Employment Standards TRIBUNAL

An appeal

- by -

Rick Stewart

- 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: Carol L. Roberts

FILE No.: 2003A/259

DATE OF DECISION: December 2, 2003

DECISION

SUBMISSIONS

Rick Stewart:	On his own behalf
Paul Wilson	On behalf of Select Systems Contractors Ltd.
Ed Wall	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Rick Stewart of a Determination of a delegate of the Director of Employment Standards issued August 27, 2003. Mr. Stewart filed a complaint alleging that his employer, Select Systems Contractors Ltd. ("Select") had failed to pay him fair wages for two specified days, and an appropriate wage for a first aid attendant, contrary to s. 5 of the now repealed *Skills Development and Fair Wage Act* ("*SDFWA*"). Although the delegate found that Mr. Stewart was entitled to two hours unpaid wages, he concluded that the *SDFWA* had not been contravened with respect to the first aid attendant rates.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. I find that an oral hearing is not necessary to determine this appeal.

ISSUE TO BE DECIDED

Whether the delegate erred in law in concluding that Mr. Stewart's first aid work did not fall within the scope of the *SDFWA*.

FACTS

Skyway Canada Limited ("Skyway") is a company headquartered in Ontario. Skyway was subcontracted by Clara Industrial Services Ltd. ("Clara") to provide and install infrastructure necessary to permit sandblasting and painting of a bridge for the Ministry of Transportation and Highway ("MOTH") in Nelson, B.C. The Nelson bridge project was subject to the provisions of the *SDFWA*.

Skyway owns Select Systems Contractors Ltd. ("Select"), a payroll company headquartered in Alberta. Select's submissions were made by Skyway's President. For the purposes of this decision, all references will be to Select.

Select hired Mr. Stewart as a labourer/safety officer on July 13, 2001. Mr. Stewart has a level one first aid certification. He contended that he was hired for his first aid skills in order for the employer to comply with Workers Compensation Board (WCB) Regulations requiring a first aid attendant on the projects, since he had no construction experience. He further stated that he was identified to the crew as the first aid attendant. Mr. Stewart submitted that he performed first aid tasks as necessary and required. He stated that he attended workers with both major and minor injuries, conducted safety meetings with crews,

conducted site and work tours with WCB and Ministry of Highways safety personnel, and ensured the first aid kit was properly equipped and maintained.

Mr. Stewart provided the delegate with a letter from a witness who served as a foreman on the site from the fall of 2001 to the summer of 2002 who indicated that the foreman, Kevin Mudge, identified Mr. Stewart as the first aid officer. The witness also indicated that Mr. Stewart always wore a radio in the event his services were needed.

A WCB occupational safety officer wrote that Mr. Stewart was introduced to him as the first aid attendant, and that he was led to believe that Mr. Stewart was "in charge" of ensuring that all workers on site were in compliance with safety regulations. The officer further indicated that Mr. Stewart accompanied him as the worker representative on several site visits.

Mr. Stewart contended that Mr. Mudge did not have first aid qualifications, and that, even if he did, he was off the work site for extended periods of time. Further, Mr. Stewart asserted that if Clara was to provide the first aid attendant, Select would be in violation of WCB requirements because Select employees were on the job site months before Clara employees arrived, and left months after Clara employees were gone.

Select denied that Mr. Stewart was designated as the first aid attendant, and that it neither offered nor intended to compensate him over and above his regular wages for his first aid qualifications or any possible health or safety responsibilities. It also denied that Mr. Stewart provided any first aid services. It stated that Mr. Mudge provided the majority of first aid services for both the general contractor and for Select.

Select contended that Mr. Stewart approached its branch manager, Jeff Elias, regarding training to upgrade his first aid qualifications, and that Mr. Elias told him that Select did not need his services as first aid attendant. Further, Select contended that the general contractor employed a first aid attendant in 2001.

Work on the bridge was suspended during winter months, and resumed in March, 2002. When Mr. Stewart was re-hired, Select's payroll records indicate his position as a labourer, with no reference to safety officer or first aid officer.

The delegate reviewed the *SDFWA* and found that it did not require the employment of a first aid attendant on this project. The delegate had regard to the definition of first aid attendant as contained in the Occupational Health and Safety Regulation:

> "attendant" means a first aid attendant who is designated by an employer to provide first aid to workers at a workplace, and who holds a first aid certificate valid for that workplace.

The delegate concluded that, in order for Mr. Stewart to qualify for the $1 per hour premium he had to be both 'designated' and hold a valid first aid certificate. Although the delegate found that Mr. Stewart had a valid first aid certificate, he was not persuaded that he was "designated" as the first aid attendant. The delegate concluded that Mr. Stewart had not provided sufficient evidence to show that Select agreed to both designate him as the first aid officer, as distinct from a safety officer, and pay him accordingly.

ARGUMENT

Mr. Stewart argued the delegate failed to observe the principles of natural justice. As I understand his argument, Mr. Stewart contended that the delegate failed to give appropriate weight to the evidence of his witnesses. Mr. Stewart also contended that following several discussions with Mr. Mudge, he was assured that the first aid rate would be paid to him.

Mr. Stewart further submitted that the delegate failed to properly consider and apply the Occupational Health and Safety Regulation. He submitted that WCB Regulations require a qualified first aid attendant to be on site at all times, that he was that person, and further, that he was represented as the first aid attendant.

Mr. Stewart further submitted that the delegate failed to determine who the first aid attendant was, if it was not him. He asserted that, without a first aid attendant, the project could not proceed.

The delegate submitted that he preferred the evidence of the employer over that of a third party, and found that the evidence supporting Mr. Stewart's position "did not outweigh the evidence supporting the employer's position". The delegate further stated that "it is noteworthy that both of the ROE's issued to the appellant describe his occupation as scaffolder, not first aid attendant".

The delegate acknowledged that Mr. Stewart performed a number of safety related duties but submitted that there was insufficient evidence to show that Select agreed to employ Mr. Stewart as a "first aid officer".

Select's response, as noted above, was prepared by the President of Skyway Canada. Mr. Wilson contended that Clara, as the prime contractor, had the primary responsibility to provide first aid for all employees on the project. He further submitted that Mr. Mudge was to be Select's first aid attendant in the event that Clara did not provide that service, and that Mr. Stewart was hired twice as a labourer and was "repeatedly and constantly" told that his services as a first aid attendant were not needed.

Mr. Wilson further submitted that the WCB regulations and the SDFWA regulations were not intended to be integrated. Mr. Wilson argues that Mr. Stewart's description of his duties suggest that he was performing duties of a safety officer rather than a first aid attendant, and that the job requirements are distinct.

In reply, Mr. Stewart provided a summary of incidents in which he provided first aid. He also submitted that he completed a WCB "Report of Injury Form" when Mr. Mudge required first aid.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

The *SDFWA* was intended to ensure skill development training in the construction industry, and to ensure that employees receive fair wages for work performed on publicly funded construction projects. (s. 2(a) and (c)).

Section 5 of the *SDFWA* provided that

> all employees of a contractor, subcontractor or any person doing or contracting to do the whole or any part of the construction to which the Act applies must be paid fair wages in accordance with the Regulation.

Fair wages are deemed to be wages for the purpose of the *Act*. There is no dispute that this project was governed by the *SDFWA*. The responsibility for complying with Part 2 of the *SDFWA* rests with the employer, whether the employer is the contractor or the sub-contractor (*Wigmar Construction* BC EST #D269/96).

During the relevant times, the specified wage rate for labourers was $19.90 per hour plus benefits, and for first aid attendants was $20.90.

The delegate concluded that the *SDFWA* did not require the employment of a first aid attendant on this project. While that may be, the delegate did not determine whether WCB regulations required a first aid attendant on the project. In other words, there was no determination as to whether WCB regulatory requirements were satisfied by Clara's first aid attendants, particularly in light of evidence that suggested that Select's employees were at the job site for several months when Clara's employees were not. There was also no determination, or apparent investigation, as to whether Mr. Mudge satisfied those requirements.

Select's submissions were made by Mr. Wilson, President of Select's parent company. Mr. Wilson had no personal knowledge of the facts. His submission was based entirely on conversations he had with Select employees. Nevertheless, the delegate chose, for reasons that are unexplained, to prefer Select's hearsay evidence over direct evidence provided by Mr. Stewart and his witnesses. I find that the delegate's preference of hearsay evidence over direct evidence which was corroborated by three persons, without reasons, is not sustainable. I find that the best evidence is that of Mr. Stewart, which was corroborated by three witnesses, at least one of whom had no interest in the outcome of Mr. Stewart's complaint.

Mr. Stewart's evidence was that Mr. Mudge hired him for his first aid qualifications. Oral agreements are sufficient to constitute an agreement under the *SDFWA (D.E. Installations* BC EST #D275/96).

Although Select denied that it hired Mr. Stewart as a safety officer at any time, Select's employee payroll information form indicates that on July 13, 2001, Mr. Stewart was hired as a labourer/Safety officer. Although Mr. Wilson acknowledged that Mr. Stewart was "designated" as a candidate for the position of safety officer, he contended that the hiring officer "neither offered nor intended to compensate Mr. Stewart additionally for either his First Aid abilities or his possible occupational health & safety responsibilities". However, Select failed to provide any statements from Mr. Mudge, who hired Mr. Stewart, and would have been in the best position to refute Mr. Stewart's statements. Although Select eventually submitted a statement from Mr. Mudge, that statement was limited solely to Mr. Mudge's activities with respect to first aid issues, and did not address any conversations Mr. Mudge may have had with Mr. Stewart, or his response to Mr. Stewart's allegations that he agreed to pay him additional amounts for the first aid position. Further, Mr. Mudge's statement does not confirm or deny that Mr.

Stewart performed any first aid tasks. Select presented no evidence from Mr. Mudge regarding what representations were made to Mr. Stewart. In my view, an adverse inference ought to be drawn from Select's failure to provide any evidence from Mr. Mudge on this point.

The evidence is that, as of October 6, 2001, Mr. Stewart was identified as an OHS officer and his wages increased from $19.13 per hour to $21.30 per hour. The fact that Mr. Stewart's ROE's identify him as a "scaffolder" are of little assistance to determining whether he was a first aid person and should be given little evidentiary weight, since those documents were prepared at Select's Alberta office by a person without any apparent knowledge of Mr. Stewart's actual duties.

I conclude that the delegate erred in finding that Mr. Stewart was not entitled to compensation for first aid attendant. I find that there was sufficient evidence before the delegate to conclude that Mr. Stewart was hired as a first aid attendant, was presented to third parties as a first aid attendant, and performed duties of a first aid attendant such that he should be paid for those duties. I find that Mr. Stewart also performed the duties of a labourer. The wages owing to Mr. Stewart may be calculated based on the amount of time he spent performing each duty (see *Wigmar Construction (BC) Ltd.* BC EST #D331/96 and *Tana L. Gilberstad* BC EST #D129/97).

ORDER

I Order, pursuant to Section of the Act, that the determination, dated August 27, 2003, be referred back to the delegate for calculation of Mr. Stewart's wages.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal