

Decision of the Review Division

Number: 2260
Date: September 18, 2003
Review Officer: Alan Monk
Subject: Identification of Independent Firms
for Assessment Purposes

The employer requests a review of the decision of the Workers' Compensation Board (the "Board") dated March 19, 2003. In support of this request for review, the employer has provided written submissions. The Assessment Department of the Board also responded to requests for information and the employer was provided with an opportunity to respond.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision, resulting from an audit, to reassess the employer for additional assessments by including in assessable payroll amounts paid to all contractors in the year 2001, less such labour performed by contractors registered with the Board.

Background

The employer was audited by the Board on March 14, 2003. The audit was conducted to verify the assessable payroll reported by the employer for the year 2001. During the audit, the assessment officer determined that the employer's assessable payroll was \$247,878, not \$93,547 as reported by the employer. As a result of the audit, the employer was assessed additional assessments and was charged an under-remitting penalty.

The employer disputes the reassessment and submits the \$154,331 additional assessable payroll found by the assessment officer is incorrect because it includes remuneration paid to 35 independent businesses for which the employer should not pay assessments.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The employer was registered with the Board on March 1, 1995 and is currently classified for assessment purposes in classification unit ("CU") number 701023 entitled "Riding Academy or Boarding or Raising Horses."

- The employer is required to file a payroll report and pay assessments to the Board on a quarterly basis, based on estimated payroll for the quarter. For the year 2001, the employer reported to the Board an aggregate payroll of \$93,547.00, which included an estimate of \$10,000 paid to “custom and contract labour.”
- By letter dated February 21, 2003, the Board provided notice to the employer that it wished to audit the payroll and sub-contract expenditures of the employer on March 14, 2003, under section 88 of the Act.
- On March 14, 2003, an assessment officer conducted an audit of the employer. During the audit, the assessment officer identified numerous payments in 2001, in the aggregate amount of \$154,331, to approximately 84 persons not registered with the Board. The assessment officer took the position that these payments were assessable to the employer. As a result, the assessment officer increased the assessable payroll of the employer for 2001 to \$247,878.00 and reassessed the employer for an additional \$8,272.14 in assessments for 2001, in addition to charging the employer an under-remitting penalty of \$661.77.
- The employer’s representative, in the request for review, submits that the recipients of the payments made in 2001 aggregating to \$154,331 were “independent businesses” and such payments are not assessable. The employer’s representative submits that “there is no employment relationship between the [employer] and these independent businesses.”
- The assessment officer offered the following explanation, in part, of the procedure utilized to audit the employer by e-mail to the Review Division dated July 24, 2003:

. . . As per normal procedure – t4’s, t4 summary, payroll printouts were examined. Financial statements indicated firm hires numerous individuals on a contract labour basis. Further analysis of the general ledger under “custom & contract labour” revealed that the firm paid \$178679.21 to numerous individuals in 2001. . . Careful scrutiny [sic] of these custom & contract labour amounts revealed that almost every one of them provided labour only – all doing various labour services involved in the operation of the horse training stables All the individuals assessed were doing casual labour, cleaning, caring, walking / riding horses. No materials or labour-producing equipment was supplied and there is nothing to deem any of these individuals independent. . .

[Reproduced as written]

- The manager, Audits, Revenue Services Department, in an e-mail to the Review Division dated July 24, 2003, provided that the assessment officer “indicated the general practice” of the Board’s Audit Section.
- By letter dated August 13, 2003 to the employer’s representative, I requested that the employer provide me with the following information for each contractor that it maintains is an independent firm:
 - the profession or occupation and a description of the work provided to the employer; and

- confirmation that some documentary evidence exists that will tend to prove, on balance, that the individual or firm is an independent firm.
- In a letter dated September 5, 2003, the employer's representative conceded that "certain of the contractors on [the employer's] list provided labour only, and therefore must be considered workers and not independent firms." However, the employer's representative provided 35 names of individuals and organizations that the employer submits are independent firms.

Law and Policy

The Act

Section 1 of the Act includes the following definition for "worker":

"worker" includes

- (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by manual labour or otherwise. . .

Section 38 provides that each employer must maintain complete and accurate particulars of its payroll and provide to the Board, either periodically or at the Board's request, reports of estimated and actual payroll.

Section 88 of the Act provides certain powers of inquiry to assessment officers. The section states, in part:

88(3) The Board, an officer of the Board or a person authorized by it for that purpose, may examine the books and accounts of every employer and make any other inquiry the Board considers necessary to ascertain whether a statement furnished to the Board under section 38 is an accurate statement of the matters which are required to be stated in it, or to ascertain the amount of the payroll of the employer, or to ascertain whether an industry or person is within the scope of this Part. . .

Section 96 of the Act states, in part:

96(1) Subject to section 239 and 240, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court, . . . and, without restricting the generality of the foregoing, the Board has exclusive jurisdiction to inquire into, hear and determine . . .

- (j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of this Part.

Policy

The policy relating to this review is found in the following policy items of the *Assessment Manual*:

Policy item AP1-1-3, *Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms* (“AP1-1-3”), outlines some general principles for distinguishing an employment relationship from one between independent firms, and sets out some specific guidelines for making the determination. The specific guidelines state, in part, that the following parties would be considered independent firms:

- (1) Any firm supplying labour and materials on which a profit or loss may result. Items such as nails and drywall tape are not considered materials for this purpose.
- (2) Any firm which has two or more pieces of revenue producing equipment. Hand tools and personal transportation vehicles or vehicles used to move equipment are not considered to be revenue producing equipment.
- (3) Service industry firms that enter into two or more contracts simultaneously.
- (4) Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms. If such circumstances exist, a full investigation will be made and the applicant’s position determined in accordance with the policies in this *Manual*. Two common situations where corporations will not be considered independent firms are where:
 - (i) the corporation is a personal service corporation (A personal service corporation for this purpose is one where no worker other than a principal active shareholder is employed, and if the firm was not incorporated, the principal active shareholder would clearly be a worker. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.); or
 - (ii) the corporation’s sole function is to provide an inescapable phase of a firm’s operations, it is providing essentially labour only for one firm at a time, and there is a degree of common ownership between the two firms. . . If the corporation is working for more than one firm, or there is not common ownership, the company will be considered a separate employer.
- (5) Society, cooperative, trade union or similar entity.
- (6) Manpower supply firms.

Policy item AP1-1-7, *Coverage under Act – Labour Contractors*, provides, in part, as follows:

Labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain Personal Optional Protection as an independent operator if they do not have workers. . . Labour contractors who choose not to register as an employer (if they have workers) or obtain Personal Optional Protection as an independent operator (if they do not have workers) are considered workers of the firm for whom they are contracting, and that firm is responsible for assessments. . .

AP 1-88-1, *Audits*, clarifies that the records subject to audit under section 88 of the Act “. . . are not limited to payroll journals, but encompass all books, documents, records, papers or things which relate to assessable earnings. . . .”

Reasons and Decision

The Act sets out definitions of “worker” and “employer,” and refers to a status of “independent operator.” In administering the Act, the Board has seen fit to define, by policy, the additional categories of status, such as “labour contractor” and “independent firm.” Employers are required to pay assessments on the payroll of their workers. Policy AP 1-1-7 provides that unregistered labour contractors are considered workers for the firm with whom they are contracting, so amounts paid to them must be included in assessable payroll. In contrast, AP1-1-3 identifies “independent firms,” for which assessments need not be paid by the employer because no employment relationship exists between the employer and the independent firm.

In their submission dated July 4, 2003, the employer’s representative submitted that the onus was on the Board to determine the status of each contractor. The employer’s representative stated, in part,

Surely the onus cannot be on the [employer] to determine if each of the payees are independent businesses, especially given the large number of payees involved in this case. If the [Board] expects the [employer] to investigate each of the businesses in order to gather evidence as to whether they are independent businesses or otherwise, in our submission this is an unreasonably onerous expectation. . . .

I asked the Assessment Department to comment on the employer’s submissions. In response to the employer’s position that the Board has the responsibility to adjudicate status on each and every contractor the employer utilized in 2001, the Assessment Department stated as follows:

. . . the [Board] expects firms to track which of their subcontractors they must cover, and allows firms to take certain deductions from contract payments where appropriate. This onus applies to all firms in the province that must report payrolls to the [Board]. If the firm in this case did not make submissions on particular subcontractors that the firm did not believe had worker status, the Assessment Officer cannot be faulted.

Section 38 of the Act requires an employer to keep records and furnish to the Board when required “complete and accurate particulars of the employer’s payrolls.” Policy 1-38-2 outlines the components of assessable payroll, which include wages and salaries, principal’s earnings, contractor’s earnings and any applicable personal optional protection amount. In order to keep accurate records of its payrolls for reporting purposes, employers are expected to make status determinations. An employer must know how many workers and unregistered labour contractors it has so remuneration paid to such workers and unregistered labour contractors can be included in assessable payroll. A “Guide to completing your Employer Payroll and Contract Labour Report” is available from the Board to help employers determine the status of their contractors. If an employer wants to determine whether a contractor is registered with the Board, the employer may contact the Board to inquire either by phone, fax, in person, or over the Internet.

Although an employer is required to report payroll in accordance with the provisions of the Act (and in so doing determine the status of its various workers and contractors), the Board is the final arbiter of status. This means that it is the Board's responsibility to determine status, in accordance with the Act and policy, if the Board wishes to challenge the status determinations of an employer.

The Board is provided with certain powers of inquiry, under section 88, to examine all documents and records relating to assessable payroll. The Board is not only provided with such powers to ensure the accuracy of an employer's self-reported assessable payroll, but also to ascertain "whether an industry or person is within the scope of this Part" or, in other words, to ascertain a person's status. This power is necessary to ensure employers do not under-report assessable earnings and, in so doing, attempt to unfairly foist the collective costs of workplace injuries upon other employers.

It is the responsibility of assessment officers to check the accuracy of employers' self-reported assessable payroll. In the case under review, the assessment officer, armed with the powers of section 88, had the power to examine the books and accounts of the employer and make any other inquiry he considered necessary to ascertain whether the employer's reported assessable payroll was accurate. In order to make such determination, the assessment officer was, when faced with a list of alleged "independent contractors," under an obligation to ascertain the status of each alleged independent contractor in accordance with the policies of the Board. This, however, does not mean the assessment officer had to conduct an exhaustive investigation with respect to each and every of the approximately 84 individuals and organizations identified by the employer as "independent contractors."

In practice, the assessment officer and a representative of the employer together usually go through the list of alleged independent contractors, with the assessment officer asking questions surrounding status and the representative answering them or undertaking to find the answers and report back to the assessment officer. For this method to work, the representative must be familiar with the services performed by each contractor. If, in response to the answers of the representative, the assessment officer is not satisfied that a contractor is an independent firm, he or she may inquire further, by demanding to examine documents relating to the employer's relationship to the contractor.

In many cases, contracts of service do not exist and other documentation is insufficient for an assessment officer to definitively determine the true relationship between an employer and a contractor. In other cases, a contract may purport to create a relationship between individual firms but all the circumstances of the case indicate an employment relationship exists. If a dispute between the assessment officer and the employer remains regarding status, the assessment officer's judgment must prevail. Section 96(1)(j) of the Act provides the Board exclusive jurisdiction to determine whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of the Act. In addition, it is the employer, not the Board, that has entered into the employment or independent contractor relationship and has the ability, if desired, to set out the terms of such relationship clearly and in writing. Where no such contract or other written evidence of an agreement exists, the fact that the employer has chosen not to create such documentary evidence sufficient for the assessment officer to determine status should not result in a presumption in favour of the employer. Where a contract exists that purports to create a relationship between independent firms, it is possible that an assessment officer may form an opinion, after considering all the circumstances of the

case, that the relationship is actually an employment relationship. In such circumstances, I note that AP1-1-3 states, in part, that “the Board’s jurisdiction cannot be excluded by private agreement between two parties, whether the agreement does this expressly, or indirectly, by labelling the parties as independent operators (who would therefore be independent firms).”

In the course of this review, I requested the assessment officer, by e-mail, to “comment upon how [he] determined that all unregistered contractors are labour contractors, including whether [he] reviewed contracts for services or whether [he] had discussions with representatives of the employer with respect to those relationships.” The assessment officer responded that he carefully scrutinized items in the employer’s general ledger under the heading “custom & contract labour.” The assessment officer did not reveal how he did this, although he did conclude that almost every one of individuals identified under “custom & contract labour” provided labour only to the employer.

The employer initially contended that “there is no employment relationship between [the employer] and these [approximately 84] independent businesses,” but later conceded that approximately 49 of them are workers or unregistered labour contractors, for which the employer is responsible to pay assessments.

I have reviewed the submissions of the employer and conclude, with respect to the 35 individuals and organizations submitted by the employer to be independent firms (indicated in Schedule “A”), that the following are independent firms:

- three independent firms that are currently registered with the Board;
- three chiropractors and/or massage specialists;
- one manpower supply firm;
- one veterinarian and horse dentist;
- three blacksmiths, each of which provided labour and tools;
- two jockeys that received bonus cheques from the employer for prizes;
- two tack repairers that provide their own equipment and supplies;
- one horse farm in the United States that was retained to care for a horse;
- one labour supply agency providing part-time hotwalkers;
- two individuals that sold their interests in horses to the employer;
- two individuals that provided construction labour and materials to the employer; and
- one landscaper that provided his own tools.

The employer is not responsible for paying assessments on the remuneration paid to the independent firms referred to above and listed in Schedule “A.”

I do not have enough information to determine whether the remaining 13 individuals and organizations listed by the employer are in fact independent firms and I am returning the status investigation in respect of such individuals and organizations back to the assessment officer for a further investigation. In some cases, the only feature listed by the employer indicating they are independent firms is that they work for other organizations as well as the employer. Most of them provide labour services, such as riding horses. The fact that such individuals work only part-time or have other jobs does not necessarily mean they are not

workers under the Act. It is possible that they have more than one job and are workers in respect of each job they have. The assessment officer will need to assess their status in accordance with the provisions of AP1-1-3.

Four organizations noted by the employer as registered with the Board are not in fact registered under the names provided. One other firm was registered but the account was cancelled effective October 1, 2000.

The employer's representative stated in its letter of September 5, 2003 that the employer could, if required, provide documents evidencing the status of the 35 individuals and organizations it submitted as independent firms. I have already determined that 22 are independent firms and no evidence is required with respect to these firms.

With respect to the remaining 13 firms (indicated in Schedule "B"), I instruct the assessment officer to attend with a representative of the employer, who shall bring documentary evidence indicating the status of each firm. I note that the employer will require about one month to catalogue and compile the documents for inspection and the assessment officer should endeavour to complete the inspection and provide status determinations within a reasonable time thereafter.

I find that the 22 individuals and organizations listed in Schedule "A" are independent firms and direct the assessment officer to investigate the status of the 13 individuals and organizations listed in Schedule "B." Such investigation shall include an examination of the documents to be provided by the employer in approximately one month from the date of this decision. As a result, I allow the employer's request, in part.

Conclusion

As a result of this review, I vary the Board's decision of March 19, 2003.

NOTE: Schedule A has been deleted from this decision for publication purposes, pursuant to the *Freedom of Information and Protection of Privacy Act*.