Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1720/10

BEFORE: J. Josefo: Vice-Chair

HEARING: September 14, 2010 at Toronto
Oral

DATE OF DECISION: October 19, 2010

NEUTRAL CITATION: 2010 ONWSIAT 2327

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicant Markel Insurance Company of Canada: Mr. J. Pollack & Mr. J. Goodman, Barristers & Solicitors

For the Co-Applicant Sky Network Express Inc.: Ms. J. P. Blacklock, Barrister & Solicitor

For the respondent Balwinder Singh Bhatti: Mr. S. Grillone, Barrister & Solicitor

Interpreter: Mr. A. Tahir, Punjabi language

REASONS

(i) The right to sue application – the parties

[1] The applicant, Markel Insurance Company of Canada ("Markel"), and the co-applicant Sky Network Express Inc., apply for orders removing the right of the respondent, Mr. Bhatti, to apply for statutory accident benefits and to continue a civil action arising out of a motor vehicle accident ("MVA") occurring on September 22, 2006. Markel specifically applies to remove the right of Mr. Bhatti to receive statutory accident benefits. Sky Network Express Inc. seeks to remove the right of Mr. Bhatti to sue, pursuant to an action Mr. Bhatti commenced under Ontario Superior Court of Justice claim file #CV-08-0190-00. Sky Network Express Inc. is the defendant in that civil action.

[2] Markel is the accident benefits insurer for Sky Network Express Inc., pursuant to a standard Ontario policy of automobile insurance. Markel is represented by Messrs. Pollack and Goodman.

[3] Sky Network Express Inc., at the time of the September 22, 2006 MVA, is the putative employer of Mr. Bhatti. Sky Network Express Inc. is represented by Ms. Blacklock.

[4] Mr. Bhatti, the plaintiff in the civil action identified above and the respondent in this within proceeding, is represented by Mr. S. Grillone. While Mr. Grillone did not submit a respondent's statement, counsel for the applicant and co-applicant did not object to his offering some oral submissions in this matter. I accordingly granted leave to Mr. Grillone so he could make submissions and, indeed, question Mr. Bhatti if desired.

(ii) Background facts and issues to be determined

[5] The facts which underpin this application are not in any significant dispute. Briefly, on September 22, 2006, while operating a 2006 freightliner truck, Mr. Bhatti was involved in a single vehicle accident. The accident occurred near Thunder Bay, Ontario. Mr. Bhatti was driving the truck when it went into a ditch, returned to the road, and then rolled over.

[6] As a result of the MVA Mr. Bhatti applied for statutory accident benefits through Markel. On September 5, 2008 Mr. Bhatti also commenced his civil action against Sky Network Express Inc. Sky Network Express Inc. defended the civil action and asserted in its pleading that "at all material times the defendant was a Schedule 1 employer and the plaintiff was a Schedule 1 employee … accordingly the plaintiff's action is statute-barred pursuant to section 28 of the Workplace Safety and Insurance Act, 1997".

[7] The sole issue which must be determined in this proceeding is whether Mr. Bhatti was, at the time of the MVA, a worker of a Schedule 1 employer or whether he was an independent operator.

[8] Counsel for the applicant and co-applicant each submitted that Mr. Bhatti was a worker of a Schedule 1 employer, and was in the course of his employment at the time of the MVA. Mr. Grillone for Mr. Bhatti acknowledged a number of the factors, which will be discussed below, yet submitted that the intention of Mr. Bhatti and Sky Network Express Inc. at the time

these parties entered into their relationship ought to be taken into account. It was further submitted that there was no intent that Mr. Bhatti would become an employee; rather, his intention was that he would be an independent operator.

(iii) Discussion and conclusions

[9] Mr. Bhatti confirmed the following in his evidence before me:

- the trucks he drove displayed the logos of Sky Network or Sky Route,
- Mr. Bhatti did not own his own tractor or trailer, rather he used the equipment provided to him by Sky Network or Sky Route (apparently a potentially related company of Sky Network),
- Mr. Bhatti did not pay any of the expenses associated with driving the truck on his long-haul runs from Toronto to either western or eastern Canada,
- Mr. Bhatti was not responsible for the fuel, maintenance, or insurance of the trucks,
- Mr. Bhatti was paid a fixed rate based upon mileage,
- Mr. Bhatti confirmed that his earnings were fixed, dependent upon the destination, and he had no risk of not being paid, nor any opportunity to earn greater income than the fixed rate based on mileage.

[10] Mr. Bhatti also testified that he established a company called "BHS Logistics Inc.". He stated he did so because it was necessary to have a company established in order to be a long-haul driver. Mr. Bhatti indicated that he claimed various expenses through BHS, and he believed that he was an independent operator because of the right to claim such expenses.

[11] On January 1, 2006 Mr. Bhatti's company BHS Logistics Inc. and Sky Network Express Inc. entered into a contract. The description of BHS Logistics Inc., "of the second part" of the contract is as follows:

> Hereinafter referred to as the "independent contractor", "contracted driver", or "company driver".

[12] The contract thus discusses terms that apply to an independent contractor, contracted driver or company driver. There are certain sections that seem to apply only to an independent contractor, such as those which provide that the independent contractor owns the equipment, which was not the case for Mr. Bhatti. Neither he nor BHS Logistics Inc. owned the tractor or trailer. Similarly, a section of the contract deals with the "maintenance/operation of equipment". This section provides that the independent operator "assumes total responsibility for the operation, supervision and maintenance of the equipment". Yet again, in the case of Mr. Bhatti, it is not disputed that Sky Network Express Inc. was solely responsible for the maintenance of the vehicle and that Mr. Bhatti was responsible for none of those expenses.

[13] Finally, the signature line for Mr. Bhatti is headed "independent contractor, contracted driver or company driver". In the case of Mr. Bhatti the phrase "company driver" is circled.

[14] On October 14, 2008 Mr. Bhatti was examined under oath pursuant to section 33.1 of the statutory accident benefits schedule. In his testimony under oath at that examination, Mr. Bhatti confirmed that he did not pay for insurance for the truck, and that he was reimbursed for all operating expenses he paid, with his compensation based upon mileage. Mr. Bhatti also testified regarding the above-referenced agreement in part as follows:

> I am not sure when we signed an agreement since I cannot read English. They just ask you to, "sign here, sign here and sign there".

[15] In his previous testimony under oath, Mr. Bhatti also stated that "in a way, I work for the company". He also testified as to his "expectations for minimum and maximum work, and how much I expect to be paid, and I also demanded or asked for 100% benefits". Mr. Bhatti stated that his employer told him "you are covered for everything", meaning, pursuant to Mr. Bhatti's testimony, that he would have coverage in case he was injured while working.

[16] I agree that Mr. Bhatti may have in some fashion considered himself to be an independent operator. Thus, I agree with counsel for the respondent that the intention of the parties is an important factor to be considered. That being stated, however, the intention must, first, be a mutual one between the two contracting parties, and it also must be supported by the facts and evidence.

[17] In this case, having reviewed the agreement which Mr. Bhatti's corporate entity entered into, it is by no means clear to me that the other contracting party, Sky Network Express Inc., considered Mr. Bhatti to be an independent operator. Indeed, the contract, which is somewhat ambiguous given it appears to attempt to cover multiple scenarios, seems to indicate that Mr. Bhatti was to be considered as a "company driver", given that line was circled on the contract. Thus, even if Mr. Bhatti may, in some way, have considered himself to be an independent operator, I am unable to conclude that Sky Network Express Inc. considered him to be anything other than its employee.

[18] Moreover, in this case, despite the possible intention of Mr. Bhatti, which I find more likely relates to his ability to claim income tax deductions for certain expenses rather than a genuine desire to be an independent operator, the facts discussed above simply do not lead to a conclusion that Mr. Bhatti was an independent operator. Quite simply, there was no chance whatsoever of profit beyond the fixed amount which Mr. Bhatti knew he would be paid based upon mileage, nor was there any risk of loss which Mr. Bhatti could suffer in the course of operating the truck.

[19] Mr. Bhatti was assigned truck runs by his employer and he drove as directed. If the truck broke down, he did not bear the financial cost of the load being late, or of having to repair the truck. If the employer did not receive timely payment from the entity which engaged it to ship goods, this did not delay Mr. Bhatti's payment. There was, plainly, no entrepreneurship whatsoever involved. Mr. Bhatti was, at the time of the MVA, a worker, and there is no dispute that the employer, Sky Network Express Inc., was a Schedule 1 employer with mandatory WSIB coverage.

