

An appeal

- by -

Pacific Western Coastal Constructors Ltd.
("PWC")

- 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: Carol L. Roberts

FILE No.: 2008A/67

DATE OF DECISION: August 5, 2008

DECISION

SUBMISSIONS

William Thomson and Barry Lang	on behalf of Pacific Western Coastal Constructors Ltd.
Terry Hughes	on behalf of the Director of Employment Standards
Anthony Baines, Ken Buchanan, Shawn Howell and James Minshull	on their own behalf

OVERVIEW

1. Pacific Western Coastal Constructors Ltd. ("PWC") has appealed a Determination of the Director of Employment Standards ("the Director") issued February 6, 2008, ordering it to pay \$51,056.60, representing wages and accrued interest owed to 30 former employees and an administrative penalty in the amount of \$500.00 for a contravention of section 18 of the *Employment Standards Act*.
2. PWC appealed the Determination on June 10, 2008 and sought an extension of time in which to file the appeal. PWC also seeks a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal.
3. This decision addresses only the suspension request.

FACTS AND ARGUMENT

4. PWC does not dispute that the employees are entitled to wages. However, PWC and the developer of the project to whom PWC was subcontracted are in a dispute over the payment of funds and PWC asserts that the disputed funds include the outstanding wages. PWC filed a lien against the property for the unpaid amounts and the funds in dispute have been paid into court pending a trial of the issues between them. (*Fairfield Project Limited Partnership v. Pacific Western Coastal Constructors Ltd.*, 2008 BCSC 135) The PWC has deposited no money towards the Determination and says it has no money to do so.
5. PWC relies on *Shimco Metal Erectors Ltd. v. North Vancouver (District)* (2002 BCSC 238, upheld 2003 BCCA 193) in support of its position that the Branch should attach the funds in court to recover the outstanding wages rather than pursuing the company.
6. The delegate says that the Branch has attempted to collect the wages through demand notices and a Writ of Seizure and Sale, but has been unsuccessful. He says that an order to suspend collection of the Determination could unduly prejudice the collection of the wages and cancellation of the demand notices could allow funds to be transferred without the protection of the *Act*. He seeks a dismissal of the suspension request.
7. The employees say that the dispute between PWC and the developer should not deprive them of their wages. They say they are unfairly caught up in the legal battle and have suffered because of it. They seek payment of their wages.

ANALYSIS

8. Section 113 of the Act provides as follows:
- (1) A person who appeals a determination may request the Tribunal to suspend the effect of the determination.
 - (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
 - (a) the total amount, if any, required to be paid under the determination or,
 - (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.
9. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.* BC EST #D420/97; *TNL Paving Ltd.* BC EST #D397/99)
10. I am not persuaded that the appeal has merit. It was filed well beyond the time for filing an appeal had expired and only after the Branch sought, unsuccessfully, to enforce the Determination. It is unlikely that the timeliness issue will be resolved in PWC's favour.
11. I am unable to find that either the *Shimco* or *Fairfield* decisions are relevant to the suspension application. *Shimco* addressed the issue of liens against holdbacks and lands, while *Fairfield* merely ordered that disputed funds be paid into court pending a trial on the merits. While PWC may ultimately succeed in its action, there is also the possibility it may not. PWC's dispute with a third party cannot have the effect of depriving employees of their wages.
12. Furthermore, PWC says it has no funds to deposit pending the appeal of the Determination, which suggests that there is a risk that the employees will never fully recover their wages. I am unable to conclude that a suspension order should be granted.

ORDER

13. Pursuant to section 113 of the *Act*, I deny the application to suspend the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal