STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-07460
	)	
Robin Young	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
Consolidated Delivery	)	Commissioner
& Logistics	)	
	)	Opinion No. 06-03WC

Hearing Held in Montpelier on June 27, 2002
Record closed on July 11, 2002

ISSUES:

1. Which state's law controls this claim?
2. What is the appropriate forum for this claim?
3. Is the claimant an employee for purposes of workers' compensation?

EXHIBITS:

1. Affidavit of John Murzda
2. Affidavit of Brian Stekloff
3. Independent contractor Agreement
4. IRS Form W-9: Request for Taxpayer Identification Number and Certification
5. NY State DMV Police Accident Report

FINDINGS OF FACT:

1. At all times material to this action, Claimant was a Vermont resident.

2. Defendant Consolidated Delivery & Logistics (Consolidated) is in the business of providing courier services. It is a corporation organized under the laws of New Jersey.

3. In May 1999 defendant obtained a contract with Charter One Bank to pick up mail and canceled checks from multiple bank locations in Vermont and deliver them to Albany, New York. Drivers were needed to fulfill the terms of that contract.

4. In an advertisement defendant placed in the Rutland Herald for "independent contractors" was a toll free number applicants could call. Claimant called that number and was told to take proof of insurance, driver's license, proof of a clean driving record, proof of vehicle ownership and registration to a job interview in Rutland, Vermont on May 20,1999.

5. Ten to twelve individuals attended the interview session in Rutland. Claimant received a copy of an Independent Contractor Agreement, route sheets and tax forms at the session. Consolidated Delivery & Logistics representatives, Tom Berry and Brian Stekloff, Senior Account Executive, looked over the forms, then told Claimant that her paperwork "looks good," that she was "all set," that she should read and sign the independent contractor agreement.

6. Next, Mr. Barry and Mr. Stekloff asked the claimant to choose a route, either "short" or "long." Claimant chose a long route because the pay was higher and the "Sweep 3" covering pick-up stops at Charter One banks in Montpelier, Berlin, White River Junction, Woodstock and Rutland and delivery to the bank in Albany. Berry and Stekloff then asked Claimant to complete a shirt size order form so that a shirt would be ready for her at orientation the following week.

7. Claimant signed the independent contractor agreement as well as IRS form W-9, Request for Taxpayer Identification Number and Certification and gave them to Messrs. Berry and Stekloff who said, "welcome aboard, we'll see you on the 26th."

8. On May 26, 1999 claimant went to Albany where some, but not all, of the applicants at the Rutland meeting were in attendance. Although he did not meet with the Claimant, John Murzda, Service Center Manager, signed the Independent Contractor Agreement between claimant and Consolidated that day. Claimant received a company beeper, photo identification, company shirt, card keys and instructions for final drop-off.

9. In the first line of the Independent Contractor Agreement is the notation that it is "dated 5/20/99." The Company identified is Click Messenger Service, Inc., a New Jersey corporation with a principal office in Edison, New Jersey. The agreement specifies, among other things, that it "shall be governed by the laws of the State of New Jersey and Contractor agrees that he/she is subject to the jurisdiction of the court of the State of New Jersey with respect to any legal proceeding commenced to enforce any provision hereof or for any breach hereof." Paragraph 15.

10. Claimant was required to drive the Sweep 3 route each day, to call the office if she could not work or to hire another Consolidated person to take over the route. The employer set the schedule.

11. Claimant's route ended in Albany each day. She received her paychecks from Albany. She was not reimbursed for mileage or gas. She had no benefits, such as vacation time, a retirement plan or sick days.

12. On August 16, 1999, Claimant was injured in a single car accident in New York State. Since then she has treated in Bennington and Rutland, Vermont.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963). Accordingly, to succeed in this action she must prove she was hired in Vermont as an employee entitled to workers' compensation coverage under the Vermont Workers' Compensation Act, or, if hired outside the state, that Vermont law applies.

Forum and Choice of Law

2. Based on the independent contractor agreement, defendant argues that the forum chosen for resolution of disputes is New Jersey, whose law must apply. Although forum selection clauses are "prima facie enforceable in Vermont," enforcement of such clauses is not automatic and may be disregarded if enforcement would be unreasonable." *Chase Commercial Corp. v. Barton*, 153 Vt. 457, 459 (1990).

3. Independent contractual provisions may apply to the enforcement, breach of other disputes of contract, but are invalid as to choice of law in workers' compensation. Unless specifically permitted by a state, parties cannot contract to choose the law or otherwise change the workers' compensation statutes. As Professor Larson has emphatically stated:

> Express agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state's statute or to diminish the applicability of the statutes of other states. Whatever the rule may be as to questions involving commercial paper, interest, usury and the like, the rule in workers' compensation is dictated by the overriding consideration that compensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements. This is most obvious when such an agreement purports to destroy jurisdiction where it otherwise exists….

