

An appeal

- by -

Vancouver Spine & Disc Centre Inc.  
(the “Company”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2013A/32

**DATE OF DECISION:** July 19, 2013

## DECISION

### SUBMISSIONS

Dr. Peter Ting

on behalf of Vancouver Spine & Disc Centre Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Vancouver Spine & Disc Centre Inc. (the “Company”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 28, 2013 (the “Determination”).
2. The deadline for filing an appeal of the Determination was 4:30 p.m. on May 6, 2013. However, the Company filed its appeal on May 27, 2013, 21 days after the expiry of the appeal date. The Company, in its appeal, alleges that the Director erred in law in making the Determination and further submits that new evidence has become available that was not available at the time the Determination was being made.
3. By way of remedy, the Company is seeking the Employment Standards Tribunal (the “Tribunal”) to cancel the Determination.
4. Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act* set out the Tribunal’s discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. I have decided that this appeal can be decided under section 114 of the *Act*. Accordingly, I will assess the Company’s appeal of the Determination based solely on the Reasons for the Determination (the “Reasons”), the written submissions of the Company’s sole director, Dr. Peter Ting (“Dr. Ting”) and my review of the section 112(5) “record” that was before the Director when the Determination was being made.

### ISSUES

5. There is a preliminary issue of whether the Company should be granted an extension to the deadline to file the appeal. If I exercise my discretion to extend the time period for appealing the Determination, the issues to be considered in this appeal are whether the Director erred in law in making the Determination and whether there is new evidence warranting cancellation of the Determination.

### BACKGROUND

6. On August 30, 2010, Romea Ambrosi (“Ms. Ambrosi”) filed a complaint with the Director alleging that the Vancouver Spine & Disc Centre (“VSDC”) contravened the *Act* by failing to pay her wages earned between July 1 to July 15, 2010, and annual vacation pay. Following an investigation, the Director concluded that the Company contravened sections 18 (wages) and 58 (annual vacation pay) of the *Act* and ordered the Company to pay Ms. Ambrosi wages and accrued interest in the amount of \$1,431.97. The Director also levied an administrative penalty against the Company in the amount of \$500.00 for contravention of section 18 of the *Act*.
7. Based on the corporate search in the Director’s record and the Certificate of Incorporation adduced by Dr. Ting in the appeal (presumably as new evidence), the Company was incorporated on November 12, 2010. Dr. Ting is the sole director of the Company. The Company operates a chiropractic facility and, prior to its incorporation, appears to have operated as VSDC with Dr. Ting as the individual in charge of operations.

8. Ms. Ambrosi commenced work at VSDC on April 12, 2010. She was hired through a 50% wage-subsidy program, a federal government program that was administered through the Province of British Columbia.
9. According to the Reasons for Determination, Career Connection was the contractor handling the individual contracts with employers who were to provide training to the participants, of which Ms. Ambrosi was one. Under the program, the employer/trainer would employ the employee/trainee at agreed-upon rates of pay and then submit claims to the program to be reimbursed.
10. Ms. Ambrosi answered to Mr. Ting at VSDC. Ms. Ambrosi decided to leave her employment with VSDC. On July 13, 2010, she sent Dr. Ting an email advising him that she was giving one week's notice of her resignation, and that her last day of employment would be July 23, 2010. Over the next week, Dr. Ting sent her several emails, including an email asking her to quit when he found a replacement employee, an email terminating her employment effective when he hired another receptionist, and an email advising her that his clinic required one month's notice of termination.
11. On July 15, 2010, Ms. Ambrosi contacted a representative of Career Connection to discuss the deteriorating work conditions between herself and Dr. Ting. After discussing this matter with the representative, Ms. Ambrosi decided not to return to work at VSDC after July 15, 2010.
12. On July 20, 2010, Ms. Ambrosi emailed Dr. Ting requesting him to advise her when she could attend his office on July 21, 2010, to pick up her final pay and Record of Employment. She also advised she would be attending at his office with an escort. Ms. Ambrosi attended at the office of VSDC along with her father. After advising the receptionist who she was and the purpose of her visit and after waiting one-half hour to see Dr. Ting, Ms. Ambrosi knocked on Dr. Ting's office door. When he appeared, she asked him for her paycheque. Dr. Ting did not have her pay cheque and threatened to call the police. As a result, Ms. Ambrosi left without any payment from Dr. Ting. Ms. Ambrosi contacted the police who advised her that there was nothing on file regarding a call from Dr. Ting.
13. On July 22, 2010, Dr. Ting sent an email to the representative at Career Connection complaining about Ms. Ambrosi. He also indicated in the email that she and her father caused a disturbance in his office when they attended and he had to call the police for assistance. He claimed she cheated in terms of hours she claimed to have worked for him, and that he was intending to fire her. He also claimed in the email that she was always late for work, and this would be "reflective in her final cheque" [*sic*], which he would deal with "asap".
14. Almost one month after his email to the representative at Career Connection, Dr. Ting sent a letter to Ms. Ambrosi advising her that he was not going to pay her wages for the time she worked in July 2010. In the letter he made similar allegations against Ms. Ambrosi to those he set out in his email to the representative at Career Connection. He also alleged that he had reported fraud on the part of Ms. Ambrosi and that Service Canada was investigating her for fraud.
15. In the Director's record, Dr. Ting appears to have submitted the Record of Employment he issued to Ms. Ambrosi. While it is difficult to read, the Comments section of the Record of Employment appears to refer to cheating and misconduct.
16. The delegate, after considering all the evidence, including the timesheets Dr. Ting submitted pursuant to the Demand for Employer Records, and the email string between Dr. Ting, Ms. Ambrosi, and the representative at Career Connection, concluded that Ms. Ambrosi's last day of employment was July 15, 2010, and she had not been paid for the hours worked in the month of July 2010. The delegate further concluded that Dr. Ting

