WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 2000-0684
Date: May 11, 2000
Panel: Jill M. Callan, Cassandra Kobayashi, Randy Lane
Subject: Status of Principals of Unregistered Companies (No. 1)

WORKERS UNDER THE ACT (PRINCIPAL OF UNREGISTERED FIRM) (CORPORATE VEIL) — Plaintiff, principal of an unregistered company, was in a motor vehicle accident — Defendants pled s. 10 of the Act and took position that plaintiff was a worker in the course of employment — Majority interpreted Decision No. 335 as affecting status of a principal of an unregistered company under sections 10 and 11 of the Act — Piercing of the corporate veil is triggered when the principal is injured, not when claim is made — Held that the plaintiff was not a worker — Dissent interpreted Decision No. 335 as providing guidelines for piercing the corporate veil — Allowing plaintiff to sue because of failure to meet obligations under the Act is contrary to justice and merits — Practical effect of majority reasons is to allow principals to opt out of the Act — Dissent would refer matter to Panel of Administrators for policy clarification — In absence of referral, dissent would find plaintiff was a worker.

Law: *WCA (1996)*: s. 1, s. 2(2), s. 5(1), s. 10(1), s. 11, s. 47(2), s. 52(2), s. 99
Policy: [Cited by **MAJORITY**] *APM*: #20:30:30; Decisions: No. 106, 2 *Workers' Compensation Reporter* 41, No. 141, 2 *Workers' Compensation Reporter* 156, No. 264, 3 *Workers' Compensation Reporter* 182, No. 335, 5 *Workers' Compensation Reporter* 101; [Cited by **DISSENT**] *APM*: #20:10:20; #20:10:30, #20:30:30; *RSCM*: #5.00, #48.48, #96.10, #111.30; Decisions: No. 169, 2 *Workers' Compensation Reporter* 262, No. 330, 5 *Workers' Compensation Reporter* 88, No. 335, 5 *Workers' Compensation Reporter* 101
Decisions: [Cited by **MAJORITY**] Appeal Division Decision No. 92-1606, 9 *Workers' Compensation Reporter* 621, Appeal Division Decision No. 94-0872, 10 *Workers' Compensation Reporter* 801; [Cited by **DISSENT**] Appeal Division Decision No. 95-0320, 11 *Workers' Compensation Reporter* 327, Appeal Division Decision No. 94-0872

Status of Principal of Unregistered Company (No. 1) [s. 11 determination]
Appeal Division Decision No. 2000-0684

17 *Workers' Compensation Reporter* 475

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(1) The defendants have requested a determination under section 11 of the *Workers Compensation Act* (the Act) in respect of this legal action. The statement of claim filed by the plaintiff, Orest Alex Zaleschuk alleges that, on or about December 19, 1995, a vehicle operated by the defendant, Peter Musch (Musch) collided with a vehicle operated by the plaintiff. The accident is alleged to have taken place on 176th Street at or near 48th Avenue in Surrey, B.C. The statement of claim alleges that AT&T Capital Canada Inc. (AT&T) was the owner of the vehicle operated by Musch and Protrux Systems Inc. (Protrux) was the lessee of the vehicle. The defendants have pled the provisions of section 10 of the Act in paragraph 9 of their amended statement of defence filed on June 11, 1997.

(2) The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. Board of Governors' Decision No. 4 dated April 9, 1991 assigned to the chief appeal commissioner and the Appeal Division the obligation of the Workers' Compensation Board (the Board) to issue certificates under section 11. The role of the Appeal Division in this matter is to determine the status of the parties pursuant to its authority under the Act. It is, however, for the courts to determine the effect of the section 11 certificate on the legal action.

(3) In this determination, submissions have been provided on behalf of all of the parties. The plaintiff's employer was provided with an opportunity to make submissions but none was received.

I. Status of the Plaintiff

(4) The contentious issue in this application concerns the status of the plaintiff. Plaintiff's counsel takes the position that he was not a worker under the Act at the time of the accident. Defendants' counsel takes the position that the plaintiff was a worker and was in the course of his employment when the accident took place.

Background

(5) On April 30, 1997, counsel for the defendants examined the plaintiff for discovery. He testified that in 1995 he leased a hotel called the Tudor Inn. He incorporated a company called 502467 B.C. Ltd. for the purposes of running the business (a company search obtained by the Appeal Division confirms that 502467 B.C. Ltd. was incorporated on August 15, 1995). The plaintiff held 55 of the issued shares in the company. His business partner held 35 shares and his daughter held 10 shares. The plaintiff and his business partner began operating the hotel around December 1, 1995 (Q 138). The plaintiff was managing the hotel and pub and his partner was managing the cabaret. The plaintiff typically worked from 6 a.m. to 3 or 4 p.m. (Q's 164 to 166). His duties included preparing the floats, doing the hotel accounting, preparing the bar, making staff schedules, and arranging the payroll (Q 167).

(6) 502467 B.C. Ltd. was not registered with the Board at the time of the December 19, 1995 accident. 502467 B.C. Ltd. doing business as the Tudor Inn was registered with the Board on January 17, 1996 under registration no. 558156.

(7) On the day of the accident (December 19, 1995), the plaintiff had started work at 6 a.m. and performed his usual routine which included picking up the floats, opening the restaurant, and making out the bank deposits (Q 187). At the time of the accident, the plaintiff was travelling from the hotel to Cloverdale in order to go to the liquor store to order liquor for the hotel and to the bank to do its banking. (Q's 204 to 207). The plaintiff did not apply for workers' compensation benefits for the injuries he sustained as a result of the accident.

(8) On July 16, 1998, the plaintiff swore an affidavit in which he stated that 502467 B.C. Ltd. was incorporated in approximately November 1995 for the sole purpose of operating the Tudor Inn. He swore that he had no earnings from 502467 B.C. Ltd. in 1995 and filed an income tax return in that regard. His affidavit also states:

> I was a true entrepreneur in the establishment of this business and not an employee in any ordinary usage of that term.

Analysis of the Majority Concerning the Status of the Plaintiff

(9) The terms "employer" and "worker" are defined in section 1 of the Act which states, in part:

> **"employer"** includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;
>
> **"worker"** includes
>
> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;
>
> (f) an independent operator admitted by the board under section 2(2);
>
> [emphasis in original]

(10) Subsection 2(2) of the Act states:

> The board may direct that this Part applies on the terms specified in the board's direction
>
> (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
>
> (b) to an employer as though the employer was a worker.

(11) Subsection 5(1) provides:

> *Where*, in an industry within the scope of this Part *personal injury* or death *arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the board out of the accident fund*.
>
> [emphasis added]

(12) Subsection 10(1) of the Act states:

> *The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action*, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.
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> [emphasis added]

(13) Pursuant to section 82 of the Act, "[t]he governors must approve and superintend the policies and direction of the board." Pursuant to section 83.1 of the Act, the powers, duties, and functions of the governors are currently performed by a panel of public administrators. Decision of the governors Number 86, which is dated November 16, 1994 and entitled "Bylaw No. 4 — Published Policy of the Governors" (*Workers' Compensation Reporter* Vol. 10, p. 781, states, in part:

> 1.1 As of June 3, 1991, the published policies of the governors consist of the following:
> (a) the *Assessment Policy Manual,*
> (b) the *Occupational Safety and Health Division Policy and Procedure Manual,*
> (c) the *Rehabilitation Services and Claims Manual,* and
> (d) *Workers' Compensation Reporter* Decisions No. 1–423
>
> 1.2 After June 3, 1991, the published policies of the governors consist of the documents listed in paragraph 1.1, amendments to the three policy manuals, any new or replacement manuals issued by the governors, any documents published by the Workers' Compensation Board that are adopted by the governors as published policy of the governors, and all decisions of the governors declared to be policy decisions.
>
> . . .
>
> 2.2 In the event of a conflict between published policy in a Manual identified in Section 1.1(a), (b), or (c) of this Bylaw, and published policy in *Workers' Compensation Reporter* Decisions No. 1–423 identified in Section 1.1(d), published policy in the *Manual* is paramount.

(14) If 502467 B.C. Ltd. had been registered with the Board at the time of the December 19, 1995 accident, it is clear that the plaintiff would have been a worker under the Act at that time (see policy no. 20:30:30 which is reproduced below). The question that arises is whether the result is different because 502467 B.C. Ltd. was not registered with the Board on December 19, 1995. It is a well-established principle of corporate law that a company is a legal entity that is separate and distinct from its principals. It is also established that, in some rather limited circumstances, the "corporate veil" will be "pierced" or ignored. Policy no. 20:30:30 of the *Assessment Policy Manual* states:

> As mentioned in the previous section, an incorporated company is usually considered an independent firm by the Board, and therefore registration with the Board is mandatory. *As the incorporated entity is considered the employer, a director, shareholders [sic] or other principal of the company who is active in the operation of the company is considered to be a worker under the Act*. The earnings of these active principals are also fully assessable, as will be discussed in Section 40:10:30.
>
> However, *in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits*. This is based on two principles established in WCB Reporter Decision No. 335:
>
> 1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
>
> 2. Except under unusual circumstances, a person who in essence is both a "worker" and an "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".
>
> Should an injured principal of a company be denied compensation benefits because of the company's failure to register with the Board, that principal's earnings prior to the date of injury are not assessed.
>
> [emphasis added]

(15) As indicated in its text, this policy is based on Decision No. 335 (dated April 27, 1981) of the former commissioners (Re Principals of Limited Companies — *Workers' Compensation Reporter*, Vol. 5, p. 101) which also constitutes published policy on this issue. In Decision No. 335, the former commissioners considered the policies regarding small owner-operated limited companies set out in Decision Nos. 106, 141, and 264.

(16) In Decision No. 106 dated April 4, 1975 (Re A One-Man Company — *Workers' Compensation Reporter*, Vol. 2, p. 41) the former commissioners considered the claim of the widow of the principal of a one-person limited company. The company had not been registered as an employer with the Board. In addition, the deceased had not purchased personal optional

protection coverage, which was available to sole proprietors. The former commissioners referred to the principle that a company is a legal entity distinct from its principal shareholders. They concluded:

> The essence of the matter is that the deceased, an independent businessman, failed to purchase the insurance protection that the Act provides, and we see no merit in the suggestion that this insurance protection should now be provided for him at the expense of other businessmen who have paid their assessments. The same man cannot avoid the coverage of the Act when it involves a cost and then claim to be covered when it involves a benefit. . . .
>
> The doctrine that a company and its principal shareholder are separate legal persons is not one that should be applied to perpetrate an injustice of that kind.

(17) Decision No. 141 dated September 24, 1975 (Re A One-Man Company — *Workers' Compensation Reporter*, Vol. 2, p. 156) involved a claim from the principal shareholder of an unregistered company. The former commissioners again concluded that the claimant could not claim the benefits of the Act because he had not caused the company's obligations under the Act to be met. They did not find merit in the argument that "if he is to be treated as a 'worker' for the purposes of establishing the assessment obligations of the company, then, to be consistent, he should also be treated as a 'worker' for the purposes of entitlement to benefits."

(18) Decision No. 264 dated November 15, 1977 (Re Compensation Payable When Company Unregistered — *Workers' Compensation Reporter*, Vol. 3, p. 182) involved a claim from one of three shareholders of a small family-owned and operated company. The former commissioners extended the principle that arises out of the earlier decisions to all active principals of an unregistered company.

(19) In Decision No. 335, the former commissioners conducted a more comprehensive review of the issues involving principals of unregistered companies. The review was initiated as a result of a request of the ombudsman "to review the Board's policy regarding small owner-operated limited companies." The ombudsman had raised three objections to the policy. The former commissioners stated (at p. 101):

> This policy is concerned with the question which the Board must determine under the *Workers Compensation Act* as to who is a "worker", who is an "employer", and who is simply an "independent operator". *The rights and liabilities which accrue under the Act differ in accordance with into which of these categories a person falls. For instance, a person has no automatic right to receive compensation for work-related injuries unless he is a "worker" and no right to immunity from legal action in respect of such injuries unless he is an "employer" or a "worker"*. An "independent operator" does not have the rights of "workers". An "independent operator" does not have the rights of "workers" under the Act unless he has purchased from the Board optional personal protection. Nor does he have the rights or liabilities of "employers" unless he also happens to have employees.
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> [emphasis added]

(20) The former commissioners then considered Decision Numbers 106, 141, and 264 and stated (at pp. 103 and 104):

> The problem with which these three decisions deal occurs when the principal of a small company submits a claim for compensation for a work injury suffered by him at a time when his company was not registered as an "employer" with the Board. The general rule followed by the Board is that a worker's claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure to register. *If the corporate form of the business were ignored, the claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair to allow him to receive the benefits of the Act without meeting his obligations*. The Board, therefore, concluded that, except in unusual circumstances, claims from principals of small unregistered companies or their dependants should be denied. . . .
>
> . . . The result is that, when the Board applies the policy contained in *Decisions 106, 141 and 264*, it concludes that the principal is not a "worker" under the Act for the purpose of his claim. . . .
>
> . . . *The Act does not envisage persons who are essentially independent operators obtaining the benefits of the Act without fulfilling the corresponding obligations*.
>
> [emphasis added]

(21) At page 104, the former commissioners stated:

> In regard to the third objection [raised by the ombudsman], we are unable to agree that the Board's policy is discriminatory. *Since the policy results in the principal of the unlimited [sic] company not being a "worker" under the Act, it cannot be maintained that he is being discriminated against in comparison with other workers*. He is, in fact, being treated exactly the same as any other independent operator who has failed to purchase coverage for himself. Nor is he being discriminated against in relation to principals of limited companies who are registered with the Board prior to a claim being made. Discrimination only exists when persons in identical situations are treated differently for no valid reason. The situations of the principal of an unregistered and a registered company are not identical.
>
> Whether they are registered or not is a distinguishing factor which properly allows the Board to treat them differently.
>
> [emphasis added]

(22) They concluded the decision by stating:

> In the result, the policy of the Board will be as follows:
>
> 1. A claim from the sole principal of a company which was unregistered at the time of the injury or his dependants will be denied.
>
> 2. A claim from one of several principals of a company which was unregistered at the time of the injury, or his dependants, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register.
>
> 3. Companies registered following a claim by a principal which is denied will not be required to pay assessments retroactively in respect of the principal's earnings.
>
> 4. Claims from a responsible principal of a company which has registered but which has defaulted in the payment of its assessments, or his dependants, will be honoured but a deduction from the resulting benefits will be made to offset the outstanding debt.
>
> This decision supersedes *Decisions No. 106, 141 and 264.*

(23) Decision #94-0872 (*Workers' Compensation Reporter*, Vol. 10, p. 801) involved a claim from a principal of a company that was registered with the Board but had not paid all of its assessments. Pursuant to item #48.40 of the *Rehabilitation Services and Claims Manual* (the Claims Manual) the Board had deducted the overdue assessments from the compensation payable to the principal. The panel discussed the concept of piercing the corporate veil and considered Decision No. 335. The panel made the following observations (at page 813):

> The policies at issue affect compensation, assessments, and prevention matters, and possibly Section 11 determinations. . . .
>
> Further, the reasoning in Decision No. 335 must be approached with caution where prevention (occupational health and safety) matters are concerned. Decision No. 335 draws a parallel between principals of unregistered companies and independent operators. The Act does not authorize the Board to inspect the business of independent operators who have not opted for personal coverage. It is doubtful that Decision No. 335 intended to question the Board's authority to inspect the premises of unregistered incorporated companies. Thus, while the analogy between the principals of unregistered companies and independent operators has some appeal, it also has its limitations.
>
> Finally, Section 10(1) of the *Act* bars the legal actions of workers against other workers and employers. If an independent operator or employer takes out personal coverage under Section 3(3) of the *Act*, they become "workers" for the

> purposes of Section 10(1). However, when the corporate entity is ignored, this may leave some uncertainty about a person's status under the *Act*, depending on what approach is used. If the corporate entity is ignored for all purposes, then a responsible principal may not be a "worker" for the purposes of Section 10(1). However, as in this case, if benefits are initially paid to the responsible principal as a "worker" but then overdue assessments are deducted from his benefits, the question arises as to whether the person is a "worker" for the purposes of Section 10(1).

