

A. M. v. Laraway Youth and Family Services (October 30, 2008)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

A. M.

Opinion No. 43-08WC

v.

By: Phyllis G. Phillips, Esq.  
Hearing Officer

Laraway Youth and  
Family Services

For: Patricia Moulton Powden  
Commissioner

State File No. Y-02248

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

**APPEARANCES:**

Beth Robinson, Esq., for Claimant  
Kelly Smith, Esq., for Defendant

**ISSUES PRESENTED:**

1. Whether Defendant was Claimant's statutory employer pursuant to 21 V.S.A. §601(3) at the time of her December 17, 2005 injury;
2. Whether Claimant's claim for workers' compensation benefits is time-barred under 21 V.S.A. §656(a).

**FINDINGS OF FACT:**

The following facts are undisputed:

1. Claimant suffered an injury at the hands of a foster child placed in her care pursuant to Defendant's Substitute Care program on or about December 17, 2005.
2. Defendant has been providing therapeutic care for adolescents since the 1970's. The nature of Defendant's business has changed in the past forty years, including a change in the corporate nature of the business.
3. For a period of time, Defendant operated an in-house residential program for youth in its care. In 1995, Defendant closed this program, obtained a license as a child-placing agency and opened a therapeutic foster care program. In connection therewith, Defendant identifies, trains, approves and supports foster care providers while providing case-management services for the children it places. This child placement and therapeutic foster care program is known as Defendant's "Substitute Care Program."

4. In addition to its child placement and therapeutic foster care program, Defendant also operates a school. This school is a licensed educational institution distinct from Defendant's Substitute Care Program; not all foster children placed by Defendant are enrolled in the school.
5. In connection with its Substitute Care Program, Defendant is licensed by the State of Vermont Department for Children and Families (DCF) as a child-placing agency. As Defendant states on its website, this license allows Defendant to "recruit, approve, train and support our own foster homes for children who are in the custody of the State of Vermont."
6. The Vermont Agency of Human Services regulates child placement agencies. It defines such an agency as "an organization established for the purpose of providing or arranging placement" for children in foster homes. Vt. Code R. 13 162 005, *Defendant's Opposition to Claimant's Motion for Partial Summary Judgment and Cross Motion for Summary Judgment at Exhibit 1*. A licensed child placement agency must provide orientation and training to the foster parents with which it places children, must assign a member of its social work staff to visit the foster home at least monthly and must involve the foster parent in developing both initial placement plans and discharge/aftercare plans for the child. *Id.*, *Exhibit 3*.
7. Once licensed by the State as a child placement agency, Defendant was authorized to approve homes to provide foster care for children in its Substitute Care Program, even if these homes were not licensed by the State.
8. There are approximately 25 children in the Substitute Care Program, ranging in age from 8 to 18. Most of these children have been victims of trauma and exhibit "acting out" behaviors. The children carry various diagnoses, and their histories are marked by inconsistent parenting, numerous short-term placements and even residential care facilities.
9. Defendant's website states that its Substitute Care Program "is rooted in the belief that when children are surrounded by caring adults who ensure their safety and who seek to develop their hidden potential, those children can grow to trust and to once again hope for a future free from their abusive pasts." To this end, the website continues, "[Defendant] provides case managers, mentors, foster parents, respite providers, individual and group and family therapists who work as a team to assist the youth in regaining a sense of self by developing strategies to address each youth's specific treatment needs."

10. Since 2006 Defendant has operated a “staffed foster home” as another placement alternative it can offer for children in DCF custody. Defendant’s paid, in-house employees work in the home, in around-the-clock shifts. Although the home initially was created to accommodate the needs of a specific child who required placement at the time, Defendant has continued to operate it for subsequent child placements as well. The services provided by Defendant’s employees for the children placed in this home are the same as the services provided to children in other foster homes in the Substitute Care Program, though the children placed in the staffed home tend to be the more challenging cases.
11. In April 2004 Claimant applied to work for Defendant as a substitute care provider.
12. In connection with her application, Claimant underwent an extensive background check, including checks with the Department of Motor Vehicles, Office of Child Support, Department of Corrections, various abuse registries and other state agencies.
13. Claimant also underwent in-depth personal interviews and a thorough home study. The home study included detailed investigation of Claimant’s personal and family background, regularly-scheduled trainings conducted by Defendant, physical evaluation of her home and living space and interviews with Claimant.
14. In addition, Defendant typically conducts an evaluation of a prospective foster parent’s home, looking for things like cleaning products within reach, for example.
15. On May 20, 2004 Defendant approved Claimant for placement of one child. Defendant’s home study report notes that Claimant “does not feel she could supervise family visits without support from the LYFS team.”
16. Although thus approved by Defendant, Claimant was not a state-licensed foster parent. As noted above, as a licensed child placement agency Defendant is authorized by the State to place children *either* in foster homes it has approved *or* in state-licensed foster homes.
17. In addition to direct care, Defendant’s job description for a foster care provider included case planning, documenting pertinent information and supporting efforts to establish and maintain ties to primary family as appropriate.
18. Claimant was not a licensed foster care provider in 2005. This means that she was not entitled legally to accept foster placements directly from the State of Vermont. Instead, in placing children with Claimant Defendant was operating pursuant to its legal authority to approve a home to provide foster care for children who are part of its Substitute Care Program.

19. Depending on the needs of a particular child, Defendant may require foster parents in its Substitute Care Program to meet additional safety standards, such as requiring more smoke alarms than the state requires. In general, Defendant has weekly meetings with the foster parents it has approved, greater access to team meetings and a higher level of case manager involvement than it does with state-licensed foster parents. The level of case manager involvement varies with the needs of a particular child.
20. Foster parents like Claimant, who are approved for placement by Defendant but are not licensed by the State Department for Children and Families, can only accept foster children from Defendant.
21. Claimant was not paid directly by the State of Vermont for her foster care services. Rather, she was paid by Defendant, on a per-day basis, from funds it received from the State of Vermont and/or Medicaid.
22. Claimant's first placement after being approved as a foster parent in its Substitute Care Program was a 16-year old girl who resided with her for a year and a half. Defendant required Claimant to provide a standard bedroom with a closet, and to ensure that the child was appropriately dressed. Claimant was not required to provide the clothing herself, however.
23. Claimant was responsible for getting the child ready for school, which included providing a nourishing meal, and for transporting her to activities on the weekend.
24. Defendant provides a good deal of support to homes in which it places children.
25. As a foster care provider in Defendant's Substitute Care Program, Claimant was provided an emergency pager so that she could summon assistance from Defendant on a 24-hour basis. Claimant was expected to and did use this pager as needed.
26. Defendant provided instructions to Claimant regarding whether to use and where to store aerosol products in her home, and regarding where to place her dog in her home during crises.
27. Defendant's supervision of foster parents such as Claimant typically consists of weekly home visits by the case manager, involving the foster parent in treatment and IEP meetings and providing ongoing training.
28. Foster parents such as Claimant were expected to report information relating to a child's health care to the case manager. In non-emergency situations the case manager, not the foster parent, typically coordinated a child's medical care. Medical decisions were within the purview of the State of Vermont, as the foster child's guardian.
29. Defendant's case managers often check in with foster parents more frequently than weekly – sometimes daily. Foster parents can call case managers at any time, and can use the emergency pager if they don't reach someone.

30. During the course of her services as a substitute care provider for her first foster child, Claimant also provided respite care for other providers in Defendant's Substitute Care Program during vacations and so these other providers could take breaks. Sometimes Defendant arranged for such respite care, and sometimes the providers made arrangements directly among themselves. Defendant paid Claimant on a daily basis for providing such respite care.
31. In 2004 and 2005 Claimant completed at least 10 trainings required by Defendant, on such topics as self-injury, eating disorders, sexual harassment, HIPAA, blood borne pathogens and non-discrimination.
32. After her first placement ended, Claimant had a second child in her care briefly, but that placement did not work out.
33. In December 2005, after Claimant's first placement had ended, Ken Hammond, Defendant's case manager, asked her to care for an approximately 10-year old boy, AS. AS had come to Defendant from Community House in Brattleboro. Two prior foster placements in central Vermont had not worked out, and AS was awaiting an opening in a residential facility in Montpelier in early January 2006. In the interim, Defendant placed AS in Claimant's home.
34. Claimant did not sign any contract with Defendant when it placed AS in her home.
35. AS required constant supervision in the home and everywhere else. He was in crisis, insofar as his behaviors couldn't be stabilized.
36. During the time AS was with her, Claimant was in daily contact with Defendant. She carried and used her emergency pager on multiple occasions.
37. During AS' brief time with her, Claimant called Defendant's crisis line a number of times, and the sheriff went to her house on numerous occasions. Defendant's crisis coordinator also may have made at least one trip to Claimant's house.
38. The support Claimant received from Defendant during AS' placement included case management, a crisis pager with 24-hour access, access to an expert consultant and community support.
39. Someone else from Defendant came to Claimant's home daily to pick up or drop off AS. Sometimes Ken Hammond, Defendant's case manager, would come to take AS out.
40. AS was not part of Defendant's schooling program.
41. When AS was with another Defendant employee, known as a "mentor" or "community support person," that person was expected to supervise him as closely as Claimant was.

42. On December 17, 2005 AS was very agitated and restless. Claimant called Defendant's emergency pager on several occasions to request help. She did not receive any assistance. That night, the child had a major violent outburst. He threw the telephone at Claimant and punched her in the left side of her jaw. Claimant does not recall losing consciousness, but she was extremely dazed and disoriented.
43. Claimant contacted the police department and Defendant's emergency pager. She was then taken to Copley Hospital, where she stayed for two nights.
44. Claimant reported her injuries immediately to Allen McCarthy, Defendant's employee. Defendant's executive director, Greg Stefanski, learned about the altercation between AS and Claimant within a day or two.
45. Following her injury, Claimant kept in close contact with Defendant's case manager, Judy Brook, who called to make sure she was alright and to see if she needed anything.
46. After Claimant was feeling better, she brought bills in to Defendant for the damages AS had caused. She reported to Defendant that her health insurer had covered her medical bills. She also mentioned that what she thought originally might have been a broken jaw was just a chipped tooth.
47. On January 5, 2006 Defendant's Director of Substitute Care, Rebecca Hemmer, wrote Claimant, referencing Claimant's recovery from her injuries and acknowledging that Claimant had incurred medical bills in connection with them.
48. Defendant did not file a First Report of Injury relating to the December 17, 2005 incident. Instead Claimant herself completed a First Report of Injury and filed it with the Department of Labor on November 16, 2006.

#### **CONCLUSIONS OF LAW:**

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samlid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).
2. At issue in this claim is whether Defendant bears responsibility for Claimant's injuries because it qualifies as her "statutory employer" under 21 V.S.A. §601(3). The facts relevant to this determination are not disputed, and therefore the question turns solely on the legal interpretation of the term.

3. The concept of “statutory employer” is codified in 21 V.S.A. §601(3), which 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 for any other reason, is not the direct employer of the workers there employed.” With this definition, Vermont’s workers’ compensation law creates a statutory employer/employee relationship where no such relationship existed at common law. *In re Chatham Woods Holdings, LLC*, 2008 VT 70 ¶10 (May 16, 2008), citing *King v. Snide*, 144 Vt. 395 (1984).
4. The Vermont Supreme Court has embraced the “nature of the business” test in determining whether a statutory employment relationship exists. This test asks whether the work performed by the putative employee “is a part of, or process in, the trade, business or occupation” of the putative employer. *In re Chatham Woods Holdings, LLC*, *supra* at ¶11. The critical inquiry, therefore, is “whether the type of work being carried out by the independent contractor is the type of work that could have been carried out by the owner’s employees as part of the regular course of the business.” *Frazier v. Preferred Operators*, 177 Vt. 571, 573 (2004). The test is to be applied broadly, in keeping with the purposes of Vermont’s workers’ compensation laws. *In re Chatham Woods*, *supra* at ¶8.
5. In the current claim, Defendant’s business consisted in “recruit[ing], approv[ing], train[ing] and support[ing] *our own foster homes* for children who are in the custody of the State of Vermont.” *Claimant’s Statement of Uncontested Facts, Exhibit 2* (emphasis added). In order to accomplish its mission, Defendant “provides case managers, mentors, *foster parents*, respite providers, individual and group and family therapists who work as a team to assist the youth in regaining a sense of self by developing strategies to address each youth’s specific treatment needs.” *Id.* (emphasis added). Thus, Defendant’s Substitute Care Program offered a comprehensive package of services for at-risk youth, of which the foster parents it recruited, approved, trained and supported formed an integral part.
6. To ensure the success of its business endeavor, Defendant went far beyond the minimum requirements imposed by the State for identifying and supporting appropriate foster care placements. It provided more training to its approved foster parents. It imposed more stringent home safety requirements. It involved the foster parent in team meetings and initiated more case manager contact. Last, recognizing its responsibility both for the safety of the children it placed and the foster parents with whom it did so, it provided its parents with emergency pagers to be used whenever appropriate. With all of these acts, Defendant operated not merely as a broker of foster home placements. It did more than simply match at-risk children with willing foster parents. Rather, it took additional steps to ensure that its team of case workers, mentors, therapists and foster parents acted together to provide nurturing, therapeutic substitute care.

7. Defendant cites the Department's Declaratory Ruling in *Howard Center for Human Services, Inc. v. Commerce and Industry Insurance Co. and AIG* (undated opinion) as establishing a precedent against finding statutory employer status in situations similar to the current claim. In *Howard Center*, the Department concluded that a community mental health center was not the statutory employer of the developmental home providers with whom it arranged placements for developmentally disabled adults. Upon careful reading of the Commissioner's Ruling, I find that the facts at play in the current claim differ significantly from those underlying the *Howard Center* ruling. To be sure, the community mental health center under scrutiny in that ruling took an interest in ensuring that the adults it placed were appropriately cared for at home. Beyond addressing basic safety issues, however, it did not dictate the home environment. Nor did it supervise the home providers directly or impose rigorous requirements as to exactly what was to be provided to each client. Simply put, it did not endeavor to provide the same range of coordinated therapeutic services, in the context of an extremely structured, closely monitored setting, that Defendant provided here. This is a critical difference.
8. In keeping with the Supreme Court's guidance in *Chatham Woods*, therefore, and notwithstanding the Department's prior ruling in *Howard Center*, I conclude that Defendant in this claim qualifies as Claimant's statutory employer under 21 V.S.A. §601(3). The type of work Claimant performed was work that could have been carried on by Defendant's own employees as part of the regular course of its business.<sup>1</sup>
9. Defendant's contention that Claimant's claim is time-barred under 21 V.S.A. §656(a) lacks merit. Section 660(a) clearly states: "Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent or representative, had knowledge of the accident *or* that the employer has not been prejudiced by the delay or want of notice." (Emphasis added). The undisputed facts establish that Defendant had knowledge of Claimant's accident within days of its occurrence. This fact alone triggers the operation of §660(a) and is enough to render Claimant's claim timely.

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<sup>1</sup> Indeed, in 2006 Defendant did decide to operate a foster home staffed by its own employees rather than by approved foster parents like Claimant. Although this home did not become operational until some months after Claimant's injury, the fact that it functioned in all respects essentially as the other foster homes in Defendant's Substitute Care Program did is strong evidence that the type of work performed there occurred in the regular course of Defendant's business.



**ORDER:**

Claimant's Motion for Summary Judgment is **GRANTED**. Defendant's Motion for Summary Judgment is **DENIED**.

Dated at Montpelier, Vermont this 30<sup>th</sup> day of October 2008.

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Patricia Moulton Powden  
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.