STATE OF VERMONT
DEPARTMENT OF LABOR

Griffyn Koski	Opinion No. 25-15WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
BlackRock Construction, LLC	For: Anne M. Noonan Commissioner
	State File No. GG-56468

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

James Dumont, Esq., for Claimant
Andrew Boxer, Esq., for Defendant

ISSUES PRESENTED:

1. Having excluded himself from workers' compensation coverage as the sole member of the limited liability corporation that directly employed him, is Claimant entitled to workers' compensation coverage under Defendant's policy as a statutory employee?

2. Alternatively, was Claimant working as a gratuitous volunteer at the time of his injury, such that he is disqualified from workers' compensation coverage?

EXHIBITS:

Claimant's Exhibit A:	Denial of Workers' Compensation Benefits (Form 2)
Claimant's Exhibit B:	First Report of Injury (Form 1)
Claimant's Exhibit C:	Affidavit of Griffin [sic] Koski
Claimant's Exhibit D:	Defendant's Response to Claimant's Interrogatories (excerpted, with attachments)
Claimant's Exhibit E:	Draft Scope of Work 10-28-2014
Claimant's Exhibit F:	Certificate of Liability Insurance
Claimant's Exhibit G:	Deposition of Griffyn Koski, May 6, 2015
Defendant's Exhibit A:	Letter to Wendell Sargent, January 2, 2015 (with attached forms and Entry of Appearance)
Defendant's Exhibit B:	Direct Referral to Formal Hearing Docket, January 28, 2015

Defendant's Exhibit C:	Deposition of Griffyn Koski, May 6, 2015 (excerpted)
Defendant's Exhibit D:	Proposal for BlackRock Construction, 10/10/2014
Defendant's Exhibit E:	Letter from Beth Robinson, Esq. to Senator James H. Greenwood, March 19, 2004
Defendant's Exhibit F:	Memorandum from Doug Robie to Senator James Greenwood, 3/25/04
Defendant's Exhibit G:	No. 132, An Act Relating to Workers' Compensation (H.632)
Defendant's Exhibit H:	Handwritten notes, H.632 Conference Committee, with attached NCCI Analysis
Defendant's Exhibit I:	Act No. 132 (H.632), summary of changes
Defendant's Exhibit J:	No. 212, An Act Relating to Economic Development (H.109)
Defendant's Exhibit K:	Draft Scope of Work 10-28-2014

Ruling on Claimant's Motion to Strike and Objection to Judicial Notice:

Claimant moves to strike portions of Defendant's May 29, 2015 pleading, entitled "Reply/Opposition to Claimant's Opposition/Cross-Motion re Summary Judgment," on the grounds that the applicable rules of procedure do not allow any pleadings beyond an initial motion and response thereto. Claimant also asserts that certain factual allegations contained in the "Statement of Undisputed Facts" that Defendant filed in response to his cross-motion should be stricken because they are "unsupported and false."

I consider the substance of Defendant's May 29, 2015 pleading to have been directed primarily at opposing Claimant's Cross-Motion for Summary Judgment. As Vermont Rule of Civil Procedure 56(c) specifically allows for such a pleading, I see no basis for striking it.

As for Claimant's assertion that certain of Defendant's "undisputed facts" are neither undisputed nor factual, the appropriate remedy lies not in a motion to strike, but rather in the summary judgment process itself. To prevail on a motion for summary judgment, the material facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979). If they are not, then summary judgment will be denied.

Two of the three "facts" Claimant claims are in dispute here – whether he provided proof of insurance before or after beginning work on the Marty's Auto project, and whether he did or did not represent to Defendant that he was "fully insured for workers' compensation" – are immaterial to the legal issues posed by the pending summary judgment motions. The question to be decided is whether an LLC member who has been approved to exclude himself from coverage under 21 V.S.A. §601(14)(H) is thereby barred from asserting a workers' compensation claim not only against his own LLC, but also against his statutory employer. Nothing in the statutory language requires an excluded employee to provide notice of his or her exclusion from coverage to a statutory employer in order for the exclusion to be effective, and nothing requires a statutory employer to provide coverage solely on the basis of the excluding LLC's representation

that it is "fully insured." *See* Conclusion of Law No. 10 *infra* (reciting the language of 21 V.S.A. §601(14)(H) *in toto*). For that reason, whether true or not, the "facts" Claimant seeks to strike are legally insignificant, and do not in any way preclude resolution of the disputed legal issues on summary judgment.[1]

The third fact that Claimant asserts is disputed – whether he did or did not expect to be paid for his demolition work – is actually not disputed at all. Defendant has acknowledged in its pleadings that Claimant did in fact expect to be paid for his demolition work on the Marty's Auto project, *see Defendant's Response to Claimant's Motion to Strike at p. 8-9.* Instead, it asserts that because his *motivation* for taking on the demolition work was to further his own interests, his actions thereby qualify him as a gratuitous volunteer. The merits of Defendant's argument are discussed *infra*, Conclusion of Law No. 37, and need not be considered further here.

Claimant's motion to strike is **DENIED**.

FINDINGS OF FACT:

The following facts are undisputed:

1. Judicial notice is taken of all relevant forms contained in the Department's file relative to this claim.

2. Claimant is the sole member of Landmark Builders, LLC ("Landmark"), a limited liability corporation (LLC) engaged in the residential construction and remodeling business. *Affidavit of Griffyn Koski ("Affidavit") (Claimant's Exhibit C) at ¶4; Deposition of Griffyn Koski ("Deposition") (Claimant's Exhibit G) at 7, 14*. Landmark employs one or two other workers in addition to Claimant. *Affidavit at ¶4*.

3. Defendant is a general contractor. It describes itself as a "paper contractor," meaning that it performs "construction management services" and does not directly employ anyone to perform work that has been subcontracted to another entity. *Claimant's Exhibit D, Response to Interrogatory Nos. 14.B and D.*

4. For the policy period from May 21, 2014 through May 21, 2015 Landmark maintained workers' compensation insurance through Liberty Mutual Insurance Co. Landmark also maintained general liability insurance, with a policy period from October 28, 2014 through October 28, 2015. *Claimant's Exhibit F*.

[1] Of note, although Defendant argues in its Response to Claimant's Motion to Strike that ample evidence exists to establish its version of the facts Claimant disputes, nowhere in either its initial Motion for Summary Judgment or in its Reply/Opposition to Claimant's Motion for Summary Judgment does it cite them in support of any of its legal arguments. Nor does Claimant cite to his version of them in either of his substantive legal pleadings. Although both parties contest them, neither appears to have considered these facts as material in any way, therefore.

5. On or about May 20, 2014 Landmark filed an Application to Exclude Corporate Officers or LLC Members from Workers' Compensation Coverage (Form 29) with the Department. As the sole member of the LLC, Claimant executed the application and sought thereby to exclude himself from coverage. The Department approved the application on May 21, 2014.

6. In October 2014 Defendant verbally contracted with Landmark to install siding and trim at a home being built in South Burlington for Adam Hergenrother, its principal. *Deposition at 26, 33; Claimant's Exhibit D, Response to Interrogatory No. 13.* While that job was ongoing, Claimant and Defendant entered into verbal negotiations regarding another project – the construction of a new addition at Marty's Auto in Milton. *Affidavit at ¶7.*

7. On or about October 10, 2014 Claimant emailed to Defendant a written proposal pertaining to Landmark's involvement in the Marty's Auto project. *Defendant's Exhibit D.* The document described the scope of work as follows:

> Stick framing of Marty's Auto off of structural steel and existing building.
> Frame and sheath building as shown in plans with the exception of outlined and previously discussed changes.
> All work is guaranteed and fully insured.

8. By the phrase "fully insured," Claimant intended to convey that Landmark carried a liability insurance policy covering its work on the project. *Deposition at 46-48.* Claimant never specifically informed Defendant that he had excluded himself from coverage under Landmark's workers' compensation insurance policy. *Id. at 50-51.* Having provided Defendant with all of his "insurance stuff" in the context of a prior job, he assumed that if Defendant required additional information prior to commencing the Marty's Auto project, it would request it from him.[2] *Id. at 48.*

9. For its work on the Marty's Auto project, Landmark proposed a total contract price of $20,000.00, payable in five equal draws. The proposal allowed for additional charges to be authorized in the event work not anticipated at the time of the original estimate became necessary. *Defendant's Exhibit D*:

10. A day or two prior to November 13, 2014, Claimant met with Zach Cattan, Defendant's commercial site superintendent, at the Marty's Auto site. *Deposition at 61; Claimant's Exhibit D, Response to Interrogatory No. 13.* Mr. Cattan presented Claimant with Defendant's draft "Scope of Work" proposal, *Claimant's Exhibit E,* which specified the parameters of Landmark's responsibilities on the

[2] To the extent that the parties highlighted minor discrepancies in Claimant's deposition testimony regarding when and what information he provided Defendant as to either Landmark's workers' compensation insurance coverage or his own exclusion therefrom, these are immaterial to the legal issues presented for summary judgment. *See* discussion *supra* at pp. 2-3.

project in much greater detail than what Landmark had described in its October 10th proposal. The proposed contract price was the same, however – $20,000.00.

