



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 565/09

BEFORE:

A. T. Patterson: Vice-Chair

HEARING:

March 18, 2009 and May 4, 2009, at Toronto

Oral

Post-hearing activity completed on August 10, 2009

DATE OF DECISION:

December 8, 2009

NEUTRAL CITATION:

2009 ONWSIAT 2840

SECTION 31 APPLICATIONS BY INSURANCE COMPANIES FOR A DECLARATION AND FOR AN ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

**For the applicant,
Insurance Corporation
of British Columbia :**

S. Smith, Lawyer

**For the applicant,
ING Insurance Company of Canada:**

T. Zigomanis, Lawyer

**For the respondent,
Estate of Gary Kregar:**

P. Diavolitsis and J. Simmons, Lawyers

Interested party:

Bonnie Begin, self-represented

**Workplace Safety and Insurance
Appeals Tribunal**

505 University Avenue 7th Floor
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

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REASONS

(i) Introduction to the appeal proceedings

[1] On August 25, 2005, a semi-trailer truck operated by Ms. Bonnie Begin overturned on a highway access ramp. Ms. Begin was injured as was her common-law spouse Mr. Gary Kregar.

[2] There are two Section 31 applications for my consideration in this matter. An insurance company, ING Insurance Company of Canada (ING), is seeking a declaration that Ms. Bonnie Begin is entitled to claim benefits under the insurance plan. Another insurance company, Insurance Corporation of British Columbia (ICBC) is seeking a declaration that the right of action of Mr. Gary Kregar has been taken away and that he is also entitled to claim benefits under the insurance plan.

[3] This matter was first heard on March 18, 2009. There was insufficient time to conclude the hearing on that date and the proceedings reconvened on May 4, 2009. At the conclusion of the reconvened hearing it was agreed that the parties would provide additional final submissions in writing. These were received and provided, along with correspondence compiled in Post-Hearing Addendum No. 1, for my consideration on August 10, 2009.

(ii) Issues

[4] The issues under appeal are as follows:

1. whether Ms. Bonnie Begin was a worker of a Schedule 1 employer at the time of the accident and, consequently, is entitled to benefits under the insurance plan pursuant to section 31(1)(c) of the *Workplace Safety and Insurance Act* (the Act), and if, Ms. Begin was a worker who was her employer,
2. whether Mr. Gary Kregar was a worker under the Act and, consequently has his right to commence an action taken away pursuant to section 31(1)(a) of the Act.

(iii) Background

[5] The following are the basic facts.

[6] On August 25, 2005, Bonnie Begin was operating a 2003 Peterbilt tractor pulling a trailer filled with peppers when the tractor and trailer overturned on a highway access ramp in Sudbury, Ontario. Mr. Gary Kregar was in the vehicle at the time of the accident. No other vehicle was involved in the accident. The load of peppers was being transported for a transport company, Red Hawk Express Transport (Red Hawk).

[7] The tractor was owned by Paccar Financial Services. It was insured by ICBC. The insurance documents list Red Hawk as the lessee and Paccar as the lessor.

[8] The trailer was owned by Red Hawk and insured by ICBC.

[9] Red Hawk was a transport company incorporated in British Columbia in 2004. It paid remittances to BC Worksafe. Red Hawk last filed an Annual Report on August 10, 2005 and was deemed dissolved for failure to file in 2008.

[10] Gary's Driving Services Inc. (GDSI) was a company incorporated in Ontario in 1998. It was not registered as a Schedule 1 employer. Gary Kregar was the sole director and shareholder of the corporation.

[11] GDSI and Red Hawk entered into an oral contract for the provision of long-haul trucking services, commencing on March 1, 2005. The parties agreed that Red Hawk would supply the cargo, pay the insurance on the tractor, and pay GDSI \$1.25 per mile.

[12] Ms. Begin and Mr. Kregar drove regularly between Leamington, Ontario and British Columbia, hauling goods for Red Hawk. They shared the task of driving the vehicle.

