

WORKERS' COMPENSATION REPORTER

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*Workplace safety and health is our challenge.
Quality rehabilitation and fair compensation is our commitment.
World leadership is our goal.*

Sections and excerpts from the Workers Compensation Act, Revised Statutes of British Columbia, Chapter 437 are provided for convenience and are to be used for informational purposes only.

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- Blue — Governors' Decisions
- Green — Appeal Division Decisions
- Pink — Miscellaneous
- Purple — Review Board Findings
- Orange — Court Decisions



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Decision of the Appeal Division

Number: 92-0025
Date: January 6, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Captive Road (No. 1) and Misconduct by Worker

A Section 11 determination has been requested in this legal action by counsel for the plaintiff. Comprehensive submissions have been provided by both counsel. Submissions were also invited from Ainsworth Lumber Co. Ltd., the employer of the plaintiff and the defendant Zimmerlee, notwithstanding the fact that the company is not a party to the legal action.

The Appeal Division was created on June 3, 1991 by Bill 27, the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4 dated April 8, 1991 assigned to the chief appeal commissioner and the Appeal Division the W.C.B.'s obligation to issue certificates under Section 11. Section 11 of the *Workers Compensation Act* provides:

Certification to court

11. Where an action based on a disability caused by industrial disease, personal injury or death is brought, the board shall, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this *Act* and, without limiting the generality of the foregoing, may determine whether
- (a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;
 - (b) injury, disability or death of a worker arose out of, and in the course of, his employment;
 - (c) an employer or his servant or agent was, at the time the cause of action arose, employed by another employer; and
 - (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part,
- and shall certify its determination to the court.

Section 85.2(6) of the *Act* provides that:

A decision of the appeal division or of a panel shall be deemed to be a decision of the board.

On December 11, 1987, the plaintiff, James Bourgeois, was riding as a passenger in a vehicle driven by the defendant, Debra Marlene Zimmerlee. The plaintiff and the defendant Zimmerlee were both employed by Ainsworth Lumber Co. Ltd., and were commuting to work at their employer's sawmill. They received no compensation from their employer in connection with their travel en route to work. The defendant Zimmerlee apparently lost control of her vehicle, and both she and the plaintiff received injuries in the subsequent collision with a logging truck. The accident was described in a letter dated January 5, 1988 from the investigating police constable as follows:

Debra ZIMMERLEE was driving a 1984 Dodge 4 wheel drive southbound on the Ainsworth Mill Road. Approximately ½ mile before the Ainsworth Mill, ZIMMERLEE noticed the lights of the '87 Western Star Logging Truck driven by BRASS, coming towards her. She attempted to pull over to the right and in so doing, lost control of the pickup. The road was hard packed snow & ZIMMERLEE's vehicle skidded approximately 30 yards side ways and collided with the logging truck.

Ms. ZIMMERLEE suffered minor injuries in the accident; pulled ligaments in the rib area. Passenger, James BOURGEOIS suffered a concussion.

As a result of our investigation, a Traffic Violation Report was issued to Ms. ZIMMERLEE for "Drive too fast for Road Conditions", Section 149(c) *Motor Vehicle Act*.

The logging truck was owned by the defendant Heyworth Transport Inc., and was being driven by the defendant Kal Brass. Mr. Brass has just unloaded a load of logs at the Ainsworth Sawmill, and was approximately a half mile from the mill site on the Ainsworth Mill Road when the accident occurred.

The plaintiff and defendant Zimmerlee both submitted applications for compensation. Their applications were denied by the claims adjudicator, who found that they were simply travelling to work on a public road at the time of the accident.

In considering the Section 11 application, the Appeal Division must consider the matter anew notwithstanding any prior determination by a Board officer. The prior decisions of the claims adjudicator do not limit the Appeal Division's consideration of the issues before it in a Section 11 determination.

(A) “Captive Road Doctrine”

The policy of the governors, as stated in #18.10 of the *Rehabilitation Services and Claims Manual*, provides:

The general rule is that there is no coverage while a worker is travelling along the roads which lie between his place of residence and his employer’s premises. However, in some cases, the nature of the road leading to the employer’s premises may give coverage while on that road.

Counsel for the defendant has argued that the nature of the road leading to the employer’s premises in this case brings the employees within the scope of their employment based on the “Captive Road Doctrine.” The “Captive Road Doctrine” is set out in #18.11 of the *Manual*, and Decisions 50 and 126 of the *Workers’ Compensation Reporter*. In order to consider this argument, it is necessary to ascertain the facts with respect to the history and use of the road on which the accident occurred.

The Ainsworth sawmill is located some distance from the nearest “public” road (Chasm Road). It is located on a semi-circular gravel road, the two ends of which connect with Chasm Road. The portion of the gravel road between the mill and Chasm Road, in the northerly direction, is known as the 3400 Road. The portion of the gravel road between the mill and Chasm Road, in the southerly direction, is known as the Ainsworth Mill Road. The accident occurred on the Ainsworth Mill Road. The 3400 Road, and the Ainsworth Mill Road, are approximately 2 km in length, each forming a quarter circle. The two roads in effect form a continuous semi-circular route past the sawmill. The Ainsworth sawmill may be approached from either road.

The Ainsworth Mill Road was originally constructed based on authorization given by the Ministry of Forests in a letter of consent dated November 9, 1970 for the construction of a right-of-way. The original consent was provided to Ainsworth Lumber Co. Ltd.’s predecessor, which was known as “The Cattermole-Trethewey Contractors Ltd.” Permission was granted for the construction and existence of an access road for a period of five years. The original letter of consent was to expire in November 1975. A second LETTER OF CONSENT FOR RIGHT-OF-WAY was issued under the provisions of Part VI of the *Forest Act* to Ainsworth Lumber Co. Ltd. on May 17, 1976:

for the period terminating with the completion of the removal of merchantable timber from the area of Timber Sale Harvesting Licence A05478.

Some of the conditions included in the LETTER OF CONSENT FOR RIGHT-OF-WAY were as follows:

- (9) The Minister reserves the right to take possession of the road constructed under the authority of this consent at any time without compensation to the consent-holder, but, however, subject to permitting the holder the use of the road for the original period and purpose granted in this consent.
- (10) The Minister reserves the right of access over and along the right-of-way area for use by employees and agents of the Crown and for the use of vehicles thereon.
- (14) The right-of-way must be cleared on a location and the road must be constructed to a standard approved by the District Forester.
- (15) The consent-holder shall, to the satisfaction of the District Forester, install drainage structures of sufficient size, type, and number or take other suitable measures to provide adequate draining to prevent erosion.

Thomas Lane, a resource officer, Engineering Department, Ministry of Forests, states in an Affidavit dated November 16, 1990, as follows:

11. That as far as the Ministry of Forests is concerned the purpose of this road is to permit access to the Ainsworth mill site only and the function of the letter of consent is to permit Ainsworth Lumber Co. Ltd. to have access to its mill across Crown land.
12. That the Ministry of Forests is not responsible for the construction, upkeep, or maintenance of the access road to the mill site.

An Affidavit dated November 14, 1990 has been provided by Robin Nadin, road construction and maintenance superintendent for the Ainsworth Lumber Co. Ltd., stating:

4. That the original access road was constructed in the early 1970's and was constructed for the purpose of providing access for the mill. The road was subsequently upgraded and expanded by Ainsworth Lumber Co. Ltd.

-
7. That once you have left Chasm Road and are on the access road to the mill there are no turn-offs or other departures from the access road and the road leads to no other place than to the Ainsworth mill.
 12. That there are a number of private residences along Chasm Road. . . , however access to all of those houses are off of Chasm Road proper and not off the access road to the mill.
 16. That Ainsworth Lumber Co. Ltd. and no one else is responsible for all construction, upgrading, maintenance and snow removal on the access road to the Chasm mill[sic].

Use of the Ainsworth Mill Road, and the 3400 Road, was not restricted to employees of the Ainsworth Lumber Co. Ltd. Robin Nadin further advises in a written statement that:

It is the company's policy that no restrictions be placed on the use of the road. All public activity is carried on with the company's full knowledge and permission . . . There are no gates preventing public access to the said highway and there are no Ainsworth buildings until the weigh scale. An employee or visitor must turn off the road in question to gain access to the mill . . . Further, there is no requirement for a worker reporting to work to wear a hard hat until that individual steps outside the vehicle in the company yard.

In a statement provided by Robert McCormack, trucking superintendent for Ainsworth Lumber Co. Ltd., the following uses of the road were described:

The main line of the British Columbia Railway parallels the northern half of this road to its intersection with Chasm Road. The said road is used regularly by B.C. Railway employees to service the main line and as additional access to the main line.

. . . there are B.C. Hydro lines running adjacent to the road which service the public along the northern half of the road [ie. the 3400 Road]. The said road is used regularly by B.C. Hydro employees in maintaining the power lines.

Further, B.C. Telephone and its employees use the road on a regular basis when servicing their customers in the area.

The road is bordered to the northeast by a ranch owned by Mr. Willis and is available to him for access to his ranching operation.

Ainsworth Lumber Co. Ltd. offers tours of its sawmill operation. These tours are well attended in sufficient numbers that there is considerable use of the road for this purpose. The company accommodates groups from the public and it is a regular occurrence for school children to be brought on tour. In addition, tours have been arranged on a frequent basis over the years for groups of foreign visitors from Japan, Germany and Sweden.

Tourists can and do use the subject road regularly . . . Tourists frequently take the semi-circular drive as part of their touring activities and it is not uncommon to see motor homes and other recreational vehicles using this road.

From the southern intersection of Chasm Road to the sawmill, there are several logging roads and trails leading off from the subject highway into the bush, which are used by hunters. There is sufficient game in the area to the extent where, approximately four years ago, an agreement had to be reached between the union and management to safeguard the workers from hunters shooting in the area. As a result of that agreement, I personally erected a sign in the area where the motor vehicle accident occurred which reads: "NO HUNTING OR SHOOTING WITHIN ¼ MILE OF MILL YARD".

In a statement dated July 31, 1991, Robert Willis, owner of the nearby Anchor Ranch, similarly described the various uses of the Ainsworth Mill Road. He advises that the road is always well maintained and is plowed, gravelled and graded regularly. He also notes that logging has been carried on in this area in the past which was not associated with the Ainsworth sawmill. For example, trees on those lands making up his grazing permit which had been killed by bugs were harvested and removed by way of the Ainsworth Mill Road and the 3400 Road. Land belonging to Mr. Willis, and over which he has a grazing permit, is enclosed on one side by the 3400 Road.

The Ministry of Forests has designated those lands as a "Cash Sale Lot" which are adjacent to, and enclosed on one side by, the Ainsworth Mill Road. This permits the removal of minor volumes of Crown timber for personal consumptive uses by the general public.

I note in particular the July 31, 1991 Statement of Les Twa, which reads in part:

I am the Petro-Canada agent for Williams Lake, 100 Mile House, Clinton and area.

Petro-Canada operates a commercial key lock station next to the Ainsworth Sawmill. Located on site is a commercial diesel pump to service our customers. Approximately 6,000 gallons of fuel are stored in two large above-ground tanks located immediately next to the pump.

We have 40 – 50 customers which use our facilities. At any given time, 90% of our customers are employed directly by the sawmill. The remaining 10% have nothing to do with the sawmill or its operation.

Key locks are available to any commercial customer, provided they obtain credit approval through Petro-Canada or the Agency. There is no requirement that the customer be affiliated with Ainsworth Lumber Co. Ltd.

The station is serviced and refilled twice per week on average. Access to the key lock is gained through either the Ainsworth Mill Road or 3400 Road . . .

It is evident from Mr. Twa's statement that he has approximately four or five customers who are not connected in any way with the Ainsworth sawmill.

Some of the key points in the governors' policy, as stated in #18.11 of the *Manual*, are as follows:

- (a) A "captive road" is one which is technically a public highway but as a practical matter leads only to the premises of the particular employer and is for practical purposes under the control of that employer. In such a case, the road might be classified as part of the employer's premises for compensation purposes.
- (b) The case for classifying a road as a "Captive Road" is particularly strong if the employer makes decisions on repairs.
- (c) The application of this doctrine may be rejected where the road is used by multiple employers.

-
- (d) Occasional use by the public, such as tourists or people looking for spots for recreational fishing, is not inconsistent with the “Captive Road Doctrine”.
 - (e) The decision must be based on evidence as to the real nature of the use and hazard of the road, rather than strictly on the basis of legal ownership and control.
 - (f) Even if the injury occurs on a “Captive Road”, it remains necessary to consider the surrounding circumstances in order to determine whether the injury arose out of and in the course of the employment. For the purposes of this consideration, however, the accident will be treated as though it had occurred on the employer’s premises.

I have carefully considered the evidence and submissions provided to determine whether the Ainsworth Mill Road, where the accident occurred, should be considered a “Captive Road.” Such a decision involves a judgment, based on a weighing of the factual evidence, as to the “real” use of the road.

I have given particular consideration to the existence of another employer (Petro-Canada) on the road. I note, however, that this is a key lock operation for commercial customers, and that they have only four or five customers who have no connection with the mill. I consider that the existence and location of this one other employer on the road is essentially secondary to the operation of the Ainsworth Sawmill. Similarly, the travelling of tour groups for the purpose of visiting the mill is incidental to the mill’s operation.

I am satisfied that use of the Ainsworth Mill Road is primarily connected with the Ainsworth Sawmill. Responsibility for the maintenance and upkeep of the road clearly rests solely with the Ainsworth sawmill. While the road is also subject to a variety of other uses, as described in detail in the submissions of plaintiff’s counsel, these all appear to be occasional and incidental in nature. It is not surprising that once a road is established, it will be subject to such other uses. I am not persuaded, however, that the extent of the use of the Ainsworth Mill Road by the public in this case is inconsistent with the application of the “Captive Road Doctrine.” While there is evidence on both sides of the issue, I find that the weight of the evidence supports the conclusion that this was a “Captive Road.” I find that the actual public use of the Ainsworth Mill Road is similar to that considered in Decision 126 of the *Workers’ Compensation Reporter* (Vol. 2: p. 123), where it was found:

There is evidence that the public do use the road right up to the mine. But this use is by occasional tourists going nowhere in

particular or by people looking for fishing spots. This limited use by the public is not inconsistent with the captive road doctrine.

(B) Arising Out of and In the Course of the Employment

As noted under (f) above, it remains necessary to consider whether the accident arose out of and in the course of the employment of the plaintiff and of the defendant Zimmerlee. In Memo #2 on the defendant Zimmerlee's claim file, the claims adjudicator commented as follows:

It should also be noted that this worker was charged under the *Motor Vehicle Act* for a violation. I feel that her actions at the time were also serious and willful misconduct and should this claim be reviewed by a Review Board and the decision that it is not a captive road be overturned, *I would say that this worker removed herself from her course of employment by the terms of Section 5(3), that the injury would be attributable solely to the worker's misconduct. She knows under the Motor Vehicle Act that you have to drive in a safe and prudent matter and she chose not to, she also was driving a vehicle with poor tires.*

(emphasis added)

The two portions underlined in the quotation from the claims adjudicator's letter, dealing with the defendant Zimmerlee's "misconduct" and the "poor tires" on her vehicle, are addressed separately below.

(i) Section 5(3): Misconduct of Worker

Section 5(3) of the *Workers Compensation Act* provides:

Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation shall not be payable unless the injury results in death or serious or permanent disablement.

The policy of the governors is stated in #16.60 of the *Rehabilitation Services and Claims Manual*:

Before Section 5(3) can be considered, it must have been determined under Section 5(1) that the injury arose out of and in the course of the employment. The actions or conduct of the worker may induce the Board to conclude that his injury does

not meet that requirement. If such a conclusion is reached, the claim will be denied even though the worker has suffered death or serious or permanent disablement.

T.G. Ison, in his book *Workers' Compensation in Canada*, Second Edition, states at page 64 that:

The restrictions imposed on the application of this statutory bar have sometimes been avoided by a court or a board saying that misconduct takes the worker outside the course of his employment. That proposition is, however, inconsistent with the intent and the express terms of the Acts.

The application of Section 5(3) involves several issues. For the purpose of considering this Section 11 application, it is sufficient to address only one of these issues.

The wording "compensation shall not be payable" in Section 5(3) is significant. The section is phrased in terms of the payment of compensation, rather than in terms of the scope of the employment. It would be logically inconsistent to define the scope of the employment as being contingent on the consequences of the injury.

The governors' policy stated in #16.60 of the *Rehabilitation Services and Claims Manual* provides that if a disability is prolonged, it may be regarded as serious even though the initial injury appears minor. It would indeed be strange if it were necessary to ascertain the length of the period of disability, in order to determine whether the worker's injury arose out of and in the course of their employment. Section 5(3) merely constitutes a bar to the payment of compensation in some cases, rather than altering the worker's status at the time of their injury. Serious and wilful misconduct within the meaning of Section 5(3) may preclude the payment of compensation where it is the sole cause of the injury, but it does not take a worker outside the scope of their employment.

In other words, Section 5(3) may constitute a bar to the payment of compensation in some cases (not involving death or serious or permanent disablement), based on serious and wilful misconduct by the worker. Even where the requirements that there have been "serious and wilful misconduct" are met, however, this does not mean that the worker is considered to be outside the scope of their employment. I find that the claims adjudicator was incorrect in concluding that the defendant Zimmerlee had removed herself from the course of her employment based on Section 5(3) of the *Act*.

In light of my conclusion on this issue, it is not necessary that I determine whether the defendant Zimmerlee's injury was attributable "solely" to "serious and wilful misconduct" within the meaning of Section 5(3) of the *Act*. For the purposes of providing a Section 11 certificate, it is not necessary for the Appeal Division to determine whether compensation would be payable by the Board.

(ii) Section 5(4) Presumption

The claims adjudicator also makes reference to “poor tires.” This appears to have been based on a conversation with the police constable who investigated the accident scene. The police report on file contains no reference to the condition of the tires on the vehicle. In #18.11 of the *Manual*, it is noted that:

The circumstances surrounding the injury may indicate that, notwithstanding the place where it occurred, it did not arise out of and in the course of the employment. Therefore, a claim for an injury on a “captive road” was denied when the accident was due to the dangerous condition of the claimant’s own vehicle.

This statement of policy must be applied with caution, in connection with the application of the “Captive Road Doctrine.” A worker travelling on a “Captive Road” must be considered in the same manner as any other worker on the employer’s premises (e.g. such as a worker parking his car in the employer’s parking lot). The road is part of the employer’s premises for compensation purposes. The presumption contained in Section 5(4) of the *Act* applies, which states:

In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

The presumption established by Section 5(4) is capable of being rebutted. In this case, however, I do not find that the reference to poor tires overcomes the presumption contained in Section 5(4) of the *Act*. I do not consider that grounds have been established for concluding that the accident was due to the “dangerous” condition of the defendant Zimmerlee’s vehicle, or that the accident did not otherwise arise out of and in the course of the employment of the plaintiff and the defendant Zimmerlee.

(C) Section 10: Right to Bring an Action

The plaintiff is arguing that he was not a worker in the course of his employment at the time of the accident. Section 10(1) of the *Workers Compensation Act* bars a worker from suing an employer or another worker, in respect of any injury arising out of and in the course of their employment. It is often the case in a Section 11 proceeding that an individual would prefer not to be found to be a worker, so that they are able to pursue a legal action against the person responsible for their injury. The Appeal Division cannot,

however, take into account the wishes of the plaintiff or defendant in arriving at its determination. The Appeal Division has the responsibility to apply and interpret the *Workers Compensation Act*, regulations and existing Board published policy. The determination rendered must be consistent with Board policy and Appeal Division decisions in other cases where a worker is seeking compensation coverage.

While I have referred to the effect of Section 10 of the *Act* in the preceding paragraph, I would emphasize that in so doing I have not rendered any determination concerning the effect of the Appeal Division certificate in the legal action. In his written submission, Defence counsel defines one of the issues for the Appeal Division as follows:

Is [the Plaintiff's] right to bring an action for damages as against the Defendants barred by the provisions of Section 10 of the *Workers Compensation Act*?

The Appeal Division determines the status of the parties pursuant to its authority under the *Workers Compensation Act*. It is, however, for the courts to determine the effect of the Section 11 certificate on the legal action based on Section 10 of the *Act*. In the case of *Smith v. Vancouver General Hospital* (1981) 31 B.C.L.R. 358, the British Columbia Court of Appeal held that (at page 362):

The effect of s. 10 is to take away the cause of action, not to adjudicate upon the cause of action. I cannot read s. 11 independently of s. 10 and do not agree that a determination by the board under s. 11 is interference in the decision in the action, but is a determination whether the action is to take place at all. Under s. 11 the board is not concerned with the wrongdoing, but merely with the status of the parties under the scheme. Section 11 is part of the scheme of the statute and part of the function of the board in carrying out that scheme.

In the British Columbia Supreme Court decision *Virk v. Bannister*, Mr. Justice Hutchison quoted with approval a letter from R.P. Goseltine, solicitor for the Workers' Compensation Board, which stated:

The Commissioners have been asked to extend the Certificate filed on the 28th of November, 1984, by certifying that the action brought by Mr. Virk had been taken away against the Defendants.

... The Commissioners consider that they have already determined the status of the parties pursuant to Section 11. For them to go on now and make a determination as to whether or not a cause of action is taken away, they consider to be "concerned with the tort" and would be beyond their jurisdiction.

The Court itself found that the plaintiff's right of action had been taken away, and this decision was confirmed by the Court of Appeal (1989) 36 B.C.L.R. (2d) 241.

For the reasons stated above, it is beyond the Appeal Division's jurisdiction to certify as to whether the plaintiff's right to bring an action for damages as against the defendants is barred by the provisions of Section 10 of the *Workers Compensation Act*, as that is a matter for the Court to determine. The request by defence counsel for such a determination by the Appeal Division must therefore be denied.

In conclusion, I find that the plaintiff and the defendant Zimmerlee were, at the time the cause of action arose, workers within the meaning of Part 1 of the *Workers Compensation Act*. The injuries suffered by the plaintiff and the defendant Zimmerlee arose out of and in the course of their employment, and the action and conduct of the defendant ZIMMERLEE which allegedly caused the breach of duty of care arose out of and in the course of her employment.

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

NO. 14667
KAMLOOPS REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

JAMES BOURGEOIS

PLAINTIFF

AND:

DEBRA MARLENE ZIMMERLEE, CLIFFORD TUCKER,
CHRYSLER CREDIT CANADA LTD., HEYWORTH TRANSPORT INC.
AND KAL BRASS

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendant in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, JAMES BOURGEOIS, was, at the time the cause of action arose, December 11, 1987, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and injuries suffered by him arose out of and in the course of his employment.
2. The Defendant, DEBRA MARLENE ZIMMERLEE, was, at the time the cause of action arose, December 11, 1987, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and the action and conduct of the Defendant ZIMMERLEE which allegedly caused the breach of duty of care arose out of and in the course of her employment.
3. The Defendant, KAL BRASS, was, at the time the cause of action arose, December 11, 1987, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and the action and conduct of the Defendant BRASS which allegedly caused the breach of duty of care arose out of and in the course of his employment.

CERTIFIED this 2nd day of January, 1992.



Decision of the Appeal Division

Number: 92-0355
Date: February 13, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Deviation from Employment

A Section 11 determination has been requested with respect to

- (a) whether at the time the alleged cause of action arose the Plaintiff was a worker within the meaning of the *Workers Compensation Act* (the *Act*) and the injuries suffered by him arose out of and in the course of his employment, and;
- (b) whether at the time of the accident the Defendant was a worker within the meaning the *Act*.

The defendant has also asked for certification as to whether the action commenced by the plaintiff against the defendant is barred by Section 11 of the *Act*.

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 based on Section 10 of the *Act*. In the case of *Smith v. Vancouver General Hospital* (1981) 31 B.C.L.R. 358, the British Columbia Court of Appeal held that (at p. 362):

The effect of s. 10 is to take away the cause of action, not to adjudicate upon the cause of action. I cannot read s. 11 independently of s. 10 and do not agree that a determination by the board under s. 11 is interference in the decision in the action, but is a determination whether the action is to take place at all. Under s. 11 the board is not concerned with the wrongdoing, but merely with the status of the parties under the scheme. S. 11 is part of the scheme of the statute and part of the function of the board in carrying out that scheme.

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. . . The Commissioners consider that they have already determined the status of the parties pursuant to Section 11. For them to go on now and make a determination as to whether or not a cause of action is taken away, they consider to be "concerned with the tort" and would be beyond their jurisdiction.

The Court itself found that the plaintiff's right of action had been taken away, and this decision was confirmed by the Court of Appeal (1989) 36 B.C.L.R. (2nd) 241.

For the reasons stated above, it is beyond the Appeal Division's jurisdiction to certify as to whether the plaintiff's right to bring an action for damages against the defendant is barred by the provisions of Section 10 of the *Act*. That is a matter for the Court to determine. The request by the defendant's counsel for such a determination by the Appeal Division must, therefore, be denied.

The plaintiff was employed by Lin-Ed Logging Company Ltd. (the company). It is agreed by the parties that both he and the defendant are workers within the meaning of the *Act*.

The defendant is a logger and, in addition, is a director, the president and a 50% shareholder of the company. The plaintiff was employed by the company for approximately two years prior to the accident which occurred shortly after 3:30 p.m. on Friday, October 20, 1989.

The terms of the plaintiff's employment included payment for 1½ hours travelling time. The defendant drove the plaintiff and three other employees (referred to herein as "the employees") to and from the worksite in order to avoid the necessity of them driving their own vehicles on the logging roads. The company often carried on logging operations in isolated areas of unorganized territories in British Columbia, usually within a 75 mile radius of Chilliwack, B.C. During the drives in and out of the isolated areas in which they worked, it was not uncommon for the plaintiff, defendant and the employees to watch for game in the trees near the edge of the road, although they only ever spotted grouse. The group often stopped the truck and took turns hunting the grouse they had spotted. Depending on the season, they would carry different type of guns such as a shotgun or a rifle in the truck.

The day of the accident the defendant drove the plaintiff and the employees to the logging site which was in an isolated area in an unorganized territory located near Walien Creek on the west side of Harrison Lake, approximately 30 miles north of Highway No. 7. The only means of access to the logging site was along a logging road used almost exclusively by logging trucks or workers in the logging industry. On the day of the accident, a semi-automatic .22 rifle was in the truck. The registered owner of the rifle was one of the employees although the rifle was actually owned by his father-in-law and had been borrowed approximately one week earlier. The defendant had used the rifle on two prior occasions.

On the date of the accident, after completing a full day's work, at approximately 3:00 p.m. the group began the trip back to Chilliwack. Less than ¼ mile from the job site the defendant, who was driving the truck, observed a grouse flying up off the road, landing approximately 40 yards away. He stopped the truck, got out of it and retrieved the rifle from behind the backseat. He loaded the rifle with a clip which he retrieved from the glove compartment. He was unsuccessful in his attempts to locate the grouse. In the course of returning to the truck and replacing the rifle behind the backseat the rifle discharged and the plaintiff was struck by the bullet.

I think it is clear on the evidence in this case that the plaintiff was a worker in the course of his employment. I base this conclusion on the fact that the plaintiff was paid during the period of time he was travelling from the job site to Chilliwack and, further, that he was in transportation provided by the employer.

Some argument appears to have been directed towards whether the plaintiff by being on the look-out for game (along with the employees) was participating in the hunting to the extent that he would have taken himself out of the course of his employment. It is not necessary for me to make a finding on this issue in view of my conclusions regarding the status of the defendant.

It is common ground that both the plaintiff and the defendant were workers at the time the incident occurred. The question has to be addressed whether the defendant's hunting activity took him out of the course of his employment.

Considering all of the factors, my determination is that his decision to stop the vehicle, retrieve the rifle and embark on a pursuit of game must be seen to represent a significant deviation from the course of his employment. He was engaged in the personal pursuit of hunting at the time of the injury.

It has been argued by the defendant's counsel that recreational social activities add to a worker's general health and fitness and are, therefore, of assistance to the employer. It is also argued that the hunting activities of this group as they travelled

together promoted a sense of camaraderie between them. Those observations may be true. They are not, however, of sufficient consequence that I would conclude the hunting activity of the defendant to be in the course of his employment. I find, therefore, that the defendant was not a worker in the course of his employment at the time the alleged cause of action arose.

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

NO. C900002
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

MARVIN R. ENGSTROM

PLAINTIFF

AND:

EDWARD J. NEUMANN

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Defendant, EDWARD K. NEUMANN, was, at the time the cause of action arose, October 20, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The action or conduct of the Defendant, EDWARD K. NEUMANN, which allegedly caused the breach of duty of care, did not arise out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 11th day of February, 1992.

REPORTER

Decision of the Appeal Division

Number: 92-0610
Date: March 16, 1992
Panel: Paul Petrie, James L. Tonn, Walter Peain
Subject: Trip with Dual Purpose

By letter dated December 2, 1991, Bonnie T. Lepin, counsel for the defendant, requested a certificate under Section 11 of the *Workers Compensation Act*. Counsel for the defendant requested a determination:

. . . as to whether or not the Plaintiff's claim is barred by Section 10 of the *Act*.

Ms. Lepin specifically requested findings as to:

- 1) whether the Defendant, Mr. Clive Malcolm, was a "worker" and the Defendant, Northwest Drywall and Building Supplies Ltd., an "employer" as defined by the *Act*;
- 2) whether the Plaintiff, Mr. Fredrick William Mater, was working for Mississippi Sauces Ltd. at the time of the accident;
- 3) if the Plaintiff is found to have been working for North Pacific at the time of the accident, whether he should be considered a worker of that employer; and
- 4) whether the Plaintiff is a worker as defined by the *Act* and thus barred by Section 10 of the *Act* from pursuing a tort claim against the Defendants.

The central issue to be resolved in this application is whether Mr. Frederick Mater was a worker under the *Act* at the time of the motor vehicle accident at 12:50 p.m. on October 23, 1989.

An oral hearing was convened on March 11, 1992 to consider the Section 11 application. The panel heard oral testimony from Mr. Mater; Mr. Doug Scarr, President of Mississippi Sauces; Mr. Dave Clenahan, claims adjuster with I.C.B.C.; Ms. Connie Abram, (former) claims adjudicator with the W.C.B.; and, Ms Susan Jacobson (former) claims adjudicator with the W.C.B.

Nature of the Employment Relationship

Because the employment relationship has some particular features that bear on our decision, the nature of the relationship as presented at the hearing is outlined as follows.

Mr. Mater began work with Mississippi Sauces in mid-July 1989. At the time, Mississippi Sauces was a partnership with Mr. Doug Scarr and Ms. Caroline Livingstone as principals. There were no other employees. Mr. Mater purchased 15% of Mississippi Sauces shares and became a “junior partner.” He was hired as a “sales manager” and was paid a salary of \$2,000 per month to increase the sales of Mississippi Sauces by promoting the product with clients. The product consisted mainly of sauces sold to food chain outlets such as Safeway, Super Value, etc.

Most of his work was in the Lower Mainland although his sales territory encompassed all of British Columbia. The nature of his employment required travelling to make contact with clients on a regular basis. Mississippi Sauces has been registered with the W.C.B. since June 5, 1984.

At the time he went to work for Mississippi Sauces, Mr. Mater was also a principal in North Pacific Rim Marketing Inc. He had three other partners; Mr. Peter Schreiber, Mrs. Sharon Mater and Mrs. Eva Schreiber. This company distributed a range of food products including Siberian ginseng, a yogurt mix, fruit drinks, etc. According to Mr. Mater, he and Mr. Schreiber were both active in working for North Pacific. The other two partners were inactive. North Pacific was never registered with the W.C.B.

The terms of Mr. Mater’s employment with Mississippi Sauces included recognition of his role with North Pacific. He agreed to work approximately 40 hours per week for Mississippi Sauces. There was an agreement that he would work 75% of his time for Mississippi Sauces and 25% of his time for North Pacific. Mr. Scarr, president of Mississippi Sauces, advised that Mr. Mater was free to arrange his own schedule to accommodate his work for North Pacific and Mississippi Sauces paid 75% of his travel expenses. On occasion, Mr. Mater sold products for Mississippi Sauces and North Pacific to the same client. He would sometimes visit clients for both employers on the same trip. There was no clear delineation between Mr. Mater’s work with the two companies and there was no expectation on Mr. Scarr’s part that there should be any separation. It was up to Mr. Mater to schedule his own work within the 75%–25% work split agreement.

The panel recognizes that the nature of the employment relationship is in some respects unusual, since it involves a high degree of individual initiative. However, the employer, through Mr. Scarr, exercised ultimate control over the working relationship and provided general direction to Mr. Mater for his work with Mississippi Sauces. On the basis of all the available evidence, it is clear to this panel that Mr. Mater's work with Mississippi Sauces involved considerable travel and we find that for compensation purposes he should be considered a travelling employee.

Policy

Published policy of the governors contained in the *Rehabilitation Services and Claims Manual* #18.40 deals with entitlement to compensation for travelling employees. That policy indicates that workers whose jobs involve travelling on a particular occasion, or generally, are covered while travelling. Where personal activities occur during business trips, the basic principle followed by the Workers' Compensation Board is set out in Larson's *Workmen's Compensation Law* as follows:

Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.

The policy also indicates that whatever other requirements there may be for accepting a claim for injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the worker is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the worker is making a significant deviation from that route for non-business purposes.

Circumstances of the Accident

On October 23rd, Mr. Mater met with Mr. Doug Scarr to discuss business related to Mississippi Sauces. Mr. Mater mentioned to Mr. Scarr that he would be doing some work for North Pacific in Surrey later in the day. Mr. Scarr testified at the hearing that he asked Mr. Mater to deliver some sauce that day to No. 1 Safeway located at 10355 King George Highway in Surrey. Mr. Scarr said he expected Mr. Mater to deliver the sauce that day since it was en route. Mr. Scarr also said that most deliveries were done by truck.

Mr. Mater apparently made some phone calls to clients and then left Mississippi Sauces's office for downtown Vancouver. It is not clear from the evidence if Mr. Mater's trip to downtown Vancouver was solely for personal business, but we conclude from

the evidence that the trip to downtown Vancouver was predominantly for business not related to Mississippi Sauces. Mr. Mater left downtown Vancouver sometime around noon en route to Surrey.

Mr. Mater stopped at a fast-food outlet for lunch at Boundary and Grandview Highway sometime after 12:30 p.m. He had returned to Grandview Highway to resume his trip to Surrey by way of the freeway and Port Mann Bridge. While stopped at the red light at the intersection of Boundary, his vehicle was struck by a truck driven by Mr. Clive Malcolm and owned by his employer, Northwest Drywall.

Mr. Mater indicates that he was planning to go directly to Hall Laboratories in Surrey to meet with a Mr. Peter Schreiber, a partner in North Pacific regarding some North Pacific business. Hall Laboratories is located at 13060 – 80th Avenue in Surrey. Mr. Mater indicates that he did not have a specific appointment to see Mr. Schreiber but that Mr. Schreiber was expecting him in the early afternoon. Mr. Mater said that if he had sufficient time after his appointment with Mr. Schreiber, he was planning to go to Rodeo Drive-In at 56 Avenue and 152 Street in Surrey on business for North Pacific. Mr. Mater said that he intended to deliver the sauces to No. 1 Safeway at 103rd Avenue and King George Highway as requested by Mr. Scarr. However, he said that because of his other commitments, he did not expect he would be able to deliver Mississippi Sauces's products to No. 1 Safeway that day and would probably have delivered them the following morning.

Mr. Mater filed a claim for I.C.B.C. benefits. His benefit application form dated November 21, 1989 indicated that his employer was Mississippi Sauces, that the injuries were sustained in the course of his employment, and that he was entitled to W.C.B. This form was accompanied by a statement prepared by Mr. Mater that was consistent with the above information. On December 18, 1989, I.C.B.C. wrote to Mr. Mater advising that his benefits claim was statute barred because he was working at the time of the injury.

On October 30, 1989, Mississippi Sauces sent an Employers' Report of Injury (Form 7) to the W.C.B. which stated that Mr. Mater's actions at the time of the injury were for the purpose of Mississippi Sauces's business and that they were part of Mr. Mater's regular work. The form was signed by the Secretary Treasurer, Ms. Carol Livingston. At the oral hearing, Mr. Mater testified that he had filled out the contents of the employer's report form for the employer. Mr. Mater also filled out and signed an Application for Compensation (Form 6) that indicates that he was employed by Mississippi Sauces at the time of the accident. The W.C.B. accepted Mr. Mater's claim and issued a wage-loss cheque for the period October 24, 1989 to December 3, 1989. Mr. Mater returned to work part time in December and was cleared by his physician to work full time starting December 27, 1989. Wage-loss benefits were, therefore, terminated as of December 26, 1989.

On January 17, 1990, Mr. Mater spoke with the W.C.B. claims adjudicator and advised that he was not working for Mississippi Sauces on October 23 when the accident occurred. He stated that he had wrapped up his obligations with Mississippi Sauces for the day and was engaged solely with his private business. On the same date, the claims adjudicator spoke with Mr. Scarr. The claims adjudicator recorded that as far as Mr. Scarr was concerned, Mr. Mater was at work and on the job at the time of the accident. At the oral hearing, Mr. Scarr agreed that this is what he probably said.

This matter was referred to a W.C.B. field investigator who, after some preliminary inquiries, concluded that there was no way to prove or disprove Mr. Mater's story. It was noted that his story was supported by Mr. Schreiber and Mr. Scarr. Mr. Mater returned the W.C.B. wage-loss cheque uncashed. Mr. Mater's legal counsel requested that the W.C.B. formally advise I.C.B.C. of Mr. Mater's status. On May 1, 1990, W.C.B. Legal Services Division advised Mr. Mater's counsel that there was insufficient information on the file to adjudicate Mr. Mater's employment status. The Board's solicitor pointed out that if Mr. Mater wished to have a formal determination of his status, an application for a Section 11 determination could be made.

Counsel for the plaintiff submits that while the plaintiff was an employee of Mississippi Sauces at the date of the accident, he was not, at the time of the accident, engaged in work for Mississippi Sauces. He also submits that the plaintiff filed a claim with the Workers' Compensation Board only because he was advised to do so by I.C.B.C.

Counsel for the defendant submits that the plaintiff was working for Mississippi Sauces at the time of the accident and seeks a finding that the plaintiff is a worker under the *Workers Compensation Act*.

Decisions and Reasons

All of the documentation provided by the plaintiff to I.C.B.C. and W.C.B. prior to January 17, 1990 indicated that the plaintiff was an employee of Mississippi Sauces at the time of the accident. The question to determine is whether the plaintiff had removed himself from that employment by virtue of his activities with North Pacific. The evidence in this case when taken as a whole indicates that the trip to Surrey was a dual purpose trip and involved work for Mississippi Sauces — the delivery to No. 1 Safeway — and for North Pacific, the meeting with Mr. Schreiber and subsequent activities.

The panel notes that No. 1 Safeway is geographically closer to the accident site than Hall Laboratories. We place significant weight on the fact that No. 1 Safeway is on a direct route to Hall Laboratories. We note that there are alternate routes that could be taken, but these alternate routes involve the same travel distance and do not offer any particular advantage. The panel finds that it is more likely that the plaintiff would have

delivered the sauces to No. 1 Safeway as requested by Mr. Scarr on his way to Hall Laboratories. Mr. Scarr's evidence was that he expected the sauces to be delivered that day. He said that the reason that Mr. Mater took the sauces was because he was going to Surrey that day. Normally, the sauces would have been delivered by truck.

The panel finds a number of inconsistencies in the plaintiff's position. The plaintiff maintains that he filed a W.C.B. claim only because I.C.B.C. required him to do so. It is clear from the evidence that I.C.B.C. Dial-A-Claim advised the plaintiff to contact the W.C.B. because he stated he was working at the time of the accident. The panel heard evidence from the I.C.B.C. adjuster, Mr. Clenahan, and we are satisfied that the plaintiff made no attempt to advise the claims adjuster that he was not working for Mississippi Sauces at the time of the accident. In fact, the plaintiff's application for I.C.B.C. benefits confirms that he was employed by Mississippi Sauces at the time of the accident. The panel also heard evidence from the claims adjudicator, Ms. Abram. We are satisfied that the plaintiff did not make any attempt to advise the W.C.B. that he was not working for Mississippi Sauces at the time of the accident. It was only after the W.C.B. had accepted his claim and paid wage loss to December 26, 1989 and I.C.B.C. had advised him that his claim for benefits was statute barred by letter dated December 18, 1989 that the plaintiff brought forward the position that his work was solely for North Pacific at the time of the accident.

In certifying, pursuant to Section 11, we are not bound by the Board's acceptance of the plaintiff's claim at the time of initial adjudication. However, after considering all of the evidence submitted by counsel for the plaintiff, counsel for the defendant, and testimony given at the oral hearing, we find that there is sufficient evidence to conclude with confidence that the plaintiff was employed by Mississippi Sauces at the time of the accident and was a worker in the course of his employment when the accident occurred.

Counsel for the defendant also seeks a finding that the defendant was a worker and the defendant, Northwest Drywall, an employer as defined by the *Act*. The evidence indicates that Northwest Drywall and Building Supplies Ltd., firm number 334375, has been registered with the Board since October 22, 1984. There is no dispute that the defendant, Mr. Malcolm, was a worker for Northwest Drywall at the time of the accident.

Finally, counsel for the defendant asks the Appeal Division to find that the plaintiff is barred by Section 10 of the *Act* from pursuing a tort claim against the defendant.

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 based on Section 10 of the *Workers Compensation Act*. It is beyond the Appeal Division's jurisdiction to certify as to whether the plaintiff's right to bring an action for damages against the defendant is

barred by the provisions of Section 10 of the *Act*. That is a matter for the court to determine. The request by the defendant's counsel for a determination related to Section 10 of the *Act* must, therefore, be denied.

To conclude, we find that the plaintiff was at the time the cause of action arose, a worker within the meaning of the *Act*. We also find that the injury to the plaintiff arose out of and in the course of his employment.

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

NO. B902523
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

FREDERICK WILLIAM MATER

PLAINTIFFS

AND:

CLIVE MALCOLM and NORTHWEST DRYWALL
& BUILDING SUPPLIES LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND UPON HEARING the evidence and argument of the parties in an oral hearing on March 11, 1992;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, FREDERICK WILLIAM MATER, was, at the time the cause of action arose, October 23, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and injuries suffered by the Plaintiff arose out of and in the course of his employment.
2. The Defendant, CLIVE MALCOLM, was, at the time the cause of action arose, October 23, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
3. The action or conduct of the Defendant, CLIVE MALCOLM, which allegedly caused the breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Act*.
4. The Defendant, NORTHWEST DRYWALL & BUILDING SUPPLIES LTD., was, at the time the cause of action arose, October 23, 1989, an employer within the meaning of Part 1 of the *Workers Compensation Act*, and was engaged in an industry within the meaning of Part 1 of the *Act*.

CERTIFIED this 16th day of March, 1992.



Decision of the Appeal Division

Number: 92-0907
Date: April 28, 1992
Panel: Alison H. Narod
Subject: Captive Road (No. 2) and Special Hazards of the Access Route

By letter dated November 14, 1990, counsel for the defendants requested a certificate under Section 11 of the *Workers Compensation Act*. The parties have provided written submissions, copies of the Pleadings, copies of the Examination For Discovery Transcripts, statements from the parties and witnesses and photographic and other documentary evidence. The plaintiff's disallowed claim has been considered.

The Appeal Division was created on June 3, 1991 by Bill 27, the *Workers Compensation Amendment Act, 1989*. The Board of Governor's Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act* provides that:

A decision of the appeal division or of a panel shall be deemed to be a decision of the board.

The action arises out of a motor vehicle accident on March 11, 1987. The plaintiff was injured when he fell from the loaded deck of a flat-deck truck owned by the defendant Babich Enterprises Ltd. ("BEL") and driven by the defendant Babich.

The issue is whether, at the time of the accident, the plaintiff was a worker within the meaning of Part 1 of the *Workers Compensation Act* and acting within the scope and course of his employment. No issue arises as to the status of the defendants: the defendant Babich was a worker acting within the scope and course of his employment with the defendant BEL at the time of the accident. At the relevant time, both BEL and the plaintiff's employer, J.S.S. Holdings ("J.S.S.") were registered as employers under the *Act*.

At the time of the accident, the plaintiff was a partner with two others in J.S.S., a falling contractor, and he was employed as a faller in that business. J.S.S. had a contract with Global Trading Corp. ("Global") to fall hardwood in a Timber Sale License at

20 Mile Bay, alongside Harrison Lake. Global had acquired the right to log this wood through a contract with BEL, who, in turn, had obtained the cutting and/or timber rights to the Timber Sale License from the Ministry of Forests. There was no direct contractual relationship between J.S.S. and BEL.

J.S.S.'s worksite was located at 20 Mile Bay and in the Timber Sale Licence. Access to the worksite was via West Harrison Lake Forest Service Road. The injury occurred on this road. All agree that this road is a gravel, logging road. It is not gated. The public has access to it (Question 178, Discovery of Babich).

Mr. Babich says he travelled the road almost daily for the two years prior to the accident. He says that the road is windy, hilly and bumpy and has potholes. He says it is not maintained by anyone and it is graded "maybe" once a year or so. At some points it narrows from about two lanes' width to about one lane's width. Bridges are a single lane's width. There are some steep hills and embankments.

The plaintiff agrees that the road's surface was extremely unfinished and says that J.S.S. had to grade it approximately three times a week. He says the road is open to the public and the public frequently travels it.

Briefly, the facts surrounding the accident are that at the end of the work day on March 11, 1987, the plaintiff, along with two employees, obtained a ride out of the worksite in a vehicle owned and operated by one of his partners, Steve O'Brien. It was getting dark and it had just stopped or was just about to stop raining. Mr. O'Brien's vehicle was disabled by a flat tire at a point about 27 or 28 kilometres from the entrance to the West Harrison Lake Forest Service Road.

Mr. Babich and an employee were following Mr. O'Brien's vehicle in a three-ton flat-deck truck owned by BEL. The flat-deck truck was loaded to about the level of the bulkhead with butt end logs which Mr. Babich was delivering to Indian Hardwoods in Bridal Falls. Mr. Babich stopped to assist the individuals in the disabled vehicle. Two of them got into the cab and two others, including the plaintiff, ended up on top of the loaded deck.

The flat-deck truck proceeded along the road and, at a point about 21 kilometres from its entrance, the plaintiff fell off the truck and sustained injuries. All agree that the injury occurred while the truck was descending a small and not very steep hill. Mr. Babich said that the grade was 3 or 4% over about ¼ mile and had a curve of 15–20 degrees. There was enough room for two vehicles to pass. There was no embankment in this particular area. Mr. Babich acknowledges that this was not the steepest hill on the road. He says he cannot recall if the road was smooth at the accident site.

The plaintiff has commenced an action in negligence against the defendants.

In this application, counsel for the defendants submits that the plaintiff's injuries arose out of and in the course of his employment. He argues that the plaintiff was being transported from his worksite by his partners on behalf of the partnership, that the injury arose out of special hazards of the access route and/or it occurred on a captive road.

1) Provision of Transportation by Employer

Counsel for the defendants submits that Mr. O'Brien, the driver of the disabled vehicle, understood that he was to be reimbursed from the partnership for his gas and vehicle expenses for driving in and out of 20 Mile Bay. The plaintiff rode to the site from time to time in Mr. O'Brien's vehicle. According to Mr. O'Brien, J.S.S. lost money on the contract and he never did receive vehicle expenses from the partnership, although he "believes" he did receive gas money from the partnership. Counsel says that, therefore, the plaintiff was being transported from his worksite by his partners on behalf of the partnership, which was his employer.

Counsel for the plaintiff says that the plaintiff was in the course of routine commuting and distinguishes the circumstances from a crew bus situation which is deemed to be an extension of the employer's premises. While payment of travel costs or wages are factors to consider, the basic question is whether the plaintiff is routinely commuting.

Counsel for the plaintiff says that J.S.S. never agreed to reimburse travel expenses and reimbursement never occurred. The plaintiff was not being transported from 20 Mile Bay by J.S.S. Holdings. The plaintiff was in the habit of providing his own transportation and occasionally rode in with one of his co-workers or partners. At the conclusion of the work day on March 11, 1987, the plaintiff was riding out as a gratuitous passenger in Mr. O'Brien's vehicle. He left that vehicle, and at the time of injury, he was riding on the defendant BEL's truck. The defendants were not under any legal obligation to provide transportation to the plaintiff.

I agree that the plaintiff was routinely commuting to and from the worksite. Mr. O'Brien's vehicle was not a "crew bus" provided by the employer. Although payment of transportation costs is a factor to consider, it is not determinative. According to item #18.22 of the Board's *Rehabilitation Services and Claims Manual* it is not usually a significant factor, nor is it ever the sole criteria. The alleged understanding of Mr. O'Brien and his "belief" that he was paid for gas expenses do not convert the occasional ride he gave to the plaintiff from routine commuting into transportation provided by the partnership.

In any event, I agree that the defendants had no legal obligation to provide the plaintiff with transportation. I find that the circumstances in which the plaintiff came to ride on the flat-bed truck did not arise out of and in the course of his employment with J.S.S.

2) Special Hazard of Access Route

Counsel for the defendants submits that the road conditions of the West Harrison Lake Forest Service Road created a special hazard well beyond the ordinary risks of highway travel. Counsel for the plaintiff says that the road does not have special hazards and the injury did not result from special hazards.

Although I have serious reservations about whether the road had special hazards, the defendants' submission is rejected on the basis that the accident and resultant injuries did not arise out of special hazards of the access road. It was dark and it had just stopped raining. The road was wet. The hill was not steep. Its curve was not sharp. There was no embankment. Mr. Babich did not recall whether or not the road was smooth. There is nothing in the evidence to suggest that the risks of the portion of the road where the accident occurred differed from the normal risks of highway travel. The evidence about the state of the road does not establish that the accident arose from special hazards of the industrial environment.

3) Captive Road

Counsel for the defendants argues in a submission dated January 9, 1991, that although the West Harrison Lake Forest Service Road was open to the public, it was a "captive road." He points out that the Ministry of Forests posted a sign near its entrance saying "use at your own risk." He says the road was used for logging trucks and was not normally used by the public except for the occasional hunter and fisherman. He says there are no public parks, businesses or private homes along the road. The real nature and use of the road at the time of this accident was access and egress to 20 Mile Bay, which was the J.S.S. worksite. At the relevant time, the Ministry of Forests did not maintain the road and it was maintained by J.S.S. Holdings pursuant to their contract with Global. Counsel points out that the plaintiff stated that J.S.S. graded the road approximately three times a week.

Counsel for the plaintiff argues in a submission dated April 3, 1992, that the road is not embraced by the captive road doctrine because the purposes it serves are not those only of J.S.S. He says the road leads to the premises of many employers working at 20 Mile Bay and at points beyond, it is not under the control of J.S.S., and it has significant use by civilians.

He says that at the southern end of the road is the Weaver Creek Fish Hatchery. The road proceeds up to and crosses Lillooet River. It then proceeds into the town of Lillooet and carries on to Pemberton.

He also says there is substantial public use of the road in all seasons. It has recreational and industrial users. During the summer, there are between 75 and 120 civilian vehicles daily. During the winter, there are frequently in excess of 30 vehicles per day. Other employers use the road beyond 20 Mile Bay, such as Pretty's Timber Co. Ltd. and Lineham Resources Co., five small logging contractors and three mining companies. At the time of the accident, Global and BEL also travelled the road daily.

Mr. Babich stated in his Discovery that he had travelled the road almost daily for the two years prior to the accident. The road was not maintained and was rarely graded. At Question 304, he acknowledged that he did not know whether there were other places that vehicles were coming from on the day of the accident. The plaintiff, at Question 413 of his Discovery, stated that the road was open to the public and the public frequently travels it.

With respect to road maintenance, counsel for the plaintiff says that J.S.S. did not exclusively maintain the road. The majority of the maintenance is done by the Ministry of Forests and the balance by private companies in the area. The plaintiff, at Question 414 of his Discovery, stated that the forest service maintains parts of the road.

Counsel for the defendants has not replied to the defendants' submission of April 3, 1992. The facts at issue between the parties include the extent of use of the road by recreational users and users other than logging trucks. There is no dispute that the road leads to at least one other employer besides J.S.S., i.e. BEL. Nor is there any dispute about whether the road extends to other locations, including Lillooet and Pemberton.

The law and policy referred to by the parties indicates that a "captive road" is one which is technically a public highway but as a practical matter leads only to the premises of the particular employer and is for practical purposes under the control of that employer. According to item #18.10 of the Board's *Rehabilitation Services and Claims Manual*:

The "Captive Road Doctrine" lays down situations when a road, though technically a public one, can, in effect, be regarded as part of the employer's premises for compensation purposes with the result that coverage extends to injuries occurring on it. This occurs when the road for practical purposes leads only to the employer's premises and can, therefore, be equated with a private road which is just an incidental feature to the employer's plant. The natural corollary of this doctrine is that, where a road is technically a private one, it should not be considered as part of the employer's premises where in reality it leads to the premises of several different employers and is indistinguishable from a public highway. The road is not then just an incidental feature of the plant of the one employer who happens to own the road.

The case in favour of a “captive road” finding is strengthened if it is found the employer makes decisions on repairs. I note that in its contract with Global, J.S.S. states that it will keep open and maintain in good condition all roads to and within the Tree Sale License. There is no corresponding provision in the contract between Global and the defendant BEL. There is no evidence about any obligations to repair the road that BEL may have acquired from the Ministry of Forests. In the absence of evidence that Global and BEL have assumed contractual obligations to repair the road as part of their respective rights to the Tree Sale License, I do not think that the contract between Global and J.S.S. (which the BEL is not a party to) can be construed as giving the plaintiff’s employer, J.S.S., control over repairs to the road.

In my view, the evidence does not establish that the road is, for practical purposes, a private road which leads only to the premises of the one employer, J.S.S., and is just an incidental feature to that employer’s premises. There is no dispute that the road is public, it leads to more than one employer and location and its users travel to and from such locations. The defendants acknowledges that it is used by other logging trucks and that there is at least occasional recreational use. I find that the road is not a “captive road.”

Summary

At the time of injury, the defendant Babich was a worker acting within the scope and course of his employment for the defendant BEL. At that time, however, the plaintiff was not acting within the scope and course of his employment for J.S.S.

Editors’ note: This decision has been edited for publication.

NO. B884101
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

SPENCER ALBERT SMITH

PLAINTIFF

AND:

EARNEST STEVEN BABICH
and BABICH ENTERPRISES LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, SPENCER ALBERT SMITH, was, at the time the cause of action arose, March 11, 1987, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, SPENCER ALBERT SMITH, on March 11, 1987, did not arise out of and in the course of his employment.

CERTIFIED this 28th day of April, 1992.

Decision of the Appeal Division

Number: 92-1056
Date: May 19, 1992
Panel: Alison H. Narod
Subject: Commuting to Work/Irregular Starting Points

By letter dated March 13, 1992, counsel for the plaintiff requested a certificate under Section 11 of the *Workers Compensation Act*. The parties have provided written submissions, copies of the Pleadings, copies of the Examination for Discovery transcripts and Statements of Facts. The trial of the action is set for June 15, 1992.

The Appeal Division was created on June 3, 1991 by Bill 27, the *Workers Compensation Amendment Act, 1989*. The Board of Governor's Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act* provides that:

A decision of the appeal division or of a panel shall be deemed to be a decision of the board.

The action arises out of a motor vehicle accident on August 9, 1990. The plaintiff was injured when the vehicle he was driving collided with a vehicle driven by the defendant Randhawa and leased by his employer, Cats Produce, from its owner, the defendant Phelps Leasing Ltd.

The issue is whether, at the time of the accident, the plaintiff was a worker within the meaning of Part 1 of the *Workers Compensation Act* and acting within the scope and course of his employment. No issue arises as to the status of the defendants: the defendant Randhawa was a worker acting within the scope and course of his employment with Cats Produce, which had leased the truck he was driving from the defendant Phelps Leasing Ltd. at the time of the accident. At the relevant time, both Cats Produce and the plaintiff's putative employer, G. Johal and Sons Farm Ltd. ("GJ&S"), were registered as employers under the *Act*.

At the time of the accident, the plaintiff was involved in two farm-related businesses. He, along with his wife and two sons, were partners in an unincorporated business known as “Johal Farms,” which owned and operated several farms. As well, the plaintiff owned 25% of an incorporated business, GJ&S, which supplied labour for the operation of the farms and a cannery located on one of the farms. The plaintiff’s wife and two sons were the other shareholders of GJ&S.

The plaintiff worked as a labourer and a supervisor. His duties included supervising the workers and directing their berry-picking, cleaning and packing work performed on the farms and at the cannery. As well, he was involved in transporting farm labourers to and from the farms’ operations and transporting berries between operations and to canneries and warehouses. His duties required him to travel between operations and, where necessary, to drive farm labourers to and from operations. In the course of transporting farm labourers, the plaintiff would drive from his home in Vancouver to their homes to pick them up and drop them off at the farms and he would deliver them to their homes at the end of the day before returning to his own home.

The farming season generally lasts from June to the end of September or early November. During this season, the plaintiff works seven days a week from early morning to early evening. GJ&S owns several vans and buses and leases and owns a number of trucks.

On the day of the injury, the plaintiff drove one of the company vans to pick up farm labourers from their homes and deliver them to their worksites to pick berries. At about 6:00 p.m., the workers stopped picking and the plaintiff drove them back to their homes. He then went home and parked the van. Between 7:30 p.m. and 8:00 p.m., the plaintiff took his son’s car and drove to the cannery, where he supervised a number of workers who were cleaning berries. He remained at the cannery for about an hour to an hour and a quarter. He then left to drive back home in his son’s car. He was en route to his home at the time of the accident, which occurred at approximately 9:30 p.m.

I find that, at the time of the injury, the plaintiff was an active principal of the limited company, GJ&S. As such, the plaintiff’s relationship to GJ&S is considered to be that of a “worker” for the purposes of the *Act* (item #7.50 of the Board’s *Rehabilitation Services and Claims Manual*).

The remaining issue is whether the accident arose within the scope and course of the plaintiff’s employment with GJ&S. This involves a consideration of whether the travelling he was engaged in at the time of the accident was part of his employment.

The Board’s general position is that accidents occurring in the course of travel from the worker’s home to his normal place of employment are not compensable.

Routine commuting to and from work is not covered. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional (item #18.00 of the *Manual*).

Employees whose jobs involve travelling on a particular occasion or generally are covered while travelling. Where they do not travel to their employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence. However, they will not be covered if they first travel to their employer's premises (item #18.40 of the *Manual*).

Item #18.32 of the *Manual*, "Irregular Starting Points," addresses a number of different situations. One which is relevant to this case is where the worker is injured in the course of a journey between home and a normal or regular operating base. The *Manual* says that situation is substantially similar to the case of a worker travelling between home and a fixed place of employment and an injury occurring in the course of that journey would not be covered.

GJ&S operates at a number of fixed premises. The plaintiff's duties involve travelling between GJ&S's fixed locations. From time to time, they also involve travelling to various locations prior to or after attending at GJ&S's fixed locations to pick up and drop off labourers. Where such travelling is required, it will likely be covered by Workers' Compensation benefits.

On the occasion at issue, the plaintiff went home after performing delivery and supervisory duties. He then left home at about 7:30 or 8:00 p.m. and went to one of GJ&S's fixed premises to perform supervisory duties. After 1 to 1¼ hours at that location, he embarked on a journey back to his home. He did not go anywhere else for employment purposes. He was going straight home.

The question is whether the plaintiff is covered by compensation benefits on those days when he travels directly to or from one of GJ&S's fixed premises, without first driving to another location for pick-ups or deliveries. I find that this type of travelling is not distinguishable from routine commuting or travelling between home and a normal or regular operating base. The plaintiff was not in the course of performing an employment function while travelling. The employment function he performed that night was supervising at a fixed premise. His return from that function was not part of his employment.

In summary, the plaintiff was a worker, but the accident did not arise within the scope and course of his employment.

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

NO. B906207
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

GURDEV JOHAL

PLAINTIFF

AND:

PALVENDER RANDHAWA and
PHELPS LEASING LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, GURDEV JOHAL, was, at the time the cause of action arose, August 9, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, GURDEV JOHAL, on August 9, 1990, did not arise out of and in the course of his employment.

CERTIFIED this 19th day of May, 1992.



Decision of the Appeal Division

Number: 92-1284
Date: July 2, 1992
Panel: Thomas Kemsley
Subject: Assault

A determination under Section 11 of the *Workers Compensation Act* has been requested in this legal action. The legal action involves injuries that Mr. Zacharias said he suffered due to an assault by Mr. Snow on November 17, 1989. The issues under Section 11 are whether or not, at the time of the alleged assault, Mr. Zacharias and Mr. Snow were workers and were within the course of their employment and whether Mr. Zacharias' injuries arose out of, and in the course of, his employment. (Note: The material on file indicates that the heading on the legal documents in this legal action refers to Zachariais. However, it appears that the correct spelling is Zacharias.)

The Appeal Division was created on June 3, 1991 by Bill 27, of the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4 dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act* provides that a decision of the Appeal Division or of a Panel shall be deemed to be a decision of the Board.

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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Submissions were received on this application from Adam J. Roberts, counsel for Mr. Snow, and Gregory K. Steele, counsel for Mr. Zacharias. These included two Statements of Facts and a transcript of the evidence from the preliminary inquiry and trial in the criminal proceedings against Mr. Snow relating to this incident.

On November 17, 1989, Mr. Zacharias was employed by Custom Drywall to install drywall on a project in Surrey, B.C. On the same date, Mr. Snow was employed by Titan Vinyl Siding to install siding at the same project. Mr. Snow's siding was stored in the garage on the site and, on November 17, 1989, he noticed that someone had

stepped on the box containing the siding. Siding can be damaged very easily. Mr. Snow went inside the house and questioned Mr. Zacharias and his wife, who were installing drywall. Mr. Snow determined that Mrs. Zacharias was the one who had stepped on the box of siding. He then went over to some corner bead that Mr. Zacharias used in drywalling. Mr. Snow damaged one piece of corner bead and then put his hand on another piece of corner bead. At that point, a physical confrontation occurred between Mr. Snow and Mr. Zacharias. They do not agree on who was the aggressor in the altercation nor on what happened. Their lawyers submitted different statements of facts on this application, as there was no agreement on certain facts.

On the submissions received, it is difficult to resolve the disputed facts on a civil standard. The acquittal of Mr. Snow on criminal charges does not assist either way. However, I think it is not necessary to resolve the disputed facts in order to make the determinations under Section 11.

The Status of Mr. Snow

Both Mr. Snow and Mr. Zacharias agree that Mr. Snow came into the house and damaged a piece of corner bead and then put his hand on more corner bead, apparently with the intention of damaging it as well. While Mr. Snow had been acting within the course of his employment prior to damaging the corner bead, I find that his actions of wilfully damaging one piece of corner bead and moving to apparently damage more pieces took him out of the course of his employment. His work material was no longer being damaged nor was there any immediate threat to it. He was either getting some revenge or trying to warn Mr. Zacharias, or both. Wilfully damaging the plaintiff's property took him out of the course of his employment relationship. It was a personal act.

Based on the evidence submitted by the parties, I find that Mr. Snow was not a worker acting within the course of his employment at the time of the alleged assault.

The Status of Mr. Zacharias

I find that the plaintiff, Mr. Zacharias, was still within the course of his employment when the altercation took place.

Mr. Zacharias had just seen Mr. Snow damage some work materials and apparently he was going to damage some more corner beading. Even if Mr. Zacharias overreacted to the situation, I find that his actions to protect his work materials from further immediate damage were within his employment.

Therefore, on the evidence submitted by the parties, I find that Mr. Zacharias was a worker and acting within the course of his employment when the alleged assault occurred and his injuries arose out of, and in the course of, his employment.

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

NO. C902061
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

ALLAN ZACHARIAIS

PLAINTIFF

AND:

JAY SNOW

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, ALLAN ZACHARIAS, was, at the time the cause of action arose, November 17, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and the injuries suffered by the Plaintiff arose out of and in the course of his employment.
2. The Defendant, JAY SNOW, was, at the time the cause of action arose, November 17, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
3. The action and conduct of the Defendant, JAY SNOW, which allegedly caused the breach of duty of care on November 17, 1989, did not occur in the course of employment within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 2nd day of July, 1992.



Decision of the Appeal Division

Number: 92-1416
Date: August 12, 1992
Panel: Thomas Kemsley, A. Grant McRitchie, Lorna A. Pawluk
Subject: Shift Lease Operator (No. 1)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action by Kamaljit K. Lehal, counsel for the Insurance Corporation of British Columbia and Kuldip Singh Brar. Peter K. Hamilton later assumed conduct of the matter from Ms. Lehal. The legal action involves injuries suffered by the plaintiff, John Nelson Armstrong — a taxi driver, on November 25, 1989 as a result of an accident involving another taxicab driven by Kuldip Singh Brar.

There is no dispute that, at the time of the accident, Mr. Brar was self-employed, was registered with Workers' Compensation Board and was in the course of his employment. The issue concerns the status of Mr. Armstrong. The panel must determine whether or not, at the time of the accident, Mr. Armstrong was a worker within the meaning of Part 1 of the *Act*. This involves a determination of whether Mr. Armstrong was an independent operator or an employee of either Gurdeep Gill (the owner of the taxicab) or Bonny's Taxi Ltd. (a taxi dispatch company). Mr. Armstrong and Mr. Gill are not registered with the Board. Bonny's Taxi Ltd. has been registered since 1978. There is no dispute that, at the time of the accident, Mr. Armstrong was engaged in his duties as a taxicab operator. Thus, if he was an employee of either Mr. Gill or Bonny's Taxi Ltd., then he was a worker within the *Act*. However, if he was an independent operator, then, because he was not registered with the Board, he would not be considered to be a worker within the *Act*.

The Appeal Division was created on June 3, 1991 by Bill 27, of the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4 dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act* provides that a decision of the Appeal Division or of a Panel shall be deemed to be a decision of the Board.

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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A).

This panel held an oral hearing on August 5, 1992 and heard evidence from Gurdeep Gill and George Lapthorne, the director of operations for Bonny's Taxi Ltd., and submissions from Mr. Hamilton and Allen LaCroix, counsel for Bonny's Taxi Ltd. Mr. A.T. Ewachniuk attended on behalf of Mr. Armstrong but offered no evidence and made no submissions.

Items #7.40 to 7.52 of the *Rehabilitation Services and Claims Manual* ("Manual") and Decision No. 32 of the former commissioners, dated March 28, 1974, set out relevant governors' policy on the determination of whether Mr. Armstrong was a worker or an independent operator. These policies make it clear that the matter cannot be determined solely by looking at how the parties label their arrangement. That is consistent with Section 13 of the *Act* which prohibits a worker from agreeing with his or her employer to waive or forego any benefits that he or she has under the *Act*. Item #7.44 of the *Manual* sets out seven principles that the Board may regard in deciding whether a person is an independent operator or a worker.

At the time of the accident, Mr. Armstrong operated a taxicab owned by Mr. Gill which was part of Bonny's Taxi Ltd.'s fleet. Mr. Armstrong paid Mr. Gill a flat daily rate for the use of his taxicab and was responsible for purchasing fuel. Mr. Gill paid Bonny's Taxi Ltd. a flat monthly fee to have this taxicab operate as part of Bonny's Taxi Ltd. Mr. Gill paid for the repairs, insurance and licence for the taxicab. Mr. Gill was one of seventy-four shareholders of Bonny's Taxi Ltd.

Mr. Armstrong, Mr. Gill and Bonny's Taxi Ltd. all consider Mr. Armstrong to have been an independent operator (or shift lease operator). This is set out in the Lease Agreement and Agreement of Shift Lease which were signed at the time that Mr. Armstrong began driving Mr. Gill's cab. However, as set out above, that does not determine the issue. The principles in item #7.44 are also relevant.

Mr. Armstrong was subject to a fairly long list of rules and regulations, as set out in the Drivers Manual and Rule Book of Bonny's Taxi Ltd. Mr. Lapthorne's evidence was that these rules were all prescribed either by the Motor Carrier Commission, by the Airport Authority or in Municipal Bylaws for all taxi drivers and thus were not rules imposed by Bonny's Taxi Ltd. This seems to be essentially true, although it is clear that Bonny's Taxi Ltd. has, in some places, clarified the rules for their taxicab operators by adding some details. However, overall, we are satisfied that the Drivers Manual and Rule Book primarily reflects controls put on all taxi drivers by other authorities and does not reflect a significant degree of control by Bonny's Taxi Ltd. over Mr. Armstrong.

We are also satisfied that Mr. Armstrong was not otherwise under the control of Bonny's Taxi Ltd. or Mr. Gill. Mr. Armstrong leased a taxicab and made the decisions about the hours he worked, the fares he took, the days he took off and where to buy his fuel. If he was going to be off for a day, he could choose a replacement driver, subject to that driver being registered with Bonny's Taxi Ltd. He also chose to operate primarily out of the airport rather than by dispatch over the radio, and Mr. Lapthorne could not remember Mr. Armstrong taking any dispatch calls in the year and a half he drove the taxicab. Neither Bonny's Taxi Ltd. nor Mr. Gill exercised any control over Mr. Armstrong in that regard. Mr. Armstrong paid a flat rate for the taxicab and there was no profit sharing or commission arrangement. He had to provide his own "float" each day and was responsible for paying G.S.T. directly to the federal government. He was entitled to terminate the lease of the taxicab on two weeks notice and there were no terms in the lease which attempted to limit his activities once the lease was terminated. While he did have to provide daily record sheets to Bonny's Taxi Ltd., the evidence was that these were required by the Motor Carrier Commission and were not monitored by Bonny's Taxi Ltd.

There are factors which show some control by Bonny's Taxi Ltd. These include the right to discipline operators in certain situations and the fact that Mr. Gill would terminate the lease of any driver if that was recommended by Bonny's Taxi Ltd. However, we are satisfied that most of the evidence supports the conclusion that Mr. Armstrong was an independent operator, or shift lease operator, and not an employee of Bonny's Taxi Ltd. or Mr. Gill.

As set out in item #7.52 of the *Manual*, the sole principal of a company will not be treated as a worker under the *Act* if his company is not registered with the Board at the time of the injury. We have found that Mr. Armstrong was an independent operator. The evidence from the transcript of the Examination of Discovery of Mr. Armstrong was that he was working for himself in his own business. As Mr. Armstrong was not registered with the Board, he falls within item #7.52 and thus is considered not to be a worker under the *Act*.

In conclusion, from the evidence presented to the panel by the parties, we find that at the time of the accident on November 25, 1989 John Nelson Armstrong was not a worker within Part 1 of the *Workers Compensation Act*.

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

NO. B904362
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

JOHN NELSON ARMSTRONG

PLAINTIFF

AND:

KULDIP SINGH BRAR and
RICHMOND CABS LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the submissions and material filed by the parties;

AND UPON HEARING the evidence and argument of the parties in an oral hearing on August 5, 1992;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, JOHN NELSON ARMSTRONG, was not, at the time the cause of action arose, November 25, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 12th day of August, 1992.



Decision of the Appeal Division

Number: 92-1541
Date: September 14, 1992
Panel: Thomas Kemsley
Subject: Deviation from Route (No. 1)

A determination under Section 11 of the *Workers Compensation Act* has been requested in this legal action. The legal action involves injuries that Mr. Foan suffered in a motor vehicle accident in which Mr. Shadforth was also involved. The matters to be addressed under Section 11 are whether or not, at the time of the motor vehicle accident, Mr. Foan and Mr. Shadforth were workers acting within the course of their employment and whether or not Mr. Foan's injuries arose out of, and in the course of, his employment.

The Appeal Division was created on June 3, 1991 by Bill 27, the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4 dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act* provides that a decision of the Appeal Division or of a Panel shall be deemed to be a decision of the Board.

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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358, (B.C.C.A.).

Submissions have been received from John E. Broadway, counsel for Mr. Shadforth and Quadra Cartage Limited, and from Dennis Hori, counsel for Mark Foan. These submissions included copies of the Statement of Claim, the Statement of Defence, statements of Mark Foan and Craig Shadforth, the transcript of the examination of Discovery of Craig Shadforth and the transcript of part of the examination of Discovery of Mark Foan.

The accident occurred at approximately 1:30 a.m. on December 21, 1988 on the Knight Street Bridge in Vancouver and involved a rental car driven by Mr. Foan and a tractor unit driven by Mr. Shadforth.

Status of Mark Foan

Mr. Foan was employed by the B.C. Lottery Corporation in its Kamloops, B.C. office. As such, he was a worker at the time of the incident. Mr. Foan was in Vancouver on business. He was staying in a hotel in Richmond which was paid for by his employer. His rental car was also paid for by his employer. Prior to the accident Mr. Foan had been at the Legion Hall located at 11th Avenue & Main Street in Vancouver to deal with the business that had brought him to Vancouver. There is no dispute that Mr. Foan was in the course of his employment while he was at the Legion Hall. On leaving the Legion Hall, he intended to return to his hotel. He could have done this by taking Oak Street and using the Oak Street Bridge. Instead, he went up Knight Street and used the Knight Street Bridge. He chose this route as his mother had asked him to check on the existence of a cherry tree at his grandmother's former house on Knight Street. Mr. Foan drove south on Knight Street and took a short detour and determined that the tree was still there. He then continued south on Knight Street and was going over the Knight Street Bridge when the accident occurred.

There is no doubt that Mr. Foan was required to travel on this occasion as part of his employment. He had to get from the Legion Hall to his hotel. The only question is whether his choice of route for personal reasons took him out of the course of his employment. Items #18.41 and #21.00 of the *Rehabilitation Services and Claims Manual* ("Manual") are relevant here. According to the map furnished in the submissions, there is very little difference in distance between taking the Oak Street route or the Knight Street route from the Legion Hall at 11th & Main to Mr. Foan's hotel in Richmond. Either is a fairly direct route between those two points. Even if Mr. Foan had not had a personal interest that took him along the Knight Street route, he might have decided to take that route to return to his hotel. I do not view it as a significant deviation in comparison to the Oak Street route.

Therefore, even though he chose the Knight Street route to allow him to also attend to a personal matter, I find that it was not a "distinct departure on a personal errand" as set out in #18.41. If he had been in an accident in the back lane while he was looking for the cherry tree, my finding might be different. However, at the time of the accident he was back on a direct and normal route to his hotel. It appears that the deviation from this route was a brief and incidental diversion and did not significantly alter his route nor the timing of his trip. Thus, he was in the course of his employment when the accident occurred.

In summary, on the evidence submitted by the parties, I find that, at the time of the motor vehicle accident on December 21, 1988, Mr. Foan was a worker and was in the course of his employment and his injuries arose out of, and in the course of, that employment.

Status of Craig Shadforth

At the time of the accident, Craig Shadforth was employed by Harjinder Cheema. Mr. Cheema was the owner of the tractor unit that Mr. Shadforth was driving. The tractor unit was leased by Mr. Cheema to Quadra Cartage Limited. Mr. Shadforth was hired by Mr. Cheema and paid by Mr. Cheema. It was not disputed that Mr. Shadforth was a worker at the time and I am satisfied that he was employed by Mr. Cheema. Mr. Cheema was registered with the Workers' Compensation Board at the time of the accident.

The issue is whether Mr. Shadforth was in the course of his employment when the accident occurred. Mr. Shadforth kept the tractor unit at home and picked up and dropped off trailer units from one depot in Vancouver and one in Tacoma. At the time of the accident he was returning home after dropping off a trailer at the Vancouver depot. Mr. Hori submitted that Mr. Shadforth had finished his work for the day when he dropped off the trailer and, after that, was in the same position as a worker travelling from his place of employment to his home. Item #18.31 of the *Manual* sets out that workers are not covered while routinely travelling to and from work.

However, I am satisfied that Mr. Shadforth was still in the course of his employment when the accident occurred. It was part of his employment contract that he keep the tractor unit and look after its maintenance. Mr. Cheema did not have a place where the tractor unit could be parked. That was the responsibility of Mr. Shadforth. Although there was evidence that he made some personal use of the tractor unit, it was not like a personal vehicle. It was a specialized piece of equipment that he used in his work and he was responsible for it. When he was called by the dispatcher, he had to take the tractor unit to the yard in Vancouver or Tacoma to pick up a trailer. He had to take the tractor unit away with him after he dropped a trailer at the Vancouver yard. I find that while he was in the tractor unit going to or from the yard to the place where he normally parked the tractor unit, he was within his employment.

On December 21, 1988, Mr. Shadforth was returning from the Vancouver yard to the place where he normally parked the tractor unit. It appears that he was on a direct route between those two points and there was no deviation for personal reasons that would take him out of his employment. As a result, on the evidence submitted by the parties, I find that Mr. Shadforth was a worker and was in the course of his employment when the accident occurred on December 21, 1988.

Quadra Cartage Limited is also a defendant in this action. While Quadra Cartage Limited was not Mr. Shadforth's employer, it was an employer under the *Workers Compensation Act* and was registered with the W.C.B. at the time of the accident on December 21, 1988.

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

NO. 16928
KAMLOOPS REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

MARK EDWARD FOAN

PLAINTIFF

AND:

CRAIG SHADFORTH, QUADRA CARTAGE LIMITED
AND GRACE DINIZ

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings, submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, MARK EDWARD FOAN, was, at the time the cause of action arose, December 21, 1988, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and the injuries suffered by the Plaintiff arose out of and in the course of his employment.
2. The Defendant, CRAIG SHADFORTH, was, at the time the cause of action arose, December 21, 1988, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
3. The action and conduct of the Defendant, CRAIG SHADFORTH, which allegedly caused the breach of duty of care on December 21, 1988, arose out of and in the course of employment within the meaning of Part 1 of the *Workers Compensation Act*.
4. The Defendant, QUADRA CARTAGE LTD., was, at the time the cause of action arose, December 21, 1988, an employer within the meaning of Part 1 of the *Workers Compensation Act*, and was engaged in an industry within the meaning of Part 1.

CERTIFIED this 4th day of September, 1992.



Decision of the Appeal Division

Number: 92-1543
Date: September 15, 1992
Panel: Thomas Kemsley
Subject: Special Hazards

A determination under Section 11 of the *Workers Compensation Act* has been requested in this legal action. The action involves injuries suffered by the plaintiff, Mr. Ingram, when the vehicle he was driving was in a head-on collision with a logging truck driven by the defendant, Mr. Nickel, and owned by the defendant, Lemare Lake Logging Ltd. The accident occurred on May 23, 1990 on the Mahata River "B" Main Road in the northern part of Vancouver Island. Mr. Ingram was driving from the Lemare Lake Logging camp to Courtenay. Donald Bruner was a passenger in Mr. Ingram's vehicle and also was injured in the accident. The issue on this application is the status of Mr. Ingram at the time of the accident.

Mr. Ingram was a self-employed falling contractor who was working under contract with Lemare Lake Logging Ltd. While working for Lemare Lake Logging Ltd., Mr. Ingram stayed at its logging camp and paid room and board. At the time of the accident, he was driving from the camp to the public highway, a distance of about eighty-nine kilometres. He was making the trip to visit his mother and had expected to return to the logging camp the next day. He had travelled about thirty kilometres when the accident occurred.

The logging road on which the accident occurred was governed by a three-way Road Use Agreement among Western Forest Products Limited, MacMillan Bloedel Limited and International Forest Products Limited. Lemare Lake Logging Ltd. was the prime contractor carrying out logging operations for MacMillan Bloedel. Lemare Lake Logging Ltd. was not a party to the Agreement regarding the maintenance of the logging road. The logging road was also used by other people for recreational purposes.

The logging truck involved in the accident was an off-road truck that was approximately eleven feet wide and not licensed for normal highway operation. The logging road was radio controlled and each logging truck would regularly broadcast its location and direction in order to warn other traffic on the logging road. Mr. Ingram's vehicle was not equipped with one of these radios.

While much of the logging road was too narrow for two vehicles to pass, the accident occurred on a bend where the logging road was approximately thirty feet wide, with eighteen feet of travelled road space. There was sufficient width at that point for vehicles to pass. However, it was a relatively sharp bend with severely restricted visibility due to a high bank and thick bush growing along the side.

Lemare Lake Logging Ltd. was registered with the W.C.B. at the time of the accident. Mr. Nickel was an employee of Lemare Lake Logging Ltd. Mr. Nickel was returning to the Lemare Lake Logging camp at the time of the accident, after dropping a load of logs. There is no dispute that he was a worker and within the course of his employment at the time of the accident. The issue is whether Mr. Ingram was a worker and whether his injuries arose out of and in the course of his employment.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4 dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act ("Act")* provides that a decision of the Appeal Division or of a Panel shall be deemed to be a decision of the Board.

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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Written submissions were received on this application on behalf of Dugan Ingram, International Forest Products Limited, Lemare Lake Logging Ltd. and Benjamin Nickel. These submissions addressed the issues of whether at the time of the accident Mr. Ingram was a "worker" and whether his injuries arose out of and in the course his employment. In particular, the submissions addressed the "Captive Road Doctrine" and the "Special Hazards of Access Route" provisions as found in items #18.11 and #18.12 of the *Rehabilitation Services and Claims Manual ("Manual")*.

Status of Defendants

Based on the submissions of the parties, I find that, at the time of the accident, Lemare Lake Logging Ltd. was an employer engaged in an industry under the *Act*, and Mr. Nickel was an employee, and any conduct which caused the breach of duty arose out of and in the course of employment within the scope of Part 1 of the *Act*.

Status of Mr. Ingram — A “Worker”

The test of whether or not a person is a “worker” for the purposes of the *Workers Compensation Act* is a fairly simple test. At the time of the accident, Mr. Ingram was a self-employed logger and had registered with the W.C.B. for personal option protection. That is a sufficient basis on which to find that Mr. Ingram was a “worker.” The fact that he was not actually working at his particular job at the time of the accident is not relevant to the issue of whether or not he was a “worker.” Those facts relate to the next issue.

Arising Out of and In the Course of Employment

Mr. Ingram had finished work two hours earlier and had returned to the camp and cleaned up in preparation for the trip. The purpose of the trip was personal — to leave the logging camp and visit his mother. As pointed out in item #18.10 of the *Manual*:

The general rule is that there is no coverage while a worker is travelling along the roads which lie between his place of residence and his employer’s premises.

Exceptions to this are contained in items #18.11 — Captive Road Doctrine and #18.12 — Special Hazards of Access Route.

In this case, the logging camp was part of the employment premises and Mr. Ingram lived there while working at this particular job. The camp was provided by Lemare Lake Logging Ltd. at a cost to Mr. Ingram. Thus, Mr. Ingram’s travel to Courtenay was, in effect, travel on a road between his place of residence (or some other non-work place) and his employer’s premises. The normal rule then is that there would be no W.C.B. coverage during this trip, subject to the exceptions.

(a) Captive Road Doctrine

Item #18.11 of the *Manual* states, in part:

The “Captive Road Doctrine” lays down situations when a road, though technically a public one, can, in effect, be regarded as part of the employer’s premises for compensation purposes with the result that coverage extends to injuries occurring on it. This occurs when the road for practical purposes leads only to the employer’s premises and can, therefore, be equated with a private road which is just an incidental feature to the employer’s plant.

Mr. Ingram was self-employed and worked under contract on the “premises” of Lemare Lake Logging. I am not satisfied that the logging road that led to the Lemare Lake Logging camp was a “captive road.” It was maintained by three forest companies, none of which were Lemare Lake Logging — the company that contracted with the worker, nor the worker — who was self-employed. While it was primarily a logging road, there were other users of the road and at least one other road split off from it to give other users access to different areas. Thus, the road did not lead only to the place of Mr. Ingram’s employment. All of these factors lead to the conclusion that it was not a “captive road” as set out in item #18.11.

(b) Special Hazards of Access Route

Item #18.12 of the *Manual* states, in part:

Where a place of work is so located that for access and egress the worker must pass through special hazards beyond the ordinary risks of highway travel, an injury sustained from those hazards is one arising out of and in the course of employment. On the other hand, an injury to a worker on the way home from work, even though on the only egress route from the employer’s premises, is not compensable if it results from other normal risks of highway travel, such as a collision between two automobiles.

...

For a claim to succeed on the grounds of a special hazard, the hazard need not lie on the only route to the employer’s premises. It is sufficient if it is on the normal route to the place of work from the direction in which the claimant is travelling.

Decision No. 50 (1974), *Workers’ Compensation Reporter*, Vol. 1: p. 212 which established this exception also stated:

For the injury to be compensable, therefore, it must result from a hazard from the industrial environment going beyond the ordinary hazards of highway travel.

Decision No. 126 (1975), *Workers’ Compensation Reporter*, Vol. 2: p. 123 involved, in part, a consideration of the special hazard of egress exception. In that case a mine worker who lived at the mine site while working was killed in a motor vehicle accident when he was driving out of the mine site after completing a ten-day shift. The mine worker’s vehicle went out of control, and no other vehicle was involved in the accident. This occurred on the mine road leading to the public highway. The commissioners

rejected the argument that the accident resulted from a special hazard of the industrial environment. Even though the mine road had sharp bends, was mountainous, and subject to falling rock, cross winds and ice, the commissioners stated:

. . . We see them as hazards of mountain highways rather than a special hazard from egress from this kind of work-place.

The road here was primarily a logging road. It was maintained by the forest companies. Even though it was open to the public, it appears the road existed primarily to provide access to timber for the forest companies. Although it was not the only means of access and egress from the employment premises, it was a normal and expected route to the place of work. And, even though the logging road was used by the public, it still presented special hazards that are not generally encountered elsewhere. Logging trucks travelling on narrow sections of the road or “blind” corners constituted a special hazard on this road. They were oversized vehicles that were not licensed to be on public roads. They were radio controlled in order to allow them to pass one another and avoid collisions. These trucks were a special hazard to anyone using the road, and not all users were there for reasons related to logging. However, Mr. Ingram was there because of his employment and logging trucks were directly connected to his employment.

Thus, it was a special hazard that went beyond the ordinary hazards of highway travel or off-road travel and it was directly connected to the industrial environment. Mr. Ingram could not avoid this logging road as it was the one that went to his place of employment. On this particular trip, he had stopped another vehicle and asked the driver to radio ahead and let incoming trucks know that he was heading out. Thus, he knew of and had taken steps in regard to this special hazard. Unfortunately, on a sharp curve in the road, he was hit by a logging truck. The logging truck was owned by the company he worked for under contract. It was going to the same camp that Mr. Ingram had just left. It is difficult to see how it could have been more closely connected with his industrial environment. It was a special hazard of access to and egress from this kind of workplace. While Mr. Ingram may not have been within the course of his employment for all potential hazards on this road, he was within the course of his employment when he was hit by a logging truck, owned by the company that he worked for, that was travelling to the employment premises on Mr. Ingram’s normal access road to those premises, and the accident occurred on a “blind” curve.

The plaintiff’s submissions referred to the manner in which the accident occurred and the way in which the logging truck was apparently being driven. I considered whether grossly negligent or reckless operation of the logging truck would remove it from the category of a “special hazard.” I find that this is not relevant to the policy contained in item #18.12. Even if the logging truck was being operated recklessly, it still constituted a special hazard found on this logging road.

The fact that Mr. Ingram has brought legal action against the defendants is not a relevant factor to the Section 11 determination. The fact that Mr. Ingram was on his way out of the woods for personal reasons does not change the situation. He was required to drive on this logging road with its special hazards for access to and egress from his place of employment. The fact that he had finished work two hours earlier is also not of significance as it appears that this delay did not alter the special hazard in any way.

As Mr. Ingram was required to travel on this logging road due to his employment and suffered an injury due to a “special hazard,” I find that he was in the course of his employment for the purposes of making a claim for W.C.B. benefits. Mr. Ingram did in fact apply for W.C.B. benefits on a Form 6 application dated July 13, 1990. In a letter dated July 18, 1990, his lawyer provided further information to the Claims Department and requested a ruling as to Mr. Ingram’s status as an employee at the time of the accident. In a Memo on the claims file, the claims adjudicator noted that he was satisfied that the captive road doctrine did not apply to the claim. He then noted that “further consideration must be given to Section 18.12 of the *Rehabilitation Services and Claims Manual* pertaining to special hazards of access route.” In a letter dated August 29, 1990, a different claims officer informed Mr. Ingram that his claim was not accepted by the W.C.B as travel from work to home was not normally compensable. The claims officer said he was unable to accept that the captive road doctrine applied. There was no mention in that letter, nor any further reference in the file, to a consideration of Section 18.12 of the *Manual*. Thus, it is not possible to determine if it was overlooked by the claims officer or if he decided it was not applicable.

The effect of this determination is to overturn the August 29, 1990 decision of the claims officer. As a result, the file will be referred to the Compensation Services Division to determine the benefits to which Mr. Ingram is entitled.

In conclusion, on the evidence presented to me by the parties, I find that, at the time of the collision, Mr. Ingram was a worker and his injuries arose out of and in the course of his employment.

Editors’ note: This decision has been edited for publication.

NO. B906007
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

DUGAN IAN INGRAM
MARY ELLEN INGRAM
LARA TRUSCOTT

PLAINTIFFS

AND:

LEMARE LAKE LOGGING LTD.
BENJAMIN FREEMAN NICKEL

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, DUGAN IAN INGRAM, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings, submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, DUGAN IAN INGRAM, was, at the time the cause of action arose, May 23, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and the injuries suffered by the Plaintiff arose out of and in the course of his employment.
2. The Defendant, BENJAMIN FREEMAN NICKEL, was, at the time the cause of action arose, May 23, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
3. The action and conduct of the Defendant, BENJAMIN FREEMAN NICKEL, which allegedly caused the breach of duty of care on May 23, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
4. The Defendant, LEMARE LAKE LOGGING LTD., was, at the time the cause of action arose, May 23, 1990, an employer within the meaning of Part 1 of the *Workers Compensation Act*, and was engaged in an industry within the meaning of Part 1.
5. The action and conduct of the Defendant, LEMARE LAKE LOGGING LTD., which allegedly caused the breach of duty of care on May 23, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 15th day of September, 1992.

Decision of the Appeal Division

Number: 92-1563
Date: September 14, 1992
Panel: Thomas Kemsley
Subject: Extra-provincial Conduct (No. 1)

A determination under Section 11 of the *Workers Compensation Act* (the "Act") was requested in this legal action by Dale G. Sanderson, solicitor for the defendant Dome Petroleum Limited ("Dome"), in a letter dated August 19, 1991. The legal action involves injuries suffered by the plaintiff, Darcy Lipinski, in a diving incident on August 11, 1986 in the Beaufort Sea.

Mr. Lipinski was a commercial/industrial diver employed by Can-Dive Services Limited ("Can-Dive") on the Canmar Explorer II ("Explorer"), a vessel owned by Dome and used in drilling and oil exploration activities. At the time of the injury, Dome had chartered the Explorer to Canmar (U.S.) Inc. ("Canmar"), a 100% owned subsidiary of Dome Corp. U.S. Dome Corp. U.S. is a subsidiary of Dome. Canmar operated the Explorer and subcontracted the diving operations to Can-Dive. These operations were being conducted, and the accident occurred, in the Beaufort Sea off Alaska, either in U.S. or International waters.

Mr. Lipinski was injured when he was involved in a deep sea dive from the Explorer using a water suit which was temperature regulated by hot and cold water piped to it through a hose from the Explorer. The cold water supply to the suit was shut off in the engine room of the Explorer, leaving only hot water running through the wet suit, which scalded and burned Mr. Lipinski. It is alleged that the defendant, Andy Simpson, was the person who turned off the cold water valve. Mr. Lipinski suffered first-, second- and third-degree burns plus post-traumatic stress syndrome.

Can-Dive was a B.C. company and was registered with the W.C.B. Mr. Lipinski's claim for his injuries was accepted by the W.C.B. Dome was involved in oil exploration and production, mineral exploration and seismic drilling in British Columbia in 1986 and was registered with the W.C.B. in regard to those activities.

This legal action was brought by the W.C.B., by virtue of its right of subrogation under the *Act*. Mr. Sanderson requested Section 11 determinations as follows:

1. That Mr. Darcy Lipinski was a worker within the meaning of the *Workers Compensation Act* at the time of his accident;
2. That Mr. Lipinski's injury arose out of and during the course of his employment;
3. That the Defendant Dome Petroleum Limited was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act* at the time of the accident; and
4. That Andy Simpson was a worker within the meaning of the *Workers Compensation Act* at the time of the accident.

Mr. Sanderson provided a written submission setting out Facts and Arguments, and included copies of documents relevant to this matter. Mr. R.P. Goseltine, of the W.C.B., made a written submission and Ms. Kathleen E. Geiger replied.

The Appeal Division was created on June 3, 1991 by Bill 27, the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4 dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11. Section 85.2(6) of the *Workers Compensation Act* provides that a decision of the Appeal Division or of a Panel shall be deemed to be a decision of the Board.

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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Darcy Lipinski

Mr. Lipinski's status does not seem to be in dispute between the parties. Can-Dive was a British Columbia company and was registered with the W.C.B. Mr. Lipinski was an employee of Can-Dive and received Workers' Compensation benefits after his injury. No argument has been made that Mr. Lipinski was not a worker nor that his injuries did not arise out of and in the course of his employment. Thus, based on the submissions of the parties, I find that, at the time of his injuries on August 11, 1986, Mr. Lipinski was a worker within the meaning of Part 1 of the *Workers Compensation Act* and his injuries arose out of, and in the course of, his employment.

Status of Andy Simpson

There is no evidence that Mr. Simpson was a worker within the meaning of the *Workers Compensation Act*. He was not a resident of British Columbia. He was not working in British Columbia at the time. The Workers' Compensation assessments paid by his employer were not paid in British Columbia. It is not necessary for a person to be working within British Columbia to be a "worker" under the *Act*. Section 8 of the *Act* sets out the circumstances in which the Board will pay compensation where an injury occurs while a worker is working outside of British Columbia. Mr. Simpson did not meet those criteria. Thus, there is nothing to connect Mr. Simpson's employment to British Columbia.

Counsel argued that the *Interjurisdictional Agreement for the Avoidance of Duplicate Assessments* applied. However, that Agreement applies when a worker is required to work in more than one province. It attempts to avoid duplicate assessments in such a situation. It does not operate to bring a worker into a provincial jurisdiction. Here, Mr. [Simpson] was not a "worker" within the British Columbia *Act*. Therefore, there is no issue of a dual jurisdiction, involving British Columbia. Thus, the Interjurisdictional Agreement does not apply.

In conclusion, based on the submissions of the parties, at the time of the accident on August 11, 1986, Mr. Simpson was not a "worker" within the meaning of Part 1 of the *Workers Compensation Act* of British Columbia.

Status of Dome

At the time of the accident, Dome was an employer within British Columbia and paid assessments on that employment. However, that employment was different from the employment that gave rise to the legal action here. As Section 10(1) of the *Act* sets out, and as commented on in *Radhak v. Workers' Compensation Board of British Columbia and Gill* (1990), 45 B.C.L.R. (2d) 94 (B.C.S.C.), the bar against common-law actions contained in Section 10(1):

... applies only when the action or conduct of the employer, his 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.

I can find nothing to connect the relevant action or conduct of Dome to employment within British Columbia. There is no evidence that the activities that Dome was engaged in with respect to this legal action were part of their B.C. operations. The contract between Dome and Canmar stated the head office of Dome was in Calgary,

Alberta, and made no reference to British Columbia. The contract was made with a U.S. firm. It was the U.S. firm that contracted with Can-Dive. The actual oil drilling operations were not being carried on in British Columbia. There is no evidence that Dome paid W.C.B. assessments in British Columbia for its drilling operations in the Beaufort Sea. There is no evidence that the work done to convert the Explorer to an oil drilling ship was done in British Columbia.

While the legal action against Dome may involve different types of conduct or action on the part of Dome, I cannot find any connection between any of those activities and Dome's employment activities in British Columbia. The fact that Dome carried on similar activities in British Columbia and paid W.C.B. assessments in regard to those activities does not mean that it can use the B.C. *Act* to bar claims in relation to its business activities in other jurisdictions. While Section 8 of the *Act* sets out that the employment does not have to occur within British Columbia for it to be treated as if it did occur in British Columbia, the requirements of Section 8 are not met here with respect to the relevant activities of Dome, its servants or agents or employees.

In conclusion, based on the submissions of the parties, the actions or conduct of Dome, or its servants or agents or employees, which caused the breach of duty did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*. Again, there is no issue of dual or overlapping jurisdiction. The relevant employment activities of Dome were not connected to British Columbia and thus the Interjurisdictional Agreement is not relevant.

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

NO. T-1549-88

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

DARCY LIPINSKI

PLAINTIFF

AND:

DOME PETROLEUM LIMITED
and ANDY SIMPSON

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendant DOME PETROLEUM LIMITED in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings, submissions and material filed by the parties;

AND HAVING CONSIDERED the pleadings, evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, DARCY LIPINSKI, was, at the time the cause of action arose, August 11, 1986, a worker within the meaning of Part 1 of the *Workers Compensation Act*, and the injuries suffered by the Plaintiff arose out of and in the course of his employment.
2. The Defendant, ANDY SIMPSON, was not, at the time the cause of action arose, August 11, 1986, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
3. The Defendant, DOME PETROLEUM LIMITED, was, at the time the cause of action arose, August 11, 1986, an employer within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action or conduct of the Defendant, DOME PETROLEUM LIMITED, which allegedly caused the breach of duty of care on August 11, 1986, did not arise out of and in the course of employment within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 14th day of September, 1992.

Decision of the Appeal Division

Number: 92-1606
Date: September 25, 1992
Panel: Thomas Kemsley
Subject: Principal of Unregistered Firm

James M. Coady, who was retained by the Insurance Corporation of British Columbia to defend this legal action, requested a certificate under Section 11 of the *Workers Compensation Act*. The legal action concerns injuries suffered by the plaintiff in a motor vehicle accident that occurred on April 17, 1990 and involved vehicles driven by the plaintiff and the defendant. The Statement of Defence set out, in part, that the action was barred by the provisions in Section 10(1) of the *Workers Compensation Act*. On this application, the Appeal Division received copies of the Pleadings and the Examination for Discovery of the plaintiff, plus submissions from Mr. Coady and Mr. Dale McGregor, the lawyer for the plaintiff.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Defendant

Neither counsel disputed that Mr. Regan was a "worker" at the time of the motor vehicle accident on April 17, 1990. He was a self-employed truck driver and was registered with the W.C.B. He was driving his truck and going to solicit business when the accident occurred.

Therefore, based on the evidence and material submitted by the parties, I find that, at the time the cause of action arose, Mr. Regan was a "worker" within the meaning of Part 1 of the *Workers Compensation Act* and any conduct of his which caused the breach of duty arose out of and in the course of his employment.

Status of Plaintiff

The contentious issue on this application is whether or not Mrs. Ha was a “worker” at the time of the accident. It seems clear that if she was a “worker,” then she was in the course of her employment at the time.

On April 17, 1990, Mrs. Ha worked for Gnath Dental Ceramics Ltd. (“Gnath”) as a secretary and dental technician. At the time of the accident she was doing a pick-up for Gnath, which was part of her duties. Mrs. Ha and her husband each owned fifty percent of the shares of Gnath. Both were directors of Gnath and Mrs. Ha also had the titles of Secretary and Manager. Mr. Ha, with the assistance of the accountant, took much more responsibility for the management of the company than did Mrs. Ha, although she performed a number of functions for the business.

At the time of the motor vehicle accident, Gnath was not registered with the W.C.B. although it was required to be registered. The policy of the governors of the W.C.B. sets out that, even though Gnath was not registered, the “workers” of Gnath would have status under the *Act* but the principal, or principals, who were responsible for registering the company with the W.C.B. would not have the status of “workers” under the *Act*, even if they actually worked for the company. This policy is found in Decision No. 335 in Volume 5 of the *Workers’ Compensation Reporter*, p. 101 (1981) and item #7.52 of the *Rehabilitation Services and Claims Manual*:

Item #7.52 —

. . . 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 that principal was not personally responsible for the failure to register. . . .

The determination of whether a particular principal is responsible or not may often be difficult to make. . . .

In addition . . . there may be direct evidence in the particular case as to who was responsible for registering the company with the Board. If the evidence indicates that several principals were jointly responsible, claims from any one of those principals will be denied.

Mr. Coady argued that even though Mrs. Ha was a shareholder and director of Gnath, it was her husband who was responsible for the failure of Gnath to be registered with the W.C.B. He argued that Mrs. Ha had no managerial duties, no control and no responsibility for this matter, and thus should be found to be a “worker” of Gnath.

Mr. McGregor argued that Mrs. Ha had equal input with her husband in many decisions, and neither she nor her husband had any greater responsibility in regard to Gnath's non-registration with the W.C.B.

It is clear that Mr. Ha was more directly involved in much of the management and administration of Gnath. However, I am satisfied that he consulted with Mrs. Ha on many issues, even if he made the final decision. With regard to the responsibility to register with the W.C.B., I cannot find that Mrs. Ha had no responsibility in that regard. She said that, prior to the time of the accident, she did not know of the requirement to register with the W.C.B. and seems to assume that her husband did not know as well. While Mr. Ha may have been more likely to have discovered this requirement due to his greater involvement with the accountant, there is no evidence that, prior to the accident, he knew that Gnath was required to be registered with the W.C.B. If he did know and chose not to register and not to inform Mrs. Ha, then he would be solely responsible for that decision. However, I do not draw that conclusion from the evidence. At Question 116 of the Examination for Discovery, Mrs. Ha said that if she had known of the requirement to register with the W.C.B., then she would have gone ahead with that registration even if her husband had disagreed. I do not agree with Mr. Coady that this statement should be disregarded as being self-serving and inconsistent with other evidence.

I am satisfied that Mrs. Ha would have registered Gnath with the W.C.B. had she known of that requirement. It is no defence to any principal of a company or owner of a firm that they did not know of the registration requirement. If they would have seen to the registration had they known, then they bear some responsibility for the failure to register, subject to the situation where another principal or owner knows of that requirement and hides or misrepresents that fact from the other principals or owners.

In this case, Mr. Ha was not solely responsible for all of the management functions of Gnath. I find that Mrs. Ha, as a principal, was jointly responsible for the failure to register Gnath with the W.C.B. Thus, the policy found in item #7.52 and Decision No. 335 applies.

Therefore, based on the evidence and material submitted by the parties, I find that, at the time the cause of action arose on April 17, 1990, Mrs. Ha was not a "worker" within the meaning of Part 1 of the *Workers Compensation Act*.

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

NO. B911783
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

YOUNG MIN HA

PLAINTIFF

AND:

LANCE W. REGAN

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant LANCE W. REGAN in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Defendant, LANCE W. REGAN, was, at the time the cause of the accident arose, April 17, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The Plaintiff, YOUNG MIN HA, was not, at the time the cause of accident arose, April 17, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 25th day of September, 1992.



Decision of the Appeal Division

Number: 92-1672
Date: October 14, 1992
Panel: Thomas Kemsley
Subject: Independent Operator

A certificate under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the defendants, Pacific Coast Waste Systems Inc. and Brad Hosie. The legal action concerns injuries suffered by the claimant, Alexander Woronuk, in a motor vehicle accident that occurred on October 16, 1990 and involved a vehicle driven by the claimant and a vehicle driven by Brad Hosie and owned by Pacific Coast Waste Systems Inc.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

On this application, submissions were received on behalf of the claimant and the defendants. Counsel for the claimant alleged that there had been a breach of the Appeal Division's procedure which had disadvantaged the claimant. I can find nothing to substantiate that argument and will not consider it further.

Status of Claimant

At the time of the accident, the claimant operated a cleaning business under the name of Ultra Care Cleaning Systems. He cleaned private homes, the offices of Desticon Petroleum and carpets for the Richmond Inn. Several months prior to the accident the Richmond Inn had changed ownership and the rooms had been re-carpeted and his cleaning services were not actually required there at the time of the accident. The claimant was also negotiating a condominium cleaning contract with Bognor Developments and did general work relating to the installation of a mixing tank. The claimant

stated that, on the day of the accident, he was on the way to pick up general cleaning supplies for his business and was going to visit a close personal friend. The claimant had had personal optional protection at an earlier time but was not registered with the Board at the time of the accident. The claimant considered himself to be self-employed.

The defendants' counsel submitted that the claimant was a "worker" within the meaning of Part 1 of the *Act* as he was engaged in an industry covered in Schedule A of the *Act* and he fit within the definition of "labour contractor" found in item #7.42 of the *Rehabilitation Services and Claims Manual*.

The *Act* sets up three categories: worker, employer and independent operator. Section 1 contains a definition of "worker" and "employer" but not of "independent operator." The definition of "worker" in Section 1 includes — "(f) an independent operator admitted by the board under section 3(3);" Section 3(3) refers to the admission of ". . . an independent operator, not being an employer or a worker." The coverage obtained by an independent operator under Section 3(3) would be personal optional protection. Section 39 provides for the Board to collect assessments from independent operators who have personal optional protection. Item #7.41 of the *Manual* provides a description of who is generally considered to be an "independent firm."

The *Manual* sets up a further category of "labour contractor," which is not found in the *Act*. Item #7.42 sets out categories of people who are considered to be labour contractors. As pointed out by the defendants' counsel, this states:

Labour contractors include unincorporated individuals or partners: . . .

- (b) who are not defined as workers, do not have workers, or supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis (for example, a janitorial contractor having simultaneous contracts with two or more unaffiliated firms); . . .

Both independent operators and labour contractors have the option of obtaining personal optional protection for themselves. If they do this, they are regarded as independent operators and fall within the definition of "worker" in Section 1 of the *Act*.

The major difference between an independent operator and a labour contractor is the effect of not taking out personal optional protection. If an independent operator does not take out personal optional protection, he or she is not covered for Workers'

Compensation benefits. However, if a labour contractor does not take out personal optional protection, then he or she becomes a worker of the “prime contractor.” Thus, a labour contractor is a “worker” within Part 1 of the *Act* whether or not he takes out personal optional protection. An independent operator is a “worker” within Part 1 of the *Act* only if he takes out personal optional protection.

The determination of who is an “independent operator” and who is a “labour contractor” can be difficult. Item #7.44 of the *Manual* sets out that, while the definitions in items #7.41 and #7.42 are routinely followed by the Assessments Department, there may be disputes as to which category a person fits into and, in resolving those disputes, regard may be had to the general principles of control; ownership of equipment or licenses; terms of work contract; independent initiative, profit sharing, and piece work; employment of others; continuity of work; and, separate business enterprise.

Thus, the definitions in item #7.41 of “independent firm” and in #7.42 of “labour contractor” are not hard and fast rules. Their purpose is to help define the words “worker,” “employer” and “independent operator” found in the *Act*. When disputes arise, regard must be had to the individual circumstances of the case. This, in effect, makes the definitions in items #7.41 and #7.42 presumptions which will apply unless the circumstances indicate otherwise.

In this case, the claimant appears to fall into Part (b) of the definition of “labour contractor,” as set out above. However, there is a dispute about his status and the principles in item #7.44 should be considered. These factors all seem to indicate that the claimant was not a labour contractor, but was an independent operator:

(a) Control

The evidence is that the claimant was self-employed and was in control of his business and the contracts he took. He was not required to do most, or much of his work for any other firm. No one else directed his work commitments.

(b) Ownership of Equipment of Licenses

It appears that the claimant owned all of the equipment, licenses, insurance, etc. that were required to operate his business and was not operating under some other firm’s licence.

(c) Terms of Work Contract

There is no evidence of any continuing terms in the claimant's work contracts that would indicate a contract of service. There is no evidence of his being required to take certain contracts or of any non-competition clauses or other similar clauses which would indicate some interdependence.

(d) Independent Initiative, Profit Sharing, and Piece Work

It appears that the claimant ran his own business and did not share profits or losses in any way with any of the firms with which he contracted. His profit or loss depended totally on his independent initiative in getting these contracts and establishing a viable contract price.

(e) Employment of Others

The claimant did employ other workers occasionally but, either way, this factor is not indicative of whether or not he was an independent operator, given the nature of his business.

(f) Continuity of Work

It appears that the claimant was running a continuous business operation of his own and contracted with a variety of other firms and people, and was not engaged continuously and indefinitely by just one or two other firms.

(g) Separate Business Enterprise

This overlaps some of the above tests and is an important consideration in the question of whether or not an individual is an "independent firm." Here, the evidence is that the claimant had an independent business separate from his contractual relationship with other firms. He made business choices of his own and was not tied to these other firms. There is no evidence that his separate existence as a firm was not a legitimate separate existence. He was not merely part of another firm's business.

As well, it appears that the firms he dealt with were quite separate businesses from that of the claimant. They were not carpet cleaning or office cleaning firms which hired the claimant to do their regular work. If the claimant's firm had been employed by another firm that offered office cleaning services and it regularly used the claimant to service its contracts, and it expected the claimant to be available and he expected to get considerable work from that firm, then the presumption in item #7.42 would apply.

However, the evidence available here indicates otherwise. The firms that the claimant contracted with do not appear to have been in the cleaning business. Cleaning was not an integral part of their business activities and there is no evidence that the claimant was part of their business in any way.

As all of these factors strongly indicate that the claimant was an independent operator, the presumption in item #7.42 does not apply. Therefore, based on the evidence submitted by the parties, I find that as the claimant was an “independent operator” and did not have personal optional protection, he was neither an “employer” nor a “worker” under the *Act*.

Status of Defendants

There does not appear to be any dispute about the status of the defendants. According to the submission of the defendants’ representative, Brad Hosie was employed by Pacific Coast Waste Systems Inc. as a truck driver and was in the course of moving a container when the accident occurred. Pacific Coast Waste Systems Inc. was registered with the W.C.B. Thus, based on the evidence submitted, I find that Pacific Coast Waste Systems Inc. was an employer within Part 1 of the *Act*, Brad Hosie was a worker within Part 1 of the *Act*, and any conduct of the defendants which caused the alleged breach of duty of care arose out of and in the course of employment within the scope of Part 1 of the *Act*.

Editors’ note: This decision has been edited for publication.

NO. S-2422
RICHMOND REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(SMALL CLAIMS COURT)

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

ALEXANDER WORONUK

CLAIMANT

AND:

PACIFIC COAST WASTE SYSTEMS INC. and
BRAD HOSIE

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants PACIFIC COAST WASTE SYSTEMS INC. and BRAD HOSIE in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Claimant, ALEXANDER WORONUK, was not, at the time the cause of action arose, October 16, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The Defendant, PACIFIC COAST WASTE SYSTEMS INC., was, at the time the cause of action arose, October 16, 1990, an employer within the meaning of Part 1 of the *Workers Compensation Act*, and was engaged in an industry within the meaning of Part 1.
3. The Defendant, BRAD HOSIE, was, at the time the cause of action arose, October 16, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action and conduct of the Defendants, PACIFIC COAST WASTE SYSTEMS INC. and BRAD HOSIE, which allegedly caused the breach of duty of care on October 16, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 14th day of October, 1992.



Decision of the Appeal Division

Number: 92-1801
Date: November 16, 1992
Panel: Thomas Kemsley
Subject: Travel to Work

A certificate under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the defendants. The action concerns injuries suffered by the plaintiffs in a motor vehicle accident that occurred on February 6, 1990. The plaintiffs were passengers in a vehicle driven by the defendant, Cong Danh Lai, and owned by the defendant, Tri Thuc Lai, which was involved in a single vehicle accident.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

On this application, submissions were received from counsel for the plaintiffs and counsel for the defendants.

Facts

At the time of the motor vehicle accident, the plaintiffs and four or five other people were travelling in a van, driven by Cong Danh Lai and owned by Tri Thuc Lai — who was not present in the vehicle. They were travelling to Tofino on Vancouver Island for the purpose of clam harvesting. They were in the business of clam harvesting and each had his own harvesting licence. Before getting to Tofino, they encountered a heavy snowfall and the van went off the highway and the people in the van were injured.

These clam harvesters usually sold most of their harvest to Pacific Pride Seafoods Corporation (“Pacific”) on a per pound basis. On this trip, they were going to meet a boat in Tofino and travel to clam harvesting sites. The boat was owned by Cal Courey, who was paid a per pound commission by Pacific. The men planned to evenly divide the expenses of the trip among themselves.

Status of Plaintiffs

The two plaintiffs here were in the same situation as the other people in the van. All were self-employed clam harvesters with their own licence. They probably came within the definition of “commercial fisherman” in the *Workers Compensation Act* and regulations and thus, while they were engaged in clam harvesting, they would be workers of the commercial buyer or commercial recipient of their clams. However, it is not necessary to decide if they were commercial fishermen here, as I find that they were not within the course of their employment when the accident occurred.

Item #18.10 of the *Rehabilitation Services and Claims Manual* sets out the general rule that there is no W.C.B. coverage while a worker is travelling along the roads which lie between his place of residence and his employer’s premises. There are exceptions to this general rule for situations where, for example, the employer has control of the road which is being used, or where there are special hazards that are particular to the employment, or where the employer provides the transportation, or where the worker is doing some additional activity connected with his employment while travelling to work, or where the employer has required the employee to report to a particular location. In this case, if the plaintiffs had reached the boat that was to take them clam harvesting and had been in the process of loading the boat and getting under way, then they would have been within the course of their employment. I do not accept the argument that they were not workers because there was no requirement that they had to sell their clams to Pacific. The *Assessment Policy Manual* contemplates that situation and I am satisfied that these men would have been workers within the *Act* even without it being certain to whom they would have sold the clams. In this case, since the boat captain was being paid by Pacific for his services and his boat, I am satisfied that the clam harvesters would have sold their clams to Pacific.

However, these men had not reached the boat site at the time of the motor vehicle accident. They were travelling to work. On the evidence submitted, it appears that they chose where to work and when to work. They had not been sent to this location by Pacific or any other employer. Their travelling expenses were not being paid by Pacific or another employer. They were travelling on a public highway and the accident occurred as a result of the normal hazards of highway travel. This was not connected in any particular way to their employment. This type of accident cannot be seen to be a normal hazard of being a commercial fisherman or clam harvester. Many

people drive to their place of work and may encounter adverse driving conditions. It is not a special hazard of the fishing industry.

Therefore, on the evidence submitted by the parties, I find that the plaintiffs were not within the course of their employment at the time of the motor vehicle accident. They were travelling to their place of work and there were no special facts which would remove them from the general rule that there is no coverage during such travelling.

Status of the Defendants

The defendant Cong Danh Lai, who was driving the van, was in the same position as the plaintiffs and the other people in the van. He was not an employer as he did not hire these people. He was probably a commercial fisherman but he was not within the course of his employment at the time of the motor vehicle accident for the same reasons that apply to the plaintiffs.

There is no evidence that the defendant, Tri Thuc Lai, who owned the van and who was not present at the time of the motor vehicle accident was in the course of his employment at the time. Nor is there any evidence that he was an employer under the *Act*.

Therefore, on the evidence submitted by the parties, I find that the defendants were not within the course of their employment at the time of the motor vehicle accident on February 6, 1990.

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

NO. B901921
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

KHAI HOANG DUONG and DUNG VAN DAO

PLAINTIFFS

AND:

TRI THUC LAI and CONG DANH LAI

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants TRI THUC LAI and CONG DANH LAI
in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters
relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit
evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and
material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiffs, KHAI HOANG DUONG and DUNG VAN DAO, were not, at the time the cause of action arose, February 6, 1990, acting in the course of employment within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiffs, KHAI HOANG DUONG and DUNG VAN DAO, on February 6, 1990, did not arise out of, and in the course of, employment.
3. The Defendants, TRI THUC LAI and CONG DANH LAI, were not, at the time the cause of action arose, February 6, 1990, acting in the course of employment within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action and conduct of the Defendants, TRI THUC LAI AND CONG DANH LAI, which allegedly caused the breach of duty of care on February 6, 1990, did not arise out and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 16th day of November, 1992.



Decision of the Appeal Division

Number: 92-1872
Date: November 25, 1992
Panel: Thomas Kemsley
Subject: Extra-provincial Conduct (No. 2)

A certificate under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the defendant. The legal action concerns injuries suffered by the claimant (plaintiff) on December 10, 1991 when a coffee pot she was using broke, with the result that she suffered burns from hot coffee that spilled on her. The coffee pot was manufactured by Melitta in Germany and distributed in British Columbia by the defendant. On this application, submissions were received from counsel for the claimant (plaintiff) and the counsel for the defendant.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Claimant (Plaintiff)

There is no doubt on the material submitted that the claimant (plaintiff) was a worker and was within the course of her employment at the time of the accident. She was a waitress with Kelly O'Bryan's Neighbourhood Restaurant, a firm registered with the Board. She was in the course of serving customers when the coffee pot broke. The only uncertainty here is the date of injury. The Notice of Claim and Particulars of Claim filed on behalf of the claimant (plaintiff) with the court indicate December 20, 1991 as the date of injury. However, the claimant's (plaintiff's) application to the Board and the medical reports filed indicate that the injury occurred on December 10, 1991. As this date seems correct, it will be used in this determination.

Therefore, based on the evidence submitted by the parties, I find that on the date of injury, December 10, 1991, the claimant (plaintiff) was a worker and her injuries arose out of and in the course of her employment within the meaning of Part 1 of the *Workers Compensation Act*.

Status of Defendant

This issue is more complicated and both arguments and case law were submitted. The arguments raised the question of whether the defendant is an employer within Part 1 of the *Act* and entitled to rely on Section 10(1) of the *Act*.

The evidence submitted indicates that the coffee pot in question was manufactured by Melitta in Germany, shipped to Melitta Canada in Ontario and then shipped to Melitta Canada's office in Burnaby, B.C. That office is responsible for the sales, distribution and servicing of Melitta products to commercial entities in B.C. It employs three sales people, two warehouse people and two secretaries. Servicing is done at independent outlets approved by Melitta Canada. The Burnaby office is registered with the W.C.B.

There is no doubt that Melitta Canada Inc. is an employer in British Columbia within the meaning of Part 1 of the *Act* and is engaged in an industry within the *Act*. However, that industry is the sales and distribution of Melitta Products. The product involved here was not manufactured in British Columbia. Melitta Canada does not pay assessments to the W.C.B. here on its manufacturing operations, as those operations are not carried on in British Columbia. If Melitta Canada was being sued for something that was incidental to its sales and distribution operation in British Columbia, then Section 10 of the *Act* would apply. However, in this case, Melitta Canada is being sued for negligence in the manufacture of the coffee pot and in the failure to recall the product and in the failure to warn users of the defect. I do not accept that the manufacture of a product is incidental to its distribution. Manufacturing is the primary operation, as without it no distribution would occur. Thus, I cannot find that Melitta's manufacturing operations can be included within the scope of the *Act*, as set out primarily in Section 2 of the *Act*. Section 10(1) of the *Act*, in providing a bar to legal action, states in the last sentence:

This provision applies only when the action or conduct of the employer, his 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.

As this action appears to be based primarily on negligence in the manufacture of the coffee pot, I find that the action or conduct which caused the breach of duty of care did not arise out of and in the course of employment within the scope of Part 1 of the *Act*. Rather, it arose from employment that was carried on in another jurisdiction and not within the scope of the B.C. *Act*.

Standing — Section 10(6)

The defendant has argued that the claimant (plaintiff) is without standing to bring this legal action. This argument is based on Section 10(6) of the *Act*. Under Section 11 of the *Act*, the Board is to determine any matter that is relevant to the action and within its competence under the *Act*. It is not within the Board's competence to determine who has standing to bring a civil action. That is a matter for the judge who is seized of the action. The Board's competence on this issue is to determine matters that relate to the Board's decision-making authority.

Under Section 10(6) of the *Act*, if an injured worker applies for compensation, then the Board is subrogated to the right of the worker in regard to any legal action arising from the injury. Section 10(6) states that, in such a situation:

The board has exclusive jurisdiction to determine whether it shall maintain an action or compromise the right of action, and its decision is final and conclusive.

In this case, the claimant (plaintiff) made an application for compensation to the Board dated December 20, 1991. Medical aid benefits were paid by the Board directly to the provider of those services. The claimant (plaintiff) personally received no compensation benefits from the Board as there was no indication that she was entitled to any benefits. She did not lose any time from work after the date of injury, and thus had no claim for wage-loss benefits. The claimant (plaintiff) and her lawyer did not contact the Board when they decided to start this civil action. If they had done so, it is possible that the Board's Legal Services Division might have authorized the claimant (plaintiff) to pursue it — on completion of the necessary arrangements. This was never done. (This might involve repaying the benefits paid on the claims or providing an undertaking to reimburse the Board as a first charge on any proceeds from the legal action.)

On the evidence submitted by the parties, I find that the claimant (plaintiff) made an application for compensation to the Board, this application was accepted and medical aid benefits were paid, and the Board, thereby, became subrogated to the right of the claimant (plaintiff) under Section 10(6) of the *Act*, and the Board has done nothing to assign its right of subrogation to the claimant (plaintiff) nor has the claimant (plaintiff) requested an opportunity to change her election under Section 10(2) of the *Act*. Subject to any further arrangements which may be made between the claimant (plaintiff) and the W.C.B., it is up to the court to determine the effect of this situation on the legal action.

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

NO. 23961
KAMLOOPS REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(SMALL CLAIMS COURT)

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

SUE GALBRAITH

CLAIMANT (PLAINTIFF)

AND:

MELITTA CANADA INC.

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant, MELITTA CANADA INC., in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Claimant (Plaintiff), SUE GALBRAITH, was, at the time the cause of action arose, December 10, 1991, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Claimant (Plaintiff), SUE GALBRAITH, at the time the cause of action arose, December 10, 1991, arose out of, and in the course of, her employment.
3. The Defendant, MELITTA CANADA INC., was, at the time the cause of action arose, December 10, 1991, an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action or conduct of the employer, MELITTA CANADA INC., its servant or agent, which allegedly caused the breach of duty of care on December 10, 1991, did not arise out of in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
5. In regard to the injuries suffered by the Claimant (Plaintiff), SUE GALBRAITH, on December 10, 1991, the Claimant (Plaintiff), SUE GALBRAITH, made an application for compensation to the Board within three (3) months of the occurrence of the injury, the application was accepted and medical aid benefits were paid, and, as of the date of this Certificate, the Board has taken no steps to assign its right of subrogation under Section 10(6) of the *Workers Compensation Act* to the Claimant (Plaintiff), SUE GALBRAITH.

CERTIFIED this 25th day of November, 1992.



Decision of the Appeal Division

Number: 92-1875
Date: November 25, 1992
Panel: Thomas Kemsley
Subject: Irregular Starting Points (No. 1)

Counsel for the plaintiff in this legal action requested a certificate under Section 11 of the *Workers Compensation Act*. The action concerns injuries suffered by the plaintiff in a motor vehicle accident that occurred on February 1, 1991 in Surrey, B.C. The plaintiff was a passenger in a vehicle driven by the defendant which was in a collision with another vehicle. On this application, submissions were received on behalf of the plaintiff and the defendant.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Facts

The facts are taken from the submissions of counsel. Both the plaintiff and defendant were employees of Beaver Lumber Ltd., a firm registered with the Board. Their normal place of work was at Beaver Lumber on 56th Avenue in Langley. The plaintiff lived on 24th Avenue in Surrey and the defendant lived on 206A Street in Langley.

On February 1, 1991 the plaintiff and defendant were planning to attend a training seminar at the Beaver Lumber branch in North Vancouver. This was an optional seminar, but had been recommended by their employer. The defendant picked up the plaintiff and they were travelling in the direction of North Vancouver when they were in the accident. It appears that the plaintiff did not normally travel to work with the defendant as they worked different shifts and the plaintiff was a full-time employee while the defendant was a part-time employee. Both were being paid for the day to attend the seminar.

Argument

Plaintiff's counsel argued that the plaintiff and defendant were not within the course of their employment at the time of the accident as they were not on their way to work — this was an optional seminar which did not involve them in their normal work duties. Counsel also pointed out that neither travelled as part of their normal work duties and they were not being paid mileage for this trip.

Defendant's counsel argued that both the plaintiff and defendant were workers and were within the course of their employment as they were engaged in an activity which was incidental to their employment. She pointed out that the seminar they were planning to attend would improve their job skills and thus was a benefit to their employer. She stated that their attendance at the seminar required them to travel at an earlier time than normal and to take a different route. She referred to item #18.30 of the *Rehabilitation Services and Claims Manual* ("Manual"). She also argued that this was an irregular starting point for both workers and referred to item #18.32 of the *Manual*.

Finding

I find that both the plaintiff and defendant were workers and were within the course of their employment when the motor vehicle accident occurred. I agree with the arguments put forth by counsel for the defendant. This seminar was connected to their work and of benefit to both them and their employer. It had been recommended by their employer and was being offered at another branch of Beaver Lumber. Both the plaintiff and defendant were being paid for the day to attend the seminar. It is not necessary for workers to be engaged in their normal productive work in order to be covered for workers' compensation. This seminar was sufficiently related to their employment to be part of their employment.

This seminar also involved an irregular starting point for the plaintiff and defendant — North Vancouver. The plaintiff and defendant normally worked in Langley and thus their attendance at this seminar involved a significant deviation from their normal routes to work.

Item #18.00 of the *Manual* points out that, generally, accidents occurring in the course of travel from the worker's home to his or her normal place of employment are not compensable. Several exceptions to that general rule are set out. Item #18.32 of the *Manual* states:

Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than his regular place of employment, he is covered for compensation while

travelling to and from that temporary place, and this is so whether he goes there from his regular place of employment or goes there directly from home. . . .

Both the plaintiff and defendant fit within the exception set out in item #18.32. Their travel to North Vancouver was work related and of benefit to the employer. They were being paid. It was not their normal or usual place of work. While the defendant may have made some deviation to pick up the plaintiff on that day, I am satisfied that this was primarily for work reasons. It appears that they did not regularly commute together. The employer, Beaver Lumber Ltd., was registered with the Workers' Compensation Board.

Therefore, on the evidence submitted by the parties, I find that, at the time of the motor vehicle accident on February 1, 1991, the plaintiff and defendant were workers within the meaning of Part 1 of the *Workers Compensation Act*. The plaintiff's injuries arose out of and in the course of her employment. Any conduct of the defendant that caused the breach of duty arose out of and in the course of his employment.

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

NO. C911909
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

BONNIE PETROWSKY

PLAINTIFF

AND:

JASON LEE WALTERS

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, BONNIE PETROWSKY, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, BONNIE PETROWSKY, was, at the time the cause of action arose, February 1, 1991, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, BONNIE PETROWSKY, on February 1, 1991, arose out of, and in the course of, her employment.
3. The defendant, JASON LEE WALTERS, was, at the time the cause of action arose, February 1, 1991, a worker within in the meaning of Part 1 of the *Workers Compensation Act*.
4. The action and the conduct of the defendant, JASON LEE WALTERS, which allegedly caused the breach of duty of care on February 1, 1991, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 25th day of November, 1992.



Decision of the Appeal Division

Number: 92-1899
Date: November 27, 1992
Panel: Thomas Kemsley
Subject: Compensable Consequences of Work Injuries

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the plaintiff and defendants. The legal action concerns injuries suffered by the plaintiff in a motor vehicle accident on December 5, 1990 which involved a vehicle driven by the plaintiff and a vehicle driven by the defendant, Mr. Lee, and owned by the defendant, Complete Environmental Services Inc. ("C.E.S. Inc."). The accident occurred in the parking lot area on the property of the W.C.B. in Richmond, B.C. Written submissions were received on behalf of the plaintiff and the defendants.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Defendants

There is no dispute about the status of the defendants. Mr. Lee was the President and owner of C.E.S. Inc. and worked for that company. Part of his work involved looking after tenders and doing estimates. He was paid a salary by C.E.S. Inc., which was registered with the W.C.B. On the day of the accident, Mr. Lee had gone to the W.C.B. to pick up a letter of good standing from the W.C.B. to attach to a tender. Mr. Lee had picked up the letter and was driving out of the visitors' parking lot to go back to the office when the accident occurred. Clearly he was a "worker" and was within the course of his employment at the time of the accident.

Therefore, based on the material submitted by the parties, I find that, at the time of the motor vehicle accident on December 5, 1990, the defendant, Hou Nung Lee, was a “worker” within Part 1 of the *Workers Compensation Act* and his injuries arose out of, and in the course of, his employment. Further, at that time, the defendant, Complete Environmental Services Inc., was an employer engaged in an industry within Part 1 of the *Act*.

Status of Plaintiff

At the time of the accident, the plaintiff was not working due to a work injury he suffered to his shoulder in July 1990. He had been a fitter/welder at the time of his accident in July. In December, he was still off work and in receipt of W.C.B. benefits. On the day of the accident, he had gone to the W.C.B. for physiotherapy treatment for his shoulder. This was part of a six-week program, that had started one week earlier, in which the plaintiff attended at the Board for physiotherapy every morning from 8:00 to 10:30 a.m. At the time of the accident on December 5, 1990, the plaintiff had finished his physiotherapy treatment for that day and was leaving the visitors’ parking lot at the W.C.B. when the motor vehicle accident occurred.

The issue is whether, at the time of the accident on December 5, 1990, the plaintiff was a “worker” and was within the course of his employment.

Items #22.00 to #22.34 set out the policy of the governors on “Compensable Consequences Of Work Injuries.” Item #22.00 states, in part:

Not all consequences of work injuries are compensable. . . .
Looking at the matter broadly and from a “common sense” point of view, it should be considered whether the previous injury was a significant cause of the later injury.

Item #22.10 provides that — “Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable.” Item #22.11 covers disablement caused by surgery.

These policy items make it clear that, for workers’ compensation purposes, an injured worker is considered to be a “worker” within the course of his or her employment for activities related to treatment for a compensable injury.

Item #22.15, referred to by the plaintiff’s counsel, sets out that — “Injuries arising in the course of normal travel for subsequent [sic] treatment are generally not compensable.” It goes on to distinguish between normal or routine travel for treatment, and special and exceptional journeys for treatment or examination — which are

compensable activities. This parallels the policy regarding travelling to and from work, as found in items #18.00 to #18.42. That is, injuries occurring in normal travel to work are not compensable, but injuries occurring in the course of special or exceptional journeys for work purposes are compensable.

As counsel pointed out, the plaintiff was attending the Board as part of normal travel for treatment — he was going daily, just as he would commute to work. Thus, his travel on December 5, 1990 was not special and exceptional.

However, the plaintiff was not travelling to or from the W.C.B. premises at the time of the accident. He was on the premises of the W.C.B. Item #18.01 sets out that:

Compensation coverage generally begins when a worker enters the employer's premises for the commencement of a shift, and terminates when he leaves the premises following the end of the shift. Thus where a worker is travelling to work by automobile, he is not covered for compensation from home to the point of entry to the employer's premises, but he is covered from there to his particular place of work. . . .

Item #19.20 sets out the policy on Parking Lots. It is clear from items #18.01 and #19.20 that, where an injury occurs in a parking lot, it will be compensable when the parking lot is on the employer's premises, the lot is exclusively for the employer's business, the lot is controlled by the employer, the injury arose from a hazard of the premises, and the injury occurred proximal to the start or stop of a shift.

Plaintiff's counsel argued that item #18.01 did not apply under these circumstances and did not override the philosophy of item #22.15. I cannot agree. The above policy items clearly show the general philosophy is that treatment related activities for an injured worker are dealt with in the same way as work related activities for workers. That is, routine travel is not covered. Injuries occurring during the actual activity, whether treatment or work activities, are covered. Coverage begins on entry to the employer's premises for the start of a shift — or treatment. It stops when the worker leaves the employer's premises. Thus, workers are in the same situation while attending for treatment for a compensable injury as they would be in while attending for work.

Here the plaintiff was on the premises of the W.C.B. at the time of the motor vehicle accident. He was in a parking lot owned and controlled by the W.C.B., which was solely for the use of W.C.B. visitors. The motor vehicle accident occurred from a hazard of the parking lot and it occurred at the end of the plaintiff's visit for physiotherapy treatments.

Therefore, based on the material submitted by the parties, I find that, at the time of the motor vehicle accident on December 5, 1990, the plaintiff, Michael Raymond Potvin, was a “worker” within the meaning of Part 1 of the *Workers Compensation Act* and his injuries arose out of, and in the course, of his employment.

Editors’ note: This decision has been edited for publication.

NO. C910620
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

MICHAEL RAYMOND POTVIN

PLAINTIFF

AND:

HOU NUNG LEE and
COMPLETE ENVIRONMENTAL SERVICES INC.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, MICHAEL RAYMOND POTVIN, and the Defendants, HOU NUNG LEE and COMPLETE ENVIRONMENTAL SERVICES INC., in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, MICHAEL RAYMOND POTVIN, was, at the time the cause of action arose, December 5, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, MICHAEL RAYMOND POTVIN, on December 5, 1990, arose out of, and in the course of, his employment.
3. The Defendant, HOU NUNG LEE, was, at the time the cause of action arose, December 5, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The Defendant, COMPLETE ENVIRONMENTAL SERVICES INC., was, at the time the cause of action arose, December 5, 1990, an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
5. The action and conduct of the Defendants, HOU NUNG LEE and COMPLETE ENVIRONMENTAL SERVICES INC., which allegedly caused the breach of duty of care on December 5, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 27th day of November, 1992.

Decision of the Appeal Division

Number: 92-1910
Date: November 30, 1992
Panel: Thomas Kemsley
Subject: Travelling Employee

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the plaintiff. The legal action concerns injuries suffered by the plaintiff in a single-vehicle motor vehicle accident on September 29, 1989. The plaintiff was a passenger in a vehicle driven by the defendant, Roger Allen Prato, leased by the defendant, A & R Installation Ltd., and owned by the defendants Hallmark Ford Sales Ltd. and Ford Credit Canada Ltd. On this application, submissions were received on behalf of the plaintiff and the defendants.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

At the time of the motor vehicle accident, the plaintiff was employed as an installer by Whistler Insulation Ltd., a firm owned by the defendant, Roger Prato, and registered with the W.C.B. at that time. Mr. Prato also operated the defendant A & R Installation Ltd., which also was registered with the W.C.B.

On the day of the accident, the plaintiff had started work in the Lower Mainland at about 6:00 or 7:00 a.m. and worked until about noon. He had volunteered to travel to Quesnel that day with his boss, Mr. Prato, to do an installation job the next day in Quesnel. The plaintiff and defendant were going to stay that night with the defendant's brother in Quesnel. The motor vehicle accident occurred in Quesnel while they were still on their way to Mr. Prato's brother's house.

Status of Plaintiff

Plaintiff's counsel argued that the plaintiff was not within the course of his employment at the time of the accident as he had volunteered to go on the trip, it was outside of his normal working hours, he was not being paid for his travel time, and his primary motivation for going on the trip was to visit a girl he had met before. There is some dispute as to whether or not the plaintiff was paid for travel time to Quesnel.

Various policy items in the *Rehabilitation Services and Claims Manual* are relevant to this determination. Item #18.00 sets out that:

The general position is that accidents occurring in the course of travel from the worker's home to his normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. . . .

Item #18.20 entitled "Provision of Transportation by Employer" states:

An employer may directly or indirectly provide transportation for its employees' journeys to and from work. In situations where this involves providing a specific vehicle such as, for example, a crew bus, in which the journeys are made, compensation coverage is generally extended to injuries occurring while travelling in this employer-owned vehicle. . . .

Item #18.22 entitled "Payment of Travel Time and/or Expenses by Employer" states:

The payment of wages or travelling allowances etc. may in some circumstances be a factor to be considered, but it usually will not be a significant factor, nor is it ever the sole criteria in determining the acceptability of a claim.

Item #18.32 entitled "Irregular Starting Points" states:

. . . Another situation is where there is an injury occurring in the course of a journey between what might be called two working points. . . . Where the worker terminates productive activity at one point and is required to commence productive activity at another point, travel between those points is part of the employment and is in the course of employment as long as the worker is travelling reasonably directly and is not making major deviations for personal reasons.

A different situation arises when the job function requires the worker, after first reporting to the employer's premises or assembly area, to travel to a work location. Clearly, the worker's travel from home to the employer's premises or assembly area would be considered commuting and, as such, would not warrant compensation coverage. The worker's travel from the employer's premises or assembly area to the point where he will begin the work is normally covered as being in the course of employment. . . .

Item #18.41 entitled "Personal Activities During Business Trips" states:

The basic principle followed by the Board is set out in Larson's Workmen's Compensation Law as follows:

"Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown."

This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

Item #18.42 entitled "Trips Having Business and Non-Business Purpose" states:

Whatever other requirements there may be for accepting a claim for an injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the claimant is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the claimant is making a significant deviation from that route for non-business purposes.

I am satisfied here that, at the time of the motor vehicle accident, the plaintiff was a worker and was within the course of his employment. The fact that he volunteered for the job is not significant. The primary reason for the trip was to do a job in Quesnel the next day. The plaintiff would not otherwise have been on the trip. He had to travel to Quesnel to do the work and it was during this travel that he was injured. He was in his employer's vehicle. He was travelling directly to the place where he would stay that night and there is no evidence of a significant deviation from that route for personal

reasons. While he had travelled before in the course of his employment, it was not a regular trip, and thus the trip was not a routine commute. Quesnel was an irregular starting point for the particular job. It does not matter whether or not the plaintiff was being paid for travelling time to get to the job — he was travelling to an irregular starting point for work reasons. His motivation for accepting the particular work does not change the situation — he was still travelling primarily for work reasons.

Therefore, based on the material submitted by the parties, I find that, at the time of the motor vehicle accident on September 29, 1989, the plaintiff was a worker and his injuries arose out of, and in the course of, his employment.

Status of Defendants

At the time of the motor vehicle accident the defendant, Roger Prato, was a worker and was within the course of his employment for the same reasons as set out above. He was employed by a company registered with the W.C.B. He was travelling to an irregular starting point primarily for work purposes. He occasionally travelled as part of his work activities. There is no evidence of any significant deviation for non-business purposes. He was travelling to the place where he would stay that night so that he could do the job the next morning.

Therefore, based on the material submitted by the parties, I find that, at the time of the motor vehicle accident on September 29, 1989, the defendant, Roger Allen Prato, was a worker within the meaning of Part 1 of the *Workers Compensation Act*. Further, any action or conduct of the defendant, Roger Allen Prato, which allegedly caused the breach of duty arose out of, and in the course of, his employment.

There was no evidence provided about the other defendants, other than that all were firms registered with the W.C.B. As none of these firms were the employer of the plaintiff or the defendant, Mr. Prato, there are insufficient facts on which to make any finding about the status of these other defendants. However, I assume that those matters are not in dispute between the parties.

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

NO. B914916
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

MICHAEL RAYMOND BIRCH

PLAINTIFF

AND:

ROGER ALLEN PRATO, FORD CREDIT CANADA LTD.,
HALLMARK FORD SALES LTD.,
and A & R INSTALLATION LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, MICHAEL RAYMOND BIRCH, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, MICHAEL RAYMOND BIRCH, was, at the time the cause of action arose, September 29, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, MICHAEL RAYMOND BIRCH, on September 29, 1989, arose out of, and in the course of, his employment.
3. The Defendant, ROGER ALLEN PRATO, was, at the time the cause of action arose, September 29, 1989, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action and conduct of the Defendant, ROGER ALLEN PRATO, which allegedly caused the breach of duty of care on September 29, 1989, arose out and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 30th day of November, 1992.

Decision of the Appeal Division

Number: 92-2012
Date: December 18, 1992
Panel: Thomas Kemsley
Subject: Captive Road (No. 3)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the plaintiff. The action concerns injuries suffered by the plaintiff in a motor vehicle accident that occurred on January 25, 1990. The accident involved a vehicle driven by the plaintiff and a garbage truck driven by the defendant, William Cousins, and owned by the defendant, Evergreen Industries Ltd.

There appears to be no dispute about the status of the defendants. The issue on this application is the status of the plaintiff at the time of the motor vehicle accident.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Plaintiff

At the time of the motor vehicle accident, the plaintiff was leaving Lilydale Co-operative Limited, her place of employment. Her employer was registered with the W.C.B. The plaintiff had finished her shift for the day, had driven her car out of the parking lot and was driving along the access road to the main road when the accident occurred. Plaintiff's counsel submitted that the plaintiff was not a worker and was not within the course of her employment at the time of the accident as the accident occurred approximately thirty-five minutes after the end of her shift, and it occurred on a public road that was not within the control of her employer.

There are several policy items in the *Rehabilitation Services and Claims Manual* that are potentially relevant to this matter:

#18.10 Road Leading to Employer's Premises

The general rule is that there is no coverage while a worker is travelling along the roads which lie between his place of residence and his employer's premises. However, in some cases, the nature of the road leading to the employer's premises may give coverage while on that road.

#18.11 Captive Road Doctrine

A "captive road" is one which is technically a public highway but as a practical matter leads only to the premises of the particular employer and is for practical purposes under the control of that employer. In such a case, the road might be classified as part of the employer's premises for compensation purposes. . . .

#19.20 Parking Lots

For the purpose of determining whether an injury occurring in a parking lot is compensable, the Board looks at five basic questions.

First, was the lot provided by the employer for the worker? . . .

Second, was the lot controlled by the employer? . . .

Third, was the injury caused by a hazard of the premises? . . .

Fourth, was the parking lot contiguous to the place of employment? . . .

Finally, did the injury occur proximal to the start or stop of the shift? If there is a significant time gap between the time of an accident and the start or stop of the shift, the matter is investigated to determine whether there is an employment relationship.

The evidence here is not entirely consistent but indicates that the access road, on which the accident occurred, led directly to the premises and parking lot of the employer. There was another road that also gave access to the employer's premises. The

access road did not legally belong to the employer nor did the employer have a formal agreement to maintain the road, although it appears that the employer did maintain the road by cutting brush for better visibility.

There were several other businesses that were located beyond the employer's premises which apparently made some use of this road, although the evidence on this point is conflicting. It appears that the access road led directly to the premises of the employer, and anyone using the road to get to these other businesses had to drive across the property of the plaintiff's employer before continuing on to the other businesses. It is not clear how much this road was used for access to the other businesses — as different people had different impressions about that. This access road had a gate on it that was installed by the plaintiff's employer but was not on the property of the employer. The gate was located at a narrower part of the road, rather than at the property line where considerable fencing would have been required to construct an effective barrier to entering the employer's premises. The employer could close the gate to prevent entry to its premises. The access road was also used by some customers of the employer. The plaintiff's car was hit inside the gate by a garbage truck that was backing down the road to collect garbage from the plaintiff's employer.

On reviewing all of the evidence on file, I am satisfied that this access road comes within the "Captive Road Doctrine." It went directly and only to the employer's property although the employer allowed others to drive across its property to get to other properties. If the employer had not allowed others to drive across its property, then the access road would have been used only for the employer's business. If an employer owns or has control of a road or parking lot, but allows others to use it, that does not mean that the employer's workers will not be covered for accidents that occur on that controlled road or parking lot. Here, the access road was fairly short and stopped at the employer's premises. The employer did not own it, but cleared brush along it and had a gate constructed part way along the road. When an employer is able to install a gate on a road to restrict access, that is a clear indication of practical control over the road. The use that others made of the road was only possible because the employer allowed them to cross its land. This did not significantly diminish the employer's control over the road. This is not like the situation where a public road passes by an employer's premises and is used by other people. In such a case, the employer would have no ability to prevent other people from using the road.

Finally, the thirty-five minute delay between the end of the plaintiff's shift and the accident is not significant. She had finished her shift and was in the process of leaving the employer's premises. There was no long and undue delay for personal reasons that would change the nature of the risk. Item #19.20 on parking lots, which reflects principles similar to item #18.11 on the captive road doctrine, sets out that one relevant question is whether the injury occurred proximal to the start or stop of the shift. Here, the accident did occur proximal to the stop of the plaintiff's shift.

Therefore, based on the evidence on file, I find that at the time of the motor vehicle accident on January 25, 1990, the plaintiff, Gloria Hitsman, was a worker within the meaning of Part 1 of the *Workers Compensation Act* and her injuries arose out of, and in the course of, her employment.

Status of Defendants

The evidence indicates that the defendant, William Cousins, worked for the defendant, Evergreen Industries Ltd., and at the time of the accident was driving a garbage truck in the course of his employment. Therefore, based on the evidence on file, I find that, at the time of the motor vehicle accident on January 25, 1990, the defendant, William Cousins, was a worker within the meaning of Part 1 of the *Workers Compensation Act* and the defendant, Evergreen Industries Ltd., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*. Furthermore, any action or conduct of the defendants which allegedly caused the breach of duty arose out of, and in the course of, employment.

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

NO. 91 3359
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

GLORIA HITSMAN

PLAINTIFF

AND:

WILLIAM COUSINS and
EVERGREEN INDUSTRIES LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, GLORIA HITSMAN, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, GLORIA HITSMAN, was, at the time the cause of action arose, January 25, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, GLORIA HITSMAN, at the time the cause of action arose, January 25, 1990, arose out of, and in the course of, her employment.
3. The Defendant, WILLIAM COUSINS, was, at the time the cause of action arose, January 25, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The Defendant, EVERGREEN INDUSTRIES LTD., was, at the time the cause of action arose, January 25, 1990, engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
5. The action or conduct of the Defendants, WILLIAM COUSINS AND EVERGREEN INDUSTRIES LTD., which allegedly caused the breach of duty of care on January 25, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 18th day of December, 1992.

Decision of the Appeal Division

Number: 93-0026
Date: January 8, 1993
Panel: Thomas Kemsley
Subject: Misconduct by Worker

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the plaintiff. The legal action involves injuries suffered by the plaintiff in a motor vehicle accident on October 28, 1990 which involved a vehicle driven by the plaintiff and a vehicle apparently driven by Frederick Thomas Martindale ("Martindale"), now deceased, which was registered in the name of the defendant, Kenbrent Refrigerated Express Ltd., and which was owned by Roger Reimer ("Reimer"), now deceased, who was in the vehicle with Martindale. The accident occurred in the vicinity of Golden, B.C. On this application, submissions were received on behalf of the plaintiff and defendants.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Plaintiff

At the time of the accident the plaintiff was in the course of his employment with his employer, Porter Trucking Ltd. The plaintiff was a resident of Saskatchewan and the vehicle he was driving was registered in Alberta. As neither the plaintiff nor his employer was resident within British Columbia, the status of the plaintiff is not a matter to be determined on this application. It is a matter for the Workers' Compensation Board of Saskatchewan.

Status of Defendants

Kenbrent

Kenbrent Refrigerated Express Ltd. was the operating arm of Kenbrent Holdings Ltd. which was registered with the Workers' Compensation Board at the time of the accident.

As Kenbrent Holdings Ltd. was registered with the Board at the time of the accident, I find that it was an employer engaged within an industry within Part 1 of the *Act*.

Kenbrent Refrigeration Express Ltd. had no record of registration with the Board. There were few facts presented about it in the submissions and it is not clear whether the status of Kenbrent Refrigeration Express Ltd. is really in issue on this application, as the submissions made only brief reference to it. The real issue seems to be the status of Roger Reimer and Frederick Martindale. As there are too few facts presented to determine the status of Kenbrent Refrigeration Express Ltd., I will make no finding on that point. If the parties wish to have that determined, they will need to submit further facts and argument.

Reimer and Martindale

Reimer and Martindale, who were the only occupants of the one vehicle, both died in the motor vehicle accident on October 28, 1990. It appears that Martindale was driving at the time of the accident, although that has not been agreed between the parties. The defendants submitted that it is not necessary for the Board to determine whether Reimer or Martindale was driving at the time of the accident.

The evidence indicates that both Reimer and Martindale had been drinking alcohol shortly before their death. The Autopsy Report for Reimer showed an elevated ethyl alcohol level of .16%. The Autopsy Report for Martindale showed elevated vitreous fluid ethyl alcohol of .35%.

A "worker" — Reimer

Reimer was a truck driver who was registered with the Board as an independent operator at the time of the accident. He was involved in transporting a shipment from California to Alberta, under contract with Kenbrent Refrigerated Express Ltd. The definition of "worker" in Section 1 of the *Act* includes:

- (f) an independent operator admitted by the board under Section 3(3).

Therefore, based on the evidence submitted by the parties, I find that, at the time of the motor vehicle accident, Roger Reimer was a “worker” within the meaning of Part 1 of the *Act*.

A “worker” — Martindale

The evidence indicates that Reimer occasionally hired Martindale to assist him as a swamper and to do some of the driving on his trips. Martindale had been a truck driver but, at the time of the accident, his driver’s licence was under suspension due to impaired driving. The plaintiff’s counsel argued there is insufficient evidence to establish an employment relationship between Reimer and Martindale at the time of the accident. He also stated that Martindale could not have been a worker as his driver’s licence was under suspension, no W.C.B. assessments were paid on his wages and no other deductions were being made from any amount he would have received from Reimer.

I am satisfied on the affidavit evidence that there was an oral contract between Reimer and Martindale for Martindale to assist Reimer on part of this trip as a swamper and driver. Martindale was not a volunteer nor a mere passenger. He was unemployed due to his licence being suspended, was in need of money, and had worked for Reimer on previous occasions. There is no indication of any other reason for Martindale to have been in the truck at the time of the accident, other than he was hired by Reimer. The fact that he had no licence does not mean that he could not have been a swamper. Undoubtedly he was also hired to do some driving and, while this was contrary to the *Motor Vehicle Act*, it did not mean that Martindale was not employed by Reimer. Reimer should not have hired Martindale to drive — but he did. Reimer should have made deductions from Martindale’s wages for unemployment insurance, income taxes, etc. There is no evidence that he intended to do this, but I find that does not mean that there was no contract of hiring here between Reimer and Martindale. Martindale could not have been an independent operator under the *Act* as he had no valid licence and could not have got trucking jobs on his own. His contract here was with Reimer to help Reimer — he was not operating an independent business.

Truck driving is an industry within Part 1 of the *Act* which means that all workers in the industry are considered to be workers within the *Act*, unless they are independent operators who have not registered under Section 3(3) of the *Act*. I have already found that Martindale was not an independent operator. Therefore, he was a worker. Reimer was not registered with the Board as an employer — only as an independent operator, which provided coverage only for himself. As pointed out in policy item #6.00 in the *Rehabilitation Services and Claims Manual (“Manual”)*, for industries within Part 1 of the *Act*, a worker’s status is not dependant upon the employer’s registration with the Board. Therefore Martindale would be a worker even though Reimer had not registered as an employer nor paid assessments on Martindale’s wages. On the evidence submitted by the parties, I find that, at the time of the motor vehicle accident, Martindale was a “worker” within Part 1 of the *Act*. His employer was Reimer.

In the Course of Employment — Martindale

Plaintiff's counsel also argued that Martindale was not in the course of employment at the time of the motor vehicle accident as his driver's licence was suspended and he was impaired by drugs or alcohol.

If Martindale was not driving the truck at the time of the motor vehicle accident but was riding as the swamper, his death was within the course of his employment as his suspended licence and intoxication would have contributed little or nothing to the accident.

If Martindale was driving the vehicle at the time of the accident, I am satisfied that he was still in the course of his employment. He did not have a valid licence to drive — but was in fact driving for hire. Even though he could have faced a charge of driving without a licence, he was working. The evidence indicates he was impaired at the time of the accident. Section 5(3) of the *Act* states:

Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation shall not be payable unless the injury results in death or serious or permanent disablement.

That section clearly contemplates that, in cases of death or serious injury, a worker within the course of his employment is not removed from that employment if the accident arose from his own serious and wilful misconduct. Here, Martindale was driving the truck on the route to the destination in Alberta. Thus, but for his intoxication, he was in the course of his employment. Section 5(3) of the *Act* does not change that conclusion. Item #16.00 of the *Manual* titled "Unauthorized Activities" states:

The mere fact that a worker's action which leads to an injury was in breach of a regulation or order of his employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of the employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take him out of the course of his employment or to prevent his injury from arising out of his employment.

Item #16.10 entitled "Intoxication or Other Substance Impairment" states, in part:

Claims involving impairment should be classified under the following headings.

...

2. Workers Not Permitted to Drink

Where drinking is not a permitted part of the employment, injuries resulting from intoxication or other substance impairment must be adjudicated as follows:

(a) Employment causation

If the injury arose in the course of the employment, and something in the employment relationship had causative significance in producing the injury, it is still one arising out of and in the course of employment notwithstanding the impairment. Examples are where an intoxicated seaman fell into the water while attempting to board his vessel, and where a forest industry worker was run over by a logging truck. In these kind of cases, if the injury results in death or serious or permanent disablement, it is compensable.

Once it is apparent that an injury is one arising out of and in the course of employment, it does not cease to be so merely because some other factor, extrinsic to the employment, also has causative significance. . . .

Decision No. 48 of the *Workers' Compensation Reporter*, Vol. 1: p. 209 (which is part of the published policies of the governors) considered a situation where a truck driver, who was driving under the influence of alcohol, was killed in a single vehicle accident. One basis on which the Review Board denied the claim was that the only operative cause of death was impairment by virtue of alcohol. The commissioners found that the Review Board was incorrect on that ground and stated:

. . . The driving of the truck had as much causative significance in producing the death as the consumption of alcohol. Absent either one, the death would most likely not have occurred. If a truck driver becomes intoxicated in the course of making his deliveries and is subsequently killed, the fact that alcohol had causative significance in producing the death is no ground for the denial of compensation. But of course in a minor injury case, the consumption of alcohol is a factor that the Board may consider in deciding whether compensation should be denied under Section 6(3). [Now Section 5(3).] . . .

This material indicates that intoxication alone is not sufficient to remove a worker from the course of employment. Since Martindale was driving the truck on its route and would have been in the course of employment but for his intoxication, I find that his intoxication did not remove him from the course of his employment.

In the Course of Employment — Reimer

For the same reasons that apply to Martindale, whether or not Reimer was driving the vehicle at the time of the accident — he was in the course of his employment.

Section 99

Plaintiff's counsel also raised Section 99 of the *Act* and stated that the "merits and justice" of the case require that the plaintiff be able to sue the defendants. As noted above, the Appeal Division, on behalf of the Board, does not determine whether or not the plaintiff can sue the defendants. It only determines matters within its competence — the court determines the effect of this on the legal action. In interpreting the words "worker," "employer," and "independent operator" in this decision, I have had regard to the *Act*, the published policies of the governors, and arguments of counsel. I note that earlier decisions of the Board in this case regarding compensation matters found that the dependants of Reimer and Martindale were entitled to benefits under the *Act*. As well, the plaintiff is entitled to benefits under the *Workers Compensation Act*. Since one purpose of the *Act* is to provide benefits to workers injured in the course of their employment, or their dependants, it is difficult to see why Section 99 would be used to remove this or any matter from the workers' compensation system. Nevertheless, I find the arguments based on Section 99 do not change my finding in this matter.

Therefore, based on the evidence submitted by the parties, I find that, at the time of the motor vehicle accident, Frederick Thomas Martindale and Roger Reimer were in the course of their employment. Further, any action or conduct of Martindale or Reimer which caused the breach of duty arose out of and in the course of employment within the scope of Part 1 of the *Act*.

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

Q.B. NO. 4099 OF A.D. 1991

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

DAN BUCKOSKY

PLAINTIFF

AND:

KENBRENT REFRIGERATED EXPRESS LTD.,
KENBRENT HOLDINGS LTD., THE ESTATE OF
FREDERICK THOMAS MARTINDALE AND
THE ESTATE OF ROGER REIMER

DEFENDANTS

AND:

IN THE MATTER OF AN APPLICATION BY THE PLAINTIFF, DAN BUCKOSKY,
TO THE BRITISH COLUMBIA WORKERS' COMPENSATION BOARD, APPEAL
DIVISION, TO ISSUE A CERTIFICATE PURSUANT TO SECTION 11 OF THE
WORKERS COMPENSATION ACT, R.S.B.C. 1979, C. 437.

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, DAN BUCKOSKY, in this action for a
determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters
relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit
evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Defendant, KENBRENT HOLDINGS LTD., was, at the time the cause of action arose, October 28, 1990, engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
2. FREDERICK THOMAS MARTINDALE was, at the time the cause of action arose, October 28, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
3. ROGER REIMER was, at the time the cause of action arose, October 28, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action or conduct of the Defendant, KENBRENT HOLDINGS LTD., and FREDERICK THOMAS MARTINDALE and ROGER REIMER which allegedly caused the breach of duty of care on October 28, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 8th day of January, 1993.

Decision of the Appeal Division

Number: 93-0073
Date: January 15, 1993
Panel: Thomas Kemsley
Subject: Provision of Transportation by Employer

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the above three plaintiffs. The legal action concerns a single vehicle motor vehicle accident that occurred on February 21, 1991. The above three defendants, Trisha Seney and Fred Lenbach were passengers in a vehicle driven by the defendant, Loreto San Andres. The plaintiffs commenced legal action against the defendant for injuries that occurred when the defendant's vehicle went off the highway near Abbotsford, B.C. This Section 11 application concerns the above plaintiffs and defendant. Nothing has been filed with the Board to establish that the other two passengers have commenced legal action in connection with the motor vehicle accident.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

On this application, submissions were received from counsel for the plaintiffs, the defendant, and the Insurance Corporation of British Columbia.

The facts relevant to this determination do not appear to be in dispute. All six people in the vehicle were employed as poultry catchers by West Coast Poultry Services Inc., which was registered with the W.C.B. At the time of the accident, the six people were on their way to work. While it was not a term of their employment, the employer provided a van and driver and, on every work day, each employee was picked up at home, driven to the worksite, and then driven home afterward. On February 21, 1991, the van was broken down and the employer called the defendant and asked him to use his own car and pick up the other employees and bring them to work. The employer

told the defendant that he would be paid \$15.00 plus gas money. The defendant did this and the accident occurred on the way to the worksite. These poultry catchers went to different farms each day on a nine-week cycle. That is, they did not return to a farm for nine weeks following the previous chicken catching. On this particular day, the employer arranged for their transportation and specified the destination, but did not specify the route.

The *Rehabilitation Services and Claims Manual* (“*Manual*”) sets out policy of the governors that is relevant to this determination. Item #18.20 entitled “Provision of Transportation by Employer” states, in part:

An employer may directly or indirectly provide transportation for its employees’ journeys to and from work. In situations where this involves providing a specific vehicle such as, for example, a crew bus, in which the journeys are made, compensation coverage is generally extended to injuries occurring while travelling in this employer-owned vehicle.

Item #18.32 entitled “Irregular Starting Points” states, in part:

Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than his regular place of employment, he is covered for compensation while travelling to and from that temporary place, and this is so whether he goes there from his regular place of employment or goes there directly from home. The same rule applies, for example, to a delivery man who goes direct from home to make his deliveries.

Where transportation to and from work is provided by the employer, in the form of a specific vehicle and a driver, it does not matter whether or not the employees are required to use the employer’s transportation. If they do, then, for the purposes of workers’ compensation, their employment begins when they enter the vehicle and would only cease if they agreed to and took a significant deviation from their route for personal reasons. Thus, on the nights when these employees were riding to and from work in the van provided by the employer, they were covered under workers’ compensation while riding in the van. That clearly would fall within item #18.20 of the *Manual*. On this particular occasion, even though the van had broken down, the employer provided a substitute vehicle and driver for these employees. The employer paid for the driver and the gas, just as it did for the company van and driver on other nights.

As the employer provided transportation to these employees and on this occasion the defendant was being paid by the employer to pick up his fellow workers and drive them to the worksite, I find that the defendant was within the course of his employment at the time of the motor vehicle accident. He was being paid and he was doing something at the request of his employer, for the benefit of his employer. He was providing a service that his employer provided to its employees. Thus, he was a “worker” and was within the course of his employment at the time of the motor vehicle accident.

The three plaintiffs also were workers and were within the course of their employment, for the purposes of workers’ compensation, at the time of the motor vehicle accident. They were riding in a vehicle provided by the employer. The employer specified the destination, which was an irregular starting point. The employer provided a vehicle every work day and it does not matter that on this particular day the employer arranged a substitute vehicle and driver. The employees were still riding in a vehicle with a driver chosen and provided by their employer. Thus, for the purposes of workers’ compensation, their injuries arose in the course of their employment.

Therefore, on the evidence provided by the parties, at the time of the motor vehicle accident on February 21, 1991, the defendant, Loreto San Andres, was a worker within the course of his employment; any action or conduct of the defendant which allegedly caused the breach of duty of care arose out of and in the course of employment within Part 1 of the *Act*; the plaintiffs, Alec Lewthwaite, Gerry San Andres, and Gary Valenciano, were workers within Part 1 of the *Act*; and, the injuries suffered by the plaintiffs arose out of and in the course of their employment.

Editors’ note: This decision has been edited for publication.

NO. CWC 91 538
CHILLIWACK REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

ALEC LEWTHWAITE, GERRY SAN ANDRES and
GARY VALENCIANO

PLAINTIFFS

AND:

LORETO SAN ANDRES

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiffs, ALEC LEWTHWAITE, GERRY SAN ANDRES and GARY VALENCIANO, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiffs, ALEC LEWTHWAITE, GERRY SAN ANDRES, and GARY VALENCIANO were, at the time the cause of action arose, February 21, 1991, workers within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiffs, ALEC LEWTHWAITE, GERRY SAN ANDRES, and GARY VALENCIANO, on February 21, 1991, arose out of, and in the course of, their employment.
3. The Defendant, LORETO SAN ANDRES, was, at the time the cause of action arose, February 21, 1991, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action and conduct of the Defendant, LORETO SAN ANDRES, which allegedly caused the breach of duty of care on February 21, 1991, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 15th day of January, 1993.



Decision of the Appeal Division

Number: 93-0103
Date: January 25, 1993
Panel: Thomas Kemsley
Subject: Irregular Starting Points (No. 2)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action by counsel for the defendants. Counsel requested a determination as to whether, at the time the cause of action arose, the plaintiff was a worker within the meaning of Part 1 of the *Workers Compensation Act* and whether her injuries arose out of, and in the course of, her employment. Further, counsel requested a determination as to the amount of compensation that the plaintiff would have been entitled to receive from the Workers' Compensation Board. No determination was requested under Section 11 as to the status of the defendants.

The plaintiff's Statement of Claim in the legal action alleges that she suffered injuries in a motor vehicle accident that occurred on November 30, 1990 in Surrey and involved a vehicle driven by her and a vehicle owned by the defendant, Zbigniew Semkow, and driven by either the defendant, Zbigniew Semkow, or an unknown driver. On this application, submissions were received on behalf of the defendants and the plaintiff.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

At the time of the accident, the plaintiff was a Community Nurse 3 employed by the Provincial Government working out of White Rock. The motor vehicle accident occurred at approximately 8:00 a.m. on November 30, 1990 while the plaintiff was driving from her home in Delta to a Mr. Robinson's house in White Rock. She was driving a car owned by the Government of B.C.

The plaintiff's job involved providing home care nursing to patients and during her work day she travelled to different patients' homes in the course of her employment. Her evidence is that, except on rare occasions, she went directly from her home to the first call of the day. On November 30, 1990, Mr. Robinson was her first call of the day. Mr. Robinson was not her first call on every day.

I find the plaintiff was a worker at the time of her motor vehicle accident. She was employed in an industry within Part 1 of the *Act*. As well, at the time of the accident, she was in the course of her employment. Item #18.00 of *Rehabilitation Services and Claims Manual* states, in part:

The general position is that accidents occurring in the course of travel from the worker's home to his normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered.

Item #18.20 states, in part:

An employer may directly or indirectly provide transportation for its employees' journeys to and from work. . . .

While these factors must be considered, the basic question to be determined is whether or not the claimant is routinely commuting to or from work.

Item #18.32 entitled "Irregular Starting Points" states, in part:

A further situation arises when the job function requires the worker to report at what might be called irregular starting points. That is, different starting points on different days or different months and terminating employment at different termination points. . . . In such a situation, once the worker has been dispatched from the depot to journey to the point where he will begin his run, as long as he is proceeding toward the place with reasonable expedition and without substantial deviation, he should be considered to be travelling in the course of employment and hence covered for compensation regardless of whether he uses public or private transportation.

Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than his regular place of employment, he is covered for compensation while travelling to and from that temporary place, and this is so

whether he goes there from his regular place of employment or goes there directly from home. The same rule applies, for example, to a delivery man who goes direct from home to make his deliveries.

Item #18.40 states, in part:

Employees whose job involves travelling on a particular occasion or generally are covered while travelling. Where they do not travel to the employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence.

The fact that the plaintiff was driving a car owned and supplied by her employer is not determinative of the issue here. However, given that she had different starting points on different days and, on most days, went directly from her home to those irregular starting points, I am satisfied that she was not routinely commuting to work as described in the *Manual*. Further, her job involved travelling and, as the plaintiff did not go directly to her employer's premises before beginning the travelling required by her work, she was covered from the moment she left her residence. Even though the plaintiff saw Mr. Robinson regularly during this time, that cannot turn Mr. Robinson's house into her "employer's premises" nor turn her journey to Mr. Robinson's house into routine commuting to work for the purposes of workers' compensation.

Therefore, based on the evidence submitted by the parties, I find that, at the time of the motor vehicle accident on November 30, 1990, the plaintiff was a worker and her injuries arose out of and in the course of her employment.

It is not possible for the Appeal Division, on this type of application, to determine the amount of compensation that the plaintiff would have been entitled to receive from the Workers' Compensation Board. As noted in the October 28, 1992 letter of Herb Morton, assistant to the chief appeal commissioner, to counsel, such a determination involves multiple decisions as to entitlement to wage-loss, medical aid, pension and rehabilitation benefits. Those decisions and calculations are made in the first instance by Board personnel in the different departments, and not by the Appeal Division. The Appeal Division is not in the position to assess those matters in the first instance. As a result, I am unable to make any determination on this matter. The parties will need to pursue inquiries with the Board to determine the full extent of the benefits payable to the plaintiff by the Board.

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

NO. C910119
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

BEVERLY JUNE BURLEIGH

PLAINTIFF

AND:

ZBIGNIEW SEMKOW and
INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, ZBIGNIEW SEMKOW and INSURANCE CORPORATION OF BRITISH COLUMBIA, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, BEVERLY JUNE BURLEIGH, was, at the time the cause of action arose, November 30, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, BEVERLY JUNE BURLEIGH, on November 30, 1990, arose out of, and in the course of, her employment.

CERTIFIED this 25th day of January, 1993.



Decision of the Appeal Division

Number: 93-0174
Date: February 4, 1993
Panel: Thomas Kemsley
Subject: Entry to Employer's Premises (No. 1)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action by the defendant, Marathon Realty Company Limited ("Marathon"). The plaintiff's Amended Statement of Claim, dated April 1, 1992, alleges that, on April 7, 1990, she suffered injuries when she was struck by a garage door at the entrance to the underground parking area in a building owned by the defendant, Marathon, in which her employer Loewen Group Inc. ("Loewen") was a tenant. The Statement of Claim also sets out that the defendant, Kinnear Industries Corporation, Limited, manufactured the door, the defendant, Ideal Door Limited, installed and serviced the door, the defendant, Imperial Parking Limited, operated the parking lot, and the defendant, Intercon Security Limited, was responsible for the maintenance and security of the premises. Apparently the defendants, Imperial Parking Limited and Intercon Security Limited, were dismissed by consent from this legal action but no court document has been received at the Appeal Division to confirm this change. Submissions were received on this application on behalf of the plaintiff and the defendants, Marathon, Ideal Door Limited and Kinnear Industries Corporation, Limited. This application for a determination under Section 11 of the *Act* addressed only the status of the plaintiff on April 7, 1990. However, I note that all of the above companies were registered with the W.C.B. on April 7, 1990.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

At the time of her accident, the plaintiff worked part-time with Loewen as a data entry clerk. Previously she had been a full-time employee with Loewen but had changed to part-time at the beginning of March 1990. She worked every Saturday plus some other days — for a total of 10 to 12 hours per week. Loewen leased office space in the building owned by Marathon and, as well, leased monthly parking spots in the underground parking garage for its full-time employees. There were approximately 10 other tenants in the building in April 1990 and there were other monthly parkers, in addition to the Loewen monthly parkers, in the parking garage. The monthly parkers each had a parking garage key and a parking pass. The key operated the garage door to the underground parking garage. The door was open from 7:00 a.m. to 6:00 p.m., Monday to Friday, but closed at other times. Thus, the key was needed to access the parking garage on weekends. The parking pass allowed the monthly parkers to park in assigned spots.

When the plaintiff changed from full-time to part-time she lost her monthly parking privileges. She returned her parking pass, but not the garage door key. Loewen had given the parking garage key to the plaintiff, who apparently was supposed to return it when she changed to part-time. It is not clear if, on April 7, 1990, her employer knew that she had a parking garage key and was using the parking garage on Saturdays. Those were the only times that she used the parking garage. On weekdays, when the plaintiff worked at the Loewen offices, she parked on the street. On Saturdays, she used the garage key to park in the parking garage — but not necessarily in the spaces assigned to Loewen. She assumed that on the weekends no one would ticket or tow her car even if it was parked in the parking garage without a monthly parking pass.

On Saturday April 7, 1990, the plaintiff had gone to work at Loewen and used the parking garage. The garage door was closed and she used the key to get into it. Later, when she was leaving, the garage door was not operating properly and she was injured when she got out of her car to try to get the door to open.

At the time of the accident the plaintiff was employed by Loewen, a firm registered with the W.C.B. As such, she was a “worker” within the meaning of Part 1 of the *Workers Compensation Act*. The issue is whether or not her injuries arose out of and in the course of her employment.

Section 5(1) of the *Act* sets out that compensation is payable where “personal injury or death arising out of and in the course of the employment is caused to a worker . . .”. The *Rehabilitation Services and Claims Manual* sets out published policy of the governors relevant to the determination of this issue. Item #14.00, entitled “Arising Out of and In the Course of Employment,” distinguishes between the terms “work” and “employment” and sets out, in part, that:

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 his pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.

Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.

Item #18.01 entitled "Entry to Employer's Premises" states, in part:

Compensation coverage generally begins when a worker enters the employer's premises for the commencement of a shift, and terminates when he leaves the premises following the end of the shift. Thus where a worker is travelling to work by automobile, he is not covered for compensation from home to the point of entry to the employer's premises, but he is covered from there to his particular place of work.

Item #19.20 deals with "Parking Lots" and sets out that the Board looks at five basic questions:

First, was the lot provided by the employer for the worker? . . .

Second, was the lot controlled by the employer? . . .

Third, was the injury caused by a hazard of the premises? . . .

Fourth, was the parking lot contiguous to the place of employment? . . .

Finally, did the injury occur proximal to the start or stop of the shift? . . . ?

Regarding the first question, I am satisfied that the parking garage access was provided to the plaintiff by her employer. The employer originally gave her the parking garage key and did not get it back from her at any point. Thus I assume that her employer knew, or ought to have known, that she still had the key and could use it to gain access to the parking garage. I find that this is covered by the part of item #19.20 which states:

The unauthorized use of a parking space by a worker would normally exclude the acceptance of a claim on the basis that the injury was not work related. There will, however, be exceptions where the employer, while not authorizing the parking, has condoned the practice by default in failing to take action to prohibit the practice.

The second question is more difficult to resolve. It is not clear what is meant by “control” in item #19.20. This could refer to control of the operation, repair and maintenance of the parking lot, or control of access to the parking lot. In this case, Loewen had no control over repair and maintenance, except in the sense that it paid a fee for its monthly parkers and, presumably, would have stopped paying the fee if the repairs and maintenance were seriously deficient. I do not consider that to be control of the operation, repair or maintenance of the parking garage. Loewen did have some control over its own employees’ use of the parking garage as it gave them the keys and parking passes.

Counsel referred to decisions from Ontario and the United States which distinguish between multi-storey office buildings and shopping centres. In Ontario, Board policy and decisions of the Workers’ Compensation Appeal Tribunal have established the principle that, in multi-storey office buildings, common areas that are used primarily by employees of the various employers in the building are included in the “employment relationship” for the purposes of workers’ compensation. It appears that this principle would include parking lots such as the one here. This is not based on a “control” test but, rather, on whether the risks are risks of employment or risks of the general public. It appears that other workers of other employers in the same building are not considered to be the general public and, therefore, the risks they all encounter in using the common areas are risks of employment.

I find the policies and cases from Ontario that extend the ambit of the employment relationship in this way to be interesting and compelling. However, there is no such policy in the published policies of the governors of the W.C.B. of B.C. While item #14.00 notes that, generally, lack of control may not be the determinative factor in the determination of the employment relationship, item #19.20 specifically addresses parking lots. That item appears to say that injuries arising in parking lots are not compensable if the injured worker’s employer did not control the parking lot. Here, it is difficult to find much control by Loewen of the parking garage. Loewen did not own it, nor operate it, nor lease most or all of the space. They were one tenant in the building with some monthly parking spots. They had some control over which of their employees had access to the parking garage, although it appears that they did not prevent the plaintiff from using it even though she did not have a parking pass. They apparently allowed her to have a key which she was able to use at the risk of having her car

ticketed or towed away. She said she did not park in one of the Loewen parking spots on April 7, 1990 as the parking garage was not very full. Loewen had no control over who else used the parking garage — the garage could have been used by monthly parkers or, presumably, hourly parkers if Marathon or Imperial Parking Limited had decided to operate it in that way.

The parking lot does seem connected to the plaintiff's employment, however, whether an employee works and parks in a shopping mall or an office tower, the employee may be able to say that the only reason she was in the parking lot was her employment. According to item #19.20, that is not sufficient in the shopping mall situation to bring it within the employment relationship — as there is insufficient control by the employer of the parking lot. There is some difference between the shopping mall parking lot situation and this situation, however, I have difficulty seeing how the plaintiff's employer exercised sufficient control here to bring this within the employment relationship. The employer allowed the plaintiff to have a key to the parking garage. She parked on the street during the week and could choose to park on the street or in the parking garage on Saturdays. She could choose where to park in the parking garage. She was not parking in the garage on Saturdays at her employer's request, although the employer did not object. I am unable to find that the plaintiff's employer, Loewen, exercised control sufficient to satisfy the policy found in item #19.20. I also considered counsel's argument that this was, in effect, part of the employment premises. Again, while that argument has some appeal, there is little support for it in the published policies of the governors. As a result I am unable to extend the employment premises or the employment relationship to cover the plaintiff's activities in the parking garage.

While this is sufficient to dispose of this application, I have considered the other questions set out in item #19.20 and, if the control test had been satisfied, I would have found that those other tests were satisfied here. The plaintiff was injured by a hazard of the premises — as the garage door was an integral part of the premises and not something extraneous or personal to the plaintiff. The parking garage was contiguous to her place of employment as it was in the same building and she went directly from the garage to the inside of the building and then to her employer's office. Finally, the injury did occur proximal to the stop of her shift on April 7, 1990.

In conclusion, while the plaintiff was a "worker" within Part 1 of the *Act*, I find that her injury, on April 7, 1990, did not arise out of and in the course of her employment.

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

NO. C906739
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

BRENDA ILIC

PLAINTIFF

AND:

MARATHON REALTY COMPANY LIMITED,
INTERCON SECURITY LIMITED,
IMPERIAL PARKING LIMITED,
IDEAL DOOR LTD., AND
KINNEAR INDUSTRIES CORPORATION, LIMITED

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendant, MARATHON REALTY COMPANY LTD., in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, BRENDA ILIC, was, at the time the cause of action arose, April 7, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, BRENDA ILIC, on April 7, 1990, did not arise out of, and in the course of, her employment.

CERTIFIED this 4th day of February, 1993.



Decision of the Appeal Division

Number: 93-0206
Date: February 9, 1993
Panel: Thomas Kemsley
Subject: Entry to Employer's Premises (No. 2)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action on behalf of the defendant. The plaintiff's Statement of Claim, dated March 12, 1992, alleges that on or about December 29, 1991 the plaintiff was injured when she fell on ice in the parking lot on premises owned by the defendant. Other documents indicate that the accident occurred on December 28 or 29, 1990 and, although no amended Statement of Claim has been filed on this application, I will treat these latter dates as the relevant time for this cause of action. On this application, submissions were received on behalf of the plaintiff and defendant.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of the Defendant

There is no dispute about the status of the defendant as an employer. At the relevant time, it was an employer within Part 1 of the *Workers Compensation Act*. At that time it was the plaintiff's employer.

The plaintiff's action is based on the alleged negligence of the defendant or, alternatively, on a breach of the *Occupiers' Liability Act* by the defendant.

I agree with the submissions of Mr. Carfra on the issue of whether the plaintiff's injuries were caused by an employment-related activity of the employer. The defendant was able to act only through its agents or employees. Thus, if the defendant failed to

properly clear the ice and snow, that was the failure of its agents or employees. Therefore, on the evidence submitted, I find that the actions or conduct of the defendant, or its servants or agents, which caused the alleged breach of duty of care arose out of and in the course of employment within the scope of Part 1 of the *Act*.

Status of Plaintiff

At the time of her accident, the plaintiff was employed by the defendant. As the defendant is an employer within Part 1 of the *Act*, that is sufficient to make the plaintiff a “worker” within Part 1 of the *Act*.

The contentious issue is whether the plaintiff’s injuries arose out of and in the course of her employment. Again, I agree with the submissions of Mr. Carfra. In the workers’ compensation system, the term “employment” is broader than the term “work” and it is not necessary that a worker be engaged in productive work to be included in the workers’ compensation system. Coverage normally begins when the worker enters the employer’s premises. These principles are contained in the published policies of the governors as found in the *Rehabilitation Services and Claims Manual*:

Item #14.00 (in part)

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 his pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.

Item #18.01 (in part)

Compensation coverage generally begins when a worker enters the employer’s premises for the commencement of a shift, and terminates when he leaves the premises following the end of the shift. Thus where a worker is travelling to work by automobile, he is not covered for compensation from home to the point of entry to the employer’s premises, but he is covered from there to his particular place of work.

Item #19.20 (in part)

For the purpose of determining whether an injury in a parking lot is compensable, the Board looks at five basic questions.

First, was the lot provided by the employer for the worker? . . .

Second, was the lot controlled by the employer? . . .

Third, was the injury caused by a hazard of the premises? . . .

Fourth, was the parking lot contiguous to the place of employment? . . .

Finally, did the injury occur proximal to the start or stop of the shift? . . .

The plaintiff's case can be dealt with under items #14.00 and #18.01. She was on the employer's premises at the time of the accident and thus her compensation coverage had started. Further, the requirements under policy item #19.20 were satisfied. The parking lot was on the premises of the employer and, as there was no evidence to the contrary, I am satisfied that it was within the control of the employer or its agents or servants. It was provided to the plaintiff by the employer. Falling on ice was a hazard of the premises and not something extraneous or personal to the plaintiff. The lot was contiguous to her place of employment and the injury occurred proximal to the start of her shift — that is, approximately 40 minutes before she was to begin work.

Therefore, based on the evidence submitted by the parties, I find that, on December 28 or 29, 1990, the plaintiff was a worker within Part 1 of the *Act* and her injuries arose out of, and in the course of, her employment.

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

NO. S3161
DUNCAN REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

MARY ELIZABETH UNDUGODAGÉ

PLAINTIFF

AND:

NANAIMO REGIONAL GENERAL HOSPITAL SOCIETY

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant, NANAIMO REGIONAL GENERAL HOSPITAL SOCIETY, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, MARY ELIZABETH UNDUGODAGÉ, was, at the time the cause of action arose, December 28 or 29, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, MARY ELIZABETH UNDUGODAGÉ, at the time the cause of action arose, December 28 or 29, 1990, arose out of, and in the course of, her employment.
3. The Defendant, NANAIMO REGIONAL GENERAL HOSPITAL SOCIETY, was, at the time the cause of action arose, December 28 or 29, 1990, engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action or conduct of the Defendant, NANAIMO REGIONAL GENERAL HOSPITAL SOCIETY, which allegedly caused the breach of duty of care on December 28 or 29, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 9th day of February, 1993.



Decision of the Appeal Division

Number: 93-0336
Date: March 5, 1993
Panel: Thomas Kemsley
Subject: Out-of-province Employer: Compulsory Industry

A determination under Section 11 of the *Workers Compensation Act* (the "Act") was requested in this legal action by counsel for the defendants. The legal action concerns injuries suffered by the plaintiff in a motor vehicle accident that occurred on July 9, 1990. The plaintiff's Statement of Claim alleges that he suffered injuries when the vehicle he was driving was struck by a vehicle driven by the defendant, William Donald Epp ("Epp"), and owned by the defendant, Bow Ridge Carriers Ltd. ("Bow Ridge"). The Statement of Claim refers to Bon Ridge Carriers Ltd., but subsequent documents establish that the correct name is Bow Ridge Carriers Ltd. The accident occurred in the Municipality of Pitt Meadows.

Defendants' counsel requested a "declaration under section 10(7) of the *Workers Compensation Act*, R.S.B.C. 1979 ch. 437 that no damages, contribution or indemnity are recoverable against it [Bow Ridge] for any negligence on the part of its truck driver, Mr. Epp."

That request goes beyond the authority exercised by the Board, and the Appeal Division, under the *Act*. The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Therefore, this decision and the certificate that follows will address the status of the parties under the *Act* at the time of the motor vehicle accident, but will not determine the effect of those findings on the legal action.

The only issue on this application is the status of the defendant Bow Ridge. The parties agree, and the materials submitted support the conclusion, that, at the time of the motor vehicle accident, both the plaintiff and the defendant Epp were workers and were within the course of their employment.

Status of Plaintiff

The plaintiff was employed as a scale technician by Western Scale Co. Ltd., a firm registered with the Workers' Compensation Board. At the time of the accident, he was driving a vehicle owned by his employer in the course of making a service call. Therefore, based on the material submitted by the parties, I find that the plaintiff was a worker within Part 1 of the *Act* and his injuries arose out of and in the course of his employment.

Status of Defendant Epp

At the time of the accident, the defendant Epp was a truck driver and was driving a tractor trailer vehicle in the course of making a pickup from a customer. He was registered with the Board as an independent operator and had Personal Optional Protection. Defendants' counsel submitted that the defendant Epp was really a worker of the defendant Bow Ridge and not an independent operator. However, that argument is not material to the status of the defendant Epp. The defendant Epp was a worker under Part 1 of the *Act* in either case. If he was an independent operator, then, since he was registered with the Workers' Compensation Board, he is deemed to have been a worker by Section 1 of the *Act*. If he was an employee of the defendant Bow Ridge, then, the defendant Epp would still be a worker under Part 1 of the *Act*, since it is compulsory for employers in the transportation industry to be registered under Part 1 of the *Act* and a person's status as a worker in that industry is not affected by his employer's failure to register.

Therefore, on the material submitted, I find that, at the time of the motor vehicle accident, the defendant Epp was a worker within Part 1 of the *Workers Compensation Act*. Furthermore, since his driving was in the course of his employment, I find that any action or conduct of the defendant Epp which allegedly caused the breach of duty of care arose out of and in the course of his employment.

Status of Defendant Bow Ridge

Bow Ridge was an Alberta company that was registered extra-provincially in British Columbia at the time of the accident. It had been registered with the Workers' Compensation Board in B.C. but that registration was cancelled effective December 31, 1989.

Bow Ridge had a written Agreement with the defendant Epp, whereby Epp conveyed the tractor and two trailers he owned to Bow Ridge and then operated those vehicles under the commercial licenses held and controlled by Bow Ridge. The Agreement set out various terms, including provisions that Epp was required to report all breakdowns and accidents to Bow Ridge, he was to maintain the vehicle as directed by Bow Ridge, he would use the vehicle only as directed by Bow Ridge, he was required to pick up and deliver loads assigned by Bow Ridge, and he was not allowed to compete directly with Bow Ridge for one year after the termination of the Agreement. In return, Bow Ridge provided all management services and paid Epp 85% of the gross revenue derived from the loads he hauled. Among other provisions, the Agreement stated that Bow Ridge “must retain complete responsibility and control over all operations which are the subject of this agreement” and Bow Ridge was to be the sole contracting party with all customers. The Agreement also provided that Epp was to pay the operating expenses of the tractor trailer and certain other costs, including workers’ compensation.

Bow Ridge was based in Alberta and ceased operations sometime in 1990, although it is not clear when. Their W.C.B. registration in B.C. was cancelled by the Assessment Department effective December 31, 1989, as, on May 3, 1990, an assessment officer visited the firm’s place of business and found that it was closed and there was no forwarding address. However, in his Examination for Discovery, the defendant Epp stated that, at the time of the motor vehicle accident on July 9, 1990, he was working for Bow Ridge. Epp said that he worked exclusively for Bow Ridge for approximately 18 months prior to the accident and approximately 85% of his mileage was done in British Columbia. He also drove loads to Alberta and, occasionally, other provinces.

One assumption I will have to make is that Bow Ridge was carrying on business in Alberta at the time of the accident. While the Workers’ Compensation Board in B.C. had no record of any active business address for them at that time, the defendant Epp said he was driving for them and the vehicle he was driving was still registered in the name of Bow Ridge.

Section 1 of the *Workers Compensation Act* states in part:

“employer” includes every person having in his 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;

Section 3(3) of the *Act* sets out that an independent operator, who is neither an employer or a worker, is allowed the option of registering with the Board for personal protection under the *Act*.

Items #7.40, 7.41, 7.42, 7.43 and 7.44 of the *Rehabilitation Services and Claims Manual* set out Board policy on these various categories. Similar policy is found in Policy No. 20:30:20 of the *Assessment Policy Manual*. Further policy is contained in the decisions of the former commissioners as found in the *Workers' Compensation Reporter* and, in particular, Decision No. 255, Vol. 3: p. 155 (1977) entitled "Re: Registration of Labour Contractors as Employers" is relevant. That decision refers to the category of labour contractor, which is not mentioned in the *Act* but is found in the above policy manuals. The defendants' Brief of Authorities contains Decision No. 255 and other relevant decisions.

Under the *Act*, registration with the Board is compulsory in certain industries, including the transportation industry. Employers in those industries must register and pay assessments, and all workers in those industries are entitled to the protection and benefits of the *Act* whether or not their employers are actually registered. The one exception is the category of independent operator. Those individuals, even if they are actually working in a compulsory industry, are given the option of taking out personal protection for themselves — although they must register for any workers they employ. If an independent operator does not register personally, then he or she is not entitled to benefits under the *Act*. A labour contractor is a person or firm which, like an independent operator, is given the option to register under the *Act*. However, unlike an independent operator, if a labour contractor does not register then he or she is considered to be a worker of the prime contractor and is entitled to the benefits of the *Act*. A labour contractor is someone who provides only labour or labour and one piece of equipment under a contract.

Section 14 of the *Act* sets out that it is not lawful for an employer to require or permit a worker to contribute to the money the employer owes under the *Act*. Contracting out is a custom in some industries. In those situations, the Board must determine whether there is a contract between real independent contractors, or whether the contract (or sub-contract) is merely a means of shifting the responsibility for W.C.B. assessments from the prime contractor to someone who is called a sub-contractor or independent operator but is really a worker. In that latter situation, pursuant to Section 14, the Board will ignore the contract or sub-contract, and assess the prime contractor directly for the wages of the sub-contractor.

As Decision No. 255 pointed out, the Board had been investigating every application by a labour contractor for registration as an independent operator. Those investigations required a lot of time and effort by the Board, and the uncertainty during that process was often interfering with contracting in the industry. As well, it was difficult for the Board to make those decisions as the parties were not always very forthcoming with all of the relevant information.

Thus, Decision No. 255 set out that, in industries where contracting out was the custom, the Board would take applications from labour contractors to be registered as independent operators at face value. The Board would not investigate those applications “unless there are circumstances suggesting that the contractor is really a “worker” under the *Act*.”

In this case, the defendant Epp was registered as a independent firm with the Board from September 1988 to September 1990 and had Personal Optional Protection from January 1, 1990 to September 30, 1990. He was registered for general trucking. There was nothing in his application or payroll reports to suggest that he was a “worker” and, thus, following Decision No. 255, his application was accepted at face value. Only on this application under Section 11 has information been supplied that suggests the defendant Epp was really a “worker” under the *Act*.

As pointed out in the policy manuals and commissioners’ decisions, when there is a dispute over the status of an individual, various tests are considered, including control, ownership of equipment and licenses, terms of work, profit sharing, independent initiative, continuity of work, and separate business enterprise. In reviewing the Agreement between the defendant Bow Ridge and the defendant Epp and the evidence of Epp in his Examination for Discovery, it is clear that he was a “worker” of Bow Ridge. The Agreement gave him no independence at all — he worked exclusively for Bow Ridge, under their control and direction. He was not allowed to contract with others or for other work, he received his money from Bow Ridge — not from the customers, he received a share of the gross revenues, he had to report any accidents or breakdowns to Bow Ridge, and he was bound by a non-competition clause for a year after the end of the contract. I will not go through all of the terms of the contract as it only assigns certain financial responsibilities to the defendant Epp, and clearly creates an employment relationship.

The plaintiff points to the fact that the Board accepted Epp’s registration as an independent operator. However, that is not determinative as the Assessment Department relies on the information supplied by applicants and, here, Epp did not provide the Assessment Department with much of the relevant information. The Assessment Department cannot be faulted in any way for not investigating Epp’s registration further, but neither can its decision be seen as determinative in light of the facts that are now available.

The plaintiff also submitted that Bow Ridge was not resident in British Columbia and thus does not come within the B.C. *Act*. Section 2(2) of the *Act* exempts “employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker resident in the Province.”

Assessment Policy Manual No. 20:30:40 deals with “Out-of-Province Employers” and states, in part:

In the trucking industry, the following criteria outline what is considered trucking in British Columbia and therefore is a compulsory industry within the scope of the *B.C. Act*. The criteria are:

- (a) hauling between B.C. points, or
- (b) hauling *out* of B.C., or
- (c) being incorporated in B.C., or
- (d) employing B.C. workers.

Epp’s evidence is that he was resident in B.C. and did most of his driving in B.C. He hauled loads from B.C. to Alberta and, on the day of the accident, was picking up loads in B.C. He had been employed continuously with Bow Ridge for 18 months. Thus, the defendant Bow Ridge was an employer in B.C. in a compulsory industry under the *Act*. The fact that Bow Ridge failed to register after December 31, 1989 does not change that conclusion. Since Epp continued to be a “worker” in B.C. for Bow Ridge, then Bow Ridge continued to be an “employer” in B.C.

I appreciate the apparent unfairness of that conclusion — that Bow Ridge could fail to remain registered as an employer in B.C. and pay no assessments in B.C., and yet be entitled to the protections found in Section 10 of the *Act*. However, the *Act* and the policy of the Board are clear. An employer in a compulsory industry in B.C. is an employer under the *Act* whether or not it is registered — otherwise the protection of its workers under the *Act* would be uncertain. An employer who fails to register is subject to certain penalties, but no exception is made in the *Act* or Board policy regarding the Section 10 protections. That is, there is nothing that allows an employer who fails to register to be found to be an employer for the purposes of assessments and penalties but not for the purposes of Section 10. An employer under Part 1 of the *Act* is an employer for all of Part 1.

Therefore, on the material submitted, I find that, at the time of the motor vehicle accident, the defendant Bow Ridge was an employer engaged in an industry within Part 1 of the *Act*. Furthermore, since the alleged negligence occurred when one of its workers was operating one of its vehicles, I find the conduct of the employer, or its servant, which caused the alleged breach of duty of care arose out of and in the course of employment within Part 1 of the *Act*.

Editors’ note: This decision has been edited for publication.

NO. A902590
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

NORMAN ANDREW WATSON

PLAINTIFF

AND:

BOW RIDGE CARRIERS LTD., and
WILLIAM DONALD EPP

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, BOW RIDGE CARRIERS LTD. and WILLIAM DONALD EPP, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, NORMAN ANDREW WATSON, was, at the time the cause of action arose, July 9, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, NORMAN ANDREW WATSON, on July 9, 1990, arose out of, and in the course of, his employment.
3. The Defendant, WILLIAM DONALD EPP, was, at the time the cause of action arose, July 9, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The Defendant, BOW RIDGE CARRIERS LTD., was, at the time the cause of action arose, July 9, 1990, an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
5. The action and conduct of the Defendants, WILLIAM DONALD EPP and BOW RIDGE CARRIERS LTD., which allegedly caused the breach of duty of care on July 9, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 5th day of March, 1993.

Decision of the Appeal Division

Number: 93-0349
Date: March 5, 1993
Panel: Thomas Kemsley
Subject: Shift Lease Operator (No. 2)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action by the plaintiff. The legal action concerns a motor vehicle accident that occurred on January 7, 1990 in Burnaby and involved a tow truck driven by the plaintiff and a taxi owned by the defendant Richmond Cabs Ltd. and driven by the defendant Charles Pei Jie Fu. The plaintiff's Statement of Claim alleges that he sustained injuries as a result of the negligent operation of the vehicle by the defendant Fu.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Plaintiff

Little information was submitted about the plaintiff as the parties agree that, at the time of the motor vehicle accident, he was within the course of his employment as a tow truck operator with Gary Tonks Ltd., a firm registered with the W.C.B. Therefore, based on the material submitted by the parties, I find that, at the time of the motor vehicle accident on January 7, 1990, the plaintiff was a worker within Part 1 of the *Workers Compensation Act* and his injuries arose out of, and in the course of, his employment.

Status of Defendant Fu

The parties do not agree on this issue. At the time of the motor vehicle accident, the defendant Fu was operating the taxi owned by Richmond Cabs Ltd. While Richmond Cabs Ltd. was registered with the W.C.B., none of the taxi cab drivers had coverage under that registration. The defendant Fu was not registered separately with the Board as an independent operator.

The issue here is whether the defendant Fu was a worker of Richmond Cabs Ltd. or an independent operator. If he was an independent operator, then, because he had not registered with the W.C.B., he would not be a worker nor an employer under the *Workers Compensation Act*. Section 3(3) of the *Act* notes that an independent operator, who is not an employer or worker, can be admitted on application by the Board. Once an independent operator is admitted, the independent operator becomes a worker by virtue of the definition of “worker” in Section 1 of the *Act*. However, before the independent operator is admitted, he or she is neither an employer nor a worker as it is not possible to have a contract of service or contract of hiring with oneself.

The status of taxi drivers as workers or independent operators was addressed by the Board in Decision No. 32 of the *Workers’ Compensation Reporter*, Vol. 1: p. 127 (1974). In that decision, the control test was considered as well as other tests that seemed significant in that situation. The taxi drivers were found to be workers of the taxi company. Counsel for the defendant Fu provided material from a subsequent W.C.B. decision, *Lenko v. Gibbons*, in which the former commissioners found a taxi driver to be a worker of the taxi cab company. As well, counsel provided a copy of an Assessment Department letter entitled “*Shift Lease Operators*” which sets out that, generally, taxi drivers who operate as “shift lease operators” will be considered to be independent from the taxi cab company or taxi owner, although, if the owner or company imposes controls on the independence of the drivers, the drivers may be considered to be workers of the cab owners or taxi cab company. Items #7.41, 7.42, 7.43 and 7.44 of the *Rehabilitation Services and Claims Manual* set out policy on the distinction between workers and independent operators.

There are various factors in this case that are relevant to the issue. Plaintiff’s counsel emphasized that the plaintiff operated under a lease for a flat fee, there was no splitting of revenue, either party could terminate the lease, and Richmond Cabs Ltd. exercised little direct control over the defendant Fu as he was not required to work in a particular place nor accept any particular fares. Defendants’ counsel emphasized that the defendant Fu had worked for Richmond Cabs Ltd. for approximately six years, Richmond Cabs Ltd. owned the car and the licence, Richmond Cabs Ltd. imposed a long list of rules which included the possibility of suspension for violations, Richmond Cabs Ltd. did exercise substantial control through these rules, and the defendant Fu had no business separate from that of the defendant Richmond Cabs Ltd. Defendants’ counsel also argued that policy considerations support the approach taken previously in Decision No. 32 and the decision in *Lenko v. Gibbons*.

An important question in Decision No. 32 was whether or not the driver had a business independent from the company. The control test and other tests assist in that determination. Here, the evidence is equivocal. The driver is subject to some control and possible suspension, and drives a cab owned and licensed by Richmond Cabs Ltd. He is referred to as a “representative” of the company. On the other hand, the driver chooses his days and hours of work, where he will work, whether he will use the dispatch system, and what fares he will take. If he operates under the dispatch system, there are rules about what fares he must take in priority to other fares. He can terminate the lease whenever he likes and there are no controls on him once the lease is terminated.

Many of the controls in the “Richmond Cabs Driver’s Info Package” are not controls imposed by Richmond Cabs Ltd. They are required by the municipalities, airport authorities and police in the areas in which the taxi cabs operate. However, there is some language in the Info Package that appears to create some level of control by Richmond Cabs Ltd.

Weighing the various factors and policy considerations, I find the factor which tips the overall balance here is the control of the money. The lease was for a flat fee. The defendant paid the same fee whether he had a good or bad day. He bore the risk of loss and profit. There was no attempt by Richmond Cabs Ltd. to control the defendant Fu’s money. He did not give them all of his fares for the day and get his share back. He just paid the flat fee. The customers paid the defendant Fu directly. He did not have to account to Richmond Cabs Ltd. for that money. He paid his business expenses, including the fee for the taxi, from that money and kept whatever remained. He would have to report his gross income to Revenue Canada and pay the appropriate amount in taxes at the proper times. Similarly, if he wanted to have W.C.B. coverage, he could determine the appropriate level of coverage and pay the assessment as a business expense.

This is not like the situation where a company has control of the money, or pays the worker at an agreed rate, or splits the revenue as in Decision No. 32. In such situations, the company knows the person’s earnings and is in the best position to make the deductions and pay the W.C.B. assessments. When the company has no control over the money and no fixed share in the money, it is not in the best position to be made responsible for W.C.B. coverage and assessments.

Thus, although some factors here point to an employment relationship, I find that an essential element of control was missing from this relationship and the defendant Fu was more like an independent operator than a worker. Financially his business was separate from that of Richmond Cabs Ltd., and Richmond Cabs Ltd. did not otherwise exercise sufficient control over his independence to create an employment relationship.

Therefore, on the evidence submitted by the parties, I find that, on the day of the motor vehicle accident, the defendant Fu was not a worker within the meaning of Part 1 of the *Workers Compensation Act* and, thus, his injuries did not arise out of and in the course of employment within Part 1 of the *Act*.

Status of the Defendant Richmond Cabs Ltd.

The parties agree on this issue. Richmond Cabs Ltd. is a firm registered with the W.C.B. Therefore, I find that, at the time of the motor vehicle accident, Richmond Cabs Ltd. was an employer within Part 1 of the *Workers Compensation Act*.

The motor vehicle accident occurred while the car owned by Richmond Cabs Ltd. was operating as a taxi. Section 10(1) of the *Act* establishes a bar against civil action in certain situations as follows:

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, his 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.*

(emphasis added)

The defendant Richmond Cabs Ltd. is an “employer within the scope of this Part” although not the employer of the defendant Fu. As well, the cause of action against the defendant Richmond Cabs Ltd. “is imposed by or arises by reason of law or contract, express or applied” as it arises pursuant to the *Motor Vehicle Act*. The final question is whether the last sentence in Section 10(1) is satisfied. The potential liability of the defendant Richmond Cabs Ltd. arises as the owner of the motor vehicle. Richmond Cabs Ltd. owned that vehicle as part of its business and leased the car to the defendant Fu and other drivers as part of its business. As Richmond Cabs Ltd. was a corporation, its business of owning and leasing taxi cabs could only be conducted through its servants acting in the course of employment. Since its potential liability arose by virtue of the action of owning and leasing the vehicle, and these actions must have been the actions of its employees, I find that the last sentence in Section 10(1) of the *Act* is satisfied.

Therefore, I find that any action or conduct of the defendant Richmond Cabs Ltd. which allegedly caused the breach of duty of care arose out of and in the course of employment.

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

NO. B916651
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

THOMAS ALLEN HOWARD

PLAINTIFF

AND:

RICHMOND CABS LTD. and CHARLES PEI JIE FU

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, THOMAS ALLEN HOWARD, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, THOMAS ALLEN HOWARD, was, at the time the cause of action arose, January 7, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, THOMAS ALLEN HOWARD, on January 7, 1990, arose out of, and in the course of, his employment.
3. The Defendant, RICHMOND CABS LTD., was, at the time the cause of action arose, January 7, 1990, an employer within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action and conduct of the Defendant, RICHMOND CABS LTD., which allegedly caused the breach of duty of care on January 7, 1990, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
5. The Defendant, CHARLES PEI JIE FU, was not, at the time the cause of action arose, January 7, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
6. The action and conduct of the Defendant, CHARLES PEI JIE FU, which allegedly caused the breach of duty of care on January 7, 1990, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 5th day of March, 1993.



Decision of the Appeal Division

Number: 93-0502
Date: April 15, 1993
Panel: Thomas Kemsley
Subject: Federal Workers

This is an application by the defendants for a determination as to whether the plaintiff was in the course of his employment under such circumstances as would entitle him to compensation under the *Government Employees Compensation Act*, R.S.C., 1985, c. G-5, when he was involved in a motor vehicle accident on April 13, 1989. The plaintiff's Statement of Claim alleges that, on that day, the plaintiff suffered injuries when the vehicle he was driving was struck by a vehicle driven by the defendant, Medjuck, and owned by the defendant, the Government of Canada, Department of Solicitor General. The accident occurred on Elbow Lake Access Road, in the City of Harrison Mills, in the Province of British Columbia.

The Appeal Division of the Workers' Compensation Board of British Columbia (the "W.C.B." or the "Board") routinely makes determinations under Section 11 of the *Workers Compensation Act* of British Columbia (the "Act" or the "B.C. Act") regarding the status of parties under the Act for the purposes of legal action. The Board of Governors of the W.C.B. assigned to the Appeal Division the Board's obligation to issue certificates under Section 11. The Appeal Division determines only the status of the parties under the Act. It is for the court to determine the effect of the Section 11 certificate on the legal action.

There are two matters to be considered on this application. First is the question of whether the Board and the Appeal Division have the jurisdiction to consider this application. The second matter concerns the status of the plaintiff at the time of the motor vehicle accident.

Jurisdiction

Both the plaintiff and the defendant, Medjuck, were employees of the Federal Government at the time of the motor vehicle accident. The *Government Employees Compensation Act* ("G.E.C.A.") is the federal legislation under which federal government workers receive compensation for injuries that arise out of and in the course of employment. The

G.E.C.A. incorporates certain sections of the *B.C. Act* for federal workers in British Columbia, and the Board administers those sections. The Board has no jurisdiction otherwise under the *G.E.C.A.*

The sections of the *B.C. Act* incorporated by the *G.E.C.A.* relate to compensation. Section 4(1)(a)(i) of the *G.E.C.A.* states that, “Subject to this Act, compensation shall be paid to an employee who is caused personal injury by an accident arising out of and in the course of his employment, . . .”.

Section 4(2) states in part:

The employee . . . referred to in Subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation *at the same rate and under the same conditions* as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependents of deceased workmen, employed by persons other than Her Majesty,

(emphasis added)

Section 4(3)(a) states in part:

Compensation under Subsection (1) *shall be determined by the same board, officers or authority as is or are established by the law of the province* for determining compensation for workmen and dependents of deceased workmen employed by persons other than Her Majesty;

(emphasis added)

This application relates to Section 12 of the *G.E.C.A.*, which states:

Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependents to compensation under this Act, neither the employee nor any dependent of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

Section 10 of the *B.C. Act* sets up a similar bar to legal action between workers and employers within Part 1 of the *B.C. Act*, when the injury and the actions which caused the injury arose out of and in the course of employment. Section 11 of the *B.C. Act* provides, in part:

Where an action based on a disability caused by industrial disease, personal injury or death is brought, the board shall, on request by the court or by any party to the action, determine any matter that is relevant to the action *and within its competence* under this *Act* . . .

(emphasis added)

There is no similar section in the *G.E.C.A.*, nor is there any reference to Section 11 of the *B.C. Act* being incorporated into the *G.E.C.A.* Thus, the issue is, does the Board, and hence the Appeal Division, have jurisdiction under the *G.E.C.A.* to make determinations under Section 11 of the *B.C. Act* with regard to federal government employees. Presumably, this authority would have to be found in Section 4 of the *G.E.C.A.* as set out above, as no other section of the *G.E.C.A.* makes reference to the authority of the provincial board.

This issue was given very thorough consideration in Ontario by the Workers' Compensation Appeals Tribunal in *W.C.A.T. Decision No. 485/90*, found in (1991), 17 *W.C.A.T.R.* 173. That Tribunal concluded it did not have jurisdiction under the *G.E.C.A.* to consider an application under Section 15 (now Section 17) of the Ontario *Workers' Compensation Act* (the "*Ontario Act*") — which corresponds to Section 11 of the *B.C. Act*. That panel found the incorporation of provincial legislation in Section 4 of the *G.E.C.A.* was limited to matters concerning the rate and conditions of compensation, and anything reasonably incidental thereto. They further found that Section 15 was primarily concerned with legal actions, not compensation, and also found that Section 15 was not reasonably incidental nor necessary to the system of compensation incorporated by Section 4 of the *G.E.C.A.* They concluded, in effect, that determinations of status for Section 12 of the *G.E.C.A.* were matters for the courts.

While I am in no way bound by the *W.C.A.T.* decision, I agree with its analysis and conclusion. There is no significant difference between Section 11 of the *B.C. Act* and Section 15 (now Section 17) of the Ontario *Act* in this regard. As set out in the *W.C.A.T.* decision, there are good policy reasons for having the same Board determine issues of status in regard to compensation and issues of status in regard to legal actions. There could be added complexity and possible inconsistency if the courts determined issues of status for legal actions for the purposes of Section 12 of the *G.E.C.A.* different from how the *B.C.* Board determined issues of status for entitlement to compensation pursuant to Section 4 of the *G.E.C.A.* However, I am satisfied that the *G.E.C.A.* only incorporates those provisions of the provincial *Act* which are reasonably incidental or necessary to the determination of compensation under Section 4 of the *G.E.C.A.*

Section 11 of the B.C. *Act* is not part of the rate or conditions under which a worker receives compensation. It concerns the determination of status under the *Act* for purposes of a legal action. An injured worker cannot apply for compensation benefits under Section 11, nor is Section 11 part of the appeal process. It provides a procedure by which parties who wish to sue, or who are being sued, can determine if there is a legal impediment to the action. I find that section is not reasonably incidental, nor necessary, to the determination of the rate and conditions of compensation for an injured worker. The *G.E.C.A.* sets up its own scheme for prohibiting legal action in Sections 9 to 12. The administration of those sections was not delegated to the province. I can find no authority for the B.C. Board to make determinations on the substantive provisions found in Sections 9 to 12 of the *G.E.C.A.* Similarly, the provisions in Section 10 of the B.C. *Act*, which restrict common law rights of action, are not incorporated into the *G.E.C.A.* It is difficult to see how the procedural provisions in Section 11, which go with the substantive provisions in Section 10 of the B.C. *Act*, can be seen to have been incorporated into the *G.E.C.A.* to go with the different substantive provisions in Sections 9 to 12 of the *G.E.C.A.*

Therefore, while there are good policy reasons for having the B.C. Board make the determination requested, I find the Board and the Appeal Division do not have jurisdiction under Section 11 of the B.C. *Act* nor under the *G.E.C.A.* to consider this application.

As I have determined that the Appeal Division has no jurisdiction to consider this application, I will make no determination as to the status of the plaintiff at the time of the motor vehicle accident.

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

Decision of the Appeal Division

Number: 93-0520
Date: April 16, 1993
Panel: Thomas Kemsley
Subject: Deviation from Route (No. 2)

A determination under Section 11 of the *Workers Compensation Act* ("the Act") was requested in this legal action by counsel for the defendant Sjoden. The legal action concerns injuries suffered by the plaintiff in a motor vehicle accident that occurred on July 15, 1991 in the Municipality of Burnaby, British Columbia. The plaintiff's Statement of Claim alleges that, on that day, she suffered injuries when the vehicle she was driving was struck by a vehicle driven by the defendant Sjoden and owned by the defendant Hystad. On this application, submissions were received on behalf of the plaintiff and the defendant Sjoden.

The Appeal Division was created on June 3, 1991 by the *Workers Compensation Amendment Act, 1989*. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Defendant Sjoden

There is no dispute between the parties as to the status of the defendant Sjoden. At the time of the accident, she was employed as a distributor by Clum-Morford Distributing Corporation, Canwest Directory Distributors, a firm registered with the W.C.B. Her work involved travelling and she was in the course of making a delivery at the time of the accident. Therefore, pursuant to the *Rehabilitation Services and Claims Manual* ("Manual") #18.40 "Travelling Employees" and based on the evidence submitted by the parties, I find that at the time of the motor vehicle accident the defendant Sjoden was a worker within Part 1 of the Act and was in the course of her employment. Further, I find that any action or conduct of the defendant Sjoden which caused the alleged breach of duty arose out of and in the course of her employment.

Status of Defendant Hystad

In the defendant Sjoden's statement of July 16, 1991, she stated she was driving her friend's automobile with his permission. Otherwise there is no evidence regarding the defendant Hystad's status at the time of the accident. Further, no request was made regarding the status of the defendant Hystad nor were any submissions made on that point.

Therefore I am unable to make any finding regarding the status of the defendant Hystad at the time of the motor vehicle accident.

Status of the Plaintiff Mackey

This is the contentious issue. At the time of the motor vehicle accident, the plaintiff was employed by National Sea Products Ltd., a firm registered with the W.C.B. She was a sales merchandiser and was required to travel in the course of her employment. On July 15, 1991 she had been at her office near Lougheed Highway and Willingdon Avenue and had left the office to travel to the Abbotsford area to make several calls on clients. Her normal route would have been to take the Lougheed Highway to Willingdon Avenue, then take Willingdon Avenue to the Trans Canada Highway, and then take the Trans Canada Highway to the Abbotsford area. On July 15, 1991, the plaintiff did not follow that route as she planned to drop off a suitcase at a friend's house in Port Coquitlam on the way. This was not related to her employment. To reach her friend's house, the plaintiff continued east on the Lougheed Highway past Willingdon Avenue. The accident occurred near the intersection of Lougheed Highway and Sperling Avenue.

There is no doubt that had the plaintiff been on her normal route when she was involved in the motor vehicle accident, she would have been in the course of her employment. This is established by various policies in the *Manual*, as referred to by counsel. The fact that she was not being paid specifically to travel or that she was not in her employer's car or not on her employer's property at the time of the accident is not relevant. However, the issue is whether the different route the plaintiff was taking for personal reasons removed her from the course of her employment.

The *Manual* contains several policies which establish that a worker who is required to travel in the course of employment is considered to be within her employment while travelling. Item #18.33 of the *Manual* entitled "Deviations from Route" states that the worker "must proceed with reasonable expedition and without substantial deviation from the most convenient route" to be within her employment. Item #18.41 entitled "Personal Activities During Business Trips" refers to travelling employees being in the course of their employment "except when a distinct departure on a personal errand is shown."

The principle in those and similar policies in the *Manual* appears to relate to a change in risk. That is, if the travelling worker's deviation for personal reasons does not substantially affect the risk she is exposed to in the course of her employment, then the deviation for personal reasons will not remove her from the course of her employment. For example, if the plaintiff here had stopped at her friend's house for 30 minutes and then continued on the Trans Canada Highway and was involved in an accident, the time difference of 30 minutes would not likely be significant, as she would still be exposed to the same risk of driving on the Trans Canada Highway but just at a slightly different time. However, if she stopped for many hours and ended up driving during the dark rather than in the daylight, the time difference could be regarded as significant.

In this case, the actual deviation appears not to be significant as the plaintiff was headed in the same direction and could have taken the Lougheed Highway as an alternative route to the Trans Canada Highway in travelling to her appointments. However, her evidence was that she took a different route in order to stop at her friend's house and, otherwise, she would have been on the Trans Canada Highway. I find that to be a substantial deviation, having regard to the relevant policy items. The plaintiff was exposed to a risk that she would not otherwise have been exposed to — she was stopped at an intersection which she would not have otherwise used. If she had not been travelling to her friend's house, she would have been on the Trans Canada Highway. While the deviation to her friend's house was a deviation from a business trip, I find that it was a distinct departure for personal reasons and took her out of the course of her employment.

Thus, while the plaintiff was employed at the time of the accident and therefore was a worker within the *Act*, her injuries on July 15, 1991 did not arise out of and in the course of her employment.

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

NO. C913768
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

DIANNE MAUDE MACKEY

PLAINTIFF

AND:

ANNE MARIE SJODEN and
JEFFERY GRANT HYSTAD

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendant, ANNE MARIE SJODEN, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, DIANNE MAUDE MACKEY, was, at the time the cause of action arose, July 15, 1991, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, DIANNE MAUDE MACKEY, at the time the cause of action arose, July 15, 1991, did not arise out of and in the course of her employment.
3. The Defendant, ANNE MARIE SJODEN, was, at the time the cause of action arose, July 15, 1991, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action or conduct of the Defendant, ANNE MARIE SJODEN, which allegedly caused the breach of duty of care on July 15, 1991, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 16th day of April, 1993.



Decision of the Appeal Division

Number: 93-0670
Date: May 10, 1993
Panel: Thomas Kemsley
Subject: Medical Malpractice Action (No. 1)

A determination under Section 11 of the *Workers Compensation Act* (the "Act") was requested in this legal action by counsel for the defendant Dr. Ellis. The named plaintiffs are the widow and children of Anthony Cesari, a worker who on August 12, 1988 was struck and run over by a forklift truck while in the course of his employment, and subsequently died in the Nanaimo Regional General Hospital. The Statement of Claim alleges that Mr. Cesari's death was caused by the negligence of the defendants in providing medical treatment to him. The Statement of Defence pleaded Section 10 of the *Act* as a bar to the plaintiffs' action against Dr. Ellis.

Section 11 of the *Act* obligates the Board to make determinations and provide a certificate to the court in certain matters which are relevant to a legal action. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's exclusive obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Status of Mr. Cesari

Section 10(1) of the *Act* sets out that the bar against legal action applies in respect of any personal injury, disablement or death to a worker arising out of and in the course of employment. The parties are agreed that Mr. Cesari was a worker and his death arose out of and in the course of his employment. Therefore, based on the submissions of the parties I find that, at the time the cause of action arose, Mr. Cesari was a worker and his death arose out of and in the course of his employment.

Status of Dr. Ellis

Dr. Ellis is an orthopaedic surgeon who practices in an unincorporated association with another doctor. They have two office employees. In 1981, they voluntarily registered their doctors' office to bring it within the scope of Part 1 of the *Act*. That registration covers the employees of the practice for compensation coverage but it does not cover the two doctors personally, although, they are employers of their employees for the purposes of Part 1 of the *Act*. The doctors also had the option of taking out Personal Optional Protection under Section 3 of the *Act* and bringing themselves within Part 1 of the *Act* as "workers," but they declined that option. Thus, with regard to the operation of their medical office, the two doctors are employers under the *Act* and their employees are workers under the *Act*.

As part of his practice, Dr. Ellis regularly attended at the Nanaimo Regional General Hospital in order to examine patients and perform operations. This relationship with the hospital also resulted in Dr. Ellis taking a regular rotation of being on call at the hospital.

On August 12, 1988, Dr. Ellis was on a regular on-call rotation and was at the hospital attending at surgery in an unrelated matter when the incident giving rise to the legal action here occurred.

After being injured, Mr. Cesari arrived at the hospital and was seen by the attending emergency room physician, the defendant Dr. Voetmann. Subsequently, Dr. Ellis was requested to attend upon Mr. Cesari and he examined him and provided certain medical treatment. Unfortunately, Mr. Cesari's condition deteriorated and resuscitation procedures were performed by Dr. Ellis and other doctors. Dr. Ellis was called away to attend to another patient. Subsequently, Mr. Cesari's condition deteriorated further and he died at the hospital.

Section 10(1) of the *Act* sets out that the bar to legal action applies to any action against "any employer within the scope of this Part . . . when the action or conduct of the employer, his 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."

There is no doubt that Dr. Ellis was an "employer" within Part 1 of the *Act* as, by voluntary registration, his medical office practice had been brought within Part 1 of the *Act* and he had two employees.

However, I find that the action or conduct of Dr. Ellis which caused the alleged breach of duty of care did not arise out of and in the course of employment within the scope of Part 1 of the *Act*.

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.

Hospitals are required to register with the Board and, as a result, all employees of a hospital, including doctors, are workers under the *Act* and assessments are paid on their wages and they are covered for injuries arising out of and in the course of their 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 at 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.

As he did not take out Personal Optional Protection to cover himself while engaged in those activities, I find that Dr. Ellis was not in the course of employment within the scope of Part 1 of the *Act* while attending to Mr. Cesari at the hospital.

Therefore, based on the submissions, I find that, at the time the cause of action arose, Dr. Ellis was an employer within Part 1 of the *Act* but the actions or conduct of Dr. Ellis which caused the alleged breach of duty did not arise out of and in the course of employment within the scope of Part 1 of the *Act*.

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

NO. C900591
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

ANNUNZIATINA CESARI, Widow and Executrix of the Deceased
ANTHONY CESARI, SANDRA CESARI, Daughter of the Deceased
ANTHONY CESARI, ROBERTO CESARI, Son of the Deceased
ANTHONY CESARI, and JEFFREY CESARI, the Infant Child of
the Deceased ANTHONY CESARI

PLAINTIFFS

AND:

DR. S. VOETMANN and
DR. D.R. ELLIS

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendant, DR. D.R. ELLIS, in this action for a
determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters
relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit
evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and
material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Deceased, ANTHONY CESARI, was, at the time the cause of action arose, August 12, 1988, a worker under Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Deceased, ANTHONY CESARI, at the time the cause of action arose, August 12, 1988, arose out of and in the course of employment within Part 1 of the *Workers Compensation Act*.
3. The Defendant, DR. D.R. ELLIS, was, at the time the cause of action arose, August 12, 1988, an employer engaged in an industry within the meaning of part 1 of the *Workers Compensation Act*.
4. The action or conduct of the Defendant, DR. D.R. ELLIS, which allegedly caused the breach of duty of care on August 12, 1988, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 11th day of May, 1993.



Decision of the Appeal Division

Number: 93-0791
Date: May 27, 1993
Panel: Thomas Kemsley
Subject: Deviation from Route (No. 3)

A determination under Section 11 of the *Workers Compensation Act* was requested in this legal action by counsel retained by the Third Party with regard to the defence of the action. On this application, the only issue between the parties is the status of Mr. Wilson and Mr. Fotiadis. There are two related legal actions — both involving a motor vehicle accident on August 14, 1990 in Surrey. In this action, the plaintiff alleges that on that day he suffered injuries when he was riding in a vehicle driven by the defendant Mr. Fotiadis and owned by the defendant Ms. Fotiadis which was involved in a collision with a vehicle driven by the defendant Mr. Gutierrez and owned by the defendant Phelps Leasing Ltd. In the other action, Ioannis (John) Fotiadis and Susan Fotiadis as plaintiffs have brought an action against Juan Carlos Gutierrez and Phelps Leasing Ltd. for the same motor vehicle accident. This Section 11 determination concerns the first of those actions. As Mr. Fotiadis is one of the defendants here and one of the plaintiffs in the other action, the determination of his status will be the same for both actions. No determination was requested with regard to the status of the other defendants in this action. As counsel submitted no evidence or argument regarding the other parties, I will make no determination as to the status of the other parties to the legal action.

Section 11 of the *Act* obligates the Board to make determinations and provide a certificate to the court in certain matters which are relevant to a legal action. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation 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. This was pointed out in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.).

