WCAT Workers' Compensation Appeal Tribunal

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WCAT Decision Number: **WCAT-2014-01918**
WCAT Decision Date: **June 25, 2014**

Panel: Andrew Waldichuk, Vice Chair

WCAT Reference Number: 131964-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. M124180
Georgios Sageorgis v. Peter Kiewit Infrastructure Co. and Anna Barkan

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Applicant: Georgios Sageorgis
(the "plaintiff")

Respondents: Peter Kiewit Infrastructure Co. and
Anna Barkan
(the "defendants")

Representatives:

For Applicant: Vahan A. Ishkanian
Barrister & Solicitor

For Respondents: Jennie Milligan/Ainsley MacCallum
BECK, ROBINSON & COMPANY

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Introduction

[1] On March 21, 2011, at approximately 9:00 a.m., the plaintiff, Georgios Sageorgis, was injured in a motor vehicle accident at or near the intersection of Barclay Street and Nicola Street in the City of Vancouver when his motor vehicle collided with a motor vehicle owned by the defendant Peter Kiewit Infrastructure Co. (Kiewit) and driven by the defendant Anna Barkan. The plaintiff, a contractor, was driving from his residence on 11th Avenue, which he had recently sold, to an apartment building on Barclay Street (Barclay Street apartments), in which he had rented a suite as of March 1, 2011. The defendant, an environmental coordinator for Kiewit, was driving in a company vehicle from her home to the airport, with the intention of stopping at the office along the way to pick up her computer.

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

[3] Mr. Maragos, counsel for the plaintiff, initiated this application by completing the appropriate WCAT documentation on July 25, 2013. The plaintiff seeks determinations regarding his status and that of the defendant Barkan at the time of the March 21, 2011 accident.

[4] Mr. Ishkanian has since been retained by Mr. Maragos's law firm for the purposes of this application. Ms. Milligan acts on behalf of the defendants. The trial of the legal action is scheduled to commence on September 8, 2014.

[5] The plaintiff commenced a claim with the Workers' Compensation Board, operating as WorkSafeBC (Board), with respect to the accident. Certain evidence from his claim file was disclosed to the parties to the legal action. I will consider the evidence anew for the purposes of this application, and any prior Board decisions are not binding on me.

[6] The plaintiff and the defendant Barkan were examined for discovery on January 17, 2013. Copies of their discovery transcripts have been provided to WCAT.

[7] WCAT invited written submissions from the parties to the legal action, which were received.

[8] Mr. Ishkanian is of the view that the defendants have put the plaintiff's credibility in issue by pointing to the inconsistency between his evidence on discovery with respect to whether or not he was planning to work at the Barclay Street apartments at the time of the accident and what he said in his March 21, 2011 statement (provided over the telephone) to the Insurance Corporation of British Columbia (ICBC). He raised this following the defendants' submissions and requested additional time to provide affidavit evidence. His request was granted. Affidavits from Georgia Eriksen, the property manager of the Barclay Street apartments, and Dimitros Karkoglou, an acquaintance of the plaintiff, both sworn (or affirmed) on May 30, 2014, were attached to the plaintiff's rebuttal submission.

[9] The defendants take the position that an oral hearing is not required, despite the plaintiff's inconsistent statements concerning the purpose of his travel at the time of the accident.

[10] The rule found at item #7.5 of WCAT's *Manual of Rules of Practice and Procedure* states that WCAT will normally grant an appellant's request for an oral hearing where there is a significant issue of credibility or there are significant factual issues in dispute.

[11] In this application, Mr. Ishkanian has been given the opportunity to provide affidavit evidence to address the inconsistency between the plaintiff's sworn evidence on discovery and the evidence contained in his unsigned March 21, 2011 statement to ICBC. While the inconsistency in the plaintiff's evidence does raise an issue of credibility and create a dispute over a factual issue – whether or not the plaintiff was planning to work at the Barclay Street apartments when the accident occurred – I am not convinced that an oral hearing would serve a useful purpose in this application. I tend to agree with the defendants' position that further cross-examination would unlikely provide any new useful new evidence. Furthermore, as explained below, whether I accept that the plaintiff was driving to Barclay Street apartments with the intention of working or for the sole purpose of transporting some of his personal belongings to the suite that he had rented as of March 1, 2011, his status at the time of the accident is the same.

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

Issue(s)

[13] Determinations are requested with respect to the status of the plaintiff and the defendant Barkan at the time of the March 21, 2011 accident.

Jurisdiction

[14] 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)). 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 so doing, must apply a policy of the board of directors of the Board that is applicable (section 250(2)). Section 254 of the Act 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 all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc*., 2007 BCSC 840.