[13] During the period between March 1, 2005 and August 25, 2005 Ms. Begin and Mr. Kregar did not provide any driving services for any entity other than Red Hawk.

[14] Ms. Begin kept track of financial expenses for GDSI. These expenses records were later provided to their bookkeeper, Ms. Sue Pink. Ms. Begin was not a partner or shareholder in GDSI.

(iv) Law and Policy

[15] Since the motor vehicle accident occurred in 2005, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[16] Specifically, section 31 of the Act is most directly applicable in the circumstances.

31. (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

Same

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

[17] Board *Operational Policy Manual* (OPM) Document No. 12-02-01 entitled Workers and Independent Operators sets out in detail the criteria of the "organizational test" used to determine whether an individual is a "worker" or an "independent operator".

(v) Testimony

[18] Mr. Daniel Edwards, a chartered accountant specializing in forensic accounting, provided testimony at the hearing. Mr. Edwards was provided with the personal income tax returns of Ms. Begin and Mr. Kregar, the corporate tax returns and financial statements of GDSI, and information relating to trips performed for Red Hawk. Mr. Edwards prepared a report which was filed.

- [19] Mr. Edwards' observations can be summarized relatively briefly. First he noted that he had concerns with respect to the reliability of the records because, in his view the declared level of income by Ms. Begin and Mr. Kregar did not reflect the earnings of individuals working full-time over a period of many years. In other words, there appeared to be an unexplained short-fall of cash. Second, Mr. Edwards noted that there did not appear to be segregation between business and personal use of the bank account registered to GDSI.
- [20] Ms. Sue Pink, a bookkeeper, also testified. Ms. Pink completed the personal income tax returns for GDSI and for Bonnie Begin and Gary Kregar. She also performed some bookkeeping for GDSI, Ms. Begin and Mr. Kregar upon receipt of expense summary sheets prepared by Ms. Begin. Ms. Pink indicated that it was left to her discretion as to how to represent expenses, as either personal or for business, listed on the summary sheets. Ms. Pink indicated that she never performed any banking reconciliation for GDSI or Ms. Begin or Mr. Kregar.
- [21] Ms. Pink indicated that Ms. Begin was treated as an employee for corporate income tax filing purposes. Ms. Pink indicated that any profits at year-end were allocated to Mr. Kregar as income on the corporate return, and also reported as self-employment business income on Mr. Kregar's personal return.
- [22] Ms. Begin testified at the reconvened hearing on May 4, 2009. Ms. Begin testified that when she and Mr. Kregar entered into a professional relationship with Red Hawk she had filled out an application form with their names, who she worked for, her driver's license number and other information relating to her driving history. She indicated that she noted that she worked for GDSI on the form.
- [23] Ms. Begin confirmed that there was no written contractual agreement between GDSI, Gary Kregar or herself and Red Hawk. Ms. Begin's understanding of the oral agreement between Red Hawk and Gary Kregar or GDSI was that Red Hawk would pay \$1.25 per mile and that all expenses would be borne and paid out of the resultant sums by Gary Kregar or GDSI.
- [24] Ms. Begin testified that Red Hawk took care of arranging for loads, and provided dispatching services. Red Hawk informed her of which loads to take and where to take them. She stated that Red Hawk arranged for licensing and plating of the truck. Red Hawk held the Commercial Vehicle Operator's Registration (CVOR) license for the truck. Ms. Begin confirmed that because Red Hawk held the CVOR GDSI or Gary Kregar could not haul goods without doing so for Red Hawk. Red Hawk also arranged for its decals to be placed on the truck. It was Ms. Begin's understanding that while the Red Hawk colours were on the truck they could only drive for Red Hawk.
- [25] Ms. Begin indicated that she took care of the bills of lading which she would provide to Red Hawk after retaining a copy.
- [26] Red Hawk provided Ms. Begin and Mr. Kregar with a gas card. Ms. Begin indicated that this was common in the industry and that they chose to use it because they got a better price on fuel. They could have used their own credit card if they had wished to do so.

[27] Ms. Begin indicated that Red Hawk asked them to drive empty on occasion. GDSI would be paid the same rate on those trips. Ms. Begin clarified that those trips would be of relatively short distances. If they were going to be late, Ms. Begin would contact the customer and inform them of the fact. She would also inform Red Hawk. If the tractor broke down Ms. Begin indicated that Red Hawk would arrange for another truck to bring the trailer to the customer. It was unclear from her testimony as to whether this ever actually occurred while they carried loads for Red Hawk.

[28] Ms. Begin testified that they could refuse to take a load. Ms. Begin was referred to her statements recorded on the transcript of her examination for discovery. In those statements she had indicated that, with respect to the load they carried at the time of the accident, Mr. Kregar and herself had had a heated discussion in the course of which she had indicated that she did not want to take the trailer as it had a mechanical failure. She indicated that she had two concerns. The first that the refrigeration unit was leaking Freon and would damage the produce. The second was that she believed that the tires were causing the trailer to weave. A replacement trailer was "just as bad, if not worse" and they were told that the original trailer had been repaired and to return to Ontario with it. She testified that she continued to refuse to take the trailer but the Red Hawk dispatcher indicated that they would have to because there was no other trailer available. Mr. Kregar then presented Ms. Begin with an ultimatum to either take the load or walk home. It was Ms. Begin's view that she did not have a choice but to drive. She opined that Mr. Kregar could have refused to take the load and that Red Hawk would have continued to provide him with loads in the future "because Gary and I were very good drivers. We didn't mess around on the road".

[29] Ms. Begin stated that GDSI, Mr. Kregar and herself had never been able to do much more than eke out a living driving trucks. She explained that transport companies that they had provided services to in the past had failed to pay them for work performed, and that an accident with a previous truck had caused it to be written off at significant loss.

[30] Ms. Begin indicated that GDSI was responsible for maintaining the truck and that Red Hawk would insure the company but that the insurance premiums were ultimately deducted from amounts owing to GDSI.

[31] Ms. Begin indicated that if Mr. Kregar could no longer provide driving services personally to Red Hawk, GDSI could have the option of hiring another driver to replace him if that driver could be insured.

[32] Ms. Begin drew a distinction between company drivers and owner/operator drivers working for Red Hawk. Company drivers drove trucks owned by Red Hawk and were paid significantly less than owner/operators. In her view company drivers were subject to far less risk than owner/operators because the owner/operators "had all their assets tied up in the truck".

[33] Ms. Begin indicated that she was paid by Mr. Kregar from a GDSI account. While Ms. Begin indicated that she was nominally paid on a monthly basis, the reality of the matter was that since they were always together she would simply ask Mr. Kregar for money when she needed it and he would withdraw the money on the GDSI account and provide it to her.

[34] Mr. Kregar passed away prior to the hearing. The transcript of his examination for discovery in the civil suit is on file. As Mr. Kregar statements during discovery were congruent with the testimony of Ms. Begin, it is not necessary to set them out at length here.

(vi) Analysis

[35] Section 2(1) of the *Workplace Safety and Insurance Act* (“WSIA”) defines a worker as “a person who has entered into or is employed under a contract of service or apprenticeship”.

[36] In determining whether a person is a worker or an independent operator I refer to the test established by the Supreme Court of Canada in *671122 Ontario v. Sagaz Industries Canada Inc* [2002] 2 S.C.R. 983, 204 D.L.R. (4th) 542, which held at paragraphs 46 to 48:

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that “no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ...” (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:

[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a [page 1005] contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[37] This test has been referred to in Tribunal decisions and found to be in accord with the organizational test followed by the Board, see for example *Decision No. 1034/07*, *Decision No. 1443/06* and *Decision No. 1785/04*. The Board’s policy regarding workers and independent operators is *Operational Policy Manual* Document No. 12-02-01 entitled “Workers and Independent Operators”. This policy sets out a variety of characteristics and criteria to consider in determining a person’s status.

[38] In essence, *Sagaz* and the Board's policy state that one must look at the totality of the relationship between the parties, rather than any one specific criterion in determining whether a person is a worker or an independent operator.

[39] In the present case, I am persuaded that the substance of the relationship between the employer and Red Hawk and GDSI or Mr. Kregar is that of a contract of service with a Schedule 1 employer. I am further persuaded that Ms. Bonnie Begin was a worker of Red Hawk, a Schedule 1 employer.

(a) The relationship of GDSI, Mr. Gary Kregar and Red Hawk

[40] I will first address the status of GDSI as a valid or sham corporation. For the reasons which follow, I do not find that the answer to that question is determinative of Mr. Kregar's status as a worker or an independent operator.

[41] I agree and follow *Decision No. 1443/06* (January 25, 2008) which concluded:

I find it unnecessary to resort to the "lifting the corporate veil" analysis. The issue in this application is not whether the corporation was valid, but rather, whether Mr. Rai was in fact a worker or an independent operator. In evaluating the issue, the Tribunal considers a number of factors, including formal business arrangements. However, the analysis focuses on the substance of the relationship, rather than form. The fact that Mr. Rai incorporated a limited liability company is one factor to weigh against the other facts of the case. Some of the formal aspects of the relationship could be construed as indicating that Mr. Rai was an independent operator, such as the incorporation of a limited liability company, opening a corporate bank account and the fact that L&W did not take statutory deductions from his pay.

[42] Similarly, I find that the fact that Mr. Kregar incorporated GDSI is only one factor to consider. While ICBC called upon Mr. Edwards to provide expert forensic accounting evidence to "lift the corporate veil". As noted above, the testimony of Mr. Edwards demonstrated that the financial records were unreliable and that funds in the GDSI bank account appeared to have been used for personal as well as business purposes. I accept Mr. Edwards' testimony but, in my view, this, in and of itself, does not establish that GDSI was a sham corporation.

[43] I also accept Ms. Bonnie's evidence that maintaining careful accounts and ensuring a proper segregation of finances was not high on the list of priorities for Mr. Kregar and herself, in practice. Mr. Kregar delegated the maintenance of records to her as "secretary" and she found what time she could while on the road, after being relieved of driving duties by Mr. Kregar, to maintain expense records which she then provided to Ms. Pink on a semi-regular basis. While this may not reflect proper accounting standards this does not result in a finding that GDSI was not a corporation, or that Mr. Kregar was not its directing mind.

[44] Nonetheless, I am of the view that that the relationship between Mr. Kregar and Red Hawk, taken as a whole, was that of a worker and employer.

[45] There are certainly many indicia which could support the conclusion that Mr. Kregar was a worker working under a "contract of service". Principally among these are:

- Red Hawk held the CVOR,

- Red Hawk was responsible for marketing truck haulage services,
- Red Hawk would pay Mr. Kregar for mileage even if the customer defaulted on payment,
- Mr. Kregar worked exclusively for Red Hawk from the inception of their relationship,
- Mr. Kregar would have had to remove the Red Hawk decals from his truck in order to carry loads for other haulage companies.

[46] On the other hand, there are also numerous factors which would support the conclusion that Mr. Kregar was an independent operator working under a “contract for service”. Principally among these are:

- Mr. Kregar could choose to reject loads,
- Mr. Kregar set his own schedule by choosing to accept loads on a three-week on, one-week off basis,
- Mr. Kregar could sever the relationship with Red Hawk at any time without legal penalty for breach of contract,
- Mr. Kregar had the possibility of hiring a driver to replace him,
- no deductions for EI, CPP or income taxes were made from payments for services performed.

[47] Considering the facts as a whole it is my view that Mr. Kregar was performing a contract for service for Red Hawk.

