

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **Roderick Densmore Contracting Limited (Employer)**

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

APPEAL DECISION

Representatives: Larry Maloney for the Worker
Joseph MacDonell for the Employer

Form of Appeal: Oral Hearing, May 27, 2008, at Truro, NS

WCB Claim No.(s): [*]

Date of Decision: July 25, 2008

Decision: The appeal of the July 3, 2007 Board Hearing Officer decision is denied, according to the reasons of Chief Appeal Commissioner Louanne Labelle.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Employer*, the Appellant in this appeal, is a corporate entity carrying on a contracting business. The Employer was contracted by a homeowner in relation to the construction of a new home. On February 8, 2007, while working as a roofer, the Worker fell from the roof of the home under construction and suffered serious injuries to his heels.

The Worker's claim was accepted by the Board as compensable because the Board determined that the Worker had sustained a personal injury by accident arising out of and in the course of his employment.

The Employer has argued from the outset that the Worker was not one of its employees at the time of the accident and therefore, the Worker should not be entitled to compensation benefits under the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended ["Act"]. Furthermore, the Employer maintains that it was not the employer for purposes of the *Act*.

In a decision dated April 17, 2007, a Board Case Manager determined that the Employer and the Worker had entered into a Principal/Sub-contractor relationship which was in effect at the time of the accident on February 8, 2007. Therefore, she found that the Worker was a "worker" under the *Act*.

On appeal the decision was confirmed by a Hearing Officer in a decision dated July 3, 2007.

The Employer now appeals from the July 3, 2007 Hearing Officer decision seeking a finding that the Worker was not a "worker" within the definition of that term in the *Act*.

The appeal proceeded by way of oral hearing. The Employer was represented by Counsel. The corporate Employer's principal director, identified by the initials R.D., testified on behalf of the Employer. Documentation was also filed in support of the appeal at the hearing including a series of invoices marked as Exhibit #1 and other documentation (already on file) marked as Exhibit #2.

The Worker did not appear at the hearing. He was represented by a member of the Pictou County Injured Workers' Association who chose to proceed with the hearing, notwithstanding the Worker's absence.

I have also considered the written submissions that the Employer provided to the Tribunal with his Notice of Appeal.

*This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

The Board did not participate in the appeal.

I have also considered pursuant to s.246 of the *Act*, the documentation in the Worker's claim file as well as the decision under appeal.

ISSUE AND OUTCOME:

Is the Worker a "worker" as defined in the *Act*, thereby entitling him to benefits under the *Act* as a result of a workplace accident on February 8, 2007?

Yes. The Worker is a "worker" as defined in the *Act* and the Employer, the Appellant in this matter, is the employer for purposes of the *Act*.

ANALYSIS:

The Employer appeals from the Board's decision to recognize a claim made by the Worker as a result of a workplace incident which occurred on February 8, 2007.

The Board found, essentially, that the Employer had entered into a contract with the Worker for the roofing of a home under construction. The Employer is a covered employer under the *Act*. Therefore, the Worker was a "worker" as defined under s. 2(ae) of the *Act* and his accident was compensable. The Worker did not have coverage under the *Act*. He was operating a roofing business under an unregistered business name.

The Employer argued that the homeowner hired the roofer and that the Worker was never an employee nor a sub-contractor of the Employer.

Under the *Act*, if the Worker entered into or worked under a contract of service written or oral, express or implied with the Employer, then he is a "worker" under the *Act* and the Employer is considered the responsible employer.

R.D. testified as to the events leading up to the hiring of the Worker as a roofer.

The Employer had been engaged as a contractor in regards to a new home construction. His primary contract was for the provision of ICF walls for the home. The contract price included also the foundation, footings and installing the walls up to the roof. As the construction progressed the Employer was asked to complete other work including, for example, flooring and framing work. All extra work was billed on an hourly basis over and above the contract price.

The Employer engaged either his own workers or sub-contractors to fulfill the contract. He was a covered employer under the *Act* and his sub-contractors had their own coverage. Although it appears from R.D.'s testimony that he originally believed that the Employer

would be the general contractor for the project, the homeowner in fact bought materials and engaged his own workers for certain aspects of the work if he did not accept the cost quoted for the extra work. For example, certain plumbing and electrical work was carried out by workers or contractors hired directly by the homeowner without R.D.'s knowledge or approval. R.D. therefore stated that the homeowner acted as the general contractor for the project. The Employer had been asked to price everything including plumbing and electrical.

Invoices #168 and #169 (Exhibit 1) dated January 16, 2007 show the breakdown of costs for the work completed at that time. The homeowner was charged, for example, an extra \$1660.00 for 54 hours for a sub-contractor to install framing and flooring.

The Employer was asked to put up and close in the roof trusses. At some point, the homeowner suggested getting the roof done at the same time as the work being completed by the Employer. Discussions between the homeowner and the Employer culminated in the hiring of a roofer who is the Worker in this appeal.

R.D. testified that he contacted the Worker to obtain a quote for the work. He had obtained his name from one of his employees to whom the Worker had given a business card. He eventually agreed on a price for the work. The Worker, R.D. and the homeowner met at the job site. The Employer explained to the Worker what work needed to be done. The homeowner approved the hiring of the Worker at the price quoted. At this point, there is some confusion as to who was hiring the Worker. R.D. stated that he asked the homeowner if he wanted to hire the Worker and the homeowner agreed. This could have been interpreted by the other parties, that is the Worker and the homeowner, as simply the homeowner giving his approval for the hiring of this contractor. This appears to have been the case.

As mentioned, for the most part, the Employer hired the workers necessary to complete extra work after obtaining approval from the homeowner but on occasion the homeowner acted on his own without any input from R.D. In these cases, it is clear who the employer was.

The circumstances of the hiring of the Worker as a roofer fall somewhere in between these two scenarios.

Neither the Worker nor the homeowner testified at the hearing. To the extent that there is any conflict between R.D.'s testimony and statements in the file, I accept R.D.'s testimony. However, no matter what R.D. says may have been his intention when negotiating the roofing contract, I conclude from all of the evidence that there was at least an oral and implied contract for roofing services between the Worker and the Employer.

There is no doubt that the homeowner approved the hiring of the roofer and was eventually

WCAT # 2007-577-AD

responsible for payment of the costs. The Employer, however, contacted the roofer, negotiated the price, showed him the work to be completed and was approached by the Worker for part payment for services rendered. The Employer gave the Worker a cheque for \$1000.00 for part payment on the contract. The Worker invoiced the Employer.

Even though I accept that the cheque may have been given to the Worker because the homeowner did not have his cheque book at the time, this action clearly shows that the Employer was a party to the contractual arrangement. The Worker had agreed to a price "per square" therefore neither the Employer nor the homeowner was keeping track of hours worked or supervising the work.

The cheque for \$1000.00 was simply referred to as "for (L.B. (homeowner) shingling". It was made out in the Worker's business name, however, the Worker added his first name to the cheque as he did not have a bank account in his business name. In fact, the Worker had just started his roofing business.

I have given more weight to the documentation and actions prior to February 8, 2007, the date of the Worker's fall from the roof. In that regard, it is clear that the Worker believed he had been hired by the Employer. The invoice dated February 5, 2007 for the \$1000.00 was made out to the Employer. He contacted the Employer for payment. I acknowledge that R.D. indicated on the invoice that the invoice was "Paid Feb 5/07 for (homeowner) chek # 0324".

After the Worker's fall, a cheque from the homeowner in the amount of \$306.30 for outstanding work above the \$1000.00 was delivered by R.D. to the Worker. The invoice for the work does not indicate to whom the invoice was directed. Two invoices (#172 and #174) prepared by the Employer on March 3, 2007, show in one case the Worker as a sub-contractor and in the other the Worker having being paid on behalf of the homeowner.

The Worker benefits from a reduced burden of proof under s. 187 of the *Act*. On the whole of the evidence I find that it is just as likely as not that a contract existed between the Worker and the Employer.

I cannot find that the Employer merely acted as a friendly conduit for the homeowner as argued by its counsel at the hearing. The Employer obtained the services of a roofer to do certain work at a certain price in keeping with his overall contract of obtaining quotes for everything to do with the home construction. He paid directly for part of the services rendered.

Based upon those findings of fact, I find that the Worker is a "worker" as defined in s.2(ae) of the *Act*.

In this particular case, the Worker did not have workers' compensation coverage for

himself or his business. The Worker was a one man operation, operating under a business name. It appears from the evidence that he had just started his roofing business. An employer under s.2(n) of the *Act*, means an employer within the scope of Part 1 of the *Act* and includes every person having in the person's service under a contract of hiring or apprenticeship, written or oral, expressed or implied, any person engaged in any work in or about an industry within the scope of Part 1, and also includes the principal, contractor, and sub-contractor referred to in ss.140 and 141.

In this case, the roofer was in a sub-contractor relationship with the Employer. The Worker meets the definition of a “worker” and the Employer meets the definition of an “employer” under the *Act*.

I therefore find that the Worker is a “worker” as defined by the *Act* and is entitled to be considered for compensation benefits. I make absolutely no finding with regards to the Worker’s entitlement to any specific benefits.

CONCLUSION:

The appeal is denied. The Worker is a “worker” defined under the *Act* and is entitled to be considered for benefits.

DATED AT HALIFAX, NOVA SCOTIA, THIS 25th day of July, 2008.

Louanne Labelle
Chief Appeal Commissioner