NOVA SCOTIA COURT OF APPEAL

Citation: *Lawen Group of Properties Limited (Dexel Developments) v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2024 NSCA 36

Date: 20240320
Docket: CA 521015
Registry: Halifax

Between:

Lawen Group of Properties Limited
(c.o.b. under the registered business name Dexel Developments),
City Light Electric Limited, and
Wildwood Cabinets Limited

Appellants

v.

Nova Scotia Workers' Compensation Appeals Tribunal,
Workers' Compensation Board of Nova Scotia,
Attorney General for the Province of Nova Scotia,
Shawn Dana Purvis

Respondents

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: January 17, 2024, in Halifax, Nova Scotia

Subject: *Workers' Compensation Act* – Definition of worker –WCB Policy 9.1.3R – Worker within the meaning of s. 2(ae) of the *Act* – Statutory bar – s. 28 of the *Workers' Compensation Act*

Summary: On September 27, 2021, the respondent Shawn Dana Purvis commenced an action against the appellants for injuries he allegedly suffered in a work-related accident on January 26, 2021 while installing cabinets at an apartment building being constructed by the Lawen Group of Properties Limited. City Light Electric and Wildwood Cabinets Limited were subcontractors on the project.
The Lawen Group applied to the Workers' Compensation Appeals Tribunal (WCAT) for determination of whether Mr. Purvis' cause of action was barred pursuant to s. 28 of the

	Workers' Compensation Act because he was a worker as defined by the *Act*. WCAT denied Lawen Group's application. It found Mr. Purvis was not a worker as defined by the *Act* and therefore his action could proceed against the appellants. It is from that decision the appellants appeal.
Issues:	Did WCAT err on a question of law in the interpretation and application of ss. 2(ae), 9 and 142 of the *Workers' Compensation Act* and WCB Policy 9.1.3R in finding that the respondent, Shawn Dana Purvis, is not a "worker" or "deemed worker"?
Result:	WCAT erred in its interpretation of the *Act*. It construed the definition of worker too narrowly, thereby defeating the purpose and intent of the *Act*. The appeal was allowed, and Mr. Purvis' action was found to be statute barred pursuant to s. 28 of the *Act*.

NOVA SCOTIA COURT OF APPEAL

Citation: *Lawen Group of Properties Limited (Dexel Developments) v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2024 NSCA 36

Date: 20240320
Docket: CA 521015
Registry: Halifax

Between:

Lawen Group of Properties Limited
(c.o.b. under the registered business name Dexel Developments),
City Light Electric Limited, and
Wildwood Cabinets Limited

Appellants

v.

Nova Scotia Workers' Compensation Appeals Tribunal,
Workers' Compensation Board of Nova Scotia,
Attorney General for the Province of Nova Scotia,
Shawn Dana Purvis

Respondents

Judges:	Farrar, Scanlan and Bourgeois JJ.A.
Appeal Heard:	January 17, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed without costs to any party, per reasons for judgment of Farrar J.A.; Scanlan and Bourgeois JJ.A. concurring
Counsel:	Amy Bradbury and André Goguen, for the appellants Brian Casey, K.C. and Elizabeth Dreise, for the respondent Shawn Dana Purvis Paula Arab, K.C. and Liesl Newman, for the respondent Workers' Compensation Board (watching brief only) Alison Hickey, for the respondent Workers' Compensation Appeal Tribunal (watching brief only) Edward Gores, K.C., for the respondent Attorney General of Nova Scotia (not participating)

Reasons for judgment:

Overview

[1] On September 27, 2021, the respondent, Shawn Dana Purvis, commenced an action against the appellants for injuries he allegedly suffered on January 26, 2021 while installing cabinets at an apartment building being constructed by the appellant, Lawen Group of Properties Limited. City Light Electric and Wildwood Cabinets Limited, were subcontractors on the project.

[2] The Lawen Group applied to the Workers' Compensation Appeal Tribunal (WCAT) for determination of whether Mr. Purvis' cause of action was barred pursuant to s. 28 of the *Workers' Compensation Act*[1] because he was a worker as defined in the *Act*.

[3] The matter proceeded to a hearing before WCAT on an Agreed Statement of Facts and evidence from a witness for Wildwood Cabinets and Mr. Purvis.

[4] In the decision dated December 30, 2022, WCAT denied Lawen Group's application. It found Mr. Purvis was not a worker as defined by the *Act* and therefore, his action could proceed against the appellants.[2]

[5] For the reasons that follow, I would allow the appeal, set aside the decision of WCAT and find Mr. Purvis was a worker within the meaning of the *Act*. Therefore, his action against the appellants is barred by s. 28 of the *Act*.

Background

[6] What follows is a summary of the Agreed Statement of Facts and the evidence given at the hearing before WCAT.

[7] The Lawen Group carries on business under the name Dexel Developments. Dexel Developments was a general contractor for a construction project at 6016 Pepperell Street, Halifax. The project was a multi-unit residential building known as "The George".

[8] Dexel subcontracted the electrical services for the project to City Light Electric, and the cabinetry and other millwork for the units to Wildwood.

---

[1] S.N.S. 1994-95, c. 10.
[2] 2022-131-TPA (Re), 2022 CanLII 131293 (NS WCAT).

[9] Wildwood, in turn, subcontracted with Mr. Purvis, who carried on business as a sole proprietorship,[3] to do installation of the cabinetry and other millwork. He performed work for Wildwood for the period January 2020 to April 2021.

[10] In his Statement of Claim, Mr. Purvis alleged the appellants were negligent, which negligence caused him to be electrocuted on January 26, 2021 in the course of installing cabinetry at The George.

[11] On March 16, 2021, Wildwood provided the following information to the WCB with respect to the incident:

> Worker's Info
>
> Name : Shawn Purvis
> […]
> Occupation : Subcontractor Installation
>
> Injury Information
> Date of accident : January 26, 2021 @ 12:45pm
> Injured body part : Left hand, arm and shoulder
>
> What happened : Shawn is installing cabinets at a multi unit project in Halifax. He was called to a unit to install the island in the kitchen. Once he was done installing the island, he reached for the dishwasher and outlet wiring to feed under the toe kick. When he picked up the wires from the floor and went to feed them thru the hole in the toeckick [*sic*], he received a jolt of electricity. His whole arm up to the shoulder went numb.
>
> He tried contacting Mark, the supervisor for the building but could not reach him. Shawn stayed in the unit for another 3 hours and then left.
>
> He sought medical attention and was refered [*sic*] to a specialist. He is still waiting for that appointment.
>
> Injury happened January 26, 2021, Shawn missed January 27th and returned to work January 28, 2021 to his regular duties.
>
> Shawn is a subcontractor and is paid by the job.
>
> Gross earnings from February 16, 2020 to January 15, 2021 : $62 334.08

[3] Mr. Purvis operated the sole proprietorship under the name Ashmans Cabinets.

> Reason why incident was not reported sooner: I was not aware of the seriousness of incident.

[12] On March 19, 2021, the WCB wrote to Mr. Purvis seeking information from him with respect to the incident. The WCB did not receive a response.

[13] A follow-up letter was sent to Mr. Purvis on March 30, 2021, again seeking information.

[14] On March 31, 2021, Mr. Purvis had a telephone conversation with an employee of the WCB. A summary of that telephone call is found in the WCB file:

> Worker had called regarding letter he received. He said he is not [actually] an employee of Wildwood Cabinets, he is a subcontractor. He does not have WCB coverage. I will default the policy.

[15] On March 31, 2021, the WCB wrote to Mr. Purvis as follows:

> We received information indicating you may have been injured at work, but have since learned that your circumstances are not covered under the terms of workers' compensation coverage in Nova Scotia.
>
> At this time, we are letting you know we are unable to continue the claim, based on the information available to us. Because of this, WCB Nova Scotia is unable to reimburse you for any health care or prescribed medications that may have been related to this injury.

[16] On January 26, 2021, Dexel Developments, Wildwood and City Electric were all covered and assessed employers under the *Act*.

[17] Mr. Purvis had not purchased special protection coverage under s. 4(2) of the *Act* which provides:

> (2) The Board may, on the application of an independent contractor, admit the independent contractor to the operation of this Part as if the independent contractor were a worker where the independent contractor performs work, the nature of which falls within the scope of this Part.

[18] As noted earlier, WCAT found Mr. Purvis was not a worker within the meaning of the *Act*. It based its decision primarily on the fact that Mr. Purvis was a sole proprietor who did not purchase voluntary coverage under the *Act*.

[19] The Lawen Group sought leave to appeal WCAT's decision. Leave to appeal was consented to by all parties.

[20] Although leave to appeal was granted on three issues, the appeal can be determined on the following issue for which leave was granted:

> Did WCAT err on a question of law in the interpretation and application of ss. 2(ae), 9 and 142 of the *Workers' Compensation Act* and WCB Policy 9.1.3R in finding that the Respondent, Shawn Dana Purvis, is not a "worker" or "deemed worker"?

Standard of Review

[21] This appeal engages the interpretation of the provisions of the *Workers' Compensation Act*. This is a question of law and the standard of correctness applies.[4]

Analysis

Did WCAT err on a question of law in the interpretation and application of ss. 2(ae), 9 and 142 of the *Workers' Compensation Act* and WCB Policy 9.1.3R in finding that the Respondent, Shawn Dana Purvis, is not a "worker" or "deemed worker"?

[22] "Worker" [5] is defined in s. 2(ae) of the *Act* as follows:

> 2 (ae) "worker" means a worker within the scope of Part I, and includes
>
> (i) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied,
>
> (ii) an officer, director or manager of an employer, where the person is actively engaged in the business and is carried on the payroll of the business at the person's actual earnings,
>
> […]
>
> (ix) any other person who, pursuant to Part I, the regulations or an order of the Board, is deemed to be a worker, and
>
> […]

[4] *Tufts v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2023 NSCA 50 at ¶14, 19.
[5] The appellants argue that Mr. Purvis would be covered under the *Act* as both a worker and a deemed worker. Whether he is a worker or a deemed worker, the result is the same.

> but, subject to Section 4, does not include
>
> […]
>
> (xii) an employer, or […]

[23] "Employer" is defined in s. 2(n) of the *Act* as follows:

> (n) "employer" means an employer within the scope of Part I and includes
>
> (i) every person having in the person's service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry within the scope of Part I,
>
> (ii) the principal, contractor and subcontractor referred to in Sections 140 and 141

[24] The *Workers' Compensation General Regulations*[6] excludes any business or undertaking from the *Act* where there are less than three workers. Section 15 of the *Regulation* says:

> **Scope of coverage—exclusion of class of employers**
>
> 15 Subject to Sections 16 to 18, every business or undertaking is excluded from the application of the Act until at least three workers are at the same time employed in the business or undertaking.

[25] Section 4 of the *Act* allows for an independent contractor to apply to the WCB for coverage under the *Act*. Pursuant to s. 4 of the *Act*, the WCB provides voluntary coverage to allow for independent contractors to obtain coverage under the *Act*. Once coverage is arranged, the independent contractor is treated as a worker and an employer (s. 4(3)). "Independent contractor" is defined in s. 4 as:

> […] a person who is not an employer or a worker but who performs work that, if the person were a worker other than by operation of subsection (3), would be within the scope of this Part.

[26] As noted earlier, Mr. Purvis chose not to obtain voluntary coverage.

[27] Section 9 of the *Act* allows the WCB to deem a person to be a worker under Part I of the *Act*:

> **Deemed worker**

[6] N.S. Regulation 22/96.

> 9 Notwithstanding the other provisions of this Part, where a person who is not a worker within the scope of this Part performs work for the benefit of another person, the Board may
>
> (a) deem the first person to be a worker and the second person to be the employer of the first person, within the meaning of this Part; and
>
> (b) determine an amount that shall be deemed to be the earnings of the worker, for the purpose of this Part.

[28] Section 142(1) of the *Act* also allows the WCB to deem workers of a contractor or subcontractor to be workers of the principal or contractor:

> **Board may deem workers**
>
> 142 (1) Where a contractor or subcontractor has not been assessed for any work carried on by the contractor or subcontractor, the Board may deem
>
> (a) any worker of the contractor or subcontractor to be a worker of the principal; or
>
> (b) any worker of the subcontractor to be a worker of the contractor.

[29] The WCB implemented Policy 9.1.3R – coverage for contractors and subcontractors which employ less than three workers pursuant to s. 9. It sets out the criteria for determining whether someone is a deemed worker under the *Act*.

[30] Policy 9.1.3R provides:

> 1. The *Workers' Compensation Act* requires employers which employ three or more workers, and which operate in industries designated by Regulation as subject to mandatory registration, to register for coverage. Employers within the scope of mandatory coverage under the *Act* are referred to as covered employers.
>
> 2. A covered employer which hires contractors is considered a principal. A covered employer who is a contractor may hire subcontractors. Contractor and subcontractor have the same meaning as in *Policy 9.5.4R1-Late Reporting of Year-End.*
>
> **Deemed Workers**
>
> 3. Where a contractor with less than 3 workers is hired by a principal, the workers of the contractor are deemed to be the workers of the principal if the following criteria are met:

a) Both the principal and the contractor operate in an industry designated under the *Workers' Compensation General Regulations* as subject to mandatory coverage;

b) The contractor has not purchased voluntary compensation coverage;

c) The principal has three or more workers.

4. Workers of subcontractors with less than three workers hired by a covered contractor are deemed to be the workers of the contractor where both operate in an industry designated under the *Workers' Compensation General Regulations* as subject to mandatory coverage, and the remaining criteria in Section 3 of this policy are met.[7]

[31] WCAT concluded that paragraphs 3 (a), (b) and (c) of Policy 9.1.3R were met but found that because Mr. Purvis was a sole proprietor and did not have employees, he was not covered by the Policy. WCAT reasoned he was not a worker of a subcontractor but was the subcontractor, per se and therefore could not be deemed to be a worker:

> The resolution of this issue turns on whether Purvis is a worker of a subcontractor per section 4 of Policy 9.1.3R. I find that he is not a worker of a subcontractor. Rather, he was the subcontractor per se, which is particularly true given that he operated as a sole proprietor, not a company. If Purvis had hired an employee or two employees, those employees would have been "deemed workers" of Wildwood per Policy 9.1.3R. However, the same does not apply to Purvis himself, who was the subcontractor and not a worker of a subcontractor.

[32] WCAT was also influenced by the fact the WCB had taken a different position regarding Mr. Purvis' claim than it had in another reported WCAT decision:

> I note that in the present case the Board has not acted in accordance with the position it took in *Decision 2019-491-AD*. In the present situation, Purvis did not purchase special protection voluntary coverage. ***Therefore, given the position the Board took in Decision 2019-491-AD, Purvis should have been considered a "deemed worker" and provided with benefits***. However, in actuality, the Board found that as a subcontractor Purvis was not a "worker" per the *Act* and was therefore ineligible for benefits. The Board has not treated Purvis as a "deemed worker" per Policy 9.1.3R, notwithstanding the position it took in *Decision 2019-491-AD*.
>
> [Emphasis added.]

[7] Policy 9.1.3R, WCB Policy Manual, Appendix "B", Appellants' Factum.

[33] WCAT's decision failed to undertake a contextual analysis of the provisions of the *Act* and WCB policies. In the oft-cited case of *Rizzo & Rizzo Shoes Ltd. (Re)*,[8] the Supreme Court of Canada set out the fundamental principle of statutory interpretation:

> [21] […] Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[34] In the workers' compensation context, *MacDougall v. Nova Scotia (Workers' Compensation Appeals Tribunal)*[9] found the main objective of the *Act* was to remove work-related claims from the law of tort:

> [35] At the outset, let me say that I agree with the appellant that the main objective of Nova Scotia's Act is to remove work-related claims from the law of tort. For example, in **Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, *supra*, we said this:
>
> > ¶ 30 I have already addressed the *Act*'s objects when considering the appropriate standard of review at paragraph 12, above. As Cromwell, J.A. observed in **Logan**, *supra*, the *Act* is designed to provide a mechanism to remove workers' compensation issues from our court system and its conventional fault-based tort system. This is accomplished through a comprehensive investigative process coupled with a specialized adjudicative regime and no-fault compensation funded through the accident fund.

[35] Section 28 of the *Act* provides protection to employers and their workers against civil actions by removing work-related injuries from tort law. It provides:

> **Compensation as exclusive right**
>
> 28 (1) ***The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against***
>
> (a) ***the worker's employer or that employer's servants or agents***; and

[8] [1998] 1 S.C.R. 27.
[9] 2010 NSCA 92.

> (b) any other employer subject to this Part, or any of that employer's servants or agents, as a result of any personal injury by accident
>
> (c) in respect of which compensation is payable pursuant to this Part; or
>
> (d) ***arising out of and in the course of the worker's employment in an industry to which this Part applies***.
>
> [Emphasis added.]

[36] Section 28 recognizes what has been described as the "historic trade-off" that exists in workers' compensation legislation, *i.e.*, the benefits based on a no-fault system of insurance are in lieu of any right of action injured workers have against employers covered by the *Act*. This historic trade-off was recognized by the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*:[10]

> 25 Sir William Meredith also proposed what has since become known as the "historic trade-off" by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability. Initially in Ontario, only the employer of the worker who was injured was granted immunity from suit. The Act was amended one year after its passage to provide that injured Schedule 1 workers could not sue <u>any</u> Schedule 1 employer. This amendment was likely designed to account for the multi-employer workplace, where employees of several employers work together.
>
> [Underlining in original.]

[37] In *Pasiechnyk*, the Supreme Court of Canada also recognized the system only works if both sides of the historic trade-off are present, *i.e.*, workers give up their right to bring action but gain access to compensation. Employers contribute to a no-fault compensation scheme but gain protection from civil action:

> 26 The importance of the historic trade-off has been recognized by the courts. In *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act*, 1983 (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principal disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be some

[10] [1997] 2 S.C.R. 890.

who would recover more from a tort action than they would under the Act. Goodridge C.J. concluded at p. 524:

> While there may be those who would receive less under the Act than otherwise, when the structure is viewed in total, this is but a negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible.

I would add that this so-called negative feature is a necessary feature. The bar to actions against employers is central to the workers' compensation scheme as Meredith conceived of it: it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured worker's obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme.

27 Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:

> (a) compensation paid to injured workers without regard to fault;
>
> (b) injured workers should enjoy security of payment;
>
> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
>
> (d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide then with any insurance.

[Bold italicized emphasis added; underlined emphasis in original.]

[38] WCAT's interpretation of the *Act* and Policy 9.1.3R fails to recognize the importance of both sides of the historic trade-off. It has resulted in the three appellants, who are covered employers under the *Act*, being open to liability in a civil action when their participation in the scheme should provide protection from

such an action. WCAT's decision undermines the integrity of the workers' compensation system.

[39] Policy 9.5.4R1 defines contractor as follows:[11]

> **"contractor"** means a person hired by a principal to perform work or services that
>
> i) include a labour component;
>
> ii) are carried out at the principal's premises or worksite, or at a location determined by the principal; and
>
> iii) are for the purposes of the principal's trade or business, including those that are integral or incidental to the operation of the principal's business;
>
> […]
>
> **"subcontractor"** has the same meaning as contractor where the person or firm is hired by a covered employer who is a contractor.

[40] The purpose of this Policy is to ensure there is coverage for contractors and subcontractors with less than three workers. Policy 9.1.3R (see ¶30 above) uses the language "workers of subcontractors" when providing coverage. However, in the situation where the subcontractor is only one person, as is the case with Mr. Purvis, the subcontractor is the worker as well as the subcontractor.

[41] Any other interpretation does not provide protection to the principals covered by the *Act* who employ contractors and subcontractors.

[42] Wildwood and Mr. Purvis were both working in an industry subject to mandatory coverage under the Regulations to the *Act*. That was a finding of WCAT which has not been appealed. Wildwood was a covered employer under the *Act* who maintained workers' compensation coverage and Mr. Purvis had not purchased voluntary compensation coverage. The three criteria of Policy 9.1.3R have been satisfied.

[43] However, WCAT found this policy did not apply because Mr. Purvis was not "a worker of a subcontractor" but was the subcontractor himself. This interpretation fails to give effect to the purpose and intent of the *Act*. In this case, Mr. Purvis is the individual who was performing the work under the contract. He chose to operate as a sole proprietor making him both the subcontractor and the worker. It was Mr. Purvis who personally performed the work.

---

[11] Policy 9.1.3R provides contractor and subcontractor the same meaning as in Policy 9.5.4R1.

[44] Principals covered by the *Act* are required to annually report to the WCB a list of contractors (or subcontractors) they have hired for the purposes of determining their assessable earnings for the year. These assessable earnings are used to determine the WCB premiums owed by the principal.

[45] Policy 9.1.3R sets out how a principal should calculate a contractor's assessable earnings for the purposes of WCB premiums:

> 5. To determine the contractor's (or subcontractor's) assessable earnings the principal (or contractor) must calculate the labour portion of the work or services performed. The labour component is determined by subtracting the value of materials and equipment from the gross amount of work or services performed. The amount remaining is the labour portion of the work or services.

[46] In this case, Mr. Purvis was hired to provide labour only. All materials were provided to him to do the work and Wildwood would be assessed based on the labour paid to Purvis. The result of the WCAT decision under appeal is that Wildwood would be assessed for premiums based on the work performed by Mr. Purvis, but Wildwood would not be afforded the protection of WCB coverage for Mr. Purvis or the immunity against civil action.

[47] Other provisions of the *Act* and WCB policies are consistent with individuals in the position of Mr. Purvis being a worker.

[48] Sections 143(1) and (2) of the *Act* allow a principal to become liable for an assessment levied against any contractor carrying out work for the principal:

> **Holdbacks and set-offs**
>
> 143 (1) Where a principal is or may become liable for an assessment levied against any contractor carrying out work for the principal, the principal may withhold from any amount owed to the contractor an amount estimated by the Board to be equal to the amount of the assessment.
>
> (2) Where a contractor is or may become liable for an assessment levied against any subcontractor carrying out work for the contractor, the contractor may withhold from any amount owed to the subcontractor an amount estimated by the Board to be equal to the amount of the assessment.

[49] Policy 9.8.4R - Holdback of Assessment Premium from Contractors and Subcontractors limits when a principal is able to holdback premium payments:

> 4. A hold-back is allowed under section 143 if
>
> a) The contractor or subcontractor is within the mandatory scope of the *Workers' Compensation Act* (has three or more workers and is in a mandatory industry); or
>
> b) The contractor is admitted under the Act through voluntary coverage pursuant to section 4.

[50] The Policy goes on to note specifically that principals cannot hold back premium payments from contractors who are "deemed workers" under Policy 9.1.3R:

> Principals are not authorized to hold back from contractors who are 'deemed to be workers' of the principal as per *Policy 9.1.3R.*

[51] The reason for this is apparent. The contractor can hold back from subcontractors amounts which they may become liable to pay to the WCB. However, they cannot withhold from a "deemed worker" any assessment for which they may become liable to the WCB. This is because the deemed worker is essentially deemed to be employed by the principal, and an employer cannot recover from their own employees assessments it is required to pay to the WCB.

[52] Policy 9.8.4R further recognizes contractors can be provided coverage under the *Act* in one of three ways:

1. As a covered employer with three or more workers in a mandatory industry;
2. By purchasing voluntary compensation coverage;
3. As a "deemed worker" under Policy 9.1.3R.

[53] Policy 9.1.3R is intended to provide protection to principals hiring contractors and contractors hiring subcontractors. It ensures when principals hire contractors with less than three workers the principal's WCB coverage will cover those contractors if they are injured at work, unless the contractor has purchased voluntary compensation coverage. This guarantees that all workers would have compensation, either through the coverage of the principal, through voluntary compensation coverage, or through the requirement to have their own WCB coverage when there are more than three employees.

