WCAT **Workers' Compensation Appeal Tribunal**

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**WCAT Decision Number**: **WCAT-2010-01449**
**WCAT Decision Date**: **May 27, 2010**

**Panel**: Herb Morton, Vice Chair

**WCAT Reference Number:** 090142-A

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Section 257 Determination
In the Supreme Court of British Columbia
Penticton Registry No. 30467
Robert Samuel Boyda v. Gary Raymond Noble, Stutters Construction Co. Ltd., Patrick Brian Byrne and DCT Chambers Trucking Ltd.

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**Applicant**: Robert Samuel Boyda
(the "plaintiff")

**Respondents**: Gary Raymond Noble and
Stutters Construction Co. Ltd.
("defendants")

Patrick Brian Byrne and
DCT Chambers Trucking Ltd.
("defendants")

**Interested Person:** Summit International Trade Services Inc.

**Representatives**:

For Applicant: Vahan A. Ishkanian
Barrister & Solicitor

For Respondents:

Gary Raymond Noble and Stutters Construction Co. Ltd.: Rodney C. Pacholzuk
FH & P LAWYERS

Patrick Brian Byrne and DCT Chambers Trucking Ltd.: Dana Graves
HEMMERLING & ASSOCIATES LAW OFFICE

For Interested Person: Valerie S. Dixon
CLARK WILSON LLP

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## Introduction

[1] On January 18, 2007, the plaintiff, Robert Samuel Boyda, was injured in a motor vehicle accident. The accident occurred on Highway 97 North near Winfield, B.C. The plaintiff was driving a 2007 International 4300 truck. The defendant, Gary Raymond Noble, was driving a 2007 Ford pickup truck. His vehicle went out of control in icy conditions. The plaintiff stopped to avoid hitting Noble, and the plaintiff's vehicle was struck from behind by a truck being operated by the defendant, Patrick Brian Byrne.

[2] Boyda had contracted to provide hauling services for Summit International Trade Services Inc. (Summit). Boyda's contract was made in the name of his company, 525227 B.C. Ltd., which was dissolved on April 7, 2000.

[3] Noble was driving a vehicle owned by Stutters Construction Co. Ltd. (Stutters), which was operated by SC Restorations Ltd. (SCR).

[4] Byrne was driving a truck owned by his employer, the defendant DCT Chambers Trucking Ltd. (DCT).

[5] 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 December 19, 2008. A transcript has been provided of the examination for discovery of the plaintiff on December 8, 2009.

[6] 525227 B.C. Ltd. and Bud's Trucking (a name used by the plaintiff) are not participating in this application, although invited to do so. A certificate has not been requested in the related legal action, *Robert Samuel Boyda v. Insurance Corporation of British Columbia*, Penticton Registry No. 30466.

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**Issue(s)**

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

**Jurisdiction**

[8] 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 Workers' Compensation Board, operating as WorkSafeBC (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.

**Preliminary matters**

[9] In his April 21, 2010 rebuttal, plaintiff's counsel reiterates his request for an oral hearing. He further requests that another vice chair be assigned to decide this application. He notes that I have "already ruled against Mr. Boyda on important procedural matters such as his refusal to grant an oral hearing." Mr. Ishkanian further notes that it is unlikely that I will grant his request for an oral hearing "or decline to apply [the] *Gathergood* decision even though it is irrelevant and wrongly decided." Although not expressly worded as such, I interpret this submission as alleging prejudgment or bias.

[10] I was the WCAT vice chair who issued *WCAT-2009-01845*, *Gathergood v. ICBC* [Insurance Corporation of British Columbia], which is cited by counsel for the defendants Byrne and DCT in this application. With reference to the earlier procedural determinations, this appears to relate to my October 8, 2009 memorandum which indicated, based on the decisions in *Hommel v. Cooke*, [2005] B.C.J. No. 1006, 2005 BCSC 658, and *Lin v. Tham*, 2007 BCSC 1862, [2007] B.C.J. No. 2736, that the legal action was not automatically stayed by the bringing of a section 257 application and that it was open to the parties to conduct examinations for discovery. (This approach was consistent with the later decision in *Dhanoa v. Trenholme*, [2009] B.C.J. No. 2619, 2009 BCSC 1787, December 29, 2009.)

*(a) Apprehension of bias*

[11] Decisions of the British Columbia courts provide guidance regarding allegations of bias. The key principles relating to the determination of whether there is a reasonable apprehension of bias were set out by the B.C. Court of Appeal (BCCA) in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, (2005), 49 B.C.L.R. (4th) 134, 2005 BCCA 350, at paragraph 7:

> The leading case on recusal is *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. Counsel for the respondent correctly identified the principles governing the reasonable apprehension of bias concept as discussed in *Wewaykum* and I quote from his factum:
>
> 7. These principles are:
>
> (i) a judge's impartiality is presumed;
>
> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> (iii) the criterion of disqualification is the reasonable apprehension of bias;
>
> (iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;
>
> (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is <u>more likely than not that the judge</u>, whether consciously or unconsciously, <u>would not decide fairly</u>;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific.
>
> [emphasis in original]

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[12] In *Lorna Adams v. Workers' Compensation Board*, [1989] 42 B.C.L.R. (2d) 228, the BCCA stated:

> This case is an exemplification of what appears to have become general and common practice; that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

[13] In *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, [1992] B.C.J. No. 2828, 74 B.C.L.R. (2d) 283, the Chief Justice of the BCCA reasoned:

> **13** A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.

[14] In *Johnson v. BC (WCB)*, 2008 BCSC 1386, [2008] B.C.J. No. 1969, Madam Justice Gray reasoned:

> [39] A judge should not withdraw from a case without sufficient grounds to support an allegation of bias. Litigants should not be encouraged to make unsubstantiated allegations in order to force the disqualification of a judge who has ruled unfavourably against them in the past, or to "taint" the proceedings with an air of bias.
>
> [40] A reasonable and right-minded person, informed of the circumstances of this case, familiar with the conduct of such petitions, and with the occasionally piecemeal manner in which judicial proceedings must be of necessity be conducted, would

> conclude that there are no serious grounds on which to found an allegation of bias.

