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 -

D. Hall & Associates Ltd.
("Hall")

\- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No: 1999/215

DATE OF DECISION: December 10, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by D. Hall & Associates Ltd. ("Hall") of a Determination which was issued on March 22, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Hall had contravened Sections 40(1) and 40(2) of the *Act* in respect of the employment of Derek Pedersen ("Pedersen") and ordered Hall to pay an amount of $13,985.22.

Hall says the Determination is wrong. In its appeal, dated April 14, 1999, Hall raised four grounds of appeal:

1. The Director erred in finding that Pedersen's position was not covered by s. 37.5 of the *Employment Standards Regulation* (the *"Regulations"*), and thus erred in finding the employee was entitled to overtime pay;

2. The Director erred in finding Pedersen's position was not covered by the variance from the overtime provisions of the *Act* for workers worki ng in the Oil Patch, which variance was in existence prior to October 27, 1997, and thus erred in finding the employee was entitled to overtime pay;

3. The Director erred in finding that Pedersen was entitled to travel time and that such travel time formed part of the work day; and

4. The Director erred in finding the employer did not have just cause to terminate Pedersen.

This appeal has already been the subject of a preliminary decision issued by the Tribunal on August 18, 1999, *D. Hall & Associates Ltd.*, BC EST #D354/99. That decision addressed two issues: first, whether submissions filed by the Director, arguing that the appeal did not comply with the requirements of the *Act* and the Tribunal's Appeal Rules, should be received and considered by the Tribunal; and second, whether any of the grounds of appeal raised by Hall failed to comply with the *Act* and Rules and, if so, what consequences flowed from that non-compliance.

As a result of that decision, the fourth ground of appeal was not permitted to proceed.

In a submission, dated May 12, 1999, Hall raised another ground of appeal:

5. The Director made errors in the calculation of wages owed to Pedersen because the full amount of wages paid to him was not deducted from the amount alleged to be owing.

The panel in BC EST #D354/99 did not address whether Hall would be granted leave to add this ground of appeal, in effect leaving that question for me to consider in this decision.

ISSUE TO BE DECIDED

The issue in this appeal is whether Hall has shown that the Determination was wrong in fact or in law in its conclusion that Pedersen was entitled to overtime pay and travel time and, if the additional ground of appeal is allowed to proceed, in its calculation of the amount owing.

The Tribunal has decided an oral hearing is not necessary to address the issue raised by this appeal.

FACTS

The Determination contains the following findings of fact:

1. Pedersen was employed from August 23, 1996 to July 18, 1998.

2. Travel time and service time were paid at straight time. All other overtime was paid at time and one-half.

3. Except for a small amount of work he performed on new lease roads, Pedersen's job was grading on approximately 270 kilometres of existing private road(s) in an old oilfield.

4. With respect to the work performed on new lease roads, Hall was to provide information showing the dates and times Pedersen was involved in actual lease or lease construction, but they did not do so.

5. Pedersen drove each day to the grader, hauling fuel and tools. Sometimes he drove a service truck and sometimes he caught a ride. He filled up a Tidy Tank every day at camp and fueled the grader from the service truck every day. Hall alleged, and Pedersen acknowledged, some of the trips to the grader were solely commuting. Hall provided a list of the dates and times of those trips and Pedersen agreed to have them removed from any calculation of work or overtime.

There is nothing in the appeal to show the above conclusions of fact are wrong.

THE STATUTORY PROVISIONS

The Determination covers a period from August 23, 1996 to July 19, 1998. From August 23, 1996 to June 30, 1997, Pedersen's employment was covered by the Oilpatch Industry Overtime Variance, and for the period from October 23, 1997 to July 19, 1998, it was covered by Section 37.5 and Appendices 3 and 4 of the *Regulations.*

1. The Oilpatch Industry Overtime Variance

The relevant portions of the Oilpatch Industry Overtime Variance provide as follows:

> Pursuant to Section 31 and 35 of the *Employment Standards Act*, I vary the overtime provisions under s. 30(1) and the hours free from work provisions under s. 35(1) and (2) of the *Employment Standards Act*, as follows:
>
> > Employees employed in the oil or natural gas well drilling, and the oil/natural gas well servicing industry, and employed in connection with oilpatch operations as defined by the Director of Employment Standards shall be paid at not less than time and one half (1½) for each hour worked in excess of 8 hours in any one day and 40 hours in any one week, with all overtime to be calculated on the employee's regular hourly rate of pay.
> >
> > Except for an emergency an employer shall ensure that each employee has at least 8 consecutive hours free from work between each shift worked.

Appended to the Variance were several conditions, in a document headed Oilpatch Industry - Overtime Variance Definitions, which included the following:

> 1. Employees employed in the following areas will be covered by the Oilpatch Variance:
>
>   . . .
>
>   (c) "construction" means the work performed in the road construction, to a site, the site preparation in regard to an oil or natural gas well.
>
> 2. An employee employed *outside* the municipal boundary, will be covered by the Oilpatch Variance in the above areas.
>
> 3. An employee while employed in an *office, shop or yard* is *not* covered by the Oilpatch Variance.
>
> (emphasis added)

2. Section 37.5 and Appendix 3 of the *Regulations*

Section 37.5, the oil and gas field workers - hourly rate of pay regulation, states:

37.5 *(1) Sections 35, 36(1), 40 and 41 of the Act do not apply in the oil and gas well drilling and servicing industry in an occupation listed in Appendix 3.*

(2) An employer of a person in an occupation listed in Appendix 3 must pay an employee in an occupation listed in Appendix 3 who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38 of the Act

(a) 1 ½ times the employee's regular wage for the time over 8 hours, and

(b) double the employee's regular wage for any time over 12 hours.

(3) An employer of a person in an occupation listed in Appendix 3 must pay an employee in an occupation listed in Appendix 3 who works over 40 hours in a week and is not on flexible work schedule adopted under section 37 and 38 of the Act

(a) 1 ½ times the employee's regular wage for the time over 40 hours, and

(b) double the employee's regular wage for any time over 80 hours.

Appendix 3 contains the following occupation:

> ***Heavy, motorized equipment operators*** *for the preparation, construction and maintenance of all aspects of industry work purposes, specifically: equipment operators, labourers.*

ANALYSIS

I will deal with the first two grounds of appeal together.

Hall's first argument is that the work being done by Pedersen was covered by the Variance and Section 37.5 because it was construction work. In Hall's appeal submi ssion of May 12, 1999, Counsel for Hall stated:

> . . . construction work itself, including road construction, is expressly included in the terms of the Variance. The term"construction" as used in the Variance must be given the meaning it is expressly defined to have in the *Act*, ie, "the construction, renovation, repair or demolition of property or the alteration or improvement of land."
>
> In this regard, the Employer submits that the work being done by the Complainant involved the construction and repair of roads. Specifically, grading involves the repair and restoration of road surfaces degraded by weather and use.

In respect of Section 37.5, the submission states:

> . . . as stated in section 1 of our submission, the statutory definition of construction includes the construction, renovation, repair, or demolition of property or the alteration or improvement of land. The definition covers the work performed by the Complainant . . .

The Director contends that the work performed by Pedersen was maintenance and such work was not covered by the Variance or Section 37.5 of the Regulation. In dealing with the application of the Variance, the Director relies on the decision of the Tribunal in *Kosick Holdings Ltd.*, BC EST #D362/96. At page 15 of that decision, the Tribunal made the following comments relating to the Oilpatch Variance:

> The variance issued by the Director is an exception to the minimum requirements as set forth in the *Act*, and, while I agree that the minimum requirements of the *Act* should be interpreted with regard to Section 8 of the *Interpretation Act*, R.S.B.C. 1979, chap. 206, that is, in a manner that is "fair, large and liberal", I am of the view that **exceptions to those minimum requirements such as this variance must be interpreted in the most narrow manner** in order to preserve the intent and purposes of the *Act.*
>
> Construction is defined in *Black's Law Dictionary* (6th Edition) as:
>
> > "The construction of something new, as distinguished from the repair or improvement of something already existing."
>
> The evidence was that KHL, in 1994 and 1995, was not involved in the building of any new oilpatch roads or new sites.
>
> I conclude therefore that any maintenance work performed on oilpatch roads or sites is not "construction" as contemplated by the Director's definition accompanying the Oilpatch Industry Overtime Variance.

Hall says that the *Kosick Holdings Ltd.* case did not consider the definition of "construction" in the *Act* and as such provides no assistance on the question of whether the work performed by Pedersen was "construction" as that term is defined in the *Act*, which states:

> ***"construction"*** *means the construction, renovation, repair or demolition of property or the alteration or improvement of land;*

I agree that when considering what is construction for the purposes of the *Act*, that question must be considered in the context of the definition provided in the *Act.* The *Kosick Holdings Ltd.* case does not address the question in that context. The Oilpatch Variance does set out a definition of "construction" that includes "work performed in the road construction, to a site". That definition will determine what is construction for the purpose of the Variance, but it is not particularly helpful in answering the question posed by Hall, which is whether, for the purposes of the *Act*, the

grading work done by Pedersen involved "construction" of the road in question. Hall argues that "construction", as that term appears in the phrase "road construction" must be given the meaning prescribed in the *Act*. I agree with that proposition.

Having said that, however, I do not agree with the argument of Hall that the work being done by Pedersen was covered by the definition of construction in the *Act*. In my view, the work being done by Pedersen is properly characterized as maintenance work, as it was done for the purpose of preserving, protecting or sustaining the proper operation of the road, and maintenance is not included in the *Act's* definition of construction. Even accepting that the work was done to facilitate access to oil and gas leases, simply having that purpose does not make the work construction work under the *Act*.

Nor do I accept that the grading work done by Pedersen involved "repair and restoration" of road surfaces. The concept of "repair . . . of property" in the definition of construction contemplates circumstances where the work being done is necessary to restore a system or part of a system that has ceased, wholly or substantially, to function. There is nothing in the material in this case suggesting that the work done by Pedersen involved any aspect of repair as that term is used in the definition of construction under the *Act*.

This conclusion does not entirely end the matter as Hall has raised three other arguments in support of the first two grounds of appeal.

Hall has raised two additional arguments relating to the Variance. The first argument is that the Variance was intended to cover all employees employed "in the field" in oil patch. This argument is based on a reading of paragraphs 2 and 3 of the conditions to the Variance. Second, Hall argues that the term "construction" in the Variance should be applied from the perspective of the totality of the work done by Hall and other companies involved in oil patch construction.

Dealing with the first argument, it is clear that the Variance was not intended to apply to all employees "in the field" in the oilpatch, but was intended to apply only to those employees employed in the areas described in paragraph 1 of the conditions (unless that employee was otherwise excluded by a subsequent condition). The reference to "an employee employed outside the municipal boundary" in paragraph 2 is still qualified by the phrase "in the above areas" that appears later in that paragraph. The fact that Pedersen was employed outside the municipal boundary is irrelevant unless he was also employed in one of the areas identified in paragraph 1, in this case "construction". As I have concluded Pedersen was not involved in construction, whether he was otherwise employed "in the field" is irrelevant and this argument rejected.

The second argument is answered by reviewing the opening words of the Variance and paragraph 1 of the Overtime Variance definitions. The opening words of the Variance read:

> Employees employed in the oil or natural gas well drilling, and the oil/natural gas well servicing industry, and employed in connection with oilpatch operations *as defined by the Director* . . .
> (emphasis added)

In the conditions attached to the Variance, the Director says that "employees employed in" specific areas identified and defined, including construction, are covered by the Variance. Construction is defined in the attached conditions as "the work performed in the road construction, to a site, the site preparation in regard to an oil or natural gas well". I have already concluded that Pedersen was not involved in "construction". Hall, notwithstanding that conclusion and the definition, advocates a broad approach and says that the term "construction" ought to be looked at from the totality of the work done by Hall and by other companies involved in construction in the oilpatch. I disagree. There are two problems with that argument. First, in my opinion, the definition is clear. It encompasses road construction, to a site, and site preparation, and Pedersen was not involved in that work. There is no mention or inference that maintenance of existing roads is included in the definition at all. Second, I prefer the view expressed in *Kosick Holdings Ltd.*, that exceptions to the minimum standards of the *Act*, in this case the Variance, "must be interpreted in the most narrow manner in order to preserve the intent and purposes of the *Act*". A strict interpretation of provisions that derogate from minimum standards is consistent with the remedial nature of the *Act* and with its purposes. I adopt and apply the following comment from *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.), that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

In respect of the argument relating to the scope of Section 37.5, Hall says that the work done by Pedersen is caught by the provisions of subsection 37.5(1) because the work falls within the occupation description of "heavy, motorized equipment operators" in Appendix 3:

> ***Heavy, motorized equipment operators*** *for the preparation, construction and maintenance of all aspects of industry work purposes, specifically, equipment operators, labourers.*

Counsel for Hall argues that the language of Section 37.5 and the Appendix are clear and a reading of the words of the *Regulation* in their ordinary, grammatical sense, giving effect to each term used, should lead to a conclusion that Section 37.5 applies to the work being done by Pedersen.

Counsel for Hall notes that the word "maintenance" is included in the occupation description. The Director disagrees with the position of Hall, stating in reply to the appeal that:

> . . . the Regulation applies only to oil and gas well drilling or servicing, and only to activities related to gas well drilling and servicing. Maintaining a long existing road . . . is not an activity which is subject to section 37.5 of the Regulations.

The Determination concluded that Pedersen was not employed in a position that fell under Section 37.5 and made the following comments in that regard:

> It is an established principle of legislative interpretation that Regulations be given a narrow read, and only those specifically mentioned should be denied basic or usual statutory entitlements. This work is for the most part, not even incidental to

> that of exploring for oil and gas or the operating of equipment to extract it. They do not operate under the same time constraints as do those whose job it is to find the resource and to set in place the machinery to extract it.

As I indicated above, the *Act*, including the *Regulations*, should be interpreted in a manner that is consistent with its remedial nature. The following comments from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 guides the interpretive approach to Section 37.5 and the Appendices:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> (para. 21)

I agree with the conclusion in the Determination and with the position of the Director that the work in which Pedersen was primarily engaged, maintaining approximately 270 kilometres of existing private road in an old oilfield, does not fall within Section 37.5 of the *Regulations* as he was not employed in any occupation listed in Appendix 3 and, more specifically, Pedersen was not employed in the listed occupation of "heavy, motorized equipment operator for the preparation, construction and maintenance of all aspects of industry work purposes".

There are three aspects to industry work: exploration, drilling and servicing oil and natural gas wells. Based on the material on file, Hall is involved primarily in part of the exploration process. In Hall's appeal submission, their business is described as follows:

> The Employer is in the business of building, repairing and maintaining well sites for oil and gas companies in Northern British Columbia. The oil and gas companies lease large tracts of land, and explore those areas for oil and gas deposits. Part of the exploration process is the preparation of the well site, including levelling, stabilizing, and ensuring proper drainage for the site. This is the work carried out by the Employer. In addition, the Employer is responsible for the maintenance of the well site, including re-levelling, monitoring drainage, snow removal, and seeding the sites. The preparation and maintenance work done by the Employer includes the construction and repair of access roads from the nearest highway to the site.

While I accept the above statement as a general description of the work done by Hall, one general comment is warranted. If the above statement is suggesting that "construction and repair of access roads" is included in the terms "preparation" and "maintenance" in the listed occupation, it is quite wrong. More directly, maintenance, which is the proper characterization of the work done by Pedersen on the existing road, is not included in what is construction for the purposes of the *Act*. In the listed occupation of "heavy, motorized equipment operator for the preparation, construction and maintenance of all aspects of industry work purposes", the terms preparation, construction (which would incorporate the definition of construction in the *Act*) and maintenance are three separate components of the work of that listed occupation.

In its ordinary meaning, the phrase "for the preparation, construction and maintenance" in the listed occupation is conjunctive. Before a person can be considered employed in the listed occupation, that person must be performing all of the work activities encompassed by that phrase. The drafting in this occupation stands in contrast to other listed occupations whose duties are stated disjunctively, such as slashing and timber salvage workers, who are described as employees engaged in "the removal *or* disposition" of vegetation, and the gathering systems and facility installers, who are described as employees engaged in "construction, installation *or* establishment of pipelines".

Also, the reference to "all aspects of industry work purposes" in the listed occupation indicates that the "preparation, construction and maintenance work" must have some aspect of industry work, whether it is exploration, drilling or servicing, as its purpose. In this case, Pedersen was doing maintenance, *simpliciter*, on an existing private road. There was no element of preparation or construction involved in that work. In addition, there is no evidence from the material on file or from the submissions of any industry work purpose. I agree with the suggestion found in the Determination that Section 37.5 was not intended to exclude employees whose job was merely incidental to an aspect of industry work, exploration, drilling and servicing oil and natural gas wells.

I reiterate that the *Act* is remedial legislation and an interpretation that extends its protection to as many employees as possible is more consistent with the purposes of the *Act* and is preferred over the interpretation proposed by Hall.

There is one additional argument raised by Hall relating to Section 37.5. Hall argues that the Director had suggested that Section 37.5 applies only to new wells and that position is wrong. I note that the source of the comment upon which this argument is grounded was contained in a letter from the Director's Delegate to Hall dated February 2, 1999. I also note that the impugned comment was followed by the statement, "it [the exemption] does not apply to any maintenance of the lease road after that time". It is unnecessary to consider Hall's argument on the whether the Section 37.5 applies only to new wells as I agree with the Director that it does not, in any event, apply to maintenance work on an existing private road in an old oilfield, which was the work being done by Pedersen in this case.

The first two grounds of appeal are dismissed.

Travel Time

On the third ground of appeal, the question raised is whether the Director was wrong to treat the time traveling from the camp to the work site as time worked. In the appeal submission of May 12, 1999, Counsel for Hall says:

> When working for the Employer, the Complainant was stationed at a camp which was, on average, 20 minutes from his work site. The grader which the Complainant operated was located at the work site. The Complainant would travel to and from

> his work site each day, in a manner which was chosen by the employee and not dictated by the employer. There was a company vehicle available to the Complainant to drive to and from his work site, but the vehicle was provided for convenience, and the Complainant was not required to use it. The vehicle was not required by the Complainant at the work site. The complainant could and did also travel to the work site as a passenger, driven by a fellow employee.
>
> On those occasions when the Complainant was required by the Employer to use the truck to refuel other vehicles, the Complainant was paid for travel and service time in respect of this task.

Pedersen had a work site location to which he reported each working day. I accept that on most of those working days, Pedersen used a company service truck to get to the work site and that he also used that truck to transport fuel and parts to the grader and, less frequently, to other vehicles which were on the route to his work site. I conclude that the use of the fuel truck to transport fuel to the grader was a necessary requirement of his job. I do not accept the assertion of Hall that Pedersen chose the manner in which he would travel to the work site each day. The need to convey fuel and, on some occasions, parts to the grader with the service truck effectively determined the manner in which Pedersen traveled to and from the work site on most occasions.

Hall correctly states that in the ordinary course employees are not entitled to be paid for time taken traveling to and from work. The rationale for this approach is that normally an employee traveling to work is not performing any work for the employer. An employee who claims entitlement to pay for time traveling bears the burden of showing circumstances that take their case outside of the norm. However, where an employee can show that he or she is doing work in the travel period, entitlement to payment of wages is established. Work is defined in the *Act* as follows:

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

Hall says there are no circumstances present that take this case "out of the norm". The Director, however, disgreed and accepted that Pedersen had established entitlement to be paid for the time traveling to and from his work site because the circumstances justified a conclusion that he was performing "work", which consisted of transporting fuel and other material to the grader, for his employer,. It is not Pedersen's burden to prove entitlement again, it is Hall's, to demonstrate that the conclusion of the Director is wrong. There is nothing in the appeal to indicate that conclusion was wrong or unreasonable and the appeal on this point is also denied.

Travel Time Calculations

Pedersen was paid for all travel time, including travel time which he acknowledged was simply commuting. During the investigation, Hall successfully argued that time spent commuting should be removed from Pedersen's hours worked and the Director agreed to remove the those commuting

hours from the calculations. In so doing, the Director also removed the money that was paid to Pedersen which was attributable to those hours. Hall says that is wrong and challenges the resulting calculation in the new ground of appeal raised in its May 12, 1999 submission:

(5) The Director made errors in the calculation of wages owed to Pedersen because the full amount of wages paid to him was not deducted from the amount alleged to be owing.

I do not intend to consider whether this is an appropriate case to exercise my discretion to consider this ground of appeal as in my opinion it is without merit and can be disposed of succinctly.

Simply put, Hall cannot have it both ways. They cannot say, on the one hand, that time spent commuting is not "time worked" while on the other say that the money paid is "wages". By successfully advocating to the Director that time spent commuting should not be included as hours worked, Hall has altered, for the purposes of the *Act*, the character of any money paid for commuting from money that would have been included in the definition of wages to money that is not included in the definition of wages. Specifically, if the money paid to Pedersen for travel was not required to be paid as wages, then it can only be a discretionary payment unrelated to work. The definition of wages:

> *. . . does not include*
>
> *(g) money that is paid at the discretion of the employer and is not related to hours of work , production or efficiency, . . .*

This ground of appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 22, 1999 be confirmed in the amount of $13,985.22, together with any interest that has accrued pursuant to Section 88 of the *Act.*

David B. Stevenson
Adjudicator
Employment Standards Tribunal