

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: [*] (Firm)

Participant entitled to
respond to the appeal:

**The Workers' Compensation Board of Nova Scotia
(Board)**

APPEAL DECISION

Representative: [HGJ] for the Firm

Form of Appeal: Oral hearing held at Port Hawkesbury on August 22, 2008

Firm & Division No.: [*]

Date of Decision: October 20, 2008

Decision: The appeal of the February 1, 2008 Workers' Compensation Board Hearing Officer decision is denied, according to the reasons of K. Andrew MacNeil, Presiding Appeal Commissioner.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This decision addresses an appeal by a Firm* from a Board hearing officer decision dated February 1, 2008. In his decision, the hearing officer determined that the Firm is an Employer pursuant to the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended ["Act"], and thereby is subject to registration with, and annual assessment by, the Board.

The decision turned on whether the Firm employed three or more people at the same time. The Board found that the Firm did, and the Firm argued that it did not.

The Firm filed a Notice of Appeal from the Board decision with this Tribunal on February 29, 2008. The appeal was set down to proceed by way of an oral hearing, and the hearing was held at Port Hawkesbury on August 22, 2008.

The only statutory participant to appear was the spouse of the business operator. He gave testimony under oath. No additional documentary evidence was filed.

ISSUE:

Is the Firm an Employer, subject to assessment, having three or more workers employed at the same time?

Yes. For the period in question, the year 2006 and the months January through November, 2007, the Firm employed three or more workers at the same time, and is subject to assessment as a consequence.

EVIDENCE and SUBMISSIONS:

The Board assessment file is before me, as well as the sworn testimony of the Firm's owner, "HGJ".

I find HGJ entirely credible as a witness. He freely confirmed the facts as related in the hearing officer decision under appeal, offered testimony upon the economic margins he faced as a business owner, and described the history of the Firm. He testified that he was the owner of the Firm, and that the Firm was established to be operated by his wife.

The Firm operates a small convenience store. Its opening hours have fluctuated since its opening and, for the period in question (2006, January through November, 2007), was

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

open for business seven days per week.

HGJ testified that for the period in question, the Firm had employed at least three full-time workers who, while employed full-time, had their work arranged in shifts, so that there were never more than two workers on the Firm's premises at any one time. His wife, who operated the business, also worked although, given the nature of her responsibilities, she was often away from the premises during any shift.

HGJ argued that the Board has mis-interpreted its own General Regulations, in particular, Section 15 of the Workers' Compensation General Regulations, which reads as follows:

Subject to Sections 16 to 18, every business or undertaking is excluded from the application of the Act until at least three workers are at the same time employed in the business or undertaking.

HGJ argued, in effect, that the ordinary interpretation of Section 15 would require, in the case of an employer operating its business by shift work, that an employer would not be subject to the *Act* unless and until he employed at least three workers per shift.

DECISION AND REASONS:

It is implicitly acknowledged by HGJ that if a firm did not operate its business by shift work, and employed three or more workers "at the same time", that the applicability of the *Act* to such a firm would not be open to question, provided that the business otherwise fell into the range of covered or included businesses.

Is there an exception for "shift workers" in the Regulation, or does it necessarily mean what HGJ urges?

There is obviously no exception identified in Section 15, reproduced above. Is there some other indication of the meaning to be attached to "at the same time"?

HGJ testified that the three workers identified in the hearing officer decision (not including his wife) were hired on a full-time basis for an indefinite period. That is, they were not hired for a fixed term; they were not hired with a date fixed for the termination of their employment.

If each of these workers had been asked in 2006 if they were then employed, would any have answered that they were not? Would only those who worked together the same hours each day have answered that they were then employed? I think the obvious answer is that each of the three full-time workers would have replied that they were employed (present tense) whether or not each of them worked the same shift.

In my judgement, whether one is employed does not depend on whether one works shift work. Three workers, each of whom may work a different shift over a 24-hour cycle, or varying shifts in a seven-day cycle, would each be employed by the same employer notwithstanding that they worked separate shifts. No one of them could reasonably be described as “unemployed” when she was not in the course of a shift.

As general rules of interpretation in workers’ compensation law, words are to be given liberal, rather than narrow interpretation and, generally, should be given their ordinary meaning.

I find, given the foregoing analysis, that to accept the interpretation of Section 15 urged by HGJ would be to give the phrase “at the same time” a narrow and unusual meaning. Except for variations due to illness or vacation, the Firm had the same three or more workers listed on its periodic payroll in 2006, week-in, week-out.

The objection by HGJ that mandatory coverage of small businesses like his impose crippling costs, and that such coverage was not intended for such businesses, are not arguments that the Board has mis-interpreted its Regulations, but are, rather, arguments that the Regulations need to be changed. The Tribunal cannot change order-in-council regulations.

To conclude, the phrase “at the same time” found in Section 15 of the Workers’ Compensation General Regulations does not mean that a Firm becomes subject to coverage only when it employs three or more workers with the same hours of work. It is correctly interpreted to include those businesses who employ three or more workers who may work different shifts within a 24-hour cycle but who are, nevertheless, regularly employed within the same pay period.

The appeal is denied.

CONCLUSION:

The appeal is denied.

The Firm is an Employer subject to assessment under the *Act*, having had three or more persons on its payroll at the same time for the period in question.

DATED AT HALIFAX, NOVA SCOTIA, THIS 20th DAY OF OCTOBER, 2008.

K. Andrew MacNeil
Appeal Commissioner