failed to provide any evidence to support his contention that Ms. Ambrosi was fraudulent in reporting her hours of work, or that she came into work late and left early. The delegate also stated that section 21 of the *Act* prohibits an employer from withholding an employee's wages for any purpose other than payments required by an enactment of the Government of British Columbia or Canada and that:

VSDC cannot withhold wages owed to Ms. Ambrosi for work done because it believes she defrauded her hours and came to work late. The time to address issues related to hours worked or coming into work late is during the pay period when it occurred. An employer does not have to pay an employee for hours not worked. However, if the employer does pay for hours not worked it cannot deduct hours from a different pay period where the hours were in fact worked.

Employers are not permitted to unilaterally claw-back or offset against an employee's wages for what they feel is owed to them. Pursuant to section 22 of the Act in order for an employer to deduct anything other than statutory deductions or amounts required to be deducted by law, such as advances or overpayments, an employer must have an "assignment of wages" freely signed by the employee. I have seen no evidence that such an assignment exists.

17. Based on Ms. Ambrosi's scheduled hours of work at seven (7) hours per day, five (5) days per week, \$15 per hour, the delegate concluded in the Determination that the Company owed Ms. Ambrosi \$1,050.00 in wages for the period July 2 to July 15, 2010, as well as vacation pay at 4% of her gross earnings, and ordered the Company to so pay Ms. Ambrosi, including interest on those amounts.

## SUBMISSIONS OF THE COMPANY

18. In the Company's appeal, Dr. Ting submits an Appeal Form, a copy of the Determination along with an incomplete copy of the Reasons, an undated fax cover confirmation sheet, a copy of the Certificate of Incorporation for Vancouver Spine & Disc Centre Inc., and the following very brief written submissions:

My grounds for late appeal are as follows:

- 1) While I have a very busy work schedule, it made me almost impossible to get hold of Joe LeBlanc, the delegate of the Director of Employment Standards. I did call him in several occasions to clarify some issues, but he wasn't available. As I am always with patients, it was inconvenient for me to leave a message having him to call me back.
- 2) For the same tokens as stated in 1), it made me difficult, if not impossible, to schedule a appointment [sic] where a lawyer and myself were both mutually available from 9 am to 5 pm. I have a full work schedule. As such, it caused a delay for me to consult with an employment lawyer.

The Director has erred in law in that he awarded wages to the complainant who is excluded from the application of the *Employment Standards Act* s. 96(1). The incorporation was established on November 12, 2010 (attached Certificate of Incorporation) while the alleged issues were prior to that.

(Excerpts)

Section 96: Corporate officer's liability for unpaid wages

- 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

19. I note that the copy of the Determination he submitted contains a highlighted part dealing with the liability of directors and officers of companies. I note the appeal is not an appeal of a section 96 determination; it is an appeal of the corporate determination.

20. Dr. Ting states that the Director erred in law in awarding “wages to the complainant who is excluded from the application of the Employment Standards Act s. 96(1)”. I find this submission somewhat cryptic and incomprehensible as the award made to Ms. Ambrosi in the Determination is not pursuant to section 96 of the *Act*.
21. He also submits that the Company was incorporated on November 12, 2010, and attaches the Certificate of Incorporation, suggesting that the subject of Ms. Ambrosi’s complaint preceded the incorporation of the Company. Presumably, he is arguing that the Company cannot be responsible for Ms. Ambrosi’s complaint because it preceded its incorporation.
22. With respect to the issue of the late appeal of the Company, Dr. Ting submits that he has “a very busy work schedule” which made it “almost impossible to get ahold of [the delegate]”. He states that he called the delegate on several occasions “to clarify some issues, but he wasn’t available”. However, Dr. Ting chose not to leave a message for the delegate as it was inconvenient for him to do so because he is “always with patients”. He also submits that it is “difficult, if not impossible” for him to schedule an appointment with a lawyer given his work schedule.

## ANALYSIS

23. Section 112 of the *Act* sets out the appeal period or the time limit for filing an appeal. In particular, subsection 112(3)(a) provides:

112 (3) The appeal period referred to in subsection (2) is:

(a) 30 days after the date of service of the determination, if the person was served by registered mail....

24. In this case, the Determination was issued on March 28, 2013, and sent on the same by registered mail to both parties. The record contains a copy of the Canada Post Tracking Sheet indicating that the Company received the Determination on April 2, 2013. While 30 days after that date is May 2, 2013, the Determination shows the expiry date for filing the appeal as May 6, 2013. Notwithstanding, the Company filed its appeal on May 27, 2013, 21 days after the stated expiry date for the appeal.

25. Section 109(1)(b) of the *Act* sets out the Tribunal’s authority to extend the time period for requesting an appeal under section 112 and provides:

109 (1) In addition to its powers under section 108 and part 13, the tribunal may do one or more of the following:

...

(b) Extend the time period for requesting an appeal even though the period has expired.

26. The Tribunal may exercise its statutory discretion to extend the time for filing an appeal where there are compelling reasons, and the burden is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Re: Tang*, BC EST # D211/96:

Section 109(1)(b) of the Act provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

27. In *Re: Dennill (c.o.b. Fibremaster Restorations & Carpet)*, BC EST # D080/01, the Tribunal delineated the following criteria the appellant should satisfy in seeking an extension:
1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  2. There is a genuine and ongoing *bona fide* intention to appeal the determination;
  3. The respondent party, as well as the Director, was aware of this intention;
  4. The respondent party will not be unduly prejudiced by the granting of the extension;
  5. There is a strong *prima facie* case in favour of the appellant.
28. In this case, I am not persuaded that an extension of time ought to be granted for the reasons discussed below.
29. First, the Determination was properly served in accordance with section 122(1)(b) of the *Act*. The record contains a Canada Post Tracking Sheet which indicates receipt of the Determination by the Company on April 2, 2013. Further, the Determination contained specific instructions or direction to the Company that, if it wished to appeal the Determination, it could do so by delivering its appeal to the Tribunal by 4:30 p.m. on May 6, 2013. The Determination also sets out the website address and telephone number of the Tribunal so the Company could obtain further information regarding how to appeal the Determination, if it so desired. While Dr. Ting states that his “busy work schedule” made it “almost impossible” to get in touch with the delegate to obtain clarification on “some issues”, he does not indicate what those issues were that required clarification. He also does not indicate when he called the delegate, whether it was before or after the expiry of the appeal period. He also indicates that he did not leave a voice-mail message for the delegate. I find this very curious, as the most obvious and reasonable course of action would have been to leave a voice-mail message for the delegate with a view to arranging a mutually-convenient time to connect with the delegate by telephone. However, Dr. Ting failed to do this, stating that it was “inconvenient” for him to connect with the delegate by telephone because he is “always with patients”.
30. I also note in the record that there is evidence that Dr. Ting contacted the delegate using email when he needed to communicate with the delegate about employer records. He could have done the same in this instance but did not. If he needed clarification on any issues before he could lodge the Company’s appeal, he certainly could have called the Tribunal whose telephone number is expressly indicated on the Determination right next to the expiry date for appealing the Determination.
31. I also note that Dr. Ting states that it is difficult for him to schedule an appointment to see a lawyer, given his “full work schedule”. I do not find this explanation persuasive or credible for his failure to request an appeal within the statutory time limit.
32. I also note that there is no evidence of a genuine or ongoing *bona fide* intention on the part of the Company to appeal the Determination, and also no evidence that the Company made the Respondent or the Director aware of any intention to appeal the Determination.
33. While the delay in filing its appeal by the Company is not very long, I am mindful of the purpose of the *Act* set out in section 2(d), namely, “to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the] Act”. This important purpose, in my view, would not be served if the Company were allowed an extension of time to file its appeal in this case, particularly in light of my assessment of the substantive merits of the Company’s appeal below.

