



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 119/19

BEFORE: P. Allen: Vice-Chair

HEARING: January 23, 2019 at Toronto
Oral

DATE OF DECISION: February 6, 2019

NEUTRAL CITATION: 2019 ONWSIAT 358

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated March 5, 2015

APPEARANCES:

For the worker: Not Applicable

For the employer: R. Fink, Lawyer

Interpreter: N/A

REASONS

(i) Introduction

[1] The employer appeals the March 5, 2015 decision of the ARO which determined that the worker's field technicians were workers of the employer as opposed to independent operators from 2006 through 2009.

[2] Prior to the start of the hearing the employer's representative requested that, if the Tribunal were to find that the field technicians were independent operators, the decision should be applied to 2006 and 2007 only and that the employer would then request that the Workplace Safety and Insurance Board (WSIB) review the status of the field technicians for subsequent years.

(ii) Issues

[3] The issue under appeal is whether the employer's field technicians were worker's or independent operators in 2006 and 2007.

(iii) Background

[4] The employer (GES) established an account with the WSIB in 2003 and advised that they performed maintenance, installation and service of residential heating, ventilation and air conditioning (HVAC) equipment.

[5] In 2008 the WSIB performed an audit of GES which determined that earnings for 84 field technicians had not been reported to the WSIB as the employer had considered them to be independent operators and not workers. The WSIB provided questionnaires (Determining Worker/Independent Operator Status- Construction) to the employer and, based on the responses, the WSIB advised GES in a letter dated March 3, 2009 that the field technicians were considered to be worker's of GES in 2006 and 2007 and not independent operators. Subsequent to this audit the WSIB made adjustments to the premiums owed to the WSIB by GES for 2006 and 2007. The employer appealed this decision.

[6] In 2011 the WSIB performed another audit of GES which determined that earnings for the field technicians had not been reported for 2008 and that for 2009 the earnings for the field technicians had been over-reported. Subsequent to this audit the WSIB made adjustments to the premiums owed to the WSIB by GES. The employer appealed this decision.

[7] On March 5, 2015 the ARO determined that the field technicians were worker's of GES from 2006 through 2009. It is from this decision that the employer now appeals.

(iv) Law and policy

[8] The *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[9] Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal: #171 (Workers vs. Independent Operator & Optional Insurance) and #299 (Decision Makin/Merits and Justice). I have considered these policies as necessary in deciding the issues in this appeal.

(v) **Testimony**

[10] The following individuals provided testimony under oath:

(a) **J.M. (Owner)**

- GES was established in 2003 and provided maintenance, installation and service for residential HVAC equipment in 2006 and 2007.
- 99% of the work performed by GES in 2006 and 2007 was referred by another employer (DES).
- In 2006 and 2007 DES sent work orders to GES via facsimile. GES would then distribute these work orders to field technicians based on availability and skill set.
- DES paid GES for the work once performed and GES would then pay the field technicians after receiving invoices from them for work performed. The invoices were made out in the field technician's business name and included GST. Payments were based on a fee schedule developed by DES and agreed to by GES. Field technicians were also paid additional fees for upselling (selling home owners additional HVAC equipment or selling annual protection plans).
- The field technicians were hired by GES (and approved by DES) and each field technician signed a contract with GES acknowledging that they were "contractors".
- Field technicians provided services to GES in one of three different categories:
 - Maintenance:** Annual maintenance and cleaning of HVAC equipment.
 - Service:** Repaired broken HVAC equipment
 - Installation:** Installation of HVAC equipment.
- In 2006 and 2007 many field technicians provided maintenance, service and installation to clients other than GES.
- In 2006 and 2007 the fall and spring were busy periods but other periods were slower and, as a result, field technicians received less work and were paid less by GES.
- Field technicians were responsible for: purchasing their own tools, purchasing a vehicle/gas/insurance; purchasing liability insurance and other expenses such as food.
- Field technicians were permitted to hire a helper if required. Field technicians involved with installation were more likely to hire staff as they required assistance with lifting and carrying heavy HVAC equipment. GES was not involved in hiring decisions of the field technicians. It was expected that these installation field technicians would have a WSIB account and provide coverage for their staff.
- Field technicians were solely responsible for work defects and, as a result, were required to fix or repair the defects without receiving additional fees from GES.
- GES did not instruct Field Technicians how to perform the work and performed audits on the quality of the work rarely (e.g. 1% of field technicians annually). In cooperation with DES, education was provided when new HVAC products were developed. This was usually performed once or twice per year for a few hours.

- In 2006 and 2007 roughly 20% of field technicians were incorporated and the rest were registered with the province of Ontario as operating a business.

(b) C.W. (Field Technician)

- C. W. has worked with GES since 2005 as a field technician providing “installation” services.
- C.W. received his “Gas Technician 2” training from a community college and was licensed in 2006 and 2007. All associated education and licensure fees were paid by C.W.
- In 2006 and 2007 C.W. was not incorporated but did have a company registered with the province.
- 40% of the revenues for the business in 2006 and 2007 were from GES and 60% of the business revenues were from other clients in 2006 and 2007.
- C.W. hired a helper to assist with the work and in 2006 and 2007 WSIB coverage for the helper was in place and paid by C.W.
- C.W. was solely responsible for business expenses in 2006 and 2007 including: tools (value \$3000 - \$5000), vehicle (purchase value \$40,000), insurance (vehicle and liability); helper, WSIB coverage for the helper, etc.
- C.W. was responsible for defects in 2006 and 2007 and was not paid extra for the time or expense required to fix the defect.
- C.W. was not supervised by GES in 2006 and 2007 and did not receive instructions on how to perform the work from GES.
- When performing work for GES he wore a photo identification badge that identified him as an authorized representative of DES. He also had a magnetic sign on his car which also identified him as an authorized representative of DES.
- C.W. invoiced GES in 2006 and 2007 for services rendered according to DES’s fee schedule. The invoice included GST which his business then remitted to the Canada Revenue Agency. GES did not issue a T4 statement to C.W. in 2006 and 2007 but instead issued a T5018 (Statement of Contract Payments) to C.W.
- C.W. acknowledged that he did not receive very many referrals from GES in January of 2006 and 2007 and, as a result, he performed more work for his other clients in this month.
- C.W signed a contract with GES in which he acknowledged that he was a contractor.

(c) M.W. (Field Technician)

- M.W. has worked with GES since 2006 as a field technician providing “maintenance” services.
- M.W. received his “Gas Technician 2” training from a community college and was licensed in 2006 and 2007. All associated educational and licensure fees were paid by M.W.
- In 2006 and 2007 M.W. was not incorporated but did have a company registered with the province. M.W. invoiced GES for services rendered under the name of his company.

Invoices included GST which he then remitted to the province. M.W. was not issued a T4 statement by GES in 2006 or 2007 and instead he received a T5108 statement from GES in 2006 and 2007.

- 70% - 75% of the revenues for his business were from GES in 2006 and 2007 and 25% - 30% of the business revenues were from other clients in 2006 and 2007.
- M. W. did not require a helper and did not hire a helper in 2006 and 2007. M.W. has personal coverage for himself through the WSIB but he was uncertain if this was in place in 2006 and 2007.
- M.W. was solely responsible for business expenses in 2006 and 2007 including: tools (value \$5000 - \$10,000), vehicle (purchase value \$10,000 to \$15,000), insurance (vehicle and liability) and food.
- M.W. was responsible for defects and was not paid extra for the time or expense required to fix the defect.
- M.W. was not supervised by GES and does not receive instructions on how to perform the work from GES.
- When performing work for GES he wore a photo identification badge that identified him as an authorized representative of DES. He also had a magnetic sign on his car which also identified him as an authorized representative of DES.
- M.W. refused work offered by GES when this work conflicted with work being performed with his other clients.
- M.W. signed a contract with GES in which he acknowledged that he was a contractor.

(d) W.N. (Field Technician)

- W.N. has worked with GES since 2003 as a field technician providing “service”.
- W.N. received his “Gas Technician 2” training from a community college and was licensed in 2006 and 2007. All associated educational and licensure fees were paid by W.N.
- In 2006 and 2007 W.N. was not incorporated but did have a company registered with the province.
- In 2006 and 2007 55% to 70% of the revenues for his business were from GES and 30% to 45% of the business revenues were from other clients in 2006 and 2007.
- W.N. did not hire a helper to assist with the work and in 2006 and 2007.
- W.N. was solely responsible for business expenses in 2006 and 2007 including: tools (value \$5000 - \$7000), vehicle (purchase value \$50,000), insurance (vehicle and liability); and food.
- W.N. was responsible for defects and was not paid extra for the time or expense required to fix the defect.
- W.N. was not supervised by GES and does not receive instructions on how to perform the work from GES.

- When performing work for GES he wore a photo identification badge that identified him as an authorized representative of DES. He also had a magnetic sign on his car which also identified him as an authorized representative of DES.
- W.N. invoiced GES for services rendered according to DES's fee schedule. The invoice included GST which his business then remitted to the Canada Revenue Agency. GES did not issue a T4 statement to W.N. but instead issued a T5018 (Statement of Contract Payments).
- W.N. refused work offered by GES 10% to 15% of the time when this work conflicted with work being performed with his other clients.
- C.W signed a contract with GES in which he acknowledged that he was a contractor.

(e) H.H. (Field Technician)

- H.H. has worked with GES since 2005 as a field technician providing "service".
- H.H. received his "Gas Technician 2" training from a community college and was licensed in 2006 and 2007. All associated educational and licensure fees were paid by H.H.
- In 2006 and 2007 H.H. was not incorporated but did have a company registered with the province.
- In 2006 and 2007 80% to 90% of the revenues for his business were from GES and 10% to 20% of the business revenues were from other clients in 2006 and 2007.
- H.H. did not hire a helper to assist with the work and in 2006 and 2007.
- H.H was solely responsible for business expenses including: tools (value \$4000 - \$6000), vehicle (purchase value \$45,000), insurance (vehicle and liability); and food.
- W.N. was responsible for defects in 2006 and 2007 and was not paid extra for the time or expense required to fix the defect.
- W.N. was not supervised by GES and did not receive instructions on how to perform the work from GES.
- When performing work for GES he wore a photo identification badge that identified him as an authorized representative of DES. He also had a magnetic sign on his car which also identified him as an authorized representative of DES.
- H.H. invoiced GES for services rendered according to DES's fee schedule. The invoice included GST which his business then remitted to the Canada Revenue Agency. GES did not issue a T4 statement to H.H. but instead issued a T5018 (Statement of Contract Payments).
- H.H refused work in 2006 and 2007 offered by GES occasionally when this work conflicted with work being performed with his other clients.
- H.H signed a contract with GES in which he acknowledged that he was a contractor.

(vi) Analysis

[11] The employer's representative submitted that the testimony of the five witnesses confirms that the field technicians are not workers and instead are independent operators. In making his submissions the employer's representative referred to OPM Document No. 12-02-01, "Workers and Independent operators".

[12] I note that OPM Document No. 12-02-01 reproduces sections 2 and 11 of the WSIA as well as the WSIB's questionnaire (Determining Worker/Independent Operator Status) which states:

Law**s.2(i)**

An "independent operator" is a person who carries on an industry set out in Schedule 1 or Schedule 2 of the Act and who does not employ any workers for that purpose.

A "worker" includes a person who has entered into or is employed under a contract of service, or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

- a learner or student
- a member of a municipal volunteer fire brigade or a volunteer ambulance brigade
- a person deemed to be a worker of an employer by direction or order of the WSIB
- a person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so
- a person who assists in any search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police Force
- a person who assists in connection with an emergency that has been declared by the Lieutenant Governor in Council or the Premier under section 7.0.1 of the Emergency Management and Civil Protection Act or by the head of council of a municipality under section 4 of that Act
- an auxiliary member of a police force
- a person deemed to be a worker under Section 12, or
- a pupil deemed to be a worker under the Education Act.

s.11(1)

A "worker" does not include

- an outworker (a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home)
- an executive officer of a corporation
- or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's industry.

Policy

The WSIB uses questionnaires (a general questionnaire and six industry-specific questionnaires), to gather information to help determine if a person is employed under a

“contract of service.” The questionnaires reflect the principles of the organizational test (see below). Persons employed under a contract of service are workers. Independent operators are not employed under a contract of service.

The WSIB has the authority to determine who is a worker or an independent operator under the Workplace Safety and Insurance Act.

Guidelines

General

A “**contract of service**”, or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.

Workers — those who work under contracts of service — are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.

A “**contract for service**”, or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.

Independent operators — those who work under contracts for service — are not automatically insured or entitled to benefits unless they voluntarily elect to be considered “workers” and apply to the WSIB for their own account and optional insurance. (See 12-03-02, Optional Insurance.) Independent operators may not be insured through the hiring company’s (payer’s) WSIB account.

Organizational test

The organizational test recognizes features of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer’s organization, or operating their own separate business.

Questionnaires

The questionnaires apply to persons, usually contractors and subcontractors, who are unsure of their own status, or whose status is in question by the hiring company or the WSIB. Elements of the organizational test are incorporated into the six industry specific questionnaires and the general questionnaire.

Industry-specific questionnaires

These questionnaires are geared to specific industries in which the question of worker/independent operator status arises most frequently.

They are

- Construction
- Courier
- Logging
- Retail stores
- Taxis, and
- Trucking.

General questionnaire

The WSIB uses a general questionnaire for persons who work in industries other than the six industries for which there are industry-specific questionnaires.

After completing and submitting the appropriate questionnaire to the WSIB, the WSIB determines whether persons are workers in an employer's organization, or independent operators running their own separate business.

Incorporation

The WSIB does not automatically consider incorporation, on its own, as a sole factor in determining whether a person is an independent operator. One-person corporations still need to apply for independent operator status by completing the appropriate industry-specific or general questionnaire. The WSIB looks at whether the person operates a business or not, rather than just the incorporated structure of the operation.

Where to get a questionnaire

Contact:

Workplace Safety and Insurance Board

200 Front Street West

Toronto, Ontario, M5V 3J1

Telephone: (416) 344-1013 or 1-800-387-8638 (toll free),

or visit our website at www.wsib.onca

Characteristics of workers and independent operators

The following list compares worker/independent operator characteristics. The statements on the left are more characteristic of the behaviour or situations of workers, while those on the right characterize the behaviour of independent operators. No one statement determines a person's status. The seven questionnaires do not necessarily include all the characteristics listed since they are designed to capture key elements of business relationships in specific industries.

| | Workers | Independent Operators |
|----------------------------------|---|--|
| Instructions | <ul style="list-style-type: none"> Comply with instructions on what, when, where, and how work is to be done. | <ul style="list-style-type: none"> Work on their own schedule. Does the job their own way. |
| Training/supervision | <ul style="list-style-type: none"> Trained and supervised by an experienced employee of the payer. Required to take correspondence or other courses. Required to attend meetings and follow specific instructions which indicate how the payer wants the services performed. | <ul style="list-style-type: none"> Use their own methods and are not required to follow instructions from the payer |
| Personal service | <ul style="list-style-type: none"> Must render services personally. Must obtain payer's consent to hire others to do the work. | <ul style="list-style-type: none"> Often hires others to do the work without the payer's consent. |
| Hours of work | <ul style="list-style-type: none"> The hours and days of work are set by the payer. | <ul style="list-style-type: none"> Work whatever hours they choose. |
| Full-time work | <ul style="list-style-type: none"> Must devote full-time to the business of the payer. Restricted from doing work for other payers. | <ul style="list-style-type: none"> Free to work when and for whom they choose. |
| Order or sequence of work | <ul style="list-style-type: none"> Performs services in the order or sequence set by the payer. | <ul style="list-style-type: none"> Performs services at their own pace. |

| | Workers | Independent Operators |
|--|---|---|
| | <ul style="list-style-type: none"> Performs work that is part of a highly coordinated series of tasks where the tasks must be performed in a well-ordered sequence. | <ul style="list-style-type: none"> Work on own schedule. |
| Method of payment | <ul style="list-style-type: none"> Paid by the payer in regular amounts at stated intervals. Payer alone decides the amount and manner of payment. | <ul style="list-style-type: none"> Paid by the job on a straight commission. Negotiates amount and method of payment with the payer. |
| Licenses | <ul style="list-style-type: none"> Payer holds licenses required to do the work. | <ul style="list-style-type: none"> Person holds licenses required to do the work. |
| Serving the public | <ul style="list-style-type: none"> Does not make services available except on behalf, or as a representative, of the payer. Invoices customers on employer's behalf. | <ul style="list-style-type: none"> Has own office Listed in business directories and maintains business telephone. Advertises in newspapers, etc. Invoices customers on own behalf. |
| Status with other government agencies | <ul style="list-style-type: none"> Terms of the relationship are governed by a collective agreement. Canada Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the Canada Pension Plan (CPP) and the Employment Insurance Act (EIA). (A ruling is made after the relevant parties complete the form "Request for a ruling as to the status of a worker under the CPP or EIA".) Collects and pays GST and other applicable taxes on payer's behalf. Payer deducts EI, CPP, Insurance, Income tax, etc. from pay. | <ul style="list-style-type: none"> Terms of the relationship not governed by a collective agreement. Canada Revenue Agency has made an official ruling that the person is not a worker under the CPP and the EIA. Collects and pays GST and other applicable taxes on own behalf. Takes no deductions from pay for EI, CPP, insurance, income tax, etc. |

Profit or Loss

To determine what the opportunities are for the person to earn a profit or suffer a loss in doing the work, the decision-maker must consider

- what assets (labour, materials, tools, and equipment) are used, operated, or put into action when doing the work, e.g., a lathe. These are to be distinguished from assets that are the subject of the work, or that are acted upon in doing the work, e.g., the table leg that is "turned" on the lathe.

- what costs are incurred in doing the work, including
 - costs of the acquisition, maintenance, operation and repair of assets;
 - financing and loan arrangements with respect to the work, and
 - licensing and insurance fees
- who pays these costs - the employer or the person
- if the person pays the costs, does the person purchase items directly or indirectly from the employer or through an arrangement with the employer
- what decisions influence the costs and to what extent
- who makes and has the right (legal or otherwise) to make these decisions - the person or the employer
- the market mobility of the person or the demand that exists for these services.

Workers have the right to make decisions that in comparison to those that the employer makes (or has the right to make), have an insignificant or lesser influence on the workers' opportunity to make a profit or suffer a loss in doing the work.

Independent Operators have the right to make decisions that, in comparison to those that the hiring company makes (or has the right to make), have a significant influence on their opportunity to make a profit or suffer a loss in doing the work.

Other applicable criteria

To determine what other applicable criteria suggest about the status of the person, decision-makers consider the paired statements that follow. None of these statements, on its own, leads to the determination of status. Before making a determination, decision-makers must consider each statement in reference to all other features of the work relationship.

| | Workers | Independent Operators |
|--|--|---|
| Continuing need for type of service | Payer has a continuing need for the type of service that the person provides. A payer has a continuing need for service if all persons who perform such services, collectively, spend more than 40 hours a month on average doing the work, or if the work continues full-time for more than 4 months. | Purchaser does not have a continuing need for the type of service that the person provides. |
| Hiring/supervising/ paying assistants | Hires, supervises, and pays workers, on direction of the payer (acts as a supervisor or representative of the payer) | Hires, supervises and pays workers, on own accord and as the result of a contract under which the individual agrees to provide materials and labour and is responsible for the results. |
| Doing Work on Purchaser's premises | Payer owns or controls the worksite | Works away from payer's premises Uses own office space, desk, |

| | Workers | Independent Operators |
|---|---|--|
| | | and telephone. |
| Oral and written reports | Required to submit regular or oral or written reports to purchaser | Submit no reports |
| Right to sever relationship | Either the person or the payer can end the work relationship at any time without legal penalty for breach of contract | Agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to pay for damages or loss of income that the payer sustains because of the failure to satisfactorily complete the work |
| Working for more than one firm at a time | Usually works for one payer | Works for more than one payer at the same time. |

Determining Status

The decision-maker reaches a decision about the status of the person. When the criteria indicate the person has a separate business that is not integrated into the employer's business, then the person is an independent operator. If the decision-maker finds

- that the person is subject to a high degree of control in doing the work, and
- that the decisions the person makes have an insignificant effect on the person's own opportunity to earn a profit or suffer a loss

the person is a worker and does not have a separate business, even if a review of "Other applicable criteria" suggests that some independence is afforded the person in the relationship with the employer.

[13]

I have considered the testimony of the field technicians and the owner of GES as it relates to OPM Document No. 12-02-01 and in the bullet points below I have summarized my findings:

- **Instructions:** All four field technicians testified that they are not provided with instructions by GES on how to perform the work nor is their work reviewed or inspected after it is performed. While GES provides the field technicians with the address of the customer's house where the work is to be performed, I also note that the field technicians have some degree of flexibility regarding when the work can be performed (e.g. within a four hour window). I further note that the field technicians may decline the work offered by GES for reasons that need not be disclosed to GES. I find that this description is indicative of an independent operator whereas workers would be required to follow specific instructions from their employer about how work is to be performed.
- **Training:** All four field technicians testified that they receive no training from GES and that DES provides training once or twice per year for a few hours when new HVAC equipment was made available. The field technicians testified that they are not required to take the courses but that they take the courses in order to stay current with the HVAC equipment being offered to customers by DES. I find that this description is indicative of

an independent operator whereas workers would be required to undergo regular training from GES.

- **Personal Service:** One of the field technicians (C.W.) hired a helper in 2006 and 2007 because, as an installer, he required assistance lifting heavy HVAC equipment. C.W. testified that he did not obtain permission to hire the helper from GES and GES did not approve the person he hired. The remaining three field technicians did not hire helpers because helpers were not needed although several noted that they could hire helpers if desired. I find that this description is indicative of an independent operator (especially as it applies to field technicians involved in installation) whereas workers would not be able to hire helpers without permission from their employer.
- **Hours of Work:** The field technicians advised that the hours of work they offer to GES vary depending on their personal needs and work they perform for other clients. I find that this description is indicative of an independent operator whereas workers would be required to perform work according to hours set by GES.
- **Full-time Work:** Each of the field technicians advised that they do not offer themselves to GES on a full-time basis. They testified that they have other sources of revenue for their business and, on average, each of the field technicians advised that roughly 20% to 30% of their revenues come from offering HVAC services to customers other than GES. I find that this description is indicative of an independent operator whereas workers would be required to dedicate themselves full-time to GES and would be restricted from performing work with other firms.
- **Order or Sequence of Work:** The field technicians advised that they can work on their own pace and schedule. For instance, each of the field technicians advised that they determine how the work is to be performed and they can decline work from GES if it conflicts with other HVAC work they perform. The field technicians also advised that they can perform the work at their own pace albeit that the longer they take to perform a job the less profit they earn because they are paid a fixed fee based on the type of work required. I find that this description is indicative of an independent operator whereas workers would be required to perform the work in the order and sequence set by GES.
- **Method of Payment:** The field technicians testified that they are paid based on the amount of work they perform. As a result, the amounts they are paid by GES vary from week to week and month to month. I find that this description is indicative of an independent operator whereas workers are paid regular amounts at stated intervals.
- **Licenses:** Each of the field technicians advised that they hold a Gas Technician 2 license and they pay the licensure fees. I find that this is indicative of an independent operator whereas worker's would not hold any particular license and said license would be held by GES.
- **Serving the Public:** The field technicians testified that they do not invoice the residential customers for whom they provide services. Instead, DES invoices the customers for work performed. The field technicians each provided an invoice to GES in 2006 and 2007 for services rendered. The invoices are in the name of the registered or incorporated company which is owned by the respective field technicians. Several of the field technicians (H.H. and W.N.) have business cards that they use to advertise services. I find that this

description is indicative of an independent operator whereas workers would invoice clients on behalf of GES.

- **Status with Other Government Agencies:** The field technicians testified that they are not part of a union and are not party to a collective agreement. I further note that there is no evidence that the Canada Revenue Agency has made a ruling in 2006 and 2007 regarding whether the field technicians independent operator status. The field technicians advised that GES does not make deductions from their fees (e.g. EI, CPP, income tax). Finally, the field technicians advised that they collected and paid GST in 2006 and 2007 on their own behalf and not on behalf of GES. I find that this description is indicative of an independent operator whereas workers may be part of a union and would have statutory deductions taken from their pay by GES.
- **Profit and Loss:** Each of the field technicians testified that in 2006 and 2007 they purchased and supplied their own tools (which on average were valued at roughly \$5000); vehicle (which on average was valued at \$30,000) as well as liability insurance and that none of these items were purchased through GES or with the assistance of GES. One of the field technicians (C.W) also advised that he hired a helper who was required full-time. The field technicians also advised that the net operating revenue of their business is negatively affected when they take too long to perform the work. They further explained that they are paid on a flat fee and when they take too long to perform the work they are unable to take on other work during the day or they are required to cancel work already scheduled. Finally, the field technicians testified that they are responsible for deficiencies. They explained that if they damage HVAC equipment while performing the work they must repair or replace the equipment and are not paid for this. In addition, if they damage the home-owner's house (e.g. damaging a hardwood or ceramic floor) while performing the work they must pay for the damages and are not reimbursed. I find that this description is indicative of an independent operator whereas workers would not be required to purchase their own tools and would not have their pay reduced if they took longer to perform the work.
- **Continuing Need for Service:** J.M. testified that providing field technicians to perform HVAC services is the only service GES provides and, as a result, I find that there is a continuing need for this service. I find that the integration of the field technicians into the business activities of GES supports that the field technicians are workers and not independent operators.
- **Hiring/Supervising/Paying Assistants:** Three of the four field technicians do not hire, supervise or pay assistants as they are not required to assist with the work duties, although several acknowledged that they could hire helpers if desired. The field technician (C.W) involved in installation of new HVAC equipment testified that he hired a helper in 2006 and 2007 to assist with work duties. C.W. advised that he alone hires, supervises and pays the helper. I find that this description supports that the field technicians are independent operators.
- **Doing Work on Purchaser's Premises:** Each of the field technicians testified that all of the work they perform is away from the GES worksite and is located in residential homes. I find that this description supports that the field technicians are independent operators whereas workers would be required to work on a worksite controlled by GES.

- **Oral and Written Reports:** The field technicians testified that they did not provide GES with oral or written reports with regards to the work they performed. The field technicians advised that they did provide DES with a “checklist” report after each job. I find that this description supports that the field technicians are independent operators whereas workers would be required to prepare and submit regular reports to GES.
- **Right to Sever Relationship:** The field technicians testified that they are responsible for the satisfactory completion of a specific job and that they are legally obligated to pay for damages that result if they elect not to sever the relationship prior to completing the work. I find that this description supports that the field technicians are independent operators whereas workers could sever the employment relationship at any time without financial consequences.
- **Works for More Than One Firm at a Time:** All four field technicians testified that they provide services to their own clients as well as GES on any given day. I find that this description supports that the field technicians are independent operators whereas workers would usually work only for GES.

[14] After considering the aforementioned analysis I find that there is one main indicator that would support a finding that the field technicians are workers. Namely, I have found above that GES has a “continuing need” for the type of services provided by the field technicians. During the hearing J.M. made clear that the only service provided by his firm related to maintenance, service and installation of HVAC equipment and that all of these services were provided by field technicians. As a result, it is clear that there is a continuing need for the services provided by the field technicians for without their services GES would not exist. I consider the degree of integration with the employer’s business and the level of responsibility of the field technicians to be indicia that in many circumstances would support a finding of worker status.

[15] However, I find that the continuing need for the field technicians is outweighed in this case by other aspects of the relationship which support independent operator status. This includes the fact that field technicians:

- Do not receive instructions from GES about how to perform maintenance, service or installation of HVAC equipment;
- Develop their own work schedule by determining when they will perform work for GES;
- May hire helpers without the consent of GES;
- Provides HVAC maintenance, service and installation services to clients other than GES often in the same geographical area in which GES operates;
- Performs the work at their own pace and in the order they deem suitable;
- Are paid by the job according for a fee schedule;
- Hold a license that enables them to perform the work;
- Invoices GES for services performed and on behalf of their own registered or incorporated company. Invoices include GST which is remitted to the Canada Revenue Agency and no statutory deductions are made from the invoices by GES;
- Perform work in the homes of DES customers and not on-site with GES;

- Do not provide oral or written reports to GES after the work is completed;

[16] I have also considered the intention of the parties which was clearly stated in the contract of GES, signed by each field technician and which clearly stated that the field technicians were “contractors”.

[17] It is well established in Tribunal case law that the intention of the parties is an important factor which will be given substantial weight. See, for example, the following excerpt from Tribunal *Decision No. 1020/10*, which reads as follows:

[44] Third, the ARO placed what in my view was insufficient emphasis on the intent of the parties. In the decision under appeal, the ARO stated:

The intention of the parties to have a business relationship rather than to operate within a “contract of service” relationship plays no role in the adjudication of the relationship for purposes of this Act. The governing policy does not take the parties intent into account.

[45] However, in my opinion, that statement fails to recognize that, ultimately, an individual’s status as a worker under the Act turns not on policy but on the legislation. As noted above, the Act defines a worker as a person who has entered into or is employed under a contract of service. The implication of that definition is that the nature of the contract entered into between two parties will be determinative. The intent of the parties to that contract will always be given substantial weight when interpreting the nature of the contract. Tribunal decisions have generally supported this principle, finding that the intention of the parties will be given significant weight subject to the qualification that the stated intention must be consistent with and supported by objective factors. (e.g., *Decision No. 522/91*, *Decision No. 659/91*, *Decision No. 422/93*, *Decision No. 543/93*, *Decision No. 395/94*, and *Decision No.472/94*). Confirmation of that general principle appears to be found in a decision of the Ontario Court of Appeal in *Aqwa v. Centennial Home Renovations* [2003] O.J. No.1077. In that case, two parties entered into an agreement whereby one party agreed to work as a commissioned salesperson for the other. The agreement permitted termination without notice. When termination occurred, the terminated party filed legal action. A trial judge concluded that, notwithstanding this clause, the terminated party was entitled to reasonable notice. On appeal, the Court of Appeal reversed that determination stating:

We accept that it will be appropriate for a court to decline to enforce a contract or a provision in a contract where it would be unconscionable to enforce that term or that contract. We see no basis in the evidence, however, for a finding of unconscionability.

[46] In my view, that excerpt reflects a judgment that the terms of a contract, including terms setting out the intent of the parties, should be given substantial weight and should only be ignored where there are compelling factual reasons for doing so. In my view, such reasons do not exist here. In my opinion, the circumstances surrounding the arrangement between the employer and the auctioneers/ringmen were fully consistent with the stated intention of the parties in their respective contracts to maintain a relationship between independent operators [*emphasis added*].

[18] There are in this case no compelling factual reasons for ignoring the unequivocal intentions of the parties. The witnesses before me made clear that the employer exerts no control over the individual field technicians with whom it contracts. GES cannot compel these individuals to accept a job, nor determine their hours of work, nor prevent them from independently performing the same type of work with other potential customers in the same geographical area.

[19]

As noted previously, the ARO decision of March 5, 2015 denied the employer's appeal and determined that the field technicians were workers and not independent operators. The ARO's decision was largely based on "credibility" issues. These credibility issues included, but were not limited to:

- **2008 Premiums:** The ARO noted that GES did not include earnings for field technicians in 2008 despite the March 2009 letter from the WSIB advising of the finding that the field technicians were considered workers. J.M., who was not sophisticated with regards to WSIB matters, testified that he relied on the advice of his former representative which was not to pay premiums for 2008 as the representative was "negotiating" the matter with the WSIB. As J.M. was justified in relying on the advice of his representative, who indicated that he had worked with the WSIB and was involved in active negotiations which would reduce the amount owed, I do not concur that there are credibility issues that would impact my findings regarding worker versus independent operator status.
- **Field Installers Testimony:** The ARO decision commented that, as a result of concerns about credibility, little weight was placed on the testimony of the field investigators as they continued to work for GES and "I am not convinced that the testimony by the contractors was given freely...". During the hearing I questioned the field technicians about whether they had been coached or coerced by anyone at GES prior to their testimony and each of the field technicians who I questioned denied any undue influence. I place considerable weight on this testimony as it appeared to be given freely and without any evidence of coercion. During their testimony J.M. was not present in the room and, as a result, I find that the field technicians should have been able to voice concerns if any existed.
- **Questionnaires:** The ARO reviewed questionnaires completed in 2013 by field technicians and identified various inconsistencies in the answers amongst the different field technicians. The ARO concluded that the completed questionnaires from 2013 could not be relied upon. However, I note that the Case Record contains four questionnaires completed by field technicians in 2008 and I find that these completed questionnaires are most relevant to the years 2006 and 2007 which the employer's representative identified as the issue under appeal. After reviewing these questionnaires I find that the answers provided by the four field technicians in 2008 (when the forms were completed) were consistent with the answers provided by four different field technicians who provided testimony to me under oath. The only exception to this finding was that each of the field technicians who completed the questionnaires in 2008 advised that they "invoiced clients on behalf of the contractor" whereas the field technicians who testified indicated that they did not invoice customers and instead invoiced GES for services rendered. I find, on a balance of probabilities, that the field technicians did not invoice clients and instead invoiced GES. I am supported in this finding by the testimony of the four field technicians and by sample invoices for services rendered from 2008 contained in the Case Record between various field technicians and GES. In addition, I note that the contract between the field technicians and GES did not describe any process whereby the field technicians would invoice clients on behalf of GES. As a result of the foregoing, I do not have credibility concerns that would affect my decision when considering the responses of field technicians on the 2008 construction questionnaires.

- **Contract:** The ARO also determined that little weight would be provided to the contract between the field technicians and GES for several reasons because of testimony that contradicted the contents of the contract. For example, the ARO indicated that testimony indicated that maintenance staff predominantly offered HVAC services only to GES whereas the contract “permits” the field technicians to perform work with third parties. I find that these two points are not in conflict. I find that, while a contract “permits” maintenance field technicians to perform work for third parties, it is up to each individual field technician whether they will offer services to third parties. The main point is that they can offer services to third parties if they so desire and this is indicative of an independent operator. Of course, I would be remiss if I did not point out that the one maintenance field technician who testified before me stated that 25% to 30% of his revenues were from other clients. I find this supports independent operator status for field technicians involved in maintenance of HVAC equipment.

Secondly, the ARO noted that the contract between GES and DES advised that those offering services to clients must be “employees” of GES. During the hearing J.M. testified that DES was well aware that the field technicians of GES were contractors and not employees as the name and background of each individual field technician was provided to DES who often contacted the individual to perform screening. In addition, I note that the identification badges issued by DES stated contained the name of the individual field technician followed by the words “Authorized Contractor”. As a result, I place significant weight on the contract between GES and the various field technicians which is indicative of an independent operator status.

[20]

The employer’s appeal is allowed. The WSIB premiums from 2006 and 2007 are to be recalculated in light of my decision that the field technicians are not worker’s and instead are independent operators. As a result, the WSIB is instructed to reimburse premiums paid by GES with respect to the aforementioned field technicians for 2006 and 2007. The employer is also entitled to interest with respect to those premiums in accordance with the Board’s policies and practices on interest.

DISPOSITION

[21]

The appeal is allowed.

1. The field technicians of GES were independent operators in 2006 and 2007.
2. The WSIB is instructed to reimburse GES premiums paid with respect to the field technicians for 2006 and 2007.
3. The employer is also entitled to interest with respect to reimbursed premiums in accordance with WSIB policies and practices.

DATED: February 6, 2019

SIGNED: P. Allen