

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

) State File No. M-17402
)
George Fontinopoulous) By: Margaret A. Mangan
) Hearing Officer
)
v.)
)
State of Vermont) For: R. Tasha Wallis
) Commissioner
Department of Corrections)
) Opinion No. 14R-00WC

RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION

The claimant through his attorney, Thomas C. Nuovo, Esq. of Bauer, Anderson & Gravel, asks this Department to reconsider its June 6, 2000 ruling that the claimant was employed under a "special agreement" and, therefore, was not entitled to workers compensation benefits under the Workers' Compensation Act. The State's attorney, Keith J. Kasper, Esq. of McCormick, Fitzpatrick, Kasper & Burchard has not opposed the motion.

Because the decision can be construed as finding facts without giving the claimant the benefit of a hearing, the claimant's motion is GRANTED and the June 6, 2000 order vacated. This case will be set for hearing.

Dated at Montpelier, Vermont this 28th day of December 2000.

R. Tasha Wallis
Commissioner

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

| | | |
|---------------------------|---|------------------------|
| |) | State File No. M-17402 |
| |) | |
| George Fotinopoulos |) | By: Margaret A. Mangan |
| |) | Hearing Officer |
| |) | |
| v. |) | For: Steve Janson |
| |) | Commissioner |
| State of Vermont |) | |
| Department of Corrections |) | Opinion No. 14-00WC |

APPEARANCES:

Thomas C. Nuovo, Esq., for the claimant
Keith J. Kasper, Esq., for the defendant

Case submitted on the record without a hearing
Record closed on November 29, 1999

CLAIMANT'S EXHIBITS:

1. VSEA memorandum re: "workmen's compensation amendments," March 11, 1981
2. Minutes of Senate Government Operations Committee, April 1, 1982
3. Report of the Attorney General August 25, 1953
4. Claimant's contract with State of Vermont, October 2, 1997 with May 28, 1998 amendment
5. Claimant's Earnings Statement January 14, 1999

Department Forms:

- Form 1: Employee's Claim and Employer First Report of Injury, filed March 1, 1999 for date of accident February 22, 1999
- Form 5: Employee's Notice of Injury and Claim for Compensation, filed March 9, 1999

ISSUE:

Whether this claim is barred by 21 V.S.A. § 601 (12)(O)(iv) that exempts from coverage under the Workers' Compensation Act, "any person engaged by the state under retainer or special agreement."

FINDINGS OF FACT:

1. Claimant's contract with the State is designated "Standard Contract for Personal Services." (Claimant's Exhibit 4). As specified in the contract, claimant's form of business was that of "sole proprietor." The original contract term was for seven months;

an amendment later extended the term for an additional year. Pursuant to 3 V.S.A. § 311 (a)(10) the Attorney General's Office provided the necessary approval to make that agreement binding.

2. Within the body of the contract, claimant acknowledged that he would "act in an independent capacity" and not as an officer or employee of the State." No employee benefits were available to him. The State did not provide him with workers' compensation insurance, nor did it require him to obtain his own insurance.
3. Specifications for work claimant was to perform included, but were not limited to, counseling and other direct therapeutic services to inmates at the facility, psychological evaluation and assessment. Claimant received an hourly wage for his services, which were to be on average 40 hours per week.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the facts asserted. *Goodwin v. Fairbanks, Morse & Co.*, 123 Vt. 161, 166 (1962).
2. A condition precedent to the establishment of workers' compensation liability is a legal finding of an employer-employee relationship as those terms are defined in our Workers' Compensation Act ("Act"). Within the claimant's burden, therefore, is the burden to prove that such a statutory relationship exists between him and the State and that no exclusion applies. See, *Burdette v. Quality Floors, Inc.*, Opinion No. 61-95WC (Sept. 7, 1995).

3. An "employer" is defined as:

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 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.

21 V.S.A. § 601(14).

4. An "employee" is a " person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, but shall not include: The sole proprietor or partner owner . of an unincorporated business, unless such sole proprietor or partner notifies the commissioner that he wishes to be included within the provisions of this chapter... . *Id.* 21 V.S.A. § 601 (14)(F).
5. An individual working for a state agency, including the Department of Corrections, is considered to be engaged in public employment, which in most instances is covered by the Act. A relevant exception to such "public employment" inclusion, however, applies to "any person engaged by the state under retainer or special agreement" § 601

(12)(O)(iv). It follows, therefore, that claimant's work with the Department of Corrections is not covered by the Act if claimant was engaged under retainer or special agreement.

6. The claimant argues that he was not so engaged. In support, he cites a 1953 Attorney General Opinion that interpreted the word retainer to "apply to members of a profession who undertake to manage or counsel on a given cause, and not to engage in any other form of practice in conflict therewith." 1953 Atty. Gen. Opinion No. 96 at 271. Because he was not given advance sums for his services not hired to work on a particular cause, but rather was employed over a period of time and paid an hourly wage, the claimant argues that he was not hired under a retainer. Clearly this claimant was not hired under a retainer.
7. Similarly, he argues that he was not hired pursuant to a special agreement, a term that he maintains should have the same meaning as independent contract. Again he cites the Attorney General's opinion, in this instance for the proposition that "generally a 'special agreement' tends to conform more nearly to what is understood as an independent contract, whereby a person undertakes to perform a certain thing but retains to himself the right to control the manner in which the work undertaken is to be performed." *Id.* at 272. Despite claimant's argument that the AG opinion should control, he has produced no evidence demonstrating that as a professional therapist, he failed to control the manner in which he undertook his work.
8. Additionally, the claimant cites a VSEA memorandum that dealt with pending legislation to make decisions of the Board for Employee benefits appealable in the same manner as awards by the Commissioner of Labor and Industry. Although such a memorandum is not binding in this forum, it must be noted that its only reference to those hired pursuant to special agreements is to acknowledge that they are not public employees.
9. Although the Workers' Compensation Act does not define "retainer" or "special agreement," the designation of those terms in ¹ 601 (12)(O)(iv) as exceptions to "public employment" clearly directs our analysis to the Vermont Personnel Act where classified state service is defined and its exceptions delineated. 3 V.S.A. § 309 *et. seq.* For example, the Personnel Act provides that "A person or persons engaged under retainer, contract, or special agreement" are not included in classified service "when certified to the governor by the attorney general that such engagement is not contrary to the spirit and intent of the classification plan and merit system principles and standards provided by this chapter." 3 V.S.A. § 311 (a)(10).
10. The crucial question raised in the instant case is whether the retainer, contract and special agreement exceptions to the classified system have the same meaning within the workers' compensation system.
11. The approval by the Attorney General is a certification "to the Governor that such a contract is not contrary to the spirit and intent of the classification plan and merit system principles, in which case state laws concerning classified service do not apply to any positions resulting from the contract." 3 V.S.A. § 311 (a)(10). Accordingly, if an individual were "classified" as that term is used for state employees, all the benefits

inherent in an employer-employee relationship would follow, including workers' compensation benefits. However, in those situations where the classified system cannot meet the need for a particular engagement in public employment, the Attorney General is empowered to approve additional positions outside the classified system.

12. While not addressing the Workers' Compensation Act, the Vermont Supreme Court nonetheless examined the meaning and application of the term "special agreement" in the context of the Vermont State Retirement System. *Fitzpatrick v. Vermont State Treasurer*, 144 Vt. 20 (1984). In *Fitzpatrick* the plaintiff was appointed as an attorney to the Department of Employment and Training pursuant to a personal services contract not dissimilar to the contract at issue in the instant case. Both contracts required the Vermont Attorney General's approval pursuant to 3 V.S.A. § 311 (a)(10). The Vermont Supreme Court held that the attorney-plaintiff was not eligible for retirement service credits because he was hired pursuant to a "Special Agreement" and therefore not within the confines of public employment for the State pursuant to the Vermont Personnel Act. 144 Vt. at 210.
13. It is the duty of this Department to give effect to the Legislature's intent and interpret that intent in a reasonable and just manner. *Clodgo v. Rentavision*, 166 Vt. 548 (1997). It used the term "special agreement" in the Personnel Act for those outside the classified system and determined that no agreement would be binding without the Attorney General's approval. Later the State Supreme Court in *Fitzpatrick* determined that the term "special agreement" has the same meaning in the Personnel Act and the Retirement System.
14. If a contract, retainer or special agreement requiring Attorney General approval would take an individual out of the state's classified system and retirement system, it follows that such an agreement would also exempt the individual from coverage of the Workers' Compensation Act under 21 V.S.A. § 601 (12)(O)(iv). Because this claimant was engaged under such a special agreement, he is not entitled to benefits under the Act.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, this claim is hereby DENIED.

Dated at Montpelier, Vermont, this 31st day of May 2000.

Steve Janson
Commissioner