



An appeal

- by -

Dale Pepper, a Director of MedviewMD Inc.

- 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.:** 2017A/121

**DATE OF DECISION:** December 6, 2017

## DECISION

### SUBMISSIONS

Dale Pepper on his own behalf as a Director of MedviewMD Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Dale Pepper (“Dr. Pepper”) has filed an appeal of a Determination issued by Tyler Siegmann, a delegate of the Director of Employment Standards (the “Director”), on September 5, 2017. In that Determination, the Director found that Dr. Pepper was a director of MedviewMD Inc. (“Medview”) at the time wages owing to eighteen employees were earned or should have been paid. The Director ordered Dr. Pepper to pay the amount of \$73,019.01, representing not more than two months’ outstanding wages to each of the 18 employees, including \$1,333.11 interest.
2. Dr. Pepper appeals the Determination contending that the delegate both erred in law and failed to observe principles of natural justice in making the Determination.
3. On November 2, 2017, after Dr. Pepper filed his appeal, the Director’s delegate discovered that wages were not owed to one of the employees named in the Determination. The delegate adjusted the amount of wages owing by \$2,163.20 plus interest, bringing the amount owed to \$70,812.45, including interest.
4. This decision is based on Dr. Pepper’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

### FACTS AND ARGUMENT

5. In December 2016 and January 2017, the Employment Standards Branch received several complaints under the *ESA* alleging that Medview had failed to pay employee wages over several pay periods. The employees subsequently quit their employment and various Medview clinics ceased operation in British Columbia.
6. Following an investigation, the delegate of the Director issued a Determination against Medview on March 10, 2017, concluding that the employees were owed wages and interest in the total amount of \$72,172.73 (the “Corporate Determination”). The Director also imposed three administrative penalties on Medview in the total amount of \$1,500 for contraventions of the *ESA*.
7. The Determination, which included a notice to directors and officers regarding their personal liability for wages under the *ESA*, was sent to Medview’s lawyer, directors, and officer.
8. The appeal period for the Corporate Determination expired April 18, 2017. The Determination was not appealed and Medview did not pay the amount in the Determination.
9. A December 23, 2016, Corporate Search indicated that Medview was incorporated in Ontario on November 25, 2013, and registered as an extra-provincial company in British Columbia on November 14, 2016. The

Corporate information indicated that Dale Pepper became a Director of Medview on October 14, 2016. Dr. Pepper, who resides and works in Ontario, is the brother-in-law of Daniel Nead, the founder, director and officer of Medview.

10. The Determination states that Dr. Pepper began performing clinical services for Medview as an independent contractor, and that in October 2016, Mr. Nead asked Dr. Pepper to become a director of Medview because Medview required the presence of a physician on the Board of Directors. Apparently Mr. Nead assured Dr. Pepper that he would not assume any financial responsibilities even though at that time, Medview was facing financial difficulties including that Medview was, or would soon be, unable to pay employee wages. Dr. Pepper agreed to become a director based on Mr. Nead's representations and his family relationship. Dr. Pepper did not consult a lawyer about his potential financial or other risks.
11. The delegate noted that Dr. Pepper emphasized that he had no control or authority over Medview operations, that he was not involved in hiring employees, negotiating or entering into contracts of employment with employees, securing business or investors, implementing or maintaining policies or practices, paying or compensating employees, terminating the employment of any employees, opening Medview locations, managing finances or any other aspect of Medview operations. Dr. Pepper ceased to be a director of Medview effective February 2, 2017.
12. Dr. Pepper argued that he should not be held responsible for unpaid wages because the Corporate Report stating that he was a director was inaccurate and that there was never a shareholders meeting; because he did not function as a director; and because Mr. Nead "duped" him into becoming a director in order to have another person assume corporate liabilities if the business were to fail.
13. Mr. Nead confirmed that he was the founder of Medview, as well as a director and officer. Mr. Nead asserted that Dr. Pepper was not a director of Medview because he did not sign any paperwork, and because he was not elected by shareholders. In addition, Mr. Nead asserted that Medview's corporate minute book did not list Dr. Pepper as a director. When asked by the delegate to supply documentation such as the corporate minute book in support of that assertion, Mr. Nead did not reply or provide any documentation.
14. The delegate spoke to a number of other witnesses, including Kellie Gillier, a shareholder of Medview; Kim Pepper, Dr. Pepper's wife; and Kim Jenkins, a Medview shareholder and employee. All the witnesses indicated that they did not know how Dr. Pepper came to be a director, and that he was not elected as such by the shareholders.
15. The delegate noted that the Corporate Records raised a rebuttable presumption that a person is a corporate director, and that the Director is entitled to rely on the records in determining if a person is a director. The delegate further noted that an individual denying director status can rebut that presumption if they are able to show, on credible and cogent evidence, that the records are inaccurate, either because they resigned or were not properly appointed, or the records were not properly processed.
16. The delegate noted that although Mr. Nead indicated that the corporate records were inaccurate and the corporate minute book did not record Dr. Pepper as a director, Dr. Pepper agreed that he agreed to become a Medview director and signed related paperwork, even though he was not elected as a director by the

shareholders. The delegate found that Dr. Pepper was more likely to remember the actions he took and preferred his evidence over that of Mr. Nead.

17. The delegate noted that although Mr. Nead and Dr. Pepper argued that Dr. Pepper was improperly appointed on the basis that he was not so elected by the shareholders, neither provided any documentary evidence, such as Medview's corporate record book including minutes of directors' and shareholders' meetings, in support of their arguments. In the absence of any evidence to support their arguments, the delegate found there was insufficient evidence to rebut the presumption that Dr. Pepper was a director of Medview.
18. The delegate noted Dr. Pepper's argument that he should not be held liable for unpaid wages because he did not perform the functions, tasks or duties of a director, but determined that section 96(2) of the *ESA* did not relieve a director from unpaid wage liability based on a functional test:

Liability based on a functional test only applies in the case of a director or officer who is not listed on the corporate registry, in which case the Director may use a functional test to determine if they are performing the functions of one of those roles to impose liability. The proposition does not apply in reverse. (See *Edward McHollister* BC EST # D099/08 and *Lucile M. Pacey* BC EST #D121/04). Therefore, the fact that Dr. Pepper never acted as a director does not relieve him of his liability for unpaid wages.

19. Finally, the delegate considered Dr. Pepper's argument that Mr. Nead "duped" him into becoming a director, and noted the Tribunal's decision in *Dyan Judith Van Dam*, BC EST # D080/04, which found that a person who is listed as a director on corporate records may not be relieved of liability for unpaid wages on the basis that he or she was "uninformed, misinformed or misled about the potential risks of being named a director." The delegate concluded that Dr. Pepper was not relieved of his liability under section 96 based on misrepresentation or oppressive conduct.
20. The delegate concluded that as a director, Dr. Pepper was liable for up to two months of the unpaid wages of the 18 employees. The delegate was unable to conclude that Dr. Pepper authorized, permitted or acquiesced in the contravention and found that he was not personally liable for the administrative penalties.

### *Argument*

21. Dr. Pepper contends that he was not a director of Medview at the time the employees' wages were earned and that he is not liable for the unpaid wages.
22. Much of Dr. Pepper's appeal submission consists of arguments made to the Director, including his assertion that Mr. Neal did not disclose to him that Medview was facing any financial difficulties when he asked Dr. Pepper to become a "medical director." Dr. Pepper also asserts that he had no experience with corporations when he agreed to be a "medical director" and that Mr. Nead informed him that he would not face any personal liability in becoming a director.
23. Dr. Pepper says that the delegate erred in law by using statements against him. He argues that he told the delegate, without being informed that any statements could be used against him, that he recalled "signing some paperwork" although he was not sure what that paperwork was. He says that "if that paperwork

involved becoming a director at most it would only have been agreement to nomination and at the least agreement to be medical officer/director.” [reproduced as written] Dr. Pepper says that he only had a “vague recollection of signing something the exact nature of which he was unsure in light of his complete lack of business experience.” He contends that the delegate erred in preferring his evidence over that of Mr. Nead, who had significant experience in the corporate world. Dr. Pepper says that Mr. Nead’s evidence is consistent with the signed paperwork, “which has never been in evidence,” of his agreement to be nominated.

24. Dr. Pepper further argues that even if he signed paperwork consenting to become a director, due process pursuant to section 119 of the *Business Corporations Act* was not followed, as there was no shareholders’ meeting and Mr. Nead informed the delegate that the paperwork was not completed.
25. Finally, Dr. Pepper argues that the delegate failed to comply with the principles of natural justice in not setting out reasons for not accepting the evidence of the witnesses. Dr. Pepper says that because he had no access to the corporate minute book and was not in control of Mr. Nead’s actions, he provided the delegate with the names of witnesses who were Medview shareholders, to rebut the corporate registry information. He argues that the delegate failed to explain why he dismissed the evidence of those witnesses, all of whom confirmed to the delegate that there had been no shareholders’ meeting or vote.

## ANALYSIS

26. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
  - (b) the appeal was not filed within the applicable time limit;
  - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
  - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
  - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
  - (f) there is no reasonable prospect that the appeal will succeed;
  - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
  - (h) one or more of the requirements of section 112(2) have not been met.
27. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
28. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Dr. Pepper has not met that burden and dismiss the appeal.

*Failure to observe the principles of natural justice*

29. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission supporting this ground of appeal. The record indicates that Dr. Pepper was notified of the fact of the Corporate Determination and given an opportunity to respond to his possible personal liability. Dr. Pepper did respond by way of an e-mail dated June 20, 2017, and the delegate considered his submissions in making the Determination.
30. Dr. Pepper's argument on this ground seems to be that the delegate failed to state why he did not accept the evidence of the witnesses. I will address that argument under error of law.

*Error of law*

31. Section 96 of the *ESA* provides as follows:

- 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.
- (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
- (a) any liability to an employee under section 63, termination pay or money payable in respect of an individual or group terminations, if the corporation is in receivership,
  - (b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act

...

32. The Tribunal has held that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. A defence to section 96 liability can be successfully raised if a director/officer can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed. (*Wilinosky*, BC EST # D106/99, and *Michalkovic*, BC EST # D056/00)
33. Dr. Pepper's arguments on appeal, including that Mr. Neal improperly appointed him, failed to hold proper elections and did not inform him of his potential liability, were all advanced before the delegate. I find no error in the delegate's conclusions on those points. Not only did the corporate records establish that Dr. Pepper was a Director of Medview as of October 10, 2016, in his June 20, 2017, e-mail to the delegate, Dr. Pepper confirmed that he was a Medview director from October 2016 until February 2017. Furthermore, attached to Dr. Pepper's response was an excerpt from documents filed by his lawyer in Ontario. Although the documents are incomplete, they are identified as "Schedule A to Defendant's Claim." Paragraph 13 of that Schedule confirms that Dr. Pepper was a director of Medview effective October 14, 2016. Paragraph 16 indicates that Dr. Pepper resigned as a director of Medview on February 2, 2017.

Paragraph 16 also indicates that Dr. Pepper's resignation was attached to the Schedule, although a copy of that resignation was not included in the response.

34. Although Dr. Pepper continues to deny that he was a director of Medview, I find no error in the delegate's conclusion that he presented no cogent or compelling evidence to discharge the presumption that he was properly recorded as a director. Indeed, the record suggests that he was aware he was a director and submitted his resignation as such after a four-month period.
35. Although the delegate did not expressly state that he rejected the evidence of the witnesses, I find no error of law in his failure to do so, as their evidence was of limited relevance. In *Michalkovic, supra*, the Tribunal held that it would be a rare and exceptional circumstance where a person recorded as a Director with the Registrar would not be found to be a director for the purposes of section 96. Showing that he or she does not actually perform the duties, functions and tasks of a director is insufficient.
36. The Tribunal has held that an honest person who is in business with a rogue who misappropriates funds and denies the director access to the company and records will be held liable (*Peter Stursberg*, BC EST # D380/01) as will a person who is a volunteer and receives no benefit from his involvement in the corporation (*Hernandez*, BC EST # D150/02). In *Grand East*, BC EST # D074/06, the Tribunal held that liability will be imposed even where there is good evidence of fraud or oppressive conduct on the part of other directors, or where the directors have exercised due diligence in attempting to operate the company properly.
37. Therefore, I find no error in the delegate's conclusion that Dr. Pepper was a director of Medview and is liable for the unpaid wages of the 17 employees under section 96 of the *ESA*.
38. The appeal is dismissed.

## ORDER

39. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated September 5, 2017, be confirmed in the amount of \$70,812.45 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**