**STATE OF VERMONT**
**DEPARTMENT OF LABOR & INDUSTRY**

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| William Mattor | ) | |
| | ) | |
| v. | ) | State File # P-40 |
| | ) | |
| Rick Thompson Carpentry | ) | Arbitration No. 2-02WC |
| Doran Roofing, Inc., and | ) | |
| Stratton Springs | ) | Frank E. Talbott, Esq. |
| | ) | Arbitrator |

Arbitration pursuant to 21 V.S.A. § 662(e)
Record closed August 23, 2002.

**APPEARANCES:**

Jason R. Ferreira, Esq. for AIG Claims Service/Stratton Springs Project
John Valente, Esq. and Christina L. DeGraff-Murphy, Esq. for CNA/Doran Roofing, Inc.

**ISSUES:**

1. Whether the Department of Labor & Industry has jurisdiction over the claim by AIG for reimbursement of benefits it has paid to the claimant.

2. Whether Rick Thompson Carpentry had effective workers' compensation insurance coverage at the time of the alleged accident, and if so, the effect of that determination.

3. Whether the claimant was an employee for purposes of the workers' compensation act.

4. Whether the claimant was in fact injured at the work-site, Bondville Real Estate, in Bondville, Vermont.

**THE CLAIM:**

1. AIG Claims Service/Stratton Springs Project, paid claimant workers' compensation benefits and requests that it be reimbursed by CNA/Doran Roofing, Inc. for all benefits paid.

2. AIG Claims Service also requests an award of attorney's fees and costs.

**EXHIBITS:**

AIG Claims Service/Stratton Springs Project:

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| Exhibit 1: | Transcript of the Deposition of William Mattor |
| Exhibit 2: | Transcript of recorded statement of Rick Thompson |
| Exhibit 3: | Transcript of the Deposition of Rick Thompson |
| Exhibit 4: | History of payments made on claim by AIG Claims Service |
| Exhibit 5: | Order for Arbitration dated August 1, 2002 |
| Exhibit 6: | Letter of February 19, 2002, from Janet LaPerle to counsel confirming the results of an Informal Conference held on February 14, 2002 |
| Exhibit 7: | Letter of April 16, 2002, from Laura Collins, Esq. to counsel confirming the results of an Informal Conference held on April 16, 2002 |
| Exhibit 8: | Letter of November 4, 1999, from Janet LaPerle to counsel confirming the results of an Informal Conference held on November 4, 1999 |
| Exhibit 9: | Letter of August 5, 2002, from Jason R. Ferreira, Esq. to Rick Thompson. |
| Exhibit 10: | Letter of August 5, 2002, from Jason R. Ferreira, Esq. to Janet LaPerle |
| Exhibit 11: | Witness and Document Subpoena to Rick Thompson |
| Exhibit 12: | Letter of January 16, 2002, from Janet LaPerle to counsel rescheduling an informal Conference |
| Exhibit 13: | Wage Statement for William Mattor, III from Rick Thompson Carpentry |
| Exhibit 14: | Weekly Net Income Worksheet for William Mattor |
| Exhibit 15: | Payroll check stubs |
| Exhibit 16: | Letter of August 5, 1999, from Traveler's Property & Casualty to "Thompson, Rick dba" |
| Exhibit 17: | Letter of September 27, 2001, from Traveler's Property & Casualty to Keith J. Kasper, Esq. and attached Proof of Coverage and Coverage Cancellation |
| Exhibit 18: | Letter of October 4, 2001, from Traveler's Property & Casualty to Keith J. Kasper Esq. |
| Exhibit 19: | Letter of October 4, 2001, from Traveler's Property & Casualty to Keith Kasper and attached Certificate of Mailing |
| Exhibit 20: | Letter of May 22, 2002, from Frank Talbott, Esq. to counsel summarizing the results of the arbitration conference |
| Exhibit 21: | Letter of July 30, 2002, from John W. Valente, Esq. to Laura Collins |

CNA/Doran Roofing, Inc.:

Exhibit A: Transcript of the Deposition of William Mattor
Exhibit B: Transcript of the Deposition of Rick Thompson
Exhibit C: Certificate of Mailing
Exhibit D: Payroll check stubs
Exhibit E: First Report of Injury
Exhibit F: Notice and Application for Hearing
Exhibit G: Certified Letter of October 12, 1999 from CNA Commercial Insurance to Berkeley Johnson, Esq.
Exhibit H: Letter of August 5, 1999 from Traveler's Property & Casualty to "Thompson, Rick dba"
Exhibit I: Letter of September 27, 2001 from Traveler's Property & Casualty to Keith J. Kasper, Esq.

