Employment Standards TRIBUNAL

An appeal

- by -

Double 'R' Safety Ltd.
("Double R" or 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

ADJUDICATOR: Paul E. Love

FILE No.: 2000/806

DATE OF DECISION: April 26, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated November 1, 2000, issued by a Delegate of the Director of Employment Standards pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the *"Act"*), concerning payment of overtime adjustments for first aid workers employed in a remote oil field location. The employees worked 12 hours per day, and were on call for a further 12 hours per day. The employer claimed that a first aid trailer, which also had separate living quarters, was an employee's residence, within the meaning of s. 1(2) of the *Act*, and therefore the employees were not deemed to be at work.

ISSUE TO BE DECIDED

Did the Delegate err in finding that first aid employees in a remote camp setting are entitled to be paid overtime wages, based on being on call for a further 12 hours per day after working a 12 hour shift?

FACTS

This case is decided upon written submissions of the employer, employees and counsel for the Director of Employment Standards.

Stewart Wilson and Larry Pringle were employed by Double "R" Safety, as first aid attendants at remote camp settings in northeastern British Columbia operated by Wasacana Energy ("Wascana"), a oil industry employer. The camps in this case were situated near the Alberta border, and about 200 kilometres east of Fort Nelson, British Columbia . There was oil drilling, seismic and pipeline work in the area. Mr. Wilson worked at an oil well drilling site from January 3, 2000 to January 8, 2000. Mr. Wilson then worked with Mr. Pringle at the Wascana site from January 9th to March 9th. Mr. Pringle worked from December 27, 1999 to March 24, 2000 at the Wascana site. When Pringle and Wilson worked with each other at Wascana, Pringle worked a day shift from 7:00 am to 7:00 pm , and Wilson worked an evening shift from 7:00 pm to 7:00 am. Wascana, and the employer ran two twelve hour shifts, which leads me to infer that the operation was a continuous 24 hour per day operation. Workers Compensation Board ("WCB") regulations require first aid attendants to be present at all time during periods of operation, and require camps of more than 201 persons to have two first aid attendants. The employees occupied an atco trailer which contained living quarters, and a first aid room. There were separate entrances to each part of the trailer. Each employee maintained a permanent address at another location. These employees were expected to remain at the job site, and were expected to respond to emergency situations after their scheduled shift. The employees were on occasion called out for first aid work during their working shifts and during their off hours. Both Mr. Wilson and Mr. Pringle told the Delegate that they took direction on the site from Wascana's Employment Health and Safety Officer.

The Delegate investigated and obtained witness statements from the employer and from operators of the camp. In particular Wascana's Environmental Health and Safety officer, Brian Knibbs, testified that this particular camp required two first aid attendants to present at all time, that Wilson and Pringle were not able to leave the camp during their 12 hours off shift. The Delegate indicated that he discussed the requirement to stay at the camp with Kurt Roblin, the principal of Double R. Dean Miller, Wascana's project manager, indicated that the first aid attendants would have taken direction from Mr. Knibbs. Dean Miller indicated that Mr. Roblin was aware that the first aid attendants' could not leave the site during their time off.

The Delegate also indicated that he spoke with Jim Maguire, an officer with the Worker's Compensation Board. Mr. Maguire stated that work projects with excess of 201 people required two first aid attendants to be on site at all times. The Delegate reviewed the tendering information issued by Wascana and provided by the employer, which set out a camp size of 200 - 250 people requires two attendants on site at all times. Wilson indicated that he was required to stay on site during his 12 hours off, and that Roblin advised him that this was a two man camp and that he was required to cover for the other first aid attendant on his 12 hours off and take direction from Mr. Knibbs. Pringle was present when Knibbs spoke with Kurt Roblin about the attendants not being able to leave the site.

The Delegate found that the employees were required to remain on site, on call and at work for periods of 24 hours. The officer applied the definition of residence set out *in Knutson First Aid Services, BCEST #D 2000/68*, and found that the employees were deemed to be at work during their time off shift. The Delegate then found that the employees were entitled to wage adjustments to reflect work in excess of 12 hours per day. The Delegate determined that the employer had contravened s. 17 of the *Act*, and found that Mr. Wilson was entitled to the sum of $13,241.53, and Larry Pringle the sum of $18,386.16. The calculations were not in issue in these proceedings. The calculation was based on the hourly rate of $10.50 per hour.

Employer's Argument:

The employer asserted that the employees agreed to be paid for 12 hour days, and did not discuss with it any pay for the further "12 hour on call period" during the course of the employment relationship. The employer complained that Wascana never informed it that there was an issue with WCB compliance. The employer believes that it was in compliance with all contracts and submits that the employees were paid in full. The employer claims that the Delegate erred in finding that the employees were on call for a further 12 hour period after their shift, and that the Delegate erred in finding that the trailer was not a residence. The employer says that since a portion of work was performed in Alberta, the B.C. *Act* does not apply. The employer says that the employees were paid in full. The employer argues that Wascana had no authority to direct the employees of Double R with regard to hours of work, and if Double R was not in compliance with WCB regulations, Wascana should have informed Double R of this fact.

I note that the employer does not appear to dispute that the employees were "on call". In its written submission of January 29, 2001, the employer referred to s. 1 and then said:

> The intent of this definition was to deal with employees who are "on call", plumbers, electricians, fire fighters, government workers, emergency personnel, etc. In the Oil and Gas Industry a number of employees are on call, usually specialists, first aid attendants, H2S specialists, and engineers, they wait for a specific time to measure and others wait in case of any emergency. The Oil and Gas Industry is a very dangerous occupation, in that we have sulphur poison, and hazardous other materials.
>
> When an employee lives in a "residence" and is on call, they are not entitled to wages, because they are not performing a service at that time, but are waiting for an emergency. Some FAA's have easy times on the sites, and others are very busy and experience deaths and other very serious accidents.

I am satisfied in this case, that the employer knew that each employee worked 12 hours per day, and could be called out for work during the balance of the day after scheduled working hours.

I take this passage to amount to an admission that the employee's were on call. There is other evidence which amply supports the fact that the employees were on call, after they finished their 12 hour shift.

The employer submits that this is a matter for an oral hearing. The Delegate indicates that an oral hearing is not necessary.

ANALYSIS

The burden rests with the appellant, in this case the employer, to establish an error in the Determination such that I should vary or cancel the Determination.

Hearing or Written Submissions:

This case was decided upon written submissions, and the appellant submitted a detailed written submission with its appeal dated November 23, 2000 and supplemental written submissions on January 29, 2001. In my view this case is resolved appropriately by way of written submissions, particularly since the facts are not in issue substantially, and the case deals primarily with the interpretation of the provisions of the *Act* , and the application of *Knutson First Aid Services*, *BCEST #D 2000/68*, reconsidered *BCEST #RD095/01*. *Knutson First Aid Services* is a case issued recently by the Tribunal on a set of facts very similar to the present case. The appellant has done a very good job of setting forth its position in its written submissions, and little if anything would be added, in my view, if this case were to be the subject of an oral hearing.

The principle issue in this case deals with the definition of work under s. 1(1) and 1(2) of the *Act*. Work is defined as meaning

> the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> 1(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

The particular issue is whether the trailer in a remote camp is "the employee's residence". If it is not the employee's residence, the employees in this case are deemed to be at work because they are on call at a location designated by the employer.

The employer has raised a number of arguments, which I find convenient to deal with before the main point.

Compliance with WCB Regulations and Dispute between Wascana and Double R:

In my view the only rational inference to be drawn from the evidence of the parties, was that the employer was aware that in a camp of more than two hundred people, two first aid attendants were required on site at all times. This is a WCB regulation. Both the employer and Wascana appear to be aware of this. The size of the camp was set out in the tender documents. If the employer was unaware of the WCB regulations relating to the numbers of first aid attendants required, it is incumbent upon it to learn the regulations, after all the employer does appear to be in the business of providing first aid attendants to industry. If the employer was mislead by Wascana, concerning the size of the camp, and this does not appear to be the case, or Wascana failed to follow protocol with regard to Double R's employees, Double R's remedy, if any, is against Wascana. If there is a dispute between Wascana and Double R concerning the contract between those parties, this is not the appropriate forum to be sorting out that dispute. The employer has raised issues which are quite separate from whether the employer breached the provisions of the *Act*, and whether the employees are entitled to further wages. My jurisdiction is limited to assessing whether the Delegate has erred in determining that the employees were entitled to wages.

The employees in this case, were obliged to follow the directions of Wascana's Environmental Health and Safety officer, even though the employees were supplied and paid for by this employer. The employer set up the situation which provided employees which were required to be available to Wascana, on a 24 hour basis. I note that an employer must comply with s. 34 of the *Act*. The employer is required to pay wages for the ... "the entire period the employee is required to be at the workplace". Certain workers are excluded from Part 4 of the Act by virtue of s. 34 of the *Employment Standards Regulation*. First Aid attendants are not persons who fall into that category of workers.

Section 4:

The employer says that the employees contracted for 12 hours pay, knew of the workplace arrangements and did not complain to Kurt Roblin, or the employer, during the course of the employment relationship. The employer says that the employees have an onus to discuss discrepancies with the employer. An employer has an obligation to comply with the *Act*. Even if one can say that the employees agreed to the terms of employment which involved pay for only 12 hours of a 24 hour working day, these facts are of course immaterial, because s. 4 of the *Act* provides the parties cannot contract out of the minimum provisions of the *Act*. The Tribunal has considered s. 4 on numerous occasions, and it is apparent from an analysis of those cases that an employee cannot waive the minimum standards set out in the *Act*.

Jurisdiction:

The employer claims that the Alberta Act applies to the employees, when the employees worked in Alberta. It is not entirely clear that this submission was ever made to the Delegate, and the employer has not thoroughly canvassed the extent of the work performed in Alberta. From the submissions made by the employees, the "Alberta work" appears to be incidental to the work performed in British Columbia. In my view, the British Columbia *Act* applies, where the employer offered work to the employees, who were living in British Columbia, and where the work was performed substantially in British Columbia. The employees in this case have a substantial and real connection with British Columbia and therefore this *Act* applies regardless of the allegation that some incidental work was performed outside of British Columbia: *G.A. Borstad Associates, BCEST #D333/96 (Roberts), Xinex Networks Inc, BCEST #D 575/98 (Stevenson), Finnie, BCEST #d363/96 (Suhr).*

Employee's Residence:

The employer argues that it is not obliged to pay the employees during the "time off", because they were in a residence. The *Act* provides in s. 14 that work means "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere". An employee can provide services from his accommodation. In section 1(2) of the *Act*, the employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence. The question in this case is whether the accommodation provided by the employer to the employee is an employee residence within the meaning of the *Act*.

I note that the word "residence" is a somewhat elastic concept. The employer argues that residence simply means bodily presence as an inhabitant in a place, and that a person can have more than one residence. The employer suggests that the word residence should be given a large and liberal interpretation. The employer distinguishes residence from domicile - domicile being a permanent intention to reside in a place. In the employer's written argument the employer makes reference to Black's law dictionary and a number of American cases, but does not supply the text

of the cases. Definitions given in a particular factual or jurisdictional context and particular cases from outside British Columbia may or may not be helpful, when one interprets a statute.

The case of *Machtinger v. HOJ Industries Ltd., [1992] SCR 986* provides that employment standards legislation should be construed to extend the *Act's* protection to as many employees as possible. In any event, the *Interpretation Act*, provides for remedial construction of statutes (s. 8). The words should not be strained, however, to provide for an unreasonable result. The Director argues that portions of the *Act* which restrict benefits should be strictly construed in order to preserve the intent of the *Act*: *Kosick Holdings Ltd, BCEST #D362/96.*

While employment standards legislation is to be given a remedial interpretation, in the context of s. 1, the use of the words "employee's residence" takes away the employee's right to payment for work. The legislature must have intended all employees to have the benefit of pay, unless the employer can show there is a reason why the benefit should be taken away. In *Awassis Home Society, BC EST #D019/97* the Adjudicator for the Tribunal concluded that:

> ...however, exceptions to those minimum requirements such as the exclusions under Section 34 of the Regulations must be interpreted in the most narrow manner in order to preserve the intent and purposes of the Act.

I note that the legislature did not use the words "onsite" to modify residence, or the word accommodation alone. These would be broader methods of framing the exclusion from the definition of work. I note that the word residence is qualified by the word "employee". The residence must "belong" to the employee.

The concepts of residence, domicile and sojourning, have been considered by the Supreme Court of Canada, in connection with the Income Tax Act, *Thompson v. M.N.R. [1946] S.C.R. 209.*

> There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage... The Shorter Oxford English Dictionary gives the meaning of "reside" as being "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place". A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is"ordinarily resident" in the place where in the settled routine of his life he regularly, normally, or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question.

I note that if one were to chose from the concepts of residence, domicile or sojourning to describe the employee's accommodation at the camp, the most appropriate definition would be sojourning not residing, as the nature of the presence in the camp is temporary.

In my view the appellant's arguments are unhelpful, as both these employees are domiciled and resident within British Columbia, and Canada. The concepts of "domicile" and "residence" are concepts which courts apply on a regular basis to take jurisdiction, to apply choices of law where there is a conflict of law, to determine whether the state is entitled to tax a person in the jurisdiction. While the concepts of "domicile and residence" may be helpful to determine whether a person has a connection with a place, sufficient to be subject to the taxing authority of a state or jurisdiction of its courts, the concept is of little help in determining this dispute, which is not a conflict of laws or jurisdictional problem. The domicile/residence distinction is not helpful in determining entitlement to "on call pay".

In *Corner House, BCEST #D 254/98*, the meaning of the word "residence" was considered in the context of the definition of a "residential care worker". The Tribunal held that "For a workplace to be considered as a residence ... there must be some element of permanence as opposed to the intermittent or temporary" nature. In *Corner Brook* the Adjudicator was of the view that

> Residence seems to be a notion which the courts and legislatures have rarely clearly defined. It seems to be a notion which is accepted in a common sense way. Residence then is something short of domicile, i.e. the intention to remain in that place permanently, but something more than temporary or intermittent. It has some degree of permanence; it is the person's settled abode; it is the place they carry on the settled routines of life. It would be the place one hangs one's hat, keeps one's clothes, stores treasures and family memories; a place of privacy protected in law from state intrusions; and a place of retreat from the turmoil of the workplace. It would be a place to entertain one's friends. It would be an address of one's own, a phone number, and a place to receive mail.
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> This is not to say that there are not situations where an employee gives up some of the benefits of a private residence to live communally or at a place of work. For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

I agree with the Director that a temporary abode, such as the one occupied by the employees at the camp cannot be considered to be a residence, as there is no element of permanency. Each of these employees did have a permanent residence elsewhere in the province.

The employer prepared its submission before the Tribunal released the reconsideration decision in *Knutson First Aid Services*. The employer was of the view that the Knutson decision was erroneous.

Knutson was reconsidered by a three adjudicator panel in *BCEST #RD095/01* with a decision issued on February 7,2001. In my view the facts in *Knutson* are indistinguishable from the case before me in that both cases deal with first aid workers, in remote camp settings, living in temporary accommodation with a requirement to work 12 hours and be on call for a further 12 hours. The issues and facts are identical. In *Knutson First Aid Services* the panel said:

> The employee was only present in the first aid trailer full time because he had to be. He had no choice in the matter. He was on call 24 hours per day. It was a "location designated by the employer" and thus falls squarely within the deeming provision for "work" in section 2(2). He was "staying " there temporarily and for a limited purpose: Corner House, supra, at p. 9. The trailer was not the employee's residence. To suggest that it was the employee's residence would in our view require a degree of permanence or settlement not shown here.

The issue is whether the trailer provided by the employer and situate on a remote worksite can be considered an employee's residence, such that a person otherwise entitled to on call pay, should be excluded from on call pay. In my view an employee's residence is something which is distinct from temporary living quarters supplied by an employer while an employee, for logistical or other employer requirements, cannot leave a job site. In the circumstances of this case, it was impractical for the employer to transport the employee to the job site on a daily basis. Wascana apparently required 24 hour coverage by two first aid attendants. An employee in a remote camp, who is required to be present, and who cannot leave, and must provide service when requested, is on call in a place designated by the employer. While the employee may occupy a trailer, which is also the first aid trailer, while in a camp setting, the occupancy is of such a transient nature that it could not be said to be an employee's residence, such to exclude the employee from on call pay .

There can be no doubt that the employees in this case where required to be at the workplace, which was also a temporary abode. I note that the employer has commented in its submission that a decision of the Tribunal to ensure payment at minimum wage or at the contracted hourly rate for 24 hours a day would "break most First Aid employers". I note that it is open to the employer through a variance, or the first aid employers, as a sector, to seek an exclusion from the *Act*. As an adjudicator, however, I do not have any power to exclude Double R from the operation of the *Act*. I am also concerned that the submission of the employer, if accepted, would require me to depart from the ruling of the Tribunal in *Knutson First Aid Services*, which is a decision indistinguishable on its facts, from the present case.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated November 1, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal