

Decision of the Appeal Division**Number: 2001-2240****Date: November 9, 2001****Panel: Cassandra Kobayashi****Subject: Section 11 Determination (Craig Sidney Parker v. Ravinderjit Singh Kandola and Yellow Cab Company Ltd.)**

APPEAL DIVISION (CERTIFICATION TO COURT) (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT) – Plaintiff struck by taxi while working at the airport as a “taxi-host” – Plaintiff’s injuries arose out of and in the course of his employment – At issue was the status of the defendant taxi driver and whether his conduct arose out of and in the course of employment – Defendant employed spare drivers but was not registered with the Board and had no personal optional protection (“P.O.P.”) – Plaintiff argued that even if the defendant was an employer for some purposes he was not acting in capacity of an employer at time of the accident and should not receive protection from suit under section 10(1) – Appeal Division panel found that the defendant was an employer – Failure to obtain P.O.P. did not affect defendant’s status as an employer – Alleged action and conduct arose out of and in the course of “employment,” which includes “business or trade.”

Law: WCA (1996): s. 1 (“employment”), s. 2(2), s. 10(1), s. 11, s. 47**Policy:** RSCM: #14.00; Decision No. 116, 2 *Workers’ Compensation Reporter* 98; Decision No. 169, 2 *Workers’ Compensation Reporter* 262; Decision No. 335, 5 *Workers’ Compensation Reporter* 101**Decisions:** Appeal Division Decision No. 93-0670, 9 *Workers’ Compensation Reporter* 731; Appeal Division Decision No. 00-0684, 17 *Workers’ Compensation Reporter* 475; Fry v. Kelly, [1994] N.J. No. 373 (Nfld. S.C.T.D.) (Q.L.)

Employer Conduct [s. 11 determination]
Appeal Division Decision No. 2001-2240

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- (1) The plaintiff claims damages for personal injury when he was struck by a taxi on July 31, 1999, while working as a ground traffic controller at the airport (“the accident”). The defendant, Ravinderjit Singh Kandola (“Kandola”), was the taxi driver. On July 11, 2000, counsel for the plaintiff requested a section 11 determination under the *Workers Compensation Act* (the Act). No request has been made regarding the status of Yellow Cab Company Ltd. (“Yellow Cab”).
 - (2) Section 11 of the Act requires the Workers’ Compensation Board (WCB or the Board) to make determinations and provide a certificate to the court regarding certain matters relevant to the legal action, and within its competence under the Act. The governors of the Board assigned this responsibility to the chief appeal commissioner and the Appeal Division: Decision of the Governors, Number 4, April 8, 1991, *Workers’ Compensation Reporter*, Vol. 7, p. 19. The Appeal Division determines the status of the parties under the Act; the court determines the effect of the certificate on the legal action.

Issue(s)

- (3) Was the plaintiff a worker whose injuries arose out of and in the course of employment? What was the status of the defendant taxi driver, and did his action or conduct, which caused the alleged breach of duty arise out of and in the course of employment?

Law and Policy

- (4) Section 10(1) of the *Workers Compensation Act* applies to a worker “in respect of any personal injury, disablement or death arising out of and in the course of employment.” Pursuant to section 82, the governors of the Workers’ Compensation Board (Board, or WCB), whose duties are now performed by a Panel of Administrators, must approve and superintend the policies and direction of the Board, including policies respecting compensation.
- (5) As set out in Governors’ Decision 86, *Workers’ Compensation Reporter*, Vol. 10, p. 781, and Panel of Administrators’ Decision 1, *Workers’ Compensation Reporter*, Vol. 11, p. 465, the published policies include the *Rehabilitation Services and Claims Manual* (R.S.C.M.), and *Workers’ Compensation Reporter*, Decisions 1–423.

Status of the Plaintiff

- (6) The plaintiff claimed compensation for the accident on July 31, 1999. He indicated on his *Application for Compensation & Report of Injury or Occupational Disease* that a Yellow Cab driver who works at the airport, knowingly broke the rules by “scooping” a fare. The plaintiff, whose duties include directing vehicle traffic, advised him not to take the fare, but the taxi driver continued to load the fare. The plaintiff called his supervisor, and walked to the front driver’s side of the car and told the driver to wait. The driver did not wait, and allegedly struck the plaintiff with the front bumper of the car. The plaintiff wrote that he stepped back, and the taxicab struck him again.
- (7) The plaintiff’s employer submitted an *Employer’s Report of Injury or Occupational Disease* regarding the incident. The employer indicated the plaintiff was their worker, whose actions at the time of injury were for the purpose of their business. The employer indicated their business was security, and the worker’s occupation was traffic control. Furthermore, the worker’s actions were part of the worker’s regular work. The employer stated the plaintiff was permanent, full-time, and not operating as a sub-contractor. He earned \$11.20 per hour, and worked four days of 8 hours each, followed by two days off. The plaintiff indicated his normal hours of work on the day of the accident as 6:30 a.m. to 3:00 p.m., and the accident as having occurred at 9:55 a.m.
- (8) Worker is defined in section 1 of the Act as including:
 - (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.

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- (9) The plaintiff's employer was registered with the WCB Assessment Department as an "employer" at the time of the accident. I find the plaintiff was under a contract of service. He was a worker under Part 1 of the Act.

Plaintiff's Injuries

- (10) The plaintiff was assigned to work at the airport, and was injured there, during work hours. He described the duties of a "taxi host," as coordinating and organizing taxis and buses traveling through the airport. His job was to stand and patrol incoming and outgoing airport traffic.
- (11) On the evidence before me, the plaintiff was attempting to enforce the rules regarding taxi pick-ups, when he claims he was injured. I find the plaintiff's injuries arose out of and in the course of his employment.

Defendant Driver's Status

- (12) Kandola was driving the taxi that allegedly struck the plaintiff. Kandola's arrangement with Yellow Cab is contained in a three-year lease dated April 6, 1998, and an Operating Agreement dated April 6, 1998. The lease is between three parties: Yellow Cab which holds the license issued by the city for the operation of Taxicab #133; the owner who is a shareholder in the company, and has the rights to operate a taxicab; and Kandola, the operator, who holds a taxi permit issued by the city police. The Lease sets out schedules of payment, depending on who was supplying the taxicab, the owner, or operator. In this case, Kandola bought the vehicle, so he paid less to Yellow Cab, than he would have if the owner supplied the vehicle.
- (13) The lease agreement was for \$1,380 per month. This gave Kandola access rights to that taxicab for the whole day, every day. Kandola was also responsible for supplying all fuel, repairs, vehicle licence from the Provincial Department of Motor Vehicles, and a road worthiness certificate. He had to pay to Yellow Cab a monthly dispatch fee, insurance costs billed to him, a yearly administration fee, and mandatory fee for bookkeeping work he agreed to have done by Yellow Cab. Kandola agreed to purchase all fuel from Yellow Cab if it were available, and to follow the various rules of the company. He agreed to accept charges to credit cards authorized by Yellow Cab, and the company would do its best to collect the amount owing, and pay the amount to the operator, subject to a "reasonable charge."
- (14) The Operating Agreement called Kandola "the owner." That agreement contained some of the same terms as the Lease, such as the owner providing fuel, maintaining road worthiness, and paying various expenses. Additional terms include the owner being responsible for the cost of installing the dispatch computer terminal, painting the vehicle the company colour, and transferring legal title of the vehicle to the company.
- (15) The policy and Appeal Division decisions have found that a taxicab operator with a flat rate lease, or shift lease is an independent operator. He is not obliged to register with the WCB unless he has workers. For coverage for himself, he could apply for personal optional protection. At one time, Kandola had personal optional protection coverage, which gave him the same benefits as a worker under the Act. At the time of the accident, he had no personal optional protection.

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- (16) The defendants maintain that Kandola was an employer at the time of the accident. The plaintiff counters that Kandola is not the employer of the spare drivers who drove his cab evenings and weekends, or on other days when he was not driving. As Kandola explained at examination for discovery, he was limited by law to driving for no more than 60 hours per week, and for times he was not driving, the company would supply a driver. Under the Lease and Operating Agreement, the taxicab was to be operated “on a continuous basis.”
- (17) Paragraph 12 of the lease provided that the taxicab could be operated only by Kandola, “or by a driver supplied or approved by the Company.” Under the Lease and Agreement, Kandola had the right to refuse the services of a particular driver, and agreed to immediately suspend or discharge a driver who the company thought had committed a serious breach of any rule or regulation of the company, city, or other regulatory body. Kandola also agreed to use the company’s bookkeeping services exclusively, for salary, deductions, and benefits for these other drivers, subject to a standard monthly charge.
- (18) Evidence from Yellow Cab is that in the month of July 1999, the month when the accident occurred, Kandola had employed the services of three other drivers. In 1998 (the year before the accident), Yellow Cab remitted second and fourth quarter assessment charges to the WCB on Kandola’s behalf. In 1999, Yellow Cab paid the Board the first quarter installment in June 1999, and the fourth quarter in January 2000.
- (19) Counsel for the plaintiff argues that Kandola was not a worker or employer at the time of the accident. The submission includes reference to the controls exerted by Yellow Cab regarding the supply of other drivers by the company, the absence of a hiring and firing relationship between Kandola and the other drivers, and Kandola’s lack of personal knowledge of whether the spare drivers worked for him or Yellow Cab. I consider that Kandola’s belief and behaviour is only part of the evidence as to the arrangement. It appears that the documentary evidence is generally accurate with respect to the terms of the agreement, and it is not determinative that Kandola did not know the specific details. Clearly, he relied on Yellow Cab to make the deductions, do the paperwork, and provide the spare drivers as necessary.
- (20) It appears that Kandola could utilize a spare driver of his choice, subject to approval by the company. I consider that in providing a spare driver at his request, Yellow Cab’s role could be seen as a labour-supply firm providing temporary workers to an employer. In some cases, the temporary workers are employed by the labour-supply firm, but in others, will become the workers of the client firm. The T-4 slips issued to the spare drivers had Kandola listed as their employer, according to the evidence provided by Yellow Cab. Driver staffing and recruiting was listed as a benefit provided by Yellow Cab in the agreement. Given that Kandola was responsible for paying the monthly lease, and his lease obligations to operate the taxi continuously, it was to his advantage to have others drive his taxicab when he was not driving. I do not view the provision of spare drivers and associated bookkeeping by Yellow Cab as changing Kandola’s independence. He paid Yellow Cab to provide that service for him.
- (21) A further factor is that if the spare driver had an accident, and the taxicab was out of commission, it was Kandola who suffered the economic consequences. Yellow Cab was assured its flat rate lease, regardless of the car being on the road. I find on the evidence as a whole that Kandola was the employer of the spare drivers.

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- (22) Kandola was characterized as an “independent operator” in the lease agreement with Yellow Cab. Counsel submits that the defendant should not be able to be characterized as an independent operator for some purposes, and an employer for others. Where a person is characterized as an independent operator for purposes outside the *Workers Compensation Act*, that characterization is not binding on the Board. The Board must make its own decision for the purposes of the Act.
- (23) On behalf of the plaintiff, it is argued that Kandola was not registered with the WCB at the date of the accident, and should not be able to take advantage of the statutory bar afforded to “employers” under the *Workers Compensation Act*. Apparently, Kandola’s account with the Board had been cancelled and was not active at the date of the accident. He later registered as an employer, and this application was back-dated to January 1, 1999. He also applied for and obtained personal optional protection, but that was not backdated, in accordance with the WCB policies.
- (24) The WCB Assessment Department at first advised the plaintiff’s counsel that Kandola was not registered on the day of the accident. A short while later, another letter advised that Kandola was registered, but to cover workers only. A third letter dated August 29, 2000 from the Manager, Assessment Marketing and Policy, indicated the worker did not have personal optional protection in effect at the time of the accident, but was registered to cover workers only. The information obtained by the Appeal Division and disclosed to the parties confirms the information in the August 29, 2000 letter.
- (25) On behalf of the defendants, it is advanced that Yellow Cab paid all assessments to the Board from 1998 when Kandola first began driving for them. Yellow Cab has provided the following evidence:
- In the first quarter of 1998, Yellow Cab made no remittance on Kandola’s behalf because he was not driving for them.
 - In July 1998, Yellow Cab paid 2nd quarter remittances to WCB on behalf of individual owners without WCB remittance forms, including Kandola. His assessment was \$92.53 on his workers’ gross earnings of \$4,168.00. No personal optional protection payment was made.
 - In July 1998, Yellow Cab billed Kandola for the WCB payment on his “Owner’s Rental Statement.”
 - In October 1998, Yellow Cab paid 3rd quarter remittances to WCB on behalf of individual owners without WCB remittance forms, including Kandola. His assessment was \$226.02. No personal optional protection payment was made.
 - In November 1998, Yellow Cab billed Kandola for the WCB charge on his “Owner’s Rental Statement.”

- In May 1999, Yellow Cab billed Kandola for the WCB charge on his “Owner’s Rental Statement,” \$173.06 on his workers’ gross earnings of \$7,795.28. No personal optional protection payment was made.
- In June 1999, Yellow Cab Cab paid 1st quarter remittances to WCB on behalf of individual owners without WCB remittance forms, including Kandola’s \$173.06.
- The accident occurred on July 31, 1999.
- In January 2000, Yellow Cab paid the 2nd, 3rd, and 4th quarter remittances to WCB on behalf of individual owners without WCB remittance forms, including Kandola. His assessment was \$387.24. Personal optional protection payment was made as if Kandola had \$7,500 of coverage.
- In February 2000, Yellow Cab billed Kandola for the WCB charge on his “Owner’s Rental Statement.”

- (26) Thus, it appears that around the time of the accident, Kandola had workers, and assessments were paid by him on those workers’ earnings. As well, the WCB accepted the payments for those workers. At the time of the accident, the 2nd quarter assessments were due, although some employers are required to pay annually, if their assessments are low. Kandola, however, had not re-registered with the Board to re-activate his account, so it is not clear to whose account, if any, the money paid was credited to. Does Kandola’s failure to properly register with the WCB in these circumstances mean he was not an “employer” for the purposes of the Act?
- (27) Some support for the plaintiff’s position can be found in Decision 169, *Workers’ Compensation Reporter*, Vol. 2, p. 262. This 1975 case considered the status of the defendant in a section 11 determination. At that time, the legislation provided a bar only between workers and employers, not workers and workers. The defendant and his wife had applied for and received personal optional protection for their hotel business. At the time of the accident in July 1973, they did not have any workers, but the commissioners said it is not necessary that they have someone in their service on that particular day. It was determined the defendant’s wife was not a worker, but a partner in the business. They had a waitress in 1972, approximately a year before the accident. The commissioners said, the defendant did not cease to be an employer on the day when his only worker left, but he does not retain the status of an employer indefinitely. The commissioners also considered whether casual labour occasionally hired to take garbage to the dump, or other such jobs would make the defendant an employer under the Act. They stated, “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.*” [emphasis added] Prior to the section 11 determination being requested, the defendant had produced a payroll report for 1973 (the year of the accident), indicating he had paid no wages or salaries in 1973. As a result he was charged no assessments. The commissioners interpreted these events to mean the Board had decided the defendant was not an employer in 1973, in accordance with the defendant’s own position. Now, the defendant wished to change his position, even offering to pay retroactive assessments. The commissioners rejected that possibility, saying he could not now seek the benefits of the statutory bar, having failed to meet his obligations.

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- (28) The facts in Decision 169 can be distinguished from the situation before me, in that the hotel owners had already declared to the Board that they had no workers prior to the request for a section 11 determination. Kandola's situation differs in that he had, through Yellow Cab, paid assessments to the WCB for his workers, and the WCB had accepted those payments. Thus, his payments were consistent with his having taken on the responsibilities of an employer, even though it turned out he did not have an active account with the Board.
- (29) In my view, obtaining a registration number is not the trigger for becoming an employer under the Act. There is no reference to registration in the statutory definitions of "employer," and the Board policy is that it is not necessary for the employer to be registered for its workers to be covered. My analysis is consistent with the provisions of section 47 of the Act. It allows the Board to penalize employers who failed to advise the Board of probable payroll reports when they became an employer, or were delinquent in providing a payroll return, and their worker suffers an injury while they were in default. Thus, the Act seems to contemplate a person being an "employer" while in default.
- (30) The situation is different for independent operators or employers seeking the status of workers by obtaining personal optional protection. In that case, coverage begins only upon application being accepted by the Board, a rule made by the Board under the authority given it under section 2(2), which allows the Board to grant coverage on terms specified by it.
- (31) Counsel for the plaintiff seeks support in Appeal Division Decision #00-0684, <http://www.worksafebc.com/appealdecisions/pdf/2000/2000-0684.pdf>. The active principal of a corporation failed to register his corporation with the Board. He was then involved in a motor vehicle accident, and sought to sue for his personal injuries. The *Assessment Policy Manual* provides that the active principal of a limited company is considered the worker of the corporation. The majority considered that having failed to register the corporation with the WCB, the plaintiff likely would not be eligible for workers' compensation benefits, due to the Board's policy of piercing the corporate veil in such situations. The majority relied on their interpretation of Decision 335, *Workers' Compensation Reporter*, Vol. 5, p. 101. They reasoned that the plaintiff could only be denied benefits under Decision 335 if he were not a worker; therefore, they found he was not a worker for section 11 purposes.
- (32) The plaintiff in that case had failed to register the limited company when he was required to do so, and therefore, had not made his business known to the Board. The defendant in the case before me, had not re-activated his account, but had been making payments to the Board. The payments are a significant factor in my decision because it indicates his assumed responsibility for the replacement drivers. Counsel for the plaintiff advances that the payments were made through the Yellow Cab account. I do not agree. The third column on the remittance records list each WCB account number.
- (33) Counsel also advances that failure to pay for personal optional protection weighs against the defendant being able to receive benefits under the Act. Whereas personal optional protection would have provided compensation benefits if Kandola were injured, failure to obtain personal optional protection does not affect Kandola's status as an employer.
- (34) I conclude that Kandola was an employer at the date of the accident.

Driver's Action or Conduct

- (35) Counsel for the plaintiff advances that even if Kandola were an employer for some purposes, he was not acting in the capacity of an “employer” at the time of the accident. Counsel submits that at the time of the accident, Kandola was not undertaking actions related to his employees. In fact, it is submitted he never performed the functions of an employer, such as hiring, firing, disciplining and controlling his alleged workers. While he was driving the taxi, counsel submits, he should be considered an “independent operator” without personal optional protection.
- (36) Support for that position can be found in published Appeal Division Decision, #93-0670, *Medical Malpractice Action (No. 1)*, 9 *Workers' Compensation Reporter* 731, also available on line at http://www.worksafebc.com/policy/appeals/93_0670.PDF, (“*Cesari*”). *Cesari* was followed in Appeal Division Decision #98-0728, which can be viewed at <http://www.worksafebc.com/appealdecisions/pdf/1998/1998-0728.pdf>.
- (37) *Cesari's* dependents sued Dr. Ellis after Mr. *Cesari* died, allegedly because of the medical treatment rendered for a compensable injury. As I understand the reasoning in that case, the panel determined the physician was not covered because his actions as a health care provider were not within the “employment relationship.” The physician had voluntarily registered with the WCB as an employer, to cover his office staff. The decision says that by taking out personal optional protection, the doctor could have brought the treatment he rendered into “employment”:

The registration of any firm, including a private doctor's office, concerns the employment activities of its workers. Assessments are paid on the wages of the workers and the workers are covered for compensation benefits for injuries arising out of and in the course of that employment.

... The practice of medicine, on its own, is not a compulsory industry within Part 1 of the Act. It is included only on application. When an unincorporated private doctor's office is brought within Part 1 of the Act on application, *no assessments are paid on the doctor's wages. That would be done only if the doctor took out Personal Optional Protection.*

The employment activities of the office staff of a doctor's office would not include attending operations at the hospital. The office staff would be concerned with the management of the office, the booking of appointments, accounting matters, etc. Those workers would be covered for compensation benefits for any injuries arising out of and in the course of that employment and *their employer would be protected under section 10(1) from any legal action based on those employment activities.* Those activities define the employment relationship and “employment” for the purposes of Part 1 of the Act for the doctor's office.

Here, none of the workers of Dr. Ellis's medical office were engaged in attending to Mr. *Cesari* at the hospital. Dr. Ellis was not attending there as a worker, as he was not a worker under Part 1 of the Act. Assessments were not paid on his

earnings for attending to Mr. Cesari. *He would not have been covered for compensation benefits if he had been injured while attending to Mr. Cesari. I cannot see how this comes within the employment relationship or “employment” within Part 1 of the Act. Dr. Ellis declined to bring his activities into “employment” under Part 1 of the Act by not taking out Personal Optional Protection.*

[emphasis added]

(38) It appears that the panel found that an employer’s protection from suit was with respect to his office staff’s activities, described as including managing the office, booking appointments, and accounting. The focus is who was engaged in the culpable behaviour, and whether assessments had been paid on that person’s earnings.

(39) The Appeal Division determined Dr. Ellis’s action or conduct was not part of “the employment relationship” with his office staff. However, section 10(1) does not refer to “the employment relationship,” but to action or conduct arising out of and in the course of employment. The definition of “employment” contained in section 1 of the Act, remains broadly defined in the current Act:

“employment”, when used in Part 1, means and refers to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1.

(40) Thus, “the employment” could be an “establishment,” “undertaking,” “trade” or “business.” If we substitute “trade or business” for “employment” in section 10(1), an employer’s action or conduct arises out of and in the course of employment, when it arises out of and in the course of “trade or business,” not exempted by the Board.

(41) On its face, the definition of “employment” in section 1 does not distinguish “employment” for workers or employers. For compensation purposes, the published policy is that coverage extends beyond the “work” for which the person is being paid. Item #14.00, R.S.C.M., provides:

Confusion often occurs between the term “work” and the term “employment”. Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker’s drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.

(42) The *Cesari* decision would not apply the broad definition of “employment” articulated in the policy to employers seeking protection from suit. To the contrary, the person who is at the centre of the business activity, perhaps the only one whose effort generates the revenue and makes possible the jobs of the support staff, is not acting in the course of employment when doing the productive work at the core of the business plan.