(24) In Appeal Division Decision #92-1606 (Principal of Unregistered Firm — *Workers' Compensation Reporter*, Vol. 9, p. 621), which was also a section 11 determination, the plaintiff and her husband were principals of an unregistered company. The panel relied upon Decision No. 335 and item #7.52 of the Claims Manual (which no longer existed at the time of the December 19, 1995 accident). Item #7.52 provided, "[a] claim from one of several principals of a company which was unregistered at the time of the injury . . . will be denied unless the evidence indicates that that principal was not personally responsible for the failure to register." The panel concluded that the plaintiff was not a worker within the meaning of Part 1 of the Act because she was jointly responsible for the failure of the company to register with the Board.

(25) The panel's conclusion in Decision #92-1606 appears to have resulted from the panel's application of the relevant policies. However, we find that the manner in which the policies are to be applied is not entirely clear. The questions that arise are:

1. Do the policies indicate that the principal of an unregistered company is a worker under the Act who is denied compensation benefits because the company is not registered or do the policies indicate that such a principal is not entitled to benefits because he or she is not a worker?

2. If the policies indicate that the principal of an unregistered company is not a worker under the Act, does their application extend to the determination of the principal's status for the purposes of sections 10 and 11 of the Act?

(26) In considering the first question, we have concluded that the passages we have quoted from Decision No. 335 indicate that the former commissioners were dealing with the status of a principal of an unregistered company under the Act and not merely his or her entitlement to benefits. The introductory words at page 101 indicate that the policies on principals of unregistered companies concerned the question of an individual's status as a "worker," "employer," or "independent operator" under the Act. In addition, Decision No. 335 likens the principal of an unregistered company to an independent operator without personal optional protection. In other words, it seems to say that once the corporate veil is pierced and the existence of the company is disregarded, such a principal becomes analogous to a sole proprietor (if it is a one-person company) or a partner in a partnership (if there is more than one principal). Pursuant to subsection 2(2), an independent operator with personal optional protection may become a worker under the Act. It follows that an independent operator without personal optional protection is not a worker under the Act and is not entitled to benefits. In light of the

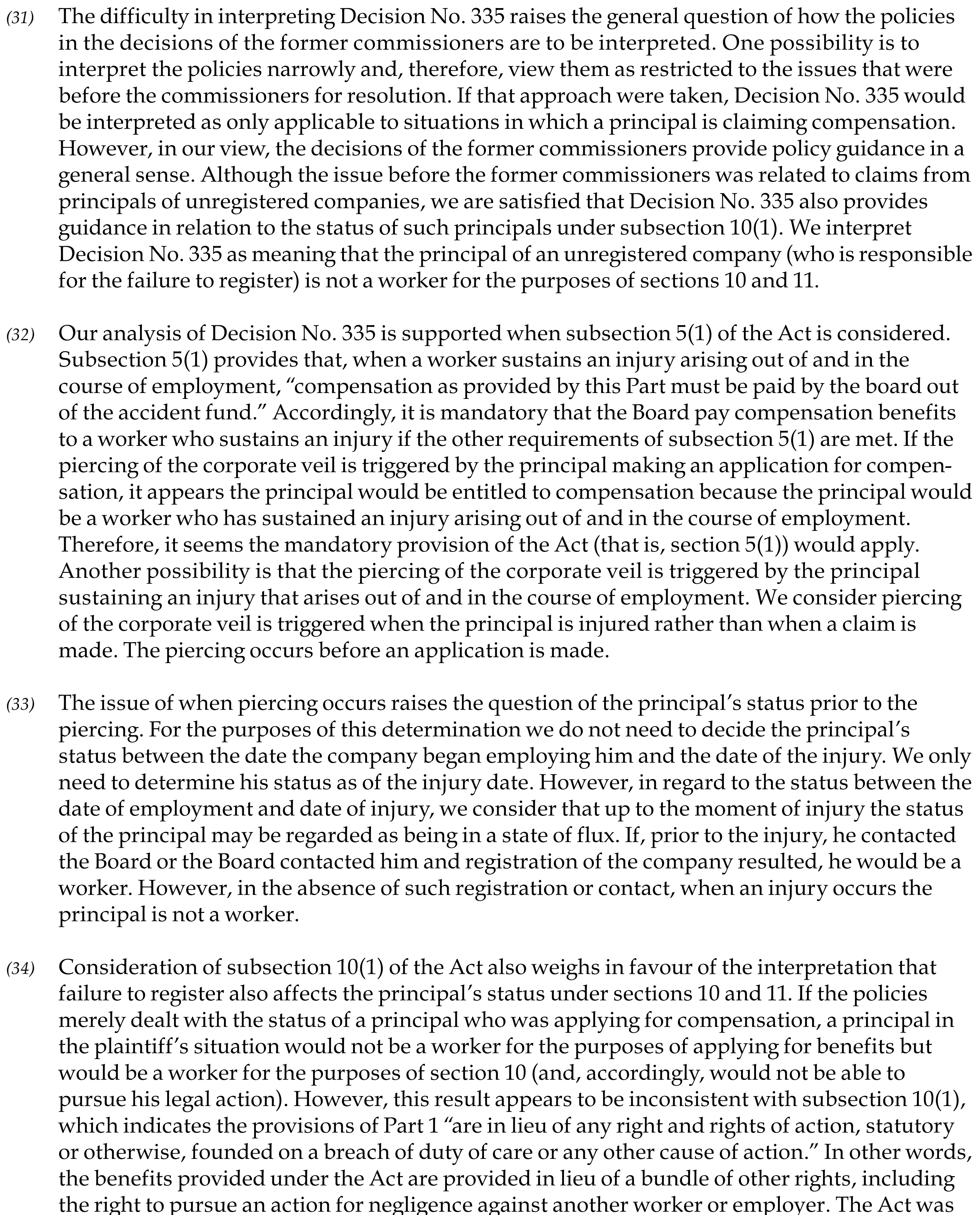
statement in Decision No. 335 concerning status under the Act and the analogy of the independent operator considered by the former commissioners, we conclude Decision No. 335 provides that the piercing of the corporate veil affects the principal's status as a worker under the Act.

(27) The second question involves consideration of whether the principal of an unregistered company is denied the status of a worker only in respect of his or her claim for compensation or is also not a worker under sections 10 and 11 of the Act. In this regard, we note that the law usually recognizes that a company is a distinct legal entity that is separate from its principals and the piercing of the corporate veil is an extraordinary measure. It is possible that a policy could dictate that the principal of an unregistered company is not a worker for the purpose of obtaining compensation without affecting the principal's status under sections 10 and 11.

