

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1201/03

- [1] This right to sue application was heard in Toronto on June 17, 2003, by Vice-Chair R. Nairn.

THE RIGHT TO SUE APPLICATION

- [2] This is an application under section 31 of the *Workplace Safety and Insurance Act* by AXA Global Insurance (“AXA”), an insurer from whom accident benefits are payable under section 268 of the Insurance Act.
- [3] The Applicant was represented by Mr. Victor Bulger, a lawyer with the firm Lilly Anderson Wilson LLP. The Respondent/Insured, (“KK”) was present, and was representing himself.

THE RECORD

- [4] I considered the following documentary evidence:
1. Applicant’s Section 31 Statement (Exhibit #1);
 2. Addendum No. 1 dated May 27, 2003 (Exhibit #2);
 3. A letter dated May 22, 2003, from Mr. M. Wentzel (Exhibit #3).
- [5] I also heard oral evidence from KK, AK, a co-owner of KW 2000 Express Ltd. and owner of the truck KK drove, and PB, an insurance adjuster with AXA. Submissions were made by Mr. Bulger.

THE ISSUES

- [6] The issue to be determined in this case is whether the Respondent is entitled to claim Workplace Safety and Insurance Board benefits for injuries sustained in the motor vehicle accident of August 23, 2001.

PRELIMINARY MATTER

- [7] As noted above, KK appeared at these proceedings representing himself. Before the hearing commenced, I took the opportunity to confirm with KK that he understood the reason for the application (i.e. that AXA was requesting an order that he ought to have claimed workplace safety and insurance benefits after his accident, rather than accident benefits) and wished to continue without representation. KK indicated that he understood the purpose of the hearing and that he was prepared to continue. As the Respondent therefore, he was provided with an opportunity to question all witnesses and make submissions (although he chose not to do so).

THE REASONS

(i) Background

[8] The following background information is, generally speaking, not contested and I have relied on it in reaching my decision:

- KK began working as a truck driver with KW 2000 Express Ltd. (“KW 2000”) on approximately July 9, 2001.
- In a letter dated May 27, 2003, Nicole Wutschert of the Tribunal’s Office of the Vice-Chair Registrar advised that according to the WSIB (the “Board”), KW 2000 was “an active Schedule 1 employer, effective January 1, 2001”.
- On July 5, 2001, KK had incorporated 1476539 Ontario Inc, with him as the sole first director
- On August 23, 2001, KK was injured in a single motor vehicle accident in Charlotte, Michigan in the United States of America. At the time, he was driving a transport tractor and hauling a trailer “on behalf of” KW 2000.
- The tractor was owned by AK, a co-owner of KW 2000. The trailer was owned by CIT Financial Ltd.
- At the time of the accident, the tractor, trailer and Respondent were insured by AXA .
- After the accident, as a condition of receiving accident benefits from AXA, KK executed an *Assignment of Workplace Safety and Insurance Benefit Entitlement* to AXA on October 10, 2001.
- Neither KK nor KW 2000 reported the accident to the Workplace Safety and Insurance Board.

(ii) The testimony of PB

[9] PB testified that he was an insurance adjuster who had been assigned this claim. He confirmed that KW 2000 had a fleet insurance policy that included coverage for its drivers. He noted that KK had been the driver involved in a single vehicle accident in Michigan, U.S.A. Initially, the insurance company’s concern had been over the physical damage in the claim but when KK retained a representative to deal with his physical injuries, carriage of the case was transferred to him.

[10] PB confirmed the documentation on file which indicated that the tractor in question was owned by AK and that the trailer was owned by CIT Financial Ltd. PB also confirmed that by means of an Application for Accident Benefits dated September 17, 2001, KK had applied for insurance benefits from AXA.

[11] PB testified (as noted in Exhibit #3) that the worker’s claim for damages has now been settled (and a release signed) upon payment of approximately \$20,000. PB advised that since a full and final settlement had been reached in this matter, the insurance company would not be attempting to recover any money from KK even if they were successful on this application.

(iii) The testimony of KK

[12] KK testified that he had been involved in a single vehicle accident in August 2001 while driving along Highway I69 near Charlotte, Michigan. At the time, he was driving a tractor trailer for KW 2000, hauling freight from Kitchener, Ontario to Chicago, Illinois.

[13] KK confirmed that he began working as a truck driver for KW 2000 on approximately July 9, 2001. He remembered having entered into an employment contract with a AK but did not have a copy of it with him. He recalled the contract indicating that he had been hired as a driver to perform driving duties and to deliver goods for the company.

[14] Under questioning from Mr. Bulger, KK testified that he did not own the tractor or the trailer and did not pay for any of the expenses related to its operation including fuel, licence, insurance and maintenance. He also noted that KW 2000 was responsible for obtaining the customers and was responsible for billing them and collecting the money. The customers did not pay KK directly. KK relied on KW 2000 to get the loads for him and he would contact them virtually every day to see if they had a load for him to deliver. While in theory he had the discretion to refuse to carry a load, he could not recall ever having done so. KW 2000 would tell him when and where to pick up the load and when and where to deliver it. He also testified that they "kind of" told him which route to take. According to KK, he was paid 34¢ a mile, whether he drove the truck loaded or empty. He also received his payment whether or not KW 2000 was paid by the customer.

[15] KK indicated that prior to beginning with KW 2000 he had worked as a truck driver in British Columbia. He was aware, at that time, that his employer had workers' compensation coverage for him. When asked why he did not claim compensation benefits after his accident in Ontario, the worker testified he did not file a claim because "he had nothing to do with the Board" since he was not paying any premiums to them. He testified he was not aware of whether KW 2000 had an account with the Board and indicated the subject of workers' compensation had never been a topic of discussion between he and AK.

[16] KK confirmed that he incorporated a company on approximately July 5, 2001. He testified that this was required of him by KW 2000 before he could begin working. In his view, there was little benefit to the incorporation other than allowing him to make some income tax deductions. He indicated that he only did because KW 2000 required it. He noted there was no Minute Book nor any other formal records of by-laws.

[17] KK also testified that KW 2000 was the only company he worked for and that he would not have been permitted to drive loads for other people using their tractors or trailers. The tractors and trailers also had a KW 2000 logo on them.

[18] KK testified that in his opinion, he was an employee of KW 2000.

(iv) The testimony of AK

[19] AK testified that he was an officer and director of KW 2000 and that the trailer KK had been driving at the time of the accident was registered to him.

[20] AK confirmed evidence on file that KW 2000 had a workers' compensation account from January 1, 2001 but had no idea who was covered by it or why it had been established. As he

recalled, the Board had contacted him after the accident suggesting that he should have coverage for his employees. AK also confirmed that AXA was their accident insurer although he was of the view that the insurance covered only the truck, equipment and cargo but not the drivers.

[21] AK was asked a number of questions relating to KK's incorporation. AK testified that he had all of his drivers incorporate themselves. He was unable to provide a reason as to why he required this indicating only that it had always been done that way and he preferred to be associated with corporations rather than individuals. He also testified however, that if an individual did not incorporate then or she would not be able to work for KW 2000. In fact, no one has ever worked for him who has not been incorporated.

[22] AK confirmed that KW 2000 was responsible for all costs associated with operating the trucks and trailers. He recalled KK occasionally indicating that he did not want to take a particular load but he also testified that KK would not be permitted to use the truck to take materials for someone else. He confirmed that KW 2000 was responsible for locating customers, had their logo on the tractor trailer and would give the driver a schedule to follow containing pick up and delivery times. He confirmed that KK was paid 34¢ a mile and that KW 2000 would determine before hand, the number of kilometres from one location to another and the driver's pay would be based on that figure (regardless of how far he or she actually drove).

[23] It was AK's view that KK was actually employed by his own numbered company, not by KW 2000.

(v) Submissions of the Applicant's representative

[24] Mr. Bulger submitted that the balance of evidence in this case clearly indicated that KK was a worker of KW 2000 at the time of his accident in August 2001. In support of that position, he noted that KK did not own the truck or trailer; was not responsible for any expenses related to the operation of the vehicles including the maintenance, insurance and fuel; did not find potential customers; was paid a flat rate of 34¢ a mile whether KW 2000 was paid by the customer or not.

[25] While Mr. Bulger acknowledged that KK had incorporated prior to the accident under consideration here, he referred to Tribunal *Decision Nos. 304 and 416/90* where Tribunal Panels have "pierced the corporate veil" and considered the actual facts of the situation in order to determine whether the individual involved was a "worker" or not.

[26] It was Mr. Bulger's position that KK was clearly a "worker" and therefore ought to have been entitled to claim workplace safety and insurance benefits following his accident.

(vi) Conclusions

[27] After considering the material before me, and the testimony provided, I am satisfied on a balance of probabilities that the relationship between KW 2000 and KK on August 23, 2001, was one of employer and worker. In reaching that conclusion, I have taken particular note of the following:

- KK did not own the tractor or trailer he was driving at the time of the accident.
- KW 2000 was responsible for all costs associated with the operation of the vehicle. These expenses included fuel, maintenance and insurance.

- KW 2000 was responsible for obtaining new customers.
- KK received 34¢ a kilometre for his trips and would be paid regardless of whether KW 2000 was paid by the customer.
- Billing for services rendered was done directly between KW 2000 and the customer. No money was paid to KK.
- The tractors and trailers had a KW logo on the side.
- KW 2000 would provide KK with a schedule indicating when and where the load was to be picked up and when and where it was to be dropped off. KW 2000 also determined the maximum mileage a driver would be paid for any one trip.
- KK was not permitted to use the tractor or trailer to haul goods for others.
- In his time with KW 2000, KK never worked for anyone else. In addition, KK testified that he never turned down a load provided to him by KW 2000.
- KK testified that in his opinion, he was an employee of KW 2000.

[28] While I acknowledge that KK had incorporated himself just prior to beginning with KW 2000, I am satisfied that this was nothing more than a *pro forma* document completed at the request of KW 2000 in, what would appear, was an attempt to avoid the establishment of a worker-employer relationship. In his testimony, the worker noted that, other than a few tax deductions, incorporation had little benefit for him and he would never have done so had it not been requested by KW 2000. In addition, AK testified that had the worker not incorporated, he would not have been able to work for KW 2000.

[29] While, in theory, KW 2000 may have retained the services of KK's numbered company, I am satisfied (as was the case in *Decision Nos. 304 and 416/90*) that the real merits and justice of the situation require that the "corporate veil" be pierced and that the facts behind the incorporation be examined to determine the true nature of the relationship between KK and KW 2000. As noted above, I am satisfied that when one examines the facts as a whole, they clearly establish that the relationship between the parties was one of worker and employer at the time of the accident on August 23, 2001.

THE DECISION

[30] The application is allowed.

[31] The Respondent is entitled to claim workplace safety and insurance benefits relating to injuries sustained in the accident of August 23, 2001.

DATED: This 27th day of June 2003.

SIGNED: R. Nairn.