Matthew Lavallee v. Michael Straight
R.L. Goodrich LLC
DEW Construction Corp and
Rynone Manufacturing Corp.

(August 27, 2014)

STATE OF VERMONT
DEPARTMENT OF LABOR

Matthew Lavallee

v.

Michael Straight,
R.L. Goodrich, LLC,
DEW Construction Corp. and
Rynone Manufacturing Corp.

Opinion No. 14-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. FF-00310

RULING ON DEFENDANT DEW CONSTRUCTION CORPORATION'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Frank Talbott, Esq., for Claimant
Corina Schafner-Fegard, Esq., for Defendant DEW Construction Corporation ("DEW")
David Berman, Esq., for Defendant Rynone Manufacturing Corporation ("Rynone")

ISSUE PRESENTED:

As a matter of law, is Defendant DEW shielded from liability as Claimant's statutory employer by virtue of Defendant Rynone's status as an insured subcontractor?

EXHIBITS:

Defendant DEW's Exhibit A:	Rynone/DEW Purchase Order
Defendant DEW's Exhibit B:	Rynone Certificate of Insurance
Defendant DEW's Exhibit C:	R.L. Goodrich invoices
Defendant DEW's Exhibit D:	Interim order, May 14, 2014
Defendant DEW's Exhibit E:	Email correspondence between Rynone and R.L. Goodrich
Defendant DEW's Exhibit F:	Notarized letter from Kristin Fortin, May 20, 2014
Defendant DEW's Exhibit G:	Letter from Randy Goodrich, April 28, 2014
Defendant DEW's Exhibit H:	Employee's Notice of Injury and Claim for Compensation (Form 5), with attached affidavit of Matthew Lavallee

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Defendant Rynone as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:[1]

1. At all times relevant to this claim, DEW was the general contractor for the Riverhouse Lot 7B Apartments project in Winooski, Vermont. *DEW's Exhibit A.* The project encompassed 72 units in a four-story building. *DEW's Exhibit G.*

2. For the policy period April 1, 2013 to April 1, 2014 DEW maintained workers' compensation insurance covering its operations in Vermont.[2]

3. On or about April 29, 2013 DEW entered into a written contract with Rynone for the purchase, delivery and installation of millwork, countertops, sinks and mirrors at the Riverhouse project. The scope of the work included providing the manpower necessary to accomplish the countertop installation portion of the contract. Excluding sales tax but including installation charges, the stated consideration for the contract was $165,142.36. *DEW's Exhibits A and F.*

4. For the policy period January 1, 2013 to January 1, 2014 Rynone maintained workers' compensation insurance covering its operations in Vermont. *DEW's Exhibit B.*

5. Rynone subcontracted with Defendant R.L. Goodrich, LLC ("Goodrich") to install the countertops and sinks at the Riverhouse project. Between July 8, 2013 and September 24, 2013 Goodrich presented Rynone with invoices totaling $34,698.65 for its work on the project. *DEW's Exhibit C.* Goodrich did not maintain workers' compensation insurance coverage at any time during this period. *DEW's Exhibit D.*

6. Rynone assigned a project manager to the job, who directed the course of Goodrich's installation work on the Riverhouse project. *DEW's Exhibits E and F.* DEW communicated with the project manager as to progress, defective materials and changes. The project manager was responsible for conveying this information to Goodrich and ensuring that its on-site installers appropriately addressed DEW's concerns. *DEW's Exhibit F.* At various times, the project manager communicated via email with both DEW and Goodrich as to inquiries that each had of the other. *DEW's Exhibit E.*

7. Goodrich hired Defendant Michael Straight ("Straight") to assist with the countertop installations at the Riverhouse project. Straight did not maintain workers' compensation insurance coverage during the time he assisted on the project. *DEW's Exhibits D and G.*

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[1] As a preliminary matter, DEW objects to Rynone's failure to comply with the requirements of Vermont Rule of Civil Procedure 56(c) with respect to its response to DEW's Statement of Undisputed Facts. In particular, Rynone failed to provide "specific citations to particular parts of materials in the record" as to the facts it refused to fully admit, as is required by V.R.C.P. 56(c)(1)(A) and/or (B). It also failed to comply with the requirements of V.R.C.P. 56(d) as to the facts it purportedly lacked sufficient knowledge or information either to admit or deny. With these omissions in mind, for the purposes of the pending Motion and to the extent they are supported by the materials now on record, I consider the facts stated in DEW's Statement of Undisputed Facts Nos. 5, 7, 8, 9, 12 and 14 to be undisputed. *See* V.R.C.P. 56(e)(2).