Joint Exhibits:

Joint Medical Records

**PROCEDURAL NOTE:**

AIG filed a Reply Brief with the Arbitrator after the deadline for filing the evidence and briefs. CNA objected to the Arbitrator considering the Reply Brief. At the arbitration conference that was held in this matter, the parties discussed whether they wished an opportunity to submit reply briefs. It was decided by the parties that they did not desire reply briefs. In the Arbitrator's letter summarizing the results of the arbitration conference, the Arbitrator pointed out that there would be no reply briefs in these proceedings. Therefore, CNA's objection is well taken, and the Reply Brief by AIG should be stricken.

**UNCONTESTED FACTS:**

1. On the date of injury, July 12, 1999, the claimant was performing work at the Bondville Real Estate Building.

2. Doran Roofing Inc. was the general contractor for the Bondville Real Estate Building roofing job. Rick Thompson Carpentry had subcontracted the job from Doran Roofing Inc.

3. On the date of injury, CNA was the workers' compensation insurance carrier for Doran Roofing Inc.

4. Claimant described that he was on a ladder when the ladder hook either bent or snapped, causing him to fall approximately 27 feet to the ground. As a result, the claimant suffered injuries to his left foot, leg and back.

5. Prior to the date of injury, Rick Thompson Carpentry had also been working for Stratton Mountain (Stratton Springs Real Estate Project), roofing a condominium complex.

6. Stratton Springs Real Estate Project (herein "Stratton Springs") was located approximately seven miles from the Bondville Real Estate Building.

7. The Stratton Springs Real Estate Project had workers' compensation coverage through a WRAP policy with AIG.

8. AIG has paid all of the Claimant's indemnity and medical benefits as a result of the work-related injury at the Bondville Real Estate Building.

**FINDINGS:**

1. Rick Thompson Carpentry is in the business of carpentry and roofing. Rick Thompson is the sole owner of the company. His business employs up to six workers depending on the time of the season.

2. In January of 1999, Rick Thompson Carpentry hired the claimant. According to Rick Thompson, the claimant was hired as a subcontractor. The claimant testified that he was hired as a foreman. Mr. Thompson testified that the claimant was "hired as a roofing mechanic just like everyone else" and that the claimant would supervise the other men on the project if it was needed because the claimant was the most experienced and most intelligent of the men on the project. The claimant testified that at the time he was hired by Rick Thompson, he was offered the choice of working for $22.00 per hour as a "subcontractor," or $18.00 per hour as an "employee." Rick Thompson testified that the claimant was hired to "subcontract for me by the hour." Rick Thompson Carpentry paid the claimant for the hours he worked at the rate of $18.00 per hour. The checks were payable to "Bill Mattor" and they referenced "Subcontractors (x hrs@$18.00)".

3. The claimant admitted at his deposition that Rick Thompson Carpentry did not have taxes taken out of his paychecks. The claimant said that he spoke to Rick Thompson's wife after receiving his first paycheck to inquire as to why taxes were not taken out. According to the claimant, Mrs. Thompson said that she needed to get some additional paperwork from the claimant and needed to install a particular computer program to figure the taxes, and that this would be straightened out. This issue was not resolved before the claimant's injury. The claimant testified that at the end of the tax year he received a 1099 statement, and that he asked his accountant to deal with the fact that no taxes were taken out of his pay and that Rick Thompson Carpentry did not pay the employer portions of payroll taxes. According to the claimant's testimony, he did not end up paying any of the employer's share of payroll taxes.

4. Mr. Thompson testified that the distinction he made between an independent contractor and an employee was that an independent contractor was someone who was doing work for other contractors and someone who gets other jobs for themselves; whereas, an employee is someone who was working only for Rick Thompson Carpentry full time.

5. Mr. Thompson testified that he did not know if the claimant was working for other companies or on other projects than the Rick Thompson Carpentry projects at the time Mr. Thompson hired the claimant, or at any time when the claimant was working on Rick Thompson Carpentry projects. All Mr. Thompson knew was that the claimant asked him for work, saying that he needed some work to fill his time between other projects. According to Rick Thompson, the claimant was looking for work "to get through the winter."

6. Rick Thompson also testified that if the work at the Stratton Springs project could not be done because of the weather or for some other reason, he would have his men, including the claimant, work on other projects where work could be done. This is what happened in this case. The claimant had been working on roofing the Stratton Springs project. However, on the day of the claimant's injury, the claimant was to be working at the Bondville Real Estate Building. Rick Thompson was waiting for the last two buildings at the Stratton Springs project to have plywood applied to the roofs so that Rick Thompson Carpentry could complete the roofing. Therefore, Mr. Thompson sent the claimant to work on the Bondville Real Estate Building.

7. Rick Thompson testified that the claimant provided all of his own hand tools for the job. However, all of Mr. Thompson's employees had their own hand tools and used their own hand tools on the job. Mr. Thompson testified that he even had employees who had their own table saws that were used on the jobs. Mr. Thompson generally supplied the ladders and the safety harnesses. However, there was contradictory testimony as to whether the claimant was using his own ladder marked with the initials "MCS" at the time of the injury. Rick Thompson also supplied all of the building materials used, unless the general contractor such as Doran Roofing was supplying the materials.

8. At one time in his history, the claimant operated his own sole proprietorship called Mattor Construction Services. He marked his tools by burning or marking "MCS" onto them. The uncontradicted evidence from the claimant was that he ceased doing business as Mattor Construction Services long before beginning work for Rick Thompson Carpentry. Although many of the tools the claimant used still had "MCS" on them, there is insufficient evidence that the claimant continued to operate his own sole proprietorship. While Rick Thompson asserted at his deposition that the claimant submitted invoices for payment as Mattor Construction Services, these invoices were never produced as evidence. The payroll checks to the claimant from Rick Thompson Carpentry were payable to "Bill Mattor" and not Mattor Construction Services.

9. Doran Roofing had subcontracted with Rick Thompson Carpentry to apply the roofing to the Bondville Real Estate Building. Mr. Thompson testified that Doran Roofing supplied all of the materials to roof the building, and Rick Thompson Carpentry was hired by Doran Roofing to provide the labor to apply the materials to the roof.

10. During the time the claimant was working for Rick Thompson Carpentry, he worked on projects other than the Stratton Springs project. For example, at one point, the claimant was working on finishing a floor in a hunting camp that was being turned into a home. Mr. Thompson showed the claimant how to use a floor-finishing machine for that job. The claimant had also worked on a residential project for Rick Thompson Carpentry during a two-week period prior to the date of his injury.

11. For all of his work, the claimant was paid hourly, not by the job. Other than experience in the trade, the claimant did not provide any specialized knowledge or skill that Rick Thompson or other employees of Rick Thompson Carpentry did not also possess. When Rick Thompson worked next to the claimant on projects, Mr. Thompson was the leader and controlled the work. Rick Thompson controlled which project the claimant worked on as well.

12. On July 12, 1999, the claimant was working for Rick Thompson Carpentry at the Bondville Real Estate Building project, slipped from a ladder on the roof of the building, and fell to the ground, fracturing his heel and apparently causing other significant injuries.

13. CNA/Doran Roofing, Inc, contests whether the accident actually occurred as described by the claimant. The circumstantial evidence suggests clearly that the claimant was injured while on the Bondville Real Estate Building project by falling from a ladder.

14. Rick Thompson testified that the Bondville Real Estate Building was the job that the claimant was to be doing on the date of the injury. The parties stipulated that the claimant was working on the Bondville project on July 12, 1999. Mr. Thompson was aware that the claimant had gone the Thompson's house in the morning, along with other employees of Rick Thompson Carpentry, to discuss the work to be done that day. The injury happened on a Monday. Mr. Thompson testified that he had seen the claimant the previous Friday, and the claimant did not appear to have any physical problems. Certainly Mr. Thompson would have noticed a preexisting broken heel. Furthermore, there was no evidence that on the morning of July 12, 1999, when the claimant was at Mr. Thompson's house to discuss the day's work to be done, that Mr. Thompson or any other employee noticed any existing physical problems with the claimant.

15. On Monday, July 12, 1999, the claimant was admitted to the Southwestern Vermont Medical Center shortly after Noon, for a "left calcaneal fracture." He was discharged from the hospital on July 14, 1999. The medical records from this hospitalization indicate a history given by the claimant of having been working about 20 feet off the ground on a roof, slipping and falling to the ground. The indications reported on the Operative Report included, "severely comminuted impacted and disrupted posterior and middle calcaneal facet status post fall from 20 feet." His diagnosed condition was a "marked" comminuted calcaneal fracture. He underwent open reduction/internal fixation.

16. There is no evidence that the claimant injured himself at any other location than while on the Bondville Real Estate Building job. There are conflicts in the testimony as to how the fall happened, exactly that time during the morning it happened, whose fault it was that the safety device did not work, and what ladder the claimant was using, but there is no evidence that directly or circumstantially suggests that the claimant injured himself any where else than on the Bondville Real Estate Building project.

17. There is no evidence to contradict the claimant's testimony that he fell from a ladder at the job site and severely fractured his heel bone, requiring surgery and hospitalization. It does not require a physician's opinion to see that a severely fractured heel is certainly consistent with falling 20+ feet from a roof.

18. CNA/Doran Roofing, Inc., contends that Traveler's Insurance, who provided insurance coverage to Rick Thompson Carpentry, is liable for any benefits because it's policy was still effective at the time of the injury. The evidence suggests that Travelers' Insurance cancelled its policy of insurance covering Rick Thompson Carpentry prior to the date of injury in this case. CNA/Doran Roofing, Inc., contends that Travelers' Insurance did not properly notify the claimant or the Commissioner of cancellation of the policy for none payment of premiums.

19. According to AIG's Exhibit 17, NCCI received notification on November 25, 1998, that coverage provided by Travelers to Rick Thompson Carpentry was being cancelled, effective January 13, 1999, for non-payment of the premium. According to AIG's Exhibit 19, Traveler's sent notice of cancellation by certified mail to Rick Thompson Carpentry on November 25, 1998, effective January 13, 1999. CNA argues that the Certificate of Mailing in Exhibit 19 does not specifically say that the certified letter that was sent out on November 25, 1998 was a certified letter of cancellation notifying Rick Thompson of cancellation of the policy. However, what has been proved is the fact that the records from NCCI indicate that it did receive notice of cancellation for non-payment of premium, that the notice issued on November 25, 1998, received by NCCI on November 25, 1998, and was to be effective on January 13, 1999 (which is 45 days plus 3 days for mailing subsequent to November 25, 1998). The evidence that Travelers sent a certified notice to Rick Thompson Carpentry on November 25, 1998 also, is consistent with Traveler's indication that this certified letter was a notice of cancellation, and is sufficient proof that notice of cancellation was mailed to Rick Thompson Carpentry. Rick Thompson's deposition testimony that he does not remember receiving a certified letter was not credible. There was also no evidence calling into credibility the Certificate of Mailing provided by Traveler's Insurance. Finally, the Department has investigated this situation, and Janet LaPerle concluded, based on this information, that the Traveler's policy was properly cancelled, which clearly establishes that the Department of Labor & Industry believes it received the proper notice of cancellation.

20. The procedural history of this claim, based on the briefs and evidence submitted, is rather confusing. The Arbitrator is taking judicial notice of the forms and correspondence in the Department of Labor & Industry file for purposes of understanding the procedural history on this claim. The conclusions as to ultimate liability are based on the evidence and the briefs, and not the matters of which judicial notice is being taken.

21. It appears from the Department's file that the claimant originally filed a Form 5 Employee's Notice of Injury and Claim for Compensation against Rick Thompson Carpentry. On August 4, 1999, the Department of Labor & Industry mailed the Notice of Injury and Claim for Compensation to Rick Thompson Carpentry, and copied Traveler's Insurance Company. Traveler's Insurance Company filed a denial of the claim on August 5, 1999, on the basis that it had cancelled its policy covering Rick Thompson Carpentry effective January 13, 1999. On August 16, 1999, Rick Thompson filed a First Report of Injury, indicating that the injury allegedly happened at Bondville Real Estate. Mr. Thompson did not identify an insurance carrier on the First Report, and appended a letter to the Department arguing that the claimant was a subcontractor and not an employee.

22. Subsequently, the claimant's lawyer, Berkeley Johnson, Esq., filed another First Report of Injury, identifying Doran Roofing Co., Inc. as the employer, indicating an "unknown" location of the injury, in the Town of Bondville. In response to that First Report of Injury, CNA Commercial Insurance, as the insurer for Doran Roofing, filed a denial of the claim, asserting that the claimant was not an employee of Doran Roofing.

23. Subsequently, the Department made an informal decision that the claimant was an employee under the Workers' Compensation Act, and that since Rick Thompson Carpentry did not have coverage, the claimant could pursue the general contractor, Doran Roofing, "pursuant to Section 601(3) of the Act."

