

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

Ron Thorn)	State File No. P-8522
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Albany Ladder (RSKCo./CNA))	
)	For: R. Tasha Wallis
&)	Commissioner
)	
HCBC/DEW(Acadia))	Opinion No. 17-02WC

Hearing held in Rutland, Vermont on October 11, 2001
Record closed on January 8, 2002

APPEARANCES:

Christopher J. McVeigh, Esq. for Albany Ladder (RSKCo./CNA)
Keith J. Kasper, Esq. for HCBC/DEW (Acadia)

ISSUE:

Can CNA shift responsibility to Acadia for the death benefits due and owing as a result of claimant's work-related injury?

STIPULATION OF FACTS:

1. Claimant Ronald Thorn died of a work-related injury on October 19, 1999.
2. At the time of the claimant's death, CNA was the workers' compensation insurance carrier for Albany Ladder Company, a subcontractor at the Rutland Regional Hospital construction site.
3. At the time of claimant's death, Acadia was the workers' compensation insurance carrier for HCBC the general contractor at the Rutland Regional Hospital construction site.
4. Following the claimant's demise, CNA has been paying death benefits to claimant's spouse and minor children pursuant to the Vermont Workers' Compensation Act.
5. CNA seeks relief from Acadia Insurance for payment of these ongoing and future death benefits to claimant's spouse and minor children and reimbursement of benefits paid to date by CNA.

6. The parties agree that the Department can take judicial notice of all forms in its file.

EXHIBITS: ADMITTED BY STIPULATION

Joint Exhibit I: Transcript of Deposition of Paul Valente
Joint Exhibit II: Transcript of Deposition of Jeff DeJarnette
Joint Exhibit III: Transcript of Deposition of George Hysell
Joint Exhibit IV: VOSHA statements

CNA Exhibit No. 1: 10-28-99 Albany Ladder Invoice (Phase II)
CNA Exhibit No. 2: Albany Ladder Rental Contract No. S-16083
CNA Exhibit No. 3: Albany Ladder Rental Contract No. S-16095
CNA Exhibit No. 4: Albany Ladder Worksheet to DEW Rutland Hospital Job
CNA Exhibit No. 5: Albany Ladder Worksheet contract #S-16083
CNA Exhibit No. 6: Picture of Scaffold
CNA Exhibit No. 7: 10-21-99 Letter from Mann to Westin

Acadia Exhibit A: 10-13-99 Purchase Order
Acadia Exhibit B: Rutland Police Report
Acadia Exhibit C: VOSHA Report
Acadia Exhibit D: 10-25-99 Albany Ladder Invoice (Phase I)
Acadia Exhibit E: Original of Albany Ladder Rental Contract S-16083

FINDINGS OF FACT:

1. The accident resulting in the claimant's death occurred outside the Rutland Regional Medical Center (RRMC) during construction and renovation. The general contractors for the construction project, sister corporations HCBC and DEW, contracted with DeJarnette Construction Company for skilled labor and with Albany Ladder to erect scaffolding. Albany Ladder was hired because of its expertise with installations at significant heights.
2. Although Albany Ladder installs trash chutes, it uses what is called a bucket-chain type manufactured chute, which comes in four-foot pieces that fit together until the desired height is reached. Albany Ladder does not use a culvert for a trash chute. Before the date of the accident, Richard Mann, who works for Albany Ladder in contracting services, specifically refused to have his employees use a culvert for a trash chute, although he agreed they would install two scaffolding towers with fully decked and fully guarded working platforms.

