BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

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WCAT Decision Number: **WCAT-2003-00896-ad**
WCAT Decision Date: June 11, 2003

Panel: Marguerite Mousseau, Vice Chair

WCAT Number: 031145-A

Donna GALLAGHER v. HARJIT & SONS ENTERPRISES LTD. and Gursharan Singh DHALIWAL & INSURANCE CORPORATION OF BRITISH COLUMBIA

Section 11 Determination
In the Supreme Court of British Columbia, Vancouver Registry No. M011023

Applicants: HARJIT & SONS ENTERPRISES LTD. (the "defendant") and INSURANCE CORPORATION OF BRITISH COLUMBIA (the "third party")

Respondent: Donna Gallagher (the "plaintiff")

Representatives:

For Applicants: Alexander Holburn Beaudin & Lang

For Respondent: Skorah Doyle Khanna

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As of April 17, 2015, this decision is no longer considered by WCAT to be noteworthy.

An amendment was issued for WCAT-2003-00896 and is attached to this document.

This decision has been published in the Workers' Compensation Reporter:
19 WCR 143, #2003-00896-AD, Status Determination: Worker or Independent Operator

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Introduction

On August 2, 2000, the plaintiff was driving her vehicle southbound on Highway 99, approaching the Deas Tunnel. Traffic was moving slowly because of congestion at the entrance to the tunnel. A dump truck, owned by the defendant Harjit & Sons Enterprises Ltd. (Harjit) and driven by the defendant Gursharan Singh Dhaliwal, approached the slow moving line of traffic and struck several vehicles, including that driven by the plaintiff.

The defendant Harjit and the third party, Insurance Corporation of British Columbia (ICBC), request a determination under section 11 of the *Workers Compensation Act* (the Act).

Issue(s)

The issues are: 1) whether the plaintiff was a worker within the meaning of Part 1 of the Act on August 2, 2000; and, if so, 2) whether injuries she sustained in the accident arose out of and in the course of her employment; 3) whether the defendant Harjit was an employer engaged in an industry within the meaning of Part 1 of the Act; and, 4) whether the defendant Gursharan Singh Dhaliwal was a worker within the meaning of Part 1; and, if so, 5) whether the alleged negligence arose out of and in the course of his employment.

Jurisdiction

This application for a determination under section 11 of the Act was filed with the Appeal Division before March 3, 2003. Effective March 3, 2003, section 11 of the Act was repealed, and the Review Board and Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in the *Workers Compensation Amendment Act (No. 2), 2002*. WCAT has jurisdiction to provide a certificate to the court under section 257 of the amended Act. Paragraph 39(1)(c) of the transitional provisions contained in *Workers Compensation Amendment Act (No. 2), 2002* provides that section 11 proceedings that were pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings before WCAT (except that no time frame applies to the making of the WCAT decision). This means that WCAT will consider this application under the former section 11, but the new WCAT provisions apply (WCAT must apply policy of the board of directors pursuant to subsection 250(2) and section 251 of the Act and section 42 of the amending act, and WCAT precedent decisions are binding under subsections 238(6) and 250(3)).

Section 11 of the Act obliged the Workers' Compensation Board to make determinations and provide a certificate to the court in certain matters which are relevant to the legal action. It is for the court to determine the effect of the certificate on the legal action.

Status of the Plaintiff

Background and Evidence

At the time of the accident, the plaintiff was employed full-time as the community development coordinator for the Muscular Dystrophy Association of Canada. This employment is not relevant to this legal action since she was not engaged in any activity related to this employment when the accident occurred.

In addition to her employment with the Muscular Dystrophy Association, the plaintiff also worked part-time as a rehabilitation assistant. This employment is relevant to the legal action because the plaintiff was on her way to White Rock to provide rehabilitation services to a client when the accident occurred. The plaintiff provided these services under an agreement between herself and Glenn Kerr, the proprietor of Sierra Rehabilitation Assistance (Sierra). The issue is whether, in providing services under this agreement, the plaintiff was operating as a labor contractor/worker or an independent operator.

Counsel for the plaintiff submits that the plaintiff was an independent operator who did not have Personal Optional Protection and she is therefore not covered by the Act. Counsel for the defendant Harjit and third party submits that the plaintiff was a worker within the meaning of Part 1 of the Act, either as an employee or a labor contractor who was not registered with the Board and did not have Personal Optional Protection.

The plaintiff was examined for discovery on September 26, 2002. At that time, she provided evidence regarding the nature of her activities as a rehabilitation assistant. She also provided evidence on this issue in an affidavit sworn on November 26, 2002 and in an unsworn statement dated January 13, 2003 made in response to interrogatories.

The plaintiff has an educational background in leisure studies and physical education. (Q. 670 – 673.) She stated that she was "on contract" with Sierra for the provision of rehabilitation services and had been doing this since March 25, 1998. (Q. 686 – 688.)

She stated that Glenn Kerr owned the company called Sierra Rehabilitation Assistance and that he obtained referrals from ICBC or occupational therapists or physiotherapists for people who were at a stage of rehabilitation where they would be going to a gym and getting "back up to speed fitness wise". Her job was to monitor programs such as using a gym, walking, tennis or hiking or other activities which were set up with an occupational therapist or physiotherapist. (Q. 725.)

