

June 9, 2016

Simard Westlink Inc.
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Via email: dbertrand@simard.ca
Original via mail

Attention: Denis Bertrand

Commissioner's Decision

Simard Westlink Inc. (CTC Decision No. 07/2016)

Introduction

1. Simard Westlink Inc. ("Simard") is a licensee within the meaning of the *Container Trucking Act* (the "Act"). Under Sections 22 and 23 of the *Act*, minimum rates that licensees must pay to truckers who provide container trucking services are established by *Regulation*, and a licensee must comply with those statutorily established rates. In particular, Section 23(2) states:

A licensee who employs or retains a trucker to provide container trucking services must pay the trucker a rate and a fuel surcharge that is not less than the rate and fuel surcharge established under section 22 for those container trucking services.

2. Under Section 31 of the *Act*, the Commissioner may initiate an audit or investigation to ensure compliance with the "Act, the *Regulations* and a licence..." whether or not a complaint has been received by the Commissioner. Under Section 26 of the *Act*, any person may make a complaint to the Commissioner that a licensee has contravened a provision of the *Act*. Under Section 29, the Commissioner reviews such complaints and, under Section 31, may conduct an audit or investigation to ensure compliance with the *Act*, the *Container Trucking Regulation* (the "*Regulation*") or a licence.
3. Complaints were filed with the Office of the Commissioner, alleging that the hourly rates being paid by Simard to its directly employed operators ("company drivers") did not meet the minimum hourly rates required by the *Regulation*.
4. The then Commissioner directed an auditor to conduct an audit to determine whether operators directly employed by Simard were being paid in accordance with the requirements set out in the *Regulation*. The auditor requested records and documentation from Simard with respect to the payment of its company drivers for the period April 3, 2014 to July 31, 2015 (the "Audit Period").
5. In 2016 two additional complaints were filed, one by a current employee and one by a former employee. Both complainants allege that they were being paid hourly rates falling below that required by the *Regulation*. These complaints were assigned to the same auditor for review and will be addressed separately in this decision.

Facts

6. Simard is a national company based out of Montreal. Its employees perform both container trucking services and other trucking services falling outside of the scope of the *Act*.
7. Simard operates a paperless payroll system. Employees use a bio-metric fingerprint scanner to scan in and out of work and are “on the clock” from when they sign in until they sign out. At the time of the audit the system was not programmed to supply a printed report for each employee.
8. Prior to November 1st, 2015 Simard’s payroll system was unable to recognize container trucking services and drivers were paid the same hourly rate for all work performed. Simard does not contest that the hourly rate being paid at the time for TLS container trucking services fell below minimum rates required under the *Regulation*.
9. On November 1st, 2015 Simard’s payroll system was updated and programmed to identify and separate out container trucking services. The updated payroll system then:
 - a. apportions benefits between container trucking services and non-regulated work; and
 - b. calculates a “container trucking adjustment” which is paid for all hours worked performing container trucking services. When this container trucking adjustment is added to an employee’s hourly rate of pay (hereafter referred to as the “base hourly rate”), the hourly rate (inclusive of benefits) paid for container trucking services equals the minimum rates required by the *Regulation*.

The container trucking adjustment, which is paid out the week following payment of the base hourly rate, is only paid for container trucking services. This method of payment, when taken together with less than clear payroll stubs and the mixture of container trucking services and non-regulated trucking work, has resulted in some level of confusion around the rates being paid.

10. When the payroll system was revised to recognize container trucking services, Simard agreed to use the updated program to recalculate the compensation properly owed to its employee drivers for container trucking services performed during the Audit Period. The results, which calculated that adjustment payments of \$72,007.16 were owing for container trucking services performed during this period, were presented to the auditor for his review and consideration. The auditor examined the results and determined that, upon payment, Simard would be substantially compliant for the Audit Period (April 1, 2014 to May 31, 2015.)
11. Simard paid the identified adjustment amounts owing for the audit period and has provided the auditor with proof of payment. The payment was made before January 22, 2016, the deadline set by the former Acting Commissioner for payment of retroactive wages owing.
12. Simard then used the revised payroll program to review compensation paid to its drivers for container trucking services performed between June 1, 2015 to October 31, 2015 (the 5 month period which immediately preceded the payroll system updates). A further \$7,982.15 in adjustments was found to be owing to Simard’s drivers. The auditor reviewed the results and determined that once paid the identified adjustments brought the hourly rates paid for container trucking services up to the minimums required under the *Regulation*. These adjustments have been paid to the drivers.

13. The auditor also reports that with the improvements to Simard's payroll system and resulting payment of a container trucking adjustment for TLS container trucking services, Simard drivers are now receiving the minimum hourly rate required by the *Regulation*.
14. I accept the auditor's findings.

Decision

15. As described above, the circumstances of this case are that Simard:
- a) was subject to an audit covering the period from April 1, 2014 to May 31, 2015, during which it cooperated fully with the auditor;
 - b) modified and updated its payroll system on November 1, 2015 to delineate between container trucking services and non-regulated work;
 - c) has introduced a container trucking adjustment for container trucking services which, when added to a driver's regular hourly rate results in the payment of an hourly rate (inclusive of benefits), which complies with the minimum rate required by the Section 13(1) of the *Regulation*;
 - d) used the updated payroll system to calculate adjustments owing to company drivers for container trucking services performed during the Audit Period (April 1, 2014 – May 31, 2015). The calculated adjustments, which totaled \$72,007.16, were paid to Simard drivers prior to the January 22nd, 2016 deadline for payment of retroactive pay imposed by the former Acting Commissioner;
 - e) used the updated payroll system to calculate adjustments owing to company drivers for container trucking services performed during the 5 month period immediately preceding the payroll system update (June 1, 2015 – October 31, 2015). The calculated adjustments, which totaled \$7,982.15, have been paid to Simard's drivers;
 - f) is now substantially compliant with its obligations under the *Act* and *Regulation*.
16. As Simard has paid the amounts owing under the legislation and corrected its non-compliant payment practices, I find there is no need to issue an order pursuant to Section 9 of the *Act* requiring the company to comply with the legislation.
17. Section 34 of the *Act* provides that, if the Commissioner is satisfied that a licensee has failed to comply with the *Act*, the Commissioner may impose a penalty or penalties on the licensee. Available penalties include suspending or cancelling the licensee's licence or imposing an administrative fine. Under Section 28 of the *Regulation*, an administrative fine for a contravention relating to the payment of remuneration, wait time remuneration or fuel surcharge can be an amount up to \$500,000.
18. The seriousness of the available penalties indicates the gravity of non-compliance with the *Act*. The *Act* is beneficial legislation intended to ensure that licensees pay their employees and independent operators in compliance with the rates established by the legislation (*Act* and *Regulation*). Licensees must comply with the legislation, as well as the terms and conditions of their licences, and the Commissioner is tasked under the *Act* with investigating and enforcing compliance.

19. The *Act* does not, however, require penalties to be imposed for non-compliance in all cases. Rather, the Commissioner is granted a discretion to impose penalties in appropriate cases. There are many circumstances in which discretion to impose a penalty or penalties is likely to be exercised. These include, but are not limited to, where a licensee:
- does not cooperate fully with an audit or investigation;
 - does not comply with orders or directions given by the Commissioner (or a delegate of the Commissioner, including an auditor);
 - engages in meritless dispute of, or delays in paying, amounts found to be owing;
 - engages in any form of fraudulent, deceptive, dishonest or bad faith behavior with respect to compliance with the requirements of the *Act*, the *Regulation* or a licence.
20. In the present case, Simard cooperated fully with the auditor's investigation of the complaint. Simard took steps to ensure that by November 1, 2015 its payroll system identified container trucking services and calculated an adjustment to be paid for those services on an ongoing basis, such that it is now compliant. Simard calculated and paid substantial adjustments for retroactive pay owed for the Audit Period, and paid that amount before January 22, 2016. In addition, Simard voluntarily calculated and paid amounts owing for the five-month period from June 1, 2015 to October 31, 2015 and thereby retroactively brought itself into compliance with the rate requirements of the *Act* and *Regulation* for the period prior to Nov. 1, 2015.
21. Considering all of the circumstances of this case, I conclude this is not an appropriate case to issue a penalty.