[48] The predominant factors in my determination of this matter are as follows.

[49] Mr. Kregar had only a limited degree of control to work on his own schedule. Red Hawk provided the loads, and directed Mr. Kregar where and when to pick them up and drop them off.

[50] Mr. Kregar would have required Red Hawk’s agreement with respect to hiring a replacement driver.

[51] I find that by agreeing to have Red Hawk decals placed on his truck Mr. Kregar restricted his ability to perform work for other haulage companies. In any case, he did not in fact provide driving services for any other haulage companies after he engaged in a relationship with Red Hawk.

[52] Mr. Kregar did not have the licenses to perform carriage of goods himself. Red Hawk was in possession of the CVOR license necessary to proffer haulage services to clients.

[53] Mr. Kregar did not and could not, without a CVOR license, make his services available to the public. He did not advertise his services. He also invoiced customers on Red Hawk’s behalf.

[54] In the event of non-payment by a customer, Mr. Kregar would have been paid for his mileage and Red Hawk would have absorbed the loss. Mr. Kregar was, however, subject to risks in relation to damage to or breakdown of the truck and would not have been paid if he was unable to provide haulage service for that reason.

[55] I do not find that the fact that insurance certificate between ICBC and Paccar and Red Hawk indicates that Red Hawk was the lessee is determinative as to ownership of the truck. Mr. Kregar had an ongoing relationship with Paccar Financial, the lessor. Paccar Financial retained ownership of the vehicle. Mr. Kregar was personally responsible for repayment of the lease to Paccar before he entered into a contractual relationship with Red Hawk and remained so afterwards. No change was made to the lease agreement between Paccar and Mr. Kregar to reflect the alleged change as asserted on the insurance document. Similarly, there is no indication that Red Hawk could have benefited from the Residual Buy Back Agreement at the end of the term of the lease. Finally, it appears that Red Hawk was deducting the cost of insurance premiums from amounts owing to GDSI. It is my conclusion that Red Hawk was listed as the lessee on the insurance documents to allow Mr. Kregar to benefit from the reduced premium rates available to Red Hawk.

[56] For the reasons above, based on a consideration of the totality of the evidence, it is my finding that a contract of service existed between Mr. Gary Kregar and Red Hawk. Further noting that Red Hawk was a Schedule 1 employer and that Mr. Kregar was in the course of his employment at the time of his accident, I conclude that Mr. Kregar's right to sue is taken away pursuant to section 28 of the Act.

(b) The relationship between Ms. Bonnie Begin and Gary Kregar and Red Hawk

[57] The parties did not contend that Ms. Begin was an independent operator. It is clear from the facts that Ms. Begin was not an independent operator. With respect to Ms. Begin's status the question is whether she was a worker for GDSI or for Red Hawk.

[58] Having concluded that Mr. Gary Kregar was a worker and not an independent operator in his relationship with Red Hawk, it follows that Ms. Begin was also a worker for Red Hawk.

[59] The evidence on file clearly shows that Ms. Begin had no opportunity for profit or loss. She did not own any equipment necessary for long-haul trucking. She worked for Mr. Kregar on a full-time basis, as she went on the road with him, sharing driving duties. Ms. Begin had no control over how and when to perform the work. This was most blatantly demonstrated when she was given the choice to drive the truck or walk home.

[60] The application by ING for a declaration that Ms. Begin was a worker employed by a Schedule 1 employer and therefore entitlement to claim benefits under the Act is granted.

DISPOSITION

[61] The applications are allowed as follows:

1. Ms. Bonnie Begin was a worker employed by a Schedule 1 employer, and in the course of her employment at the time of the accident, she is therefore entitled to claim benefits under the Act; ING's application is therefore granted.
2. Mr. Gary Kregar was a worker employed by a Schedule 1 employer and in the course of his employment at the time of the accident, his right to sue is therefore taken away; ICBC's application is therefore granted.

DATED: December 8, 2009.

SIGNED: A.T. Patterson.