In the affidavit sworn on November 26, 2002, the plaintiff stated that she was not an employee of Sierra and she received no employee benefits. She stated that she was an independent contractor with regard to her duties as a rehabilitation assistant and that she had never applied for workers' compensation coverage. She stated that she declared her income for income tax purposes under the Statement of Professional Activities and that she earned this personally and not as a corporate entity. She agreed with the substance of an affidavit by Glenn Kerr appended to her affidavit as Exhibit A.

In this affidavit, Glenn Kerr said that the plaintiff was not an employee of his company. He stated her rate of pay as $20 per hour for "regular" time, $10 per hour for travel time and mileage at $.32 per km. He stated that her hours varied throughout the year but based on invoices she had faxed to him it appeared that she worked an average of 8-12 hours (no time frame is specified). He states that she was paid biweekly and that she averaged $300 - $400 per month.

In response to interrogatories provided by counsel for the defendant, dated December 19, 2002, the plaintiff responded that she did not have a written contract with

Glenn Kerr. With regard to the terms of her employment she stated that Glenn Kerr would contact her to see if she was available to work with a client. If the location, time, dates and type of injury suited her, she would agree to meet with the potential client, and the occupational therapist or physiotherapist. Glenn Kerr provided the contact number for the therapist and she would call the therapist directly.

The schedule of activities, types of activities, location of activities and duration of rehabilitation program would be determined by the plaintiff and the occupational therapist or physiotherapist. She submitted her progress reports directly to the occupational therapist or physiotherapist. The location of activities depended on the objectives of the rehabilitation program, which were set by the occupational therapist or physiotherapist.

The plaintiff invoiced Glenn Kerr twice a month. In addition, she submitted summary reports of dates, times, duration, location and activity to Glenn Kerr once per month. She prepared her reports and other paper work in her home. She was reimbursed for expenses such as entrance fees to facilities, tubing bands, squeeze balls, etc.

The plaintiff stated that she did not provide rehabilitation services under any arrangement other than the agreement with Glenn Kerr.

In his unsworn statement dated January 9, 2003, Glenn Kerr stated that he is a self-employed rehabilitation assistant. He has a business license but is not a registered company. He said that, when he became too busy or was on vacation, he would refer his clients to another rehabilitation assistant or he would “contract the assistant to fill in for me”.

He stated that prior to starting this arrangement with the plaintiff he “sat down with her for an afternoon and went through a policy and procedures manual that I use personally”. They had also discussed rates and billing procedures at that time and agreed on the rate of compensation previously described.

He said that the plaintiff might get 2 or 3 cases from him per year. She submitted an invoice to him every second week and he paid her directly. He stated “Then I would bill my client’s fee payer (usually ICBC or WCB) monthly.” He said that he could not remember if the plaintiff occasionally got her own clients but, even if she did, she would have handled them through Glenn Kerr. He said that this was at her request as “she did not have a vendor number with ICBC or the WCB and did not want to deal with the administration”.

He said that he would write a cheque directly to the plaintiff for her services and they had agreed that she would look after her own taxes. He paid her the amounts on her invoice and did not pay for benefits or make any deductions. He understood that she did not contract to provide rehabilitation assistance with anyone else. He would put the plaintiff in touch with the occupational therapist who would direct the therapy. If equipment was necessary, the plaintiff would have billed him for it and he would then bill the client.

He said that the plaintiff did not report to him, she reported directly to the occupational therapist. He also stated "All I have on file for Donna is her résumé and invoices. I have had other people work for me, about 6 people have contracted to me over 7 years."

The plaintiff traveled directly from her home to see clients. She did not need to stop by his home/office first. He said that, on the day of the accident, she had been on her way to see a client who was a referral from the WCB. He could not remember whether the occupational therapist had called him or the plaintiff, but, in either case, he would have invoiced the WCB as usual.

In a subsequent undated statement received at the Appeal Division on January 29, 2003, Glenn Kerr said that he did not consider himself an employer nor did he consider the plaintiff an employee. With regard to the client that the plaintiff was going to see when the accident occurred, he believed that the occupational therapist had contacted the plaintiff directly.

He said that he did not direct the plaintiff in how she performed her work, when she performed her job, how often she performed her job, what tools she used or with whom she worked. He said that he did the paperwork and billed clients on her behalf "and for that I charge a small fee". He said that they had agreed on this fee before entering the relationship. He again said that the plaintiff submitted invoices on a bi-weekly basis, which he used to bill the fee payer "on her behalf". He said that the plaintiff could have done this but she "did not want the hassle of having to get a vendor number from ICBC or WCB". And, "She also preferred getting some money twice a month instead of having to wait for the fee payer which took 2-3 months."

Further, he said that the plaintiff "was being paid for her travel time by the WCB at the time of the accident" and she was working for herself and was not a worker or employed by him. He stated that, based on the definition of worker under the Act, he considered that the plaintiff had a contract with the Workers' Compensation Board, "who agreed to enlist her services and with the Occupational Therapist who initiated her involvement." He said that the plaintiff did not have this kind of contract with him.