2016 Complaints

22. In 2016 the Office of the British Columbia Container Trucking Commissioner ("OBCCTC") received two additional complaints, the first dated April 19, 2016 from a former employee ("Complaint #1) and the second dated April 26th, 2016 ("Complaint #2)

Complaint #1

23. Complaint #1 alleges that between in 2014 and 2015, the complainant was not paid the hourly rate required under the *Regulation*.
24. The auditor has fully investigated the complaint and determined that, with the payment of the calculated adjustment amounts for the Audit Period and for the period from June 1, 2015 to October 31, 2015, Complainant #1 received an hourly rate for container trucking services during these period which complies with the minimums required by Section 13 of the *Regulation*.

25. I accept the finding of the auditor.

Complaint #2

26. Complaint #2 also complains that this complainant not been properly paid for container trucking services he provided to Simard.
27. The auditor has fully investigated the complaint and determined that:

- a. Complainant #2 received adjustment payments for the Audit period and for the period between June 1, 2015 and Oct. 31, 2015 which brought his hourly rate for these periods up to the minimum rate required by the *Regulation* for container trucking services.
- b. Since November 1, 2015, Complainant #2 has received the container trucking adjustment for container trucking services which, together with his regular hourly rate (inclusive of benefits), results in an hourly rate of pay which meets the minimum hourly rate required by the *Regulation*.

28. I accept the findings of the auditor.

29. The 2016 complaints, although not made out, suggest that the payroll practices at Simard may be causing some confusion. In particular:

- a. the payroll process, and specifically how the container trucking adjustment is determined and paid, is not well understood;
- b. it is not well understood that the rates required by the *Regulation* only apply to TLS container trucking services. Rates for non-TLS container trucking are not regulated under the *Act* or *Regulation*.
- c. some drivers may not understand that the minimum hourly rates for directly employed operators established by Section 13 of the *Regulation* are "inclusive of benefits". The *Regulation* defines "benefits":

"benefit" includes

- (a) medical, disability, extended health, life, accidental death and dismemberment, dental or orthodontic insurance, and
- (b) contributions to a pension plan or retirement fund, but does not include
- (c) wages or other remuneration calculated on the basis of work done or productivity, or
- (d) the licensee's or employer's costs of doing business;

30. The auditor reports that Simard has conducted employee seminars to explain how the container trucking adjustment works, and is working with a committee of drivers to address and bring clarity to Simard's benefit program. I encourage Simard to continue with these programs. In addition, I direct Simard to revise its payroll stubs ("Income and Deduction Registers") to better and more clearly report driver income (including the Container Trucking Adjustment) and deductions.

Conclusion

31. In summary, as a result an OBCCTC investigation process initiated after receipt of complaints filed with the Commissioner, it was determined that Simard:

- a. owed a total of \$79,989.31 to its directly employed drivers and former drivers for container trucking services performed during the Audit Period and from June 1, 2014 to October 31, 2015;
- b. cooperated fully in the audit process,
- c. paid the amount owing in a timely way;
- d. has adjusted its payroll program to identify container trucking services and has

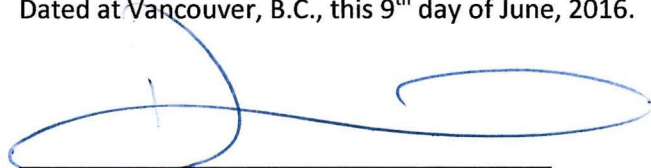
implemented a container trucking adjustment which brings the rate paid for TLS container trucking services up to the minimums required by the *Regulation*.

In these circumstances, while I record the fact of Simard's non-compliance with the *Act* by way of this decision, as well as Simard's appropriate actions to bring itself into compliance, I have declined to exercise my discretion to impose a penalty on Simard in this case.

32. As well, I have taken this opportunity to clarify that the minimum rates required under the *Regulation* are inclusive of benefits and that minimum rates proscribed by regulation only apply to container trucking services.
33. Finally, I have directed Simard to continue to take steps to clarify its payroll and benefits and to change its payroll stub to make it more understandable.

This decision will be delivered to Simard and published on the Commissioner's website (www.bc-ctc.ca).

Dated at Vancouver, B.C., this 9th day of June, 2016.



Duncan MacPhail, Commissioner

Cc: Complainant #1
Complainant #2