[15] In *De Cotis v. De Cotis*, [2004] B.C.J. No. 150, 2004 BCSC 117, Mr. Justice Groberman of the BCSC (as he then was) reasoned:

> 9 The awkwardness of the situation and the importance of the court avoiding any appearance of bias lead the court to err, if at all, on the side of caution in these matters. That is, in my view, a salutary position.
>
> 10 There is, however, another aspect of these matters that must not be forgotten. It is the duty of a judge to hear cases that come before him or her, and a party should not be able to unilaterally choose not to have a matter heard by a particular judge simply because that party would prefer that another judge hear the case. If one party, without sound reason, is able to unilaterally determine that a particular judge will not hear a case, it also tends to bring the administration of justice into disrepute.
>
> 11 I do not suggest that the Defendants are engaging in "judge shopping" in this case. Nonetheless, **it is my duty to determine whether or not I ought to recuse myself, not by simply agreeing to refrain from hearing the matter because an objection is raised, but by reference to established legal principles**.
>
> [emphasis added]

[16] In *WCAT-2006-02830*, summarized as noteworthy on the WCAT website, the WCAT chair reasoned:

> I am satisfied that the fact that the panel has made two previous decisions regarding claims for NHL [non-Hodgkin's lymphoma] due to the nature of employment as a firefighter, does not, in and of itself, lead to the conclusion that there is a reasonable apprehension of bias in this case. In fact, in my view, fairness requires that like cases be treated alike provided that the merits of individual cases are taken into account by decision-makers. In addition, I view a decision-maker's previous experience with substantive issues to be beneficial….
>
> …
>
> The Assigned Panel determined that it would consider the decision in the Previous Appeal. While not required by the MRPP [WCAT's *Manual of Rules of Practice and Procedure*] to do so, they disclosed that decision to counsel and invited submissions on it. In my view, the fact that they

> disclosed the previous decision reflects their desire that counsel have the opportunity to make submissions regarding that decision. In other words, it appears to promote procedural fairness rather than detract from it.

[17] As a WCAT vice chair, I took an oath of office pursuant to section 232(8) of the Act, and section 3 of the *Workers Compensation Act Appeal Regulation*. That oath was in the following form:

> I, ....., swear (solemnly affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, carry out my duties as a member of the Workers' Compensation Appeal Tribunal, I will conduct myself with integrity, and I will discharge my duties in accordance with the laws of the Province.

[18] I am also guided by the "Code of Conduct for WCAT Members," set out at Appendix 12 of the MRPP. Item 1.2 of this Code provides:

> Members must make their decisions based on the merits and justice of the case, and must apply the law and policy to the evidence in good faith and to the best of their ability. Members must approach the hearing and determination of every appeal with a mind that is genuinely open with respect to every issue, and open to persuasion by convincing evidence and argument. Members must avoid doing or saying anything that would cause a reasonable, well-informed individual to think otherwise.

[19] I also note the guidance provided by MRPP item 21.2.2, "Duties of a Representative," under item 21, "Codes of Conduct":

> (j) A representative has a duty to bring forward, at the earliest opportunity, any information which may give rise to a reasonable apprehension of bias or conflict of interest on the part of a WCAT member. However, such allegations should not be made frivolously or in a fashion which diminishes confidence in the integrity of WCAT decision making. Accordingly, if the allegation has been addressed by WCAT and rejected, the representative should not continue to raise similar allegations in other appeals. Examples of the types of allegations that will not, on their own, raise a reasonable apprehension of bias include instances where a panel previously decided a similar issue or worked for the Board in the past.

[20] I do not consider that any reasonable apprehension arises simply on the basis of my decision in a prior case (whether or not the facts of the prior case are similar to those raised in the present case). I similarly do not consider that a reasonable apprehension

of bias arises simply because the preliminary handling of this application required procedural determinations which the plaintiff views as adverse. In every case which requires a preliminary procedural determination, one of the parties may not be happy with the determination, but this does not give rise to a right to have a different panel assigned to hear the merits. Accordingly, in the absence of other reasons requiring a panel reassignment, it is my duty to hear this application.

*(b) Hearing method*

[21] With reference to the plaintiff's request for an oral hearing, I note that the plaintiff gave evidence in an affidavit sworn on June 30, 2009 and in an examination for discovery on December 8, 2009. An affidavit sworn on March 5, 2010 was also provided by Steven Kendall on behalf of Summit.

[22] The "Rule" at MRPP item #7.5 provides:

> **WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based and credibility is not at issue.**
>
> **WCAT will normally conduct applications for an extension of time to appeal (item 8.2), a stay of decision (item 8.3), a certification to court (chapter 18), and a reconsideration (items 20.2 to 20.3.2) by written submissions.**
>
> [bolding in original to denote a "Rule" pursuant to section 11 of the *Administrative Tribunals Act* (ATA), S.B.C. 2004, c. 245]

[23] The parties to the legal action and Summit are each represented by legal counsel, who have provided written submissions. The issues in this application primarily concern questions of law and policy, rather than involving disputed facts or questions of credibility. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

**Status of the plaintiff, Robert Samuel Boyda**

[24] The plaintiff submitted an application for workers' compensation benefits in relation to the injuries he suffered in the January 18, 2007 motor vehicle accident. He described the occurrence of the accident as follows:

> I was driving south on Hwy 97 just north of Winfield, B.C. when a small truck lost control and was coming towards…me in my lane. I brought my vehicle to a stop. The oncoming vehicle made it past me without hitting me but then I was rear ended by a DTC Chambers chip truck. I was

> knocked out. When I came to, my truck was 200+ feet past the point where I had stopped.
>
> [block capitalization removed]

[25] By decision dated February 29, 2008, a Board entitlement officer denied the plaintiff's claim. The Board officer reasoned:

> Our assessments department spoke with you on May 18, 2007. They have noted that your company 525227 BC Limited is not registered with WorkSafeBC. The principal shareholders are yourself and your wife and you hire no workers. You supply your own equipment, vehicles for delivery. As such you would be required to be registered with WorkSafeBC and purchase Personal Optional Protection.
>
> …
>
> Assessment policy AP1-1-4 was referenced and as you were injured prior to the registration of your firm you are not considered a worker on January 18, 2007. Therefore rejection of your claim was recommended.
>
> It is my decision to reject this claim as it does not meet the requirements of s. [section] 5(1) of the *Act*.

[26] Item #18.1 (formerly #20.20) of the MRPP provides 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.

[27] On January 18, 2007, policy at AP1-1-4 of the *Assessment Manual* provided:

> **(c) Principals of corporations or similar entities**
>
> As the incorporated entity is considered the employer, a director, shareholder or other principal of the company who is active in the operation of the company is generally considered to be a worker under the *Act*. A spouse, child or other family member of a principal or a shareholder for whom earnings are reported for income tax purposes is considered to be active in the business and a worker.
>
> If a sole, active principal of a limited company is injured at a time when the company was not registered as an employer with the Board, the principal will not be considered a worker at that time and a claim by the principal or his or her dependents will be denied. For the same reason, a claim from one of several principals of a company that was unregistered at the time

> of the injury, or in the case of fatality, his or her dependents, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register. The term "principal" covers persons who would be proprietors or partners in the business if the business were not incorporated.
>
> In determining whether a principal was personally responsible for a failure to register, the factors considered include whether the principal was:
>
> - a minority or majority shareholder;
> - a director of the company;
> - carrying out management functions or simply doing work that an employee would normally do; and
> - responsible for doing other functions equivalent to those associated with the Board, such as dealing with income tax or employment insurance.

[28] A copy has been provided of a BC Company Summary for 525227 B.C. Ltd. The plaintiff and his wife, Rena May Boyda, were listed as directors of the company which was incorporated on August 15, 1996. The company was dissolved on April 7, 2000, due to a "failure to file." The dissolution of the company occurred nearly seven years prior to the January 18, 2007 motor vehicle accident.

[29] In his affidavit sworn on June 30, 2009, the plaintiff advises that at the time of the motor vehicle accident he was travelling from Vernon to Oroville, Washington, U.S.A. He describes himself as an independent operator of a proprietorship. He did not purchase Personal Optional Protection (POP) coverage from the Board. Although at one time he had operated his business through 525227 B.C. Ltd., that company was struck off the Registry in April 2000 and he continued to operate his business thereafter as a proprietorship. The plaintiff explained:

> 7. Since my business had a bank account in the name of 525227 BC Ltd. at TD Canada Trust, I continued using that account after the company was dissolved, and transacted all financial business through that account.

[30] The plaintiff first entered into a contract with Summit on September 1, 2001, covering four years. The contract stipulated that the plaintiff was an independent contractor, responsible for matters such as taxes, WCB coverage, and so on. The plaintiff

provided a truck (a diesel truck with a 20 foot aluminum van body, power tailgate and other equipment) and was responsible for all insurance, taxes, and cross-border requirements such as licenses and permits and costs.

[31] The plaintiff signed a Lease-Operation Extension Agreement, which extended the contract with Summit until September 1, 2006. The written agreement had lapsed by the time of the accident on January 18, 2007, but the plaintiff continued to do business with Summit on the same terms.

[32] The Vehicle Lease and Service Agreement dated March 31, 2006, and the Owner's Certificate of Insurance and Vehicle License, were in the plaintiff's personal name. He was personally fined $500.00, as set out in a letter dated March 6, 2006 from the U.S. Customs and Border Protection, for an alleged violation. The plaintiff renewed his Alpha Code with Homeland Security in his business name of "Buds Trucking," as set out in a letter dated June 23, 2006.

[33] In his affidavit, the plaintiff stated that he entered into an agreement with Summit in 2001 as it needed a carrier for goods to be shipped between the U.S.A. and B.C. He stated:

> 18. Shortly after commencing operations, I began to be approached by various potential customers who had seen my truck, who asked me if I could take a delivery for them during my trips to the U.S. Because I had an agreement in place with Summit, I approached Mr. Kendall about adding southbound deliveries to my routes, and we agreed that I could continue to promote this new business so long as all invoicing was channelled through Summit so that they could keep track of all transactions and also charge a fee themselves.
>
> 19. As a result, I was able to add many new customers for deliveries southbound to the U.S., and northbound from the U.S. to British Columbia, which were all outside of the terms of the written agreement aforementioned. In addition, I was also approached many times by individual customers for delivery of small parcels for which I invoiced and which they paid to Summit, who was keeping track of all financial transactions.
>
> 20. At all times, I was free to take or not take new customers, all of whom I promoted and brought to Summit, and I also set all the prices. Because of this new business, I was able to enter into a more favourable fee structure with Summit, who agreed to give me 80% of the invoices rather than the much lower rates set out in the written agreement.

[34] The plaintiff used documents marked "Bud's Trucking Bill of Lading," or similar documents, for all transactions. The customers would make their payments to Summit, who would then pay the plaintiff. The plaintiff states that a substantial part of his revenue, up to 50%, came from these "extra" contracts.

[35] In his 2006 income tax return, the plaintiff showed his business as a proprietorship. The plaintiff states:

> 34. Summit never provided me with any training or policies, never disciplined me, and never objected to or contradicted any new arrangements I brought to them. In that sense, I had full control over the business, while Summit used its own internal administration for our mutual convenience to keep track of all transactions and to collect payments.

[36] A copy has been provided of the Lease-Operation Agreement between Summit and 525227 B.C. Ltd. That agreement was signed by the plaintiff on behalf of 525227 B.C. Ltd. A copy has also been provided of the Lease-Operation Extension Agreement, which was also signed by the plaintiff on behalf of 525227 B.C. Ltd.

[37] In his examination for discovery on December 8, 2009, the plaintiff advised that his wife and two daughters both worked for the business (Q 40). Copies have been provided of the T4 statements of remuneration provided to the plaintiff's daughters, Erica Boyda and Jodi Boyda, in 2006. These were issued by "Robert Boyda O/A 525227 B.C. Ltd." In his examination for discovery, the plaintiff advised (Q 147):

> Q And the OA, do you know what that was supposed to represent, is that operating as?
> A I believe so.

[38] I note that the *The Oxford Dictionary of Abbreviations*, originally published by Oxford University Press, 1998, also defines "o/a" as meaning "on account of."

[39] The plaintiff's wife, Rena May Boyda (Q 32), did the accounting and billing (Q 41). The plaintiff stated that "She did it all on her own" (Q 43). The company also used an accountant, Heather Thew (Q 49 to 50). The plaintiff's evidence is that he would sign where he was asked to sign, but did not really understand exactly what was going on tax-wise (Q 46 to 48). The plaintiff's wife and the accountant did the paperwork together (Q 55).

[40] The plaintiff incorporated 525227 B.C. Ltd. on August 15, 1996 (Q 70). This was the first time he had incorporated a business (Q 71). At the time the plaintiff incorporated 525227 B.C. Ltd., he had a business building doors (Q 72). That door building

business continued from 1996 until 2001 (Q 73 to 74). The plaintiff was paid by the company, but at the time of discovery the plaintiff did not recall the manner in which he was paid (i.e. by salary or dividends) (Q 77 to 78). The plaintiff started the hauling business in 2001 (Q 69).

[41] The plaintiff advised that his tax return for 2006 was being audited, apparently due to some adding mistakes (Q 173). He stated (Q 174):

> Q Okay. And was it you personally who were being audited or was it 525227 that was being audited?
> A Me, myself, personally as the company.

[42] The plaintiff stated that during the years he was making doors for 525227 B.C. Ltd., he did not have a contract of employment with the company (Q 193). He was paid by cheque from the company during those years (Q 195).

[43] In 2007, all of the payments from Summit to the plaintiff for the hauling work were deposited into the bank account for 525227 B.C. Ltd. The plaintiff did not have a personal banking account (Q 262 to 264). The plaintiff used the bank account for 525227 B.C. Ltd. for the hauling business between 2001 and 2007 (Q 268). The cheques written by the plaintiff for expenses relating to the hauling business were also written on this account (Q 272). The plaintiff subsequently clarified his evidence by explaining that he and his wife had a personal joint account in Kelowna, but no business matters went through that account (Q 553 to 555).

[44] The plaintiff advised that there was no conscious decision to dissolve the company. Rather, it simply lapsed for lack of filing (Q 282). He did not recall receiving any notices warning that the company would lapse unless it filed certain documents (Q 283). He did not recall making any conscious decision to allow the company to lapse (Q 284). He continued banking in the company name after that date because it was convenient to do so (Q 285). All the paperwork was in place (Q 286).

[45] The plaintiff stated (Q 287 to 289):

> Q When you incorporated the company, you knew there were some benefits with incorporation with respect to tax benefits and things like that, correct?
> A Right.
> Q And you would continue to get those benefits if you use the company, correct?
> A Right.

Q Okay. That was one of the reasons why you kept using the company's bank account?
A Right.

[46] At question 295, the plaintiff further stated:

Q So even though the company was dissolved in 2000, you continued to attempt to run your business to some degree through the company; is that fair to say?
A Yes.

[47] The plaintiff confirmed the lease operation agreement was between Summit and 525227 B.C. Ltd. He stated (Q 301):

Q So you were holding out to Summit, in any event, that you were operating under a limited company at that time, correct?
A Right. As far as I know, yes.

[48] The plaintiff further explained (Q 303 to 304):

Q Do you remember telling Summit in 2001 that, well, the company's dissolved now. I don't have a company, so don't make the contract with the company, make it with me? Did you tell them that?
A No.
Q Because you were still trying to use the corporation for the reason you incorporated it to begin with.
A Right.

[49] The plaintiff had not thought of having 525227 B.C. Ltd. resurrected (Q 305).

[50] The plaintiff never told Summit that he had changed his business model from a limited company to a sole proprietorship (Q 321 to 322).

[51] The plaintiff advised (Q 327):

Q …If you were running your hauling business as a proprietorship, why were you signing contracts on behalf of 525227 BC Limited?
A I was lazy.

[52] The plaintiff explained (Q 330):

> I didn't look after any of the banking work. I didn't do any of the financial stuff. She [the plaintiff's wife] was in charge of all the paying the bills and all that. My job was making the money.

[53] Regarding workers' compensation coverage, the plaintiff explained (Q 333 to 336):

> Q What was your understanding as to your status with WCB when you signed this deal with Summit?
> A I had nothing to do with WCB.
> Q Did you put your mind to it at all before you signed the agreement?
> A No.
> Q Okay. Just something that never occurred to you?
> A No. I was under the influence I didn't require it.
> Q Did you think that you were covered by Summit's WCB coverage?
> A No. I knew I wasn't. I had asked them if I could join Summit, pay into some of their benefits, like dental, and they said they couldn't do it. It was too complicated.

[54] The plaintiff had used the nickname "Bud" since he was a child (Q 11). The truck the plaintiff was operating at the time of the accident had the name "Bud's Trucking" on the door (Q 371). The plaintiff put that name on the door as soon as he leased the new truck (Q 372). The plaintiff explained that Summit wanted a company name to put on the bills of lading (Q 356 to 361).

[55] An affidavit has been provided by Steven Kendall, sworn on March 5, 2010. Kendall is the director and regional vice president of Summit. At the time Kendall executed the contract on or around September 1, 2001 with the 525227 B.C. Ltd., Kendall was not aware that 525227 B.C. Ltd. was not an active company. Kendall did not become aware that 525227 B.C. Ltd. was not an active company until these proceedings commenced. Throughout Summit's dealings with the plaintiff, Kendall was under the impression that that 525227 B.C. Ltd. was an active company. Summit's cheques were issued to 525227 B.C. Ltd. Kendall states that he had read the plaintiff's affidavit and the transcript of the plaintiff's examination for discovery, and confirms that the plaintiff "has, for the most part, accurately represented the business relationship and dealings between Summit and 525227 B.C. Ltd./Mr. Boyda."

[56] Kendall describes the contractual arrangement as follows:

> 10. As at January 18, 2007, the arrangement between Summit and 525227 B.C. Ltd./Mr. Boyda was as follows:
>
> (a) Summit paid to 525227 B.C. Ltd./Mr. Boyda the base amount of $5,500 per month. This covered the transport of all northbound shipments that arrived at Summit's warehouse in Oroville, Washington or North Country Warehousing in Oroville, Washington, by courier, with a total weight under 70 lbs. With rare exceptions, all northbound shipments were for Summit clients alone.
>
> (b) For northbound overweight shipments (ie. over 70 lbs), Summit clients were charged an additional amount (ranging from $0.08 to $0.13 per lb depending on where the shipment was to be delivered). 525227 B.C. Ltd./Mr. Boyda received 50% of those overweight charges.
>
> (c) For any northbound shipment which arrived at either Summit's warehouse in Oroville, Washington or North Country Warehousing in Oroville, Washington, by truck (as opposed to courier), or any northbound shipment requiring pick up anywhere else in Oroville, Washington, 525227 B.C. Ltd./ Mr. Boyda received 80% of the charges rendered to Summit clients.
>
> (d) For all southbound shipments, 525227 B.C. Ltd./Mr. Boyda received 80% of the charges rendered. Almost all of the southbound freight clients were not originally Summit clients are not now Summit clients. In addition, the Summit clients for which 525227 B.C. Ltd./Mr. Boyda did deliver southbound shipments are, as of the date of the termination of the relationship between Summit and 525227 B.C. Ltd./Mr. Boyda, no longer provided those services by Summit (with very rare exceptions).
>
> (e) Summit carried out all of the client invoicing for both northbound and southbound shipments. Invoicing for the southbound shipments arranged by 525227 B.C. Ltd./ Mr. Boyda was prepared by Summit mainly as a mutual administrative convenience for both 525227 B.C. Ltd./ Mr. Boyda and Summit. The 20% which Summit received from

> charges rendered for the southbound shipments handled by 525227 B.C. Ltd./Mr. Boyda was essentially a fee for Summit doing the invoicing for these shipments.
>
> (f) The rates for southbound shipments were set by 525227 B.C. Ltd./Mr. Boyda. Mr. Boyda often made "deals" with clients for rates which were lower than Summit's standard northbound rates. Summit had no control over or input into the southbound shipment rates.
>
> (g) It was the sole discretion [of] 525227 B.C. Ltd./Mr. Boyda to accept or refuse southbound shipment business. It was also in his sole discretion as to when and where he would make those deliveries. Summit had no control over or input into these matters whatsoever.

[57] Plaintiff's counsel submits that the plaintiff was an independent operator who did not apply for POP coverage and was not, therefore, a worker at the time of the accident. Plaintiff's counsel further submits that the plaintiff's circumstances are analogous to those of a principal of a company who fails to register with the Board. He cites *WCAT-2004-04553*, *WCAT-2004-05552*, *WCAT-2005-05297* (noteworthy) and *WCAT-2006-01747* (noteworthy) regarding principals of companies who were found to be independent operators rather than workers under the Act. Plaintiff's counsel submits:

> In accordance with the overarching test of independence, Mr. Boyda conducted his business in a manner more closely in line with that of an independent operator than that of a worker in a master-servant relationship with Summit. Mr. Boyda expanded his business far beyond what was contemplated in the original signed agreement with Summit, and he developed a substantial clientele for new deliveries in both northbound and southbound directions that were not within the contemplation of the written agreement or within the control of Summit, who accepted his new customers and his setting of prices without question. That Mr. Boyda was able to expand the scope of his business in these ways points strongly to his independence.

[58] By memorandum dated July 24, 2009, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that at the time of the accident Summit was registered as an employer with the Board. There was no registration for 525227 B.C. Ltd., the plaintiff, or Bud's Trucking (in connection with the plaintiff's hauling services). Other registrations under the name "Bud's Trucking" were not related to the plaintiff.

[59] Counsel for the defendants Noble and Stutters submits that the plaintiff was a labour contractor in the context of his work activity for Summit. Counsel cites *WCAT-2004-05834, WCAT-2007-02604*, and *WCAT-2003-03322-AD*. Counsel submits, alternatively, that the plaintiff may be considered as having two jobs. If he is to be considered an independent operator, that would be in the context of delivering parcels for other parties, and he would be a labour contractor in the context of his work activity for Summit.

[60] *WCAT-2004-05834* involved a plaintiff, the sole proprietor of RLB Delivery Service, who was delivering frozen meals in his refrigerated camper-truck unit. *WCAT-2007-02604* (noteworthy) involved a plaintiff who worked as a "contract operator" using a leased truck. The WCAT panel found that the plaintiff was a labour contractor at the time of the accident, as he was contracting his labour and the use of his truck which was a major revenue-producing piece of equipment. Since he had chosen to register with the Board and had POP, he was covered under the Act as an independent operator and, therefore, he was a worker. In that situation, he was a worker within the meaning of item (f) of the definition of worker in section 1 of the Act, and section 2(2) of the Act, rather than a worker of the firm with which he was contracting.

[61] *WCAT-2003-03322-AD*, noteworthy, analyzed the plaintiff's status as follows, in finding that he was a worker rather than an independent operator:

> The lease agreement also describes the lessor (Mr. Giesbrecht) as an independent contractor. However, the document indicates that H&R [H & R Transport Ltd.] had considerable control over the manner in which Mr. Giesbrecht conducted his activities as a driver. The agreement states that the lessor will provide "exclusive service" to the carrier unless otherwise authorized by the carrier in advance. The lessor is required to read the carrier's "DRIVERS HANDBOOK" and abide by its contents. The lessor is also required to conform to the carrier's standards of performances, which are itemized. The items include the requirement to accept any load offered by dispatch and the requirement to comply with all dispatch instructions. The lessor is also required to attend scheduled safety meetings and to comply with the carrier's safety program, as well as a number of other miscellaneous obligations. In addition, the hiring standards refers to "hiring procedures" and indicates that successful applicants must attend a 2-day orientation program. These factors indicate a significant degree of control by H&R over the manner in which the lessor, in this case Mr. Giesbrecht, would have carried out the contract.

> In addition, there was no opportunity for independent initiative or profit sharing since Mr. Giesbrecht was prohibited from driving for other companies except with the express permission of the carrier. According to his application for compensation he worked in response to calls from H&R's dispatcher.
>
> With regard to the employment of others, there is no evidence that Mr. Giesbrecht had ever hired another person to assist him in this contract. And, although the leasing agreement provides that the lessor is fully responsible for any drivers he hired, all drivers (or passengers) had to be approved by the carrier before being permitted on the equipment.
>
> As for continuity of work, the evidence is that Mr. Giesbrecht drove only for H&R under this contract. As previously noted, he was not permitted under the leasing agreement to drive for anyone else without the permission of H&R.
>
> Mr. Giesbrecht owned the major equipment used for providing the service he had contracted to provide but all of the elements of the relationship point to a relationship of employment as opposed to a relationship between independent firms.

[62] Counsel for the defendants Byrne and DCT submits that while 525227 B.C. Ltd. was dissolved on April 7, 2000 according to the Registrar of Companies, the plaintiff appears to have continued to use this company in operating the parcel delivery business up to the date of the accident. He submits that the fact that the company was dissolved is not determinative of its status. Companies can be restored pursuant to the terms of the *Business Corporations Act*. He submits that the requirement for a business like 525227 B.C. Ltd. to register with the Board cannot be defeated by the company's failure to file documents with the Registrar of Companies. Counsel submits the plaintiff was a worker of 525227 B.C. Ltd. at the time of the accident. Alternatively, he was an employee of, or labour contractor to, Summit, at the time of the accident.

[63] Policy at AP1-38-1 of the *Assessment Manual* further provided:

> **(c) Corporations**
>
> Occasionally, a firm is registered which is inadvertently or deliberately misrepresented as an incorporated company. Alternatively, a properly incorporated and registered company may be struck from the register by the Registrar of Companies but may continue to operate as if it still has the status of a corporation. The status of such firms' accounts with the Board is changed to that of a proprietorship or partnership. The effective

> date of the change will be when the correct legal status of the firm is discovered. For the period up to that date, the proprietor or partners will be treated as if they were workers of the limited company, and will be provided compensation coverage and their earnings assessed. Collection of assessments owed will proceed under the proprietorship or partnership name(s) regardless of when the liability was incurred.

[64] Pursuant to this policy, where a company is registered with the Board, and the company is subsequently struck from the register, the Board will continue to treat the proprietor or partners as if they were workers up to the date when the correct legal status of the firm is discovered. This policy does not expressly address the situation of a company which never registered with the Board, and which was struck from the register prior to the date of an accident involving a proprietor.

[65] Under the current *Business Corporations Act*, SBC 2002, c. 57, the registrar may dissolve a company under section 422 if a company fails to file an annual report in each of two consecutive years. Section 344 provides that when a company is dissolved under section 422 it ceases to exist for any purpose subject to sections 346 and 347. Section 346 provides that despite the dissolution of a company, a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and a legal proceeding may be brought against the company within two years after its dissolution as if the company had not been dissolved. Section 347 provides that the liability of each director, officer, shareholder and liquidator of a company that is dissolved continues and may be enforced as if the company had not been dissolved. An application may be made under Division 11 of the *Business Corporations Act* for restoration of a company that has been dissolved. Section 364(4) provides that a company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved.

[66] In this case, the company was dissolved before the plaintiff commenced his trucking operations. The company was never registered with the Board, and has not been restored.

[67] Counsel for Summit submits that the plaintiff was a worker employed by 525227 B.C. Ltd. at the time of the accident. Alternatively, the plaintiff was an independent operator and not a worker. Counsel submits that Summit did not have control over significant aspects of the work. While Summit did control the days on which the plaintiff made his northbound deliveries to Summit clients, Summit did not control the timing or manner of those deliveries or the routes used by the plaintiff. Summit had even less control regarding southbound deliveries. The only training provided by Summit to the plaintiff involved a single ride-along with a Summit employee to show him where the warehouse, customs office, Summit office and some of Summit's clients were located.

Summit did not request information regarding the truck leased and operated by the plaintiff. Summit acknowledges the presence of a non-competition covenant in the contract, but concedes this was not enforceable at law. Counsel notes:

> In the 6 month period preceding January 18, 2007, the majority of the compensation paid by Summit to 525227 B.C. Ltd./Mr. Boyda, over and above the $5,500 per month base, was with respect to southbound shipments arranged by 525227 B.C. Ltd./Mr. Boyda as set out above. In that same period, approximately 30% of the total remuneration paid to 525227 B.C. Ltd./Mr. Boyda was solely with respect to southbound shipments arranged by 525227 B.C. Ltd./Mr. Boyda.

[68] On January 18, 2007, policy in the *Assessment Manual* at AP1-1-3, "Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms," provided:

> **(a) General principles**
>
> In distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The factors considered include:
>
> - whether the services to be performed are essentially services of labour;
> - the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;
> - whether the individual doing the work might make a profit or loss;
> - whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;
> - if the business enterprise is subject to regulatory licensing, who is the licensee;
> - whether the terms of the contract are normal or expected for a contract between independent contractors;
> - who is best able to fulfill the prevention and other obligations of an employer under the *Act*;

- whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and

- whether the individual doing the work is able or required to hire other persons.

The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.

Some regard must also be paid to the structure and customs of the particular industry involved. Where an industry makes much use of the contracting out of work, this should be recognized as a factor in considering applications for registration as employers by parties to contracts in those industries.

**(b) Specific guidelines**

Parties who would be considered independent firms include:

(1) Any firm supplying labour and materials on which a profit or loss may result. Items such as nails and drywall tape are not considered materials for this purpose.

(2) Any firm which has two or more pieces of revenue producing equipment. Hand tools and personal transportation vehicles or vehicles used to move equipment are not considered to be revenue producing equipment.

(3) Service industry firms that enter into two or more contracts simultaneously.

(4) Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms.…

(5) Society, cooperative, trade union or similar entity.

(6) Manpower supply firms.

These guidelines will resolve the question whether a particular person or entity is an "independent firm" in most cases.

The Board, for the purposes of the *Act*, has the exclusive power under section 96(1) to determine status. The Board's jurisdiction cannot be excluded by private agreement between two parties, whether the agreement does this expressly, or indirectly by labelling the parties as independent operators (who would therefore be independent firms). The Board makes its own judgment of their status, having regard to the terms of the contract and the operational routines of the relationship. However, decisions made by the Board are for workers' compensation purposes only and have no binding authority under other statutes.

[69] The policy at AP1-1-7 of the *Assessment Manual* concerns labour contractors. The policy provides:

Labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain Personal Optional Protection as an independent operator if they do not have workers. A labour contractor who takes one of these actions is an "independent firm" for purposes of Item AP1-1-3.

Labour contractors who choose not to register as an employer (if they have workers) or obtain Personal Optional Protection as an independent operator (if they do not have workers) are considered workers of the firm for whom they are contracting, and that firm is responsible for assessments. Any persons employed by the labour contractor to assist them are also considered workers of the firm with whom the labour contractor is contracting. A worker cannot be an "independent firm".

If the labour contractor is registered, the proprietor or partner is not covered unless Personal Optional Protection is in effect.

Labour contractors include proprietors or partners who:

- have workers and supply labour only to one firm at a time;
- are not defined as workers, do not have workers, or do not supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis; or
- **may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual.**

Persons who are normally labour contractors and who employ a worker are considered independent firms for any period of time that they are not contracting with another person or entity.

[emphasis added]

[70] If the policy concerning labour contractors applied to the plaintiff's circumstances, he would clearly be a worker of Summit. The plaintiff fit within the definition of labour contractor, as a person who had workers and who contracted a service including one piece of major revenue-producing equipment to Summit. The plaintiff did not register with the Board. Accordingly, he and any persons he employed (his wife and daughters) would be considered workers of Summit.

[71] However, an explanatory note which precedes the policy concerning labour contractors states:

> For persons who are not covered by the normal criteria for "independent firms" set out in the POLICY in Item AP1-1-3, the Board uses a category called "labour contractors" in determining whether a person is a worker or independent firm under the *Act*. This policy sets out the guidelines for determining who is a labour contractor and the significance of that determination.
>
> [reproduced as written]

[72] The term "labour contractor" is not a term contained in the Act. It is not a separate status under the Act. The Act contemplates persons being employers, independent operators and workers. The labour contractor term provides a policy construct which works as a type of sorting mechanism, to assist in clarifying the status of persons who are in a grey area (as an independent operator or a worker). If there are sufficient indicia to show that the person is independent, a finding may be made on that basis

without reference to the labour contractor policy. Accordingly, the labour contractor policy may be found to be inapplicable, if there are sufficient indicia of independence.

[73] Counsel for the defendants cites *WCAT-2009-01845*, *Gathergood v. ICBC*. That decision concerned the status of a morning newspaper carrier, driving her personal vehicle. The carrier did not purport to have any separate corporate existence. I consider that the factual circumstances of that case are different, and that the decision in that case merely serves to illustrate the application of the policy concerning labour contractors in a particular context. Other WCAT decisions concerning these policies include *WCAT-2007-02297* and *WCAT-2007-04051*. In both of those decisions, the driver was found to be a worker of the firm for which he was contracting, notwithstanding a POP registration with the Board in one case, and a registration as an employer in the second case.

[74] The plaintiff provided a piece of major revenue-producing equipment. His services were not merely services of labour (as a driver), as he bore the expense of leasing the large truck required by his work. In the event his truck was unavailable, the plaintiff was required under paragraph 9(b) of the contract to provide a replacement vehicle. Accordingly, the plaintiff bore the risk of loss if major repairs were required. These factors point to independence.

[75] Paragraph 9(a) of the contract provided that in case of foreseen or unforeseen disability or absence of the Operator from his duties, the Operator was required to provide a replacement driver (and that any such driver would be an employee of the Operator). The ability and requirement to provide a replacement driver is an indication of independence.

[76] With respect to licensing, the evidence is mixed. Summit was responsible for maintaining the Motor Carrier Commission Authority and Licence Fee. The plaintiff was responsible for all other licenses and insurance. The plaintiff renewed his Alpha Code with Homeland Security in his business name of “Buds Trucking,” as set out in a letter dated June 23, 2006.

[77] Paragraph 17 of the contract provided that the operator would insure that the truck was not operated except on Summit business, unless written consent of Summit was obtained in advance detailing the requested use, territory of travel and time period involved.

[78] In terms of remuneration, and the opportunity for profit or loss, Summit agreed to pay a basic fee to the plaintiff of $5,000.00 per month (increased to $5,500.00 in the extension agreement). In return, the plaintiff agreed to transport without charge all northbound shipments under pounds for Summit clients without additional charge. The plaintiff received a share of the overweight charges for northbound cargo.

The evidence shows that the plaintiff developed his own clientele for southbound freight, for which he would receive 80% of the charges rendered. Summit collected 20% from these charges, which Kendall describes as essentially an invoicing fee. The plaintiff often made deals with his clients for southbound shipments, providing rates which were lower than Summit's standard northbound rates. Kendall states that Summit had no control over or input into the setting of these southbound shipment rates. When the relationship between the plaintiff and Summit came to an end, Summit did not continue to provide services to those clients (with very rare exceptions).

[79] In summary, the evidence regarding remuneration is mixed. The commitment by Summit to make a substantial minimum monthly payment to the plaintiff would normally point to a relationship of employment. However, this factor must be weighed in the context of the fact that Summit's understanding was that it was contracting with an independent company. It was thus contracting to provide a minimum level of payment, to obtain the delivery services required pursuant to the contract.

[80] The fact that all of the plaintiff's work was performed through Summit tends to detract from a finding that the plaintiff was independent. However, the fact that the plaintiff was free to negotiate his own rates for southbound shipments, and in fact charged lower rates than those charged by Summit, is supportive of his being independent. Otherwise, it could reasonably have been expected that Summit would want to capture that additional market share and ensure that there was no undercutting of its rates.

[81] The plaintiff's circumstances appear unique, or at least very unusual. I find that the plaintiff's responses to the questions posed to him in his examination for discovery show him to be truthful but naïve or uninformed regarding the legal consequences of his actions. He entered into contracts with Summit in the name of his former company (525227 B.C. Ltd.), as a matter of convenience, while knowing the company had been dissolved and no longer existed and without taking any steps to establish a new company or re-establish his former company. He represented to Summit that he was operating as a company, while not taking the necessary steps to establish such a status. He conducted business through the name and bank account of his former company, notwithstanding that it did not exist. He does not appear to have had any nefarious intent in such misrepresentations. It is evident from his responses in his examination for discovery that he left the paperwork in conducting his business to his wife, daughters and accountant. He also operated under the name of Bud's Trucking.

[82] The fact that the plaintiff entered in a contract with Summit on the basis that he was signing on behalf of 525227 B.C. Ltd. is a strong indicator of independence. As far as Summit was concerned, it was contracting with a party that had a separate corporate identity. In these circumstances, there would be an element of unfairness in finding that the plaintiff was their worker, during the years that the plaintiff was providing hauling services for Summit on the basis that he was the worker of another company.

That factor is not conclusive, however, as Summit did not exercise diligence such as by ascertaining whether 525227 B.C. Ltd. was registered with the Board (as is compulsory for any company whose principal is active in the business and/or has other workers).

[83] Given that 525227 B.C. Ltd. had been dissolved before the plaintiff began hauling operations, I do not consider it appropriate to treat the plaintiff as the principal of a company which failed to register with the Board. I consider that a separate corporate existence is generally a prerequisite for the application of that policy. If the plaintiff were to be treated as a principal of an unregistered company, it would then be necessary to determine whether he should be considered responsible for the failure to register. Arguably, the plaintiff's lack of involvement in dealing with business records and filings could be viewed as meaning he was not responsible for the failure to register, which would support characterizing the plaintiff as a worker of 525227 B.C. Ltd. (see *WCAT-2004-03077*). At the same time, however, the plaintiff's actions in conducting business on behalf of 525227 B.C. Ltd., while seemingly being blind to any legal requirements regarding the existence of this company (and any consequential requirement to register with the Board), would tend to support holding the plaintiff responsible for the failure to register. On this point, I consider that by entering into contracts on behalf of 525227 B.C. Ltd., the plaintiff was carrying out management functions rather than simply doing work that an employee would normally do. This evidence would tend to support a finding that the plaintiff shared in the responsibility for the failure to register 525227 B.C. Ltd. with the Board.

[84] The plaintiff's evidence in his examination for discovery was that he knew he was not covered under Summit's WCB registration. He further indicated that he was under the impression that he did not require WCB coverage. I interpret the plaintiff's evidence as meaning that he was aware that 525227 B.C. Ltd. was not registered with the Board. Given this knowledge, I do not consider that he should be treated as having no responsibility for the failure to register, so that he should be characterized as being a worker of 525227 B.C. Ltd. with workers' compensation coverage for his injuries in the January 18, 2007 accident.

[85] The plaintiff no longer performs work for Summit. This decision is solely concerned with his status at a point in the past, namely, at the time of the accident on January 18, 2007. There are features of his relationship with Summit that point to a relationship of employment. In particular, the facts that all of his billings were conducted through Summit, that he had no business with clients outside of his relationship with Summit, and that he received a minimum monthly payment of $5,500.00, point to a relationship of employment.

[86] I consider it significant, however, that the plaintiff used a corporate name (525227 B.C. Ltd.) in order to enter into a business relationship with Summit. He also used the name "Bud's Trucking," which would appear to denote his separate business. He provided

major equipment, and developed his own clientele to whom he charged his own rates. He operated on the understanding that he was not covered for workers' compensation coverage with Summit, and that as a proprietor of his own business he was free not purchase workers' compensation coverage.

[87] Pursuant to section 250(2), WCAT must make its decision based on the merits and justice of the case, but in so doing, WCAT must apply a policy of the board of directors of the Board that is applicable in that case. If the labour contractor policy were applicable, the plaintiff (and any persons hired by him) would be considered workers of Summit. However, I consider that it would be contrary to the merits and justice of the case to apply the labour contractor policy in these circumstances, when Summit believed that it was dealing with an incorporated business and did not discover otherwise prior to the motor vehicle accident. This conclusion is consistent with the policy at AP1-38-1, which permits the Board to treat the proprietor of a firm as a worker of a company even after the company has been struck from the register, until such time as the true legal status of the firm is discovered. I consider that the plaintiff's work activities in relation to Summit are appropriately viewed as a whole, rather then as involving two jobs.

[88] On balance, I consider that the evidence shows that the plaintiff was functioning as the proprietor of an independent business (notwithstanding the fact that 525227 B.C. Ltd. had been struck from the register). I find that the preponderance of evidence supports a conclusion that the plaintiff was an independent operator, pursuant to the policy at AP1-1-4. Accordingly, I do not consider that the labour contractor policy is applicable to the plaintiff's circumstances.

[89] Alternatively, I consider that at the time of the accident, the plaintiff was continuing to function through his company even though it had been struck from the register. Even though he was not responsible for handling the paperwork and doing other functions equivalent to those associated with the Board, he was carrying out management functions by entering into contracts on behalf of 525227 B.C. Ltd. as though the company was still in existence. I consider that the plaintiff, as a principal of 525227 B.C. Ltd., bore some personal responsibility for the failure of this company to register with the Board so that he is appropriately found to not be a worker within the meaning of Part 1 of the Act at the time of the accident.

[90] I find, therefore, that the plaintiff was not a worker within the meaning of Part 1 of the Act. It therefore follows that his injuries did not arise out of and in the course of employment within the scope of Part 1 of the Act.

**Status of the defendants**

[91] In view of my conclusion regarding the status of the plaintiff, it does not appear necessary to address the status of the defendants. If further determinations remain necessary, a supplemental certificate may be requested.

**Conclusion**

[92] I find that at the time of the January 18, 2007 accident:

(a) the plaintiff, Robert Samuel Boyda, was not a worker within the meaning of Part 1 of the Act; and,

(b) the injuries suffered by the plaintiff, Robert Samuel Boyda, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

NO. 30467
PENTICTON 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:

ROBERT SAMUEL BOYDA

PLAINTIFF

AND:

GARY RAYMOND NOBLE, STUTTERS CONSTRUCTION CO. LTD.,
PATRICK BRIAN BYRNE AND DCT CHAMBERS TRUCKING LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, ROBERT SAMUEL BOYDA, 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, January 18, 2007:

1. The Plaintiff, ROBERT SAMUEL BOYDA, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, ROBERT SAMUEL BOYDA, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of May, 2010.

_____

Herb Morton
Vice Chair

NO. 30467
PENTICTON REGISTRY

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IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
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PATRICK BRIAN BYRNE AND DCT CHAMBERS TRUCKING LTD.

DEFENDANTS

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SECTION 257 CERTIFICATE

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WORKERS' COMPENSATION APPEAL TRIBUNAL
150-4600 Jacombs Road
Richmond, BC V6V 3B1
FAX (604) 664-7898
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