

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

)	State File No. P-20594; P-20595
)	
Mario Forcier)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
LaBranch Lumber Co. and)	Commissioner
Simon's Chipping, Inc.)	
)	Opinion No. 04-02WC

Hearing Held in Newport on July 10 and July 11, 2001
Record Closed on August 1, 2001

APPEARANCES:

Duncan Kilmartin, Esq. for the claimant
Vincent Illuzzi, Esq. for the defendant Simon's Chipping, Inc.
John W. Valente, Esq. for defendant LaBranche Lumber, Co.

ISSUES:

1. Was LaBranche Lumber, Co. a statutory employer of claimant Mario Forcier on September 7, 1999?
2. Was Simon's Chipping, Inc. a statutory employer of Mario Forcier on September 7, 1999?

EXHIBITS:

CLAIMANT'S EXHIBITS:

- A. Duncan Kilmartin's Letter of July 11, 2000
- B. Claimant's Fact Sheet under cover of letter dated July 11, 2000
- C. Employee's Notice of Injury and Claim for Compensation; Employer: LaBranche Lumber Co., Inc.
- D. Notice of Injury and claim for Compensation; Employer: Simon's Chipping, Corp.
- E. Notice of Injury for Compensation
- F. Corporation information regarding Simon's Chipping, Corp. from the Vermont Secretary of State
- G. Corporation Information regarding LaBranche Lumber, Inc. from the Vermont Secretary of State
- H. Check stubs from Simon's Chipping Corp. and/or LaBranche Lumber Co., Inc. dated 01/14/99 through 10/08/99

- I. Claimant's response to "Questions: Right to Control" test; and "Nature of Business" test dated August 24,2000
- J. Claimant's Affidavit of August 24, 2000 as set forth in letter of August 24, 2000
- K. Duncan Kilmartin's letter of August 29, 2000
- L. As set forth in Duncan Kilmartin's letter of November 14, 2000
- M. Letter dated August 8, 2000 signed by Florence Verge on behalf of LaBranche Lumber Co., Inc.
- N. Letter of August 8, 2000 signed by Florence Verge on behalf of Simon's Chipping, Inc.
- O. Attorney Illuzzi's letter of November 12, 1999 written on behalf of Simon's Chipping Corp and LaBranche Lumber Co., Inc.
- P. Copy of Mr. Forcier's Schedule Property Policy
- Q. Copy of Mr. Forcier's Commercial Lines Policy
- R. Copy of Mr. Forcier's 1997 invoices
- S. Copy of Mr. Forciers 1998 invoices
- T. Copy of Mr. Forcier's 1999 invoices
- U. Insurance declarations
- 2FV 1997 US Corp. Income Tax Return for Simon's Chipping
- 3FV 1999 VT Corp. Income Tax Return for Simon's Chipping
- 4FV 1999 US Corp. Income Tax Return for Simon's Chipping
- 5FV 1998 VT Corp. Income Tax Return Simon's Chipping
- 6FV 1998 US Corp. income Tax Net (form 1120) for Simon's Chipping
- 7FV 1997 VT Corp. Income Tax Return for Simon's Chipping
- 8FV Chip Purchase Agreement between Simon's Chipping and Orleans Division of Ethan Allen
- 9FV VT DOT 01/22/01 Apportioned Registration Cab Cards to LaBranche Lumber and Simon's Chipping
- 10FV 12/02/93 Equipment Sales Order to LaBranche Lumber for a Barko Loader
- 11FV 1998 VT Business Tax Return for LaBranche Lumber
- 12FV 1998 US Income Tax Return for S-Corp. (1120S) for LaBranche Lumber
- 13 FV 1999 VT Business Income Tax Return for LaBranche Lumber
- 14 FV 1999 US Income Tax Return for an S Corporation for LaBranche Lumber

DEFENDANTS' EXHIBITS:

- 1. Copy of Mr. Forcier's Scheduled Property Policy (see claimant's Exhibit P)
- 2. Copy of Mr. Forcier's Commercial Lines Policy (see claimant's Exhibit Q)
- 3. Copy of Mr. Forcier's 1997, 1998 and 1999 invoices under the heading "M.F. Welding and Repair"
- 5. Listing of the checks which were issued from LaBranche Lumber Company to M.F. Welding in 1999 (see Claimant's Exhibit H)
- 6. Copy of August 8, 2000 to DOL from Florence Verge, Secretary of LaBranche Lumber Co., Inc. (see Claimant's Exhibit M)
- 8. Copies of Promissory Note signed by Mr. Forcier
- 9. IRS Form W-9 dated 05/16/97
- 10. Business Card
- 11. Check Stubs
- 12. Repair Bill from Demers to the claimant dated July 31, 1999

13. Copy of Check for Paul Stone to MF Welding, dated January 27, 1998

FINDINGS OF FACT:

1. Claimant is an experienced welder. He learned welding in high school, then worked at several welding jobs before establishing a business he called M. & F. or M.F. Welding. He owned his own equipment and when he was still able to drive transported that equipment to different sites where he did welding work. It was his practice to charge \$10.00 per hour if he did not use his own equipment, or \$25 per hour when he did.
2. Although welding requires special skill, its application is not limited to those who are exclusively welders. For example, many if not most Vermont farmers know how to weld and use that skill in the maintenance and repair of farm equipment. Similarly, many mechanics also are familiar with welding.
3. In 1984 LaBranche Lumber Co., Inc. was incorporated as a lumber business. As of September 7, 1999, Jean Pierre (JP) LaBranche and Rachelle LaBranche were the principals. Their son, Simon LaBranche, has worked at LaBranche Lumber since its inception.
4. Simon's Chipping was incorporated in July 22, 1993. As of September 7, 1999 its registered agent was Jean Pierre LaBranche. The President was Simon LaBranche; Vice President was Jean Pierre LaBranche; the Secretary and Treasurer was Rachelle LaBranche. All three—son, mother and father—were directors.
5. LaBranche Lumber and Simon's Chipping owned several trucks and trailers, most of which were registered to LaBranche Lumber.
6. JP LaBranche is not a welder or mechanic; Simon LaBranche is both.
7. In 1999 Simon LaBranche was the only person identified as an "employee" of Simon's Chipping. As such, he opted out of workers' compensation insurance coverage. There was no coverage for any Simon's Chipping employee at the time of the injury at issue in this case.
8. Since the early 1980's, Simon LaBranche has been active in the management of both LaBranche Lumber and Simon's Chipping. He has received a salary and other monetary benefits from each corporation. At the time of claimant's injury at issue here, Simon's primary income was from Simon's Chipping. In the year 2000 he went back on the payroll at LaBranche Lumber.
9. Simon had management tasks for both corporations. For example, he operated machinery for both businesses, did some welding and mechanic's work and supervised the claimant in his activities for both businesses.
10. LaBranche Lumber produced sawdust, chips, bark, and finished lumber. Those products were transported in a fleet of tractors and trailers owned, operated and maintained by

LaBranche Lumber, for the benefit of LaBranche Lumber and Simon's Chipping. As an integral part of the businesses, employees maintained those vehicles and repaired them when necessary. In fact, maintenance of all the equipment was part of the businesses. Vehicles and other equipment were used interchangeably by both businesses.

11. The chipping operation for Simon's Chipping is conducted in the woods. Equipment used includes a chipper, loader and spot truck. The chipper was a self-contained machine that chipped what loggers could not use, for example the top of trees. It was transported from one site to another by attaching it to a tractor and following it with a vehicle with lights (the spot truck).
12. The chips from the stationary chipper at the LaBranche Lumber mill were used for paper. The chips from Simon's Chipping were used for fuel chips.
13. Claimant did some work for the LaBranche Family from at least 1997, but until 1999 there was no regularity to that work.
14. In December 1998 JP LaBranche approached the claimant to work as a chipper, mechanic and welder for the LaBranche family. He was to replace Jason Gonyaw, who had done that work, who had been a salaried and statutory employee of LaBranche Lumber and who was covered by LaBranche Lumber's workers' compensation policy.
15. Claimant was paid \$10.00 per hour. At his request, no taxes were deducted. He received no fringe benefits. Neither LaBranche Lumber nor Simon's Chipping ever provided the claimant with a Form 1099, although Forms 1099 were issued to those from whom LaBranche Lumber bought logs for more than \$600.00. Claimant has not filed an income tax return since 1997.
16. Also in December 1998 the LaBranches rented one-half of Andre Couture's garage in Coventry, Vermont where it intended to maintain and repair the fleet of vehicles operated by LaBranche Lumber and Simon's Chipping. With that rental, Simon LaBranche decided to move maintenance and repairs inside. To Andre Couture, LaBranche Lumber and Simon's Chipping were one and the same. He did not distinguish between the two. Sometimes he received a rent check from LaBranche, sometimes from Simon's Chipping. Couture saw Simon LaBranche, the claimant and an employee named Marcelle working at the garage.
17. Claimant was hired to operate the chipper for Simon's Chipping, perform mechanic work for both LaBranche Lumber and Simon's Chipping and to weld for both entities. Approximately 75% of his work was operating the chipper and maintaining trucks and trailers. The other 25% of the time, the claimant did welding.

18. Except when there was a pressing need for a vehicle, maintenance of vehicles generally took place when the chipping operation was down or the chipping equipment was being moved from one job site to another.
19. Because the claimant did not drive, he was assigned to the garage to do mechanical or welding work when equipment was moved from one site to another.
20. Welding and mechanical work was an integral part of the business of both LaBranche Lumber and Simon's Chipping because road ready tractor-trailers were essential for the delivery of the product. Employees of LaBranche Lumber in the normal course of their jobs did work necessary to maintain and repair vehicles, including welding. Simon's Chipping and LaBranche Lumber's businesses benefited from the in-house maintenance. Only rarely did they use the services of an independent welder. At first it was Simon who did the welding, work he continued even after Simon's Chipping was incorporated. When he took over more of the managerial tasks for the business, Simon supervised the employees who welded.
21. The only chipping work the claimant did in 1999 was for Simon LaBranche. In addition, he repaired vehicles and did welding work for J.P. LaBranche. He also did some welding work for other businesses, but that was usually on weekends or at other times when the LaBranches did not need him.
22. There was considerable sharing between LaBranch and Simon's. For example, a box trailer is registered to Simon's Chipping and was used by Simon's Chipping for the first few years, but now is used by LaBranche.
23. Records of payments to M. & F. (or M.F.) Welding & Repair from Simon's Chipping and LaBranche Lumber, based on \$10 per hour, reflect the following:

1/14/99	Simon's Chipping	\$ 250.00	25.0 hours
1/21/99	LaBranche Lumber	\$ 245.00	24.5 hours
1/21/99	unclear but from one of the two entities	\$ 105.00	10.5 hours
1/28/99	Simon's Chipping	\$ 340.00	34.5 hours
2/4/99	Simon's Chipping	\$ 267.50	26.7 hours
2/11/99	Simon's Chipping	\$ 22.50	2.25 hours
2/18/99	Simon's Chipping	\$ 125.00	12.5 hours
2/25/99	Simon's Chipping	\$ 240.00	24.0 hours
3/4/99	Simon's Chipping	\$ 285.00	28.5 hours
3/11/99	Simon's Chipping	\$ 425.00	42.5 hours
3/18/99	Simon's Chipping	\$ 395.00	38.5 hours
3/23/99	Simon's Chipping	\$ 180.00	18.0 hours
3/30/99	Simon's Chipping	\$ 280.00	28.0 hours
4/08/99	Simon's Chipping	\$ 197.00	19.7 hours
4/15/99	Simon's Chipping	\$ 60.00	6.0 hours
4/15/99	LaBranche Lumber	\$ 125.00	12.5 hours
4/21/99	Simon's Chipping	\$ 450.00	45.0 hours
4/29/99	LaBranche Lumber	\$ 197.00	19.7 hours
5/5/99	LaBranche Lumber	\$ 110.00	11.0 hours
5/12/99	Simon's Chipping	\$ 377.50	37.75 hours
5/20/99	Simon's Chipping	\$ 470.00	47.0 hours
5/27/99	LaBranche Lumber	\$ 110.00	11.0 hours
5/27/99	Simon's Chipping	\$ 435.00	43.5 hours
6/02/99	Simon's Chipping	\$ 240.00	24.0 hours
6/09/00	Simon's Chipping	\$ 325.00	32.5 hours

