone at the time. Taruski heard claimant's scream and went to help him. As a result of that fall, claimant was taken by ambulance to a hospital where he had surgery on his hip.
11. Claimant has not worked since April 16, 2004.
12. Taruski did not have workers' compensation insurance in place at the time of the claimant's injury.
13. Claimant's attorney worked 42 hours pursuing this claim and incurred \$352.18 in necessary costs.

CONCLUSIONS OF LAW:

1. The sole issue for decision is whether an employee-employer relationship existed within the Workers' Compensation Act (Act) at the time of claimant's fall from the ladder.
2. Under the Act, an employee is "a person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer." 21 V.S.A. § 601(14). An employer is "any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of there being an independent contractor or for any other reason, is not the direct employer of the worker their employed." § 601(3).

3. Claimant argues that he had been working under the direction and control of Taruski and that Taruski provide all materials for his work. Accordingly, under the authority of *Edson v. State*, 175 Vt. 330 (2003), he asks the Commissioner to hold that he was a statutory employee entitled to benefits under the Act.
4. Indeed, Taruski's role falls squarely within the language of § 601(3). He was the owner of the premises and in control of the business being carried on.
5. Like the manufacturer of wood products who hired an independent contractor to haul its lumber and load it on railroad cars, held to be the deceased employee's statutory employer because hauling and loading the lumber was an integral part of the business, see, *O'Boyle v. Parker-Young Co.*, 95 Vt. 58, 112 A. 385 (1921), Taruski was a statutory employer because organizing pallets, claimant's work, was an integral part of the business. See also, *Edson* 175 Vt. 330 (worker who had received workers' compensation benefits from a trucking firm was the statutory employee of the State Department of Liquor Control, whose business is the sale and distribution of liquor).
6. Once an employer-employee has been established, a change in job responsibilities to include sheet rocking cannot change that relationship. Otherwise coverage could be denied to any worker who goes beyond a "job description" to do extra work his employer needs, work that an outside contractor theoretically could be hired to do.
7. Accordingly, claimant and Taruski had a statutory employer-employee relationship at the time of claimant's injury. Because Taruski did not have workers' compensation insurance, he is personally liable for the benefits due claimant. 21 V.S.A. § 687(b).
8. Benefits owed are medical benefits for the treatment of claimant's work related injury, § 640; temporary total disability benefits from the date of injury until the claimant reaches medical end result, returns to work or is released to work, 21 V.S.A. § 642, § 634a; permanent partial disability benefits once determined, § 648; interest from the date each benefit was due, § 664; and attorney fees and costs, § 678(a).
9. Taruski is also subject to citation and penalty from this Department for failure to carry workers' compensation insurance. § 688.
10. Because claimant has prevailed, he is entitled to a mandatory award of necessary costs and mandatory award of attorney fees pursuant to 21 V.S.A. § 678(a). The 42 hours worked on this case were reasonable given the work required and the costs were necessary to the success. Hence, both are awarded.

ORDER:

Therefore, based on the forgoing findings of fact and conclusions of law, Taruski is ORDERED to adjust this claim as indicated above, to pay:

1. Medical benefits associated with the work related injury;
2. Temporary total disability benefits until medical end result or return to work;
3. Permanent partial disability benefits, when a permanent impairment rating has been assessed;
4. Statutory interest from the date each benefit became due;
5. Attorney fees of \$3,780 for 42 hours at \$90.00 per hour and costs of \$352.18.

Dated at Montpelier, Vermont this 8th day of September 2005.

Patricia A. McDonald
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.