Employer — Workers

At the time of the accident, Mr. Wilson and Mr. Fotiadis worked for Canre Inc. and/or Canre Remodelling Inc. as salesmen. Their counsel argued that it was established only that they worked for Canre Inc., which was not a firm registered with the W.C.B., and therefore they were not workers under the *Act*. Canre Remodelling Inc. was registered with the W.C.B. at the time of the accident.

Mr. Fotiadis said Canre Inc. was a subsidiary of an American company, Amre Inc., which was based in Irving, Texas. He said Canre stood for Canadian Remodelling and Amre stood for American Remodelling. He said Canre may have been referred to as Canadian Remodelling. He did not make any distinction between the two names. In his statement for I.C.B.C. he said he worked for Sears — Canre Remodelling. His Revenue Canada T4 slip listed his employer as Canre, Inc. and his Canada Employment and Immigration Record of Employment listed his employer as Canre Inc., 4949 W. Royal Lane, Irving, Texas. In Mr. Wilson's statement for I.C.B.C. he said he worked for Canre Remodelling and also referred to it as Canre. In his Examination for Discovery he said he worked for Canadian Remodelling. The address listed with the Assessment Department for Canre Remodelling Inc. was c/o 4949 West Royal Lane, Irving, Texas.

On this evidence, I am satisfied that Canre Inc., Canre Remodelling Inc. and Canadian Remodelling were the same company. Mr. Wilson and Mr. Fotiadis made no distinction between the names and used the different names interchangeably. The same address appears for Canre Inc. and Canre Remodelling Inc. There was no evidence introduced to show that they were different companies — counsel merely relied on the onus of proof. There is sufficient evidence to meet the onus of establishing that these names all refer to the same company. There was no evidence to the contrary, other than the fact that different names were used.

Therefore, I find that, at the time of the accident, Mr. Fotiadis and Mr. Wilson were workers of Canre Remodelling Inc., a firm registered with the W.C.B. As such, they were workers within Part 1 of the *Workers Compensation Act*.

In the Course of Employment

On the day of the accident Mr. Wilson, who lived in North Vancouver, had a sales call to make in White Rock at 11:00 a.m. His employment relationship required him to attend at all sales calls. He left his home to drive to White Rock but developed car trouble. He went to a garage and was forced to leave his car there to be fixed. He called Mr. Fotiadis at home in West Vancouver to ask him if he could drive him to his sales call in White Rock. Mr. Fotiadis had no sales calls that day. His and Mr. Wilson's jobs

involved attending at sales calls. If they had no sales calls at a particular time or day, then they were free to use the time for personal matters. As Mr. Fotiadis had no sales calls on August 14, 1990, he was not working. He agreed to drive Mr. Wilson to White Rock. Mr. Fotiadis picked up Mr. Wilson at the service station, they stopped briefly at their office in Burnaby and then went to White Rock. Mr. Wilson made his sales call at a residence, and Mr. Fotiadis waited outside in the car. There is some conflict in the evidence as to whether Mr. Fotiadis assisted Mr. Wilson in measuring the house at some point. After the sales call, Mr. Fotiadis and Mr. Wilson went to a nearby coffee shop on the King George Highway. It appears that they stayed there for at least an hour, although the evidence establishes a range of 45 minutes to 2 hours for their stop. They may not have been in the coffee shop the whole time, but they were stopped at the coffee shop from shortly after they left the sales call until shortly before they were in the motor vehicle accident at approximately 2:30 p.m. On leaving the coffee shop, they continued north on the King George Highway and the collision occurred quite soon thereafter.

There is a considerable dispute on the evidence as to whether, at the time of the collision, Mr. Fotiadis and Mr. Wilson were going directly back to the garage in North Vancouver or were going to the New Westminster Quay for lunch before returning to North Vancouver. Mr. Wilson made a claim for workers' compensation benefits but this was denied by a claims adjudicator in a letter dated October 12, 1990. As both Mr. Wilson and Mr. Fotiadis told him they were going to the New Westminster Quay to have lunch when the collision occurred, the claims adjudicator concluded that this was a substantial deviation from Mr. Wilson's normal route to and from his house. Both Mr. Wilson and Mr. Fotiadis made statements for I.C.B.C. in August 1990 and answered questions under oath in Examinations for Discovery in 1993. Neither made any further reference to the New Westminster Quay and they said they were heading back to North Vancouver when the accident occurred. At the oral hearing on this application, both confirmed that they were going to the New Westminster Quay first and only then to North Vancouver. They said they did not mention the New Westminster Quay in their statements for I.C.B.C. or in the Examinations for Discovery as they were not asked directly about the New Westminster Quay and they did not realize it was important.

Status of Mr. Wilson

On August 14, 1990, Mr. Wilson had a sales call in White Rock at 11:00 a.m. and then had another call in the evening. Employees who are required to travel in the course of their employment are covered for workers' compensation while travelling. There is no doubt that, while Mr. Wilson was travelling directly to and from his sales call in White Rock, he was in the course of his employment and covered for workers' compensation. The issue that arises is whether he was returning from his sales call or whether he had embarked on a deviation for personal reasons which removed him from the course of his employment.

The claims adjudicator in his decision letter of October 12, 1990 stated:

I feel that your decision to have lunch at the Quay in New Westminster represents a substantial deviation from your normal route to and from your house. Had you stopped to have lunch at a restaurant located along the normal route to and from your house to the customer, you would be deemed to be in the course of your employment. However, the Quay in New Westminster does represent a substantial deviation from the most expeditious route to and from your house to the customer's house. Such a deviation, due to the fact that it is substantial, results in a finding that you were, for the course of that deviation, not in the course of your employment.

I have considerable doubt about where Mr. Wilson and Mr. Fotiadis were going at the time of the accident. While they did mention the New Westminster Quay to the claims adjudicator in 1990 and again at this oral hearing, they failed to mention it at other times. I realize they were not asked direct questions about it and may not have realized its importance. An Examination for Discovery is not a situation where a witness gives all of his evidence, rather he just answers the specific questions put to him by counsel for the other side. Nevertheless, the questions about their destination and route were asked several times and both Mr. Wilson and Mr. Fotiadis indicated they were headed directly back to North Vancouver. It is curious that they would stop at a coffee shop around 12:30 p.m. for one or two hours and then, after 2:00 p.m., decide to go for lunch. However, they said they worked irregular hours and had meals at irregular times.

One reason that it is difficult to resolve the issue of where they were planning to go is that, when the collision occurred, they were still at a point on the King George Highway which would have taken them to either New Westminster Quay or North Vancouver. According to the evidence, they had not yet got to a point where they were required to go one way for New Westminster and another way for North Vancouver. If they had passed that point, their actual destination would have been clear. Since they were still on the King George Highway on a route they would have taken to North Vancouver, no actual deviation for personal reasons had yet begun. That is, even if they were intending to go to New Westminster Quay first, they had not yet taken any deviation from their normal route back to North Vancouver.

The policies contained in the *Rehabilitation Services and Claims Manual* ("Manual") #18.33, #18.41 and, #21.00 discuss deviation which takes a worker out of, or puts him into, the course of employment. These policies are based on a change in the nature of the risk — that is, has the risk changed significantly because of the deviation for

personal reasons. A stop for lunch while on a business trip does not change the risk, unless the stop becomes significant in some other way — for example, it involves the consumption of alcohol or requires the return trip to be taken after dark rather than in the light. Item #18.33 discusses when a deviation for business reasons will bring a worker, who is otherwise on a personal trip (routine commuting), into the course of employment. That item analyses it in terms of a change of risk — as long as the worker was still driving on the same route that he normally took to work, then the intended deviation for business reasons had not yet affected the risk and thus the worker was not yet within the course of employment.

Thus, it is an actual deviation which produces an actual change in risk that is relevant, not what the worker intended to do in the future.

Applying those policies here, I find that Mr. Wilson and Mr. Fotiadis were still on an expeditious route back to North Vancouver. If they intended to go to New Westminster Quay, they had not yet turned off their route home. Thus, while they may have intended to make a deviation for personal reasons, it had not actually happened at the time of the accident and thus it had not changed the risk yet. Mr. Wilson was covered for workers' compensation while returning to North Vancouver, and the accident occurred at a point when he was still exposed to the normal risk of that return trip. He had stopped at a coffee shop and, even though it was a lengthy stop, I find that it had not significantly altered his return trip. It had not taken him off his route but only delayed his trip by one or two hours. However, no alcohol was consumed and I cannot find that the risk of the return trip was changed significantly by a difference of one or two hours in the middle of the day.

I agree with the claims adjudicator that, if Mr. Wilson and Mr. Fotiadis had actually deviated from their route home and were on their way to the New Westminster Quay, then the deviation was substantial and Mr. Wilson would no longer have been in the course of his employment. However, based on all the evidence available, I find that no deviation had actually occurred by the time of the collision.

Therefore, based on the evidence, I find that, at the time of the motor vehicle accident, the plaintiff Mr. Wilson was a worker and his injuries arose out of and in the course of his employment.

Status of Mr. Fotiadis

Mr. Fotiadis was not required to drive Mr. Wilson to his sales call, he was assisting him in a time of need. Mr. Fotiadis would not gain financially from the journey, although Mr. Wilson was on business. As is pointed out in several places in the *Manual*, it is not necessary for a worker to be in the course of productive activity or actually doing his

job to be covered for workers' compensation. However, in considering those sections, I am unable to conclude that Mr. Fotiadis was in the course of employment that day. He was not working so offered to drive a friend and fellow worker to a sales call. There was no evidence that he was required to do this by his employer. There was no evidence that Mr. Wilson could not have rented or borrowed a car for the day. The evidence was that Mr. Wilson and Mr. Fotiadis did not travel together in one car even when they both went to Vancouver Island on business. It was not part of their normal employment relationship. Mr. Wilson asked Mr. Fotiadis for a favour and Mr. Fotiadis obliged. While Mr. Fotiadis assisted Mr. Wilson in his employment, I find that it did not bring Mr. Fotiadis into the course of employment. He voluntarily exposed himself to the risk of the trip.

Even if Mr. Fotiadis made a brief stop at the office in the morning and assisted Mr. Wilson in measuring the house, those were incidental intrusions of work-related functions into what was primarily a personal activity by Mr. Fotiadis. As pointed out in *Manual #21.00*, it is necessary to determine what are the predominant features and an incidental intrusion of work functions into an otherwise personal activity will not bring the person into the course of employment.

Therefore, based on the evidence, I find that, at the time of the motor vehicle accident, Mr. Fotiadis was a worker in that he was an employee of a firm registered under the *Act*, but any action or conduct of Mr. Fotiadis which caused the alleged breach of duty did not arise out of and in the course of employment.

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

NO. B905429
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

CHARLES WILSON

PLAINTIFF

AND:

JUAN CARLOS GUTIERREZ, PHELPS LEASING LTD.,
IOANNIS FOTIADIS and SUSAN FOTIADIS

DEFENDANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

C E R T I F I C A T E

UPON APPLICATION of the Third Party, the INSURANCE CORPORATION OF BRITISH COLUMBIA, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, CHARLES WILSON, was, at the time the cause of action arose, August 14, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, CHARLES WILSON, at the time the cause of action arose, August 14, 1990, arose out of and in the course of his employment.
3. The Defendant, IOANNIS FOTIADIS, was, at the time the cause of action arose, August 14, 1990, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The action or conduct of the Defendant, IOANNIS FOTIADIS, which allegedly caused the breach of duty of care on August 14, 1990, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 27th day of May, 1993.

Decision of the Appeal Division

Number: 93-1185
Date: August 19, 1993
Panel: Thomas Kemsley, Connie Munro, P. Michael O'Brien
Subject: Medical Malpractice Action (No. 2)

Introduction

Counsel for the defendants requested a determination under Section 11 of the *Workers Compensation Act* (the "Act") in this legal action. The plaintiff's Statement of Claim alleges that, as a result of the negligence of the defendant Dr. Martin, the back injury he suffered at work on August 31, 1988 was greatly exacerbated and he suffered damages. Dr. Martin is alleged to be a physician representative of the defendant Workers' Compensation Board (the "Board"). The defendants pleaded Section 10(1) of the *Act* and said the plaintiff's action was statute-barred.

The issues on this application concern the status under Part 1 of the *Act* of the plaintiff and the defendants at the time the cause of action arose, whether the plaintiff's injuries arose out of and in the course of employment, and whether the conduct of Dr. Martin which caused the alleged breach of duty of care arose out of and in the course of employment within the scope of Part 1 of the *Act*.

The plaintiff also raised a preliminary issue relating to jurisdiction. The plaintiff argued that the Board is disqualified from making a determination under Section 11 in this case as a reasonable apprehension of bias arises from the fact that the Board is a party to the legal action.

Section 11 of the *Act* obligates the Board to make determinations and provide a certificate to the court in certain matters which are relevant to a legal action. The Board of Governors' Decision No. 4, dated April 8, 1991, assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under Section 11.

The role of the Appeal Division is merely to determine the status of the parties under Section 11. The Appeal Division does not have the jurisdiction to decide whether a lawsuit is barred under Section 10(1) of the *Act*. Prior to 1968, the Board had the jurisdiction to determine whether a lawsuit was statute-barred. But as a result of

Mr. Justice Tysoe's 1966 recommendations, that jurisdiction was taken away from it and left with the courts. It is for the courts to determine the effect of the Section 11 certificate on the legal action.

Jurisdiction — Bias

As set out above, under Section 11 the Board has the exclusive jurisdiction to make determinations and issue certificates. The Board is also a defendant in this particular action.

As noted by defendants' counsel, the *Act* contemplates the Board making determinations under Section 11 in actions where it is a litigant, notably where the Board is subrogated to the claims of an injured worker under Section 10(6) of the *Act*. This occurred, for example, in the case of *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.). The trial judge there held that the Board "was the instigator of the action in which they were then asked to make a determination" pursuant to Section 11. In that case the Board's determination under Section 11 caused its action against some of the defendants to be dismissed. Apparently, no issue of jurisdiction was raised with the court.

In the judicial review application *C.Y. Loh Associates Ltd. and Kosta C. Marcakis (Petitioners) and Workers' Compensation Board of British Columbia and Raymond Gerald Innes (Respondents)*, (Supreme Court of British Columbia, Vancouver Registry No. A912408, date of decision November 6, 1991), the petitioners (defendants in the legal action) challenged a certificate issued by the Board pursuant to Section 11 of the *Act*. The Board had started a subrogated action against the defendants for compensation on behalf of an injured worker. The two defendants applied to the Board for a determination under Section 11 of the *Act* that they were an employer and worker under Part 1 of the *Act* and in the course of employment when the accident occurred. Such a determination would have had the effect of barring the action against them. However, the Board determined that the defendants were not an employer and a worker within Part 1 of the *Act* at the time of the accident, with the result that the subrogated action by the Board could proceed against the defendants. On judicial review, the petitioners argued that the Board's determination under Section 11 should be set aside as the procedure created a reasonable apprehension of bias. The petitioners pointed to the involvement of the Board's Legal Department as counsel for the plaintiff in the legal action, as adviser to the Board's commissioners in the Section 11 determination — which included preparation of the memoranda and draft reasons by the commissioners, and as the initiator of a decision by the Board not to hire the defendants as consultants on a building project. The judge examined the statutory scheme of the *Act*, which involved the Board in both subrogated actions and determinations under Section 11, and stated:

This shows that some degree of inherent statutory bias is contemplated by the *Act*. The second issue is whether the procedures evolved under this statute are free from a reasonable apprehension of bias and, more specifically, whether the allegations in this case are supported by sufficient evidence.

The judge then went on to consider the Federal Court of Appeal decision in *MacBain v. Canadian Human Rights Commission* (1985), 16 Admin. L.R. 109, and stated:

The [Federal] Court distinguished between independent administration and independent adjudication; the former which cannot realistically exist, and the latter which is vital to the proper administration of justice.

(page 16)

The judge in *C.Y. Loh Associates Ltd. et al* noted that in *MacBain* the court found that the independence of the adjudication was compromised by the statutory scheme, but then stated:

Here, in contrast, the functions of the Workers' Compensation Legal Department were administrative, not adjudicative, as the Legal Department was not involved in assessing the evidence, choosing the Commissioners or making the decision. . . .

In addition, the *MacBain* problem stemmed from overlapping steps (investigation, appointment, representation) in one matter. In the case at bar, there were separate matters (the certificate, adjudication and the subrogated action). These are sufficiently distinct from one another and were handled by different members of the Legal Department.

(page 17)

...

Therefore, structural bias is present, as dictated by the statutory scheme. Practical considerations influence the composition and actions of the Legal Department. Under these circumstances, including the realistic limitations on the ideal of administrative independence, there is no foundation for the reasonable apprehension of bias allegation.

(page 18)

The application for judicial review was dismissed. In *MacBain*, the federal court set out the test as whether:

... an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that a reasonable apprehension of bias exists under this scheme and in this case.

The Federal Court approved of the approach of the trial judge that:

... a “properly informed person” was one who was knowledgeable about the scheme of the statute and was also knowledgeable as to the way in which that scheme was applied in the processing of the complaint at Bar.

Since the decision in *C.Y. Loh Associates et al*, the structure has changed. The Board still has the exclusive jurisdiction to make determinations under Section 11. However, as noted above, that jurisdiction has been assigned to the Appeal Division. The administration and adjudication of Section 11 applications are now done in the Appeal Division. Other departments of the Board, including the Legal Department, are not involved in the adjudication of these applications. The Appeal Division is not involved in giving legal advice to the Board. Any bias that remains results solely from the fact that the Board is an interested party in the Section 11 application. While this may create some degree of inherent structural bias, we are satisfied that with regard to Section 11 determinations it creates no reasonable apprehension of adjudicative bias. While the Appeal Division is part of the Board, it hears appeals from a wide range of decisions made by different adjudicators in the Board and functions independently of all other departments of the Board. Section 85 of the *Act* establishes the independence of the Appeal Division. In particular, Section 85(5) states that just cause to remove an appeal commissioner does not arise where an appeal commissioner makes a decision with which the governors do not agree. In all matters, if the Appeal Division receives information from any department of the Board, including the Legal Department, it discloses this information to the parties for their comments prior to making a decision. The Appeal Division has no involvement in legal actions such as the one brought here, other than to make a determination under Section 11, if requested. Thus neither the Legal Department nor any other Board officers are in a position to influence in any way a determination under Section 11 by the Appeal Division — other than to make written submissions on the application as can any other party to the legal action.

We find that, generally and in this particular case, a person properly informed about the complete separation between decisions taken by the Board’s Legal Department in legal actions and Section 11 determinations made by the Appeal Division would conclude there was no reasonable apprehension of bias created by the Appeal

Division making determinations under Section 11 of the *Act*, even when the Board was a party to the legal action in question. In this particular case, the Appeal Division has had no contact with the Board's Legal Department about the legal action, other than for the submissions filed on this application which have been disclosed to the plaintiff.

Therefore, we reject the arguments on this issue and find we have jurisdiction to proceed with the Section 11 determination.

Section 11 Determinations

The plaintiff's legal action is based on the alleged negligence of the defendant Dr. Martin in the diagnosis and treatment of a compensable back injury. The plaintiff claims he suffered further injury to his back as a consequence of the defendant's negligence.

There is no question that, at the time of his original back injury, the plaintiff was a "worker" within Part 1 of the *Act* and his injury arose out of and in the course of his employment. Plaintiff's counsel submits that, in regard to any subsequent injury which occurred in the course of treatment;

- (a) the plaintiff was no longer a worker within Part 1 of the *Act*;
- (b) the subsequent injuries did not arise out of and in the course of employment;
- (c) Dr. Martin may not have been a worker under the *Act*; and,
- (d) the Board was not an employer within the meaning of Section 10 of the *Act*.

Status of Plaintiff

The published policies of the governors set out that subsequent injuries arising in the course of treatment for a compensable injury are also compensable. This is found in the *Rehabilitation Services and Claims Manual* ("*Manual*") beginning at item #22.00 entitled, "Compensable Consequences of Work Injuries." Item #22.10 sets out that "Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable." Item #22.11 states in part:

Compensation is not limited to the direct consequences of work accidents. Ordinarily, when a claimant undertakes surgery for his injuries, the consequences of the surgery are accepted as consequences of the accident, and any disablement resulting from the surgery is treated as compensable.

Thus, any subsequent injury that was caused to the plaintiff's back during his treatment for his compensable back injury was compensable. However, plaintiff's counsel argues that does not necessarily mean that the plaintiff was a worker nor that his subsequent injury arose out of and in the course of employment. Plaintiff's counsel sets out that, at the time of the alleged negligent diagnosis and treatment by Dr. Martin, the plaintiff was not employed.

Section 5(1) of the *Act* states that compensation is payable for "personal injury arising out of and in the course of the employment." Decision No. 152, (1975) *Workers' Compensation Reporter*, Vol. 2: p. 186 entitled "Re: Injuries Arising Out of Treatment and Other Appointments," was the basis for the policy in *Manual* #22.10 and #22.11. The concluding paragraph in Decision No. 152 states:

Where a subsequent injury within the scope of this directive is accepted as compensable, *it is not accepted on the ground that the injury is one arising out of and in the course of the employment*. It is accepted on the ground that the subsequent injury is a *compensable consequence* of the original injury. Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.

[emphasis added]

This raises a possible distinction between injuries that arise out of and in the course of employment and injuries that arise as a consequence of a compensable injury. There was no further analysis or elaboration of that statement in Decision No. 152 nor in any other document that we are aware of, although it was reproduced in a subsequent book written by Dr. Terence Ison, the author of Decision No. 152. The *Manual* does not reproduce that last paragraph from Decision No. 152, so it is necessary to consider it in light of other policy items found in the *Manual*.

Manual #14.00 entitled "Arising Out of and In the Course of Employment" states:

Before a worker becomes entitled to compensation for injury under the *Act*, the injury must arise out of and in the course of employment.

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 his pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.

Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.

Item #16.00 "Unauthorized Activities" states:

The mere fact that a worker's action which leads to an injury was in breach of a regulation or order of his employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take him out of the course of his employment or to prevent his injury from arising out of his employment.

Item #21.00 "Personal Acts" states in part:

There is a dilemma that is always inherent in workers' compensation. The difficulty, of course, is that the activities of workers are not neatly divisible into two clear categories, their employment functions and their personal lives. . . . it has long been accepted that compensation is not limited to injuries occurring in course of production. . . .

. . . This is within the scope of the established doctrine relating to acts which, though not in themselves productive, are nevertheless a normal incident of employment.

Item #21.10 "Lunch, Coffee and Other Breaks" states in part:

A worker is considered to be acting in the course of her employment not only when she is doing the work she is employed to do but also while engaged in other incidental activities. For example, she does not cease to be in the course of her employment while having a lunch or coffee break on the employer's premises, while going to the toilet, having a smoke or

other such activities. Therefore, if while engaged in such activities she is injured by virtue of some aspect of her work environment, a claim will be accepted.

Item #22.00 “Compensable Consequences of Work Injuries” states:

Not all consequences of work injuries are compensable. . . . Looking at the matter broadly and from a “common sense” point of view, it should be considered whether the previous injury was a significant cause of the later injury.

Item #22.10 “Further Injury or Increased Disablement Resulting from Treatment” states:

Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable.

Where a worker is undergoing treatment for a compensable injury, the place of treatment is analogous to a place of employment, and a further injury arising out of the place of treatment would also be compensable.

Item #22.22 “Suicide” states:

In a case of suicide, death benefits are payable if it is established that the suicide resulted from a compensable injury.

Items #22.31 “Multiple Sclerosis,” #22.32 “Cancer,” #22.33 “Psychological Problems/Chronic Pain Problems” and #22.34 “Alcoholism and Drug Dependency Problems” consider the relationship of other potential consequences to the compensable work injury.

A review of the referenced policy indicates that the requirement of “arising out of and in the course of employment” has been given a broad interpretation by the Board. While Decision No. 152 raised a possible distinction between original and subsequent injuries, the *Manual*, which is a more recent statement of the published policy of the governors, does not refer to any such distinction. Nor can we find support for the distinction in any other material.

We have given considerable thought to whether any real distinction can be drawn between an “injury arising out of and in the course of employment” and a “compensable consequence” of an original injury. We can see no basis for differentiat-

ing between the two concepts. If the statute restricted compensability to injuries *occurring* in the course of a worker's employment, injuries in the course of treatment might well be subject to a different consideration. A much broader concept is expressed, however, by the term "*arising*" out of and in the course of employment. The breadth of that terminology is reflected in the manuals containing the governors' published policies.

As noted by defendants' counsel and seen in such cases as *Smith v. Vancouver General Hospital* (cited above), the Board apparently has routinely determined in the past that, when an injured worker's condition was made worse during treatment for a compensable injury, the worker was still a worker and the subsequent injury arose out of and in the course of employment. The Court in *Frandle v. Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.) noted that the Board had made those determinations in that case with regard to the plaintiff and the hospital in which his subsequent injuries occurred.

That approach appears to fit more closely the intent of the *Act* than the interpretation suggested by the plaintiff. It may be difficult to say that an injured worker who is undergoing an operation miles from his place of employment is still in the course of his employment. It is less difficult, however, to characterize the operation as *arising out of* the course of such employment.

The real issue in workers' compensation law is whether the injured worker should be covered for any subsequent injury arising from the treatment. The Board has decided, properly in our view, that these subsequent injuries are compensable if they are a direct consequence of treatment for a compensable injury. An original injury which arose out of and in the course of employment is both compensable under Section 5(1) and gives rise to a certificate under Section 11 which can bar a legal action. It follows that the same must be said for the direct consequences of that injury which gave rise to further entitlement to compensation. The worker is undergoing treatment because of a work injury. Exposure to the risk of further injury during that treatment is due to having suffered the work injury. Otherwise, the worker would not be undergoing the medical treatment. There is a direct causal link between the two injuries. The risk in treatment is part of the original compensable injury for the purposes of compensation under Section 5(1) of the *Act*. We find that it is also part of the compensable injury for the purposes of Section 11. That is, the direct consequences of a compensable injury also arise out of and in the course of employment. The broad definition given to that phrase for the purposes of Section 5(1) must carry through into Section 11. There is no reason to assume that the legislature intended them to be interpreted differently.

However, under both Sections 5(1) and 11, this is limited to situations where there is a sufficient causal link between the original injury and any subsequent injury. An injured worker could be further injured by an unrelated cause or by a cause that is only remotely connected to his work injury or subsequent treatment. In such a case, the

subsequent injury would not be a compensable consequence of the original injury. It would not arise out of and in the course of employment, either for Section 5(1) or Section 11 of the *Act*.

In this case, Mr. Howden's complaint is that his injured back was exacerbated by Dr. Martin's treatment. Some subsequent injuries could be "new" injuries, in the sense that they are separate and distinct from the original injury and/or there is an insufficient causal link between the original and subsequent injuries. However, we find any exacerbation of Mr. Howden's injured back was a direct consequence of his original injury and not a new or different injury. Therefore, we find that the plaintiff's injuries arose out of and in the course of employment.

It does not matter that the plaintiff was not employed at the time of the subsequent injury. For each claim, and the compensable consequences arising as part of the claim, the worker must meet the requirement of being a "worker" under the *Act* only once. That is, the person must be a "worker" for the claim to be accepted initially, but it is not necessary to show that the person is still a "worker" each time further compensation is claimed. The worker still is an injured worker with the Board while undergoing treatment for a compensable injury. The Board does not stop compensation because the worker becomes unemployed. The worker is receiving compensation from the Board and the compensation paid has relevance to the assessments paid by the worker's original accident employer.

Other sections of the *Act* also recognize a worker's continuing claim even though the employment has ceased. For example, Sections 35(5) and 98(3) address the issue of compensation where the injured worker is out of the work force due to hospitalization or confinement to jail. While compensation may be interrupted or diverted in those cases, there is no doubt that the person is still a "worker" under the *Act* for the existing claim.

In this case, Mr. Howden was a "worker" at the time of his original injury. He met that requirement in Section 5(1) for compensation and he did not have to satisfy it again under this claim. He remained a "worker" for the purposes of the claim. Therefore, we find that, at the time the cause of action arose, the plaintiff was a worker within Part 1 of the *Act*.

Status of Defendants

(a) Workers' Compensation Board

By virtue of Section 2(1)(e) of the *Act*, the Board is an employer within Part 1 of the *Act*. It employed Dr. Martin to provide medical services to injured workers. The plaintiff argued that the Board's primary status in respect of the *Act* is not as an employer but as

“the Board,” and referred to the case of *Hunt v T&N plc. et al* (1990), 72 D.L.R. (4th) 567 (B.C.S.C.). We do not accept that argument. The *Hunt* case was an application to strike out a third party notice. It did not decide that the Board was not an “employer” under Section 10 — only that the point was arguable. It based this on a possible distinction between the Board in exercising its primary duty to protect workers as compared to its secondary function of assisting injured workers and providing medical aid. In that case, the Board’s alleged failure in its primary function was the basis of the claim against it and gave rise to the possible distinction between “the Board” and the Board as “an employer.” In this case, the alleged negligence relates to the secondary function — of providing medical aid and advice. In that role the Board was operating as an “employer.”

The Board employs people to carry out those functions, and is a significant employer in that regard. The Board, like other major employers, has a deposit account with the W.C.B. and pays its assessment on a “cost plus” basis. Therefore, with respect to the provision of medical advice regarding an injured worker, the Board is an employer, and the functions performed by its employees in those duties are within the scope of the employment relationship.

The plaintiff further argued that if the Board or its workers failed to meet an appropriate standard of care in executing its duties, the Board does not retain the status of “employer” for the purposes of Section 11. We do not accept that argument. The issue of negligence is not relevant to the determination of who is an employer under Section 11 of the *Act*.

Therefore, we find that, at the time the cause of action arose, the Board was an employer engaged in an industry within Part 1 of the *Act*.

(b) Dr. Martin

Evidence supplied by the Board establishes that, at the time Dr. Martin was involved in treating the plaintiff, he was a regular employee of the Board. The functions he was performing were functions which he had been hired to perform. There is nothing to indicate that he was not acting in the course of his employment. Whether or not he was negligent is of no consequence to this determination. Like any worker acting in the course of his employment, Dr. Martin remained a worker and in the course of his employment even if he performed his employment duties negligently.

Therefore, we find that, at the time the cause of action arose, Dr. Martin was a worker within the meaning of Part 1 of the *Act*.

(c) Conduct of the Defendants

As the Board employed Dr. Martin to provide medical advice and Dr. Martin was engaged in giving that medical advice at the time the cause of action arose, we find that any action or conduct of the Board or Dr. Martin which caused the alleged breach of duty of care arose out of and in the course of employment within the scope of Part 1 of the *Act*.

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

NO. 7730
PRINCE RUPERT REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1979, CHAPTER 437
AND AMENDMENTS THERETO

BETWEEN:

THOMAS VICTOR HOWDEN

PLAINTIFF

AND:

WAYNE MARTIN, M.D. MEDICAL ADVISER,
and WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, WAYNE MARTIN, M.D., MEDICAL ADVISER, and WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT:

1. The Plaintiff, THOMAS VICTOR HOWDEN, was, at the time the cause of action arose, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, THOMAS VICTOR HOWDEN, which gave rise to the cause of action, arose out of and in the course of his employment.
3. The Defendant, WAYNE MARTIN, M.D., MEDICAL ADVISER, was, at the time cause of action arose, a worker within the meaning of Part 1 of the *Workers Compensation Act*.
4. The Defendant, WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, was, at the time the cause of action arose, an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
5. The action or conduct of the Defendants, WAYNE MARTIN, M.D., MEDICAL ADVISER, and WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, which allegedly caused the breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 19th day of August, 1993.