[2] This is according to information reflected in NCCI's Proof of Coverage Inquiry, a copy of which is contained in the Department's file relating to the pending claim.

8. Straight brought Claimant to the Riverhouse project to assist with the countertop installations. *DEW's Exhibit D.*

9. On or about August 5, 2013 Claimant injured his left hand while lifting a countertop at the Riverhouse project. *DEW's Exhibit H*. Randy Goodrich, Defendant Goodrich's principal, drove Claimant to the hospital for treatment. Based on comments Claimant made during the ride, Mr. Goodrich came to believe that Claimant was Mr. Straight's friend and was merely helping him out for the day. From his own observation of Claimant, Mr. Goodrich determined that he had little skill in the construction trade, and likely would command a starting salary of $10.00 per hour. *DEW's Exhibit G*. However, in his affidavit Claimant stated that Mr. Straight had hired him to work a 40-hour work week, promised to pay him at the rate of $20.00 per hour, and expected that the work would continue full time for at least a month. *DEW's Exhibit H*. From the evidence presented, I am unable to resolve the discrepancies between these two statements, or even to determine which is the most credible.

10. In October 2013 Claimant filed a Notice of Injury and Claim for Compensation (Form 5) against Straight, in which he sought both lost time and medical benefits. *DEW's Exhibit H*. Upon learning that Straight lacked insurance coverage, the Department's workers' compensation specialist subsequently notified Goodrich, DEW and Rynone of their potential liability for benefits under 21 V.S.A. §601(3).

11. On May 14, 2014 the Department's workers' compensation specialist issued an interim order against DEW, directing it to pay medical benefits causally related to Claimant's August 5, 2013 injury. In fashioning the order, the specialist found that Defendant Straight had hired Claimant as an employee, and also that neither Straight nor Goodrich, the next subcontractor up the chain, had maintained workers' compensation insurance coverage. The specialist eliminated Rynone as a statutory employer on the grounds that it "was simply the manufacturer of the solid surfaces that were to be installed . . . and [was] only in the business of fabricating solid surface countertops and sinks." She thus concluded that DEW was the statutory employer responsible to pay benefits to Claimant. *DEW's Exhibit D*.

12. On July 14, 2014 the hearing officer granted DEW's motion to stay the specialist's interim order as to payment for medical charges already incurred, but denied it as to payment for medically necessary ongoing treatment causally related to Claimant's August 5, 2013 injury.

13. No evidence has been presented to suggest that DEW had any contractual relationship germane to the pending workers' compensation claim with Claimant, Goodrich or Straight.

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. The legal issue posed by this claim arises under Vermont's statutory employer provision, 21 V.S.A. §601(3). Where an injured worker's direct employer is an uninsured subcontractor, which of two insured contractors in the ascending order above it should be tagged with responsibility for paying benefits in its stead? DEW asserts that as a matter of law Rynone should, as it was the insured subcontractor closest in line to Goodrich, the uninsured subcontractor whom it retained and who in turn retained Straight, the uninsured direct employer.

3. Vermont's workers' compensation law defines the term "employer" to include so-called "statutory" employers as well. Section 601(3) states as follows:

> "Employer" 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.

