STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-01083
	)	
Kenneth Stowell	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Dennis Landrey d/b/a	)	
Northern Scapes and Gardens	)	Opinion No. 07-02WC

Hearing Held in Montpelier on September 21, 2001
Record Closed on October 26, 2001

APPEARANCES:

Steven P. Robinson, Esq. for the claimant
Edward B. French, Jr., Esq. for the defendant

ISSUES:

1. Was the claimant an "employee" and Dennis Landry d/b/a Northern Scapes & Garden, his "employer" under the Workers' Compensation Act on July 24, 1998?

2. Is this claim barred by the statute of limitations?

EXHIBITS:

Claimant's Exhibit A:

Packet of Trial Exhibits:

1. Business Check to claimant
2. Checks to Claimant
3. Personal Checks-1st production
4. Personal Checks-2nd production from credit union
5. Customer List
6. Town of Eden Tax Bill
7. Stowe Police Department Report
8. Employee's Claim and Employer First Report of Injury
9. Affidavit of Dennis Landry
10. Wage Statement
11. Claimant's Medical Records from Copley Hospital
12. Claimant's Medical Records for Stowe Family Practice

Defendant's Exhibit AA: Photographs (11)
Defendant's Exhibit BB: Diagram

The parties stipulated to the admission of the exhibits listed.

FINDINGS OF FACT:

1. Dennis Landry, defendant in this action, owns and operates a landscaping business known as Northern Scapes & Gardens in Eden, Vermont. In the summer of 1998 defendant engaged several people, including the claimant, to help him with his business.

2. Defendant owned two expensive commercial lawn mowers that he used in his business. On a regular basis, he mowed the lawn for about fifteen customers.

3. In the spring of 1998 the defendant had at least one full-time employee, Dexter Domina, who performed various services for the business including mowing and landscaping. Defendant paid Mr. Domina on an hourly basis, provided the equipment he used and directed and controlled Domina's work for his long-time customers. To avoid the complications of tax laws, defendant paid Domina from his personal checking account.

4. In the early part of the 1998 season, defendant asked Domina if he knew of other persons looking for work. Domina suggested the claimant who at the time was working as a night security guard.

5. Claimant met with defendant, demonstrated his work and began working for the defendant.

6. As he did with Domina, defendant directed claimant to perform work, provided the equipment and customers and paid him on an hourly basis, primarily from his personal checking account. The claimant worked at the defendant's home property on one day and for paying customers all other days.

7. On July 24, 1998 claimant worked at a regular customer's property in Stowe. At the end of the workday, defendant picked up claimant and the equipment. As claimant was loading the equipment into the truck, he slipped and lacerated his right knee. Defendant was aware of the incident. In fact, he testified that the claimant hopped up and said he was fine. He took the claimant home and told him to call Domina if he would not be able to work the next day. That evening claimant went to an emergency department where he was treated. After eight weeks, he returned to his job as a security guard, but not to work with the defendant.

8. Claimant worked for the defendant for eight weeks during which time he earned more than $2,000.00.

9. Claimant filed a Form 5 Employee's Notice of Injury and Claim for Compensation on July 27, 2000. Defendant's Form 1 Employee Claim and Employer first Report of Injury is dated August 7, 2000, but was not filed in this Department until March 29, 2001. On the Form 1 Landry identified "scraped hands" as the injury. He also wrote that the accident could have been prevented if "rather than trying to jump up and over side, he could have climbed out of the truck."

10. Claimant submitted proof that his attorney worked 47.9 hours on this case and incurred $358.92 in necessary costs.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. The defendant argues that this claim is not covered by the Workers' Compensation Act because the claimant was a "person engaged in …service in or about a private dwelling" and therefore exempt under § 601(14)(E).

4. Claimant's testimony, and that of Mr. Domina as well as the documentation provided prove that the claimant was an employee under the Act, and not exempt from coverage as the defendant now argues. It is simply not credible to believe that the claimant worked solely at the defendant's residence during the summer of 1998 as the defendant testified.

5. Next, defendant argues that this claim is barred by the statute of limitations because the claimant made no formal claim until 2000, two years after the accident. Pursuant to 21 V.S.A.§ 656 notice of injury must be given within six months of the date of injury. However, § 600 relaxes that strict time frame if the employer "had knowledge of the accident or [if] the employer has not been prejudiced by the delay…" in which case the claimant has six years from the date of injury within which to file the claim. Because the defendant in this action had knowledge of the incident, the six-month time limitation in § 656 does not apply. And because the claim has been brought within six years of the action, it is a viable claim under § 660.

6. Finally, the defendant argues that any injury he may have incurred did not arise out of work for Northern Scapes and Gardens. However, the claimant testified credibly that he hurt his knee loading equipment into Landry's truck. On the Form 1 Landry wrote that the accident could have been prevented if "rather than trying to jump up and over side, he could have climbed out of the truck." At the hearing, Landry acknowledged that the claimant had fallen. And on the day of the incident he told the claimant to call Domina if he could not work the next day, tacit acknowledgment of an injury.

7. In sum, the claimant has proven that he was an employee of Dennis Landry in the summer of 1998 that he was injured in the course of that employment and that the private dwelling exception does not apply. The statute of limitation does not bar this claim.

8. Having prevailed, the claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law pursuant to V.S.A § 678 and Workers Compensation Rule 10. In that discretion, fees of $70.00 per hour for 47.9 hours, a reasonable time given the nature of this case, are awarded. Claimant is also awarded $358.92 in necessary costs.

ORDER:

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law, defendant is ORDERED to:

1. Assume adjustment of this claim.
2. Pay the claimant attorney fees of $ 3,353.00 and costs in the amount of $358.92.

Dated at Montpelier, Vermont this 11th day of February 2002.

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R. Tasha Wallis
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.