

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

by

Irvine J. Millar
("Millar")

of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Alfred C. Kempf
FILE No.:	96/764
DATE OF HEARING:	April 23, 1997
DATE OF DECISION:	May 20, 1997

DECISION

OVERVIEW

This is an appeal by Irvine Millar ("Millar"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on November 21, 1996. In this appeal Millar claims that wages are owed to him by Doug Damen and Noreen Damen operating as Triple AAA Tree Service ("Triple A").

The hearing was in Vernon, British Columbia on April 23, 1997. Millar appeared on his own behalf. Doug Damen and Noreen Damen appeared on behalf of Triple A.

Millar requested leave to provide further evidence and submissions after the hearing. Triple A received and responded to these additional submissions.

The primary issue was compensation for travel time.

AGREEMENTS

Millar and Triple A agreed on the following matters at the outset of the hearing:

1. Millar is not pursuing any claims for wages other than arose out of the Mabel Lake and Shuswap contracts which will be referred to in detail below;
2. The only other issue under appeal concerns the Determination's denial of reimbursement for apparel known as slashing pants in the amount of \$198.00 representing two pairs of such pants.

FACTS

Millar started working for Triple A in 1992. Part of Triple A's business was the clearing of right-of-ways for B.C. Hydro.

Millar was at all relevant times a certified arborist and therefore qualified to do tree falling and trimming work near or adjacent to power lines. Triple A employed other workers on these projects to clear up cuttings left by the trimming and falling work and also to clear slash in the right-of-ways.

Triple A's base of operations was the yard of it's principals in Vernon, British Columbia.

Triple A also was engaged in residential tree trimming and clearing work in or about Vernon. This work, since it took place mainly in town, is not in issue in this appeal.

Mabel Lake Project

A project for powerline right of way clearing at Mabel Lake was started by Triple A in the fall of 1994. Millar claims that he was paid for 8 hours a day for most of this contract when in fact he worked 10 hours per day. The difference of 2 hours consisted of travelling time from various locations in Vernon to the worksite at Mabel Lake.

Doug and Noreen Damen testified that they advised their employees that it was their responsibility to make their own way to the worksite and that they were only to be paid for their time at the worksite which was from 8 a.m. to 4:30 p.m. with a ½hour unpaid lunch break.

There is no dispute that Millar was paid at least 8 hours per day. For the first 3 days of the contract he was paid an additional sum for travel in the equivalent of 1 hour per day.

In summary, Triple A's evidence was that Millar was paid 8 hours per day for his actual working time. The time taken to commute was not Triple A's responsibility. Doug and Noreen Damen gave evidence that Millar expressly agreed to this method of compensation and in fact Doug Damen testified that Millar had suggested that nothing be paid for travel time. Millar did not challenge or give contrary evidence on this point.

Millar testified that he drove other workers to the site and that he used a company vehicle to do this. Doug and Noreen Damen agreed that he did transport other workers and that he did use a company vehicle. They testified this was merely for the convenience of the employees as it had been made clear to them that they would not be compensated for travel unless the travel to and from the worksite was more than 1 hour in each direction.

It is obvious that the nature of Triple A's business is that workers would not normally work at one location but would be expected to work in a variety of locations.

Doug and Noreen Damen gave evidence that the travel time from Vernon to the Mabel Lake site was in the range of 30 to 45 minutes. Millar gave no direct evidence as to the time it took to travel from Vernon to Mabel Lake although it may be inferred from his written submissions that he claimed it would have taken 1 hour each way. I prefer the direct evidence given by Doug Damen that the travelling time from Vernon to the Mabel Lake project was 30 to 45 minutes.

Triple A produced time records and payroll records indicating that, with the exception of the 3 first days of the Mabel Lake job, time recorded for Millar was 8 hours per day. While Millar did not sign these time records or submit or keep his own time cards, there was uncontradicted evidence from Noreen Damen that these time cards were often completed in the presence of Millar who raised no objection. It is also clear from the evidence that Millar was paid on the basis of 8 hours per day during the Mabel Lake

project. There is no evidence that he made any claim for travelling time until he left the employ of Triple A over two years later.

Shuswap Project

The Shuswap project started shortly after the Mabel Lake project. This contract was for the clearing of right-of-ways between Scotch Creek and Anglemont. Millar was paid for 8 hours of work and the equivalent of 2 hours pay as a travel allowance for each day worked on this project. (In other words Millar was paid the equivalent of 10 hours per day without overtime and he claims to be entitled to 12 hours per day, or a difference of 2 hours per day plus overtime).

There was some dispute about Millar's actual travel time per day.

Millar claims that he left Vernon at approximately 6:00 or 6:30 a.m. to get to the project and returned to Vernon between 6:00 and 6:30 p.m. Noreen Damen's evidence was to the effect that the truck that Millar was using to travel to the project was picked up around 7:00 a.m. and returned around 5:00 to 5:30 p.m although he did often take it home with him.

Other employees on the project, Chris and Shane Pochay gave evidence that they were typically picked up en route to the project at the Squilax Bridge by Millar at 7:45 a.m. and started work between 8:00 and 8:30 a.m. They also gave evidence that quitting time was usually at 4:00 p.m. and that they were normally dropped off at the Squilax Bridge at approximately 4:30 to 4:45 p.m. On the few occasions that Pochay travelled to the jobsite from Vernon, he says he left the Vernon area at approximately 7:00 a.m. with Millar.

There is no evidence to substantiate Millar's evidence that he generally left Vernon at 6:00 to 6:30 a.m. and returned to Vernon at 6:00 to 6:30 p.m.

Millar after the oral hearing submitted a letter from the Ministry of Transportation and Highways providing distances between Vernon and the Squilax bridge (102.702 km) and between the Squilax Bridge to the far end of the contract at Anglemont (46.341 km). The letter also contains an opinion of the time taken to travel from Vernon to Squilax of 1 hour and 30 minutes. There is no indication what speeds would be travelled or whether the time taken would be dependant on the time of day or time of year travelled.

Triple A responded to the letter from the Ministry of Transportation and Highways by saying that the distance from their yard to the Squilax Bridge is 93.79 km and travelling time to this point was one hour in the mornings and 1.5 hours in the afternoons (due to more traffic). Triple A points out that Millar did not always arrive at Squilax at exactly 7:45 and that he was often up to fifteen minutes late.

Doug and Noreen Damen testified that the Shuswap and Mabel Lake projects were handled in accordance with the company's long standing policy that travel time from Vernon to the site of more than 1 hour would be compensated for by a travel allowance of up to 1 hour at the employee's applicable hourly rate.

In January of 1996 Triple A changed its policy to introduce an amendment whereby an employee who is required to transport other employees would be entitled to be paid an hourly rate of \$7.00 per hour even if the travel was less than 1 hour per direction from Vernon.

I am left with the task of reconciling this evidence to determine the actual travel time on these projects.

Mabel Lake: I am satisfied on all of the evidence that the travel time to Mabel Lake from Vernon was not more than one hour.

Shuswap: I have more trouble with this evidence. I accept that travel times between Vernon and Squilax at the times travelled by Millar were one hour in the morning and one and a half hours in the afternoon.

The distance from Squilax to the worksites would have been anywhere from a few kilometres to 46 km. There is no other practical method of resolving this issue other to find that this distance was an average of 23 km. The evidence at the hearing was that the actual travel time for this last leg averaged one half hour.

Millar's actual travelling time was therefore one and one half hours in the morning and two hours in the afternoon for a total of three and one half hours. In reaching these conclusions I have included brief stop times to pickup and drop off the employees at Squilax but I have not included other stop times for personal business.

The Damens testified that Millar was not required to travel - if he had objected to travel to either of these jobs they may not have been taken or other arrangements made, for example for, accommodations close to the job-site.

Millar used company vehicles for the travel in issue. He also had some personal use of Triple A's vehicle outside of work hours.

Special Clothing

The evidence discloses that Millar's work required Workers' Compensation Board approved pads or chaps be worn. Triple A supplied chaps which are worn over regular clothing. Millar preferred wearing special long pants affording, in his opinion, better protection. These pants were not supplied by Triple A nor was there any agreement on Triple A's part to supply these pants to Millar. Millar says he purchased 5 or 6 pairs of such pants but is only claiming reimbursement for 2 pairs of these pants. Apparently Triple A purchased 2 pair of pants for Millar at his request and then deducted the cost of these pants from a subsequent paycheque. There is no evidence of any objection or dispute about this until after Millar was dismissed from the employment of Triple A. There was no evidence before me that the clothing supplied by Triple A did not meet Workers'

Compensation Board standards or that the clothing selected by Millar was required by Triple A.

ISSUES TO BE DECIDED

The primary issue which arises is whether, in the circumstances, Millar is entitled under the *Act* to be compensated for the time taken by him to travel from Vernon to the Mabel Lake or Shuswap project sites and if so, the subsidiary issue is how much time was taken by him to travel to these sites.

The second issue is whether Triple A has any liability under the Special Clothing provisions of the *Act*.

ANALYSIS

The Employer's Liability for Travelling Time

There is no definition of specific provisions regarding travelling time in the *Act* or *Regulation*.

Work is defined as follows:

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

The issue of travelling time has recently been considered in two decisions of this Tribunal (BC EST #D267/96 and BC EST #D090/97).

These decisions restate the starting proposition that employees are not entitled under the *Act* to payment for time taken to get to work. Some employees commute great distances to get to work - some have merely to turn on a computer at home. There is no mechanism in the *Act* for compensating the travelling employee unless a construction of his or her employment contract leads to the conclusion that the employee is working and not merely commuting to work.

There are several factors which might be considered in determining whether a travelling employee is working:

1. has the employer designated a marshalling point and indicated that he will pay for travel from that point or is the marshalling point merely a convenient gathering point for the employees;
2. has the employer assigned duties to the employee to be performed en route (i.e. picking up other employees or supplies);

3. does the employer pay for expenses of the vehicle transporting the employee;
4. does the employer provide a vehicle;
5. is the use of such provided vehicle mandatory or optional;
6. is the vehicle driven by the employee required at the remote job location;
7. is there a minor or significant amount of travel involved;
8. does the employer have a policy or is there an agreement between the employer and employee about compensation for travel time which does not offend the provisions of the *Act*; and
9. does the employer require the employee to travel as part of his duties.

This list is by no means exhaustive and some of the factors mentioned will not apply in all circumstances. Nor are any of these factors individually determinative of the issue.

In the present case I have concluded that Triple A had a policy for travel which did not offend the *Act*. Millar would be compensated for travel to worksites which were an hour or more away from Vernon. That compensation was limited to the equivalent of one hours pay each way no matter how long the travel took.

I have considered whether this provision offends the overtime provisions where the combination of work time and travel time exceeds the hours of work standards in the *Act*. I have concluded that it does not because Millar was not "working" while travelling. I have reached this conclusion because:

1. He did not have assigned duties along the way. Picking up employees en route was merely a convenience for the employees.
2. If it can be said that any marshalling points were established they were established only for the convenience of the employees.

3. There was no evidence that the vehicle being driven by Millar, while supplied by Triple A, was required at the job site since arrangements were made near the job site to store required equipment. Rather the provision of the vehicle was more a prerequisite of Millar's employment.
4. Millar was not required to travel as part of his employment. If he did not want to work on a remote project he did not have to work on the project. If he did not want to commute under the travel policy in effect Triple A could have arranged accommodations close to the work site.

On balance, having regard to all of the considerations set out above Millar has not established on a balance of probabilities that the Determination is incorrect on the issue of travel time. While the time taken to travel to the Shuswap contract was considerable, I am satisfied that it was not "work" as defined by the *Act*.

Special Clothing

The *Act* provides as follows:

25. (1) *An employer who requires an employee to wear special clothing must, without charge to the employee,*
 - (a) *provide the special clothing_*

I am satisfied on the evidence that Triple A provided the special clothing required by the Worker's Compensation Board. To the extent that Millar wished to use a different kind of special clothing he must bear the expense himself. Triple A did not require or agree to pay for special clothing which it did not supply.

ORDER

In summary, I order under Section 115 of the *Act*, that the Determination #CDET 004765 be confirmed.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal