STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Stefan Kurant	)	State File No. M-8732
	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
	)	Commissioner
Sugarbush Soaring Association, Inc	)	
	)	Opinion No. 10-01WC

Hearing held in Montpelier, Vermont on October 6, 2000
Record closed on November 22, 2000

APPEARANCES:

John C. Page, Esq. and Patricia K. Turley, Esq. for the claimant
Frank E. Talbott, Esq. for the defendant

ISSUE:

Whether, under the Workers' Compensation Act, the claimant was an employee of the Sugarbush Soaring Association (the Club) at the time of his injury on October 5, 1998.

STIPULATIONS:

1. Claimant, Stefan Kurant, sustained severe and permanent injuries when his glider crashed on October 5, 1998. His injuries included two broken ankles, broken right femur, broken left hand, a lumbar vertebral fracture, ossification in his knee, left orbit fracture, nose fracture, retina damage and severe brain injury.

2. At the time of the glider crash, claimant was flying a foliage tour for the Club, a membership organization in which members purchase a share to join and then pay annual dues in order to use the Club's gliders for soaring trips. Full members use the Club's gliders at no charge but must pay a towing fee for each flight. The club also maintains a commercial soaring business in which it charges a fee to the public for scenic rides and soaring lessons.

3. The Club maintains a roster of pilots and flight instructors who are members of the Club and who maintain commercial pilot licenses and are willing to pilot commercial soaring trips. The Club determines which pilots it will include on its list of qualified members to fly commercial soaring flights.

4. On October 5, 1998 claimant piloted one of the Club's gliders carrying a passenger who was a customer of the Club. While under tow, the glider went out of control and crashed.

5. The passenger was killed and the claimant suffered the injuries described above.

6. The customer piloted by claimant paid money to the Club for the October 5, 1998 glider ride.

FINDINGS OF FACT:

1. Soaring is a sport that started in the Warren-Sugarbush valley in 1957. Those who eventually formed a soaring club used a field in that area, known as Estes Field. In 1966 the Sugarbush Soaring Association (the Club), defendant in this case, was incorporated as an organization to carry on the sport of soaring at the Warren-Sugarbush Airport.

2. To become a member of the Club, one must purchase a "share," for a cost of $750.00. The Club has 129 authorized and issued shares. In addition to the share price, members pay annual dues based on a two-tiered structure: Full Members and Associate Members. Full members pay almost twice as much as Associate Members. Full Members may then use the Club's gliders without any further rental fees and also receive reduced costs for towing.

3. The claimant joined the Club in 1997. He bought a share for $750.00 and paid $500.00 dues for the first year as a Full Member.

4. The Club's primary function is to provide an organization and a place where enthusiasts can engage in the sport of soaring glider planes. The Club manages the Warren-Sugarbush Airport and owns and maintains a small fleet of glider planes for its members.

5. To help raise money for its needs, the Club gives scenic glider rides to members of the public for which it charges approximately $75.00 to $95.00 for a 20 to 40 minute glider ride.

6. John Daniell, President of the Club in 1998, testified that the scenic rides to the public subsidize the organization's primary operations. He explained that giving rides is a sideline for the Club that generates a small amount of income as well as public interest in the sport that could bring additional members.

7. Mr. Daniell testified that in his estimate the rides generated about $2,000 to $3,000 per year. Financial statements indicate that the Club had a gross profit of $132,484 in 1998. The Club also raises money by giving glider lessons.

8. Each active member of the Club is expected to contribute some time during the soaring season to assist the staff with line operations, field maintenance, or as ride pilots or flight instructors, if they are qualified.

9. Line operations include keeping the tow lines untangled, hooking the tow line to the glider or the tow plane, checking the connections, keeping the rope taut while the tow plane is taking up the slack in the tow line, and generally helping out on the field as a glider is about to be towed into the air.

10. Field maintenance includes such things as mowing the grass, trimming the grass, picking up trash and generally maintaining the grounds.

11. Contributing to the Club as a ride pilot means making oneself available to take a person up for glider rides, as the claimant did for a customer on October 5, 1998.

12. A member-instructor helps in giving glider instructions to other members.

13. The claimant testified that he volunteered to help give scenic glider rides because he wanted to fly glider planes and this allowed him to fly without having to pay the tow charge he would have to pay if he were taking the glider up for a private flight.

14. Although the claimant appeared on the list of approved commercial glider pilots, he did not appear on the list of employees for 1998 because he did not receive any wages for acting as a ride pilot.

15. To qualify to take a paying customer on a soaring ride, a pilot must hold a commercial license obtained according to the Federal Aviation Association (FAA) guidelines. Thus, not all members of the Club are eligible to take customers on glider rides or to give flying instructions. For example, because Mr. Daniell holds only a private glider license, he would not be eligible to take customers on glider rides.

16. The Club had an incentive policy which reads as follows:

> *Sugarbush Soaring depends on club members for instruction and commercial rides on weekends and holidays, which is an extra commitment for pilots with those ratings. To avoid "burnout," the club needs as many Instructors and Commercial pilots as possible.*
> *To encourage club members to obtain these ratings, the Sugarbush Soaring Association will provide the following support:*
> *Tow, instruction, and sailplane rental for up to three (3) examination flights*
> *Tow and sailplane rental for up to three (3) examination flights.*
> *FAA examiner's fees for the rating*

Tows and sailplane rental for up to three (3) Instructor Recertification flights
FFA examiner's fees for Instructor Recertification

In return, the Sugarbush Soaring Association expects rated pilots to be available for weekend duty on a scheduled basis.

17. Despite the language specifying that pilots were to be available for weekend duty, both the claimant and Mr. Daniels testified that pilots flew commercial flights when they simply showed up and made themselves available, not on any schedule. Such was the case on the day of the accident at issue here when the claimant arrived and told the staff he was available to do rides. At no time was the claimant scheduled to provide a scenic glider ride.

18. Mr. Daniell testified that a member who takes advantage of the incentive policy actually does not owe the Club any return services. A member is not obligated to perform a certain number of commercial rides. He explained that after members receive the benefits of the incentive policy, their participation in commercial rides as a pilot is totally voluntary.

19. After the claimant decided to take advantage of the incentive program, the Club gave him a credit on his account for a total of $340.68, of which $140.00 was the FAA Examiner fee and $200.68 represented six instructional flights.

20. At the time of the claimant's accident, the Club had seven (7) paid employees. Also, it had a list of twelve (12) members who were approved certified flight instructors and a list of sixteen (16) members who were approved commercial glider rider pilots.

21. The claimant testified that he decided to join the Sugarbush Soaring Association in reliance on the incentive program and the fact that he could fly glider rides. His reasoning was that as a member of the Club, he had to pay an average of $30.00 for a tow each time he went up for a glider ride. It was his testimony that since he did not have to pay for the tow plane when he flew a glider ride for the Club, he anticipated that he would be able to save on the tow charges. To obtain the incentive benefits for reimbursement for the FAA Examiner's fees and instructional rides, totaling $340.68, the claimant paid $750.00 to join the Club and $500.00 each year as dues.

22. In 1998 between June 30 and October 5, the claimant piloted eleven (11) commercial rides. Over the three months that he had a commercial license, therefore, he averaged fewer than four (4) commercial rides a month. Those flights were usually half an hour.

23. During the time he had a commercial license the claimant flew fourteen (14) private flights all of which were longer than an hour, most longer than two or three hours.

24. Mr. Daniell testified that all members who act as club pilots are volunteering their time. They receive no money.

25. The Club does not "control" a member flying as a commercial pilot any more than anyone could control the flying of any other pilot under FAA regulations. The only limitations on the member flying a commercial ride are the time limit on the ride and a rule against aerobatics. The pilot determines if a flight should be shortened because of weather conditions or whether to turn controls over to the passenger after 1000 feet.

26. The claimant testified that he was never scheduled to do any rides. His logbook suggests that he did commercial rides on those days he was at the airport for a private flight.

27. The Club's New Member Information Book talks about the nature of the employment relationship between members acting as ride pilots in two places. The first is in respect to Liability Insurance Coverage and provides:

> *The "insured" is Sugarbush Soaring, its employees, officers and directors. Ride pilots and casual instructors, although not necessarily Sugarbush Soaring employees, are also covered if their names are shown on the Sugarbush Soaring list of approved club ride pilots and instructors for the current year.*

28. The second place where the handbook speaks about the employment nature of members is in the section entitled "Policies on Compensation" where it states:

> *Members are expected to participate in the activities of the Sugarbush Soaring Association in many ways for the mutual benefits of all and without compensation.*
>
> *Nevertheless, in order to accomplish its objectives, certain services must be directly compensated for in order to secure them at all (office staff, tow planes, etc) or are of such magnitude that it would not be reasonable to expect them to be given "gratis." Hence it is the policy of Sugarbush Soaring Association to make direct compensation for the personnel listed below. (Actual amounts will be determined from time to time by the Board of Directors.)*
> *Airport Manager*
> *Office Staff*
> *Flight Instructors*
> *Commercial Ride Pilots (No compensation will be given to commercial pilots who donate their time on an "as available basis.")*

However, if, in the judgment of the Office Manager, it is necessary to request certain commercial pilots to be available for specific times, then these pilots will be compensated for the rides actually flown."

While actually engaged in performing as a commercial pilot or as an Instructor, a member is considered an employee of Sugarbush Soaring Association. (Emphasis added).

29. Among the terms and conditions specified on the Pilot's Registration Form is this one: "No Pilot, other than a Sugarbush Soaring employee, may use Sugarbush Soaring Equipment for any commercial purpose."

30. The claimant submitted evidence of his fee agreement with his attorneys, which provides for payment on an hourly basis. He provided evidence supporting his claim for payment based on 113.6 hours of attorney time and $375.43 in reasonable and necessary costs.

CONCLUSIONS OF LAW:

1. Such a case of first impression asks whether a club is a member's statutory employer when the member is performing a task for which the club receives payment.

2. The Act defines an employer as "any body of persons, corporate or unincorporated, …and includes the owner or lessee of premises or other person 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 for any other reason, is not the direct employer of the workers there employed." 21 V.S.A. § 601 (3).

3. The Vermont Supreme Court determined that this "broadly worded provision was intended, inter alia, to prevent owners of trades or businesses from relieving themselves of liability under the Act 'by doing through independent contractors what they would otherwise do through their direct employees.'" *Falconer v. Cameron* 151 Vt. 530, 531, 532 (1989), quoting *King v. Snide,* 144 Vt. 395, 401 (1984).

4. The Act also requires for coverage that a claimant meet this statutory definition of employee: "a person who has entered into the employment of, or works under a contract of services with an employer, but shall not include a person whose employment is casual and not for the purpose of the employer's trade or business. 21 V.S.A. § 601 (14). "[T]he test usually applied is whether the employment is casual-not whether this employee's relation to the employment is casual or brief." 4 Larson's § 73.02 at 73-5. It is not enough that the employment is casual, however, because the trade or business exception must be independently satisfied for the exception to apply. Id.

5. Underlying the entire workers' compensation system is the assumption that the worker is in a gainful employment at the time of the injury. "The essence of compensation protection is the restoration of a part of the loss of wages which are assumed to have existed." 3 Larsons' Workers' Compensation Law, § 64.01.

6. In support of his position that he was a statutory employee at the time of his injury, the claimant cites *RLI Insurance Co. v. Vt. Agency of Transportation*, Slip op. 99-278 (Filed August 23, 2000) in which the Vermont Supreme Court affirmed a lower court ruling that an insurer had a duty to defend a flight instructor in a wrongful death suit because the instructor was an employee.

7. The employer in *RLI* was a full-service operation offering refueling, aircraft maintenance, tie downs, storage, airplane rental and flight instruction. Because the employer's president was not a licensed flight instructor, he retained the flight instructor whose employment status was at issue, to offer flight instruction. Although the employer could not legally exercise control over the actual flight instruction, he exercised control in other ways, such as scheduling appointments with students and arranging for the airplane in which to conduct the instruction. Because such intermediate level of control did not resolve the issue, the Court considered several factors specified in the Restatement of Agency: whether the worker supplies his own tools and place of work, whether the method of payment is by time or by the job, whether the work is part of the regular business of the employer and what is the length of employment.

8. In *RLI*, the employer was a full-service operation that included flight instruction and aircraft rental. All flight instruction took place at the place of business. The employer employed the instructor and others to provide services that were part of the regular business. From payment the employer received for instruction, the instructor was paid a percentage of the hourly tuition, leading the Court to conclude that he was paid by time rather than by the job, a factor weighing in favor of a finding of employment status. Finally, the Court noted that the instructor had an ongoing relationship with the employer for more than one year. On balance, the Court concluded that the instructor was an employee entitled to coverage.

9. This case differs from *RLI* in several respects, most notably that the claimant here was a paying club member who performed some work for the Club, not a pilot who received direct payment for the commercial flights. Public policy could be served by encouraging club members to advance the work of a club without exposing it to workers' compensation liability, especially in a case such as this where the claimant has paid for membership.

10. Indeed, the employer argues that the claimant was a gratuitous worker, that is one who volunteers to assist another person with a view toward furthering his own interest, even though the other's interest is also furthered by his assistance. 3 Larson's § 61.03 [3]. Gratuitous workers are not considered employees because the element of "hire" is lacking. Id. at 65-1. The claimant argues that the element of hire is

11. In this case, remuneration took the form of waived towing fees when the claimant flew a commercial flight and reimbursement for FAA fees.

12. Finally and most importantly, the Club unequivocally stated in its handbook that a member is considered an employee "while actually engaged in performing as a commercial pilot." At the time of the accident at issue here, the claimant was clearly performing as a commercial pilot. Were it not for club members, the Club would have had to hire pilots to provide this service to its paying customers. Under the principles enunciated in *King*, 144 Vt. 395 and its progeny, the claimant was an employee under the Act at the time of his injury and as such is entitled to workers' compensation benefits.

13. This prevailing claimant is awarded attorney fees subject to Rule 10 (2) (A), that is $60.00 per hour for 113.6 hours for a total of $6816.00 plus $375.43 in costs.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the defendant is ORDERED to pay the claimant:

1. All medical, indemnity and permanency benefits to which he is entitled as a statutory employee;

2. Attorneys fees of $6816.00 and $375.43 in costs.

Dated at Montpelier, Vermont this 18th day of April 2001.

_____
R. Tasha Wallis
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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.