

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Applicant: [CR]

Respondents: [SS]

and the Workers' Compensation Board [Board]

SECTION 29 APPLICATION DECISION

Representatives: Jeff Aucoin, McInnes Cooper, for the Applicant
Barry J. Mason, Pressé Mason, for the Respondent SS
Stephen Lawlor, for the Board

Action: SS v. CR
S.H. No. 221634

Date of Decision: October 21, 2008

Decision: The action by the Respondent against the Applicant is not barred by operation of s. 28 of the *Act*, according to the reasons of Appeal Commissioners Louanne Labelle, K. Andrew MacNeil and Glen Johnson.

BACKGROUND TO THE APPLICATION:

This application was made to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on March 11, 2008 by CR under s. 29 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended [the "Act"]. CR is the defendant in an action brought by SS in the Supreme Court of Nova Scotia. CR is seeking a ruling that the action taken by SS is barred by operation of s. 28 of the *Act*.

CR is the owner and operator of a fishing vessel named [the "Vessel"]. He owns and fishes several licences including crab, lobster and swordfish licences. SS was employed by CR for many years as a deck hand on the [Vessel].

On May 14, 2002, SS suffered personal injury by accident as a result of a fall while working on board the [Vessel] SS commenced an action against CR in May 2004. He did not file a claim for workers' compensation benefits. CR did not have coverage under the *Act* at the time of the accident, nor has he applied for coverage or been assessed as an employer within the meaning of the *Act* since that time.

CR seeks a finding that he should have been registered as an employer under the *Act* and, therefore, SS's action is barred under s. 28 of the *Act*.

A panel of three appeal commissioners heard the application. The Tribunal received oral testimony from CR and his spouse D. CR at a hearing held on May 29, 2008. Counsel for CR, SS and the Board provided oral argument at that time. Counsel for CR filed pre-hearing submissions on May 1, 2008 which included, as Appendices A to E, employee financial records. Counsel for SS filed pre-hearing submissions on May 16, 2008 and submitted the discovery transcript from CR in the Supreme Court action. At the hearing, Counsel for CR submitted additional financial records for the year 2003 marked as Exhibit 1.

Post-hearing submissions were filed by all parties as a result of the Tribunal's requests for additional information from the Board and its assessment department. The Board's representative filed submissions on June 11, July 24 and August 19, 2008. A memorandum dated August 15, 2008 from the Board's assessment department was also submitted for consideration. Counsel for CR filed post-hearing submissions on June 19, 2008 and August 28, 2008. Counsel for SS also filed post-hearing submissions on June 19, 2008.

ISSUE AND OUTCOME:

Is CR an employer under Part 1 of the *Act*, thereby giving rise to the operation of a bar of SS's action against him, pursuant to s. 28 (1) of the *Act*?

No. For the reasons set out below, although CR is an employer engaged in an industry subject to mandatory coverage under the *Act*, he is excluded from the operation of the *Act*, as he did not have at least three workers employed at the same time in his fishing operations.

ANALYSIS:

Section 29 of the *Act* gives exclusive jurisdiction to the Tribunal to determine whether an action is barred by operation of the *Act*. SS has begun an action against CR who has in turn applied to the Tribunal for a determination whether the action is barred by operation of s. 28 of the *Act*.

Is CR an employer under Part 1 of the *Act*, thereby giving rise to the operation of a bar of the action against him pursuant to Section 28(1) of the *Act*?

Section 28 reads in part as follows:

- 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 dependent 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 by 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.

For the bar to action to operate, two conditions must be met: (i) the worker must first have suffered a compensable injury, that is, he must have suffered a personal injury by accident arising out of and in the course of his employment; and (ii) the employer in favour of which the bar operates must be a covered employer, that is, the employer must be subject to Part 1 of the *Act*.

There is no dispute in relation to the first condition. SS suffered personal injury by accident arising out of and in the course of his employment.

In regard to the second condition, the *Act* requires employers with three or more workers, operating in industries designated by regulation as subject to mandatory registration, to register for coverage under the *Act*.

The *Workers' Compensation General Regulations*, N.S. Reg. 22/96, as amended by N.S. Reg. 146/2002, provide at s.2 that employers and workers engaged in, about or in connection with the industries listed in Appendix A are subject to the operation of the *Act*. Appendix A includes the following industries: fishing, sealing, whaling and dredging.

Section 15 of the *Regulations* provides further that 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.

Under s. 2(n) of the *Act*, "employer" means an employer within the scope of Part 1 and includes:

(i) 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,...

(ix) any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry to which Part I applies and, with respect to the industry of fishing, the owner or operator of a boat or vessel rented, chartered or otherwise provided to a worker employed in the fishing industry and used in or in connection with an industry carried on by the employer to which Part I applies, and...

Applying these provisions to the facts of this case, we find that CR is an employer engaged in an industry subject to mandatory coverage. However, CR would be excluded from the operation of the *Act* if he did not have at least three workers employed at the same time in the business.

Did CR have at least three workers employed at the same time in his fishing business?

CR argued that he should have been registered with the Board for the period 2000 to 2004 as he had the number of workers required, if casual employees are included. The panel finds that the critical period for the purposes of this application is the period prior to and including May 14, 2002. If CR had three employees, he was obligated to report his operations to the Board. The Board would then continue to assess CR unless notified of a workforce reduction.

The panel has considered all of the evidence pertaining to CR's workforce and has concluded, for the reasons that follow, that CR did not have at least three workers employed at the same time in his fishing business.

Relevant to this discussion are the following provisions of the *Act* and *Regulations*:

From s. 2 of the *Act*:

(ae) "worker" means a worker within the scope of Part I, and includes

(i) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied,

(ii) an officer, director or manager of an employer, where the person is actively engaged in the business and is carried on the payroll of the business at the person's actual earnings,

- - -

(vi) in respect of the industry of fishing, a person who becomes a member of the crew of a vessel under any profit-sharing arrangement,

- - -

(ix) any other person who, pursuant to Part I, the regulations or an order of the Board, is deemed to be a worker, and

(x) in relation to compensation payable to a dependant, a dependant, but, subject to Section 4, does not include

(xi) a receiver, liquidator or other person appointed by a court or a judge with power to manage or carry on the business of an employer for winding-up or other purposes,

(xii) an employer, or

(xiii) a member of the family of an employer or a member of the family of a director of a corporation who

(A) is employed by the employer or the corporation, and

(B) lives with the employer or director as a member of the employer's or director's household.

From the *Regulations*:

15 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.

17 When counting the number of workers for purposes of Section 15, "worker" includes

(a) a person who would be a worker but for the operation of clause 2(ae)(xiii) of the Act; and

(b) an officer, director or manager of an employer, where the person is

(i) actively engaged in the business but not carried on the payroll of the business at the person's actual earnings, or

(ii) not actively engaged in the business but carried on the payroll of the business.

18 For greater certainty, the definition of "worker" in Section 17

(a) is made solely for purposes of counting the number of workers for purposes of Section 15;

(b) does not operate to make a person described in Section 17 a "worker" for purposes of the Act; and

(c) does not entitle any person described in Section 17 to compensation under the Act.

The panel will first address the status of specific individuals.

CR testified that, as the owner of the fishing licences, he is always a member of the crew on the *Miranda J.C.*. CR, however, is an employer and by the operation of s. 2 (ae)(xii) of the *Act* he is specifically excluded from the definition of worker under the *Act*.

Section 17 of the *Regulations* provides that, when counting the number of workers for purposes of the three worker rule, "worker" includes an officer, director or manager of an employer where the person is actively engaged in the business but not carried on the payroll of the business at the person's actual earnings. CR is actively engaged in his fishing business. He is not distinct from himself as employer, or as an officer, director or manager of an employer; there is no separate entity that is "the employer" for whom he could be "the manager".

Had the panel found that CR was a worker under the *Regulations* for purposes of the three worker rule, then he would have been an employer subject to the *Act*, as he testified that he required at least two other workers while fishing crab.

CR's spouse, D. CR, testified that she was involved in her husband's business to the extent that she attended at the wharf to process settlements. She has never been on the payroll. She is *prima facie* excluded from the definition of "worker" by s. 2 (ae)(xiii) of the

Act. Further, she is not included as a “worker” pursuant to the *Regulations*. In particular, the panel is unable to conclude on the evidence before us that D. CR is an officer, director or manager for her husband and, therefore, she is not included for purposes of the worker count under s. 17 (b) of the *Regulations*. Nor is she included under s. 17(a) as she does not otherwise qualify as a “worker”.

CR’s son, J. CR, has been, on occasion, actively engaged in the fishing business and has been included on his father’s payroll. He is excluded from the definition of “worker” under s. 2 (ae) (xiii) of the *Act*. However, he is a “worker” for purposes of the three worker rule by the operation of s. 17 (a) of the *Regulations*.

In light of the above, did CR have at least three workers **employed at the same time** in his fishing business?

CR testified as to his fishing operations. He owns several fishing licences which he fishes at different periods of the year depending on the seasons and the economics of the particular fishery. As mentioned, he required two other deck hands for the crab fishery but only one other for the lobster fishery. He will hire crew as required and often dependant on availability. SS was a regular employee since 1998. CR also hired replacements as and when needed.

On May 14, 2002, CR was fishing lobster and SS was the only deck hand employed at that time.

CR referred to financial records produced in evidence showing all his employees and their earnings for the years 2000 to 2004. In the year 2000, CR employed 6 different individuals as deck hands. In the year 2001, he employed 5 individuals including his son. In 2002, he employed 4 individuals. Apart from deck hands required for fishing, CR might employ a worker to help with the gear and banding at lobster time. He paid a bookkeeper to prepare financial statements.

An examination of CR’s financial records shows that he never had more than 2 workers (excluding himself) on his fishing vessel for any fishing trip except, possibly, for one day, July 20, 2001. However, even that fact is not certain as the records show workers employed for trips on July 19/20 and July 20/21. It is possible that these were merged trips and only two deck hands were on the vessel with CR at any given time for these trips. Workers whose employment is of a casual nature, such as short-term employment for intermittent periods, are not excluded from classes of workers covered by the *Act* [s. 9 of the *Regulations*].

CR argues that, although he never had 3 full time workers, he had at least 3 workers if regular part time or casual employees are included. He therefore argues that he had at least 3 workers employed at the same time for the years 2000 to 2004.

The panel disagrees.

The Manager of the Board's assessment services indicated in his August 15, 2008 memorandum that, in practice, the assessment department views "at the same time" to be on a regular and consistent basis in operating a business. The panel accepts this interpretation of the meaning of "employed at the same time" in s. 15 of the *Regulations*.

The Manager suggests, that in the case of a fishing account, if three or more workers are employed on the vessel at the time it is fishing then the threshold would be met. The panel agrees with this statement. It is also possible for workers to be employed on a regular and consistent basis in other capacities in relation to the fishing operations.

A review of the financial records shows that, in 2002, SS was the only employee hired by CR prior to May 14th.

In 2001, CR employed D.P. during the months of July to November beginning on July 19th. SS was employed from June through to December. G.C. worked in June and July but not after July 11. T.M. worked only 25 hours for a trip on July 15 & 16. CR's son worked shifts on July 20/21, August 4/6 and 21 hours in early December.

Therefore D.P. and SS were employed on a regular intermittent basis during 2001. However, the same can not be said of T.M. and J. CR, who only worked on one and 3 occasions respectively. G.C. worked early in the season but obviously was replaced and never worked again that year. As mentioned, it is possible that three people worked on July 20th but this seems to be an anomaly.

The panel finds that CR did not have three workers employed at the same time during 2001. The same analysis applies to the year 2000. During that year, SS was employed on a regular intermittent basis from January to December; C.S. worked from May 14 to July 22nd; G.C. worked from July 25 to October 6th; S.S. and R.P. only worked during one trip for 30 and 48 hours respectively; and P.S. only worked for 3 weeks in December.

We concur with the assessment department's interpretation of the evidence in this case, that is, while CR regularly issued 3 or more T4s in a year, these were for workers who were working at various times throughout the year and not at the same time within the year. CR did not have three workers fishing on the vessel at the same time [except possibly for one day]. Considering his fishing operations as a whole, he did not have three workers employed on a regular and consistent basis.

We agree with CR's submission that the purpose of the workers' compensation scheme is to provide protection for both workers and employers. However, the *Act* and *Regulations* provide for inclusions and exclusions from coverage and, in interpreting these provisions, we can not ignore the unique nature of the fishing industry. Different deck hands may be engaged for purposes of specific fisheries and for different seasons. It is evident that CR

engaged no more than 2 deck hands for any given trip. He may have engaged a different deck hand if someone was unavailable or if someone had to be replaced. An occasional replacement can not be considered a casual employee. A worker employed as a deck hand does not necessarily remain a casual employee once a fishing trip or season is finished.

The panel is not suggesting that an employer, in the normal course, is required to have 3 workers working at the same moment in order to meet the threshold. Workers may work on different shifts, for example, but be employed in an employer's business at the same time. This is not analogous to the situation in the fishery.

In summary, although CR is an employer engaged in an industry subject to mandatory coverage under the *Act*, he is excluded from the operation of the *Act*, as he did not have at least three workers employed at the same time in his fishing operations for the relevant periods. CR is not a covered employer, that is, he is not subject to Part 1 of the *Act*. The action taken by SS against CR is not barred by s. 28 of the *Act*.

In view of the panel's findings, we need not address whether the fact that CR was not registered at the time of the accident affects the application of the statutory bar. Furthermore, we did not address SS's argument that the bar can not apply because SS would be estopped from claiming benefits under the *Act* by operation of s. 83 of the *Act*.

CONCLUSION:

The action by SS against CR is not barred by operation of s. 28 of the *Act*, for the reasons set out above.

DATED AT HALIFAX, NOVA SCOTIA, this 21st day of October, 2008.

Louanne Labelle
Chief Appeal Commissioner

K. Andrew MacNeil
Appeal Commissioner

Glen Johnson
Appeal Commissioner