

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **Town of Lunenburg (Employer)**

Participants entitled to respond to the appeal: **[*] (Worker) and
Workers' Compensation Board of Nova Scotia (Board)**

APPEAL DECISION

Representatives: **Brad Proctor for the Employer
The Worker presented her own case**

Form of Appeal: **Written Submissions**

WCB Claim No.(s): **[*]**

Date of Decision: **July 7, 2008**

Decision: **The appeal of the November 29, 2007 Workers' Compensation Board Hearing Officer decision is partly denied and part is referred back to the Hearing Officer for reconsideration, according to the reasons of Appeal Commissioner David Pearson.**

WCAT # 2007-1020-AD-RTH**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

The Worker operated a business that provided contract cleaning and personal care services. In August, 2007, the Worker filed a Report of Accident with the Board, indicating that she had experienced right shoulder problems, which she attributed to the performance of cleaning duties over a period of time.

The Worker had purchased special protection coverage prior to 2007, but her coverage was not in effect at the time she filed the Report of Accident. The Worker had a cleaning contract with the appellant town, which had been renewed on an annual basis since 2005. The town stipulated as part of the cleaning contract that the Worker purchase her own coverage from the Board.

After the Worker filed her Report of Accident, the Board noted that her special protection coverage had lapsed, but then considered the appellant town to be her Employer for purposes of the injury and any assessments related to the injury.

The town appealed the Board's decision finding the town to be the Employer. In a November 29, 2007 decision, the Hearing Officer upheld the original decision. The Employer appealed the Hearing Officer's decision to the Tribunal.

The Tribunal appeal proceeded by way of written submissions. Counsel for the Employer filed written submissions on March 26, 2007. I wrote the Board on June 17, 2008 with some questions. The Board responded to my questions on June 25, 2008. I forwarded the Board's response to the Worker and Employer for comment, but none was received.

ISSUE AND OUTCOME:

Was the Appellant properly determined to be the assessable Employer for purposes of the Worker's July 1, 2007 compensable injury?

Yes, the Employer town was properly determined by the Board to be the accident Employer. There is insufficient evidence in order to determine whether the claim costs associated with the Worker's injury should be apportioned between other Employers. The apportionment issue is referred back to the Hearing Officer for reconsideration, pursuant to s. 251 of the *Act*.

ANALYSIS:

The *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended (the "*Act*") applies to this appeal.

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The Appellant seeks a finding that it is not the accident Employer, and thus, is not responsible for the claim costs of the Worker's injury. The Employer said that when it contracted with the Worker for cleaning services, the Employer stipulated that the contractor was responsible for securing her own workers' compensation coverage. As the contractor failed to obtain the coverage, the town argued that it should not be held responsible as the assessed Employer.

Under the *Act*, every employer that operates in a mandatory industry, and employs three or more workers, must register with the Board for coverage.

Under s. 4 of the *Act*, employers not otherwise covered may apply to the Board for coverage. Independent contractors or other employers with less than three workers might apply for coverage under this section.

If an application is made for coverage under s. 4, according to Policy 9.1.2, the resulting special protection coverage is effective the date the application is made and that the full assessment amount is paid to the Board. Coverage ceases automatically, unless it is renewed annually.

According to the Board, the Worker's business is in a mandatory industry, but as she has less than three workers, coverage was not automatically required.

The Worker, however, chose to obtain coverage by purchasing special protection coverage from the Board. The Worker did not initially obtain coverage from the Board for the 2007 year.

The Worker indicated in her Report of Accident to the Board that she was a contract cleaner and personal care worker, and that she had been an independent contract cleaner since 2005. She listed herself as both the Worker and Employer.

The effect of purchasing special protection coverage is precisely as the Worker indicated, according to ss. 4(3)(a) and (b) of the *Act*. The independent contractor is "a worker in so far as this Part applies to workers employed by an employer" and "an employer, in so far as this Part applies to employers of a worker."

The Board determined that the town was the Worker's Employer, and thus, held it responsible for the claim costs associated with the injury.

The Worker subsequently reinstated her special protection coverage, effective October 1, 2007. The Board confirmed this in June 25, 2008 submissions. The Worker was unable to retroactively obtain coverage for the period from January 1, 2007 to September 30, 2007.

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The Board stated in its June 25, 2008 submissions that the Worker did not have special protection coverage at the date of her injury, and thus, it could not provide coverage for that injury. Further, the Board indicated that the subsequent reinstatement did not have the effect of providing coverage for the injury which occurred when no coverage was in place.

Given the language of s. 4 and Policy 9.1.2, I agree that the Worker's special protection coverage was ineffective at covering her injury in July, 2007.

As a result of my finding that special protection coverage was not effective to cover the Worker's injury, there are only two possible outcomes. Either the Worker's injury was non-compensable, as no coverage existed, or the Worker had coverage from some other source, i.e., by virtue of her relationship with the Appellant town.

Policy 9.1.3 addresses how coverage will be effected for contractors or sub-contractors that have less than three workers. This is the provision through which the Board considered the Appellant to be the Employer of record for the Worker's injury. The Policy says that a covered Employer who hires a contractor is considered a "principal contractor". It also says that if the principal contractor has more than three workers and operates in a mandatory industry, and the contractor hired has less than three workers, that the contractor will be considered workers of the principal.

The authority for passing Policy 9.1.3 appears to have come from, s. 140 of the *Act*, which states,

140 (1) Where a contractor undertakes any work for a principal in an industry to which this Part applies, both the contractor and the principal are liable for any assessment the Board may levy in respect of any work performed for the principal by the contractor.

(2) The Board may collect any amount required to be paid pursuant to subsection (1) from the principal or the contractor, or partly from one and partly from the other.

(3) Where a principal has paid an assessment levied pursuant to subsection (1), the principal may recover the amount of the assessment from the contractor. 1994-95, c. 10, s. 140.

The Worker sustained an injury at work. Generally speaking, such injuries should be covered by the Worker's Compensation regime, if possible, as that is central to its

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mandate. The Worker did not have her own coverage, but by virtue of s. 140 and Policy 9.1.3, the Worker could also be a deemed worker of the principal, the Appellant town. I note that principals are able to recover assessments paid for contractors, according to s. 140(3).

Between the two options, only one of the possibilities furthered the aims of the *Act*. That possibility was to deem the contractor a worker of the principal, and thus, bring her within the scope of Part 1 of the *Act*. This ensured she had coverage for her workplace injury, and allowed the principal an opportunity to recover assessments paid from the contractor. The alternative was to provide no coverage for an otherwise acceptable workplace injury. I prefer the former option.

I find the Board was within its authority to assess the Appellant town for the Worker's July, 2007 injury.

Two alternative arguments raised by the town were: (1) that the town be assessed for a temporary flare-up of her tendinitis, and that following the resolution of the flare-up, the town's account be closed, and any further costs be assessed directly to the Worker, as her account was now in good standing. The town indicated the costs should be shifted to the Worker as of the date she restored her own coverage, i.e., October 1, 2007; and (2) the town should not be held solely responsible for the costs of the injury because the Worker had cleaning contracts with other organizations, and she was also employed as a personal care worker.

The first argument, limiting the town's responsibility to the period of flare-up, is denied. The injury took place at a time when the Worker did not have her own coverage, and the injury became compensable only because of her relationship with the town, her principal. There is insufficient evidence to make a finding either that the Worker had a pre-existing shoulder problem, or that it was flared up with her work with the town.

With respect to the apportionment request, the original decision-maker did not address these arguments, as they were only made in the appeal to the Hearing Officer. The Hearing Officer said that there was no authority for apportioning medical aid claim costs between several different Employers.

I disagree with the Hearing Officer. Policy 9.6.1 states,

Any apportionment of claim costs that the Board undertakes will only apply to costs associated with injuries occurring on or after February 1, 1996 - the date of proclamation of the Workers' Compensation Act (Chapter 10, Acts of 1994-95).

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The Policy cites sections 18, 44, 45, 46, and 47 of the *Act* as references. Section 18 pertains to the apportionment of claim costs in cases of occupational diseases. Sections 44-46 provide assistance to the Board in calculating earnings in particular circumstances where the stated earnings are not representative. One of those circumstances is where the Worker has earnings from concurrent employment. Section 47 authorizes the Board to allocate such additional cost or portion of costs to any fund or funds.

One practical effect of this Policy is that it authorizes the Board to allocate the costs of an injury amongst more than one Employer, provided that the injury was caused by work with more than one employer. The Worker in the present case was thought to have rotator cuff tendinitis, an overuse injury. It is now thought she has a rotator cuff tear, and is awaiting a surgical appointment. It is conceivable that her duties at more than one location may have been operative in the development of her condition. There is, however, insufficient evidence concerning those other jobs to make an informed decision.

The Board should obtain the information required of the Worker's concurrent employment, and make a new decision about whether the claim costs attributed to the injury should be apportioned amongst more than one employer.

As the Board has not undertaken a thorough analysis of the apportionment issue, and additional information is required in order to perform such analysis, I find it appropriate to refer this aspect of the appeal back to the Hearing Officer for reconsideration, pursuant to s. 251 of the *Act*.

CONCLUSION:

The Employer town was properly determined by the Board to be the accident Employer. There is insufficient evidence in order to determine whether the claim costs associated with the Worker's injury should be apportioned. The apportionment issue is referred back to the Hearing Officer for reconsideration, pursuant to s. 251 of the *Act*.

DATED AT HALIFAX, NOVA SCOTIA, this 7TH of JULY, 2008.

David Pearson
Appeal Commissioner