(28) Policy no. 20:30:30 may be interpreted to mean that an active principal of an unregistered company who applies for compensation is not entitled to benefits because the application for compensation has triggered the piercing of the corporate veil. The policy sets out, as its rationale, the two points which it indicates are derived from Decision No. 335. Firstly, active principals are responsible for the registration of the company under the Act. Secondly, when an active principal has not met his or her obligations as the operating mind of the employer, he or she cannot be granted the benefits to which workers are entitled under the Act. If the piercing of the corporate veil is triggered by the application for compensation, it would not necessarily follow that the corporate veil is pierced when the status of such a principal is determined for the purposes of sections 10 and 11.

(29) There is nothing in policy no. 20:30:30 to indicate that the status of the principal under sections 10 and 11 has been considered or dealt with under the policy. Perhaps this is not surprising since that policy appears in the *Assessment Policy Manual*, which is generally concerned with the funding of the workers' compensation system. Since policy no. 20:30:30 is silent of the question of status under sections 10 and 11, further analysis of Decision No. 335 is required.

(30) Decision No. 335 appears to be focused on claims matters. The three objections raised by the ombudsman (which are listed at page 103) related to compensation claims by principals of unregistered companies. We have quoted the statement from page 104 that the principal of an unregistered company "is not a 'worker' under the Act for the purpose of his claim." This statement and other similar statements in the decision could be read as providing that the corporate veil will only be pierced in respect of the claim. However, the words we have underlined from the quote at page 101 of Decision No. 335, which include the statement "a person has . . . no right to immunity from legal action in respect of such injuries unless he is an 'employer' or 'worker'," suggest that the former commissioners were contemplating the status of the principal under subsection 10(1) as well as the status for claims matters. The statements of the former commissioners at page 101 and elsewhere (such as in the passage we have quoted from page 104) indicate that the policy applies to the status of the principal under the Act. These statements coupled with the statement concerning "immunity from legal action" suggest that the policy is intended to extend to the status of the principal under subsection 10(1).



(31) The difficulty in interpreting Decision No. 335 raises the general question of how the policies in the decisions of the former commissioners are to be interpreted. One possibility is to interpret the policies narrowly and, therefore, view them as restricted to the issues that were before the commissioners for resolution. If that approach were taken, Decision No. 335 would be interpreted as only applicable to situations in which a principal is claiming compensation. However, in our view, the decisions of the former commissioners provide policy guidance in a general sense. Although the issue before the former commissioners was related to claims from principals of unregistered companies, we are satisfied that Decision No. 335 also provides guidance in relation to the status of such principals under subsection 10(1). We interpret Decision No. 335 as meaning that the principal of an unregistered company (who is responsible for the failure to register) is not a worker for the purposes of sections 10 and 11.

(32) Our analysis of Decision No. 335 is supported when subsection 5(1) of the Act is considered. Subsection 5(1) provides that, when a worker sustains an injury arising out of and in the course of employment, "compensation as provided by this Part must be paid by the board out of the accident fund." Accordingly, it is mandatory that the Board pay compensation benefits to a worker who sustains an injury if the other requirements of subsection 5(1) are met. If the piercing of the corporate veil is triggered by the principal making an application for compensation, it appears the principal would be entitled to compensation because the principal would be a worker who has sustained an injury arising out of and in the course of employment. Therefore, it seems the mandatory provision of the Act (that is, section 5(1)) would apply. Another possibility is that the piercing of the corporate veil is triggered by the principal sustaining an injury that arises out of and in the course of employment. We consider piercing of the corporate veil is triggered when the principal is injured rather than when a claim is made. The piercing occurs before an application is made.

(33) The issue of when piercing occurs raises the question of the principal's status prior to the piercing. For the purposes of this determination we do not need to decide the principal's status between the date the company began employing him and the date of the injury. We only need to determine his status as of the injury date. However, in regard to the status between the date of employment and date of injury, we consider that up to the moment of injury the status of the principal may be regarded as being in a state of flux. If, prior to the injury, he contacted the Board or the Board contacted him and registration of the company resulted, he would be a worker. However, in the absence of such registration or contact, when an injury occurs the principal is not a worker.

(34) Consideration of subsection 10(1) of the Act also weighs in favour of the interpretation that failure to register also affects the principal's status under sections 10 and 11. If the policies merely dealt with the status of a principal who was applying for compensation, a principal in the plaintiff's situation would not be a worker for the purposes of applying for benefits but would be a worker for the purposes of section 10 (and, accordingly, would not be able to pursue his legal action). However, this result appears to be inconsistent with subsection 10(1), which indicates the provisions of Part 1 "are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action." In other words, the benefits provided under the Act are provided in lieu of a bundle of other rights, including the right to pursue an action for negligence against another worker or employer. The Act was

originally founded on what is often referred to as the "historic compromise," which involved workers receiving benefits under the Act in lieu of their right to sue their employers. In 1974, the Act was amended so that workers were also prevented from suing other workers (provided that both parties were in the course of their employment at the relevant time). If the principal is not a worker for the purposes of applying for benefits but is a worker for the purposes of section 10, instead of being entitled to pursue a legal action in lieu of receiving compensation benefits, the principal would be left without the ability to pursue the legal action and be denied benefits under the Act. If such a severe result had been intended, we would have expected it to have been specifically outlined in the policies.

(35) We have considered the application of our interpretation of Decision No. 335 to a scenario involving the principal of an unregistered company who, following a motor vehicle accident, is claiming benefits under section 5 and is also the defendant in a law suit. If the corporate veil was pierced and he was denied the status of a worker, he would not be able to claim benefits and he would not have the status of a worker for the purposes of the defence under section 10. This result is not inconsistent with subsection 10(1) since the principal would not be claiming benefits in lieu of pursuing a legal action because he or she would have no right of action.

(36) We have also considered the fact that, in a case such as the situation before us, the piercing of the corporate veil will result in a benefit being conferred upon the plaintiff because his failure to register the company with the Board will enable him to pursue his law suit. We recognize that this appears to be somewhat anomalous because generally the corporate veil is pierced so that an individual, who has not met his or her obligations, will not receive a benefit. However, the policies also appear to operate to prevent the plaintiff from claiming workers' compensation benefits. Therefore, they do, in fact, operate to prevent such an individual from obtaining the benefits that are provided under the scheme of the Act.

(37) In addition, we have considered the argument advanced by counsel for the defendants that if an individual, such as the plaintiff, is not a worker he or she may pursue a law suit against a worker or employer who would otherwise enjoy the benefit of the section 10 defence. While we acknowledge that this argument raises a legitimate concern, it does not alter our conclusion. Our determination that the principal of an unregistered company is not a worker for the purposes of section 10, is grounded in our interpretation of the relevant provisions of the Act, including the trade-off involving compensation in lieu of a right of action set out in section 10.

(38) In this determination, it is not necessary for us to consider whether the corporate veil should be pierced when the principal of an unregistered corporate employer is seeking employer status because the issue before us concerns the principal's status as a worker. We note, however, that whether it is registered or not, the company would be an employer and there appears to be no basis on which to pierce the corporate veil to confer employer status on the principal. We acknowledge that the second principle set out in policy no. 20:30:30 is:

> Except under unusual circumstances, a person who in essence is both a "worker" and an "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".

(39) This language could be interpreted to mean that, when the corporate veil is pierced, the principal becomes an employer who has failed to meet his or her obligations under the Act. However, it seems that the better interpretation is that the principal is "in essence" an employer because the principal is the operating mind of the employer. Accordingly, we interpret the statement to mean that the corporate veil should be pierced because the principal who (as the operating mind of the employer) has not caused the employer to be registered, should not be able to claim benefits under the Act.

(40) In applying the relevant policies in this case, we have noted that Decision No. 335 referred to the policy concerning "small owner-operated limited companies." A potential question that arises is whether 502467 B.C. Ltd. meets that definition. It could be argued that it is not such a company because it operates a hotel and presumably has a significant number of employees. However, since policy no. 20:30:30 (which deals with piercing the corporate veil generally) specifically states that it applies to principals of private companies (as opposed to being limited to small owner-operated companies) we find the policies are applicable to the plaintiff in this case.

(41) Finally, we would like to note some other concerns that we have in respect of the question of whether principals of unregistered corporate employers are workers. On October 1, 1999, the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* (Bill 14) came into force as Part 3 of the Act. Part 3 contains a number of provisions that place obligations on workers. For instance, section 116 outlines the general duties of workers. The question of whether principals of unregistered corporate employers are workers for the purposes of Part 3 is not before us in this determination. However, in light of the enactment of Part 3 and the lack of clarity of the policies concerning principals of unregistered corporate employers, the Panel of Administrators may wish to review the policies.

(42) In Decision #94-0872, the panel stated the following (at pages 816 and 817):

> Finally, as set out above, there are some unresolved matters which the governors may wish to address, regarding the status of principals of unregistered and registered firms. While these unresolved matters did not prevent us from making a decision in this case, there is a degree of uncertainty, and perhaps inconsistency, in this area. The *Act* and the governors' policy are not clear on who will be considered a principal or active principal of a corporation. Active principals appear to form a hybrid category — they can be workers or employers, or perhaps both, while also described as akin to independent operators. This has implications for the determination and collection of overdue assessments and entitlement to compensation, as well as possible consequences for prevention and Section 10(1) matters. It is a complex area and some of the uncertainties have been pointed out above.

(43) Accordingly, they also recognized the need for a review of the policies in this area.

(44) Our dissenting colleague has suggested that this is an appropriate case to seek policy guidance from the Panel of Administrators in accordance with Governors' Decision No. 75 (*Workers' Compensation Reporter* Vol. 10, p 753). It states (at page 756):

> Where the chief appeal commissioner considers it necessary that the governors address a policy issue prior to a decision being made in one or more appeals, the chief appeal commissioner has the authority to bring that policy issue before the governors for consideration and to postpone the Appeal Division's decision in the appeal until the policy issue has been addressed by the governors.

(45) We acknowledge that the difference between our conclusion and that of our colleague largely stems from the difficulty of interpreting Decision No. 335. While we recognize that clarification would be of assistance, we have concluded that we should render a decision because the concerns about the policy identified in Decision #94-0872 (which was issued in 1994) have not been addressed by the Panel of Administrators and we do not wish to delay this matter further.

(46) We do not consider the 1994 amendments cited by our colleague resolved the issues raised by Decision #94-0872. The amendments to the Claims Manual were issued in December 1994 and the changes to the *Assessment Policy Manual* were issued in April 1995. The amendments consolidated the definitions of worker and employer in the *Assessment Policy Manual* but did not resolve the matter. We note that item #5.00 of the Claims Manual refers to Decision No. 335 and to policy no. 20:30:30 of the *Assessment Policy Manual* which also cites Decision No. 335. We do not consider that the amendments expressly limit the impact of Decision No. 335 to claims matters with the result that it has no relevance to section 10 matters. We also do not consider that the amendments have the effect of ensuring that an active principal of a limited company has worker status regardless of the circumstances.

(47) In summary:

- Decision No. 335 constitutes published policy of the governors.
- We interpret the policy in Decision No. 335 as denying compensation to the principal of an unregistered company because such a principal does not have the status of a worker under the Act for the purposes of establishing a claim.
- We interpret the policy as also affecting the status of such a principal under sections 10 and 11 of the Act because, in the decision, the former commissioners referred to the status of such an individual under the Act and specifically stated that status under the Act is relevant to immunity from suit.
- Our analysis is further supported when Decision No. 335 is considered in the context of sections 5 and 10 of the Act.

Conclusion of Majority Concerning the Status of the Plaintiff

(48) We find, at the time of the December 19, 1995 accident, the plaintiff was not a worker within the meaning of Part 1 of the Act. Accordingly, the injuries suffered by the plaintiff did not arise out of and in the course of employment within the meaning of Part 1 of the Act.

DISSENT

(49) I agree with the majority on the status of the defendants, but come to a different conclusion with respect to the status of the plaintiff. The published policies on determining status for the purposes of section 10 and 11 incorporate the general policies on the status of principals of limited companies. Furthermore, there are specific policies on when the Board will pierce the corporate veil to affect status. I would not expand the practice of piercing to this plaintiff's situation.

Status of Active Principals of Limited Companies

(50) The Act defines "worker" inclusively, and includes a person who has entered into or works under a contract of service, express or implied.

(51) At one time, the *Rehabilitation Services and Claims Manual* (*R.S.C.M.*) defined worker and employer, but in 1994, these definitions were consolidated in the *Assessment Policy Manual*. At the time of the accident on December 19, 1995, Chapter 2 of the *R.S.C.M.*, "Workers and Employers Covered by the Act," referred the reader to Policy No. 20:10:30 of the *Assessment Policy Manual* for those definitions:

> **#6.00 Definitions of "Worker" and "Employer"**
>
> . . . Detailed discussions concerning the definitions of worker and employer may be found at 20:10:30 of the Assessment Policy Manual.

(52) The policy in *A.P.M.* Policy No. 20:10:30 discusses the statutory definitions, and others including volunteers, proprietors, cooperatives, inmates, elected officials, trade unions, federal workers and lent employees. Included in that policy is the following on incorporated companies:

> **Incorporated Companies**
>
> *In a situation where the employer is a limited company, a director, shareholder or other principal of the company who is active in the operation of the company is considered a worker*. Frequently, these active principals do not draw salaries due to income tax considerations, the lack of profitability of the company in formative years or other reasons, and this apparent lack of earnings does not affect their status as workers. If the active principal has drawn a nominal salary, or no salary at all,

the assessment base is adjusted to reflect the relative worth of the person's services to the company for the year in question. This is covered in greater detail in Section 40:10:30 of this manual.

[emphasis added]

(53) These definitions are used by both the Compensation Services Division for adjudicating claims, and by the Assessment Department for determining payroll. They are also the definitions for the purposes of section 10 and 11, according to the policy in #111.30 of the *R.S.C.M.* on third party claims:

#111.30 Meaning of "Worker" and "Employer" under Section 10

In the provisions discussed in #111.10–#111.24, "worker" and "employer" have the meaning given to them in Chapter 2.

For the purpose of Section 10, "worker" includes an employer entitled to personal optional protection. (10) However, this does not affect status as an employer under this section in regard to other workers.

The meanings of "employer", "worker", and "employment" for the purpose of Section 10 in claims concerning commercial fishers are discussed in Fishing Industry Regulation 14 (found in Workers' Compensation Reporter Decision 223).

Note: (10) S. 10(9); S. 3(3)

[emphasis added]

(54) Thus, the published policy has been designed so that for the purposes of claims, sections 10 and 11, and assessments, the definitions of who is a "worker" and who is an "employer" are consistently applied. In practice, this means that assessments will generally be paid on "workers" who will have coverage for work injuries and occupational diseases. It also means that a "worker" for section 10 and 11 purposes, will also be a "worker" for claims and assessment purposes.

Exceptions to the General Rules on Status

(55) If a person is a "worker" under the Act, section 5(1) provides compensation must be paid for a personal injury arising out of and in the course of employment. Thus, as a worker, an active principal of a limited company is generally entitled to workers' compensation benefits if injured at work. The policy in #5.00 of the *Rehabilitation Services and Claims Manual* provides that registration of the employer with the Board generally does not affect coverage, subject to the exceptions identified in the policy:

A worker's claim is not prejudiced by the fact that the employer has not complied with the obligation to register with the Board. This is subject to the

principles set out in Workers' Compensation Reporter Decision 335 and 20:30:30 of the Assessment Policy Manual.

(56) Policy No. 20:30:30 of the *A.P.M.* provides that a claim for compensation from a principal of a corporation that was not registered with the Board at the time of the injury will be rejected:

> As mentioned in the previous section, an incorporated company is usually considered an independent firm by the Board, and therefore registration with the Board is mandatory. As the incorporated entity is considered the employer, a director, shareholders (*sic*) or other *principal of the company who is active in the operation of the company is considered to be a worker* under the Act. The earnings of these active principals are also fully assessable, as will be discussed in Section 40:10:30.
>
> However, *in the event of an injury* to an active principal of a private company that is not registered with the Board, that active principal is *not entitled to compensation benefits*. This is based on two principles established in Workers Compensation Reporter Decision No. 335:
>
> 1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
>
> 2. Except under unusual circumstances, a person who in essence is both a "worker" and "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".
>
> Should an injured principal of a company be denied compensation benefits because of the company's failure to register with the Board, that principal's earnings prior to the date of injury are not assessable. . . .
>
> [emphasis added]

(57) Another exception occurs when a claim is made by a principal for an injury at the time the corporation is registered but is in arrears in paying assessments, Item #48.48 of the *R.S.C.M.* provides the guidelines for collecting the unpaid assessments from benefits owing to the injured principal:

> **#48.48 Unpaid Assessments**
>
> Unpaid and overdue assessments are treated in the same manner as overpayments if a claim is later received from an employer or principal of the limited company responsible for the debt or an independent operator who has purchased but not fully paid for personal optional protection coverage. If, at the time of the claim, the claimant is a worker for another company or organization, the decision whether or not to recover the overdue assessment from benefit

> entitlements can only be made by the Manager, Collections, or a Claims Director or a delegate. Recoveries will not be made from widows, widowers or dependants where the claim is the result of a fatality and the worker was employed with an employer other than the employer owing the assessments.

(58) In that situation, the principal's claim is accepted, but the Board pierces the corporate veil when the assessments owed by the limited company to the accident fund are set-off against compensation payable to the principal from the accident fund.

Analysis of the Policy on Piercing the Corporate Veil

(59) Both of the above exceptions are discussed in Decision 335. While the operational Manuals quoted above outline the mechanics for decision-making, the underlying legal analysis is contained in Decision 335 and the decisions it replaced, 106, 141, and 264. In Decision 335, the commissioners affirmed the Board's long-standing policy of respecting the normal separation between a limited company, and its principals. In compensation terms, this means the Board treats active principals of limited companies as "workers" of the corporation:

> . . . Surely all principals who are actively engaged in management of their companies are in basically the same position and should be treated the same under the Act. The Board long ago laid down a general principle that all such principals should be treated as "workers" under the Act and we can see no grounds for changing this position now. . . .
>
> . . . The Board is also in agreement with the basic principle of accepting at face value the form in which people carry on their businesses, while at the same time reserving a power to look into the real nature of the arrangements. The Board shares the reluctance of the courts to "pierce the corporate veil" and this is another reason why the Board prefers to treat principals of limited companies as "workers". To do otherwise would leave them in the anomalous position of being neither "workers", "employers", nor "independent operators" under the Act. Alternatively, the Board would have to ignore the corporate form of a business in all cases where there were active principals and consider them as independent operators and, where appropriate, the employers. We feel that the latter course of action would be too large an interference with the well-established practice of carrying on business through a limited liability company which would not be justified by the end sought to be achieved.

(60) The commissioners then noted the Board's reasons for lifting or piercing the corporate veil will differ from those of the courts. They noted the courts had not laid down particular principles for piercing. Decision 335 rejected a case-by-case approach for the purposes of an administrative tribunal:

> While we recognize the merits of this approach, as an administrative tribunal it is often necessary for the Board to lay down general guidelines for its staff. It is

> the guidelines for piercing the corporate veil set out in Decisions 106, 141, and 264 which are the subject of this review.
>
> The problem with which these three decisions deal occurs when the principal of a small company *submits a claim for compensation* for a work injury suffered by him at a time when his company was not registered as an "employer" with the Board.
>
> [emphasis added]

(61) Thus, the subject matter of Decision 335 is providing guidelines for Board staff when adjudicating a claim for compensation. The conclusion of Decision 335 reinforces this interpretation, as all four points address "a claim" from a principal:

> In the result, the policy of the Board will be as follows:
>
> 1. *A claim* from the sole principal of a company which was unregistered at the time of the injury or his dependants will be denied.
>
> 2. *A claim* from one of several principals of a company which was unregistered at the time of the injury, or his dependents, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register.
>
> 3. Companies registered *following a claim* by a principal which is denied will not be required to pay assessments retroactively in respect of the principal's earnings.
>
> 4. *Claims* from a responsible principal of a company which has registered but which has defaulted in the payment of its assessments, or his dependants, will be honoured but a deduction from the resulting benefits will be made to offset the outstanding debt.
>
> This decision supercedes *Decisions No. 106, 141 and 264.*
>
> [emphasis added]

(62) The majority has quoted some passages from Decision 335 as supporting their conclusion that "the former commissioners were dealing with the status of a principal of an unregistered company under the Act and not merely his or her entitlement to compensation." I agree that the commissioners referred to status, but interpret the quoted passages as simply describing how status changes upon piercing the corporate veil when adjudicating a claim for compensation. The commissioners point out at page 101 that rights and liabilities differ according to status. That passage provides by way of background that piercing will affect whether the Board determines a person is a "worker," which will in turn, determine their rights and obligations.

(63) At page 103, the commissioners state that, "*If* the corporate form of the business were ignored" the active principal making a claim is really an independent operator who failed to obtain coverage. In other words, once the Board pierces the corporate veil, the person making the claim for compensation is an independent operator who failed to obtain coverage. The subjunctive verb tense — "were" — indicates the statement on status is conditional on ignoring the corporate form.

(64) At page 104, Decision 335 states that "*the policy results* in the principal of the unlimited *(sic)* company not being a 'worker' . . ." under the Act. The commissioners were not stating that the principal was not a worker, but that when the policy on piercing the corporate veil is applied, the result is that the principal loses the status of worker.

(65) In sum, Decision 335 first affirms that the Board will pierce the corporate veil only as an exception. It then specifies the two exceptions which are summarized in the enumerated conclusions. The references to status in the body of the decision need not be read more broadly than set out above to make sense of the decision. Given the stated purpose of the decision was to provide guidelines to staff for piercing the corporate veil, as a rejection of the case-by-case approach of the courts, I would hesitate to pierce the corporate veil without sound reasons as an exception to this policy. That said, policy must not be applied in a rigid, mechanical manner; therefore, I have considered whether the facts before us support piercing.

Section 99: the Merits and Justice of the Case

(66) Section 99 of the Act requires the Board to give its decision according to the merits and justice of the case. The notion that policies are not to be applied inflexibly is also reflected in the provisions of #96.10 of the *R.S.C.M.* The published policies are described as general indications of how the Board will act when certain circumstances arise. Regard must be had to whether an existing policy should be applied, or whether there are grounds in a particular case for a change in or departure from policy.

(67) In a section 11 determination, the merits and justice of the case include not only the plaintiff's situation, but that of the other parties to the action. Do the justice and merits of the case lead to a conclusion that the extraordinary remedy of piercing should be invoked to allow the non-compliant principal to bring a suit against those who may well have met their statutory obligations?

(68) Because the situation before us is not explicitly discussed in the policy, I have reviewed other policy decisions for guidance on how the justice and merits of the case should be determined in a section 11 matter. Decision 169 (1975), *Workers' Compensation Reporter*, Vol. 2, p. 262, involved a defendant who wished to be afforded the protection of the bar as an employer. He was a partner with his wife in a hotel operation. The defendant had obtained personal optional protection, but declared he had no employees for the year in question. When he was later sued for his part in a motor vehicle accident, he said he had in fact hired occasional casual help. At that time, the Act did not bar suits between workers, so the defendant sought to be characterized as an "employer." The commissioners refused to let the defendant submit a revised

payroll declaration and pay assessments. They said he "might . . . have been in the position of an employer" or not, but he cannot claim to be an independent operator when the obligations of an employer are being considered, and then seek to be an employer when there is some advantage in that position. The commissioners said the hotel operator might have believed the casual help he hired "was too slight and too trivial to require him to register and pay assessments as an employer." These comments suggest that it would have been open to the hotel owner to declare as workers, the casual workers he hired for one or two hours, twice a month. The commissioners said, at page 264:

> This employment appears to have been of a very casual kind, not continuous, at a low frequency, and for very temporary periods. Even so, it might well be enough to qualify the Defendant as an employer under the Act if it were not that the Board had earlier decided, for assessment purposes, and on the evidence of the Defendant, that he was not an employer.

(69) The prior payroll report was seen as the hotel operator's declaration, upon which the Board considered the defendant was not an employer and the consequences for the section 11 determination now flowed from that declaration.

(70) It appears that the decision was based on whether the person would gain some advantage for which they had not met the corresponding obligations. The commissioners summarized that underlying principle at page 265:

> It would not result in a consistent application of the Act if the same person were to be treated as an employer for the purpose of obtaining a benefit when he has not been so treated, and has not treated himself as being in that position for the purpose of meeting the obligations of an employer.

(71) That language is very similar to the rationale for piercing in Decision 335 — "It would be unfair to allow him to receive the benefits of the Act without meeting his obligations" (at p. 103). It is arguable that the right to sustain a civil action is not necessarily a "benefit of the Act" equivalent to compensation benefits or immunity from suit. That said, the rationale expressed in Decisions 335 and 169 supports an exercise of discretion based on preventing a person from benefiting from failure to meet their statutory obligations.

(72) In Decision 330, *Workers' Compensation Reporter*, Vol. 5, p. 88, the commissioners considered an argument that the plaintiffs' claims should be denied on the basis of section 99, because the plaintiffs would prefer to pursue a legal action. The commissioners rejected that approach as contrary to the mandate given the Board under the Act to determine the rights and status of those affected.

(73) Finally, piercing to allow the plaintiff to sue is not consistent with the tradition of using this extraordinary remedy to prevent an injustice. The majority is uncomfortable with the possibility that an active principal who failed to register his limited company with the Board may be denied compensation benefits, when he has been found to be a "worker" for the purposes of a section 11 determination. First, it is not a certainty he will be denied compensation. Second,

for those who have failed to meet their obligations under the Act, there may indeed be hardship if they are injured on the job. That is true whether they are in a position to sue another person or not. I do not consider that the extraordinary remedy of piercing should be used to provide a principal who has not met his obligations with the opportunity to revert to his common-law rights.

(74) Thus, even if Decision 335 stands for the proposition that generally the corporate veil will be pierced when determining status under section 11 of a non-compliant principal, the thrust of the policies leads me to conclude a person who did not meet their obligations should not stand to benefit over those who did. On the justice and merits of the case as a whole, allowing the plaintiff to sue because he did not meet his obligation as principal of a limited company to register and pay assessments is contrary to the scheme of the Act.

Alternate Policy Solutions

(75) Underlying the majority reasoning seems to be a belief that a person who is a "worker" prior to claiming compensation, would be entitled to benefits because he would be a worker under section 5(1). Section 96(1) gives the Board exclusive jurisdiction to determine matters of status, and its decision is protected by a privative clause. As stated in Decision 335, there is nothing in the *Workers Compensation Act* that defines active principals of a corporation as "workers."

(76) There are other situations where the Board determines status as a "worker" based on registration. Section 2(2) of the Act allows the Board to extend coverage to independent operators on the terms specified by the Board. An independent operator who obtains personal optional protection, is considered a "worker." The Board also allows "labour contractors" as defined in the *A.P.M.* to register. If they do, they will be considered the "employer" of those they hire, but they will not retain the status of a worker unless they also obtain personal optional protection.

(77) That said, there is a possibility that the policy is unlawful in denying compensation to an active principal who has not registered the limited company, but otherwise has a valid claim. In an apparent attempt to uphold the lawfulness of the policy denying benefits, the majority would move the moment of piercing back in time to the occurrence of injury.

(78) Because the lawfulness of the policy denying compensation is not before us, I have not made any determination on that point. However, in the absence of any finding that the policy is unlawful, I question on what basis the Appeal Division should depart from the published policy as to when the Board will consider piercing the corporate veil.

(79) As an aside, there is another way to uphold the statutory entitlement of workers to compensation, while ensuring a principal not be allowed to benefit from his own failure to register the corporation. The provisions of section 47(2) allow the Board to collect the cost of any claim for an injury that occurs when an employer is in default with respect to its obligations at the time of the accident:

(2) An employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by the employer under section 38(1), or who refuses or neglects to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it, must, in addition to any penalty or other liability to which the employer may be subject, pay the board the full amount or capitalized value, as determined by the board, of the compensation payable in respect of any injury or occupational disease to a worker in the employer's employ which happens during the period of that default, and the payment of the amount may be enforced in the same manner as the payment of an assessment may be enforced.

(80) If the claim for compensation of an active principal were accepted, then the mechanism available under section 47(2) would help ensure that other contributors to the accident fund do not pay the cost of a claim of a principal who failed to meet his obligations *qua* employer. If the assets of the corporation do not cover the cost of the claim, section 52(2) allows the Board to recover from property owned by a principal of the corporation where the property was used in connection with the industry. It is arguable that because the Act includes provisions to be followed if an employer fails to provide a statement required under the Act, the legislature's intent was that the statutory mechanism for recovery is the one that should be used by the Board. Perhaps the policy to pierce at the moment of an application for compensation is an attempt to shortcut that procedure to achieve the same result in at least some cases, with less administrative expense.

(81) That said, the legality of the policy denying compensation to a principal who failed to register the corporation is not before us.

The Historical Compromise

(82) The majority reasons that by giving normal effect to incorporation of the plaintiff's business, the plaintiff would lose the ability to sue, and under the policies, likely be denied compensation. They say he would not have the benefit of the historic compromise that gave workers the right to no-fault compensation benefits, in lieu of the right to sue employers. This, they suggest, is such a severe result, that they would expect it would have been specifically outlined in the policies.

(83) Section 10(1) begins, "The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise. . . ." Section 10(1) does not state that compensation benefits will be paid in lieu of the individual's lost rights of action. What is given in lieu are the "provisions of this Part," which means the whole bundle of rights and corresponding duties. Failure to meet the statutory and lawful policy requirements does not allow a person to revert to their common-law rights. For example, failure to submit an application on time can result in being denied compensation of any sort, without recourse to a civil suit. This could be seen as unfair in that the one-year period to file a claim is shorter than the limitation period for many types of legal action. As well, the Act imposes a ceiling on the earnings which a worker may recover, a

limitation that did not exist at common law. Such differences are the result of the Legislature altering common law rights. The loss of common law rights in some situations is not sufficient reason, in my view, to justify piercing the corporate veil as a new exception to ensure a non-compliant principal has some redress.

(84) I agree that great personal hardship can result from a situation where a person doing business through a limited company fails to meet their obligations to register the company, and is subsequently denied compensation for an injury at work. Decision 106, *Workers' Compensation Reporter*, Vol. 2, p. 41, presented very compelling facts: a widow sought compensation for the death of her husband, who ran a "one-man company." If he had registered and paid assessments, compensation would have been payable, but even in that situation, benefits were denied to the surviving dependant. That decision was reviewed and its effect upheld in Decision 335.

(85) There is nothing in the law or policies that suggests the principals of a corporation may opt out of the historic compromise, or the provisions of the Act. To the contrary, the expansion of the Act in 1994 to all workers and employers in the province has broadened the expectation that almost all workers and employers will be operating on the same footing. Various exemptions have been identified by the Panel of Administrators and are published in the *Assessment Policy Manual* (*A.P.M.*), Policy No. 20:10:20. No general exemption has been made for the active principals of an incorporated business not registered with the Board.

(86) Exemptions from the mandatory registration requirements have also been rejected in individual cases. In a test case brought by a lawyer who carried on business through a law corporation, the Board rejected her request to be treated as if she were an independent operator. Appeal Division Decision #95-0320, "Law Corporations As Employers," (1995) *Workers' Compensation Reporter*, Vol. 11, p. 327, upheld the director's decision that personal law corporations are employers, and the active principals are its "workers."

(87) In sum, the remedy of an active principal of a limited company injured in the course of employment is to seek benefits from the workers' compensation system, as will be determined by the Board if he applies. Having failed to register the corporation in a timely manner, he cannot revert to his common law rights. The fact that he has the opportunity to pursue a third party action is also not sufficient to make an exception to the policies on piercing.

Seeking Policy Clarification

(88) The decision whether the corporate veil should be pierced is a complex matter, potentially affecting other aspects of the Board's business such as assessments and prevention, as well as the viability of the legal action. Such matters are better addressed by the policy-makers of the Board, rather than on an adjudicative level with only one aspect of the issue before us.

(89) The majority believes that piercing the corporate veil is triggered "when the principal is injured." For the purposes of a section 11 determination, that appears to mean when an active principal of an unregistered limited company commences an action to recover damages for injury, he will not be considered a "worker" for the purposes of that injury. Under this approach, the

person's status will be resolved when a determination is made as to the existence of an injury. In a section 11 matter, the Board usually leaves that issue for the courts to determine. A complication arises in that defendants often plead that the plaintiff was not injured, or that any injuries pre-existed the accident in question. Under the majority's approach, if the court determines the plaintiff's injuries were pre-existing or non-existent, it would appear the plaintiff would then revert to possibly having the status of a worker.

(90) If I am correct in interpreting the policy as intending a determination of a person's status to apply for the purposes of claims, assessments, and sections 10 and 11, it would appear that an active principal of a corporation could defer investigation and determination by the Board of their status by claiming injury and commencing an action. Until the existence of an "injury" were determined, the person's status would be in limbo. That in turn could affect the collection of assessments on that person's earnings.

(91) Before taking the extraordinary step of piercing the corporate veil at the time of the alleged injury for the purposes of a section 11 determination, I would refer this matter to the Panel of Administrators for clarification of the policy. Governors' Decision 75, *Workers' Compensation Reporter*, Vol. 10, p. 753, allows the chief appeal commissioner to ask the Panel of Administrators to address a policy issue and postpone a decision in an appeal. Although this is not an "appeal," in a matter of such importance to the parties, clarification is desirable in any event.

(92) The majority notes that policy clarification was suggested in a 1994 Appeal Division decision, and has not yet been provided. Although we do not know the reasons for failure to respond to that request for clarification, one possibility is that the policy is considered to be clear. Appeal Division Decision #94-0872 was issued in July 1994. In late 1994, the Board's policy-makers revised the policy in the *Rehabilitation Services and Claims Manual* containing definitions of "worker" and "employer." The definitions have now been centralized in the *Assessment Policy Manual* for the purposes of sections 10 and 11, claims, and assessment matters, which suggests that the definitions are intended to be applied consistently in these areas, subject to the narrow exclusions set out in the policy.

Summary of Minority Reasons

(93) Applying published policy helps ensure predictability and fairness between like cases. The general policies concerning status for the purposes of section 10 and 11 provide that active principals of limited companies are "workers" under the Act. The policy to pierce in specified situations could be seen as part of the Board's authority to define who is a "worker" and who is not. The situations where an exception is made to the general policy are clearly defined, and do not include determinations under section 11.

(94) The subject of Decision 335 is the guidelines for piercing the corporate veil. The guidelines define two situations for piercing: in a claim for compensation by a principal whose limited company was not registered at the time of the injury, or was registered but in default. Upon piercing, the principal loses the status of a "worker" under the Act. A person who is not a "worker" is not entitled to compensation under the Act. Thus, a change in status follows

piercing. Any concerns about the lawfulness or appropriateness of the policy on piercing should be addressed by those responsible for setting policy, or in adjudication of that issue in a claim, not by creating new guidelines for piercing for section 11 purposes.

(95) The practical effect of the majority's reasons is that principals of corporations will be treated as if the Act does not require their participation. If they do not register, and sustain an injury while working, they will be allowed to revert to their common law rights. This result is untenable, in my view, in light of the provisions of the statute as a whole, including the historical compromise, and the expansion of the Act to cover virtually all workers and employers in the province.

(96) This is not a case where piercing will prevent an injustice. The Board should not pierce the corporate veil to enable a person who failed to meet his obligations to override the benefit of the statutory bar enjoyed by workers and employers who have accepted their obligations and rights under the historical compromise.

(97) The majority's interpretation of the policies warrants referring this matter to the chief appeal commissioner to consider requesting clarification by the Panel of Administrators before we issue our decision. In the absence of such a referral for policy clarification, I would find the plaintiff was a worker, and would proceed to determine if his injuries arose out of and in the course of employment.

I agree with the majority regarding status of the defendants.

Cassandra Kobayashi
Appeal Commissioner

II. Status of the Defendant, Protrux

(98) At the time of the accident, Protrux was registered with the Board under registration no. 438592. We find, at the time of the December 19, 1995 accident, the defendant, Protrux Systems Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act.

III. Status of the Defendant, Musch

(99) Musch provided evidence in an affidavit sworn on March 27, 1998. At the time of the accident, he was employed by Protrux as a truck driver. In his affidavit, he indicates that he was in the course of his employment. We find at the time of the December 19, 1995 accident the defendant, Peter Musch, was a worker within the meaning of Part 1 of the Act.

(100) Since we have little evidence in respect of his activities at the time of the accident, we decline to make a finding in respect of whether any action or conduct of Musch which allegedly caused the breach of duty of care on December 19, 1995 arose out of and in the course of

employment within the scope of Part 1 of the Act. In light of the determination of the status of the plaintiff by the panel majority, we have not invited further submissions on this question. If the parties consider that a further determination is necessary, they may request a supplemental certificate.

IV. Status of the Defendant, AT&T

(101) Neither counsel has requested a determination of the status of the defendant, AT&T Capital Canada Inc.

V. Summary

(102) The majority finds at the time of the December 19, 1995 accident:

1. The plaintiff, Orest Alex Zaleschuk, was not a worker within the meaning of Part 1 of the Act.

2. The injuries suffered by the plaintiff, Orest Alex Zaleschuk, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

(103) The panel unanimously finds at the time of the December 19, 1995 accident:

3. The defendant, Protrux Systems Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act.

4. The defendant, Peter Musch, was a worker within the meaning of Part 1 of the Act.

Jill M. Callan, Chair
Appeal Commissioner

Randy Lane
Appeal Commissioner

Editors' Note: This decision has been edited for publication.