- (43) The fact that the employer fully funds the assessments on its workers' earnings is not mentioned in the *Cesari* decision, even though payment of assessments could be seen as the cost to employers for protection from suit. The Act prohibits any contribution by workers toward the assessments payable to the Board's Accident Fund. This was acknowledged in Decision 169, referred to above. The commissioners' interpretation accords with mine that employers' immunity from suit is not limited to particular actions within the business or industry for which assessments are paid. Had the commissioners agreed with the *Cesari* approach, they could have disposed of the case very quickly by stating the hotel owner had immunity only when conducting activities relating to staff. The hotel owner's journey at the time of the motor vehicle accident had nothing to do with his workers, because he had had no workers for approximately a year before. Instead, the commissioners describe the historical bargain in broad terms, at p. 265:

When workmen's compensation was first introduced into this Province, it was something in the nature of a bargain. Workers obtained a right to compensation for injuries arising out of and in the course of employment without enquiry into fault. The new obligation imposed upon employers was to pay assessments to the Board, and in return for that obligation, employers were granted an immunity from suit by workers for injuries arising out of and in the course of employment. It would not be consistent with that policy rationale of the legislation that someone who has not accepted the role of employer, not accepted the obligations of an employer, and not paid the assessments of an employer should then be allowed to claim the status of employer when it comes to immunity from suit on a tort claim.

- (44) The commissioners' interpretation finds support in the legislative history concerning the bar against civil actions. From its inception, the B.C. Act has barred suits by a worker against his or her employer. Section 11 of the *Workmen's Compensation Act*, S.B.C. 1916, c. 77, stated:

11 (1) The provisions of this Part shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law, or by any Statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the employer shall lie in respect of such accident.

- (45) The employer's action or conduct is not described. Rather, the section bars suits against the worker's employer where the worker's accident arises out of and in the course of the worker's employment. This is different than the current Act, which specifies the bar applies only where the employer's action or conduct which caused the breach of duty arose out of and in the course of employment within the scope of Part 1.
- (46) The injured worker was also barred from suing another employer covered by Part 1 of the Act, but this was in a separate section, along with the provisions relating to suits against third parties. Section 10(1) provided a worker may elect to claim compensation, or if possible, sue

someone other than his own employer. Section 10(4) however, limited a worker's right to sue an employer other than his own:

(4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part; . . .

(47) That subsection proceeded to give the Board discretion to charge the cost of compensation against a different subclass. There did not seem to be any requirement that the employer's culpable activity was related to the employer's business which was covered under the Act. On its face, the worker could not sue an employer who was covered under the Act, even if the employer's activities were completely personal.

(48) In 1954, that was addressed with the addition of the underlined clause:

(4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part *when the accident arises out of and in the course of the business of the employer; . . .*

(49) The term, "business," was not defined in section 1 of the Act, although "employment" was defined as including "business":

"employment," when used in Part I, means and refers to the whole or any part of any establishment, undertaking, trade, or business within the scope of that Part, and in the case of any industry not as a whole within the scope of Part I includes any department or part of such industry as would if carried on separately be within the scope of Part I.

(50) In the 1966 Report of Mr. Justice Tysoe, who conducted a Commission of Inquiry into the *Workmen's Compensation Act*, these provisions were reviewed in detail. Mr. Justice Tysoe provided his interpretation of the provisions:

In my opinion what the Legislature intended in enacting subsection (4) was that when a workman suffers a personal injury by accident arising out of and in the course of his employment, neither the workman nor his dependent nor his employer shall have any right of action in respect thereof against an employer in any industry within the scope of Part I of the Act when the accident arises out of and *in the course of business* of the employer last referred to.

[emphasis added]

(51) Mr. Justice Tysoe also addressed concerns with the interpretation of the combined effect of section 11(1), and (4). He was asked whether a worker could maintain an action for a “top up” of benefits promised in a collective agreement while a worker was receiving workers’ compensation payments; or whether a worker could maintain an action for property loss occurring in the same accident in which he was injured. Mr. Justice Tysoe recommended greater precision in defining the class or type of cause of action which is intended to be barred. As well, the Report recommended that the Board continue to determine the status of the parties, but whether the action is barred should be decided by the court, not the WCB.

(52) Likely in response to the Tysoe Report, the bar against suing another employer was moved in the 1968 amendments to the provision barring actions by a worker against the worker’s own employer, that is, section 10 of the Act, S.B.C. 1968, c. 59:

10 (1) 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, whether that duty be imposed by law or contract, express or implied, to which a workman, dependent, or member of the family of the workman is or may be entitled against the employer of the workman, or against any employer within the scope of this Part, in respect of any personal injury, disablement, or death arising out of and in the course of employment and no action in respect thereof lies. This provision applies only when the action or conduct of the employer, his servant or agent, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

(53) That provision resembles the current one, except that workers could still sue and be sued by other workers. This changed in 1974 when the bar was extended to protect workers from suit by other workers under the Act. That was also when that the term “worker” replaced “workman.” Minor wording changes have occurred since. Section 10(1) now provides:

10 (1) 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, dependent 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.

(54) In sum, the Act has always afforded employers protection from suit by their own workers and other employers’ workers. Various refinements were made to the bar, but none of them required the employer to obtain personal optional protection. Until 1974, workers could be sued by other workers, so obtaining personal optional protection to obtain the benefits under

Part 1 afforded to “workers” would have been irrelevant. When the bar was extended to worker versus worker actions, no change was introduced requiring employers to obtain personal optional protection to maintain protection.

- (55) I have also canvassed judicial consideration of this issue. Keeping in mind that workers’ compensation legislation differs between provinces, the Newfoundland Supreme Court squarely addressed the issue of whether there is a valid distinction between an employer’s “business” generally and an employer’s “business as an employer” in *Fry v. Kelly*, [1994] N.J. No. 373 (Nfld. S.C.T.D.); followed in *King v. Newfoundland (Workplace Health, Safety and Compensation Commission)*, [1999] N.J. No. 176 (Nfld. S.C.T.D.).
- (56) The *Fry* case arose from a motor vehicle accident. The plaintiffs were employees of the provincial government, who were “workers” within the course of their employment at the time of the accident and received compensation for their injuries. The defendant had a business delivering mail under contract to Canada Post. He had one employee and was assessed on the payroll of that single employee. At the time of the accident, the defendant was carrying on his business of mail delivery in a truck which he owned. The plaintiffs commenced an action claiming damages resulting from the defendant’s alleged negligence in driving his vehicle. The defendant requested a determination from the Board of Commissioners of the Workers’ Compensation Commission of Newfoundland and Labrador (the “Commission”) on whether the action was barred under the applicable section of the Newfoundland Act [R.S.N., c. 403 (as amended)], which provided:

... neither the workmen, his personal representative, his dependents nor the employer of the workman has any right of action in respect of the accident against an employer in any industry within the scope of this Part or against any workman of that employer unless the accident occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

- (57) The Commission (which was overturned by the court) articulated an approach similar to that adopted by the Appeal Division in *Cesari*:

Having concluded that Mr. Fry is not a worker under the Act and would have been excluded for coverage had he been injured, we must decide the question of whether the wording of Section 12(1) may be applied to achieve immunity from suit because he was an employer of one employee on whom coverage had been obtained. Can Mr. Fry claim absolute immunity even in a case where the injury resulted from his own negligence?

... the question is whether Mr. Fry can avail of the words ‘an employer in any industry within the scope of this part’ to achieve immunity from suit. . . .

It is our opinion that he cannot. He is being sued as a negligent party, as a driver, etc. but not as an employer. To quote Terrence G. Ison, LL.D., an

established authority and author of “Workers’ Compensation in Canada” –
“for a claim to be barred, it must relate to some act or omission in the course of
employment or in the course of the defendant’s business as an employer.”

- (58) The defendant appealed to the court, who did not agree with the Commission that the employer could achieve immunity from suit only if the claim arose vicariously through an employee or the employer had opted for personal coverage. The court went on to note that the section on personal coverage addressed *eligibility for compensation* – it did not address the employer’s entitlement to immunity. On the face of the Act, immunity was not tied to personal coverage. The court was also not convinced that there was a valid distinction between the appellant’s business and his business as an employer. A plain reading of the section prohibited an action against an employer unless the accident occurred outside the normal course of business. Here, the accident was in the normal course of business. Immunity was granted as part of a no-fault insurance scheme funded by employers to cover accidents occurring in the course of business. To hold otherwise would be to “. . . carve out an exception to this statutory scheme for unincorporated employers.”
- (59) There are also practical reasons for following a plain reading of the Act. Limiting the employer’s course of employment to activities involving his staff may invoke an unworkable distinction. Consider, for example, a carpenter operating as a proprietor, without personal optional protection. He hires other carpenters to work on a project, and like many small business owners, also engages in the work activity of a carpenter. Does the carpenter’s protection from suit under section 10(1) depend on whether he was giving orders to his worker when he drops his hammer on a worker’s head, or if he was simply hammering at the time of the accident? There is no direction in the policy to make these types of inquiries to determine if there is a possible third party action. Furthermore, conducting such inquiries would be a daunting administrative challenge. What if the carpenter was “thinking” about going to the bank to get the payroll at the time he drops the hammer, and those thoughts distracted him from working safely? Is his “thinking” a management activity that would allow us to characterize his dropping the hammer as an “employment” activity?
- (60) In my view, the Act and policy do not envision a workers’ compensation system that decides entitlement based on such ephemeral matters as what one was thinking when the accident occurred. Employer’s coverage would be changing from moment to moment.
- (61) The former commissioners rejected an approach that resulted in coverage changing during a working day in Decision No. 116, *Workers’ Compensation Reporter*, Vol. 2, p. 98. That 1975 case involved the owner and operator of a backhoe. He had not applied for personal optional protection, so was an “independent operator” under the Act. While working on a construction site, he accidentally broke some water pipes. The custom in such a situation was for everyone on the project to help effect the repair, and no one would be charged the cost of the break. While holding the copper pipe that was being repaired, he was injured.