4. The legislative purpose underlying this language is to impose liability upon an owner or proprietor of a regular trade or business when it hires an uninsured independent contractor to do what its direct employees otherwise would have done. *Marcum v. State of Vermont Agency of Human Services*, 2012 VT 3, ¶8, citing *King v. Snide*, 144 Vt. 395, 400-01 (1984); *see also Vella v. Hartford Vermont Acquisitions, Inc.*, 2003 VT 108, ¶7, citing *Edson v. State*, 2003 VT 32, ¶6. Considered in its appropriate context, the statutory employer concept provides essential support for the public policy compromise embodied by the workers' compensation law –employees relinquish their right to sue in tort in the event of a work-related injury, in return for which employers secure insurance to pay specified benefits regardless of fault. *DeGray v. Miller Brothers Construction Co.*, 106 Vt. 259, 276 (1934). Were the law otherwise, a business owner might avoid its obligations by "purport[ing] to hire, as contractors, minions to carry out [its] own 'regular trade or business.'" *Marcum, supra* (citations omitted).

5. Construction employment settings often involve an ascending chain of subcontractors and contractors. In such situations, the statutory employer concept is most logically applied by imposing upon each contractor in the chain the responsibility for ensuring that its immediate subcontractor has procured the required workers' compensation insurance coverage for its own employees. *See, e.g., Sites Construction Co. v. Harbeson*, 434 S.E.2d 1, 3 (Va. App. 1993); *see also Minnaugh v. Topper & Griggs, Inc.*, 416 N.Y.S.2d 348, 349 (1979). The direct contractor is best positioned to insist on proof of such coverage as a condition precedent to employing the subcontractor, knowing that it risks liability under its own insurance policy if it fails to do so. And the more remote contractor, by fulfilling its responsibility to employ an insured subcontractor, has thereby secured protection for all of the employees on the jobsite, both direct and indirect. There is no basis for imposing upon it responsibility for protecting the insured subcontractor as well. After all, the Workers' Compensation Act "is what its name implies – a compensation act for work[ers], and not an act for the protection of subcontractors." *Byrne v. Henry A. Hitner's Sons Co.*, 138 A. 826, 827 (Pa. 1927); *see also In re Van Bibber's Case*, 179 N.E.2d 253, 257 (Mass. 1962) (purpose of statutory employer provision is to make general contractor liable only to employees of an uninsured subcontractor).

6. In the pending claim, the evidence is undisputed that both DEW and Rynone were properly insured for workers' compensation at the time Claimant was injured. Furthermore, nowhere in its opposition to DEW's summary judgment motion does Rynone dispute, on either factual or legal grounds, its position as the insured contractor closest to Goodrich and Straight, the uninsured subcontractors directly beneath it in the chain. Instead, Rynone argues that summary judgment should be denied because genuine issues of material fact exist regarding whether Claimant was working as Straight's employee at the time of his injury or merely volunteering his services for the day. *See* Finding of Fact No. 9 *supra*.

7. I agree that the evidence is as yet inconclusive on this issue, and also that Claimant's entitlement to workers' compensation benefits ultimately will depend on its resolution. This will occur in the context of the formal hearing on the merits of Claimant's claim, however. The purpose of the pending motion is to determine which of two insured defendants properly should be held responsible for defending that claim, and if unsuccessful, for paying benefits accordingly. As to that determination, no genuine issues of material fact exist. Accordingly, I conclude that Rynone's objection on these grounds is an insufficient basis for denying summary judgment.

8. Rynone also argues that dismissing DEW from the claim at this point would contravene the purpose of Vermont's Workers' Compensation Act, that is, to protect injured workers by ensuring that they are appropriately compensated in the event of a work-related injury. To accomplish this result, Rynone advocates for a system whereby potentially responsible employers, and their insurers, are all held primarily liable to the injured worker. Rynone cites to the Vermont Supreme Court's holding in *Morrisseau v. Legac*, 123 Vt. 70 (1962), as support for this position.

9. The claimant in *Morrisseau* was the widow of a worker who was killed in the course of his employment for a construction subcontractor. Both the subcontractor and the general contractor were insured for workers' compensation. Following a formal hearing, the commissioner prioritized the order in which the two contractors, and their respective insurance carriers, were liable for the benefits owed, as follows: first, the subcontractor's insurer, and in the event of its default, the subcontractor, and in the event of the subcontractor's default, then the general contractor's insurer, and in the event of that insurer's default, the general contractor. *Id.* at 72.

