

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Applicant: **Sangati America Incorporated**

Respondent: **The Workers' Compensation Board of Nova Scotia**

Interested Party: **Sangati spa.**

SECTION 29 APPLICATION DECISION

Representatives: Debbie L. Duggan for the Applicant
John T. Shanks for the Respondent
Michael S. Ryan for the Interested Party

Form of Appeal: Written submission

Court Action: S. H. No. 150483

Date of Decision: August 23, 2006

Decision: The action against the Applicant and Interested Party by the Respondent is not barred by operation of s. 28 (1) of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended [*"Act"*], according to the reasons of K. Andrew MacNeil, Appeal Commissioner.

HISTORY OF THE PROCEEDINGS:

This decision concerns an application made by the Applicant ["Sangati America"] to this Tribunal for a determination whether a subrogated action by the Respondent ["the Board"] against the Applicant and Interested Party ["Sangati spa."] can be maintained, or whether it is barred by operation of s. 28(1) of the the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended ["the Act"].

The Board's action was begun by the filing of an Originating Notice and Statement of Claim in the Supreme Court of Nova Scotia at Halifax, on or about September 28, 1998. The action was assigned the number S.H. No. 150483.

The action arose out of the death of Carl Hughes on September 26, 1996, who died by accident in the course of paid employment, and who left a surviving common law spouse and two children.

A Report of Accident was filed with the Board by Manpower Services Ontario Limited, carrying on business in Nova Scotia as Manpower Temporary Services, which employed the deceased as a general labourer at the time of his death. The employer was a covered employer under the *Act*, having been assigned the Firm No. 103299.

Benefits were paid by the Board to the surviving spouse and children of the deceased worker.

In this application, it appears that all parties agree that the deceased was both a worker within the meaning of the *Act* and that the deceased was acting in the course of his employment at the time of his death.

SUBMISSIONS:

The application by Sangati America was filed with the Tribunal on April 12, 2006. It was completed by the filing of Sangati America's counsel's letter dated April 21, 2006.

Written submissions were received from all parties to the action: from Sangati America on June 7, 2006; from Sangati spa. on June 7, 2006, with an addendum on June 8, 2006; and from the Board on June 23, 2006.

The burden of the submissions from Sangati America and Sangati spa. is that, in the first instance, both of them were employers of Carl Hughes, either through a reasonable interpretation of relevant provisions of the *Act* or through the development of employment jurisprudence, such that they are protected under s. 28(1)(a) from the subrogated action

begun against them by the Board or, in the alternative, they were otherwise employers subject to Part I of the *Act* and, therefore, protected under the s. 28(1)(b) bar to the Board's action.

In the Board's submissions, it is argued that only Manpower and Dover may avail themselves of the protection against suit as employers. Sangati America and Sangati spa. were not, and could not be, protected employers even under the case law they cite in their submissions, nor could Carl Hughes, in the alternative, be viewed as their worker, nor were they otherwise employers subject to Part I.

ISSUES AND OUTCOME:

Were either or both of Sangati America or Sangati spa. employers of Carl Hughes at the time of his death, or otherwise covered employers within the meaning of the *Act* and, if so, is the action against them by the Board barred by s. 28(1) of the *Act*?

Neither Sangati America nor Sangati spa. were employers of Carl Hughes, or otherwise covered employers within the meaning of the *Act*, and so the action against them by the Board is not barred by s. 28 (1) of the *Act*.

ANALYSIS:

This decision is taken in accordance with the provisions of the *Act*.

At the time of his death, Carl Hughes was one of a number of workers, skilled and unskilled, employed to build a new flour milling facility at Halifax. The facility was being constructed for Dover Mills Limited ["Dover"], which had contracted with Sangati America to supply and install necessary machinery for the new facility.

Under the terms of its contract with Dover, Sangati America, a wholly-owned subsidiary of Sangati spa. of Italy, operating out of Kansas City, was to provide six skilled workers to assist in the installation of the new equipment. Dover was to provide six unskilled workers. Carl Hughes ["Hughes"] was one of the six unskilled workers provided to Sangati America.

Hughes was hired by Dover through a temporary-worker agency, Manpower Temporary Services ["Manpower"]. Under the terms of the contract between Dover and Sangati America, Dover was to supply "Local Labor (6) for 60 days". As it appears, Hughes was paid by Manpower, and Manpower was paid by Dover. Hughes was not paid either by Sangati America or Sangati spa., and there was no relationship between Sangati America or Sangati spa. and Manpower. Hughes was supervised, while at the Dover construction site, chiefly though not exclusively by Sangati America. This appears to have been the

practical limit of the relationship between Hughes and Sangati America.

At no time during the currency of the contract with Dover were either Sangati America or Sangati spa. assessed by the Board for coverage under the *Act*.

The *Act* defines “employer” in s. 1 as follows:

- (n)** “employer” means an employer within the scope of Part I and includes
- (l) every person having in the person’s service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry within the scope of Part I,
 - (ii) the principal, contractor and subcontractor referred to in Sections 140 and 141,
 - (iii) a receiver, liquidator, executor or administrator and any person appointed by a court , who has authority to carry on the business of an employer,

...

“Worker” is defined in s. 1(ae) as follows:

- (ae)** “worker” means a worker within the scope of Part I, and includes
- (l) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied....

...

Section 8 of the *Act* is addressed to temporary hires:

- 8** Where the employer of a worker temporarily lets or hires the services of the worker to another person,
- (a) the worker continues to be the worker of the employer for the purpose of this Part, while the worker is working for the other person,
 - (b) the person who lets or hires the services of the worker is the employer of the worker for the purposes of this Part, while the Worker is working for that person; and
 - (c) the employer of the worker and the person who lets or hires the

services of the worker are jointly and severally liable to fulfil any obligations of an employer as set out in this Part.

On a plain reading of s. 1(n), s. 1(ae) and s. 8 of the *Act*, it appears that both Manpower and Dover, each of whom were assessed employers under the *Act*, are identified as having obligations as employers under the *Act*. It appears that neither s. 1(n) nor s. 8 applies necessarily to either of Sangati America or Sangati spa.

The statutory bar relevant here is set out in s. 28(1) of the *Act*. Section 28(1) provides:

28(1) The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against

- (a) the worker's employer or that employer's servants or agents; and
- (b) any other employer subject to this Part, or any of that employer's servants or agents, as a result of any personal injury accident
- (c) in respect of which compensation is payable pursuant to this Part; or
- (d) arising out of and in the course of the worker's employment in an industry to which this Part applies.

What a worker surrenders through the operation of the *Act* is the right of action he or she would otherwise have against covered employers and employees in the event of a workplace accident; this right of action is surrendered (notionally) in exchange for the assured compensation provided under the *Act*.

As has been made clear by the Nova Scotia Court of Appeal in *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers Compensation Appeals Tribunal)*, 193 N.S.R. (2d) 385 (NSCA), ["*QE II Health Sciences Centre*"] an employer who pays an assessment to the Board receives benefits in return, one of them being an immunity from suit under s. 28(1). Both Manpower and Dover paid assessments to the Board to fund the compensation that the *Act* has substituted for the common law right of action and, in exchange, they have received the protection from suit that s. 28 (1) provides; they were covered employers under the provisions of the *Act*. Accordingly, Carl Hughes was protected under the terms of the *Act* in his relationship with both Manpower and Dover: s. 1 and s. 8 provided for that.

Were either of Sangati America and Sangati spa. employers of Carl Hughes?

Sangati America and Sangati spa. argue in their respective submissions that they provided supervision of Hughes' labours and were, at least in that respect, acting more as employers than as disinterested third parties. Counsel for Sangati America cites the case of *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, ["Pointe-Claire"] in support of Sangati America's position that, as a supervisor, it is otherwise able to enjoy the protection of an employer, as provided for in s. 28(1)(a).

The Supreme Court's decision in *Pointe-Claire* is discussed at pp. 5 - 6 of Sangati America's submissions. It appears to have been cited for the Court's acknowledgement of the increasingly common phenomenon of workers hired through temporary-employment agencies, and the effect on traditional notions of worker and employer rights and obligations arising from the presence of third parties. Section 8 of the *Act* appears to address this increasingly common, tripartite relationship.

In *Pointe-Claire*, the Court found that both the temporary agency and its client – the City of Pointe Claire – each possessed some of the traditional qualities of an employer with respect to the temporary worker hired by the city. Increasingly, the Court observed, employment relationships are more than bilateral ones – between obvious employers and workers – and the increasing complexity of the workplace requires a consideration of the actual relationship between a (potential) employer and the individual worker. Speaking of tripartite relationships, among a temporary employment agency, its client and the worker, the Court wrote at paragraph 26:

There is accordingly a certain splitting of the employer in a tripartite relationship. The agency may recruit, train, pay and discipline the employee, while the business supervises the work, imposes the employee's working conditions and bears the financial burden of the wages paid.

The foregoing passage was highlighted by Sangati America in its submissions at page 6 prior to asserting that Dover, in the instant case, assigned its supervisory role over Carl Hughes to Sangati America. While that may largely have been the case, that appears to be the extent of the relationship between Sangati America and Mr. Hughes: Sangati had no contractual relationship with Hughes directly, nor with Manpower. Its role was far more limited than that of either of the potential employers in *Pointe-Claire*. Further, Sangati America concedes at p. 7 of its submissions that, notwithstanding its supervisory role respecting Hughes, Dover maintained a project manager on the construction site. The precise interplay between and among Sangati America, the project manager, and Hughes is not described.

I do not accept Sangati America's conclusion at p. 7 of its submissions that "based on the reasoning in *Pointe-Claire*, *supra*, Manpower, Dover and Sangati America can be viewed

as the employers of Mr. Hughes.” Sangati America argues, in other words, that the sharing of even one employer trait – some degree of supervisory control – is sufficient to bring it within the definition of “employer”. That, in my opinion, is reading too much into *Pointe-Claire*, where the employee in question had a much fuller relationship with both the agency and the city than Mr. Hughes had with Sangati America.

As considered by counsel for the Board, Chief Justice Lamer made the following critical observation, quoted at pp. 11-12 of the Board’s submissions:

In applying collective labour relations legislation that is similar to that in Quebec, Canadian administrative agencies have also dealt with how to identify the real employer in a tripartite relationship. Most of the decisions of those agencies... have noted that the essential test for identifying an employer-employee relationship in a tripartite context is that of fundamental control over working conditions. The application of the fundamental control test leads to an analysis of which party has control over, *inter alia*, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business....

The Chief Justice went on to quote with approval from the decision of Justice Deschamps in the court below:

It seems improbable to me that a client using the services of a temporary personnel agency would end up being the employer of the agency’s employees simply because it controls the work that is to be done every day. This reduces the concept of “employer” to insignificance and ignores reality, which calls for a much more comprehensive view....

In this case, on the evidence before me, it is impossible for Sangati America and Sangati spa. to meet the “fundamental control” test outlined by the Supreme Court of Canada. Accordingly, neither was the employer of Carl Hughes.

Were either of Sangati America and Sangati spa. employers subject to Part I?

Section 28(1)(b) enlarges the protection from suit to include “any other employer subject to this Part...”, which, I find, does not include either Sangati America or Sangati spa.

Neither Sangati America nor Sangati spa. paid assessments to the Accident Fund for the benefit of Hughes, or any other worker as far as the evidence reveals, or for the protection they seek under s. 28 (1).

They were not, and could not be, assessed under the *Act* as it then read. Neither employer expected to be operating in the province for the requisite minimum six month period set out in s. 21 of the former *Act* [*Workers' Compensation Act*, R.S.N.S. c. 89], which was in effect at the relevant time: the contract with Dover required that their work be completed within 60 days.

Nevertheless, Sangati America relies on the decision of the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (SCC), ["Pasiechnyk"] to support its position that it was an employer as contemplated by s. 28(1)(b).

The decision involved an appeal by the Province of Saskatchewan from a Court of Appeal decision which allowed parties to claim against the province in an action arising out of a workplace accident. The Saskatchewan Workers' Compensation Board had previously found that the action was barred by the Saskatchewan Workers' Compensation Act.

In so finding, the Board asked four questions: (1) was the plaintiff a worker within the meaning of the Act; (2) if so, was the injury sustained in the course of the employment; (3) is the defendant an employer within the meaning of the Act; and (4) if so, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged. The Supreme Court of Canada, by majority, approved of these questions.

In reviewing these questions, counsel for Sangati America argued that the first two were answered affirmatively by all parties to this application. In considering the third question, counsel wrote:

It is submitted that Sangati America is an employer within the meaning of the Act by virtue of s. 2(n)(l) which states:

(n) "employer" means an employer within the scope of Part I and includes

(l) every person having in the person's service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry within the scope of Part I [...]

Sangati America, by virtue of its contract with Dover, was the employer of Mr. Hughes. They were in the business of manufacturing and installing mill equipment. This is an industry protected under Part I. As such, Sangati America, would be classified as an "employer" under the Act.

As determined earlier, and to the contrary, I have found that Sangati America was not an employer of Mr. Hughes; the relationship contemplated by s. 2(n)(l) is infinitely closer than the one actually obtaining between Sangati America and Hughes.

One should also consider the import of Sangati America's and Sangati spa.'s exclusion from the obligation to pay assessments to the Board. While the General Regulations passed pursuant to the *Act* would appear to include the "business of manufacturing and installing mill equipment", s. 21 of the former *Act* appears expressly to exclude businesses operating in the Province for a period of less than six months. Although the facts in *Pasiechnyk* are complicated by the Province of Saskatchewan's particular identity, the Court appeared to find the following significant:

The government, although not an "industry" in the ordinary sense of the term, must be understood to be an industry within the workers' compensation scheme. *It is expressly included as an "employer" under the Act and pays premiums into the fund.* [my emphasis]

If an employer's protection from suit is bestowed in exchange for a benefit to the worker (the compensation benefits funded by the assessment), in the instant case, what benefit would be provided to someone in Hughes' position where no assessments were paid? I find that they cannot have been both protected from suit under s. 28 (1) and not liable to be assessed by the Board under s. 21.

Mr. Justice Cromwell, writing for the court in *QE II Health Sciences Centre*, *supra*, wrote the following at paragraphs 40 and 41:

The bar to a civil action established by s. 28(1)(b) applies to workers' actions against employers who are "subject to this Part". However, whether an employer is "subject to this Part" is not defined by the legislation uniquely for the purposes of the bar of civil actions; it is defined in the same way for all of the many purposes under the Act for which this is a relevant consideration. The question of whether an employer is subject to the Act is fundamental, not only to the bar of actions, but to the operation of the Act in general. It is a determination made on the basis of a single set of provisions, that relates not only to whether a particular civil action is barred, but to a host of other determinations under the Act. [emphasis in original]

Whether or not an employer is subject to the Act relates to whether an employer has a duty to report an accident (s. 86(1) and s. 2(n) of the Act) as well as to the many other duties of such employers set out in ss. 88, 90 to 92, 97 and 98. It determines whether an employer is liable to contribute to the accident fund (s. 115) and has the duties associated therewith (see, e.g. s. 129).

It would appear that neither Sangati America and Sangati spa. claim to have been subject to any of the duties outlined by Cromwell, J.A. in the paragraph above, specifically including the reporting of an accident and the paying of assessments. To re-iterate, I find that an employer cannot be “subject to this Part” with respect only to the bar of actions against an employer by an employee, and not subject to any other section of the *Act*.

In considering the whole of the evidence before me, including the written submission of counsel for Sangati America, Sangati spa. and the Board, I find that the action against Sangati America and Sangati spa. is not barred by s. 28(1) of the *Act*.

CONCLUSION:

The Board’s action against Sangati America and Sangati spa. is not barred by s. 28(1) of the *Act*.

DATED AT HALIFAX, NOVA SCOTIA, THIS 23rd DAY OF AUGUST, 2006.

K. Andrew MacNeil
Appeal Commissioner