STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Robert Hathaway	)	State File No. S-21368
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Addison County Commission Sales	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 23-03WC

APPEARANCES:

Beth Robinson, Esq., for the Claimant
Keith Kasper, Esq. , for the Defendant

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

Claimant moves for summary judgment on the issue of compensability. Specifically, the question presented is whether Addison County Commission Sales (ACCS) was the Claimant's statutory employer at the time of his death. Applicable statutory language and relevant case law support the conclusion that it was.

The following undisputed facts can be gleaned from the record, including depositions of ACCS representatives: ACCS is a commission sales business that provides a service for the farming community. It hauls animals from various farms in the community to its sale barn two days per week and sells them to local slaughterhouses and buyers, taking a commission on the sales. The services of the business are the hauling and selling animals, with fees for both charged to the farmers. Although the hauling service is not profitable, it is an essential part of the business. ACCS employees and "independent" truckers haul cattle.

Claimant began working as a part time truck driver for ACCS in the Fall of 2001, under an open-ended contract for an indefinite period. At that time, he had a maple-sugaring operation, but not a trucking business. ACCS provided the Claimant with a truck and trailer and provided him with assignments. Time cards formed the basis for his pay. ACCS paid for the gas for the truck and for repairs.

At times Claimant helped ACCS with other work, including repairing trucks and recording notes at sales for which he was paid by the hour. However, ACCS did not withhold taxes or pay benefits. Claimant specifically requested to be treated as an independent contractor.

In support of a request for fees, Claimant submitted a copy of a contingent fee agreement; an itemized statement of attorney hours worked and evidence of necessary costs expended totaling $507.18.

Discussion and Conclusions

The Vermont Rules of Civil Procedure apply to workers' compensation hearings insofar as they do not defeat the informal nature of the proceedings. Workers' Compensation (WC) Rule 7.1000. Pursuant to V.R.C.P. 56(c), summary judgment is appropriate when the moving party demonstrates that there is no genuine issue of any material fact and that party is entitled to judgment as a matter of law. *Toy, Inc., v. F.M. Burlington Co*., 155 Vt. 44, 48 (1990).

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 to be 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 there employed." 21 V.S.A. § 601(3).

The Vermont Supreme Court recently outlined the intent underlying this statutory provision:

> As we stated in *King v. Snide*, 144 Vt. 395, 400, 479 A.2d 752, 754 (1984), § 601(3) "creates a statutory relationship of employer and employee, where no such relationship existed at common law." The statute was intended to impose liability for worker's compensation benefits upon business owners who hire independent contractors to carry out some phase of their business. Id. at 401. The idea was to prevent business owners or general contractors from attempting to avoid liability for workers' compensation benefits by hiring independent contractors to do what they would otherwise have done themselves through their direct employees. Id.

Edson v. State 2003 VT 32 ¶ 6, ___Vt.___.

The crucial test, as the Court clearly explained, is the nature of the business. "[T]he question is whether the work that the owner contracted for "is a part of, or process in, the trade, business or occupation of the owner." Id. 7.

Long standing Supreme Court and Department precedent support this nature of business test, as the following cases illustrate. The owner of a wood lot was not the statutory employer of a logger's employee. *King,* 144 Vt. 395. The owner of a creamery business was not the statutory employer of an employee of a contractor hired to build on the creamery site. *Packett v. Moretown Creamery Co.,* 91 Vt. 97 (1917). An employee of a roofer was not the statutory employer of a Condominium Association, *Chandler v. Continental Loss Adjusting Services,* et al. Op. No. 59-94WC (1995). In each of those cases, the injured worker was an employee in a business quite different from the putative employer.

In contrast, a manufacturer of wood products who hired an independent contractor to haul its lumber and load it on railroad cars was 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). And a 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. *Edson*, supra. A trucking firm in *Edson* had a contract with the State to load and deliver merchandise. The Court held that the State Department of Liquor Control was the statutory employer of the trucking firm employee, thereby immunizing the State from civil liability. According to the Court, the "true test" was whether the work being done by the injured employee pertained to the defendant's business. Because the business of the Department of Liquor Control was both sales and distribution, the Court held that delivery work done by the trucker met that test. Id. ¶ 9.

Defendant distinguishes *Edson* and the cases cited therein from the instant case by arguing that those claimants were subcontractors of other statutory employers. It contends that the purpose behind the statutory employer law is to protect employees of independent contractors, not the independent contractors themselves. However, *Falconer v. Cameron*, 151 Vt. 530 (1989) indicates otherwise. In *Falconer* an "independent" trucker was deemed a statutory employer of the Defendant trucking business, even though the parties had contracted for an independent contractor relationship. The Court cited *King v. Snide* with approval when he reiterated the intent underlying § 601(3).

Furthermore, Defendant argues that this case is different from those where a statutory employer-employee relationship was found because this Claimant had other employment, particularly his maple-sugaring business. Although it is true that a claimant's other work was a factor in other cases, such as *Ordway v. Johnson Lumber Co*., Op. No. 67-98WC (1998), it was relevant to the ultimate issue of the nature of the business, not an automatic bar to a finding of a statutory relationship.

In the instant case, hauling services are integral to the business of Addison County Commission Sales; otherwise cows could not be brought to ACCS. The work Claimant did was the same work ACCS regular employees did. Claimant worked side by side with other workers performing other tasks as needed. Although the work was not full time, it was within the nature of the ACCS business. As such, *O'Boyle* and *Edson* govern and a statutory employer-employee relationship is found.

Even if this case were analyzed under the right to control test, See *Workers' Comp. Div. v. Playmate Entertainment, Inc*. Opinion No. 29-97PEN (Sep. 29, 1997) citing Restatement §220, this Claimant would be an employee. That is because ACCS provided the truck and trailer; it based Mr. Hathaway's pay on time cards. ACCS paid for the gas for the truck and for its repairs. And ACCS determined the assignments. Regardless of the name the parties put on the relationship, it was one the employer controlled. As such, Claimant was not an independent contractor for purposes of the Workers' Compensation Act.

Therefore, Claimant's Motion for summary judgment is granted.

Pursuant to 678(a) and Rule 10.000, a prevailing claimant is entitled to a discretionary award of attorney fee and mandatory award of costs. A contingency fee as requested based on 20% of the past due benefits is an appropriate award in this case given the legal work involved and is awarded. The necessary costs of $507.18 are also awarded.

ORDER:

Because ACCS was the statutory employer of Robert Hathaway at the time of his death, the employer/insurer must:

1. Adjust this claim;

2. Pay attorney fees of 20% of the past due benefits, not to exceed $9,000, and costs of $507.18.

Dated at Montpelier, Vermont this 9th day of May 2003.

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Michael S. Bertrand
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.