- (62) The board of review reasoned that the backhoe operator had temporarily become the worker of the gas company, while he was holding the pipe. The commissioners cautioned, at p. 99:

Adoption of the principle suggested would mean that in the ordinary course of a working day, compensation coverage for an independent operator could be off, on, off again and even on again, all with regard to activities conducted at the same work-site. A line would have to be drawn around the area of activity that was included in the hiring of the independent operator to distinguish that area of activity from anything extra that he did at the request of any employer or of a worker on the site. Evidence and argument on whether the extra work was of an emergency nature would have to be considered to determine whether a notional hiring of the independent operator as a temporary employee should be deemed to be authorized. Again, there would need to be evidence to determine whether the participation of the independent operator had been requested or was purely voluntary. Making such distinctions would involve the kind of hair-splitting arguments about the detailed circumstances of injury that our system of workers' compensation was intended to move away from, at least as far as possible.

- (63) The commissioners proceeded to consider various examples which illustrated the difficulty of administering such an approach. They concluded that the principle used by the Board of review would make it difficult for people to plan their insurance needs, and to determine in advance, the extent of compensation coverage or lack of it. Although Decision 116 focussed on the other aspect of the entitlement gateway – worker status – I consider it provides direction to interpret the Act and policy with principles of good administration in mind. As well, the characterization of a person's status should be clear and determinable, and not require a detailed inquiry into minutiae of the moment. That decision is still part of the published policy.
- (64) In considering a worker's entitlement to compensation, once the person is determined to be a "worker" under the Act, the policies interpret the phrase, "arising out of and in the course of employment" broadly, with foreseeable and administratively viable borders. The *Cesari* decision did not identify any policy supporting a different interpretation to determining whether the employer's action "arose out of and in the course of the employment." For these reasons, I decline to apply it to the facts before me.
- (65) Turning now to the defendant taxi driver, is driving his own taxi an activity arising out of and in the course of "trade" or "business"? Picking up fares is what generates revenue for the business, and it is central to the nature of the "undertaking, trade or business" which was registered with the Board. Thus, on a plain reading of the words of the Act, the defendant driver's action and conduct while driving his own taxi, arose out of and in the course of employment.
- (66) Furthermore, the risk of accidents is part of the business of driving a taxi. It is not alleged in the Statement of Claim that the defendant committed an intentional assault upon the plaintiff. I have considered whether being in violation of the airport rules on picking up fares was of a nature and degree sufficient to sever the defendant's actions from the course of employment. Counsel for the defendants submits that the policy in #16.00, Unauthorized Activities,

R.S.C.M., provides that even if a worker's action is in breach of a regulation, or order, or otherwise is unauthorized by the employer, it does not necessarily mean the injury did not arise out of and in the course of the employment.

- (67) Failing to wait his turn at the airport could be seen as a violation of a rule with the goal of increasing his productivity. The commissioners addressed the violation of safety rules in Decision 108, *Workers' Compensation Reporter*, Vol. 2, p. 44. In that compensation case, the worker rode to the surface from the underground mine on an ore car, in violation of the Coal Mines Regulations. The commissioners considered that if a worker falls into the temptation of using a short-cut such as this, he should not be denied compensation. Fault would not be a ground for denying compensation, except under the serious and willful misconduct provisions (now in section 5(3)). I find that Kandola's action or conduct in "scooping" the fare did not take him out of the employment.
- (68) Having considered the evidence and argument, I find that Kandola's action or conduct alleged to have caused the breach of duty arose out of and in the course of employment within the scope of this Part. He was an employer, meeting his obligations as an employer by paying assessments on his workers' earnings to the Board. His not having personal optional protection does not affect his status as an employer. His alleged action and conduct arose out of and in the course of "employment," which I interpret as including "business or trade."

Conclusion

- (69) On July 31, 1999:
1. The plaintiff was a worker whose injuries arose out of and in the course of his employment.
 2. The defendant, Ravinderjit Singh Kandola, was an employer whose action or conduct alleged to have caused the breach of duty arose out of and in the course of employment within the scope of Part 1.