

# Inconsistent Records Can Thwart Your Argument



**What Happened:** A father hired his son to supervise a crew in his roofing company. He paid him a salary as an employee for that supervision. He also paid the son for “piece work.” The piece work was invoiced to the father’s company by the son based on the number of roofing squares installed on each job. The father deducted the wages from the job proceeds and kept 20% and the rest went to the son. The son claimed that percentage payment was for rental of the son’s truck and equipment. Although the son had his own roofing company, he claimed he was the father’s employee and not a subcontractor. The son testified he was only an employee and that the payments for piece work were really for equipment rentals and the father determined the amount of the payments for those rentals. A check paid to the son listed it as payment for “piece work.” None of the invoices from the son to the father referenced equipment rentals. In fact, some of the son’s job invoices to the father bore the name of the son’s company—supporting the argument that he was a subcontractor. The son also answered an HR questionnaire indicating he performed roofing services as a subcontractor. Further, the father’s ledger referred to

payments to the son as subcontractor payments and no payments were listed as payment for equipment rental. The Minister concluded that the parties were deemed not to be dealing with each other at arm's length and the circumstances didn't demonstrate the parties would have entered into a contract substantially similar to what they did if they were dealing with each other at arm's length. The parties appealed the Minister's decision.

**What the Court Decided:** The Tax Court of Canada ruled the Minister's decision was reasonable.

**How the Court Justified the Decision:** The court explained that the evidence presented was inconsistent because testimony and records alternately referred to the payments as subcontractor payments, piece work payments and rental of equipment. Additionally, the evidence didn't demonstrate that the parties contracted as if they would if they were dealing with each other at arm's length. Also, the court noted that the father determined the rental payment or piece work payment amount rather than the son. It found this contrary to expectations: "No person would have agreed to a similar arrangement without determining in advance his share of the surplus on each job completed or by leaving to the payer, sole discretion as to how the share is to be divided unless that person is related to the payer." Thus, the parties weren't dealing with each other at arm's length and there wasn't insurable employment [*Michaud v. M.N.R.*, [2013] TCC 245 (CanLII), Aug. 1, 2013].

## ANALYSIS

The Employment Insurance Act declares that when parties are not dealing with each other at arm's length, the relationship doesn't give rise to insurable employment. Parties otherwise deemed not dealing with each other at arm's length, because they are related parties or entities for example, could still argue the relationship gives rise to insurable employment if they demonstrate they contracted in substantially the same way they would if dealing with each other at arm's length. In this case, the court found the evidence inconsistent. Even the parties weren't sure how to characterize their relationship and the testimony and documents demonstrated that uncertainty—referring alternately to employee, subcontractor, rental payments and piece work. Therefore, the parties lost the opportunity to rebut the presumption they weren't dealing with each other at arm's length.

**Bottom Line:** Make sure your records clearly and consistently document employment relationships and the nature of payments, particularly relationships with related parties or companies.