

An appeal

- by -

S.G.D. Transport Ltd.
(the “Employer”)

- 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: Robert E. Groves

FILE No.: 2012A/95

DATE OF DECISION: November 15, 2012

DECISION

SUBMISSIONS

Steve Davis on behalf of S.G.D. Transport Ltd.

Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by S.G.D. Transport Ltd. (the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”).
 2. The Employer challenges a determination (the “Determination”) of a delegate (the “Delegate”) of the Director of Employment Standards issued on July 31, 2012. The Delegate determined that the Employer had contravened section 13 of the *Act* and sections 6(1)(f) and 6.1 of the *Employment Standards Regulation* (the “Regulation”). For ease of reference, these provisions are reproduced as follows:
 - 13 (1) A person must not act as a farm labour contractor unless the person is licensed under this Act.
 - 6 (1) A farm labour contractor must do all of the following:
 - (f) file with the director
 - (i) an up-to-date list of the registration numbers and licence numbers of each vehicle used by the farm labour contractor for transporting employees....
 - 6.1 (1) A farm labour contractor must, in every vehicle used by the farm labour contractor to transport employees, post a notice provided by the director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and the *Workers Compensation Act*, including driver, seating and seat belt requirements.
 3. Pursuant to section 29 of the *Regulation*, the Delegate ordered that the Employer pay administrative penalties in the amount of \$3,500.00.
 4. I have before me the Determination, the Delegate’s Reasons for the Determination, the Employer’s Appeal Form and submissions, the record the Director has produced pursuant to section 112(5) of the *Act*, and a brief submission from the Director.
 5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation now before me.
- ### FACTS
6. On June 26, 2012, the Employment Standards Branch Agriculture Compliance Team (the “Team”) conducted a roadside check to ensure that vehicles used to transport farm workers were being operated in

compliance with the *Act* and *Regulation*. The Team checked a vehicle with licence plate number DB 3221. The vehicle belonged to the Employer and was being used to transport farm workers.

7. The driver showed the Team a copy of the Employer's farm labour contractor licence. It was later determined that the licence had expired on June 15, 2012.
8. The Team noted that no safety notice was posted in the vehicle, as required by section 6.1 of the *Regulation*.
9. It was also determined that the Employer's vehicle, licence plate number DB 3221, was not registered with the Branch, contrary to section 6(1)(f) of the *Regulation*.
10. The Delegate forwarded letters to the Employer dated June 28, 2012, and July 10, 2012, identifying the alleged contraventions, and requesting a response.
11. In communications from the Employer generated by this correspondence, the Employer's principal ("SD") stated the following regarding the matters relevant to the determination of this appeal:
 - The Employer had been operating as a farm labour contractor with an expired licence. However, as soon as SD realized that this was so, he immediately contacted the Branch in order to commence the process needed to renew the licence.
 - The safety notice was not posted because the Employer's cleaners had removed it from the back of the driver's seat in the vehicle, and then lost it. They then replaced it with a copy of what SD referred to as the Employer's "Farm Labour Contract."
 - SD had personally delivered to the Branch the vehicle information required in section 6(1)(f) of the *Regulation*, but that the Branch had written the vehicle license plate number for the vehicle in question as DB 3221, rather than DB 3321, the correct number.
12. Regarding the last-mentioned item, subsequent inspection of the insurance documentation for the vehicle revealed that the proper licence number was, in fact, DB 3221, and that the Employer had never filed registration documents for a vehicle with licence plate number DB 3321.
13. In the Determination, the Delegate concluded that since the Employer was providing labour to harvest an agricultural product when the roadside check occurred on June 26, 2012, the Employer was acting as a farm labour contractor for the purpose of the *Act*. The Employer does not appear to dispute this finding.
14. The Delegate was also of the view that since the Employer was not licensed to act as a farm labour contractor at the time of the check, it was operating in contravention of section 13. Its failure to comply with the provisions of section 6(1)(f) and 6.1 of the *Regulation* on that date also constituted contraventions.
15. As the Employer had contravened section 6.1 of the *Regulation* on another occasion less than three years prior to June 26, 2012, the Delegate was of the view, expressed in his Reasons, that there should be a mandatory administrative penalty of \$2,500.00 imposed in respect of this violation. As for section 13 of the *Act* and section 6(1)(f) of the *Regulation*, it is to be inferred from the Delegate's Reasons that he believed administrative penalties of \$500.00 must also be imposed in respect of the contraventions of those provisions.

ISSUES

16. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

17. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
18. Section 115(1) of the *Act* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
19. The Employer submits that the Determination should be varied because the Director failed to observe the principles of natural justice.
20. A challenge to a determination on this basis raises a concern that the procedure followed by a delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case he is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
21. In my view, no failure to observe the principles of natural justice occurred in this case. The preliminary findings of the Delegate were communicated to the Employer in detail. A response was invited, before the Determination was issued. SD did make submissions regarding the alleged contraventions of the *Act* and *Regulation*. The Delegate analyzed those submissions carefully in his Reasons for the Determination. The fact that the Delegate decided they were insufficient to prevent a finding that the Employer had contravened the *Act* and the *Regulation* in the manner alleged does not support a conclusion that the Delegate committed a procedural error.
22. SD admits that the Employer's licence to operate as a farm labour contractor had expired, and that it was operating without a licence when the roadside check occurred on June 26, 2012, in violation of section 13 of the *Act*. By way of defence, SD asserts that he acted immediately to apply for a renewal of the licence as soon as he learned that it had expired, and so the Employer is entitled to leniency. He also states that the Branch failed to provide a reminder that the licence was about to expire, as other licensing bodies do.
23. Regarding the failure to post the safety notice as required by section 6.1 of the *Regulation*, SD acknowledges that the Employer had been fined previously for a contravention of this provision, and that he did not want it to happen again. He implies that he thought the notice was posted in the vehicle, but as it turned out, it was not.
24. SD also challenges the \$500.00 penalty imposed in respect of the failure to provide updated information regarding the registration number and licence number of the Employer's vehicle checked at the roadside on

June 26, 2012. He states that he did submit the insurance documentation for the vehicle in question, as he had purchased two vehicles and placed them into service on the same day. He says that he also delivered the insurance documentation to the Branch on that day. He asks, rhetorically, why he would only deliver one set of papers. He suggests the possibility that it was the Branch that mis-placed the documentation for the vehicle the Team checked on June 26, 2012.

25. In my view, none of the Employer's submissions are sufficient to warrant my interfering with those parts of the Determination which decide that the Employer contravened section 13 of the *Act* and sections 6(1)(f) and 6.1 of the *Regulation*, or that administrative penalties must be imposed.
26. The relevant provisions employ the word "must" in describing the requirements that are imposed. Section 29 of the *Interpretation Act* RSBC 1996 c.238 states that the word "must" is to be viewed as imperative. This means that it was the Employer's responsibility to ensure that it was licensed to operate as a farm labour contractor at the relevant time, that up-dated vehicle registration information was provided to the Branch, and that safety notices were properly posted.
27. There is nothing in the legislative provisions engaged in this matter that operates to provide a defence to the Employer against the imposition of administrative penalties based on the reasons SD has provided explaining the Employer's failure to comply with the requirements of section 13 of the *Act*, and sections 6(1)(f) and 6.1 of the *Regulation*. The failure to monitor the date on which the Employer's licence expired, or to ensure that a safety notice was properly posted in the checked vehicle, lies entirely at the feet of the Employer. That the Employer did not intend to contravene the *Act* is entirely beside the point.
28. I do not accept SD's suggestion that he delivered the insurance documentation for the checked vehicle to the Branch, and that somehow the Branch mis-placed it. While this is possible, it is not probable.
29. In his Reasons, the Delegate stated as a fact that the vehicle the Employer was using to transport farm workers on June 26, 2012, was not registered with the Branch. Apart from his own bald statement that he delivered the insurance documentation for the vehicle to the Branch, SD offers no evidence to support his contention that the Employer complied with the requirements of section 6(1)(f) in respect of it.
30. SD's contention is undermined, in addition, by the fact that initially he advised the Delegate that the Branch had incorrectly recorded the licence plate number for the vehicle, and that the proper number was DB 3321. When SD later delivered the insurance documentation for the vehicle, however, the Delegate observed that the licence plate number referred to on the documentation was, indeed, DB 3221, the number of the vehicle that was inspected on the day the Team conducted the roadside check. These facts suggest that SD's implying that the Employer's alleged violation of section 6(1)(f) was really due to errors on the part of the Branch is nothing more than an attempt by the Employer to evade responsibility for its failure to comply with that provision.
31. I have decided that the appeal must fail.
32. Having said that, I note that the Determination states that the administrative penalty of \$2,500.00 is to be imposed because of the contravention of section 6(1)(f) of the *Regulation*. It is clear from the Delegate's Reasons, however, that the \$2,500.00 penalty was imposed because of the violation of section 6.1. For that reason, I propose to vary the Determination so that it provides that the \$2,500.00 is in respect of the contravention of section 6.1 of the *Regulation*, while a \$500.00 penalty will be imposed in respect of the violation of section 6(1)(f).

ORDER

33. Pursuant to section 115 of the *Act* I order that the Determination be varied to provide that the administrative penalty for the Employer's contravention of section 6.1 of the *Regulation* be \$2,500.00, and the administrative penalty for the violation of section 6(1)(f) of the *Regulation* be \$500.00. In all other respects, the Determination is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal