WCAT **Workers' Compensation Appeal Tribunal**

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898
Website: www.wcat.bc.ca

**WCAT Decision Number**: **WCAT-2014-00811**
**WCAT Decision Date**: **March 18, 2014**

**Panel**: Guy Riecken, Vice Chair

**WCAT Reference Number:** **131637-A**

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Section 257 Determination
In the Supreme Court of British Columbia
New Westminster Registry No. 144321
Selene Joon v. Mohammed Kahn and 0714773 B.C. Ltd.

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**Applicants**: Mohammed Kahn and
0714773 B.C. Ltd.
(the "defendants")

**Respondent**: Selene Joon
(the "plaintiff")

**Interested Person**: Surrey School District #36

**Representatives**:

For Applicants: Lisa Gullett
ICBC Litigation Department

For Respondent: Vahan Ishkanian
Barrister & Solicitor

For Interested Person: Bernadine Babuik
Surrey School District #36
Health & Safety Consultant

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## Introduction

[1] The plaintiff, Selene Joon, commenced a legal action respecting personal injuries resulting from a motor vehicle accident on October 13, 2010 at the intersection of 84 Avenue and 156 Street in Surrey, British Columbia. In her notice of civil claim the plaintiff states that she was stopped for a traffic light at the intersection when a vehicle owned by the defendant, 0714773 B.C. Ltd., and negligently driven by the defendant, Mohammed Kahn, reversed and collided with the plaintiff's vehicle, and that the collision caused personal injury, loss, and damage to the plaintiff.

[2] Under section 257 of the *Workers Compensation Act* (Act), where an action is commenced based on a disability caused by occupational disease, a personal injury, or death a party or the court may ask the Workers' Compensation Appeal Tribunal (WCAT) to make determinations and to certify those determinations to the court.

[3] On July 3, 2013 WCAT received an application by the defendants for section 257 determinations of the status of the plaintiff and the defendant Mohammed Kahn, and for certifications to the court.

[4] The defendants are represented by the same legal counsel, and the plaintiff is represented by legal counsel. The plaintiff's employer, Surrey School District #36, is participating as an interested party, and is represented by a health and safety consultant.

[5] Submissions were requested and received from the plaintiff's counsel, the defendants' counsel, and Surrey School District #36. The defendants provided a copy of the unsigned statement of the defendant, Mohammad Kahn, dated October 19, 2010, and a signed statement of the plaintiff, dated October 25, 2010. The defendants provided a copy of the transcript of the examination for discovery of the plaintiff conducted on April 23, 2013, and the affidavit of Mohammed Kahn sworn October 7, 2013. The defendants also provided a copy of the affidavit of the plaintiff sworn December 11, 2013 in answer to the interrogatories delivered to the plaintiff by the defendants.

[6] This application involves questions of law and policy which can be properly considered on the basis of the available evidence and written submissions, without the need for an oral hearing.

**Issue(s)**

[7] Determinations were requested as to the status of the plaintiff Selene Joon and the defendant Mohammed Khan at the time of the accident.

**Jurisdiction**

[8] Part 4 of the Act applies to proceedings under section 257 (except that that no time frame applies to the making of the WCAT decision (section 257(3)).

[9] Pursuant to section 250(1) of the Act, WCAT is not bound by legal precedent. WCAT must make its decision based on the merits and justice of the case, but in doing so, must apply a policy of the board of directors of the Workers' Compensation Board (Board)[1] that is applicable (section 250(2)). The applicable policies are found in the Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), and the *Assessment Manual*. Throughout this decision I refer to the versions of the applicable policies that were in effect at the time of October 13, 2010 accident.

[10] Section 254 gives WCAT 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 matters 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)).

[11] The court determines the effect of the section 257 certificate on the legal action.

**Status of the Plaintiff, Selene Joon**

[12] The general circumstances of the plaintiff's employment, as described in her examination for discovery evidence, her December 11, 2013 affidavit, and the school district's January 7, 2014 written submission to WCAT, are not in dispute. The plaintiff was employed as a teacher with the school district since August 16, 2007. For the September 2010 – June 2011 school year (the school year during which the accident happened) the plaintiff was employed under a one-year term contract with duties that included teaching French as a Second Language and some administrative relief duties. The plaintiff worked under that contract four days per week (Tuesday to Friday) at Woodland Park Elementary School. Under the one-year contract she was paid an

[1] The Board operates as WorkSafeBC.

annual salary. On Mondays she was a teacher on call (TOC) at a variety of schools, and was paid a daily amount for the days she was called in to work. The October 13, 2010 accident happened on a Wednesday, one of the plaintiff's regular term contract work days at Woodland Park Elementary School.

[13] On the day of the accident the plaintiff attended a conference for French teachers at the school district's Education Centre during the morning, and was scheduled to teach at Woodland Park Elementary in the afternoon. After the conference ended early at 10:30 a.m., she drove home to do laundry, clean up, and eat lunch. She was driving from her home to the school when the accident happened at approximately 12:30 p.m.

[14] In a memorandum dated July 8, 2013 a research and evaluation analyst in the Board's Audit and Assessment Department stated that according to the Assessment Department records, there was no record of registration in the plaintiff's name. There is an account registered for Surrey School District #36. It was registered at the time of the October 13, 2010 accident.

[15] The terms "employer" and "worker" are defined in section 1 of the Act. The term "employer" is defined as including "every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry," and "worker" is defined as including "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."

[16] The Board's *Assessment Manual*, at policy item #AP1-1-2, "Coverage Under *Act* – Types of Relationships," states that where a person contracts with another person or entity to do work, the contract creates one of two types of relationship. It is either one of employment or one between independent firms. Policy item #AP1-1-3, "Coverage Under the *Act*, Distinguishing Between Employment Relationships and Relationships Between Independent Firms," sets out a number of factors and special tests and a general principle to consider when determining whether a relationship is one of employment or between independent firms.

[17] It is not necessary to discuss those factors in detail here, as it is not disputed that the plaintiff was, in a general sense, a worker. However, although the plaintiff concedes she was a worker in a general sense, she draws a distinction in arguing that she was not a worker at the time of the accident. She contends that this distinction was made by the vice chair in *WCAT-2010-02714* (*Browne v. Moss et al.*) The plaintiff notes that the B.C. Court of Appeal confirmed WCAT's approach in that decision in *Browne v. Workers Compensation Appeal Tribunal* 2013 BCCA 487. The plaintiff submits that in the WCAT decision the vice chair found that while the defendants in that case were generally speaking workers, they were not workers at the time of the accident.

[18] I do not agree that the vice chair in *WCAT-2010-02714* drew a distinction in the way the plaintiff describes. However, I do not consider it necessary to address this point in detail, as I will address the plaintiff's arguments in relation to the question of whether her injuries arose out of and in the course of employment.

[19] As seen in the *Assessment Manual* policies I have referred to, the question of whether a person is a worker as defined in Part 1 of the Act concerns whether he or she provides services under a contract of employment, or under a contract between independent firms. Once it is determined that a person is a worker by way of being an employee of an employer, the nature of the contract generally does not change at the time of an accident depending on whether the accident had an employment connection. The employment relationship generally extends beyond a particular point in time.

[20] Since the plaintiff's evidence that she was employed by the school district (which is registered as an employer with the Board, as seen from the Assessment Department memorandum) as a contract teacher to work four days a week (with the plaintiff being a TOC on the fifth day) is not disputed, and since the accident occurred on one of the four days that she regularly worked as a contract teacher for the school district, I find that she was a worker at the time of the accident within the meaning of Part 1 of the Act.

[21] The disputed issue is whether the plaintiff's injuries arose out of and in the course of her employment. This involves two questions. The first is whether her attendance at the French teachers' conference on the morning of October 13, 2010 was part of her employment, such that her travel to and from the conference was also part of her employment. If attendance at the conference and the related travel were part of her employment, the second question is whether she remained in the course of employment when the accident happened during her post-lunch time, the journey from her home to the school.

[22] The defendants' position is that attendance at the conference and the travel related to it were part of the plaintiff's employment. The defendants say that the following evidence supports this position. Although the conference did not take place at the elementary school where the plaintiff regularly worked, it took place at the Surrey School District #32 Education Centre, located at 14033 - 92 Avenue in Surrey, and that the offices of the school district are also located there. The conference took place during the plaintiff's regular hours of work, and pay was not deducted for the time she was at the conference. Accordingly, the conference occurred at a time for which the plaintiff was being paid her regular salary. The Surrey School Board French Department organized the conference. The defendants refer to information in the plaintiff's discovery transcript, an email letter from Gurdeep K. Sappal, a human resources coordinator at the school board, and in the employer's written submission, and submit that the conference, which was entitled EFSL (Elementary French as a Second Language)

Contact Teacher Meeting, was intended to provide pedagogical practices and resources, curriculum updates, and support for elementary school French teachers. The plaintiff's attendance was therefore of benefit to both the employer and the plaintiff. The plaintiff submits that although attendance was voluntary, it was highly recommended.

[23] The defendants refer to the Board's policies on work-related travel and on education or training courses, as well as the following WCAT decisions as supporting its position: *WCAT-2005-01178*, and *WCAT-2012-01778*. The essence of the defendants' position is that the worker has regular place of employment at the elementary school, and that on the day of the accident she was employed temporarily at another of her employer's work locations, the Education Centre. As such, workers' compensation coverage extended to her travel between the Education Centre to the elementary school after the conference ended.

[24] In its January 7, 2014 submission, the school district does not explicitly address the question of whether the plaintiff's attendance at the conference was part of her employment. It states that on "October 13, 2010, Ms. Joon was on a .6 full time equivalent detached duty assignment" and that the "remaining .15 FTE [full time equivalent] was to be completed at her assigned site." The school district's position is that the plaintiff took herself out of the employment relationship when she chose to go home instead of reporting back to work following the conference. It is implicit in this submission that the school district considers the worker to have been in the course of her employment on the morning of the conference up to the point she traveled to her home for lunch.

[25] The essence of the plaintiff's position is that her attendance at the conference and her related travel were not part of her employment. The plaintiff expresses this by saying she was not a worker at the relevant time. However, for the reasons given earlier, I have found that the plaintiff was a worker, but that the real focus of the dispute between the parties is better characterized as whether her injuries arose out of and in the scope of her employment.

[26] I am not persuaded by the plaintiff's argument with respect to her attendance at the French conference. A significant problem with it is that it does not address the applicable policy on education and training, and refers instead to a prior version of the policy. Effective July 1, 2010 the board of directors of the Board amended the policies in Chapter 3 of RSCM II, including the policy on education and training. The new version of Chapter 3, which includes significant policy revisions, applies to all injuries occurring on or after July 1, 2010.

[27] Given the date of the accident, and the circumstances of this application, the policy items from the revised Chapter 3 are relevant to the determination of whether the plaintiff's injuries arose out of and in the course of her employment. They include the following.

[28] Policy item #C3-14.00, "Arising Out of and In the Course of the Employment," is the principal policy in Chapter 3 that sets out decision-making principles for personal injury claims. This policy provides, in part, that employment is a broader concept than work and includes more than just productive work activity. It states that "Arising out of the employment" generally refers to the cause of the injury or death. In considering causation, the focus is on whether the worker's employment was of causative significance in the occurrence of the injury or death. The employment factors need not be the sole cause. "In the course of employment" generally refers to whether the injury or death happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the employment. Time and place of employment are not strictly limited to the normal hours of work or the employer's premises.

[29] Policy item #C3-14.10 sets out a non-exhaustive list of nine factors that may be considered in making a decision about whether an injury arose out of and in the course of employment, but it states that no single factor may be used as an exclusive test. In addition, other relevant policies may be considered. The factors listed in this policy are the following:

> **1. On Employer's Premises**
> Did the injury or death occur on the employer's premises? If so, this factor favours coverage.
>
> **…**
>
> **2. For Employer's Benefit**
>
> Did the injury or death occur while the worker was doing something for the benefit of the employer's business?
>
> **…**
>
> **3. Instructions From the Employer**
>
> Did the injury or death occur in the course of action taken in response to instructions from the employer? For example, did the employer direct or request that the worker participate in an activity as part of the employment? The clearer the direction, the more this factor favours coverage.

The more tenuous the direction, the less this factor favours coverage: for example, if the worker was doing something on a purely voluntary basis, or the employer simply sanctioned participation without directing or requesting it.

**4. Equipment Supplied by the Employer**

Did the injury or death occur while the worker was using equipment or materials supplied by the employer? If so, this factor favours coverage.

**5. Receipt of Payment or Other Consideration from the Employer**

Did the injury or death occur while the worker was in the process of receiving payment or other consideration from the employer? If so, this factor favours coverage.

**…**

**6. During a Time Period for which the Worker was Being Paid or Receiving Other Consideration**

Did the injury or death occur during a time period in which the worker was paid a salary or other consideration, or did the injury or death occur during paid working hours? If so, this is a factor that favours coverage.

**7. Activity of the Employer, a Fellow Employee or the Worker**

Was the injury or death caused by an activity of the employer or of a fellow employee? If so, this factor favours coverage.
Was the injury or death caused by a non-work related activity of the worker? The more tenuously the worker's activity is related to the employment, the less this factor favours coverage.

Consideration in either case is given to whether the activity of the employer, fellow employee or worker was employment-related or unauthorized (see Item C3-17.00, *Deviations from Employment*).

**8. Part of Job**

Did the injury or death occur while the worker was performing activities that were part of the worker's job? If so, this factor favours coverage.

**9. Supervision**

Did the injury or death occur while the worker was being supervised by the employer or a representative of the employer having supervisory authority? If so, this factor favours coverage.

[30] Policy item #C3-14.20, "Accident – Section 5(4) Presumption," provides guidance for determining a worker's entitlement to compensation for personal injury caused by accident. The policy notes that section 1 of the Act includes the following non-exhaustive definition:

> "accident" includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause;

[31] The policy explains that section 5(4) of the Act creates the following presumption for injuries resulting from an accident:

- Where an injury is caused by an accident that arose out of the employment, unless the contrary is shown, it is presumed that the accident occurred in the course of the employment; and,
- Where an injury is caused by an accident that occurred in the course of the employment, unless the contrary is shown, it is presumed that the accident arose out of the employment.

[32] This presumption is not conclusive, and is rebutted if opposing evidence shows that the contrary conclusion is more likely.

[33] Policy item #C3-17.00, "Deviations from Employment," provides guidance for determining a worker's entitlement to compensation where a worker's participation in an unauthorized activity may have had causative significance in the worker's personal injury or death. The policy refers to policy item #C3-14.00, and notes that in some circumstances the evidence supporting one component of the employment-connection test may be clear, while evidence supporting another component is questionable, because the worker did something that was unauthorized by the employer. In considering whether an injury or death arose out of and in the course of the employment, all relevant factors are taken into consideration, including the causative significance of the worker's conduct in the occurrence of the injury or death, and whether the worker's conduct was such a substantial deviation from the reasonable expectations of employment as to take the worker out of the course of employment. The policy also states that an insubstantial deviation does not prevent an injury or death from being held to have arisen out of and in the course of employment. The policy goes on to provide guidance as to how some of the factors in policy item #C3-14.00 may be applied when considering a worker's unauthorized activity, including: instructions from the employer, whether the worker was acting to protect the employer's interests during an emergency, whether a generally unauthorized activity (such as alcohol consumption) was part of the permitted activities of the worker's employment, whether the injury occurred on the employer's premises, and the degree to which the

worker, the employer, or a fellow employee participated in a generally unauthorized activity such as horseplay or fighting.

[34] Policy item #C3-18.00, "Personal Acts," provides guidance for differentiating between a worker's employment functions and a worker's personal actions. The policy recognizes that there is a broad intersection and overlap between employment and personal affairs. An incidental intrusion of personal activity into the process of employment is not a bar to compensation. Conversely, an incidental intrusion of some aspect of employment into the personal life of the worker at the moment of injury or death does not automatically entitle a worker to compensation. The policy goes on to discuss specific examples, such as: lunch, coffee, and other breaks; and, acts for the personal benefit of principals of the business.

[35] Policy item #C3-19.00 provides guidance for determining whether an injury or death occurring when a worker is engaged in work-related travel arose out of and in the course of employment. It states the general policy related to travel is that injuries or death occurring in the course of travel from a worker's home to the normal place of employment are not compensable. On the other hand, where a worker is employed to travel, injuries or death occurring in the course of travel may be covered. This is so whether the travel is a normal part of the job or is exceptional. In those cases the worker is generally considered to be traveling in the course of employment from the time the worker commences travel on the public roadway. The policy goes on to discuss a number of factors that may be considered, including whether the worker is a "traveling worker" who typically travels to more than one work location in the course of a normal workday as part of their employment duties, or is directed by the employer to temporarily work at a place other than their normal, fixed place of employment.

[36] Policy item #C3-21.00, "Extra-Employment Activities," states that activities which people undertake outside the course of their employment are for their own benefit, and injuries or death occurring in the course of these activities are generally not compensable. However, the policy recognizes that some extra-employment activities may be sufficiently connected to a worker's employment as to be considered part of that employment. This item includes parts that address the following specific types of activities: "A. Participation in Competitions"; "B. Recreational, Exercise or Sports Activities"; "C. Educational or Training Courses"; and, "D. Fundraising, Charitable or Other Similar Activities."

[37] Part C states that compensation coverage does not generally extend to injuries or death that occur during educational or training courses. Such courses are generally for the worker's own benefit, and are not considered to have a sufficient employment connection to be compensable. However, some types of educational or training courses may be sufficiently connected to a worker's employment as to be considered part of that employment. In determining whether there is a sufficient employment

connection, consideration is given to the factors in item #C3-14.00 and any other relevant factors not listed in policy.

[38] In arguing that the factors in the general policy (the former item #14.00) are irrelevant to the specific consideration of whether an education or training course is within the scope of a worker's employment, the plaintiff overlooks the portion of the current version of the policy on education and training that expressly states that the factors in the general policy (now #C3-14.00) are to be considered. On my reading of the current policy, the board of directors have incorporated into Part C of policy item #C3-21.00 many of the of factors considered by the vice chairs who decided *WCAT-2005-01178*, and *WCAT-2012-01778.*

[39] Although policy item #C3-21.00 states that generally compensation coverage does not extend to injuries that occur during educational or training courses, as since such courses are generally for the worker's own benefit and are not considered to have sufficient employment connection, it also acknowledges that some types of educational or training courses may be sufficiently connected to the worker's employment as to be considered part of that employment.

[40] A number of the factors from item #C3-14.00 weigh in favour of workers' compensation coverage for the conference attended by the plaintiff on October 13, 2010. The conference took place on the employer's premises (at its Education Centre), it was during a time period for which the plaintiff was being paid, and was paid for by the employer. With regard to this last factor, I recognize that the employer did not pay a fee on behalf of the plaintiff to attend the conference, or reimburse the plaintiff for her payment of such a fee. However, the conference was organized by the French Department of the school board of Surrey School District #32, and this amounts to the employer paying for or providing the conference.

[41] I agree with the defendants that both the plaintiff and the employer benefitted from her attendance at the conference. Referring to the December 18, 2013 email from Gurdeep K. Sappal, identified as the school district's human resources coordinator, the plaintiff argues that Ms. Sappal does not reveal the person(s) providing the answers to the defendants' questions about the conference, and "re-iterates" information about the purpose of the conference. While it is true that Ms. Sappal simply says that one of the administrators who was in charge of the conference was able to answer the questions, without naming the administrator, I accept as reliable the answers set out in the email unless they have been directly contradicted by the plaintiff's evidence about a matter that was in her personal knowledge. I accept that the human resources administrator was able to speak to an administrator who helped organize the conference and who was knowledgeable about it. As the plaintiff is a French teacher in the school district, and attended the conference herself, I infer that if she possesses knowledge about the

conference based on her personal experience which contradicts Ms. Sappal, she would have been able to provide it in the course of this application.

[42] As the plaintiff has not provided evidence to the contrary, I accept as reliable the statement by Mr. Sappal in her email that the purpose of the conference related to pedagogical practices, resources for the elementary French teacher, curriculum updates, and support. I also accept the statement in the email that the conference benefitted teachers by providing them with necessary, practical information to better carry out the role as an elementary teacher of Core French.

[43] While not stated in the email, I consider it reasonable to infer that those benefits to the teachers were also intended to benefit the employer in carrying on its business of providing French language instruction in its elementary schools. It appears to me to be self-evident that the employer would benefit to some degree from having its French teachers receive ongoing education on pedagogical practices, available resources for the elementary French teacher, curriculum updates, and support. It seems likely to me that is why the French Department of the employer arranged the conference. The comment by the plaintiff's representative that there is no evidence about whether or not her attendance at the conference helped the plaintiff become a better teacher, and that this is "therefore a hope or presumption," is entirely unhelpful to her in this application. Nothing in the policy requires such evidence. As stated in the policy, it is concerned with weighing the employment features of the education or training against the personal features to reach a conclusion as to whether the test of employment connection has been met.

[44] I find the as a fact that the French teachers' conference was intended to benefit both the plaintiff and the employer, and that this weighs somewhat in favour of an employment connection.

[45] The part of Ms. Sappal's email that the plaintiff appears to disagree with most strenuously is the statement that her attendance at the conference was "highly recommended." As that is inconsistent with the evidence of both the plaintiff and the employer that attendance was entirely voluntary, I do not accept it. I find that the plaintiff's attendance was purely voluntary, and that this weighs against an employment connection. I also find that attendance at the conference was not considered part of the plaintiff's job (in the sense of her regular work duties as a teacher or administrator), and that this also weighs against an employment connection.

[46] While there are some factors that weigh against an employment connection to the plaintiff's attendance at the conference, I find the preponderance of the evidence supports such a connection. In particular, I find that the fact that the conference took place on the employer's premises, during the plaintiff's regular work hours, during a time for which she was paid her regular salary by the employer, and that it was

organized by the employer's French Department, are strong indicators of an employment connection. In addition, I find that the employer benefitted to some degree from its French teachers attending the conference, and that this weighs to a minor degree in favour of an employment connection.

[47] I conclude that the plaintiff's attendance at the French conference on the morning of October 13, 2010 was part of her employment.

[48] I also find that the plaintiff's travel to attend the conference and her journey to her school to teach during the afternoon after the conference were also part of her employment. This flows from the application of Part C of policy item #C3-19.00, "Traveling Employees," to the circumstances of this case. This part of the policy provides that "traveling employees" include workers who "have a normal, regular or fixed place of employment, and are directed by the employer to temporarily work at a place other than the normal, regular or fixed place of employment."

[49] The policy goes on to state that travel to different work locations has an employment connection where a worker:

- terminates productive activity at one work location and travels to another work location to commence productive activity for the same employer. This is so regardless of whether the worker was paid a salary or other consideration for the travel; … [or,]
- travels from home to a temporary place of work without first traveling to the normal, regular or fixed place of employment. Again, the employment connection begins when the worker commences travel on the public roadway.

[50] As the plaintiff has a normal, regular fixed place of employment during the four days each week that she works at Woodland Park Elementary School, and her attendance at another of the employer's premises (the Education Centre) for the conference on the morning of October 13, 2010 was part of her employment, I conclude that under this policy workers' compensation coverage extended to her as a traveling employee on the day of the conference, including the journey from the Education Centre to resume her teaching duties at the elementary school after the conference ended.

[51] This leads to the question whether an employment connection existed at the time of accident, when the worker had gone home and was then continuing on her way to the elementary school.

[52] Before turning to the evidence about the plaintiff's activities and travel on the day of the accident it, is useful to note the locations involved. At the time, the plaintiff lived at 14823 – 83 Avenue, Surrey. She taught at Woodland Park Elementary School at 9025 – 158 Street, Surrey. The school district's Education Centre, where she attended the conference, is located at 14033 – 92 Avenue, Surrey. Attached as exhibits to her affidavit the plaintiff provided printouts of three "Google Maps" from the Internet on which she has marked her travel routes.

[53] Part C of policy item #C3-19.00 states that an employment connection generally exists throughout travel undertaken by traveling employees, providing they travel reasonably directly and do not make major deviations for personal reasons. The policy also states (in the final paragraph of Part C) that an employment connection generally exists for traveling employees during normal meal or other incidental breaks, such as using the washroom facilities, so long as the worker does not make a distinct departure of a personal nature.

[54] The defendants' position is that an employment connection continued throughout the time the plaintiff went to have lunch at home and during the continuation of her journey to school after lunch. They characterize the plaintiff's travel at the time of the accident as part of her journey from the conference to the school, with only a minor deviation along the way to have lunch at home that did not take her out of the course of her employment.

[55] The defendants refer to the following WCAT decisions as supporting their position that the plaintiff's trip to her home to have lunch did not involve a substantial personal deviation from her employment-related travel: *WCAT-2003-01739-RB*; *WCAT-2004-05894*; *WCAT-2005-01114* (*McLaren v. Wood et al.*); *WCAT-2005-01837; WCAT-2007-02428*; *WCAT-2008-01866* (*Makhani v. Diener et al.*); and, *WCAT-2013-02769* (*Albertson v. Art's Nursery Ltd. et al.)*. While these decisions involve different facts, they have in common findings that the particular deviations from employment travel for the purpose of having lunch was not a substantial deviation that took the respective workers out of the scope of their employment.

[56] The plaintiff's position is that her trip home from the conference before continuing her journey to the school after lunch involved a substantial deviation to attend to personal matters. The plaintiff refers to *WCAT-2014-00090* in which I summarized a number of previous WCAT decisions on travel with both personal and employment features. Those decisions were the following: *WCAT-2005-03608*; *WCAT-2006-03549*; *WCAT-2008-01569*; *WCAT-2009-01052*; *WCAT-2010-02714* (*Aldridge et al. v. Browne et al.*); and, *WCAT-2013-017804/2013-01805*. In *WCAT-2014-00090* I noted that these decisions apply a "predominant purpose test" that considers whether the predominant purpose of the journey was employment or personal, and then considers the nature and extent of any deviation from that journey.

[57] The plaintiff submits that none of her activities at home was connected in any way to her work duties. Not only did she significantly alter the route she would have otherwise taken between the conference and school, she spent a considerable amount of time attending to matters that were entirely personal and unconnected to work. The predominant purpose of her trip home was personal and unconnected to her employment activities. She was not doing anything that benefitted the employer. The plaintiff also agrees with the employer's submission that the employer had not directed her to go home, she was not supervised at home, and she was not carrying out any activities that were reasonably incidental to the obligations and expectations of her employment. The plaintiff also submits that at the time of the accident she had not yet re-joined her route from the conference to the school after undertaking the personal deviation to her home. Therefore, the plaintiff submits, her injuries did not arise out of and in the course of her employment.

[58] The plaintiff's evidence at her examination for discovery and in her affidavit responding to the defendants' interrogatories about her travel on the day of the accident includes the following.

[59] The plaintiff did not go to Woodland Elementary School before going to the conference. The conference ended early at 10:30 a.m. (paragraphs 5 and 10 of the plaintiff's affidavit).

[60] The worker stated that when the conference ended:

> I had headed home to just do laundry and clean up and have lunch, so it was a leisure day, and I was just heading back to my school for the latter half of the day [Q 132].

[61] With respect to the time she was supposed to be back at school and the time she left home, the plaintiff stated:

> The bell goes at 10 to 1:00, so 12:50, so I had left my home. My home is about 5 to 6 minutes away from my school, and I had left my home around 12:25 [Q 133].

[62] She also stated:

> Basically, I was coming from home after my conference from a different location, and it had ended early, so I was just running some errands at home, laundry and whatnot. Had lunch, and left my home at approximately 12:25 in the afternoon, and I was heading east on 84th Avenue as I usually do … [(Q 184].

[63] On the map that includes her route from the conference to her home (exhibit B to her affidavit), the plaintiff marked a location where she stopped along the way to pick up some food for lunch at or near the corner of Fraser Highway and 152 Street. The same map shows her route from her home to the school, including the accident location at 84 Avenue and 156 Street. The map at exhibit C to her affidavit shows her usual route from her home to Woodland Park Elementary School. The point where the accident occurred is on her usual route from her home to the school. According to paragraph 13 of her affidavit, the map at exhibit A to her affidavit shows the route the plaintiff "would have" taken from the conference back to Woodland Park Elementary School. I infer that this means the route she would have taken had she gone directly from the conference to the school without stopping at home.

[64] In their rebuttal submissions the defendants state that using the map provided by the plaintiff at exhibit A to her affidavit they determined that the direct distance from the Education Centre to Woodland Park Elementary School is 5.8 kilometres and takes a traveling time of approximately 9 minutes. The defendants note that the route actually taken by the plaintiff on the day of the accident (from the Education Centre to the food pick up stop to her home and then to the school) is indicated to be 10.2 kilometres, and to take an approximate traveling time of 19 minutes. Based on these figures, the defendants submit that the plaintiff's deviation from the direct route from the conference to the school amounted to 4.4 kilometres of distance traveled and 10 minutes of travel time.

[65] The defendants also attach two other printouts from Google Maps on which they base an alternative method of calculating the plaintiff's route deviation, being approximately 5.6 kilometres in travel distance and 10 minutes in travel time.

[66] Using these figures for the distances and times involved, the defendants submit that the plaintiff's travel involved only a minor deviation from the route she would have taken had she gone directly from the conference location to the school.

[67] The plaintiff was given an opportunity to respond to the defendant's rebuttal submission because the plaintiffs had presented new evidence with their rebuttal. The plaintiff objected to the defendants providing new evidence. Regarding the information from Google relied on by the defendants, the plaintiff submits that the only evidence of any significance is the maps, but notes that these had already been provided by the plaintiff with her response to the defendants' interrogatories. The plaintiff notes that the only part of the defendants' rebuttal that is new is the reference to the travel times. The plaintiff questions the reliability of this evidence since there is no reason to believe that Google or whoever entered the travel times at Google has any expertise in estimating travel times, and because the times that appear in Google Maps are assumptions only and do not take into account specific conditions on a specific day.

[68] I agree with the plaintiff that the travel times from Google Maps referred to by the defendants involve assumptions or rough estimates that do not take into account a number of factors such as actual driving conditions on a particular day, or an individual driver's driving style or habits. In addition, I note that it would have been preferable for the defendants to have asked the plaintiff about her estimates of the driving times involved in her route deviation either at her examination for discovery or in the interrogatories, since her estimates could at least have been possible based on her personal experience. I do not place significant weight on the estimated driving times referred to by the defendants in their submissions.

[69] However, I place significant weight on the driving distances referred to by the defendants, as these are not subject to the vagaries of traffic patterns or individual driving habits that afflict time estimates. At the same time, I recognize that the distances referred to by the defendants are estimates, and not precise measurements. I accept that the plaintiff's deviation from the direct route between the conference and the school to go home and then return back to the direct route involved a driving distance of 4.4 to 5.6 kilometres. In my view, in the circumstances of this case, nothing turns on whether the travel distance of the route deviation was closer to 4.4 kilometres or 5.6 kilometres.

[70] I have considered the previous WCAT decisions cited by the plaintiff and the defendants. Prior appellate decisions are not binding on me, but may provide helpful analysis of relevant policy items, or examples of the application of policy to particular circumstances. However, each case must be decided on its own merits.

[71] I have already found that the worker was in the course of her employment in attending the conference, and that she was a traveling employee during her journey between the conference and the elementary school since this was, in effect, travel between two different work locations of the same employer. It follows that the predominant purpose of her journey from the conference to the elementary school was connected to her employment. As stated in *WCAT-2014-00090,* after referring to a number of previous appellate decisions:

> [85] Former appellate decisions, including WCAT decisions, are not binding on me (see section 250 of the Act). However, I find the decisions I have cited to provide useful analyses, and examples, of how to approach the dilemma of differentiating between a worker's employment functions and personal actions when the two overlap. I recognize that the decisions I have cited referred to the version of the policy on personal acts that was in force prior to July 1, 2010 (policy item #21.00), and that the wording of the current policy, which was in force at the time of the accident, is different. However, while the current policy omits some of the language from the earlier version of

the policy, and is expressed more concisely than the former policy, it still states that:

> In marginal cases, it is impossible to do better than weigh the employment features of the situation against the personal features to reach a conclusion, which can never be devoid of intuitive judgment, as to whether the test of employment connection has been met.

[86] In light of the substantial similarities between the former and the current policies on personal acts, I consider the decisions that cited the former policy to remain helpful in considering the current policies.