3. DeJarnette's workers, carpenters and tradesmen, wore DEW shirts and hard hats and did demolition, metal stud framing and drywall work.
4. The first time DeJarnette Construction used any type of trash chute was with the RRMC project. DeJarnette erected two chutes—one on the third floor, the other on the second. The chutes went from a window on the floor being demolished to a few feet above a dumpster.
5. The chute to the fourth floor was to be made from a 20-foot culvert provided by DEW, the same material DEW used to erect the chutes on the second and third floors, although workers cut the culvert when they installed it on the shorter spans. Because the one at issue here had to extend higher, the culvert was longer and set up more complicated.
6. DeJarnette and Barry Denton, from DEW, discussed how the chute was to be assembled and positioned.
7. DeJarnette, for DEW, purchased heavy-duty straps, 6 by 6's and wire to help raise the culvert.
8. The deceased claimant, Ron Thorn, and a co-worker, Todd Duquette, both Albany Ladder employees, arrived at the Rutland Hospital construction site at about 6:30 a.m. on October 19, 1999. They understood that they were to erect staging and brought materials necessary for that work, but knew nothing about a demolition chute. When first asked if they would help erecting the chute, they initially declined.
9. Thorn and Duquette, both with experience working at heights, erected two scaffolding towers to the fourth floor. The trash chute was to be erected between them.
10. At the completion of their assigned work for the day, Thorn and Duquette agreed reluctantly to erect the chute.
11. Thorn decided how to lift the chute, which included threading a rope through the culvert. He also provided the motorized pulley system from the Albany Ladder truck to facilitate assembly of the chute.
12. Thorn decided how to lift the chute. He hoisted the tube up to Duquette who hooked the culvert. It was Thorn who directed others while the culvert was being prepared and positioned as a trash chute. At the time of the installation, any other employees who were working on the chute were assisting Thorn and Duquette.
13. Claimant did not have an implied or actual contract with HCBC/DEW at the hospital site at the time of his death.

14. Duquette was at the window on the fourth floor and Thorn on the ground as they were attempting to hoist the culvert into position. In the process, the chute hit Thorn causing the injury that killed him. The accident occurred at about 2:30 in the afternoon.
15. It is common for various trades to help one another on a construction site.
16. Albany Ladder billed DEW and paid Duquette and the claimant for the time spent installing the trash chute.
17. CNA for Albany Ladder has been paying death benefits to the claimant's widow and children. It now seeks reimbursement for benefits paid and the shifting of responsibility to Acadia, insurer for HCBC/DEW, for future benefits.

CONCLUSIONS OF LAW:

1. As the party seeking to relieve itself of liability, the CNA has the burden of proof. See, *Smith v. Chittenden Bank*, Opinion No. 17-01WC (June 27, 2001) and cases cited therein.
2. At the time of his death, the claimant was an employee of Albany Ladder, but was performing a task for HCBC/DEW. The legal doctrine at issue, therefore, is that of the "lent employee." To begin the analysis, we must begin with the presumption that employment continues under the general employment, in this case Albany Ladder, a presumption that can be overcome if certain criteria are met. See, 3 Larson's Workers' Compensation Law, § 67.03. "To overcome this presumption, it is not unreasonable to insist upon a clear demonstration that a new temporary employer has been substituted for the old." *Id.*
3. The clear demonstration can be met if CNA proves:
 - a) the employee (claimant) has made a contract of hire, express or implied with the second employer (HCBC/DEW);
 - b) the work being done was essentially that of the special employer; and
 - c) the second employer has the right to control the details of the work.*Id.* § 67.01[1].
4. If CNA cannot meet the first criterion, that claimant made a contract with HCBC, then the inquiry ends because one cannot be a borrowed employee if he has not made a contract with the second employer. See, *Id.*; *Mercier v. Holmes*, 119 Vt. 368 (1965); *Delotto v. Penta Corp.*, Opinion No. 22-95WC (May 23, 1995) at 5; See also *Candido v. Polymers*, 166 Vt. 15 (1996) (borrowed-servant criteria acknowledged, but employer's immunity to negligence claim decided on statutory language).

5. At the time of the claimant's death, he and his colleague believed they were employees of Albany Ladder. Albany Ladder paid both men for the time they spent erecting the trash chute. The claimant controlled the work he was doing on the chute. He did not bargain to become an employee at HCBC. Clearly there was no contract express or implied between claimant and HCBC for the claimant to become an HCBC employee.
6. Having failed to prove this first crucial test for a lent-employee, Albany Ladder's attempt to shift or to share the worker's compensation burden fails.

ORDER

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, CNA's request to shift responsibility to Acadia for the death benefits due and owing as a result of claimant's work-related injury is DENIED.

Dated at Montpelier, Vermont this 2nd day of April 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.