Reasons and Findings

1. *The first issue is whether the plaintiff was a worker under Part 1 of the Act when the accident occurred.*

As of the date of the accident, under section 82 of the Act, the Governors had authority to approve and superintend the policies and direction of the Board, and those duties were then being discharged by a Panel of Administrators under section 83.1 of the Act. Governors' policy included the *Rehabilitation Services and Claims Manual*, the *Assessment Policy Manual*, and, Decisions No. 1-423 of the *Workers' Compensation Reporter*. (See Governors' Decision No. 86 (*By-law No. 4 — Published Policy of the Governors*, 10 *WCR* 781), and the Panel of Administrators' Decision No. 1 (*Discharge of Governor Policy-making Function*, 11 *WCR* 465)).

Since then a number of relevant *Workers' Compensation Reporter* decisions were "retired" and the *Assessment Policy Manual* was superseded by the *Assessment Manual* as of January 1, 2003. My decision refers to the law and policy that existed as of the date of the accident. However, I also note that the above noted changes do not alter the substance of the applicable law and policy.

The Act creates three categories: employer, worker, and independent operator. "Worker" and "employer" are defined in section 1 of the Act. The definition of "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;

It also includes an independent operator admitted by the Board under subsection 2(2) of the Act. The term "independent operator" is not defined in the Act.

The policies of the Governors utilize a fourth category which is not contained in the Act, namely, that of "labour contractor". Item #6.10 of the *Rehabilitation Services and Claims Manual* (Manual) which is entitled, "Nature of Employment Relationship" provides:

> Where a person contracts with another to provide labour in an industry covered by the *Workers Compensation Act*, the Board considers that the contract may create one of three types of relationship. The persons doing the work may be independent firms, labour contractors, or workers.

Item #20:20:00 of the *Assessment Policy Manual* provides the following with regard to labour contractors:

> A labour contractor is an unincorporated party who supplies essentially labour only or one piece of major equipment and works for one concern at a time. Labour contractors can take out Personal Optional Protection even if they have no workers or they can register to cover their workers only. If they are unregistered they and anyone they employ to assist them will be regarded as workers of and covered by the prime contractor.

The *Assessment Policy Manual* provides guidance in establishing the status of firms and persons. It states generally as follows at #20:10:30:

> The commencement and termination of an employment relationship and distinguishing a relationship of employment from a relationship between independent contractors is considered in Workers' Compensation Reporter Series Decisions 26, 32, 138 and 255. . . . The current policy used to determine whether an individual is an independent contractor and is therefore eligible for registration will be discussed further in Section 20:30:20 of this manual.

Item #20:30:20 of the *Assessment Policy Manual* commences as follows:

> The current operational policy for the administration of registration requirements or eligibility is set out in Workers' Compensation Reporter Series Decision Number 255. That decision sets out the spirit and intent of registering firms.
>
> From a registration viewpoint, there are three basic categories to consider when determining the registration requirements of an employer; independent firms, labour contractors and workers. Each of these categories is discussed below and represents guidelines in determining the registration requirements or eligibility. Individual cases must be viewed as to whether the application o[f] the policy is appropriate for that case.

Decision No. 255 (3 *WCR* 155) states, in part, at pages 155-156:

> *Decisions 32 and 138* also lay down the factors considered by the Board in determining how the relationship between the parties to a contract should be classified. These factors include, for example, the degree of control exercised over the supplier of labour by the person for whom he works, whether the supplier of labour or the person for whom he works provides the necessary equipment or licenses, and whether the supplier of labour engages continuously and indefinitely for one person or works intermittently and for different persons. **The major test, which largely encompasses these factors, is to ask whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works.**
> . . .
>
> No business organization is completely independent of all others. It is a question of degree whether a contractor has a sufficient amount of independence to warrant his registration as an employer.
>
> [emphasis added]

Decision Nos. 26, 32, 138, and *255* list several factors as being significant in determining whether a person is an independent firm, labour contractor or a worker. These factors were previously summarized at #7.44 of the *Rehabilitation Services and Claims Manual* (the *Manual*) as follows:

(a) Control
(b) Ownership of Equipment or Licences
(c) Terms of Work Contract
(d) Independent Initiative, Profit Sharing, and Piecework
(e) Employment of Others
(f) Continuity of Work
(g) Separate Business Enterprise

Items (a) to (g) were headings from #7.44; the policy also included discussion with respect to the application of these criteria. Also of relevance is the comment in Decision No. 32 that, “In distinguishing between an employment relationship and one of independent contractors there is no single test that can consistently be applied”.

By resolution dated October 3, 1994, the Governors deleted #7.44 from the Manual, effective November 1, 1994, as part of a package of revisions to the Manual and

Assessment Policy Manual. The accompanying explanatory notes concerning these revisions indicated that they did not effect any change in the policies other than those necessitated by *Workers Compensation Amendment Act, 1993* and a court decision concerning First Nations operations on reserve land. There was an intent to avoid duplication between the two manuals, and to remove policies from the Manual which concerned assessment issues.

Counsel have applied the concepts indicated by items (a) to (g) to the agreement between Glenn Kerr (Sierra Rehabilitation Assistance) and the plaintiff with differing results. Counsel have also cited several prior decisions of the Appeal Division, together with argument as to why they should be followed (or distinguished) in this case. Counsel for the plaintiff cited Appeal Division Decision #92-1672 [*Independent Operator*, 9 WCR 627] in support of her position. Counsel for the defendant cited Appeal Division Decision #94-0455 [*Labour Contractors*, 10 WCR 589] and Appeal Division Decision #92-1967 [*Interpretation of "Worker", "Employer", and Independent Contractor*, 9 WCR 55]. Decisions of the Appeal Division do not constitute policy but the reasoning expressed in those decisions may assist in considering the application or interpretation of governors' policy (now the policies of the directors).

Counsel for the plaintiff relies particularly on Decision #92-1672 (supra) and submits that the facts of that case are very similar to those of the plaintiff in this case. Decision #92-1672 involved a request for a certificate under section 11 with respect to the status of a party who operated a cleaning business. The panel applied the seven principles described above and concluded, in the facts of that case, that the party was an independent operator.

The facts included that, the cleaner was in control of his business, he was not required to do most of his work or much of it for any other firm, and no one directed his work. He owned all the equipment, licenses, insurance etc. required to operate his business and he was not operating under some other firm's license. There were no continuing terms in the claimant's work that would indicate he was under a contract of service and no evidence that he was required to take certain contracts or of any non-competition clauses which would indicate interdependence. He did not share profit or losses but his profit or loss depended entirely on his own independent initiative in getting those contracts and establishing a viable contract price. He contracted with a variety of firms and people and was not engaged continuously and indefinitely by just one or two firms.

The panel concluded that all of the above led to the conclusion that the cleaning business was indeed an independent enterprise and the cleaner was not a labour contractor.

Decision #92-1967 (supra) dealt with a decision of the Assessment Department and involved consideration of whether a group of managers were independent operators or workers. It is useful for its discussion of the term "worker" in workers' compensation law and some of the larger policy considerations which are reflected in determinations of who is an employer. The panel in that case also applied the seven criteria described in the policy and determined that the group of managers, despite contractual language to the contrary, were workers.

Decision #94-0455 (supra) dealt with an application for a determination under Section 11 as to the status of a carpet cleaner. This decision is also useful for its review of the various terms used in the Act and the policies. The panel in that case determined that the cleaner was a worker.

In the present case, the plaintiff's employment as a rehabilitation assistant does not meet the criteria for a labour contractor as defined in policies at item #20:20:00 and #20:30:20. The central issue is whether her relationship with Sierra is an employment relationship or a relationship between two independent operators. This involves consideration of her employment activities in light of the seven factors described in the policies.

Control

The discussion under this heading in the policy states that "this is the traditional common law test which asks whether one party controls or has the right to control the manner in which the other party carries out the work contracted for". The policy goes on to say that "The test is now rather discredited, but is applied along with the other tests in suitable cases."

Counsel for both parties have applied this test, each emphasizing a different aspect of the relationship between Sierra and the plaintiff. Counsel for the defendant notes that all of the work done by the plaintiff, as a rehabilitation assistant, came from Sierra. Glenn Kerr was the only one who referred work to her and he controlled the flow of that work. Accordingly, counsel submits that this points to more of an employer/employee relationship.

Plaintiff's counsel submits that the plaintiff was in control of the work she accepted, what work she would do, and how she would do it. She was neither directed nor monitored in her work product by Sierra. Accordingly, she should be viewed as an independent operator.

Both of these submissions are largely consistent with the evidence but do not fully speak to the test as it is described above because of the relatively unusual circumstances of this case. It is unusual in that neither Sierra nor the plaintiff had a significant degree of control over the manner in which the work was carried out. This is by virtue of the work itself and the role of a rehabilitation assistant, whose functions are performed under the direction of a therapist. Although the plaintiff could decide not to take a referral, once she had accepted the referral the nature of the service she provided, including the equipment that would be used, would largely be determined by the therapist – albeit with the plaintiff's input. Accordingly, the "control" test is not particularly suited to this arrangement and the results of attempting to apply it are equivocal at best.

Ownership of Equipment or Licenses

This involves the question of who owned any major equipment used in the provision of the labor or service or who held the licenses necessary to provide the service. In this case, the provision of services did not involve equipment provided by either party. In addition, no licenses were required. However, it is of some significance that the plaintiff had no capacity to bill the clients with whom she worked since she did not have a vendor number in relation to either ICBC or the WCB. The ownership of a license is significant because it assists in determining the capacity of the parties to function independently of each other. If the individual or firm that provides the labor does not have a license to provide that labor but relies on the license of another party, this argues against the labor provider being an independent operator. Similarly, the fact that the plaintiff did not have a vendor number and could not therefore bill directly for her services denotes dependence on the other party, Sierra, more consistent with a labor contractor than an independent operator.

In this regard, I note that Glenn Kerr, in his statement of January 9, 2003, described the clients he referred to the plaintiff as his clients. He also said that he did not remember if the plaintiff had occasionally "got her own clients" but even if she did she would still have to go through him because she did not have a vendor number.

Terms of Work Contract

This factor involves consideration of whether the terms of the agreement between the parties are more consistent with an employment contract or an agreement between two independent contractors. Although there was no written contract in this case, the parties had an agreement with regard to the amount of remuneration, the frequency of invoicing, and the frequency and contents of reports provided by the plaintiff to Sierra. In addition, the plaintiff and Glenn Kerr had reviewed his policy and procedures manual

before he referred any clients to her. The plaintiff could choose not to accept a referral but once she accepted it, the terms of the agreement with Sierra applied to the services she provided.

The plaintiff was paid on an hourly basis and she did not/could not bill clients directly. In this regard, I also note the final submission from Sierra in which Glenn Kerr states that the plaintiff paid Sierra a small fee for the provision of financial services, and the amount of this fee had been agreed upon before they entered their arrangement. As counsel for the defendant has noted, this "fee" was not previously mentioned by either party in their direct statements describing the arrangement. And, since the payment of such a fee would perhaps favor characterizing the relationship as one of independent parties this statement is in the interest of Glenn Kerr, since the plaintiff would be viewed as his worker if she is characterized as a labor contractor. In view of these factors, I have not placed undue weigh on this statement.

On the other hand, the fact that Sierra did not deduct taxes or make other deductions such as those required for EI or CPP is consistent with the view that Glenn Kerr did not intend to assume responsibility for the plaintiff as an employee. However, the nature of an agreement under the Act is not largely determined by the stated intent of the parties or, for that matter, how they might characterize themselves in a written agreement.

In Decision #32 (*Re The Employment Relationship*, 1 WCR 127) the former commissioners considered the status of a group of taxi drivers and concluded that the drivers were employees of the taxi company. The company had a contract with each driver which described the driver as an "independent contractor". After considering all aspects of the arrangement between the taxi drivers and the company the commissioners concluded that the taxi drivers were employees of the company. In arriving at this conclusion, the commissioners made the following statements at page 128 which are relevant to the situation in this case:

> One point that has been stressed is that the drivers want to be treated as self-employed businessmen. We accept that this is a genuine desire of the drivers and that they are not being unduly influenced by the company. But to recognize the wishes of the drivers as being legally relevant would be inconsistent with the principle of compulsory coverage, and inconsistent with the terms of section 13.

Section 13 of the Act, as it was then, prohibited workers from waiving or foregoing benefits to which the worker was entitled under the Act. Section 13(1) of the current legislation contains the same provision.

In the plaintiff's case, the fact of an hourly rate of pay, the inability to bill payers directly, the need to provide reports regarding the manner in which her time was spent, and the review of a policy and procedures manual before entering the agreement are all consistent with an employment relationship. They denote a substantial degree of dependence on the part of the plaintiff despite whatever intentions or perceptions the parties may have had with regard to the classification of their relationship.

Independent Initiative, Profit Sharing, and Piecework

Where there are opportunities for independent initiative or profit sharing this is indicative, but not determinative, of an independent operator.

Counsel for the plaintiff submits that the plaintiff ran her own independent business. Accordingly, there was no basis for sharing in business profits. She also submits that the initiative regarding the volume of work and level of income was entirely the plaintiff's. The factors of initiative and profit sharing, however, relate more to the opportunities for the party or parties to find their own clients, and to assume risk in order to acquire greater profits. In this situation, it was solely Sierra that obtained the clients and to the extent that there was any risk involved, it was assumed by Sierra.

Employment of Others

The employment of others is also a factor which would weigh more in favor of an independent operator or firm. The plaintiff, however, did not have employees.

Continuity of Work

The policy describes this as a test concerning "whether one party is engaged continuously and indefinitely for the same party or intermittently for different parties".

Counsel for the plaintiff states that this was a part-time enterprise and the plaintiff had worked with a variety of injured people over the years. On this point, there is no dispute that the plaintiff worked part-time but all of her referrals came from Sierra during the period in question. There is no evidence that she accepted referrals from other rehabilitation assistants and she could not take direct referrals from the WCB and ICBC. Although her work activities involved assisting different injured people, these people were not her "clients" in the sense that they paid her for her services. She was paid by Sierra to provide rehabilitation assistance to them.

Although the plaintiff had the ability to refuse a referral, once a referral was accepted, she delivered her rehabilitation assistance to the injured person in return for the

compensation she received from Sierra. The contract for services was between the plaintiff and Sienna.

Separate Business Enterprise

This test is described as a test of "whether one party has an existence as an independent businessperson separate from the relationship with the other party". The policy states that the test largely encompasses the factors described above.

The circumstances of the plaintiff in this case differ substantially from those of the cleaner in Decision #92-1672 (supra). Of particular significance is the fact that the cleaner had all licenses, insurance etc. necessary to conduct his business. He obtained his own clients and he negotiated the contract prices. None of these circumstances are present in this case.