[87] From my review of the applicable policies and the prior decisions that I have cited, I consider that, in determining the status of a worker injured in the course of travel that has both employment and personal features, it is appropriate to begin by identifying the predominant purpose of the journey as a whole, then to consider whether at the time of the accident the worker had undertaken a deviation from the route related to the dominant purpose. If so, it is necessary to determine whether the deviation was relatively minor or was substantial. In analysing these factors, relevant considerations include the extent to which the timing of the journey as a whole, the route related to the predominant purpose, the route related to the deviation, and the sequence and timing of different legs of the journey, were influenced by employment or personal considerations.

[72] In this case, the purpose of the plaintiff's deviation, from the direct route from the conference to the school, was to go home, including having lunch. While in many situations a worker having lunch on their own time away the employer's premises would be considered a purely personal activity, as stated in Part C of policy item #C3-19.00, "[a]n employment connection generally exists for traveling employees during normal meal or other incidental breaks … so long as the worker does not make a distinct departure of a personal nature."

[73] This principle is reflected in a number of the decisions referred to by the defendants. For example, in *WCAT-2003-01739-RB*, the worker, a multimedia technician, was involved in a motor vehicle accident during his unpaid lunch break after a meeting at one of his employer's premises. The meeting ended at approximately 11:00 a.m. and the worker went across the street to browse in a book store and buy a Christmas present. After buying a book, the worker returned to his car and was heading toward a restaurant to eat lunch before returning to his regular work location when the accident occurred. An entitlement officer at the Board allowed the claim under the policy on irregular starting points as it read at that time (item #18.32) on the basis that crossing the street to browse in a bookstore or going to buy his lunch was not a deviation

sufficient to remove the worker from the course of his employment. In denying the employer's appeal, the vice chair found that the worker did not engage in a substantial deviation from a reasonably direct route back to his regular work location. In reaching this conclusion, the vice chair noted that the worker's destination (the employer's office) was at 75th and Granville, and that at the time of the accident the worker was on south Granville on his way to a restaurant. Accordingly, this did not involve a substantial deviation from the most direct route, and the worker remained in the course of his employment while driving to get lunch. The circumstances in that case are different to the present one, in that here the plaintiff's home was not on, or close to, the route between the conference and the school. Instead, the plaintiff drove an additional distance of more than four kilometres to go to and from her home.

[74] Past decisions have also recognized that the same principle may apply if a traveling worker travels home to have lunch in the course of travel between different work locations. For example, in *WCAT-2005-01937*, the worker, an air conditioning technician, was a traveling worker who attended at different work locations to service equipment. The vice chair found that the worker was on his way home to have lunch after a service call when the accident occurred. She found that as a traveling worker, under the principle in the former policy (item #18.41) he was covered for workers' compensation purposes during all of his travel during the day until he returned home. The exception to this would be if he was on a distinct departure or substantial deviation from a travel route for personal reasons. The vice chair noted that travel for lunch is not usually considered a distinct departure for personal reasons for a traveling worker. The vice chair found that the worker was in the course of his employment at the time of the accident in order to have lunch.

[75] However, in that case, the vice chair also found that the proximity of the worker's home to the last work location was a factor that favoured coverage. She stated that:

> If the plaintiff had travelled a substantial distance away from any work-related route in order to have his lunch, such a trip might constitute a distinct departure for personal reasons. But, the evidence in this case does not suggest that this occurred. The evidence is that the plaintiff usually ate his lunch on the road. He went home for lunch on the day of the accident only because he was working in the area and he could "swing by" once he had finished the job. At the time that he agreed to go home, he did not realize that he would need additional parts to complete the job. But, once he became aware of this, the supplier from which he planned to obtain the parts is located so close to his home that stopping for lunch along the way would not involve a distinct departure.

[76] Similarly, *WCAT-2007-02428* involved a traveling worker who, in driving back to the office after going to an office supplies store to pick up ink for a fax machine, drove to his home to "grab something to eat." He stated that it was just a quick dash into his house and he kept his car running while he went in. His house was about a four- to five-minute drive from the office supply store, and his office was another two-minute drive from his home. The vice chair found the worker's travel involved a dual purpose trip, as he intended to both pick up the ink for the office and to pick up his lunch. However, the reason for the timing of the trip (at 10:00 a.m. instead of during his regular lunch hour) was due to the urgent need for the ink for the fax machine. The trip therefore had both a business and a personal purpose. Alternatively, the trip could be characterized as a business trip with a personal deviation to pick up lunch. The vice chair emphasized that the accident occurred after the worker had returned to the route from the store to the office at the time of the accident. She found that the predominant purpose of the trip was business, and that to the extent that the trip home involved a personal deviation, he had returned from it to the route of the business trip when the accident happened. Accordingly, he was in the course of his employment at the time of his accident. The circumstances in this case are different, in that the plaintiff spent considerably longer at home doing laundry and cleaning (in addition to eating lunch), had not yet returned to the direct business route when the accident occurred.

[77] In contrast with the short deviations in travel distance to go home for lunch in those cases, *WCAT-2008-01866* involved a worker who had driven from his usual work location to another part of the Lower Mainland to drop off some supplies to be cut at a supplier's premises. As he had to wait some time for the supplies to be cut, and would not be pressed for time for his lunch, he decided to drive approximately 15 to 20 minutes from the supplier to a Tim Hortons to have lunch. He was aware there were other restaurants closer to the supplier, one of which was next door. However, he preferred Tim Hortons. The accident happened after lunch on the way back from Tim Hortons to the supplier. In finding that the accident occurred in the course of the worker's employment, the vice chair reasoned:

> I consider that the plaintiff's circumstances, in respect of his decision to drive to have his lunch at Tim Hortons, are not comparable to those of the truck operator described at RSCM II item #18.41. In view of the facts that the plaintiff had to allow time for the work at FlexyShop to be completed, that it was around noon, and that there were likely only limited alternative restaurants to choose from in the area surrounding FlexyShop, I do not consider that the plaintiff's decision to drive five miles in order to go to a particular restaurant in Delta amounted to a distinct departure on a personal errand. I consider that the plaintiff's decision to travel some additional distance for the sake of exercising an element of personal choice as to where he took his lunch may reasonably be characterized as involving an insubstantial deviation for personal reasons.

[78] The vice chair distinguished this from a situation where the worker might have driven a greater distance to another municipality to meet a friend for lunch, which the vice chair thought would be a substantial deviation.

[79] In this case, the plaintiff was also not pressed for time, since the conference ended early at 10:30 a.m., and she did not have to be at the school until just before 12:50 p.m. In keeping with the analysis in *WCAT-2008-01866*, with which I agree, I would not consider the driving distance added to the plaintiff's trip to the school by her decision to go home on the way (which I accept was about 4.4 to 5.5 kilometres), in itself, to mean that the worker had embarked on a substantial personal deviation in going home. However, it is necessary to consider travel distance in the context of the purpose of the portion of the plaintiff's journey that involved her drive to her home.

[80] From my reading of the plaintiff's discovery evidence, she viewed the trip home as part of a "leisure day" in which, once the conference ended early at 10:30 a.m., she "headed home just to do laundry and clean up and have lunch" (Q132).

[81] In my view, the plaintiff's characterization of the time that became available when the conference ended early as a "leisure day," that offered an opportunity to do such personal activities as laundry and cleaning during her time at home, strongly favours a finding that the worker had undertaken a substantial personal deviation from her employment travel. The plaintiff did not state when she got home, and it is not apparent exactly how much time she spent there. Yet, given the fact that the conference ended at 10:30 a.m., the distance from the conference site to her home, and the fact that she left home to go to the school at approximately 12:25 p.m., this suggests that she spent between one hour and one hour-and-a-half at home doing laundry, cleaning up, and eating lunch.

[82] Part D of policy item #19.00 recognizes that personal activities associated with and incidental to business trips, such as traveling, eating in restaurants, "staying in overnight accommodations (including sleeping, washing etc.)" are normally regarded as within the scope of the employment where a worker is on a business trip. For a worker on an overnight business trip, I would consider doing laundry to be among the otherwise personal activities that are incidental to the business travel. However, in the circumstances of the present case, where the business journey between the conference site and the elementary school was relatively short and undertaken within the course of a single day, I am unable to conclude that activities at the worker's home such as cleaning up and doing laundry were incidental to the business trip. In addition, while stopping to have lunch in the course of employment travel is generally considered to be in the scope of employment, I do not consider doing laundry and other cleaning at the plaintiff's home to be merely incidental to a lunch break. This distinguishes this case from the circumstances in the cases relied on by the defendants and which I discussed earlier. I find that given the purpose of the plaintiff's trip to her home, the

distance traveled, and the time she spent at home, the trip home involved a substantial personal deviation from her travel between the conference site and the school.

[83] I also find it significant that at the time of the accident, the plaintiff had not returned to the route she would have taken between the conference site and the school. According to the maps provided by the plaintiff with her affidavit, that route would have taken her from the Education Centre a short distance northward to the Fraser Highway, and then east on Fraser Highway to 156 Street where she would have turned north and continue to the school. At the time of the accident she was on a route that would take her east on 84 Avenue to 156 Street, where she would turn north and continue across the Fraser Highway toward the school. She would have rejoined the direct route from the conference site to the school when crossing Fraser Highway on 156 Street. As the accident happened at 84 Avenue and 156 Street, she had not yet rejoined the route of the employment-related journey. This means that the portion of her journey that involved a substantial personal deviation had not ended, and I find that this weighs against an employment connection to the accident.

[84] I find on the preponderance of the evidence that the worker was not in the course of her employment at the time of the accident, and that the accident did not arise out her employment. It follows that any injuries caused by the accident did not arise out of and in the course of the plaintiff's employment.

**Status of the Defendant, Mohammed Khan**

[85] In view of my conclusion that the plaintiff's injuries did not arise out of and in the course of her employment, it appears that a determination of the status of the defendants may not be necessary. If a determination of their status is required, a supplemental determination and certificate may be requested.

**Conclusion**

[86] I find that at the time of the October 13, 2010 accident:

(a) the plaintiff, Selene Joon, was a worker within the meaning of Part 1 of the Act; and,

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

Guy Riecken
Vice Chair

RE: Section 257 Determination
In the Supreme Court of British Columbia
New Westminster Registry No. 144321
Selene Joon v. Mohammed Kahn and 0714773 B.C. Ltd.

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GR:gw

NO. 144321
NEW WESTMINSTER 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:

SELENE JOON

PLAINTIFF

AND:

MOHAMMED KAHN and 0714773 B.C. LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, MOHAMMED KAHN and 0714773 B.C. LTD., 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, October 13, 2010:

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

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

CERTIFIED this day of March, 2014.

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Guy Riecken
VICE CHAIR

NO. 144321
NEW WESTMINSTER REGISTRY

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IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
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BETWEEN:

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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
TELEPHONE 604-664-7800

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WCAT **Workers' Compensation Appeal Tribunal**

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898
Website: www.wcat.bc.ca