

*Guyette v. Big Time Builders*

*(February 27, 2004)*

*STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY*

*Thomas Guyette*

*Opinion No. 01-04WC*

*v.*

*By: Margaret A. Mangan  
Hearing Officer*

*Big Time Builders, Inc./  
American Home Assurance  
and AIGCS*

*For: Michael S. Bertrand  
Commissioner*

*State File No. U-00884*

*Submitted on records and briefs  
Record closed on December 23, 2003*

*APPEARANCES:*

*E. William Leckerling, Esq., for the Claimant  
Glenn S. Morgan, Esq. and Marion T. Ferguson, Esq. , for the  
Defendant*

*ISSUE:*

*Was the claimant, Thomas Guyette, a statutory employee of Big Time  
Builders at the time of his injury on February 21, 2003 and, therefore,  
entitled to workers compensation benefits?*

*EXHIBITS:*

*Medical Records  
Employee Questionnaire*

*STIPULATED FACTS PERTAINING SOLELY TO DETERMINATION OF  
COMPENSABILITY*

*On or about February 21, 2003, Thomas Guyette was injured at a condominium construction project in Waterbury, Vermont ("the job").*

*Big Time Builders was the general contractor on the job where Mr. Guyette was injured.*

*Over-Time Management, LLC was the owner of the premises where Mr. Guyette was working at the time of the injury.*

*Joel Baker is the principal of both Big Time Builders, Inc and Over-Time Management, LLC.*

*Big Time Builders, Inc. states it never did the electrical work on any of its jobs, but regularly contracted them out to independent electrical contractors such as Guyette's Electrical Service (GES).*

*Thomas Guyette is a master electrician who was and is the owner of GES, a sole proprietorship.*

*On or about February 21, 2003 Thomas Guyette, d/b/a GES, had not notified the Vermont Department of Labor and Industry of a wish to be included within the provisions of the workers' compensation law nor had he purchased a workers' compensation insurance policy.*

*Joel Baker states that Big Time Builders, Inc. was aware that Thomas Guyette, d/b/a GES, had no workers' compensation insurance.*

*GES had been in operation for over 25 years on or about February 21, 2003.*

*On or about February 21, 2003, GES was a sole proprietor consisting of Thomas Guyette.*

*As of July 25, 2003 Mr. Guyette denied ever having a worker's compensation claim other than that of February 21, 2003.*

*On or about February 21, 2003, Mr. Guyette, d/b/a/ GES, was an independent contractor as that term is defined under Vermont workers' compensation law and Vermont common law, inasmuch as GES, inter alia, contracted with Big Time Builders, Inc. to do a piece of work according to its own methods without being the subject to the control of Big Time Builders, Inc. except as to the result of the work.*

*On or about February 21, 2003 Mr. Guyette fell approximately eight to nine feet through an opening in the floor on the job where he was working, landing on a concrete floor of the basement, sustaining traumatic brain injuries and multiple physical injuries requiring hospitalization and has been out of work since.*

#### **DISCUSSION:**

*Claimant seeks workers' compensation benefits under the policy Big Time Builders had with American Home Assurance at the time of his February 2003 injury. He argues that case and statutory law lead to the inescapable conclusion that he was an employee of Big Time Builders under Vermont's Workers' Compensation Act (Act). See 21 V.S.A. § 601(3); Welch v. Home Two, Inc. 172 Vt. 632 (2001). Defendant argues that a specific provision in the Act that allowed the claimant to opt out of workers' compensation insurance coverage bars this claim. See 21 V.S.A. § 601(14)(F).*

*Under the Act, an employer is "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 other reason, is not the direct employer of the workers there employed". § 601(3). "This language specifically and unambiguously covers multiple-employer business situations." Candido v. Polymers, Inc., 166 Vt. 15, 17, (1996).*

*Subject to several exceptions, one of which is relevant here, "'worker' and 'employee' means a person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, ..." § 601(14). Under the Supreme Court's holding in Welch, 172 Vt. 632, a general contractor is clearly the statutory employer and its subcontractor an employee.*

*However, defendant argues that it would be unfair to hold the general contractor in this case liable for workers' compensation benefits for the claimant who was self-employed and who voluntarily chose not to purchase workers' compensation insurance. In fact, excluded from the definition of employee is: "the sole proprietor or partner owner or partner owners of an unincorporated business, unless such sole proprietor or partner notifies the commissioner of his or her wish to be included within the provisions of this chapter; the submission of a contract or an amendment to a contract to elect coverage of the sole proprietor or partner shall be considered sufficient notice. § 601(14)(F) ("elective coverage provision").*

*Prior to the enactment of § 601 (14)(F), sole proprietors and partner owners in Vermont often were not able to purchase workers' compensation insurance coverage and were excluded from bidding on some projects where proof of coverage was required by the general contractor. See transcript from House Commerce Committee on H.567, January 26, 1988, testimony of Hod Palmer. The elective coverage provision remedied that problem by expressly bringing the sole proprietor within the definition of "employee" if the sole proprietor purchased insurance. See transcript from House Commerce Committee, February 10, 1988, testimony of William Gilbert.*

*In this case, claimant clearly could have purchased insurance for himself, but chose not to do so. In choosing not to purchase such coverage, the claimant knew or should have known that if an accident occurred he would not be entitled to workers' compensation benefits. To hold otherwise would be unfair to the defendant, who should not be liable for coverage for an individual who has taken advantage of a provision that allows him to operate without such coverage. It would also lead to reluctance on the part of general contractors to contract with any sole proprietor who has not purchased a workers' compensation insurance policy.*

*CONCLUSION OF LAW:*

*Accordingly, claimant was not "employee" of Big Time Builders under the Vermont Workers' Compensation Act at the time of his February 2003 injury.*

*ORDER*

*Therefore, Thomas Guyette's claim for benefits under the Act is DENIED.*

*Dated at Montpelier, Vermont this 27<sup>th</sup> day of February 2003.*

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*Michael S. Bertrand  
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.*