

An appeal

- by -

Rick Stewart

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/43

DATE OF DECISION: May 26, 2004

DECISION

SUBMISSIONS

On his own behalf: Rick Stewart

On behalf of the Director of Employment Standards: Ed Wall

On behalf of Select Systems Contractors Ltd.: Paul Wilson

OVERVIEW

This is an appeal by Rick Stewart, pursuant to Section 112 of the *Employment Standards Act (Act)*, against a decision of the Director of Employment Standards (Director) issued March 3, 2004. The decision followed a referral back to the Director on the issue of the calculation of Mr. Stewart's wages (Tribunal decision BC EST #D323/03).

Mr. Stewart alleged that Select Systems Contractors Ltd. ("Select") failed to pay him fair wages for two days, and an appropriate wage for a first aid attendant contrary to the now repealed *Skills Development and Fair Wage Act ("SDFWA")*. The delegate concluded that the *SDFWA* had not been contravened. I concluded that the delegate erred in that conclusion, and determined that Mr. Stewart had been hired as, and performed the work of, a first aid attendant, and that he should be paid for those duties. I also determined that Mr. Stewart performed the work of a labourer. I referred the matter back to the delegate to determine the wages owed to Mr. Stewart, with the direction that the wages could be calculated based on the amount of time he spent performing each duty.

ISSUE TO BE DECIDED

Whether the Director's delegate correctly determined the wages owed to Mr. Stewart.

FACTS

The delegate sought additional submissions from the parties on the issue before him on the referral back, and provided the parties with Tribunal decisions on the issue. (*Wigmar* and *Gilberstad*)

In response, Mr. Stewart contended that he was entitled to first aid attendant rate for all the hours he worked on the basis that the additional pay was payable by virtue of his presence on the site, not by the actual performance of those duties.

Select attempted to separate the hours Mr. Stewart worked as a labourer from those he worked as a first aid attendant, and submitted that he had worked a total of 2,002 hours as a labourer, and 83 hours as a first aid attendant.

Following a review of those submissions, the delegate determined that Mr. Stewart worked a total of 149 hours as a first aid attendant, with the balance being worked as a labourer.

ARGUMENT

Mr. Stewart contends that the delegate's March 3, 2004 decision is contrary to industry standards and WCB regulations, and that the delegate had "failed to properly consider or rationalize [Mr. Stewart's] issue of concurrency".

Mr. Stewart argues that it is contrary to industry, union and government norms to compensate first aid attendants based on the amount of time they spend performing that specific function. In support of his argument, Mr. Stewart refers to the British Columbia Government and Service Employee's Union agreement, the New Webster Dictionary definition of "attendant" and Occupational Health and Safety Guidelines in support of his position. Mr. Stewart also submits that the *Wigmar* and *Gilberstad* cases do not apply to his position, since they address

vastly differing job functions including clerical duties, apprentice carpentry and first aid with significant differing wage levels. The pay rate in that case differed significantly as did the job descriptions, so the issue of job function was very important.

Skyway submits that the *Wigmar* and *Gilberstad* cases are virtually identical to the present facts, and that the authorities relied on by Mr. Stewart are of little relevance. Skyway also submits that Mr. Stewart's concept of "concurrency" is not applicable to his employment. It seeks to have the March 3, 2004 findings upheld.

The delegate contends that Mr. Stewart's submission does not accord with my decision in that it does not contain any estimate of time spent on each function. The delegate also says that

Select's submission contained evidence that established that a worker other than Mr. Stewart, provided first aid to an injured worker.

ANALYSIS

Having reviewed the delegate's decision on the referral back, and the submissions of the parties, I confirm the findings.

The Tribunal has established that an employee can be employed in, and paid for, distinct functions. Arguments advanced by Mr. Stewart on the issue of concurrency were argued before the Tribunal in *Gilberstad*, and rejected. The Tribunal found that Ms. Gilberstad was hired for three separate job functions, one of which was first aid attendant. The Tribunal stated:

In my view, an employee may well be hired to perform different job functions and, in such circumstances, is entitled to be paid at the prescribed wage rate for each separate function.

I found that Mr. Stewart was hired in July 2001, as a labourer/safety officer, and that he was identified as an occupational health and safety officer in October, 2001. Mr. Stewart was laid off in the winter. When he was rehired in March 2002, it was only as a labourer. I determined that Mr. Stewart was to be paid according to the amount of time he spent on each function. Mr. Stewart did not make any submissions on the amount of time he spent on each task. Select made submissions based on a review of its records. The delegate, for the most part, accepted Select's records in the absence of any submissions to the contrary

from Mr. Stewart, but adjusted the hours to reflect time spent by Mr. Stewart on safety meetings and guiding government officials.

I find that the delegate considered the evidence, and arrived at a rational conclusion on that evidence. I find no basis to conclude that the calculations are in error.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated August 27, 2003, be varied to indicate Mr. Stewart is owed the amount of wages set out in the delegate's March 3, 2004 referral back report.

Carol L. Roberts
Member
Employment Standards Tribunal