The agreement between Sierra and the plaintiff, when viewed in light of the factors described above, is more consistent with an employment relationship than a relationship between two independent operators. In this regard, I consider it quite significant that the plaintiff did not have a vendor number with the WCB or ICBC and there is no evidence that she had developed the capacity to acquire other clients outside of those referred to her Sienna. The fact that she could refuse clients is not a sufficient indicator of an independent operator when that person has no capacity to obtain clients by other means. Many part-time employees are permitted to turn down shifts that do not suit their circumstances; this does not alter the status of the person from an employee to an independent contractor.

Although the absence of a vendor license is a primary consideration, most of the other factors also point to a relationship that is more consistent with that of an employer/employee than a relationship between independent operators. Accordingly, I find that she was a worker at the time the accident occurred.

2. *The next issue is whether the plaintiff's alleged injuries arose out of and in the course of her employment.*

Counsel for the plaintiff made no submissions on the issue of whether the plaintiff's accident arose out of and in the course of employment. Counsel for the defendant acknowledges that accidents occurring in the course of travel from a worker's home to their place of employment are not compensable. He submits, however, that the plaintiff comes within the exceptions to this general rule.

He states that her employment required her to work at various sites and at various times and to travel to those locations. Accordingly, he submits that the plaintiff would be covered under the Act from the time she left her home according to the policy on irregular starting points. (Item #18.32 of the Manual.)

In addition, he submits that travelling was a substantial part of the service for which the plaintiff was employed. Accordingly, her travel would be considered part of her employment. Furthermore, she was paid on an hourly basis for the time she spent travelling. In view of these two factors, the same principles should apply as is applied to travelling salesmen.

The policies with respect to travelling employees are set out in items #18.00 to #18.42 of the Manual. The general rule is set out in item #18.00 as follows:

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

The policies address various circumstances in which injuries that occur in the course of travel are compensable. The policy at item #18.32, *Irregular Starting Points,* provides:

#18.32 Irregular Starting Points

> There are a number of different situations that have to be considered under this heading. One is where the worker is injured in the course of a journey between home and a normal or regular operating base. 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.
>
> . . .
>
> 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. This could apply, for example, to bus drivers. In cases where such a driver must first report to the depot to receive an assignment, travel from home to the depot would not be covered under compensation. The question as to whether the driver's

> travel from the depot to the point where the run will begin should be covered as being in the course of employment is distinct from that of union members who go from a hiring hall to different work locations and, perhaps, to different employers each day. There is only one employer in this case and the worker is sent from the employer's premises. In such a situation, once the worker has been dispatched from the depot to journey to the point where the run will begin, as long as the worker is proceeding toward that place with reasonable expedition and without substantial deviation, the worker.
>
> Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than the regular place of employment, the worker is covered for compensation while travelling to and from that temporary place, and this is so whether the worker goes there from the regular place of employment or goes there directly from home. The same rule applies, for example, to a delivery person who goes direct from home to make deliveries.

Item #18.22, *Payment of Travel time and/or Expenses by Employer,* provides, in part:

> 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.

There is also a decision of the former commissioners which deals with wages for travelling. Decision No. 190 [Re The Coverage of Workers' Compensation, 2 W.C.R. 299], which has not been retired, involved a miner who was fatally injured in a motor vehicle accident on his way to work. All employees of the mine were paid a "travel allowance" of $1.50 per day. This amount was paid regardless of whether an employee used his own transportation or the bus that was subsidized by the company.

A majority of the Board of Review had found that the payment of the travel allowance was sufficient to bring the journey to work within the scope of employment. The commissioners, however, found that the test was "whether or not the journey itself is a substantial part of the service for which the worker is employed". They went on to discuss the effect of the travel allowance and whether it served to bring the travel within the course of employment. On this point, the commissioners said:

> Clearly, if the payment was an hourly wage for travelling time one could easily infer the establishment of an employment relationship. However, in

> this case there is no suggestion that the workers were being compensated for time spent on the road per se. Neither was the $1.50 intended to cover the worker's actual expenses of travel…It is fairly clear that the intent of the payment was to encourage regular and continuous employment rather than to compensate for time spent in travel.

Item #18.40 of the Manual, *Travelling Employees*, provides:

> Employees whose job involves 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 even though their vehicle has been provided by their employer and/or they need that vehicle to do the travelling required by their work.

The issue of injuries occurring while a worker is travelling has been considered in a number of published Appeal Division decisions. In several published decisions Appeal Division panels applied the policy on irregular starting points without taking into account whether the worker had a usual place of employment.

In Decision #97-0191[*Travel to regular starting points*, 15 W.C.R. 145] the Appeal Division panel questioned this approach. In a subsequent Appeal Division decision, Decision #98-0869 [*Irregular Starting Points (No. 3)*, 15 W.C.R. 205], another panel considered the same policy. That decision also involved a section 11 certificate. The plaintiff was employed as a painter and he was involved in an accident while on his way to his assigned work site for the day.

The panel concluded that the policy on irregular starting points was not intended to extend coverage to an employee while traveling to their employment solely on the basis that the worker's employment involved travel to different starting points. The panel was of the view that, "the existence of a 'regular or usual place of employment' is a condition precedent to the application of the policy at #18.32…in respect of providing coverage for travel to a different work location". In the absence of any other factors that would serve to bring the journey to work within the course of employment, the panel concluded that the painter's accident in that case had not occurred in the course of his employment.

