EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

943 Sand Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/132

DATE OF DECISION: April 18, 1997

DECISION

OVERVIEW

This is an appeal by 943 Sand Ltd., under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination issued by a delegate of the Director of Employment Standards on February 12, 1997. The Determination imposed a penalty of $500.00 on 943 Sand Ltd. for its failure to produce or deliver employment records as required by a Demand for Employer Records dated December 6, 1996.

This decision deals only with the Determination which imposed a penalty on 943 Sand Ltd. It does not address any issues pertaining to the employment of Norman Rumbucher or Wayne Taylor.

ISSUE TO BE DECIDED

Should the Determination by varied, cancelled or confirmed?

FACTS

The Director's delegate sent, by certified mail, a letter and a Demand for Employer Records (dated December 6, 1996) to both the regular mailing address (P.O. Box 1038, Delta, B.C.) and the Registered and Records Office of 943 Sand Ltd. (5592 Summer Way, Delta, B.C.). Those Demands required the disclosure, production and delivery of certain employment records to the Director's delegate by December 23, 1996. They also contained the following notice:

> "Failure to comply with a record requirement may result in a $500.00 penalty for each contravention as stated in Section 28 of the *Regulations*."

The Determination states that the 943 Sand Ltd. did not produce or deliver the records described in the Demand. As a result, the Director's delegate determined that 943 Sand Ltd. contravened Section 28 of the *Employment Standards Regulations*.

Documents provided by the Director's delegate (and disclosed by the Tribunal to 943 Sand Ltd.) show that both Demand notices were returned by Canada Post and marked "unclaimed".

ANALYSIS

Section 28 of the *Act* requires employers to keep detailed payroll records for each employee. Specifically, Section 28(1)(d) requires the employer to record "the hours worked by an employee on each day, regardless of whether the employee is paid on an hourly or other basis."

Section 85(1)(c) of the *Act* describes the powers given to the Director of Employment Standards to inspect any records that may be relevant to an investigation under Part 10 of the *Act*. Section 85(1)(f) permits the Director to:

> *require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c).*

Section 46 of the *Regulation* (B.C.Reg. 396/95) states:

> *A person who is required under Section 85 (1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.*

The penalty was imposed by the Director's delegate under authority given by Section 98 of the *Act* and Section 28 of the *Regulation.*

Section 28 of the *Regulation* establishes a penalty of $500.00 for **each contravention** of Section 28 of the *Act* and Section 46 of the *Regulation*. Thus, the Director has no discretion concerning the amount of the penalty to be imposed once she has determined that a contravention of Section 28 has occurred.

Section 29(2) of the *Regulation* sets out the penalty for contravening a provision or requirement listed in Appendix 2 of the *Regulation*. In particular, Section 29(2)(a) of the *Regulation* imposes a $0 penalty for contravening a "specified provision" for the first time. However, Section 28 of the *Act* is not a "specified provision". I conclude from this that the Legislature intended that a $500.00 penalty would be imposed for **each** contravention of Section 28 of the *Act*.

943 Sand Ltd. gives the following reasons for its appeal:

- No demand for employer records was ever received by us in any shape or form. The officer Glen Smale has never contacted us in any way and certainly not by certified mail.
- The only correspondence with the Employment Standards that we have had was the Determination ordered by Kevin Rooney.
- The $500.00 fine is therefore ill conceived and should never have been ordered.
- Our co-operation is assured, however we are completely in the dark as of what this is all about.

Section 122 of the *Act* states:

> *(1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if*
>
> *(a) served on the person, or*
>
> *(b) sent by registered mail to the person's last known address.*
>
> *(2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.*

The address on Summer Way, Delta and the post office box to which the Demands were sent by certified mail were the last known addresses of the employer and its Registered and Records Office. Therefore, under Section 122(2) of the *Act*, the Demands are deemed to have been served on 943 Sand Ltd. It is not an adequate ground of appeal for 943 Sand Ltd. to argue that its cooperation is assured in the future.

I find, for the reasons given above, that the penalty imposed by the Determination falls within the statutory authority given to the Director or her delegate.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

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Geoffrey Crampton
Chair
Employment Standards Tribunal