24. Subsequently, the Workers' Compensation Specialist at the Department of Labor & Industry discovered that National Union Fire Insurance (AIG Claims Service) covered Rick Thompson Carpentry at the time of the injury in this case, and notified AIG of this determination. On December 16, 1999, CNA/Doran Roofing, Inc.'s counsel notified the Department that it was closing its file because AIG was paying benefits to the claimant.

25. On April 4, 2001, AIG informed the Department of Labor & Industry and all other parties that it had made a mistake of fact. The AIG policy was a WRAP policy, providing coverage to Rick Thompson Carpentry on the Stratton Springs Real Estate project. AIG asserts that it had assumed the claimant was injured at the Stratton Springs Real Estate project while working for Rick Thompson Carpentry. AIG learned at some point from some one that the injury actually happened at another site that was not covered under the WRAP policy.

26. According to the Agreement for Permanent Partial Disability Benefits, executed by the claimant and AIG in May 2001, Temporary Total Disability ended on April 23, 2001. A Form 22 was executed and filed with the Department by AIG, with a reservation of asserted rights to seek reimbursement from Travelers or Doran Roofing. The Form 22 was approved on June 14, 2001, and AIG paid the permanency benefits in a lump sum.

27. A Notice and Application for Hearing (Form 6) was filed by AIG on September 25, 2001, seeking reimbursement for all benefits paid on the claim due to a mistaken belief as to the location of the injury.

28. CNA/Doran Roofing, Inc. has not made any claim in these proceedings that AIG has improperly adjusted the claim. CNA/Doran Roofing, Inc., does contend that that the injury did not happen at the Doran Roofing project, but otherwise does not contend that it has been prejudiced in any other way if it were to be held responsible for the benefits paid by AIG.

29. AIG has paid $68,760.52 to the claimant in indemnity benefits and $20,694.08 in medical benefits.

**CONCLUSIONS:**

## I. Jurisdiction

1. CNA/Doran Roofing, Inc. first contends that the Department lacks jurisdiction to determine this dispute between AIG and CNA.

2. This matter is being arbitrated pursuant to 21 V.S.A. § 662(e), which provides:

> In any dispute between employers and insurers arising under subsection (c) or (d) of this section, after payment to the claimant, the commissioner may order that the dispute be resolved through arbitration rather than formal hearing process under sections 663 and 664 of this title.

3. 21 V.S.A. §662(c) provides:

> Whenever payment of a compensable claim is refused on the basis that another employer or insurer is liable, the commissioner, after notice to interested parties and a review of the claim, … shall order that payments be made by one employer or insurer until a hearing is held and a decision is rendered. …Payments pursuant to this subsection shall not be deemed an admission or conclusive finding of an employer's or insurer's liability nor shall payments preclude subsequent agreement under subsection (a) of this section or prejudice the rights of either party to a hearing or appeal under this chapter.

4. Jurisdiction over the subject matter of an action cannot be conferred by agreement or consent of parties when it is not given in law. The power of the Department of Labor & Industry to deal with the subject matter of the controversy can be generated only by force of law and is unaffected by the agreement or the conduct of the parties. *Suitor v. Suitor*, 137 Vt. 110, 400 A.2d 999, (1979). *Pockette v. LaDuke*, 139 Vt. 625, 432 A.2d 1191 (1981). *Shute v. Shute*, 158 Vt. 242, 607 A2d 890 (1992). When a judicial body of limited powers exceeds its jurisdiction, the whole proceedings are void. *Barber v. Chase*, 143 A. 302, 101 Vt. 343 (1928). If the Commissioner did not have jurisdiction over this dispute under §662(c), the commissioner would not have the power or authority to refer this matter to the Arbitrator.

5. In a case where there are multiple "employers" as defined by the act, and, therefore, multiple defendants who have direct and primary liability to a claimant for injuries sustained, it is within the Commissioner's jurisdiction under the Act to determine the primary liability of the parties' defendant. *Morrisseau v. Legac*, 123 Vt. 70,78 (1962). However, the Vermont Supreme Court has pointed out that the Commissioner is not authorized under the act to pass upon the ultimate rights and liabilities between employers or carriers who are each directly and primarily liable to the claimant. *Id.*

6. This case does not present the same factual scenario as the *Morrisseau* case. In *Morrisseau*, the Commissioner decided the liability of a general contractor and a subcontractor to the claimant, and then ordered that the claimant recover first from the subcontractor's carrier, and in the event of its default, against the subcontractor, and in the event of its default, against the general contractor's carrier, and in the event of its default, against the general contractor. The Vermont Supreme Court held that the judgment order of the Commissioner should have been against all of the defendants unconditionally, and nothing in the law gave the Commissioner the power or authority to establish a hierarchy of recovery that the claimant must follow. *Id.* This position has been reaffirmed by the Vermont Supreme Court in *King v. Lowell*, 160 Vt. 614 (1993).

7. If this were a case in which AIG Claims Service/Stratton Springs and CNA/Doran Roofing, Inc. were both liable under the Workers' Compensation Act for benefits to the claimant as "employers," CNA's jurisdictional arguments would be accurate. The Commissioner would not have jurisdiction to determine the rights of the insurance carriers as between themselves. *E.g., Race v. Abair Roofing*, Op. No. 21SJ-02WC (May 6, 2002).

8. However, this is a case in which AIG Claims Service/Stratton Springs asserts that it had no liability to the claimant, and that CNA/Doran Roofing, Inc. is the liable carrier. CNA/Doran Roofing, Inc. was put on notice of this claim even before AIG was put on notice of the claim. CNA/Doran Roofing, Inc. appeared and defended itself in the claim through informal procedures that resulted in an interim determination by the Department of Labor & Industry that it was the "employer" under the act and must provide workers' compensation benefits. (AIG Exhibit 8.) Apparently, before benefits were paid by CNA, however, AIG Claims Service/Stratton Springs began paying benefits at the request of the Department, under a mistaken understanding of the facts.

9. 21 V.S.A. § 606 requires that questions arising under the provisions of the Workers' Compensation Act, if not settled by agreement of the parties interested therein with the approval of the commissioner, shall be determined, except as otherwise provided, by the commissioner. 21 V.S.A. §662(c) vests with the Commissioner the power and authority to order one carrier to pay benefits, and proceed to a hearing to determine which carrier or employer is liable for benefits being paid to a claimant where one carrier refuses liability on the basis that another carrier is responsible for the benefits. To argue that the Commissioner does not have authority to order reimbursement between two carriers in a factual situation that falls within the ambit of §662(c) would not make sense. The statute provides that the Commissioner may order that one carrier pay benefits, without prejudice, until a hearing is held on which carrier is liable.

10. AIG assumed liability in this case under a mistake of fact. The Workers' Compensation Act, and the Rules adopted by the Commissioner, anticipates that mistakes as to the right to compensation might be made, and the Commissioner is given discretion to correct those mistakes. For example, 21 V.S.A. §651 provides that payments made by an employer or his insurer to an injured worker during the period of his disability, which, by the provisions of the workers' compensation laws, were not due and payable when made, may, subject to the approval of the commissioner, be deducted from the amount to be paid as compensation. 21 V.S.A. §662 (a) provides that agreements entered into by the claimant and the carrier and approved by the commissioner are binding, but may be modified under §668 upon a showing of a change in conditions. Rule 17 of the Workers' Compensation Rules provides that approved agreements may be modified upon a showing of a material mistake of fact.

11. The Commissioner would not interpret 21 V.S.A. §662(c) to require that one carrier seek an interim order to pay benefits before being entitled to assert that another carrier is primarily liable under the Act for the benefits. The Workers' Compensation Laws are to be construed in a manner that advances the goal of the Act, to provide an expeditious remedy to the injured worker. The Commissioner has, in the past, accepted a carrier's voluntary agreement to advance benefits without prejudice under §662(c) without the need for an interim order, and to pursue a formal hearing against another carrier. In this case, AIG learned of its mistake of fact and notified all parties of its mistake, and of its intention to seek reimbursement. It then continued to advance benefits, without prejudice, but without moving to terminate benefits and require an interim order that it continue paying benefits until a hearing is held to determine its liability. This procedure is consistent with the language and the spirit of §662(c), to provide expeditious payment of benefits to the employee, without causing the employee to become embroiled in the middle of a dispute between carriers.

12. The Arbitrator concludes that the Commissioner would have jurisdiction under the Workers' Compensation Act and particularly §662(c) to determine whether AIG is entitled to reimbursement on this claim from CNA/Doran Roofing.

## II. Liability of Traveler's Insurance

13. Rule 23 provides that the National Council of Compensation Insurance (NCCI) is designated the Department's agent for the purpose of receiving the notices required by 21 V.S.A. §§ 690, 696 and 697. The information required shall be filed in whatever format deemed acceptable to NCCI.

14. According to the evidence from NCCI, proper notice of cancellation for nonpayment of premiums was filed with NCCI as the agent for the Department. The weight of the evidence also convinces the Arbitrator that notice of cancellation was also mailed by certified mail to Rick Thompson Carpentry.

15. Ironically, if Travelers' insurance were obligated to provide coverage on the date of the injury to Rick Thompson Carpentry, the dispute between Traveler's and CNA would fall squarely within the limitations on jurisdiction as outlined in *Morrisseau*. The determination of allocation of payments would need to be resolved between Doran Roofing/CNA (the general contractor) and Rick Thompson Carpentry/Travelers Ins. (the subcontractor) in a superior Court. *King v. Lowell,* 160 Vt. at 615.

## III. Whether the claimant was an employee for purposes of the workers' compensation act.

16. In determining whether a claimant is an employee or independent contractor, the Commissioner typically relies on the test in the Restatement of Agency (2nd). Determining factors of that test are: 1) the extent of control which the master/employer may exercise over the details of the work; 2) whether the claimant is engaged in a distinct operation or business; 3) the type of occupation, with reference to whether in the locality, the work is usually done under the direction of an employer or by a specialist without supervision; 4) the skills required in a particular occupation; 5) whether the defendant or the claimant supplies the instrumentalities, tools and the place of work; 6) the length of time for which the claimant is employed; 7) the method of payment, whether by time or by the job; 8) whether or not the work is part of a regular business of the employer; and 9) whether or not the parties believe they are creating an employer/employee relationship. Restatement, § 220(2).

17. In this case, the claimant clearly does not meet the definition of independent contractor. There was no evidence that the claimant could roof the projects as he saw fit. The claimant was hired to perform as a laborer and supervise other laborers when needed. He was hired to roof buildings, which is the very business Rick Thompson Carpentry is in. The work the claimant was doing is not work that was done by a specialist without supervision. There were no special skills required of the claimant. The claimant used some of his own tools, but Rick Thompson said all of his employees use their own tools. The claimant was paid hourly, not by the project. The claimant believed he was an employee. Under the circumstances of this case, the claimant was clearly an employee of Rick Thompson Carpentry. Rick Thompson's testimony in his deposition is most telling. He testified that he hired the claimant "as a roofing mechanic just like anybody else."

18. Additionally, one of the major purposes of the Workers' Compensation Act is "to prevent owners of trade or businesses or general contractors from relieving themselves of liability . . . by doing through independent contractors what they would otherwise do through their direct employees." *King*, 144 Vt. at 401. The Commissioner has examined this by looking at "the nature of the claimant's work in relation to the regular business of the employer." *Mitchell v. Harrington Plumbing & Heating*, Op. No. 91-95 WC (Dec. 7, 1995) (citing Larson, Workers' Compensation Law, § 43.50). The defendant has clearly attempted to circumvent the purposes of the Act by classifying the claimant and a few of his other employees as independent contractors. The nature of the claimant's work was at all times the regular business of the defendant – roofing and construction. There was no evidence that the claimant was engaged in any independent business of his own. There was no evidence that the claimant either obtained or was responsible for any construction contracts in addition to the work he was doing for Rick Thompson Carpentry. It appears from the weight of the credible evidence that the only difference between the claimant and Rick Thompson's other employees was that Rick Thompson called the claimant a subcontractor and did not pay payroll taxes on his wages.

19. Whether the claimant was a subcontractor to Rick Thompson Carpentry, however, does not answer the question of whether Doran Roofing, Inc. is the "employer" of the claimant under the workers' compensation laws. Doran Roofing, Inc., was the general contractor of the roofing job on the Bondville Real Estate project. It subcontracted with Rick Thompson Carpentry to apply the materials to the roof of the project. Rick Thompson Carpentry hired the claimant as a roofing mechanic.

20. The Vermont Supreme Court has held that a general contractor is the statutory employer of subcontractors and their employees, regardless of an independent contractor relationship. *King v. Lowell*, 160 Vt. 614 (1993); *Welch v. Home Two, Inc.*, ____ Vt. ____ (2001). Likewise, the Commissioner has consistently concluded that a general contractor is the statutory employer of the workers on the project under 21 V.S.A. § 601(3). Indeed, in *Race v. Abair Roofing*, Op. No. 21SJ-02WC (May 6, 2002), the Commissioner held that where an employee of a subcontractor of a subcontractor to a general contractor was injured on the construction project, all of the companies qualify as statutory employers under the Act, and all have primary liability, including both of the subcontractors and the general contractor.