I agree with the interpretation of the policy on irregular starting points as expressed in these two decisions, #97-0195 and #98-0869. A worker is not covered under the Act while travelling to work solely by virtue of having employment which requires him or her

to start work at various locations. The fact that a worker's employment involves irregular starting points and that he or she has no usual starting place may, however, be indicative that the worker is a travelling employee, as contemplated by the policy in item #18.40 of the Manual.

Under item #18.40, an employee whose job involves travel is covered for the journey from home to the first work site or client of the day because this travel is considered part of his employment. If this person travels to the employer's premises first, the journey from home to the employer's premises is not covered, in keeping with the general rule that travel to the place of employment is not covered.

In this case, the plaintiff had no usual place of employment or work site. Accordingly, the policies regarding irregular starting points would not apply to her travel to see a client.

The more significant consideration is whether the plaintiff is a travelling employee, such that a trip to meet with a client would be covered under the Act. The policy in item #18.00 states that, "where a worker is employed to travel, accidents occurring in the course of travel are covered". Item #18.40, states that "Employees whose job involves travelling on a particular occasion or generally are covered while travelling". I have also found Decision 190 useful in that the former commissioners formulated the test as "whether or not the journey itself is a substantial part of the service for which the worker is employed".

In that decision, the commissioners drew on the following example from Larson's Compensation Law to illustrate this point:

> Suppose that an employee who lives a considerable distance from the mine where he is employed, has as part of his job, the duty of returning to the mine at night and throwing the switch to turn on the pumps so that the mine will be ready for operations in the morning. His actual work consists of a single motion which takes but a fraction of a second, the closing of the switch, but anyone appraising that job as a whole would immediately agree that the essence of the service performed was the making of the journey to the mine and back at the precise time when the pumps had to be turned on. It follows that the entire journey to and from the mine is in the course of employment.

It is clear in this example that the travel was a substantial part of the service and yet the miner would not be considered a traveling employee in the usual sense of that term.

The plaintiff in this case does not have a usual place of employment but she is also not engaged in travel in the same way that the more traditional travelling employee (travelling salesperson) would be. Had she worked as a rehabilitation assistant full-time then her situation would be very similar to that of a travelling salesperson or anyone who travels from client to client in order to provide a service for their employer. In that situation, the necessity of travel combined with the payment of an hourly rate to travel makes a clearer case for coverage of the travel as part of the employment.

The plaintiff, however, worked part-time only. She was paid $300 to $400 per month at a rate of $20 per hour for rehabilitation assistance and $10 per hour for travel. Given these numbers and the existence of a full-time job it seems unlikely that she would have seen more than two clients consecutively and, more likely, she saw only one on any given day.

On the other hand, the capacity to provide rehabilitation assistance to clients in various locations was integral to the service provided by Sierra. As a result, travel was a significant aspect of the overall service provided by Sierra and, consequently, the service provided by the plaintiff for Sierra's clients.

The payment of an hourly rate specifically for travel time is also a factor to take into account in determining whether the plaintiff was employed to travel. The policy at item #18.32 cautions against over-emphasizing the significance of "wages or travelling allowances" in determining whether the journey to work was within the course of employment but recognizes that they may be a factor to take into account. In this case, the combined hourly rate paid to travel and the travel allowance were substantial enough that they would not be characterized as anything other than payment for travel and the costs of travel. At a minimum, the rate of pay for travel and the additional travel allowance provide additional evidence of the significance of the travel in relation to the overall service provided.

In view of the nature of the service provided and the rate of pay for travel, I consider that travel was a substantial aspect of the plaintiff's employment and, as a result, that she was a travelling employee. Accordingly, I find that her journey from home to the client in White Rock occurred in the course of her employment. Since she sustained injuries as a result of an accident which occurred in the course of her employment, the rebuttable presumption under section 5(4) of the Act, that the injuries also arose out of the employment, is brought into play. In the absence of evidence that would rebut the presumption, the plaintiff's injuries arose out of and in the course of her employment.

Given the above, I find that injuries sustained by the plaintiff as a result of the accident on August 2, 2000 arose out of and in the course of her employment.

In summary, I find that, at the time of the accident on August 2, 2000, the plaintiff was a worker under Part 1 of the Act and any injuries sustained in that accident arose out of and in the course of her employment.

Status of the Defendants

Status of Harjit & Sons Enterprises Ltd.

A December 6, 2002 memorandum from the policy manager, Assessment Department indicates that the defendant was registered with the Board at the time of the accident. In an affidavit sworn on April 28, 2003 Harjit Hans stated that he is a co-owner of Harjit and on the date of the accident, August 2, 2000, Gursharan Singh Dhaliwal, his employee, was driving the dump truck that was involved in the accident. Accordingly, at the time of the accident Harjit was an employer engaged in an industry within the meaning of Part 1 of the Act.

