WCAT Workers' Compensation Appeal Tribunal

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WCAT Decision Number: **WCAT-2010-00650**
WCAT Decision Date: **March 3, 2010**
Panel: Herb Morton, Vice Chair

Section 257 Determination
In the Supreme Court of British Columbia
Nanaimo Registry No. 50533
Mike Milkovich v. Nick Bucan

Introduction

[1] On February 27, 2006, the plaintiff, Mike Milkovich, was injured in a single vehicle accident. At the time of the accident, the defendant, Nikola Bucan, was driving and the plaintiff was the passenger. The parties were travelling from Prince George to Fort St. John to perform construction labouring work for Western Industrial Contractors Ltd. (WIC). The parties attended the WIC office in Prince George before commencing their journey to Fort St. John. The plaintiff had not previously worked for WIC. While working in Fort St. John, the parties were to stay in an apartment provided by WIC, and were to receive a living allowance of $50.00 a day (in addition to their wages).

[2] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury or death. This application was initiated by counsel for the plaintiff on August 28, 2007. Transcripts have been provided of the examinations for discovery of both parties on July 27, 2009.

[3] WIC was invited to participate in this application as an interested person. WIC completed a notice of participation, but did not provide a submission.

Preliminary – Hearing Method

[4] By letter of August 28, 2007, plaintiff's counsel requested an oral hearing. He noted there was some urgency to this request as the plaintiff was brain-injured and his mental state was deteriorating with the passage of time. In a preliminary review on August 28, 2008, I noted that it was not apparent that this application involved any serious issue of credibility. Accordingly, the application proceeded on the basis of written submissions from the parties. I noted that counsel could, as part of their written submissions, include a request for further consideration of the hearing method.

[5] In his rebuttal of February 16, 2010, plaintiff's counsel submits that credibility remains a concern. He flags factual questions involving disputed evidence, and notes:

> If the tribunal is of the view that sufficient facts can be found without an oral hearing, then the Plaintiff submits that he was not a worker in the course of his employment at the time of the accident. If sufficient facts cannot be found without an oral hearing, then the Plaintiff repeats his request for an oral hearing.
>
> [all quotations are reproduced as written, except as marked]

[6] The plaintiff provided evidence at an examination for discovery on July 27, 2009. In that discovery, he was presented with a copy of his application for workers' compensation benefits. While acknowledging that the signature on the document looked like his signature, the plaintiff denied that he had signed any such document. He advised that while he had gone to the Worker's Compensation Board, operating as WorkSafeBC (Board), he never signed anything (Q 30 to 37). He also denied having signed a WIC "Employee Information Sheet," which was dated February 27, 2006 and contained his personal information. He denied knowledge of his social insurance (SIN) number, but on being asked to compare the number on the "Employee Information Sheet" with the number on the SIN card in his pocket, acknowledged the numbers were the same (Q 40 to 43). He confirmed the other personal information on the form was correct (Q 44 to 49). He further denied having signed a Form 6(A) "Worker's Report of Injury" to WIC (Q 193 to 195). By letter of August 19, 2009, plaintiff's counsel wrote to counsel for the defendant stating:

> After the examination for discovery of Mike by you, Mike and his wife Mary and I went for coffee to debrief the discovery. When Mary was able to put the circumstances of the documents being signed to Mike, he remembered signing them. He required to be reminded of the occasion and persons present.

[7] By letter of March 1, 2010, counsel for the defendant submits that this evidence shows that the plaintiff's evidence cannot be relied upon.

[8] Given this background, I have some question regarding the reliability of the plaintiff's memory regarding the circumstances surrounding the occurrence of the motor vehicle accident. In any event, and for reasons which are explained further below, I do not consider that my decision in this case involves any significant issue of credibility. The key evidence is not in dispute. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

[9] Determinations are requested concerning the status of the parties to the legal action.

Jurisdiction

[10] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the Plaintiff, Mike Milkovich

(a) Background and evidence

[11] Following the February 27, 2006 accident, the plaintiff signed an application for workers' compensation benefits dated March 20, 2006. This was stamped as received in the Prince George area office of the Board on March 21, 2006. A typewritten document was attached to the plaintiff's application as "Appendix A," which stated:

> On February 27th, 2006 myself and Nick Bucan (co-worker) were traveling to Fort St. John for employment purposes with Western Industrial Contracting. I was suppose to start work on the evening of the 27th at 10:00 pm at the Overwaitea in Fort St. John. We left Prince George at approximately 10:30 am, I was the passenger and Nick Bucan was the driver. At approximately 1:30 pm we were involved in a single vehicle rollover accident in the Pine Pass approximately 70 km's south of Chetwynd. The road conditions were poor and Nick Bucan lost control of the vehicle resulting in the vehicle sliding across the road and flipping into the ditch…. I am uncertain whether WCB or ICBC [Insurance Corporation of British Columbia] will deal with my claim as I was traveling to work when I sustained my injuries and had never worked for this company before.

[12] In his application, the plaintiff indicated he was to be paid $27.00 per hour, and a daily allowance of $50.00.

[13] An employer's report of injury was submitted to the Board by WIC dated March 14, 2006. This stated:

> Worker was travelling from PG [Prince George] to Fort St John to report to work starting that night.
>
> [block capitalization removed]

[14] The employer advised:

> Worker was paid 40 regular hrs for week of Feb 27-March 3, 2006.
> [block capitalization removed]

[15] The employer confirmed the plaintiff was to be paid $27.00 per hour.

[16] The plaintiff's claim was accepted by the Board, and wage loss and pension benefits were awarded. By memorandum dated April 27, 2006, a case manager of the Board reasoned:

> Requirements of Section 5(1) of the Workers Compensation Act are met - I am satisfied that worker's injury, resulting from single vehicle rollover, is arising out of and in the course of his employment. He was traveling (passenger in co-worker vehicle) from Prince George to Fort St. John to commence work on a project at Save On Foods - employer had rented an apartment to accommodate workers. The worker's travel to this location is within scope of his employment - as would be his travel home at the end of the job.

[17] In a claim log entry of May 15, 2006, a case manager of the Board noted:

> I spoke to Mike again, and asked about what he understood was to happen with respect to travel time or pay to get to Ft. St. John. He said WIC never said anything about it, just that he and Nick should go up and start work at 10 o'clock that night, despite all the snow and bad weather. Mike didn't ask about what if anything they would be paid for the trip up. As far a Mike knows Nick didn't ask either. They just got in Nick's car and went. Mike has known Nick since 1974 and has worked with him before on a number of jobs including at the airport for Wayne Watson construction. **Mike said they expected to be working 10-12 hours every day at $27/hr plus $50/day for food and their room was supplied.**
>
> [emphasis added]

[18] In a further claim log entry of May 15, 2006, a case manager of the Board noted:

> I called and spoke to Rod Cryderman in Ft. St. John.
> He said he dealt with Mike and Nick in P.G. on Feb 27.
> The way he recalls the events leading up to Feb 27 is that he had a job for Nick up in Ft. St. John and Nick had talked about going up and had put it off several times. Then on Feb 27 Nick was finally ready to go and Mike became available so he said they should go up together.

> **The weather was bad but he told them to drive up and he would pay them for the time on the road, expecting that if they took it easy it would be about 5 hrs**.
> He said after the accident Nick was able to start work on the Tuesday and continue.
> He thinks Mike worked about half the night on Tuesday before he went back to the apt because he was sick. **Rod was going to pay Mike for a couple of days while he recovered rather than have him return to P.G., as they were really short of crew on the job**.
> Mike just got on the bus and came back to P.G. without letting anyone on the job know that he was leaving.
> **I asked about the cheque for 40 hours plus 1.4 hrs overtime.**
> **He said he doesn't recall the details and would have to look at the payroll.** He thinks the pay was for the time on the road to get there, the hours he managed to work and a few more days pay waiting for him to get back to work. It then became obvious that he had sustained an injury in the MVA [motor vehicle accident] that prevented him from returning.
>
> [emphasis added]

[19] In another claim log entry on May 16, 2006, the case manager noted:

> Mary called to ask what the a/e [accident employer] said with respect to Mike being paid for travel time.
> I related briefly my conversation with Rod Cryderman.
> **Mary said she had talked to Mike again and he denies he had any conversation about being paid for travelling to Ft. St. John.**
> They think that Nick didn't go up earlier as he has only a learner's drivers licence. When Mike said he would go up then Nick felt it was OK to be on the road. **Whatever agreement Rod had made with Nick in the past, about pay to drive up, is not known to Mike.**
> Mary again pointed out that the pay cheque Mike received says nothing about travel time and bears no resemblance to hours Mike worked or travelled. She says Mike was told not to make a claim and Rod would pay him until he was ready for work. Mary said Mike was supposed to be working at least 10 hrs/day and that is one of the reasons he agreed to go up and work there, instead of waiting for Coopers to call him back. He wasn't paid the 10 hrs he was promised, which affects his wage rate and his rate will be going down again based on his prior year earnings.
> She simply wants what is fair, and doesn't think for an instant that Mike was working or would have been paid for the drive up.
> Mary believes that Mike's injury is an ICBC matter and not WCB.
>
> [emphasis added]

[20] The plaintiff requested a review by the Review Division of the decision to accept his claim. In *Review Division #R00*68684 dated December 1, 2006, a review officer confirmed the April 27, 2006 decision by a Board officer to accept the plaintiff's claim for compensation. The review officer pointed out that his decision would only affect whether the plaintiff continued to receive benefits under his claim. If the plaintiff wished to obtain a determination of his status for the purposes of pursuing a legal action, he would have to request a determination by WCAT under section 257 of the Act.

[21] WCAT's *Manual of Rules of Practice and Procedure* (MRPP) explains at item #18.1 that in a section 257 application, WCAT will consider all of the evidence and argument afresh regardless of a prior decision by a Board officer or a review officer.

[22] As the parties were travelling together at the time of the accident, the evidence of both parties is relevant. Accordingly, I have considered the evidence provided by both parties in their examinations for discovery, in addressing the status of the plaintiff.

[23] An unsigned copy has been provided of a statement taken by the Insurance Corporation of British Columbia from Nikola Bucan on July 9, 2007. He stated:

> At the time of this accident, I worked for Western Industrial, WIC. My boss was Rod Cryderman. I was the only owner and driver of a 1992 Ford 4WHDR [four wheel drive] pickup…. In February 2006, I had a job in Fort St John with WIC. I was heading up for the first day. I had a passenger with me, Mike Milkovitch. He also worked for WIC, and was getting a ride with me. We were both laborers, in construction. We got paid travelling time to head up to Fort St John. I can't remember the exact amount, but I think it was my hourly wage, which was somewhere around $27.00 and hour. Mike got paid the same amount.
>
> [block capitalization removed]

[24] In his examination for discovery on July 27, 2009, Bucan stated he only had a learner's driving licence on the date of the accident (Q 6 to 9). The accident occurred at approximately 3:00 p.m. or 3:30 p.m. on February 27, 2006 (Q 19 to 21, 48), approximately 65 to 70 kilometres before Chetwynd (Q 22) on Highway 97 north of Prince George (Q 39). The vehicle had a big toolbox full of tools behind the cab (Q 36 to 37). They left Prince George around 11:30 a.m., to drive to Fort St. John (Q 49 to 50). They expected the trip to take about 5 or 5.5 hours in bad weather (Q 51). They were going to do construction renovation work inside the Overwaitea in Fort St. John (Q 52). The plaintiff and defendant had been friends for many years (Q 53 to 57).

[25] They were supposed to report for work at 8:00 p.m. that night, and work the night shift (Q 58 to 61). They would be staying in an apartment the employer had rented for them (Q 62). The apartment was located a few minutes walk away from the Overwaitea (Q 63). They intended to go to the job site first before going to the apartment. They did not know where the apartment was located, and they were to be given directions to the

apartment after reaching the job site at Overwaitea (Q 72 to 75). They would then go to the apartment and settle in, prior to going to work commencing at 8:00 p.m. (Q 76 to 78).

[26] They were paid for their travel time in driving from WIC's office in Prince George to Fort St. John, but had to arrange their own meals during the drive (Q 81 to 87). Bucan and Milkovich lived close by to each other. Bucan picked up Milkovich and they drove to the WIC office in Prince George to meet Rod Cryderman. Bucan noted (Q 91):

> He tell us to come. He give us direction and explain what we're going to do when we come to the job.
>
> [reproduced as written]

[27] Bucan had worked for WIC on a part-time basis in the past when WIC had work and he was otherwise unemployed (Q 93 to 96). With respect to the payment of travel time to Milkovich, Bucan advised that as far as he knew they were to receive the same rate of pay with the same terms and conditions. He further advised (Q 109 to 112):

Q You were to be paid travel time?
A Yes.
Q And Mike was supposed to be paid travel time?
A Yes.
Q And how do you know Mike was to be paid travel time?
A Should be.
Q Did anyone tell you that Mike was to be paid travel time?
A No.

[28] Bucan advised that they would receive a living-out allowance of $50 a day for food (Q 113 to 118). Bucan worked at the job in Fort St. John from February 27, 2006 until the end of July 2006. He was paid travel time for the return journey to Prince George (Q 125). He did not receive travel time for visits home to Prince George prior to the completion of the job (Q 127 to 128).

[29] Milkovich also gave evidence at an examination for discovery on July 27, 2009. He had previously performed labour construction work for Cooper Construction but had been laid off during the winter time (Q 11 to 13). He was not looking for work (Q 15 to 17). He was waiting to be called back to work by Cooper (Q 18 to 19). He learned about the work with WIC from Bucan. He and Bucan went to the WIC office, before embarking on their drive to Fort St. John (Q 27 to 28). They talked to Rod Cryderman at the WIC office (Q 62). Milkovich had packed clothes for the journey to Fort St. John (Q 65 to 68). He had put these clothes in the truck as they were planning to go out of town (Q 68).

[30] Regarding payment for the work in Fort St. John, Milkovich advised (Q 89):

> Q Okay. Did you know what you were going to get paid for this job?
> A Now I forget everything. Good money. That's what he said, "Good money."

[31] He thought they would be working in Fort St. John for a couple of months (Q 92). He understood that WIC had arranged for a hotel at WIC's expense (Q 96 to 101). Milkovich was not paying anything for the transportation to Fort St. John (Q 102). He did not know who was paying this cost, and did not know if he was being paid travel time (Q 104 to 105, 223 to 224). He knew they would be getting $50.00 a day for food, and that WIC would be paying for the cost of their room (Q 230 to 231). He subsequently received a cheque from WIC which he cashed (Q 109 to 110).

[32] The plaintiff agreed that the accident occurred on the direct route between the WIC office in Prince George and where they were going to work in Fort St. John (Q 120).

[33] The defendant has furnished a copy of an "Employee Information Sheet." This was marked as exhibit 1 in the July 27, 2009 examination for discovery of the plaintiff (Q 37). The plaintiff acknowledged that the signature on the form looked like his signature, but denied having signed anything with WIC (Q 30 to 37). This form included information regarding the plaintiff's social insurance number, birth date, phone number permanent address, next of kin, driver's licence number, and various questions relating to safety training. The personal identifying information written on the form regarding the plaintiff was accurate (in terms of being the same as the information contained in the plaintiff's and WIC's subsequent reports to the Board concerning the February 27, 2006 accident).

[34] I do not consider it necessary to set out details concerning the actions of the parties subsequent to the motor vehicle accident, as these activities were affected by the occurrence of the accident. I consider that the events leading up to the accident are of primary importance to my decision.

[35] The plaintiff has furnished copies of "Time Entry Reports" from WIC concerning payments made to the plaintiff and defendant. The report appears to show biweekly pay periods of March 4, 2006 and March 18, 2006. This appears to show that Bucan received payment for 51 hours in relation to his first week of work until March 4, 2006, consisting of 40 regular hours and 11 overtime hours. Two additional payments are shown in the amount of $280.37 and $19.63 (totalling $300.00), which are coded as "LOA" (appears to mean living out allowance). The report also appears to show that Milkovich received a payment of $1,327.64, on the basis of 40 regular hours of work, 1.40 hours of overtime, and additional LOA payments of $93.46 and $6.54 (total LOA of $100.00).

[36] No explanation has been offered by WIC regarding the meaning of these records, as to how the regular and overtime hours were calculated and whether this included payment for travel time in relation to the journey to Fort St. John. The evidence is unclear as to whether such payments were in fact made. Given that these records were prepared subsequent to the motor vehicle accident, and have not been explained, I consider that they have only limited evidentiary value in this application.

(b) Law and policy

[37] At the time of the accident on February 27, 2006, policy in chapter 3 of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II), included the following selected excerpts:

> **#14.00 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT**
>
> 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 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.
>
> No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:
>
> (a) whether the injury occurred on the premises of the employer;
>
> (b) whether it occurred in the process of doing something for the benefit of the employer;

(c) whether it occurred in the course of action taken in response to instructions from the employer;

(d) whether it occurred in the course of using equipment or materials supplied by the employer;

(e) whether it occurred in the course of receiving payment or other consideration from the employer;

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

(g) whether the injury occurred during a time period for which the employee was being paid;

(h) whether the injury was caused by some activity of the employer or of a fellow employee.

i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

j) whether the injury occurred while the worker was being supervised by the employer.

This list is by no means exhaustive. All of these factors can be considered in making a judgement, but no one of them can be used as an exclusive test.

#14.10 Presumption

Section 5(4) provides that “In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must 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 must be presumed that it arose out of the employment.”

Thus for injuries resulting from an accident, evidence is only needed in the first instance to show either that the injury arose out of the employment or that it arose in the course of employment. The balance is presumed, unless there is evidence to the contrary. Generally speaking, “out of the employment” concerns the cause of injury and “in the course of the employment” its time and place.

#17A.10 Commencement of Employment Relationship

The commencement of compensation coverage is not marked by common law principles relating to the commencement of a contract of service. **A decision must be made whether, having regard to the substance of the matter, an employment relationship had begun for compensation purposes.**

For example, where the place of employment is some distance from the available labour market, workers may arrive at the place of employment in a number of ways. If workers go there of their own initiative looking for whatever jobs they may find, they take the risk of travel upon themselves. But if an employer extends its network of hiring arrangements to distant places, and induces a worker to leave a distant city and journey to the employer's place of work upon the promise of travel time and expenses, the journey becomes part of the employment relationship, and the hazards of the journey become risks of the employment.

A person offering services to an employer will often be told to come back at a certain time in the future when work might be available. A person may also be promised a specific job but the commencement date may be specified some weeks or months ahead. Such persons would not normally commence to be workers under the *Act* until they actually returned to the employer's premises at the future date and commenced work.

It is not essential that a person must actually have commenced productive work for an employer before being covered. If, for example, an injury took place while entering the employer's premises on the way to the first day of work the worker may be covered. The employment relationship would have commenced at the moment of entry to the premises and would not have been delayed until completion of the necessary hiring formalities or actual commencement of work. Coverage might even commence earlier in the journey to work that morning if the situation falls within one of the other exceptional cases when travelling to work is regarded as part of the employment.

#18.00 TRAVELLING TO AND FROM WORK

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.

#18.20 Provision of Transportation by Employer

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. In some situations, the employer may let the worker choose her or his own mode of transportation, but pay for all or part of the costs of this transportation. The employer may also pay the worker a wage for the time spent in travelling. While these factors must be considered, the basic question to be determined is whether or not the worker is routinely commuting to or from work. The fact that coverage does not extend to include routine commuting could override the fact that the worker is being paid a travel allowance or a wage to cover the commuting. This is distinct from the crew bus situation described above which can be deemed to be an extension of the employer's premises.

#18.22 Payment of Travel Time and/or Expenses by Employer

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.

Where the place of employment is some distance from the available labour market, workers may arrive at the place of employment in a number of ways. If workers go there of their own initiative looking for whatever jobs may be found, they take the risk of travel upon themselves. But if an employer extends the network of hiring arrangements to distant places, and induces a worker to leave a distant city and journey to the employer's place of work upon the promise of travel time and expenses, the journey becomes part of the employment relationship, and the hazards of the journey become risks of the employment.

In the Lower Mainland area, stevedores are normally required to report to the hiring hall in Vancouver in the morning. They are then dispatched to the various employers in the area. When dispatched outside the City of Vancouver itself, for example North Vancouver, stevedores have the option of transportation in their own vehicle or to use a taxicab at the employer's expense. No similar allowance is made within the city limits of Vancouver. In view of this exceptional circumstance, stevedores are

covered under compensation from the point when they leave the city limits in which the hiring hall is located while travelling to a work place outside the city limits, whether they use a taxicab provided by the employer or use their own vehicle. No coverage applies when travelling to destinations within the city where the hiring hall is located.

#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.

Another situation is where there is an injury occurring in the course of a journey between what might be called two working points. That is, where the worker terminates productive activity at one point and then has to travel to commence productive activity at another point. If that occurs in the course of a working day, then the travel is one of the requirements of the job. It is one of the functions that the worker has to perform as part of the employment whether or not the worker is paid for it. 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 or she will begin work is normally covered as being in the course of employment. This situation is distinct from that of union members who go from a hiring hall to different work locations and, perhaps, to different employers each day. (See policy item #18.22, third paragraph, "Stevedores".)

#18.40 Travelling Employees

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.

#18.41 Personal Activities During Business Trips

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." (5)

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

(c) Findings and reasons – plaintiff's status

[38] The first issue to be addressed is whether the plaintiff was, at the time of the accident on February 27, 2006, a worker within the meaning of Part 1 of the Act. If so, the further question to be addressed is whether his injuries in the accident arose out of and in the course of his employment.

[39] The plaintiff notes that WIC was a Prince George based construction company that had a contract in Fort St. John. This was not the case of an out-of-town company luring prospective workers to leave town. This is supported by the fact that the parties went to the WIC office in Prince George immediately prior to commencing their journey to Fort St. John.

[40] As set out in policy at RSCM II item #17A.10, a decision must be made whether, having regard to the substance of the matter, an employment relationship had begun for compensation purposes. I find that the plaintiff had entered into a relationship of employment for WIC prior to commencing on his travel to Fort St. John (based on the facts that the plaintiff attended WIC's office prior to his departure for Fort St. John, and that he was then travelling to Fort St. John on the understanding that he would be working for a few months for "good money" and staying in accommodation provided by WIC). The decision to hire the plaintiff was made in Prince George, prior to the plaintiff's travel to Fort St. John. For the purposes of my decision on this issue, it is not necessary that any paperwork have been completed in the Prince George office. Section 1 of the Act defines the term "worker" as including:

> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

[41] Accordingly, the entering into of an implied oral contract of service is sufficient to support a finding that a relationship of employment had commenced. I find, therefore, that at the time of the accident the plaintiff was a worker within the meaning of Part 1 of the Act.

[42] While not necessary to my decision, I consider that the WIC Employee Information Sheet, which is dated February 27, 2006 and bears the plaintiff's signature, was genuine and provided written evidence of a contract of employment in any event. While the plaintiff denied having signed this document, I consider that his memory on this point may not have been reliable (bearing in mind that he also denied having signed an application for compensation until his memory was refreshed subsequent to his examination for discovery). In his examination for discovery, the plaintiff confirmed that the information contained in this form regarding his SIN number, birthdate, occupation, phone number, address, and name of his next of kin (his spouse), were correct (Q 33 to 47). I consider it reasonable to infer that WIC would have wished to have the employee information sheet completed for administrative and payroll purposes as well as for work safety, prior to the plaintiff's planned arrival at the job site that evening. As well, WIC, which is not a party to the legal action, would have no apparent motive for fabricating such evidence.

[43] A separate and additional issue then arises as to whether the plaintiff's injuries in the February 27, 2006 accident arose out of and in the course of his employment.

[44] The plaintiff denies any knowledge that he would be paid travel time in going to Fort St. John. The defendant's evidence is that he was to be paid travel time, and assumed that the plaintiff would similarly be entitled to travel time. The defendant acknowledged that no one told him that the plaintiff would be paid travel time.

[45] One possibility is that the plaintiff was going to be paid travel time, but this was not communicated to him prior to the journey to Fort St. John. Another possibility is that only Bucan was going to receive travel time, in recognition of the fact he was driving his own vehicle and was transporting the plaintiff as a passenger. A further possibility is that the plaintiff was advised by Rod Cryderman he would receive travel payment, but forgot this in the aftermath of the motor vehicle accident. For the purposes of my decision, I accept the plaintiff had no information or knowledge regarding the payment of travel time prior to the occurrence of the motor vehicle accident.

[46] This was not a situation in which the employer extended the network of hiring arrangements to distant places, and induced the plaintiff to leave a distant city and journey to the employer's place of work upon the promise of travel time and expenses.

Rather, this is a situation in which the employer and the worker were both located in Prince George. The plaintiff was hired in Prince George, and sent to Fort St. John to perform work which would last at least a few months. While staying in the out-of-town location, the plaintiff would be provided with accommodation and a living allowance. The plaintiff was required to make the journey to the out-of-town location (Fort St. John), in order to perform the work for which he had been hired. The planned journey to Fort St. John involved travel between the employer's office in Prince George, and the job site in Fort St. John where they would receive directions to the nearby apartment which had been rented by WIC.

[47] In these circumstances, I consider that the plaintiff's journey to Fort St. John was one which arose out of and in the course of his employment, whether or not he was promised or received any payment in relation to his travel. It was necessary to his employment that he make the journey from Prince George to Fort St. John. This journey did not involve commuting between the plaintiff's home and his normal place of employment. I find that the plaintiff was a travelling employee in respect of his journey to Fort St. John, whether or not the employer paid the expenses of the journey. I consider that this was a work-related journey, commencing from the time the parties left the employer's office in Prince George.

[48] There is, as well, an additional or alternative basis for reaching the same conclusion. I accept the evidence showing that WIC was going to pay Bucan some form of travel allowance for driving from Prince George to Fort St. John, whether this was based on an hourly rate or calculated on the distance driven in kilometers. Policy at RSCM II item #18.20 provides that an employer may directly or indirectly provide transportation for its employees' journeys to and from work. Given that WIC was making a payment to Bucan in relation to this travel, and that the plaintiff was then receiving free transportation to the job site in Fort St. John, I consider that this supports a conclusion that the employer was indirectly providing transportation to the plaintiff even if the plaintiff received no payment for his travel. In any event, policy at RSCM II item #18.22 provides that 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.

[49] The policy at RSCM II item #18.32, provides that travel from the employer's premises or assembly area to the point where he or she will begin work is normally covered as being in the course of employment. This policy would similarly support a conclusion that workers' compensation coverage would apply in relation to the plaintiff's travel from the WIC office to the job site in Fort St. John. At the time of the accident, the parties were on a direct route to Fort St. John, with no evidence of any deviation from this route.

[50] I find that the plaintiff was injured in an accident on February 27, 2006, and that this accident occurred in the course of his work-related journey. As his accident occurred in the course of his employment, a presumption arises pursuant to section 5(4) of the Act

that his accident also arose out of his employment. The evidence in this case does not rebut this presumption on a balance of probabilities.

[51] Upon consideration of the foregoing, I find that the injuries suffered by the plaintiff in his accident on February 27, 2006, arose out of and in the course of his employment within the scope of Part 1 of the Act.

Status of the Defendant, Nick Bucan

[52] Counsel for the defendant advises that the correct spelling of the defendant's first name is Nikola, rather than Nick. Plaintiff's counsel points out that the defendant gave his name as "Nick Bucan" when he was asked to provide his full name for the record at the time of his examination for discovery (Q 1). It does not appear that anything turns on this point. It may well be the case that the formal spelling of the plaintiff's name on official documents is "Nikola," but that he goes by the name of "Nick." I will use the spelling "Nikola" in the attached certificate.

[53] The evidence with respect to the defendant's circumstances at the time of the accident is set out in the first part of this decision. While not significant to my decision, I note that the defendant had only a learner's driving licence at the time of the accident.

[54] The evidence regarding the defendant is substantially the same as that concerning the plaintiff, except that the Bucan advised he was receiving payment for the travel from Prince George to Fort St. John. This is an additional factor supporting a conclusion that Bucan was working at the time of the accident.

[55] For substantially the same reasons as set out in the first part of this decision, I find that Bucan was, at the time of the accident on February 27, 2006, a worker within the meaning of Part 1 of the Act. I further find that any action or conduct of Bucan, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

Costs and Expenses

[56] Plaintiff's counsel notes that the plaintiff has incurred the following costs and expenses:

- Issue Writ $208.00
- Issue Part 7 Writ $208.00
- Serve Tort Writ $ 71.40
- Examination for Discovery Transcript and Attendance of Court Reporter $370.13

[57] The plaintiff claims these costs and expenses on the basis that a section 257 determination cannot be made under the Act unless and until a legal action has been commenced, thereby necessitating the commencement of an action and the service of the Writ. Additionally, MRPP item #18.4.1 provides that the parties must provide WCAT with copies of transcripts of examinations for discovery, if held.

[58] Sections 6 and 7 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation), B.C. Reg. 321/2002, provide:

> Costs
>
> **6** The appeal tribunal may award costs related to an appeal under Part 4 of the Act to a party only if the appeal tribunal determines that
>
> (a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault,
>
> (b) the conduct of another party has been vexatious, frivolous or abusive, or
>
> (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> Expenses
>
> **7** (1) Subject to subsection (2), the appeal tribunal may order the Board to reimburse a party to an appeal under Part 4 of the Act for any of the following kinds of expenses incurred by that party:
>
> (a) the expenses associated with attending an oral hearing or otherwise participating in a proceeding, if the party is required by the appeal tribunal to travel to the hearing or other proceeding;
>
> (b) the expenses associated with obtaining or producing evidence submitted to the appeal tribunal;
>
> (c) the expenses associated with attending an examination required under section 249 (8) of the Act.
>
> (2) The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

[59] While these sections refer to an appeal rather than a section 257 determination, section 257(3) of the Act provides that Part 4 of the Act applies to proceedings under section 257 as if the proceedings were an appeal under Part 4. Accordingly, sections 6 and 7 of the Appeal Regulation may be read as having potential application to a section 257 determination.

[60] A court decision dealing with the awarding of expenses between the parties to a legal action is *Dhanoa v. Trenholme*, [2009] B.C.J. No. 2619, 2009 BCSC 1787, December 29, 2009. In that case, a Master granted the defendant costs on only some items and not others, following the provision of a section 257 certificate which resulted in the plaintiff's cause of action being barred. The defendant appealed the British Columbia Supreme Court, which concluded:

> **25** I am satisfied that the defendant being the successful party is entitled to their costs for all the items requested, pursuant to R. 57(9), subject to taxation. There is nothing arising from the defendant's conduct in this litigation that provides a proper judicial basis to deny their costs.

[61] MRPP item #16.1.3 provides:

> WCAT will generally order reimbursement of expenses for attendance of witnesses or obtaining or producing written evidence, regardless of the result in the appeal, where:
>
> (a) the evidence was useful or helpful to the consideration of the appeal; or
>
> (b) it was reasonable for the party to have sought such evidence in connection with the appeal.
>
> As the workers' compensation system functions on an inquiry basis, reimbursement of expenses is not dependent upon the result in the appeal. WCAT will generally limit the amount of reimbursement of expenses to the rates or fee schedule established by the Board for this purpose.

[62] However, WCAT's general practice is to leave questions of costs and expenses to be addressed in the legal action. MRPP item #18.7.1 provides:

> Expenses and costs are normally matters to be determined in the legal action. Thus WCAT normally will not award expenses or costs in a section 257 application. (chapter 16)

[63] I read the term "normally" as meaning that WCAT has a discretion to consider awarding expenses in unusual circumstances. The "Supplement" to *WCAT-2006-02800 / WCAT-2006-02801* provides an example of a case in which reimbursement of certain expenses relating to the examination for discovery transcripts was awarded. That case involved consideration of an application for a section 257 certificate together with the hearing of an appeal by the putative employer of the plaintiff (in relation to a Review Division decision which found the plaintiff's injuries were compensable).

[64] The circumstances of this case were that the plaintiff's claim had been accepted by the Board (and a pension was awarded on the basis that the plaintiff is permanently totally unemployable as a result of the February 27, 2006 accident, as set out in a decision dated April 16, 2008). The decision by a Board officer to accept the plaintiff's claim for workers' compensation benefits was confirmed by the Review Division. Pursuant to section 10(6) of the Act, the Board was subrogated to any right of action against a third party. The Board did not pursue a legal action. The plaintiff decided to revoke his election to claim workers' compensation benefits for the purpose of pursuing a legal action. This was permitted by the Board without requiring the plaintiff to repay in advance the compensation which he had received on the claim. This resulted in a suspension of further compensation benefits being paid to the worker "until the outstanding issue has been determined by WCAT." By letter of March 11, 2009, the case manager advised the worker that the Board's Legal Services Division would advise him if and when benefits could be resumed pending the outcome of the WCAT decision.

[65] I am not persuaded that sufficient basis has been established for ordering the Board to pay the expenses incurred in bringing a legal action. The plaintiff's decision to attempt to pursue a legal action in lieu of claiming workers' compensation benefits was his own, on the advice of counsel.

[66] I acknowledge that the transcripts of the examinations for discovery of both parties were an important source of evidence on which I relied in this decision. However, this expense was incurred by the plaintiff in connection with his attempt to pursue a legal action. The evidence was obtained by the plaintiff for the purpose of attempting to establish that he was not entitled to workers' compensation benefits. This was not a case in which the plaintiff's application for compensation had initially been denied by the Board, or in which the employer was disputing the Board's determination that he was a worker who had suffered a compensable injury. In this context, I am not persuaded that grounds are establishing from departing from the general guideline provided at MRPP item #18.7.1.

Conclusion

[67] I find that at the time of the February 27, 2006 accident:

(a) the plaintiff, Mike Milkovich, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Mike Milkovich, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the defendant, Nikola Bucan, was a worker within the meaning of Part 1 of the Act; and,

(d) any action or conduct of the defendant, Nikola Bucan, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HB:gw

NO. 50533
NANAIMO REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

MIKE MILKOVICH

PLAINTIFF

AND:

NICK BUCAN

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, MIKE MILKOVICH, in this action for a determination pursuant to section 257 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 action arose, February 27, 2006:

1. The Plaintiff, MIKE MILKOVICH, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, MIKE MILKOVICH, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, NIKOLA BUCAN, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

4. Any action or conduct of the Defendant, NIKOLA BUCAN, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of March, 2010.

_____

Herb Morton
Vice Chair

NO. 50533
NANAIMO REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
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BETWEEN:

MIKE MILKOVICH

PLAINTIFF

AND:

NICK BUCAN

DEFENDANT

SECTION 257 CERTIFICATE

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