

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 -

Brad Irvine operating as B.W.I. Coatings
("Irvine")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Cindy J. Lombard

FILE NO.: 1999/412

DATE OF DECISION: October 14, 1999

DECISION

OVERVIEW

This is an appeal by the employer, Brad Irvine operating as B.W.I. Coatings (“Irvine”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued on June 8, 1999. In that Determination, the Director allowed the claim of the employee, Kenneth James Dodge (“Dodge”), for wages owing for the period May 1, 1998, to June 28, 1998, for painting done for the employer.

The employee stated that he was hired by Irvine at \$25.00 per hour to do painting. Supplies and materials, that is paint, brushes, ladders, etc., were supplied by the employer.

The employer, Irvine, initially verbally stated to the Director that he contested the claim on the basis that Dodge was a subcontractor and not an employee and therefore was not covered by the *Act*. In his letter dated June 2, 1999, and July 12, 1999, in support of the Appeal, Irvine states:

1. That the employee, Dodge’s statement that partial payment of wages owing to him in the amount of \$5,000.00 paid by cheque was returned NSF was not true as he cannot locate a record of any NSF cheque.
2. That the Panorama job which the employee, Dodge, states he worked on could not have taken place in May and June, 1998, as the job did not start until September, 1998.

ISSUES TO BE DECIDED

1. Was Dodge an employee or subcontractor?
2. Did Dodge perform the painting work for Irvine during the period May and June, 1998?

ANALYSIS

The burden of proof is on the Appellant to show that on a balance of probabilities the Determination under Appeal ought to be varied or cancelled. The nature of that burden is to persuade the Tribunal that the Determination is wrong in some material respect. In other words, the Appellant must clearly set out why and how the determination is flawed.

With respect to both issues to be decided, the Appellant has supplied no evidence in support of his position that Dodge was working as a subcontractor and not covered by the *Act* nor that the Appellant did not work for him on the job in question.

1. Was Dodge an employee or subcontractor?

The findings of fact by the Director were that the claimant did work for Brad Irvine on a job in Panorama, B.C. The general contractor for the job was Carlson Construction from Calgary, Alberta, who subcontracted to Brad Irvine. Irvine hired Dodge to do painting work at a rate of \$25.00 per hour. The Appellant has provided no proof to the contrary concerning these facts.

2. Did Dodge perform the painting work for Irvine during the period May and June, 1998?

Again, Irvine has provided no evidence in support of his position that Dodge did not work on the Panorama job in May and June, 1998, nor that any payment to him was returned by NSF cheque.

In summary, it is my determination that there is no compelling reason to overturn the Director's findings of fact and that the claim of the Appellant is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated June 8, 1999, be confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal