OSWCA
Ontario Sewer & Watermain Construction Association

MEMBER BULLETIN

March 1, 2017

Casual Workers under the Workplace Safety and Insurance Act

Michael Zacks of the Office of the Employer Advisory at the WSIB recently issued the following notice to employers:

One of the traditional exemptions of worker coverage in the WSIA is contained in s.11(1) (a) – Casual Workers:

> *11. (1) The insurance plan applies to every worker who is employed by a Schedule 1 employer or a Schedule 2 employer. However, it does not apply to workers who are,*
>
> > *(a) persons whose employment by an employer is of a casual nature and who are employed otherwise than for the purposes of the employer's industry;*

This provision which has been in the legislation since at least 1937,

> 3(4) This section shall not apply to a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business. R.S.O. 1937, c. 204, s. 2.[1] [Footnotes are below my signature]

It is very rarely used, and has only been considered by the Workplace Safety and Insurance Tribunal (WSIAT) a handful of times over the years. The exemption has been successfully applied to deem a worker as being exempt from the Act on only a few cases: ***Decision No. 1957 02***[ii], ***Decision No. 315 92***[iii] [There are a few older cases that I have omitted.]

Generally, the issue arises in the context of the injured worker wanting to bring a law suit against the employer, and is challenged in doing so by the employer's insurance company at the WSIAT or other appeal body with s. 31 (WSIA) jurisdiction.
Recently the New Brunswick Court of Appeal considered such a case. This is such a rarity, that I wanted to share it with you should the issue ever come up for one of your members or colleagues, so feel free to pass this email on.

The decision is *Eastland Industries v Casey*, 2016 NBCA 57 The facts, like in many of the cases dealing with this issue are unusual:

1. On February 1, 2011, the respondent, Derrick Casey, was severely injured when, while removing snow from the roof of a building, he fell through and landed on the cement floor. Mr. Casey had not previously worked for Eastland Industries Ltd., the building's owner, and the snow removal job, for which remuneration was to be drawn from the office "petty cash", was expected to take no more than one day. As would be anticipated, the parties agree Mr. Casey's employment was "casual". Moreover, and just as importantly, the record shows conclusively that, at the time of the accident, the building was not used for the purposes of Eastland Industries' business.

Casey brought a law suit action against Eastland for negligence, and Eastland brought an application to the NB WCAT to determine if Casey's right of action was taken away by the WCA. The WCAT said it was not because Casey fell within the casual worker exemption. Eastland brought an appeal as is allowed under the NB WCA.

The Court made a very extensive review of the case law on this issue, including similar provisions in several American states [see paragraphs 35 and 36]. In concluding that Casey was a casual worker, the Court stated:

> **41.** The parties agree that, although Mr. Casey was a "worker", his employment was of a casual nature. Moreover, the Appeals Tribunal found it was "otherwise than for the purposes" of Eastland Industries' business. In my view, that finding is unimpeachable in light of the uncontested facts recited above and the following features of the record: (1) the unchallenged representation by Mr. Casey's counsel before the Appeals Tribunal that the building from which the snow was being removed was used solely to store personal goods of Eastland Industries' president; and (2) an affidavit from one of its employees acknowledging "[t]he building [...] was not used by Eastland for its business". The Appeals Tribunal's finding is also harmonious with the jurisprudential pronouncements on point.

The Court dismissed the employer's appeal.

The most significant take-away for employers from this case is if you are going to use company money to pay for work, then a clearance certificate should be obtained to ensure the individual doing the work is a worker under the WSIA, and thus not able to sue for negligence resulting from an injury.

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[1] RSO 1950

[ii] The appellant was injured while working with the employer to construct a storage shed attached to the employer's garage at the employer's residence. The appellant appealed a

decision of the Appeals Resolution Officer finding that the worker was not a worker within the meaning of the Act.

The appellant did other work for the appellant as well. The method of payment was indicative of independent operator status. There were other factors suggesting that the appellant was a worker. However, based on the nature of the project itself, the Vice-Chair found that the appellant was a person whose employment was of a casual nature and who was employed for purposes other than the employer's industry. It was not contested that his employment was casual. The appellant was not working within the employer's industry but rather was assisting in the construction of a storage shed at the employer's residence. The shed may have been intended at least in part for the employer's business, but the employer was in the electrical business and was not typically involved in construction of storage sheds.

The appellant was not a worker within the meaning of the Act. The appeal was dismissed.

[iii] The infant plaintiff in a civil case applied to determine whether her right of action was taken away. The plaintiff's mother worked for the defendant employer. The employer operated an annual do-it-yourself consumer show. The show lasted four days and was intended to improve sales in the employer's stores in general. The show was family oriented. Workers of the employer volunteered to work at the show on a paid basis. Members of worker's families were also employed at the show. The plaintiff was the eight year old daughter of a single mother. The mother wanted to work at the show but needed supervision for her child. She asked the employer if her daughter could work at the show. After some consideration, the employer agreed. The plaintiff was given a job handing out balloons at the show. Her hand was injured by a helium tank while working.

The Panel found that the plaintiff was employed by the employer. The contract was entered into on her behalf by her mother. She was employed on a one-time basis to perform a job which was not regularly available. She was a casual employee.

A casual employee is excluded from the definition of worker if the employment is other than for purposes of the employer's industry. The Panel found that the consumer show was an integral part of the employer's usual business. Further, the work of inflating and handing out balloons was part of the promotions integral to the success of the show. However, the primary and overriding purpose of the plaintiff's employment was to accommodate the mother's need for child care on the day of the show. The fact that the employment was coincidentally consistent with the employer's business was secondary and minor.

The plaintiff was employed casually other than for the purpose of the employer's industry. Accordingly, she was not a worker within the meaning of the Act. Her right of action was not taken away.