[54] WCAT's interpretation of Policy 9.1.3R results in the coverage not being inclusive as it should be and leaves the principals vulnerable to civil action even though they are meeting all of the requirements of the *Act*. WCAT recognized in an earlier decision[12] that the *Act* and its policies should be interpreted in favour of workers, i.e., ensuring coverage for workers:

> In connection with the interpretation of section 3 (c) of Policy 9.3.1R1 [*sic*], the general principle holds that workers' compensation legislation should be interpreted in favour of workers. Thus, if legislation - including Board Policy - presents a reasonable ambiguity, that ambiguity should be resolved in favour of a worker. See, for example, *Cape Breton Development Corporation v. Estate of James Morrison*, 2003 NSCA 103 (CanLII), at paragraph 36, and *Decision* 2015-38-AD (August 27, 2015, NSWCAT), 2015 CanLII 54436. Thus, if section 3 (c) of Policy 9.3.1R1 presents a reasonable ambiguity, it should be construed in the Worker's favour. This interpretative principle provides additional support for the conclusion that the Employer/Firm has three or more workers per Policy 9.3.1R1, section 3 (c).

[55] The interpretation of Policy 9.1.3R by WCAT in the present case would make it difficult for a general contractor to protect itself from civil action. As was the case here, where there are multiple subcontractors and levels of subcontractors; it would be an onerous task for the general contractor or other contractors to ensure everyone working on the project would have adequate WCB coverage.

[56] Employers should not be subject to civil action when they have taken all appropriate steps to ensure coverage under the *Act* as covered employers and rely on the protection from civil action in s. 28 and as part of the historic trade-off.

[57] This Court recognized the concern that covered employers would not have the protection of s. 28 in *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2001 NSCA 75. In *Queen Elizabeth II*, this Court overturned WCAT's finding that a worker was able to sue the hospital for alleged malpractice in his treatment following a workplace accident. In concluding s. 28 should apply, the Court stated:

> [46] The QE II pays nearly $4 million in assessments under the **Workers' Compensation Act**. WCAT offers no explanation for how it is that an employer is generally subject to the **Act** for assessment purposes but not for the purposes of s. 28 of the **Act**. As noted, the same definition of the employers who are subject to the **Act** applies for both purposes.

[12] 2015-408-AD (Re), 2016 CanLII 89843 (NS WCAT).

[58] WCAT's decision also fails to recognize the benefits to workers in the historic trade-off. Under the workers' compensation scheme, workers are entitled to benefits regardless of who is at fault for the accident. In Mr. Purvis' situation, if he was at fault for his own injury he would still be entitled to benefits. WCAT's interpretation of the *Act* and its policies would deny any independent contractor working in situations such as Mr. Purvis benefits for injuries suffered in the workplace if those injuries were as a result of that worker's own negligence.

[59] In light of this interpretation, one may question why someone in the position of Mr. Purvis as a sole proprietor would ever purchase voluntary coverage under the *Act* if he is covered by the principal for whom he is working. The answer is simply a sole proprietor may not be working for a covered employer under the *Act* and would not have coverage through his employer. The most common example would be if Mr. Purvis was installing cabinets in a residential property for a homeowner.

[60] Ms. Arab, K.C., counsel for the WCB at the hearing of this appeal candidly acknowledged the WCB was simply wrong not to deem Mr. Purvis to be a worker within the meaning of the *Act* when Wildwood reported the incident back in March 2021.

[61] Finally, in his factum and before us, Mr. Purvis' counsel was not able to refer to any Canadian case where an independent contractor, in circumstances similar to Mr. Purvis', was not subject to the statutory bar. The reason seems self-evident; to interpret "worker" in the manner WCAT did in this circumstance would send the workers' compensation system into chaos—it would defeat the very purpose of the historic trade-off and the no-fault nature of workers' compensation benefits.

[62] The principles of statutory interpretation and the overall scheme of the *Act*, lead to no other conclusion than Mr. Purvis was a "deemed worker" and, therefore, a worker in accordance with the provisions of the *Act* and Policy 9.1.3R.

Conclusion

[63] As a result, I would allow the appeal and find Mr. Purvis is a worker for the purposes of the *Act*. As a result, the action which is taken against the appellants is barred pursuant to the provisions of s. 28 of the *Act*. As is usual in WCAT appeals, there will be no award of costs to any party.

Farrar J.A.

Concurred in:

Scanlan J.A.

Bourgeois J.A.