Status of Gursharan Singh Dhaliwal

No submissions have been received with respect to this defendant nor was any direct evidence provided with respect to his status. There is an affidavit of service for documents served on the defendant, including the Writ of Summons and Statement of Claim with respect to this action. However, correspondence from the Appeal Division to the defendant, which was delivered to the address for service, was returned to the Appeal Division as 'unclaimed'.

The only evidence with respect to the status of Mr. Dhaliwal is the affidavit provided by Harjit Hans. Harjit Hans states that Mr. Dhaliwal was an employee of Harjit and was operating the dump truck that was involved in the accident on August 2, 2000. He also states that, at the time the accident occurred, "Gurshuran Singh Dhaliwal was in the course of his employment with Harjit & Sons Enterprises Ltd."

The question of whether the alleged breach of duties which gave rise to the legal action arose out of and in the course of Mr. Dhaliwal's employment is a determination which requires the application of the law and policies to the facts in a particular case. The statement by Harjit was that Mr. Chaliwal was "in the course of his employment" is not evidence it is a submission. There is insufficient evidence in this affidavit from which to make a determination as to the whether Mr. Dhaliwal's alleged breach of duty arose out of and in the course of his employment.

The parties have indicated that there is no dispute between them as to the status of Gurshuran Singh Dhaliwal but that also is not sufficient to provide a basis for a

certificate. If the parties require a certificate with respect to the status of the defendant Gurshuran Singh Dhaliwal, a request for that certificate may be submitted to the WCAT with the supporting evidence and argument.

Conclusion

I find that, at the time of the August 2, 2000 accident:

1) the plaintiff, Donna Gallagher, was a worker within the meaning of Part 1 of the Workers Compensation Act;
2) the injuries suffered by the plaintiff arose out of and in the course of her employment within the scope of Part 1 of the Act;
3) the defendant, Harjit & Sons Enterprises Ltd., was an employer in an industry within the meaning of Part 1 of the Act;

I make no finding with respect to the status of the defendant Gurshuran Singh Dhaliwal for the reasons provided.

Marguerite Mousseau
Vice Chair

MM/gw

NO. M0110123
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492

BETWEEN:

DONNA GALLAGHER

PLAINTIFF

AND:

HARJIT & SONS ENTERPRISES LTD. and
GURSHARAN SINGH DHALIWAL

DEFENDANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

C E R T I F I C A T E

UPON APPLICATION of the Defendant, HARJIT & SONS ENTERPRISES LTD. and Third Party, 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 and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons 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 WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT AT THE TIME THE CAUSE OF THE ACTION AROSE, August 2, 2000:

1. The plaintiff, DONNA GALLAGHER, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the plaintiff, DONNA GALLAGHER arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The defendant, HARJIT & SONS ENTERPRISES LTD., was an employer in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of June, 2003.

_____

Marguerite Mousseau
VICE CHAIR

NO. M011023
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492

BETWEEN:

DONNA GALLAGHER

PLAINTIFF

AND:

HARJIT & SONS ENTERPRISES LTD. and
GHURSHARAN SINGH DHALIWAL

DEFENDANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

THIRD PARTY

SECTION 11 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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031145-A

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WCAT Decision Number: **WCAT-2003-00896a-ad**
WCAT Decision Date: August 1, 2003

Panel: Marguerite Mousseau, Vice Chair

WCAT Number: **031145-A**

Donna GALLAGHER v. HARJIT & SONS ENTERPRISES LTD. and Gusharan Singh DHALIWAL & INSURANCE CORPORATION OF BRITISH COLUMBIA

Section 11 Determination
In the Supreme Court of British Columbia, Vancouver Registry No. M011023

Applicant: HARJIT & SONS ENTERPRISES LTD. (the "defendant") and INSURANCE CORPORATION OF BRITISH COLUMBIA (the "third party")

Respondent: Donna Gallagher (the "plaintiff")

Representatives:

For Applicant: Alexander Holburn Beaudin & Lang

For Respondent: Skorah Doyle Khanna

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WCAT Decision Number: **WCAT-2003-00896a-ad**
WCAT Decision Date: **August 1, 2003**
Panel: Marguerite Mousseau, Vice Chair

Section 11 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. M011023
Donna GALLAGHER v. HARJIT & SONS ENTERPRISES LTD., Gursharan Singh DHALIWAL & THE INSURANCE CORPORATION OF BRITISH COLUMBIA

Amended Decision

In WCAT Decision #2003-00896-ad issued on June 11, 2003, I made findings with respect to a request for a section 11 certificate. After reviewing the original decision, and based on the common law principles regarding clarification/correction/amendment of decisions, I am amending the last line of the first paragraph on page 11 and the first line on page 12 to replace the term "labor contractor" with the term "worker" as follows (changes in bold):

Page 11

Similarly, the fact that the plaintiff did not have a vendor number and could not therefore bill directly for her services denotes dependence on the other party, Sierra, more consistent with a **worker** than an independent contractor.

Page 11 – 12

And, since the payment of such a fee would perhaps favor characterizing the relationship as one of independent parties this statement is in the interest of Glenn Kerr, since the plaintiff would be viewed as his worker if she is characterized as a **worker**.

Marguerite Mousseau
Vice Chair

MM:gw