[20] In my view, Tribunal *Decision No. 1370/06* is applicable to these facts. That earlier decision also involved a truck driver who, while having some trappings of independence, was ultimately found to be an employee. Tribunal *Decision No. 1370/06* discussed the law and facts in that case, which facts I note are similar to the matter before me, and came to the following conclusions:

> In cases such as this it is rare to find a truly "black and white" relationship. Usually there are nuances and indicia of both sorts of relationship that must be carefully parsed in order to determine the correct result. The example of a "continuum" often applies to these cases: at one end of the continuum there is most clearly established a relationship between worker and employer, while at the other end of the continuum the relationship has all the hallmarks of independence, with the result of a relationship between independent contractor and principal.
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> Yet for a case to reach the Tribunal it is usually because there are elements of both sorts of relationships. Certainly, there are elements and characteristics of an independent contractor relationship with Hodzic and the other parties. But, despite the able submissions of Ms. Dajczak and Mr. Sonoski, I conclude that the better descriptor of Hodzic is that of a worker or employee who was employed by either Law's or Morrice, or possibly both trucking firms.
>
> I so conclude because, as Mr. Jovanovic well summarized when referring to Tribunal *Decision No. 659/91*, the issue is "the substance and not the form" of the relationship. In this case, I find that the substance of the relationship between the parties is more accurately described as that of worker and employer, rather than independent contractor and principal.
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> While Hodzic could and indeed did refuse routes and negotiated a slightly higher rate of pay, these factors do not, in my view, indicate that he was an independent contractor. After all, casual employees often can choose when to work, for whom to work as well as negotiate the rate of compensation for their work.
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> Yet, Hodzic did not own his own truck. He did not own the essential tool of his trade, which indeed was the truck and not merely the permit to drive one. Hodzic was not responsible for the operating expenses of this essential tool of the trade, and he really had no significant risk of loss or chance of profit. He knew in the main what he would earn based upon the flat rate that he would be paid. Even if Law's and Morrice were not paid by the shipper or receiver of goods, this did not impact Hodzic. He still would be paid regardless of the ability of the trucking firms to collect upon a receivable.
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> If the truck had a serious mechanical problem and required a costly repair, Hodzic was not concerned about this expense. It would not impact his earnings at all. Indeed, Hodzic specifically testified that he did not want to own a truck because he did not want to be worried about all the expenses, including the operating expenses, associated with ownership. He was quite content to earn a good living as a driver, and had no aspirations to be an owner/operator.
>
> Other than an ability to agree to work or not work, once he agreed to work Hodzic had no choice over the ultimate destination and pick-up and drop-off points. These were assigned to him by the dispatcher at Morrice. Hodzic only could do the pre-determined run and could not on his own pick-up additional loads while on route for additional personal profit.
>
> That Hodzic could have worked elsewhere again does not take away his status as an employee. There is nothing that prohibits, in such circumstances, a casual employee from working for more than one employer. Thus, even if Hodzic had done so between July and November 2002 when he was driving for Law's and

Morrice, I find that it would not have changed the nature of his relationship with Law's and Morrice.

...

In my view the line of "trucking cases" relied upon by the Applicant more accurately fit the fact scenario in this matter. Tribunal *Decision No. 105/93* makes it clear that, despite the intention of the parties, the Plaintiff was a truck driver who had entered into an employment relationship with the purported contractor. Considering the lack of chance of profit or risk of loss, that Panel concluded that the Plaintiff was a worker in the course of employment with thus no right to sue.

Tribunal *Decision No. 369/00* found that, because the Plaintiff did not own the truck, had fixed earnings, and could not chose his own routes, with no chance of profit or risk of loss, the Plaintiff was a worker in the course of employment with no right to sue.

I find Tribunal *Decision No. 257/03* to be of particular applicability in this matter. The facts in *Decision No. 257/03* are very similar to the facts before me. A truck driver when in the course of employment suffered injuries from a MVA. The question was whether that driver was a worker or independent contractor. The Panel that decided Tribunal *Decision No. 257/03* stated in their analysis in part as follows:

According to the Tribunal decisions the intention of the parties will be given a significant weight. Subject to the qualification that the stated intention of the parties must be consistent with and supported by objective factors. (For example, see *Decisions No. 522/91, 659/91, 422/93, 543/93, 395/94, and 472/94.*) ...

Out of the reasoning on this matter has evolved a test referred to as the "business reality" or "hybrid" test. The leading case in the development of this test was *Decision No. 921/89*, 14 W.C.A.T.R. 207. At page 225, the Panel, in that decision offered the following reasoning of the development of this particular test:

> The actual name applied to the test whether "integration" test, "organization" test, "hybrid" test or "business reality" is not important. What is important is that parties have an idea of the factors to be considered by the Appeals Tribunal in determining status as a "worker" or "independent operator". By referring to these factors parties may themselves develop a sense of the character or reality of the business relationship and thus make a realistic assessment of the situation. It is the opinion of this panel that the factors enumerated in this decision assist in this goal to a greater extent than merely asking whether the work is "integral" to the overall business. The question to be asked is, "what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship"?
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> The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case.

The Panel in that decision proposed 11 factors that might be considered in determining the nature of the relationship between two parties to a service contract. They are:

1. ownership of equipment used in the work of business;
2. the form of compensation paid to the worker or independent operator (i.e. whether a fixed rate is agreed to or a variable remuneration with an attendant prospect of profit or a risk of loss);
3. business indicia;

4. evidence of coordinational control as to "whether" and "when" the work is performed;
5. the intension of the parties often evidenced by an agency agreement, employment agreement, contract for services, contract of services or limited term contract;
6. business or government records which reflect upon the status of the parties;
7. economic or business market;
8. the existence of the same or very similar services applied to an employer by a person or persons who are classified as workers under the Act;
9. substitute service i.e. the right to hire others;
10. size of the consideration or payments;
11. degree of integration.

I agree that these factors referenced above are useful in my consideration of the matter before me. The conclusions of the Panel that decided Tribunal *Decision No. 257/03* are equally apt to this matter. That Panel concluded as follows:

Having considered the evidence in this case and the submission made by Mr. Gold we are persuaded, on a balance of probabilities, that the relationship between the appellant and the owner of the trucking company is that of an employer and worker and not one between two independent operators.

In particular, we note that the appellant does not own the truck, he merely drives the truck for those who have hired him.

The Panel notes that the appellant was involved in making deliveries. In our view, the individual bringing forth this appeal was employed as a truck driver only. He worked as a long-haul truck driver and collected payment on a mileage basis in accordance with the usual standard for truck drivers in the industry.

We are not persuaded that there was any entrepreneurial benefits to this appellant in the relationship with the employer. The appellant testified that basically he was driving a truck to places designated by the employer that hired him and essentially made deliveries of goods for those people. It appears to this Panel the intention of both parties was to obtain the labour of a truck driver to make deliveries. The purpose for those hiring the appellant was to have someone who had a suitable truck driving licence and who could perform the duties of a truck driver.

The Panel was persuaded that all copyrights in the vehicle operated by the appellant were controlled by the person that hired the individual. The appellant made no capital investment and in essence took no financial risk in the arrangements of the deliveries.

The remuneration arrangements between the parties closely resembled the remuneration arrangements between a worker and an employer and a driver and an employer. In essence, the remuneration paid was at a rate of miles travelled and the payment consisted of what amounted to a bi-weekly paycheque according to the testimony we received.

The appellant testified that he virtually had no control as to the destinations of the deliveries, although he may have had some control over the route taken. He had no control over load selection and simply picked up whatever loads he was directed to by the dispatcher of the company and drove the truck and made deliveries as a "truck driver".

> As indicated earlier the essential tool of the trade, the truck, belonged to the employer. The employer provided all the necessary out of country relevant licences to operate the vehicle, paid for all maintenance, fuel, insurance and repairs. The appellant in essence derived all his work and all his income from the employer. In our view, without the employer the appellant had no work in the trucking delivery business.

[21] In my view, considering the facts of this matter before me, there can be no doubt that Mr. Bhatti was a worker and was in the course of his employment when the unfortunate MVA occurred on September 22, 2006. Thus, Mr. Bhatti's right to claim statutory accident benefits arising out of that MVA is taken away. Similarly, Mr. Bhatti has no right to sue and to continue the earlier described civil action arising out of that MVA, but he may claim WSIB benefits within the time limits provided when such civil actions are found to be statute-barred.

DISPOSITION

[22] The applications are granted. Mr. Bhatti does not have the right to claim statutory accident benefits, nor to commence or maintain his civil action arising out of September 22, 2006 MVA, because Mr. Bhatti was a worker and in the course of his employment at the time of that MVA.

DATED: October 19, 2010

SIGNED: J. Josefo