Melissa Marcum v. State of Vermont, Agency of Human Services (December 15, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Melissa Marcum	Opinion No. 50-09WC
v.	By: Sal Spinosa, Esq. Hearing Officer
State of Vermont, Agency of Human Services	For: Patricia Moulton Powden Commissioner
	State File No. AA-2088

RULING ON DEFENDANT'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT[1]

ATTORNEYS:

Charles Powell, Esq., for Claimant
Andrew Boxer, Esq., for Defendant

ISSUES PRESENTED:

1. Was Claimant an employee of Defendant at the time of her June 5, 2007 injury?

2. If yes, is Claimant's current claim time-barred under the provisions of 21 V.S.A. §§656 and 660(a)?

FINDINGS OF FACT:

Considering the facts in the light most favorable to Claimant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. On June 5, 2007, while working in the Nelson home in Ryegate, Vermont, Claimant injured her shoulder when she fell while holding the Nelson child, CN. Claimant provided home-based medical care services for CN, who suffers from a congenital disease that affects his ability to breathe involuntarily. This is a life-threatening condition that requires 24-hour monitoring and care.

2. Claimant first met Heather Nelson at Dartmouth Hitchcock Medical Center, where CN was a recurrent patient. Claimant was a licensed practical nurse, and CN came under her care.

[1] Although Defendant frames its pleading as a Motion to Dismiss, it is more properly characterized as a Motion for Summary Judgment. *See generally* V.R.C.P. 12(b)(6) and 56.

3. Due to his medical condition CN qualified as a Medicaid beneficiary. As a consequence, he was eligible for a variety of Medicaid-funded services, including in-home personal care attendant services provided in accordance with the Children's Personal Care Services Program (CPCSP). In Vermont, the CPCSP is administered through the Agency of Human Services' Department of Disabilities, Aging & Independent Living (DAIL).

4. The goal of the CPCSP is to provide supplemental assistance with self-care and activities of daily living to Medicaid-eligible children with significant disabilities or health conditions. This support is meant to supplement, not replace, parental roles.

5. In order to assist eligible individuals in gaining access to the personal care attendant program, DAIL has contracted with ARIS Solutions, an intermediary payroll service, to process the payroll and billing for personal care attendants hired under the program. ARIS uses Medicaid funds to pay personal care attendants for their work.

6. The state also has contracted with ARIS to procure a single workers' compensation insurance policy covering all personal care attendants, so that the time and expense of doing so does not fall to each eligible individual him- or herself. In taking this step, however, the statute specifically mandates that personal care attendants "shall not be construed as state employees except for purposes of 21 V.S.A. chapters 9 [dealing with workers' compensation] and 17 [dealing with unemployment compensation]." 33 V.S.A. §6321(f).[2]

7. There is another option for parents of Medicaid-eligible dependents to access Medicaid funds for the in-home medical services their children require. Under the Family Managed Nursing Initiative (FMNI), parents assume responsibility for selecting skilled nursing staff (either registered or licensed practical nurses) to provide in-home care. In addition, they must select a nurse coordinator (also a registered or licensed practical nurse) to assist in hiring, training and supervising the nursing staff. Last, the parents are responsible for managing the staff's work schedules and reviewing their time sheets.

8. The goal of the FMNI program is to secure quality, consistent, cost-effective home care services. It does so by directing less money to home health care agencies in the form of administrative fees, thus making more money available for nursing wages.

[2] The statute was amended in 2008, adding subsection (g) to clarify the state's ability (through its intermediary payroll service) to provide workers' compensation coverage for personal care attendants in the manner described. In making this amendment, the statute also clarified that "subsections (f) and (g) . . . are intended to permit the state to provide workers' compensation and unemployment compensation and shall not be considered for any other purposes." Whether this amendment merely codified the state's prior intent or added something new is unclear. In either event, Defendant's reliance on the language of the amendment itself in support of its position is misplaced, as it was not in effect at the time of Claimant's 2007 injury.

9. To participate in the FMNI program, parents must use only those nurses who are enrolled as qualified Medicaid providers. Otherwise, the nurses are not eligible to receive payment through the FMNI program. In Vermont, the Agency of Human Services (AHS) has contracted with EDS, a third-party payer, to review, adjust and pay the bills for in-home services provided under the FMNI program. EDS uses Medicaid funds to do so. All told, Medicaid pays for the services of approximately 14,000 approved providers in Vermont, including doctors, nurses and other medical providers.

10. During a meeting at Dartmouth Hitchcock in 2006 Heather Nelson asked Claimant if she would be interested in providing the home care that CN required. Because at that point Claimant was not a qualified Medicaid provider, Ms. Nelson proposed that she work initially as a personal care attendant under the CPCSP. Ms. Nelson further proposed that both she and Claimant would work towards garnering approval to transition into the FMNI program – Ms. Nelson as a qualified FMNI client and Claimant as an approved medical provider. At that point Claimant would be eligible to be paid at a significantly higher rate than what she would receive initially as a personal care attendant.

11. Claimant was amenable to this proposal. In late 2006 she began providing home care services for CN as a personal care attendant. Claimant's duties included monitoring CN's ventilator, suctioning him as needed and otherwise tending to his personal care needs. Claimant was paid under the CPCSP, at the rate of $10.00 per hour.

12. Claimant also began the process of qualifying as a provider under the FMNI program. In that context, she received an informational bulletin that described the program. Under the section entitled "Family Managed Nursing Initiative Program Requirements," the bulletin stated, "Nurses will be self-employed and will be responsible for handling their own tax payments."

13. On January 27, 2007 Claimant signed her initial provider enrollment contract which allowed her to participate in the FMNI program. She continued to care for CN, but now as a medical provider rather than as a personal care attendant. Although her job duties were essentially the same as they had been as a personal care attendant, Claimant's responsibilities under the FMNI program recognized her status as a trained and certified licensed practical nurse. As such she could perform some additional services that CN required.

14. Claimant's reimbursement rate under the FMNI program recognized her altered status as well. Depending on the shift differential Claimant's pay rate ranged from $27.86 to $37.66 hourly, a significant increase from her wage rate as a personal care attendant. Claimant billed EDS directly for her services, and no taxes were deducted. The time sheets she submitted to EDS included the phrase "….private duty (self-employed) nurse for the child named above."

15. Neither Claimant nor Ms. Nelson understood that the transition from the CPCSP to the FMNI program affected Claimant's workers' compensation coverage in any respect. Prior to Claimant's June 5, 2007 injury the issue was never discussed.

16. Ms. Nelson was aware of Claimant's injury on the date it occurred. However, Claimant did not file a notice of injury and claim for compensation with the Department until January 9, 2009. AHS first learned of her injury at around the same time.

DISCUSSION:

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 a judgment in its favor as a matter of law. *Samplid 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. Realty of Vermont*, 137 Vt. 425 (1979).

2. In the current claim, Defendant's motion for summary judgment is predicated on its assertion that Claimant was not an AHS employee at the time of her injury. Claimant asserts otherwise, and argues that she is thus entitled to workers' compensation coverage for her injury.-

3. Had she been injured when she worked as a personal care attendant under the CPSCP, Claimant would have been entitled to workers' compensation coverage under 33 V.S.A. §6321(f). This is true not because she was in fact a state employee, but solely because the statute provided such coverage to personal care attendants in the program.

4. Once Claimant made the transition to the FMNI program, however, the coverage provided by §6321(f) no longer applied to her. That Claimant performed the same services after the transition is irrelevant. All that matters is that, for whatever reason, the legislature decided to provide coverage for personal care attendants but not to FMNI providers.

5. Without the coverage mandated by §6321(f), in order to be entitled to workers' compensation benefits Claimant must establish that she was an AHS employee at the time of her June 5, 2007 injury. To do that, she must either fit herself within the definition of employee provided in 21 V.S.A. §601(14), or establish that the state was her statutory employer under 21 V.S.A. §601(3).

