STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-06653
	)	
	)	By: Margaret A. Mangan
Ronald Race	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Clayton and Marie Abair/	)	
Abair Roofing	)	Opinion No.21SJ-02WC

MOTIONS FOR SUMMARY JUDGMENT

Submitted on affidavits, briefs and the Department's file
Record Closed on March 8, 2002

APPEARANCES:

William B. Skiff, II. Esq. for the claimant
Brian Tillman, Esq. for Clayton and Marie Abair/Abair Roofing
Andrew W. Goodger, Esq. for Barton Builders/Travelers
Joshua Simonds, Esq. for Stuart Ireland/Wausau
Christopher McVeigh, Esq. for S.D. Ireland/CNA

ISSUES:

Which defendant is responsible for the defense of this claim before the Department?

FACTS (to be considered for the pending motions only):

Claimant Ronald Race asserted claims for worker's compensation benefits against Abair Roofing arising out of an alleged January 10, 2000 injury while employed as a roofer on a worksite known as Lot 9, Spear Street in South Burlington, Vermont.

Stuart Ireland/S.D.Ireland (Ireland) was building the house on Spear Street. Ireland hired Barton Builders (Barton) to frame the house, put on the roof and install windows and doors.

Barton Builders' workers' compensation carrier is the Travelers.

Barton hired Abair Roofing (Abair) for the roofing work.

Abair hired the claimant to work on the roof. On January 10, 2000, Abair had no workers compensation insurance in effect.

There was no contract between Ireland and Abair for any aspect of the Spear Street project.

On April 6, 2001 an Interim Order of Benefits was issued on behalf of the claimant against Abair who made certain payments under the Order but did not comply fully.

In response to Abair's default of its obligation to obtain workers' compensation insurance and failure to provide benefits as ordered, claimant asserted his claims against Barton by an October 2001 letter requesting that Barton be put on notice of the claim.

In response to notice received, Barton denied the claim on the basis that Ireland was the General Contractor on the work site. This Department then put Ireland on notice of a potential claim.

Claimant reiterated his claims against Barton on January 8, 2002 when he requested an Interim Order of Benefits against Barton.

DISCUSSION:

Ireland/Wausau argues that any action against it in this Department must be dismissed, with the claim proceeding solely against Barton. Barton argues that in this contractor-subcontractor situation, S.D. Ireland as the general contractor must be held liable.

To assure that workers injured in the course of their employment receive benefits, the Vermont Workers' Compensation Act requires employers to carry workers' compensation insurance or to be self-insured. 21 V.S.A.§ 687. The broad statutory definition of "employer" in the Act provides that injured workers receive benefits even if their direct employers failed to provide coverage, as this case amply illustrates.

> "Employer" includes any body of persons, corporate or unincorporated, public or private…and includes 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. If the employer is insured, "employer" includes his insurer so far as applicable.

21 V.S.A. § 601(3). See also, *King v. Lowell,* 160 Vt. 614 (1993)(mem).

The claimant's direct employer did not have insurance coverage; therefore, claimant sought benefits from Barton who clearly is an employer under the Act. A subcontractor who contracts to provide all aspects of framing a house and then subcontracts some of that framing work can be said to be "operator of the business there carried on." Id. In fact, under the definition all defendants in this case are statutory employers under § 601 (3). The essential question presented is which is liable in this action before the Department.

Ireland/CNA contends that the liable party must be Barton, the subcontractor who hired the other subcontractor and had the opportunity to insure compliance with he Act. In support, Ireland cites Larson's, which counsels as follows:

> The purpose of the legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principle contractor, which has it within its power in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers. This being the rationale of the rule, in the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors upon sub-subcontractors, it an employee of the lowest subcontractor on the totem pole is injured, there is not practical reason for reaching up the hierarchy any further than the first insured contractor. Thus, *In re Van Bibber's Case*, 179 N.E..2d 253 (Mass. 1962), an insured general contractor engaged an insured subcontractor who in turn engaged an uninsured sub-subcontractor. The subcontractor was held liable for the compensation payable to an injured employee of the sub-subcontractor. The general contractor was held not liable.

A. Larson and L.K. Larson, 4 Larson's Workers' Compensation Law § 70.04

Ireland/Wausau argues that this Department is without jurisdiction to decide liability among employers. Because the claimant brought this action against Barton, Ireland argues that action must proceed. Should Barton contend that another employer is liable for benefits it has been ordered to pay, it would then need to bring an action in superior court.

Citing the Vermont Supreme Court's decision in *Candido v. Polymers*, 166 Vt. 15 (1996), Barton argues that a general contractor is liable for payment of workers compensation benefits of a subcontractor's employee, irrespective of the absence of a direct contractual relationship between the general contractor and the injured employee. While it is true that a general contractor is a statutory employer and may therefore be immune from a civil suit, as in *Candido*, such a conclusion does not answer the question presented in the instant motion, i.e. which statutory employer must defend the claim before this Department.

Legal, public policy and practical considerations support Ireland's position that this action should proceed solely against Barton. Barton is a statutory employer under § 601(3). It is impractical and costly for this contested case to proceed against multiple defendants for an alleged single incident. The claimant brought the action against Barton. The mission of the Commissioner is to "pass upon the primary liability of the parties defendant, [s]he is not required or authorized under the act to pass upon the ultimate rights or liability as between carriers." *Morrisseau v. Legac*, 123 Vt. 70, 78 (1962).

When the Department acquiesced in Barton's request to put Ireland on notice, we did so in contravention of *Morrisseau.* Unlike an aggravation–recurrence case in which the Department must decide the liability among carriers for separate injuries, this case presents liability for a single incident. Without an election by the claimant to join another employer, this Department is without authority to do so. Any action between Barton to shift liability to Ireland must be brought in a superior court. *King*, 614 Vt. at 615.

THEREFORE, Ireland's requests that it be dismissed are **GRANTED**. Barton's motion for Summary Judgment in its favor is **DENIED**.

Dated at Montpelier, Vermont this 6th day of May 2002.

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R. Tasha Wallis
Commissioner