

STATE OF VERMONT
Department of Banking, Insurance, Securities and
Health Care Administration

In re: 2Morrow Studio/Build, Inc.

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Docket No. 09-094-I

**Hearing Officer's Proposed Decision and
Commissioner's Final Decision**

This matter involves an appeal to the Commissioner of the Department of Banking, Insurance, Securities, and Health Care Administration by Travelers Insurance Company . Travelers has appealed the June 5, 2009 Case Summary decision by the Vermont Workers Compensation Appeals Board, which overturned Travelers' determination regarding inclusion of certain workers in the calculation of 2Morrow Studio/Build, Inc.'s premium basis for workers' compensation insurance.

The Hearing Officer's Proposed Decision, set forth below, recommending that the Board's decision be vacated, was issued on December 14, 2009. No party made a request to file written exceptions, legal briefs and request oral argument before the Commissioner pursuant to Section 7 of the Department's Hearing Procedure Regulation No. 82-1.

Upon consideration of the entire record in this matter, the Commissioner's Final Decision is hereby issued.

Proposed Decision on the Appeal of the
Workers' Compensation Appeals Board Decision

Introduction

This matter involves an appeal to the Commissioner ("Commissioner") of the Department of Banking, Insurance, Securities, and Health Care Administration ("Department") by Travelers Insurance Company ("Travelers"). Travelers has appealed the June 5, 2009 Case Summary decision ("Decision") by the Vermont Workers Compensation Appeals Board ("Board"), which overturned Travelers' determination regarding inclusion of certain workers in the calculation of 2Morrow Studio/Build, Inc.'s ("2Morrow") premium basis for workers' compensation insurance. The Board found the workers to be independent of 2Morrow and directed Travelers to remove them from the premium calculation.

The appeal hearing took place on October 13, 2009. Antonin Robbason, Esq. appeared on behalf of Travelers, and John Connell, President and Owner of 2Morrow, presented the case on behalf of 2Morrow. The parties filed pre-hearing material, which was considered at the hearing along with their respective oral statements. In addition, the parties submitted the following post-hearing documents:

1. 2Morrow's Summary of Defending Position dated November 3, 2009;

2. Traveler's Response to 2Morrow's Filing and Proposed Findings and Order dated November 5, 2009.

After consideration of all the material submitted by the parties, the Hearing Officer issues the following Proposed Findings of Fact, Conclusions of Law, and Decision.

Proposed Findings Of Fact

1. 2Morrow is an incorporated architectural and building firm that designs and builds residential and some commercial projects. 2Morrow occasionally hires subcontractors to provide certain services for the company.

2. Travelers issued to 2Morrow a workers' compensation policy no. 6KUB0735L03907 ("Policy"), effective for the policy period 7/26/07 to 7/26/08.

3. Vantine & Daughters ("Vantine"), an unincorporated sole proprietorship, was one of the subcontractors hired by 2Morrow.

4. Travelers included in the premium base of the Policy the remuneration paid to Vantine, because Vantine did not have proof of workers' compensation insurance. In addition, Travelers determined that 2Morrow and Vantine did not have a contract that complied with statutory requirements.

5. The Vermont Workers' Compensation Act ("Act") sets forth a definition of "employee" that includes "an individual who has entered into the employment of, or workers under contract of service ... with, an employer" 21 V.S.A. § 601(14).

6. 2Morrow appealed Travelers premium decision to the National Council on Compensation Insurance, Inc. ("NCCI"). NCCI, by letter dated February 12, 2009, agreed with Travelers' calculation. 2Morrow appealed NCCI's decision to the Board.

7. The Board below found that Vantine "... meets all the requirements set forth in the statute, except for a written contract." The Board further determined that Vantine was independent of and not considered an employee of 2Morrow, and directed Travelers to remove Vantine from the premium calculation for 2Morrow. Decision, p. 3.

8. By letter from Antonin Robbason, Esq. dated June 25, 2009, Travelers appealed the Board's decision. Travelers maintains that since Vantine did not have Workers Compensation Insurance and no contract with 2Morrow that complied with statutory requirements, under the terms of the Policy issued to 2Morrow, Vantine engaged in work that was a risk on the policy and could make Travelers liable, and, as such, his inclusion in 2Morrow's premium base was proper.

9. 2Morrow maintains that there was a contract between it and Vantine that complied with "90%" of the statutory requirements; therefore, the Board's decision should be upheld, or at most, 2Morrow should not be required to pay more than 10% of the premium at issue.

10. 2Morrow submitted as evidence a contract between it and Vantine (2Morrow Exhibit A). It is not clear whether this contract was in place during the policy period in question. It does not contain language that is required by 21 V.S.A. § 601(14)(F)(vi)

Proposed Conclusions Of Law

A. Specifically at issue is whether Vantine, as a subcontractor hired by 2Morrow, falls within the sole proprietor exception to the definition of “employee” under 21 V.S.A. § 601(14)(F), or should be considered an employee of 2Morrow during the policy period in question and as such, be included in 2Morrow’s premium base for that policy.

B. Vermont law under the Act, sets forth a definition of “employee” that includes “An individual who has entered into the employment of, or works under the contract of service ... with, an employer” 21 V.S.A. § 601(14).

C. The Act contains certain exceptions to this definition by setting forth several categories that are not included in the term “worker” or “employee”. The one relevant to this case is as follows:

The term “worker” or “employee” does not include:

* * *

(F) The sole proprietor or partner owner or partner owners of an unincorporated business provided:

(i) The individual performs work that is distinct and separate from that of the person with whom the individual contracts.

(ii) The individual controls the means and manner of the work performed.

(iii) The individual holds him or herself out as in business for him or herself.

(iv) The individual holds him or herself out for work for the general public and does not perform work exclusively for or with another person.

(v) The individual is not treated as an employee for purposes of income or employment taxation with regard to the work performed.

(vi) The services are performed pursuant to a written agreement or contract between the individual and another person, and the written agreement or contract explicitly states that the individual is not considered to be an employee under this chapter, is working independently, has no employees, and has not contracted with other independent contractors. The written contract or agreement shall also include information regarding the right of the individual to purchase workers’ compensation insurance coverage and the individual’s election not to purchase that coverage. However, if the individual who is a party to the agreement or contract under this subdivision is found to have employees, those employees may file a claim under this chapter against either or both parties to the agreement.

21 V.S.A. § 601(14)(F).

D. When construing the Workers’ Compensation Act, the Supreme Court has stated: “When construing the Act, we seek to implement the Legislature’s intent as expressed in the words of the Act itself. See Colwell v. Allstate Ins. Co., 2003 VT 5, 7, 175 Vt. 61, 819 A.2d 727 (Court construes statutes to implement legislative intent found in the

statute's plain language)." *Butler v. Huttig Bldg. Prods.*, 2003 VT 48, P11. See also *Smith v. Desautels*, 2008 VT 17, P17.

E. The plain language of 21 V.S.A. § 601(14)(F) indicates that six factors must exist in order for a sole proprietor not to be considered an employee under the Act. In the present case, since Vantine did not have a contract with 2Morrow that contained the language required by 21 V.S.A. § 601(14)(F)(vi), the sixth factor has not been met, the statutory exclusion does not apply, and the subcontractor in question must be considered an employee under the plain language of the statute.

F. The Vermont Department of Labor interprets this section in this manner, as its webpage contains, in part, the following information: "**Important note:** any business that wishes to rely upon any of these exceptions must meet all of the requirements of the law." Vermont Dept. of Labor, *VT Business Owners & Contractors: Changes in WC Insurance Coverage* (visited December 14, 2009): <http://labor.vermont.gov/FormsPubs/WCFormsandPublications/FactSheetForEmployers/tabid/298/Default.aspx>. An agency's interpretation of the statutes that it administers is presumed correct, and a party challenging such interpretation must make a compelling showing of error to overcome the presumption. *In re Central Vermont Medical Center*, 174 Vt. 607, 608 (2002)(citing *In re Professional Nurses Services, Inc.*, 168 Vt. 611, 613 (1996)).

G. Since the worker in question must be considered an employee under the plain language of the statute, if injured on the job, he would be entitled to file a claim for workers' compensation benefits against 2Morrow's policy. The Supreme Court has consistently interpreted the Act as reflecting the legislative intent of "impos[ing] liability for workers compensation benefits upon business owners who hire independent contractors to carry out some phase of their business." *Frazier v. Preferred Operators*, 177 Vt. 571, 573 (2004) (quoting *Edson v. State*, 175 Vt. 330, 332 (2003); see also *Falconer v. Cameron*, 151 Vt. 530, 532 (1989) (noting that the legislative intent was "to prevent owners of trades or businesses from relieving themselves of liability under the Act by doing through independent contractors what they would otherwise do through their direct employees").

H. Because the exception set forth in 21 V.S.A. § 601(14)(F) does not apply, and Vantine did not provide Workers Compensation Insurance coverage for himself, the inclusion in 2Morrow's premium base of the money paid to Vantine for the services he provided as an employee is proper. See Rule 2(H), *Basic Manual for Workers Compensation and Employers Liability Insurance*.

I. Although 2Morrow's argument evokes empathy, the plain language of the statute just does not support it. Rather, the agency website referred to above sets forth the interpretation that is consistent with the plain wording of the statute and its purpose. 2Morrow's claims, while understandable, do not overcome the presumption of validity that accompanies the agency's interpretation. The interpretations advanced by 2Morrow would require an amendment of 21 V.S.A. § 601(14)(F). Any change of this nature must be brought about by the Legislature.

Proposed Decision

Based on the above-stated Proposed Findings of Fact and Conclusions of Law, this Hearing Officer proposes that:

1. The Board's Decision of June 5, 2009 should be vacated.
2. Under the relevant portions of the Act, the subcontractor in question should be considered an employee of 2Morrow, and as a result, the remuneration paid to him should be included in 2Morrow's premium base for the policy period at issue.

RIGHT TO FILE WRITTEN EXCEPTIONS

"Any party adversely affected by the proposal of decision of the hearing officer shall have 10 days from the date of service to file written exceptions, legal briefs or request oral argument before the Commissioner." Regulation No. 82-1 (Revised), Section 7(c). The parties, by written stipulation, may waive these opportunities. Regulation No. 82-1 (Revised), Section 7(d).



Phillip J. Cykon, Esq.
Hearing Officer

December 14, 2009
Date

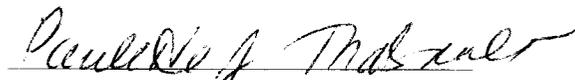
Commissioner's Final Decision

Upon consideration of the entire record in this matter, the Commissioner hereby ADOPTS the Hearing Officer's proposed Findings of Fact and Conclusions of Law contained in the Proposed Decision.

Accordingly, it is hereby ORDERED:

1. The Board's Decision of June 5, 2009 is hereby VACATED.
2. Under the relevant portions of the Act, the subcontractor in question is considered an employee of 2Morrow, and as a result, Travelers may include the remuneration paid to him in 2Morrow's premium base for the policy period at issue.

Dated at Montpelier, Vermont this 13 day of February , 2010.



Paulette J. Thabault, Commissioner