6/16/99	Simon's Chipping	\$ 490.00	49.0 hours
6/19/99	LaBranche Lumber	\$ 220.00	22.0 hours
6/21/99	Simon's Chipping	\$ 92.50	9.25 hours
6/30/99	LaBranche Lumber	\$ 470.00	47.0 hours
7/8/99	Simon's Chipping	\$ 447.50	44.75 hours
7/15/99	Simon's Chipping	\$ 305.00	30.5 hours
8/11/99	Simon's Chipping	\$ 225.00	22.5 hours
8/19/99	Simon's Chipping	\$ 415.00	41.5 hours
8/25/99	Simon's Chipping	\$ 402.50	40.25 hours
8/30/99	Simon's Chipping	\$ 270.00	27.0 hours
9/7/99	Simon's Chipping	\$ 190.00	19.0 hours
9/10/99	LaBranche Lumber	\$ 200.00	20.0 hours
9/18/99	LaBranche Lumber	\$ 200.00	20.0 hours
9/22/99	LaBranche Lumber	\$ 200.00	20.0 hours
9/29/99	LaBranche Lumber	loan	
10/8/99	LaBranche Lumber	\$ 200.00	20.0 hours

24. Florence Verge is employed by LaBranche Lumber to handle the accounts for LaBranche Lumber and Simon's Chipping. She routinely made entries for both entities when recording payables and receivables. JP LaBranche hired her and she was trained in the operations of both corporations.
25. One office computer was used for LaBranche Lumber and Simon's Chipping.
26. LaBranche Lumber paid the insurance premiums on the vehicles used by both entities.
27. LaBranche Lumber used a Simon's Chipping line of credit in 2000.
28. Other than the claimant, there was no person in 1999 who provided regular services to the LaBranche businesses who was not considered an employee.
29. When the claimant was not engaged in the chipping operation or maintaining the equipment of the equipment operation, he received assignments from JP or Simon LaBranche to do any number of tasks including welding and fabricating equipment within LaBranche Lumber's plant, welding on trailers, welding on tractors and mechanic's work. The only other welding work claimant did while working for the LaBranches in 1999 was when he was not working for LaBranche Lumber or Simon's Chipping. Usually that was on weekends, but it also included nine days in July when he was not working for the LaBranches.
30. When the claimant worked for LaBranche Lumber and Simon's Chipping, except for a cape, gloves and helmet he used when welding, all tools and materials were supplied by LaBranche Lumber or Simon's Chipping.
31. Simon LaBranche supervised the claimant in all the work he did for Simon's Chipping, except the work he did inside the production plant of LaBranche Lumber when J.P. LaBranche supervised him. Simon also supervised him when he did work on vehicles to make them road ready and able to pass inspection, although Simon was not always physically present when claimant worked at the garage.
32. Claimant was paid an hourly rate for the work he did for Simon's Chipping and LaBranche Lumber.

33. Simon LaBranche, with periodic input from his father, created the claimant's work schedule, although it was not reduced to writing. The schedule revolved around the chipping jobs Simon had. Because the claimant did not drive, Simon or JP LaBranche or Florence Verge picked him up on the days they wanted his services. Simon told the claimant when he would be picked up, which was usually at 6:30. He then worked until 5:00 p.m. when someone at Simon's or LaBranche Lumber drove him home.
34. A tractor and trailer operated by a salaried employee of LaBranche Lumber in one day would pick-up several loads of Simon's chips, loads of LaBranche Lumber's chips and loads of LaBranche lumber products and deliver them to different locations.
35. All of the equipment and vehicles were insured under one insurance policy listing the two corporations and the three principals as named insureds.
36. In June or July of 1999 the claimant welded under conditions he considered unsafe, but at J.P. LaBranche's direction inside the mill, causing a smoldering fire. J.P. LaBranche then instructed the claimant to secure a liability insurance policy if he wanted to continue to work for him.
37. On September 7, 1999 the claimant was working at the rented garage on a trailer owned by LaBranche Lumber. He was to weld the landing gear, but to make the area safe, first shoveled chips in the back of the trailer out of his way. It was in the course of shoveling the chips that he alleges he injured his back, the incident that forms the basis for this claim.

CONCLUSIONS OF LAW:

1. The sole issue for decision is whether the claimant was an "employee" and Simon's Chipping or LaBranche Lumber or both his "employer(s)" under the Workers' Compensation Act. 21 V.S.A. § 601 et. seq.
2. The Workers' Compensation Act defines an employee as "a person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer..." 21 V.S.A. § 601(14).
3. 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 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)

4. In a number of decisions, this Department has examined the nature of the relationship between an employer and one the employer claims is an independent contractor. We have cited with approval the test in the Restatement of Agency (2nd) distinguishing between an employee and an independent contractor. See, e.g. *Bashaw v. Newton*, Opinion No. 24-82WC; *Mitchell v. Harrington Plumbing & Heating* Opinion No. 91-95WC (Dec. 7, 1995). Since the Restatement test can be construed as one of exclusion and the Workers' Compensation statute one of inclusion, a worker who is an employee under the Restatement test would likely also be an employee under § 601 of the Workers' Compensation Act, See *Mitchell*, Op. No. 91-95WC. However, even if one has signed a contract purporting to absolve an employer of liability, he may be an employee under the Workers' Compensation Act if he is performing work normally performed by a direct employee. 21 V.S.A. § 625; *Falconer v. Cameron*, 151 VT 530 (1989).
5. In an Entry Order, *RLI Insurance Co. v. VT Agency of Transportation* (99-278, filed Aug 23, 2000), the Vermont Supreme Court held in an insurance coverage dispute that the insurer had a duty to defend and provide coverage to Champlain Valley Aviation, Inc. (CVA) because a flight instructor was an employee of the insured. The Court looked to the Restatement (Second) of Agency § 220 and considered whether: the worker supplies his own tools and place of work, whether the method of payment is by time or by job, whether the work is part of the regular business of the employer and what is the length of the employment. *Id.* at 2. The court explained that "characterization as an independent contractor for tax purposes alone does not necessarily lead to a legal determination of employment status." *Id.*, citing *North East Ins. Co. v. Soucy*, 693 A. 2d 1141, 1145 (Me. 1997) (experienced roofer hired to help roofing contractor on large job was employee).
6. On balance, the Court held that the flight instructor was an employee, even though he alone controlled the method of instructional work. The employer, whose business was a "full service operation offering refueling, aircraft maintenance, tie downs, storage, airplane rental and flight instruction" controlled the hours the instructor worked and arranged for the airplane in which to conduct the instruction. Instructive to the instant case are facts on which the Court relied: that the instructor performed tasks that were part of the regular business of CVA including opening and closing, answering the phone, clerical duties and mowing the lawn. In addition, the instructor had an ongoing relationship with CVA and was retained to instruct more than one student or one class. *Id.*

7. Earlier, in the worker's compensation case *Falconer v. Cameron*, 151 Vt. 530 (1989), the Court found a trucker operating under a purported independent contract with a trucking company to be an employee of that trucking company, under both the "right to control test" as well as pursuant to §601(3). The court cited §601(3), as authority for making an independent contractor into an employee, if the work the contractor did was the business, trade or occupation of the employer. The Court bolstered this conclusion by citing the provision referring to the broad remedial purposes of the statute, §709, and also §625, which states that "an employer shall not be relieved in whole or in part from liability created by the provisions of this chapter by any contract, rule, regulation or devise whatsoever." But see, *King v. Snide*, 144 VT 395, 401 (1984) (retired grocer managing his daughter's woodlot not statutory employer of logger.)
8. In enacting the statutory predecessor to § 601 (3), the Vermont legislature "wanted (1) to protect employees of independent contractors and subcontractors who were not financially responsible and (2) to prevent owners of trades or businesses or general contractors from relieving themselves of liability under the Workers' Compensation Act by doing through independent contractors what they would otherwise do through their direct employees." *King v. Snide*, 144 VT 395, 401 (1984).
9. The leading commentator in the field of workers' compensation advises that "the modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service. 3 Larson's Workers' Compensation Law, § 6200.
10. The defendants make much of the claimant's insistence that taxes not be taken from his paychecks and that he had business cards for his M.F. Welding. However, an arrangement to avoid tax withholding is not a legal determination of employment status. See, *RLI Insurance*, supra. Nor is a business card. Although the claimant did welding for some other businesses, during 1999 those instances were rare and occurred primarily on weekends or when Simon or JP LaBranche did not need him.
11. Additionally, Simon's Chipping and LaBranche Lumber defend by defining their businesses in the narrowest possible terms, thereby urging this Department to hold that welding is outside the normal course of those businesses. However, welding is not the specialized task the defense would make it out to be. Vermont farmers and other business owners weld to keep their equipment in workable order. And even a specialized task would not necessarily remove the claimant from the status of employee as demonstrated in *RLI Insurance*, supra, where one with the specialized expertise of pilot was deemed to be an employee when all other factors affecting employment status were considered.

12. The defendants are correct when they argue that the claimant was independent and not a statutory employee in 1997 and 1998 when he worked for several companies, including LaBranche Lumber, in his own independent welding business. However, his employment status changed in late 1998 when JP LaBranche approached him to do work for him and Simon, work that had previously been done by an employee. Claimant's work was not exclusively welding, as it had been in his independent business, although welding was a part of the work. He worked in the chipping operation, repaired vehicles and welded.
13. The lumber and chipping businesses of LaBranche Lumber and Simon's Chipping dealt not only with wood products but also with the vehicles that transported them. Those two entities rented a garage where the maintenance work could be done indoors and where the claimant allegedly was ultimately injured. The welding work the claimant did for LaBranche Lumber and Simon's Chipping was work that had been done by direct employees before the claimant was hired on a regular, though not a full-time, basis. It was an integral part of a job that included chipping, maintenance and repairs. That the claimant could have done independent welding work and that he had done such work in the past is not dispositive of the nature of the work he was doing in September of 1999. At that time, he had been working on a regular basis for Simon's Chipping and LaBranche Lumber, as the regular checks made out to him amply illustrate. Those two entities provided the materials he needed for his work, with the exception of the cape, gloves and helmet. They paid him on an hourly basis. And the work claimant did was part of the normal business.
14. It was in the course of work normally carried out by a direct employee that claimant was allegedly injured. Under the clear standard outlined in *Falconer*, 151 Vt. at 531-532, therefore, claimant was a statutory employee entitled to workers' compensation benefits. Because it was JP LaBranche who oversaw the overall business operations, because it was he who approached the claimant in December of 1998 to replace an employee who had left and because LaBranche Lumber owned the vehicle on which the claimant was working at the time of the alleged injury, LaBranche Lumber is liable for this claim.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, I conclude that LaBranche Lumber must assume adjustment of this claim.

Dated at Montpelier, Vermont this 12th day of February 2002.

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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.