21. The Workers' Compensation Act defines an employer to include:

> 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 other reason, is not the direct employer of the workers there employed.

21 V.S.A. §601(3)

22. This italicized language has been construed by the Vermont Supreme Court to include without question a general contractor on a construction project. *Welch v. Home Two, Inc.* In *Welch*, the Court said:

> Similarly, Welch's assertion that the general contractor cannot be said, as a matter of law, to be "virtually the proprietor or operator of the business there carried on [the premises]" would effectively remove general contractors from the statutory definition of employer unless they were the owners or lessees of the premises. See 21 V.S.A. § 601(3). It would be difficult, to say the least, to give effect to the clear legislative intent to make general contractors "employers" for purposes of broadening workers' compensation coverage, if general contractors cannot be said to be operators of the general contracting business on the premises where the construction project takes place. Welch's injury occurred at the construction site at the Charlotte Library, where, as general contractor, Home Two was "virtually the proprietor or operator of the business [the construction project] there carried on." Id.

23. Since the claimant's injury happened on the Bondville Real Estate project, while the claimant was doing his job for the subcontractor, and Doran Roofing was the general contractor for that roofing project, Doran Roofing is the statutory employer of the claimant under the statute and case law, and is primarily liable for the benefits owed to the claimant under the Workers' Compensation Act.

24. AIG insured the Stratton Springs project, which was also a project on which Rick Thompson Carpentry was a subcontractor doing a roofing job. However, the claimant was not working on the Stratton Springs project when he was injured. The Bondville project was separate from the Stratton project, was seven miles away, and there is no evidence that Stratton was involved in any way with that project. AIG did not insure the Bondville Real Estate project. Therefore, neither Stratton Springs nor AIG is an employer of the claimant under the facts of this case, for purposes of this injury.

**IV. Whether the claimant was in fact injured at the work-site, Bondville Real Estate.**

25. The claimant testified that he injured himself falling off a ladder while beginning to roof the Bondville Real Estate project. There is no evidence that the claimant injured himself at any other location than while on the Bondville Real Estate Building job. There are conflicts in the testimony as to how the fall happened, whose fault the safety device did not work, and what ladder the claimant was using, but there is no evidence that directly or circumstantially suggests that the claimant injured himself any where else than on the Bondville Real Estate Building project. Based on a preponderance of the evidence, it is clear that the claimant fractured his heel and otherwise injured himself when he fell from a ladder at that job, while he was engaged in the work he was expected to be doing for Rick Thompson Carpentry.

**AIG'S CLAIM FOR ATTORNEY'S FEES:**

1. AIG has made a claim in this case for attorney's fees. Attorney's fees are awardable only if provided by contract or by statute. 21 V.S.A. §662(e)(2) provides that the Arbitrator shall, "Determine apportionment of the liability for the claim, including costs and attorney's fees, among the respective employers or insurers, or both…."

2. This statute does not grant a right to recover attorney's fees by the prevailing insurer. The only expression of a right to recover attorney's fees in the Workers' Compensation Act is under §678, wherein it provides that the Commissioner may allow the claimant to recover reasonable attorney's fees. The most logical construction of §662(e)(2) is that the arbitrator may apportion the liability of attorney's fees owing to the claimant among the insurers who are parties to the arbitration.

**ORDER:**

Based on the foregoing Findings of Fact and Conclusions of Law, the Arbitrator Orders that CNA/Doran Roofing, Inc. reimburse AIG Claims Service/Stratton Springs Project for all benefits paid to the Claimant on account of the Claimant's injury on July 12, 1999 at the Bondville Real Estate project, totaling $89,454.60.

1. AIG's request for attorney's fees is denied.

2. Costs of the arbitration proceedings are to be paid by CNA/Doran Roofing. AIG is to submit a bill of costs for which it wishes to be reimbursed, consistent with the categories of costs (other than attorney's fees) that would be recoverable by a prevailing claimant under the workers' compensation act.

3. The Arbitrator's fees at the rate of $150.00 per hour are to be paid by CNA/Doran Roofing.

Dated at Burlington, Vermont this 3rd day of October 2002.

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Frank E. Talbott, Esq.
Arbitrator