34. I find the substantive merits of the Company's appeal lacking in that I do not find the Company to have made out a strong *prima facie* case in its favour, nor has it convinced me that it has a reasonable prospect of succeeding on appeal. More specifically, I find Dr. Ting's submission that the Director erred in law in awarding "wages to the Complainant who is excluded from the application of the Employment Standards Act s. 96(1)" is incomprehensible. The Determination did not award wages to Ms. Ambrosi based on section 96. Section 96 deals with corporate officers' liability for unpaid wages. Dr. Ting's reference to section 96 appears to be based on a misunderstanding of the provision. The appeal in question is an appeal of a corporate determination, and not a section 96 determination.
35. I also note that Dr. Ting appears to suggest that because the Company was incorporated on November 12, 2010, the Company should not be liable for the Determination because the subject matter of Ms. Ambrosi's complaint relates to a period that preceded the incorporation of the Company. I also note that during the investigation of Ms. Ambrosi's complaint, when Dr. Ting was requested to provide employer documents by the delegate, the Demand for Employer Records was made to the Company and not to VSDC, and I note that Dr. Ting's response to that demand in his email of March 25, 2012, to the delegate, shows Dr. Ting signing off with a signature block of the Company, and not VSDC. I simply point this out to show that Dr. Ting was aware that Ms. Ambrosi's complaint was against the Company although it may have begun as a complaint against VSDC, because at the time the complaint was lodged by her, the business was not incorporated, and only subsequently was it incorporated. At no point during the investigation did Dr. Ting challenge or raise the issue of the Company being distinct from the employer who employed Ms. Ambrosi. He could have then adduced the Certificate of Incorporation that he now adduces in the appeal as "new evidence" and he could have then advanced the argument he is now advancing in the appeal. However, he failed to do this. While I think he would have likely experienced the same result then as in this appeal, the time to make that argument and produce supporting evidence was before the Determination was made, during the investigation.
36. While I note, in the Reasons, the delegate did not refer to section 95 of the *Act*, nor perform an analysis of the relationship between the Company and VSDC under section 95, I find there is sufficient evidence in the record to suggest that VSDC and the Company are associated employers. Section 95 of the *Act* provides:
95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.
37. I also note that in "*Employment Standards in British Columbia Annotated Legislation and Commentary*", the authors say as follows with respect to section 95 of the *Act*:

The statutory provision allows the Director to pierce the corporate veil and look beyond the legal structure of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of s. 95 to the circumstances of any matter before the Director:

- (1) There must be more than one corporation, individual, firm, syndicate or association;
- (2) Each of these entities must be carrying on a business, trade or undertakings;
- (3) There must be common control or direction; and

(4) There must be some statutory purpose for treating the entities as one employer.

38. Based on the evidence in the record, I find that the four (4) preconditions to the application of section 95 have been met in the present case. The Company, before it was incorporated on November 12, 2012, was operated by Dr. Ting as VSDC. It was during the latter period that Ms. Ambrosi was employed with VSDC. During her employment with VSDC, Ms. Ambrosi answered to or reported to Dr. Ting, and it is apparent, based on the record, that when the business incorporated on November 12, 2010, (using the exact same pre-incorporation name), it continued under the common control and direction of Dr. Ting. In the circumstances, I do not find that the Company's or Dr. Ting's argument that the Company is not responsible or liable to Ms. Ambrosi, because it was incorporated much later after Ms. Ambrosi's period of employment, meritorious.
39. In the circumstances, I do not find the Company has made out a case warranting an extension of time for requesting an appeal. I also do not find that there is any reasonable prospect that the Company's appeal would succeed if an extension of time to appeal were granted.

### **ORDER**

40. Pursuant to section 114(1)(b) and (f) of the *Act*, the appeal is dismissed on the basis that the request for an appeal has not been made within the time permitted and there is no reasonable prospect that the appeal will succeed.
41. Further, pursuant to section 115 of the *Act*, I order that the Determination, dated March 28, 2013, be confirmed as issued in the amount of \$1,431.97, together with interest that has accrued since the date the Determination was issued pursuant to section 88 of the *Act*.
42. I also confirm the Determination relating to the administrative penalty of \$500.00 against Vancouver Spine & Disc Centre Inc. for contravening section 18 of the *Act*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**