6. Section §601(14) defines an "employee" as "an individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer." The definition codifies the common law concept of employee; it presumes on a most basic level a person who performs services for another. *See* 3 *Larson's Workers' Compensation Law* §60.01.

7. Claimant's relationship with AHS does not fit within that definition. Her interaction with AHS was limited to submitting her bills to the agency's third-party payer for processing and payment under the FMNI program. AHS neither hired Claimant, nor assigned her responsibilities, nor set her schedule, nor assessed her work. Her interaction with the state consisted solely in processing payment for the services she provided to CN. This is insufficient to establish an employer-employee relationship with AHS.

8. Nor does Defendant qualify as Claimant's "statutory employer" under 21 V.S.A. §601 (3). That provision 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." This definition creates within Vermont's workers' compensation law a statutory employer-employee relationship where none existed at common law. *In re Chatham Woods Holdings, LLC,* 184 Vt. 163, 169 (2008), citing *King v. Snide,* 144 Vt. 395 (1984).

9. The Vermont Supreme Court has embraced the "nature of the business" test to determine 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, supra* at 170. The test is to be applied broadly, in keeping with the purposes of Vermont's workers' compensation laws. *In re Chatham Woods, supra* at 168. At the same time, due regard must be given to the facts of each particular situation. *King, supra* at 401.

10. Applied to the circumstances of the current claim, the critical inquiry, therefore, is whether the type of work that Claimant performed is the type of work that AHS employees themselves could have carried out as part of AHS' regular course of business. *See Frazier v. Preferred Operators, Inc.,* 177 Vt. 571, 573 (2004).

11. Given AHS' limited role in administering the FMNI program, the answer is no. AHS is not itself charged with providing medical services to eligible beneficiaries; it merely facilitates payment for them. AHS does not employ a stable of nurses to deliver in-home care, nor does it hire, train, assign work to or otherwise supervise those, like Claimant, who do. Its business is to process payments, not to provide direct services. *See Dwinell v. Merchants Bancshares, Inc.,* Opinion No. 40-09WC (October 14, 2009).

12. Notwithstanding her failure to qualify as either a common law or a statutory employee, Claimant argues that she should be granted employee status nonetheless by virtue of Defendant's failure to comply with the requirements of 21 V.S.A. §601(14)(F). That provision carves out an exception to the common law concept of employee for sole proprietors who express clearly their desire to be treated as independent contractors instead. Claimant misreads the intent of this provision, however. Section 601(14)(F) creates an *exception*, not a rule. Its purpose is not to *create* an employer-employee relationship where one otherwise would not have existed. Rather, its function is to *undo* a relationship that the law otherwise might have found.[3]

13. I find, therefore, that Claimant was not an employee of AHS at the time of her injury. As a matter of law, she did not meet the common law definition of employee as reflected in 21 V.S.A. §601(14), nor did she establish the existence of a statutory employment relationship under 21 V.S.A. §601(3). AHS bears no workers' compensation responsibility for her June 5, 2007 injury.

14. In view of my determination that AHS was not Claimant's employer at the time of her injury, it is not necessary to reach Defendant's notice and statute of limitations argument.

ORDER:

For the foregoing reasons, Defendant's Motion to Dismiss and/or for Summary Judgment is **GRANTED**. Claimant's claim for workers' compensation benefits arising out of her June 5, 2007 injury is **DISMISSED**.

DATED at Montpelier, Vermont this 15th day of December 2009.

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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.

[3] In the context of her §601(14)(F) argument, Claimant asserts that Defendant did not explicitly notify her that the workers' compensation coverage she had enjoyed under the CPCSP terminated once she transitioned instead to the FMNI program. Given that the provisions of §601(14)(F) do not apply, Defendant's alleged failure to do so is irrelevant. In any event, Claimant received sufficient information to alert her to her change in status, but failed adequately to appreciate its significance. *See* Finding of Fact Nos. 12 and 14 above.