11. As they walked the site together, Claimant and Mr. Cattan discussed Defendant's draft Scope of Work proposal. *Deposition at 53.* On his copy of the proposal, Claimant crossed out three of the items Defendant had listed as "inclusions," including one that would have obligated him to demolish the existing roof trusses on the building. *Claimant's Exhibit E.* His reason for doing so was because Landmark did not want to perform any of the demolition work on the project. Mr. Cattan acquiesced, and agreed that Defendant would retain responsibility for this aspect of the job. *Deposition at 54-55.*

12. During their walk-through, the parties discussed various other items that Landmark wished to be excluded from the scope of its subcontracted work. *Deposition at 56.* Thereafter, Claimant understood that Mr. Cattan was to prepare a revised Scope of Work proposal, but this did not occur. *Deposition at 54, 61.* Nor did either party execute the draft Scope of Work document as originally proposed. *Claimant's Exhibit E*. Nevertheless, by their subsequent conduct both Landmark and Defendant indicated their general understanding that Landmark would undertake responsibility for framing and siding at the Marty's Auto project for a contracted price of $20,000.00. *Affidavit at ¶15*. The parties further understood and verbally agreed that the scope of work covered by Landmark's subcontract would not include any demolition services. *Deposition at 54; Defendant's Reply/Opposition to Claimant's Opposition/Cross-Motion Re Summary Judgment, Statement of Undisputed Facts No. 4*.

13. On or about November 12, 2014 Mr. Cattan informed Claimant that certain steel beams integral to the second story addition to the Marty's Auto building were scheduled to be delivered in two days. As the beams could not be placed until Landmark built the wooden framing supports or "pockets" upon which they would rest, Mr. Cattan asked Claimant to undertake and complete that portion of the framing job on the following day, November 13, 2014. *Deposition at 66-70, 80; Affidavit at ¶19.* Given that Landmark was already working as a subcontractor on Defendant's Hergenrother construction project, Claimant was confident that ultimately the parties would reach agreement as to any unresolved details pertaining to the scope of work on the Marty's Auto project. For that reason, notwithstanding that they had yet to execute a final Scope of Work proposal, he agreed to Mr. Cattan's request. *Affidavit at ¶20.*

14. On November 13, 2014 Claimant and another Landmark employee, Harrison Flynn, began the day at the Hergenrother construction site, then "grabbed some tools" and drove together in Claimant's truck to the Marty's Auto jobsite. *Deposition at 71*. Anticipating that their framing work at Marty's Auto would only take three hours or so to complete, *Deposition at 67,* Claimant did not bring his trailer, which held other equipment, including his safety glasses. Instead, he left it behind at the Hergenrother site. *Affidavit at ¶¶25-27.*

15. Upon their arrival at Marty's Auto, Claimant observed Mr. Cattan and Austin Avery, whom Defendant employed as a commercial laborer, *Claimant's Exhibit D, Response to Interrogatory No. 13*, using sledge hammers and crowbars to demolish walls and other aspects of the existing building, in accordance with the renovation plans. This task needed to be completed before Claimant and Mr. Flynn could undertake the framing work necessary to prepare for installation of the steel beams. *Deposition at 72, 82-83; Affidavit at ¶21*.

16. While Mr. Cattan and Mr. Avery continued to work on the demolition, Claimant and Mr. Flynn cut some of the wood they would need for beam pockets and wall studs. After an hour or so, they told Mr. Cattan they were leaving, and would return "in a little bit." In response, Mr. Cattan advised that he thought he and Mr. Avery would be done with the demolition work by the time they returned. *Deposition at 72-74; Affidavit at ¶22.*

17. When Claimant and Mr. Flynn returned to the site an hour or two later, Mr. Cattan and Mr. Avery were still working on the demolition. *Deposition at 75-77*. Claimant and Mr. Flynn moved some of the materials they had cut previously indoors. At that point, they realized that unless more progress was made on the demolition, it would be impossible for them to complete the necessary framing work in time for the steel beams to be placed. As Mr. Cattan had expressed urgency that the framing work had to get done that day, Claimant and Mr. Avery started helping with the demolition. *Deposition at 78.*

18. Claimant acknowledged that Mr. Cattan neither asked nor instructed him to help with the demolition, and in that sense he volunteered his assistance. *Deposition at 78, 82.* The terms of the parties' verbal subcontract did not include any date certain or deadline by which Landmark was to have finished building the steel beam support pockets, *Deposition at 80*, such that Claimant would have violated the agreement had he not helped to speed up the demolition process. In their verbal negotiations, furthermore, both parties had agreed that Landmark would not be responsible for any demolition work, and therefore from that perspective as well Claimant was not obligated to assist. *Deposition at 54; Defendant's Reply/Opposition to Claimant's Opposition/Cross-Motion Re Summary Judgment, Statement of Undisputed Facts No. 4*.

19. As the scope of work to which Landmark and Defendant had verbally agreed did not include demolition, and therefore was not included in the $20,000.00 subcontract price, Claimant anticipated that he would bill for his time spent assisting Mr. Cattan and Mr. Avery at an hourly rate. *Deposition at 83.* This is standard practice in the construction industry, and was also consistent with Landmark's practice on two other framing jobs it had subcontracted from Defendant. *Deposition at 25-27, 36-37, 83*.

20. Using a crowbar from his truck, Claimant set to work within a few feet from Mr. Cattan, and assisted him in taking down a concrete wall. *Deposition at 82*. After removing the wall, Claimant began pulling nails from the concrete. *Deposition at 84-85*. He was not wearing safety glasses, having left them in the trailer at the Hergenrother jobsite. *Affidavit at ¶¶25-27*. While engaged in this activity, a nail flew into his left eye, causing injury. Thereafter, Mr. Flynn drove him to the hospital. *Affidavit at ¶¶34-35*. Later, Claimant underwent two surgeries. His vision is improving, but remains impaired. *Deposition at 87-88.*

21. While Claimant was at the hospital, Defendant emailed him a document entitled, "Subcontract Agreement." *Claimant's Exhibit D*. The agreement correctly identified Defendant as the contractor, Landmark as the subcontractor, Marty's Auto as the project, and $20,000.00 as the subcontracted price. Beyond that, however, the agreement appears to have been generic in nature; it referenced certain requirements applicable to "plumbing, heating, electrical and other mechanical work," *Id., Subcontract Agreement at Section 6(i)*, and contained various other terms that had never been discussed or negotiated previously and to which Landmark had never agreed. *Id.; Affidavit at 40*. The agreement was not signed by either party. *Claimant's Exhibit D.*

22. The record does not reflect when, but at some point after November 13, 2014 Landmark invoiced Defendant on an hourly basis for the demolition work Claimant had performed on that day, and Defendant paid accordingly. *Deposition at 83; Affidavit at ¶36*.

23. The parties have each acknowledged in their pleadings that given the nature of Defendant's business, it was Claimant's statutory employer during the time that he was working on the Marty's Auto project. *See Claimant's Reply to Employer's Motion for Summary Judgment and Cross Motion for Summary Judgment at p. 12; Defendant's Reply/Opposition to Claimant's Opposition/Cross-Motion re Summary Judgment at p. 5.*

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. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

Statutory Employment

2. The legal question presented here is whether an LLC member who excludes himself from coverage under the Workers' Compensation Act, as Claimant did in this case, thereby forfeits his entitlement to workers' compensation benefits as another employer's statutory employee.

(a) Statutory Employment as Defined in 21 V.S.A. §601(3)

3. The concept of statutory employment is embodied in the Act's definition of "employer." The statute, 21 V.S.A. §601(3), defines the term as follows:

> "Employer" includes any body of persons, corporate or unincorporated, public or private, … 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 workers there employed.

4. As the Supreme Court has often explained, §601(3) "creates a statutory employer/employee relationship where no such relationship existed at common law." *In re Chatham Woods Holdings, LLC*, 2008 VT 70, ¶10, quoting *King v. Snide*, 144 Vt. 395, 400 (1984). The legislative intent was to impose liability for workers' compensation benefits "upon business owners who hire independent contractors to carry out some phase of their business." *Edson v. State*, 2003 VT 32, ¶6, citing *King, supra* at 401. Phrased alternatively, "[t]he idea was to prevent business owners or general contractors from attempting to avoid liability for workers' compensation benefits by hiring independent contractors to do what they would otherwise have done themselves through their direct employees." *Id.; see also, Frazier v. Preferred Operators, Inc.*, 2004 VT 95, ¶11 (mem.) (affirming the *Edson* court's use of the "nature of the business" test as reflective of both the language and intent of §601(3)).

5. The statutory employment concept has particular application in the construction industry. The general contractor/subcontractor relationship, in which the former typically "outsources" to the latter specific responsibilities within a construction project, is an employment pattern that is "well known to, and recognized by, the Legislature." *In re Chatham Woods, supra* at ¶14, quoting *Welch v. Home Two, Inc.*, 172 Vt. 632, 634 (2000) (mem.). Workers' compensation statutes are "nearly universal" in their intent to make the general contractor the employer for purposes of extending coverage to its subcontractor's employees. *Id.*

6. The parties in this case do not dispute that Defendant, as the general contractor responsible for undertaking the Marty's Auto renovation project, was Claimant's statutory employer. Defendant has specifically conceded the issue, *see Defendant's Reply/Opposition to Claimant's Opposition/Cross-Motion re*

Summary Judgment at p. 5, and it is exactly on those grounds that Claimant seeks judgment in his favor as a matter of law, *see Claimant's Reply to Employer's Motion for Summary Judgment and Cross Motion for Summary Judgment at pp. 12, 20*.

7. Rather, the dispute here is as to Claimant's status as a statutory employee. With reference to 21 V.S.A. §601(14)(H), Defendant asserts that when Claimant, as the sole member of Landmark Builders, LLC, applied for and was granted the right to exclude himself from workers' compensation coverage, Finding of Fact No. 5 *supra*, he ceased thereby to qualify as an employee as that term is defined under the Act. That being the case, Defendant contends, then regardless of its status as the statutory employer Claimant is no longer entitled to any of the benefits that the statute affords.

(b) <u>*Exclusions from Coverage under 21 V.S.A. §§601(14)(F) and (H)*</u>

8. Section 601(14) defines the terms "worker" and "employee" to mean "an individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer." In the subsections that follow, the statute identifies various circumstances whereby an individual will be excluded from the definition of "worker" or "employee." *See* 21 V.S.A. §601(14)(A) (casual employment); §601(14)(B) (amateur sports); §601(14)(C) (small agricultural employers); §601(14)(D) (family member dwelling in employer's house); §601(14)(E) (service in or about private dwelling).

9. Of particular relevance here, subsections (F) and (H) consider the employee status of business owners, whether unincorporated or incorporated. Subsection (F) exempts a sole proprietor or partner owner(s) of an unincorporated business from the definition of "worker" or "employee," but only if specific requirements, designed to clearly distinguish a true independent contractor from an employee, are met.[3]

10. As to corporate officers and LLC members, subsection (H) provides as follows:

> With the approval of the Commissioner, a corporation or a limited liability company (L.L.C.) may elect to file exclusions from the provisions of this chapter. A corporation or an L.L.C. may elect to

[3] The requirements encompass elements of both the "nature of the business" test, §601(14)(F)(i), and the "right to control" test, §601(F)(14)(ii), *see Frazier, supra*, citing *Falconer v. Cameron*, 151 Vt. 530, 532-33 (1989), for determining independent contractor status. Other indicators of independent contractor status also must be evident, including that the individual holds himself out as a business owner, §601(14)(F)(iii), that he not work exclusively for another person, §601(14)(F)(iv), and that he not be treated as an employee for income or employment tax purposes, §601(14)(F)(v). In addition, the statute requires that both the individual and the person for whom he agrees to work must execute a written agreement explicitly affirming the individual's independent contractor status as well as his election not to purchase workers' compensation insurance coverage, §601(14)(F)(vi).

> exclude up to four executive officers or managers or members from coverage requirements under this chapter. If all officers of the corporation or all managers or members of an L.L.C. make such election, receive approval, and the business has no employees, the corporation or L.L.C. shall not be required to purchase workers' compensation coverage. If after election, the officer, manager, or member experiences a personal injury and files a claim under this chapter, the employer shall have all the defenses available in a personal injury claim. However, this election shall not prevent any other individual, other than the individual excluded under this section, found to be an employee of the corporation or L.L.C. to recover workers' compensation from either the corporation, L.L.C., or the statutory employer.

11. Importantly, while subsections (F) and (H) both provide a process by which a business owner may be considered to have excluded himself from workers' compensation coverage, the exclusion applies only to the individual, and not to other employees of the business entity. If injured on the job, the latter can claim workers' compensation benefits from either their direct employer or from a statutory employer.[4]

(c) *Exclusion Analysis under Chatham Woods*

12. Neither subsection (F) nor subsection (H) clearly delineates what happens when it is the excluded individual who is injured while working for a statutory employer, as is the case here. Does the exclusion from workers' compensation coverage apply solely to the direct employer, as Claimant contends? Or does it extend as well to the statutory employer, as Defendant asserts?

13. The Supreme Court directly addressed this issue in *Chatham Woods*, *supra*, though in a somewhat different context and under a prior version of the statute. The appeal in that case was from an administrative determination that a real estate development company could be charged additional premium on its workers' compensation insurance policy on the grounds that certain of its subcontractors were more properly classified as its statutory employees. The subcontractors – two sole proprietors and the sole officer of an incorporated business – all had elected not to purchase workers' compensation insurance for themselves. As Defendant has here, the development company argued that having thus opted out of coverage, the subcontractors were now excluded from the statutory definition of "employee," not only as to their own businesses but also as to any statutory employer. Lacking the requisite employee status, it asserted, there could be no workers' compensation liability, and therefore no basis for assessing additional insurance premium. *Id.* at ¶7.

[4] Though not identical to the last sentence of subsection (H), the last sentence of subsection (F) embodies the same concept, stating that the employees of a sole proprietor or partnership "may file a claim for benefits under this chapter against either or both parties" to an independent contractor agreement.

14. The Court disagreed. Favoring an "all embracing" definition of employee and employer as best calculated to effectuate the statute's remedial objectives, it held that the sole proprietor exclusion applied only to the individual's employment status vis-à-vis the sole proprietorship. It did not extend so far as to protect a statutory employer, who could still be liable for workers' compensation benefits in the event of an injury. *Id.* at ¶¶8-9 (internal citations omitted).

15. Of note, the Court's analysis in *Chatham Woods* was based entirely on its interpretation of subsection (F), which relates exclusively to sole proprietors and unincorporated partner owners. It did not separately consider subsection (H), notwithstanding that one of the involved subcontractors was incorporated. *Id.* at ¶2. In fact, as the subsequent amendments to subsection (F) make clear, the two groups present different challenges in the context of establishing independent contractor status, and therefore merit different treatment under the statute.

(d) The Pre- and Post-2004 Amendment Versions of §601(14)(F)

16. Prior to its amendment, under subsection (F) a sole proprietor was deemed excluded from the definition of "worker" or "employee" unless he opted in, which was accomplished simply by purchasing workers' compensation insurance coverage.[5] With no formalities required to establish true independent contractor status, the statute posed a trap for the unwary laborer, whom a general contractor might label a "sole proprietor" for no other purpose than to avoid workers' compensation liability, *see Defendant's Exhibit E at p. 7.* It also presented a pitfall for the unwary sole proprietor, who might have chosen that business model without fully understanding its workers' compensation ramifications, *see Guyette v. Big Time Builders,* Opinion No. 01-04WC (February 27, 2004).

17. The 2004 amendment to subsection (F) addressed these deficiencies. By clarifying the requirements for establishing independent contractor status, §§601(14)(F)(i)-(iv), it protected the unwary laborer. And by requiring both a written agreement with the general contractor and written notice of the right to elect coverage, §601(14)(F)(vi), it protected the unwary sole proprietor as well.

18. Presumably because of the formalities that already attach to an incorporated business, no such protections were deemed necessary for corporate officers, however. Not only does the process of incorporation itself require affirmative action, but unlike sole proprietors and partners, subsection (H) has always presumed coverage for corporate officers unless the corporation applies for and is granted permission to exclude them. With these formalities in place, it is far more

[5] The specific language excluded a sole proprietor or partner owner from coverage "unless such sole proprietor or partner notices 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."

difficult to envision the circumstances under which a corporate officer or LLC member would unwittingly acquiesce to independent contractor status without meaning to do so than it would be were a sole proprietor involved.

19. *Chatham Woods* was decided under the pre-2004 amendments to subsection (F), *id.* at ¶7 n.2, and therefore it is impossible to discern whether the Court might reach a different result were it to consider the same facts today.[6] In any event, as the case before me involves an LLC member rather than a sole proprietor, it does not trigger consideration under subsection (F) in any respect. Instead, it arises squarely under subsection (H), which the *Chatham Woods* court never specifically considered. As noted above, the distinctions between the two subsections, and the manner in which they treat incorporated versus unincorporated businesses differently, are real, and as such they require distinct legal analysis.

(e) *Public Policy as Applied to Corporate Officer and LLC Member Exclusions Under §601(14)(H)*

20. The public policy underlying the workers' compensation statute's mandatory insurance requirement is "to secure the injured employee against financial irresponsibility of his employer." *DeGray v. Miller Brothers Construction Co.*, 106 Vt. 259, 276 (1934). Likewise, the public policy underlying the concept of statutory employment is to protect the employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the principal contractor. 4 Lex K. Larson, *Larson's Workers' Compensation* §70.04 at p. 70-6 (Matthew Bender Rev. Ed.); *Welch v. Home Two, supra* at 634. The principal contractor wields the power – it can refuse to contract with a subcontractor who has not itself purchased the required workers' compensation insurance coverage, thereby insuring not only its own protection but that of the subcontractor's employees as well. *Larson's Workers' Compensation, supra; see, e.g., Lavallee v. Straight, et al.*, Opinion No. 14-14WC (August 27, 2014).

21. As applied to an incorporated subcontractor who employs workers other than its principal owners, the statutory employment concept affords necessary and effective protection. However, to afford the same protection to a corporate officer or LLC member who has sufficient ownership and control as to be, in effect, the subcontractor's "alter ego," is a different matter altogether. *Larson's Workers' Compensation, supra* at chapter 76, p. 76-1. In that instance, the person who controls the decision to file an exclusion application under §601(14)(H) is the same person on whose behalf the application is made. No public policy is served by allowing him to avoid the self-imposed consequences of that action, by requiring the statutory employer to pay benefits instead if an injury subsequently occurs. *Id.*

[6] The *Chatham Woods* court also did not consider the 2004 amendment to §601(3), which now excludes from the definition of "employer" a person who "enter[s] into a contract for services or labor with an individual who has knowingly and voluntarily waived coverage of this chapter" under subsection (14)(F).

22. The statute's plain language in fact supports the conclusion that when a corporate officer or LLC member elects to exclude himself from workers' compensation coverage under §601(14)(H), the exclusion applies equally to the business entity of which he is a part and to any statutory employer for whom he might work. As noted above, Conclusion of Law No. 3 *supra*, §601(3) defines the term "employer" to include both direct and statutory employment, thus specifically equating the two. *See, e.g., Edson, supra* at ¶11 (holding that because a statutory employer is "in effect, made the employer for the purposes of the compensation statute," it is immune from tort liability to same extent as direct employer). Nothing in the language of §601(14)(H) indicates any legislative intent to do otherwise with respect to corporate exclusions.

23. I conclude that when a corporation or LLC elects to exclude an officer or member from workers' compensation coverage in accordance with §601(14)(H), the officer or member is thereby excluded from the definition of "employee," not only as to his employment for the excluding business entity, but also as to any employment for a statutory employer. This result is based on a fair and logical reading of the statute's plain language, and is consistent with public policy. It leaves intact the protections accorded to those who require it at the same time that it holds those who do not to their informed choices.

(f) *Statutory Remedy for Individuals Excluded under §601(14)(H) in the Event of a Work-Related Injury*

24. Having concluded that Claimant's exclusion from workers' compensation coverage applies equally both to Landmark, his direct employer, and to Defendant, his statutory employer, I now consider what rights the statute accords him in the event of a work-related injury.

25. Prior to its amendment in 2004, §601(14)(H) read as follows:

> Subject to the written approval of the commissioner an officer of a corporation may elect not to come under the provisions of this chapter, then *if an action is brought by the employee to recover damages for personal injury* . . . sustained after the employee had so elected and arising out of and in the course of his employment, the employer shall have all the defenses which he would have had if the provisions of this chapter were not in force. [Emphasis added].

26. The statute thus provided that a corporate officer who suffered a work-related injury after electing to exclude himself from coverage was no longer subject to the statute's exclusivity provision, 21 V.S.A. §618(a). Instead, the remedy sounded in tort, with no restrictions on either the damages available to the injured employee or the defenses available to his or her employer. This made sense. The corporate officer had removed himself from coverage, and therefore the public

policy compromise upon which the workers' compensation statute was built, in which the injured worker relinquished the right to sue in tort in return for the employer's assumption of strict liability, *Marcum v. State of Vermont Agency of Human Services*, 2012 VT 3, ¶7, no longer applied.

27. Section 601(14)(H) was amended in 2004.[7] The penultimate sentence now reads:

> If, after election [to exclude a corporate officer or LLC member from coverage], the officer, manager, or member *experiences a personal injury and files a claim under this chapter*, the employer shall have all the defenses available in a personal injury claim. [Emphasis added].

28. The last sentence of subsection (H), also added in 2004, states:

> However, this election shall not prevent any other individual, *other than the individual excluded under this section*, found to be an employee of the corporation or L.L.C. to [sic] recover workers' compensation from either the corporation, L.L.C., or the statutory employer. [Emphasis added].

29. By removing the reference to "an action . . . to recover damages for personal injury," from the pre-amendment statute, the first sentence now prohibits an excluded employee who is injured on the job from bringing an action in tort against his or her employer.[8] Instead, by its reference to filing "a claim under this chapter," it appears to offer the excluded worker access to the same benefits as are available to a covered worker, albeit with one important difference – the employer's right to assert personal injury defenses.

30. It is difficult to discern the rationale for this change. Allowing the excluded employee to "file a claim under this chapter" while at the same time permitting the employer to allege comparative fault as a defense disturbs one of the statute's most basic premises – that having relinquished the right to recover damages in tort, an injured worker's entitlement to workers' compensation benefits exists "even though his own negligence is the sole cause of his injury by accident." *Grenier v. Alta Crest Farms, Inc.*, 115 Vt. 324, 328 (1948).

31. There is another problem with the first sentence. Not every workers' compensation claim involves an element of comparative fault on the injured worker's part. In fact, many, if not most, do not. If the first sentence is interpreted to mean that an excluded employee can still "file a claim under this

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[7] Section 601(14)(H) was amended again in 2006, to allow for LLC managers and members to excluded themselves from coverage in the same manner as corporate officers.

[8] *See The Travelers Companies v. Liberty Mutual Insurance Co.*, 164 Vt. 368, 373 (1995) (quoting Restatement (Second) of Torts §12A (1965) and construing the term "damages" as denoting "the money payable by a tortfeasor who is liable for injuries caused by his tortious act.").

chapter" against his employer (whether direct or statutory), then in those cases the exclusion is rendered meaningless. The "excluded" employee garners unfettered entitlement to workers' compensation benefits, for which the employer's insurance carrier has received no premium in exchange.

32. Standing alone, the second sentence of subsection (H) offers greater clarity. Its plain language permits only covered employees to "recover workers' compensation," and not those who have elected to exclude themselves. However, when considered together the two sentences appear to leave excluded employees with no means of redress whatsoever in the event of a work-related injury. One sentence precludes an action for personal injury damages in tort, while the other precludes an action to recover workers' compensation benefits. Subsection (H) thus appears to grant a right but not a remedy, an outcome that "frustrate[s] the legislative purpose of the statutory scheme and produce[s] an irrational result." *Noble v. Delaware & Hudson Ry. Co.*, 142 Vt. 156, 160 (1982).

33. I assume that the Legislature did not intend this result. Instead, I assume that it intended to offer the excluded employee the remedy that best exemplifies the statute's public policy objectives and remedial purpose. By its plain language, the second sentence of subsection (H) accomplishes this result, while the first sentence does not.

34. I further assume that by its reference to "personal injury" in the first sentence of subsection (H), the Legislature intended to preserve the excluded individual's right to damages in tort in the event of a work-related injury. No other interpretation makes sense.[9]

35. I thus conclude that by excluding himself from coverage under §601(14)(H) Claimant thereby forfeited his right to claim workers' compensation benefits from either his own LLC or from Defendant, his statutory employer. Having effectively removed himself from the statute's coverage, his remedy now lies in tort.

[9] Defendant asserts that the conflict between the first and second sentences of subsection (H) can be reconciled by reference to §618(b). It theorizes that by granting an excluded employee the right to "file a claim under this chapter," the Legislature intended the same remedy as that provided to an employee who is injured while working for an employer who has *unlawfully* failed to insure itself against workers' compensation liability under 21 V.S.A. §687. Subsection (H) provides a means of *lawfully* excluding an employee from coverage, however. By its plain terms, §618(b) does not apply, therefore. Had the Legislature intended that it should, I assume it would have stated so in a less oblique manner. In any event, I agree with Defendant's underlying assumption, which is that the Legislature would not have barred an excluded employee from seeking workers' compensation benefits from his employer without also providing an alternate remedy.

Gratuitous Employment

36. Having concluded that Claimant is not entitled to claim workers' compensation benefits from either his direct or his statutory employer, I consider only briefly Defendant's alternative argument – that at the time of his injury Claimant was acting as a "gratuitous worker" and not as an employee. Defendant asserts, first, that Claimant was under no contractual obligation to assist with the demolition work on the Marty's Auto project, and second, that he volunteered to do so in order to advance his own interests, given that he could not start on the work he had contracted to do until the demolition was completed.

37. One of the lines of demarcation between an employee and a gratuitous volunteer is that the former expects to be paid for his or her services, while the latter typically does not. *Larson's Workers' Compensation, supra* at §65.01. However, in situations where an individual offers assistance at least in part with an eye towards furthering his or her own interests (or the interests of his or her employer), the distinction between "employee" and "volunteer" can become blurred. *Id.*, §65.01[3] at p. 65-11 *et seq.* and cases cited therein.

38. Defendant asserts here that Claimant's motivation for assisting with the demolition work "was not so as to receive pay, but rather to ensure that he would be able to perform his contracted-for work on time," *Defendant's Response to Claimant's Motion to Strike at p. 9*, but does not point to any evidence in the record to support this claim. In fact, the undisputed evidence establishes that neither Claimant nor Landmark, his direct employer, was under any contractual obligation to complete its framing work by a particular deadline, Finding of Fact No. 18 *supra*. There was no "on time" element to Claimant's work; rather, the urgency accorded the demolition process was all Defendant's. That fact, combined with the undisputed evidence establishing both parties' expectation that Claimant would be paid for the demolition assistance he provided, Finding of Fact Nos. 19 and 22 *supra*, disqualifies Claimant from volunteer status as a matter of law.

Summary

39. In sum, I conclude as a matter of law that having been lawfully excluded from coverage under 21 V.S.A. §601(14)(H), Claimant thereby forfeited his right to claim workers' compensation benefits on account of his November 13, 2014 injury from either Landmark, his direct employer, or from Defendant, his statutory employer.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits arising out of his November 13, 2014 work-related injury is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont this _____ day of _____, 2015

_____
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.