9 Larson's Workers' Compensation Law § 143.07

4. Vermont follows the principles Larson propounds as evidenced by 21 V.S.A.§ 625, which provides that "[a]n 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 device whatsoever."

5. Therefore, the written agreement notwithstanding, if the Claimant was hired in Vermont, the Act clearly provides that this state's law applies, "[i]f a worker who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state." 21 V.S.A.§ 619.

6. In fact, even if she had "been hired outside of this state is injured while engaged in his employer's business and is entitled to compensation for such injury under the law of the state where [s]he was hired, [s]he shall be entitled to enforce against his employer his rights in this state, if h[er] rights are such that they can be reasonably determined and dealt with by the commissioner and the court in this state." § 620.

7. Claimant maintains that she was hired when interviewed by Mr. Berry and Mr. Stekloff in Rutland. In fact, they in effect told her she was hired, gave her the agreement and IRS forms to sign took back the signed papers, gave her the date for orientation and welcomed her "aboard."

8. "In determining what one party intended and the other party ought to have understood, regard must be had to the situation and purpose of the parties, the subject matter and course of the negotiations. The question whether there was a contract between the parties does not depend alone upon the specified facts found but also upon the reasonable inferences to be drawn from them." *Toys, Inc. v. F. M. Burlington Company*, 155 Vt. at 50 (quoting *Ackerman v. Carpenter*, 113 Vt. 77, 81 (1943)).

9. In the present case, claimant came to a job interview in Vermont. Employer representatives reviewed her paperwork, gave her a contract and tax form to sign, and told her she was all set. She accepted by signing the forms and selecting routes from the choices given. Nothing in the written contract or in any message from the company representatives to the Claimant indicated that acceptance could only be made in Albany or in what manner "approval" could be made.

10. The "place of contract is where the last act essential to the completion was done." *Chase Commercial Corp. v. Barton*, 153 Vt. 457, 461 (1990) (quoting West-*Nesbitt, Inc. v. Randall*, 126 Vt. 481, 483 (1967)). To the defendant, that last essential act was John Murzda's signature on May 26 in Albany. To the Claimant, the last essential act was the Claimant's acceptance of the employment offer, in Rutland on May 20.

11. The facts support the Claimant's position that a contract for hire was made in Rutland, Vermont. What followed in Albany a week later was an orientation for those who had been hired, as demonstrated by her receipt of bank keys, a beeper and a shirt. All that she had been asked to produce occurred in Rutland. The date of Mr. Murzda's signature, without more, does not move the contract of hire from Vermont to New York.

12. Accordingly and pursuant to 21 V.S.A.§ 619, whether Claimant is entitled to workers' compensation benefits and the extent of those benefits shall be determined according to the law of this state.

13. Even if we found that claimant has been hired in New York, jurisdiction would be properly accepted in this state because Claimant's work for defendant and her residence were in Vermont and her medical treatment has been in Vermont. These factors support a conclusion that Vermont has more than a casual interest in the case and that her rights can be reasonably determined here. 21 V.S.A.§ 620; *Bahr v. Cal-Ark Trucking*, Op. No. 14-96WC (1996).

Statutory employee

14. The existence of an employer-employee relationship for purposes of workers' compensation has been analyzed by the "right to control" test and the "nature of the business" test, applied to the totality of the circumstances pertinent to the particular employment relationship. The nature of the business test is increasingly the preferred for the two tests. 3 Larson's Worker's Compensation Law § 60.05[1],[4] (2000). See also, 21 V.S.A.§ 601(3); *King v. Snide*, 144 Vt. 395 (1984).

15. In the workers' compensation context, if the work performed pertains to the business, trade, or occupation of the putative employer, carried on by it for gain, the fact that it is done through the medium of an independent contractor does not relieve the employer from workers' compensation liability. *O'Boyle v. Parker-Young Co*., 95 Vt. 58 (1921). And, as noted above, an employer cannot be relieved from liability under the workers' compensation Act by any contract, rule, regulation or device whatsoever. 21 V.S.A.§ 625; *Falconer v. Cameron*, 151 Vt. 530 (1989).

16. The courier work claimant regularly performed for defendant was an integral part of the defendant's business, carried on for pecuniary gain. Therefore, the employer of this claimant hired in Vermont, who worked in Vermont and who had no other work, is a Vermont "employer" and claimant its "employee" within the meaning of the Vermont Workers' Compensation Act, 21 V.S.A.§ 601.

17. The parties are encouraged to resolve informally the questions of causation and entitlement to benefits and to request another hearing if those efforts fail.

ORDER:

The defense motion to dismiss this claim is denied. The claim was properly brought in Vermont.

Vermont law governs this action.

Dated at Montpelier, Vermont this 16th day of January 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.