10. On appeal, the Supreme Court held that it was error for the commissioner to establish an order in which the four defendants were to be held alternatively liable. Instead, it deemed all of them primarily liable to the claimant. Citing the language in 21 V.S.A. §601(3) by which the term "employer" is defined to "include[] its insurer so far as applicable," the Court first characterized the insurer's liability as "more than that of an indemnitor; it is a primary liability to an injured employee." *Id.* at 76, citing *DeGray, supra* at 279; *see also* 21 V.S.A. §693 (granting injured employee option of proceeding directly against employer's insurer in pursuing any claim for benefits). As between the two sets of employers and carriers, furthermore, the Court found no indication in the statute "that the liability of any party, if once found to exist, is secondary to any other party's liability." Thus, the Court concluded, "While the Commissioner should pass upon the primary liability of the parties defendant, he is not required or authorized under the act to pass upon the ultimate rights or liability as between carriers." *Id.* at 78.

11. Underlying the Court's holding in *Morrisseau* was its concern that an injured worker who is clearly entitled to benefits not be made "a football" in a contest among multiple defendants as to which of them bears the ultimate payment responsibility. *Id.*; *see Labrie v. LBJ's Grocery*, Opinion No. 29-02WC (July 10, 2002). In the years since *Morrisseau* was decided, the statute has been amended to address this concern, however. Specifically, 21 V.S.A. §662(c), enacted in 1984, now empowers the commissioner, in cases "where payment of a compensable claim is refused on the basis that another employer or insurer is liable," to issue an interim order that one employer or insurer pay benefits pending a formal hearing.

12. Here, the procedural history of the pending claim is somewhat confusing. As noted above, Conclusion of Law No. 7 *supra*, given the factual issues surrounding Claimant's purported employee status, the compensability of his claim has not yet been finally resolved. The workers' compensation specialist concluded, albeit somewhat summarily, that the evidence did not reasonably support a denial on those grounds, however. From that point on, the posture of the dispute became one between the two insured employers. The specialist's decision to issue an interim order against DEW rather than Rynone is appropriately before me now for a final administrative determination.[3] I conclude as a matter of law that it was error for her to do so. Rather, as the insured employer closest in line to Claimant's purported direct employer, who was uninsured, Rynone bears responsibility for defending the claim and, if unsuccessful, paying benefits.

ORDER:

1. Summary judgment in favor of Defendant DEW Construction Corp. is hereby **GRANTED**.

2. Claimant's claim against Defendant DEW Construction Corp. is hereby **DISMISSED WITHOUT PREJUDICE**. In the unlikely event that Defendant Rynone Manufacturing Corp. ultimately is determined, by a court or tribunal with appropriate jurisdiction, to have been an uninsured employer during the period relevant to Claimant's claim, Claimant shall have the right to renew his claim against Defendant DEW Construction Corp.

3. Defendant Rynone Manufacturing Corp. is hereby **ORDERED** to reimburse Defendant DEW Construction Corp. for any and all payments made pursuant to the Department's May 14, 2014 interim order, and pending a formal hearing on the merits of Claimant's claim for workers' compensation benefits, to pay for medically necessary ongoing treatment causally related to his August 5, 2013 injury.

DATED at Montpelier, Vermont this 27th day of August 2014.

_____
Anne M. Noonan
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.

[3] Rynone asserts that DEW's summary judgment motion amounts essentially to a renewed motion to stay the specialist's interim order against it, and that it should be required instead to defend at formal hearing. This argument misses the mark. Contrary to Rynone's assertions, the Commissioner is indeed empowered to consider the same evidence upon which the specialist based her interim order and reach an opposite conclusion. Where, as here, the specialist's determination was grounded in an erroneous application of the law to the undisputed facts, summary judgment is the appropriate vehicle for doing so.