Status of the Plaintiff, Georgios Sageorgis

[15] The plaintiff said in his March 21, 2011 statement to ICBC that he owned a business called "Georgios Sageorgis Services Ltd." He described himself as a general contractor whose job entailed residential building projects – he did painting, tiles, carpet, and laminate flooring. His customers were homeowners and building owners. Furthermore, the plaintiff said he was a sole proprietor, without any employees.

[16] The plaintiff testified as follows during his examination for discovery. He has been self-employed during most of his adult life (Q 271). He incorporated a company in January 2011 (Q 273). It was called "Georgios Sageorgis Services Limited" (Q 275). He was the sole director and shareholder (Q 276 to 277). He had no employees (Q 278). He worked as a general contractor (Q 279). When the plaintiff was asked how many contracts he had at the time of the accident, he responded:

> I don't - - it's not like a contract. It's - - I've had two - - I've had, like, about two buildings that are - - like, I've had for a while, and, like two or three other little ones that I do here and there. So it's not like - - I don't have a contract with them. You know, it's not an actual contract, written contract. It's just that I've been with these buildings for quite a few years (Q 280).

[17] The two main buildings were the Barclay Street apartments and another apartment building on Haro Street (Haro Street building) (Q 282 to 283, 285). He had been working with the people at the Barclay Street apartments for 6 or 7 years, whereas he had been working with the people at the Haro Street building for approximately 18 years (Q 286 to 288). He did not have a written contract for either building (Q 289). If the tenants had a "leak or something" they would call the building manager and the plaintiff would do all the work (Q 293). He was paid by the owners of the buildings (Q 294).

[18] There was no negotiating for the work he did; each building knew his rate and what he charged (Q 297). He would invoice them once a month (Q 298). He would be told what work had to be done by email or, as happened most of the time, by "word of mouth" – specifics about a suite would be given to him when he arrived at the building (Q 299). He dealt strictly with the property managers (Q 300). He was not paid by the hour. How much he was paid depended on the job he had to do. For instance, having to close a hole because of a leak usually cost the same. It had cost the same for many years. He did not charge $100 to close a hole one month, and then $400 to perform the same task another month (Q 301 to 302). Having been with the buildings for quite a while, how much he billed was generally known (Q 304). The Barclay Street apartments and the Haro Street building were at least 90% of his business (Q 307). He had keys to all of the apartments in both buildings (Q 319). Before the accident, he did 95% of the work himself. If he needed help with something or it was too much for him to do that month, he would "bring somebody" (Q 326).

[19] A February 20, 2014 memorandum from the Board's Assessment Department advised that neither the plaintiff nor "Georgios Sageorgis Services" was registered with Board at the time of the accident.

[20] Section 1 of Act contains the following definition:

> **"worker"** includes
>
> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;
>
> …
>
> (f) an independent operator admitted by the Board under section 2 (2); and
>
> (g) a person deemed by the Board to be a worker under section 3 (6).

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[21] Section 2 of the Act provides:

> **2** (1) This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the Board.
>
> (2) The Board may direct that this Part applies on the terms specified in the Board's direction
>
> (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
>
> (b) to an employer as though the employer was a worker.

[22] Pursuant to section 2(2)(a) of the Act, and item (f) of the definition of the term worker in section 1 of the Act, an independent operator who purchases Personal Optional Protection coverage is considered a worker (even though the person would not otherwise be a worker).

[23] Policy item #AP1-1-1 of the *Assessment Manual* provides general descriptions of the following categories of persons:

- *Employer* – An employer is a person or entity employing workers. The employer may be a sole proprietor, a partner in a partnership, a corporation, or another type of legal entity. "Employer" is defined under section 1 for purposes of Part 1 of the *Act.* An employer is an "independent firm".

- *Worker* – A worker is an individual who performs work under a contract with an employer and has no business existence under the contract independent of the employer. "Worker" is defined under section 1 for purposes of Part 1 of the *Act*. A worker cannot be an "independent firm".

- *Independent Operator* – "Independent operator" is not defined in the *Act*. The term is referred to in section 2(2) of the *Act* as being an individual "who is neither an employer nor a worker" and to whom the Board may direct that Part 1 applies as though the independent operator was a worker. An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an "independent firm".

- *Labour Contractor* – The Board has created the term "labour contractor" to assist it in determining whether an individual is an employer, worker or independent operator. A labour contractor who is a worker cannot be an "independent firm". For more information about "labour contractors", see Item AP1-1-7.

- *Firm* – A firm is any person or entity carrying on a business.

- *Independent Firm* – The Board has created the term "independent firm" to identify those persons who are either required by the *Act* to register with the Board as employers of workers, or from whom, as unincorporated employers or independent operators, the Board will accept a registration through the purchase of Personal Optional Protection for themselves. An independent firm performs work under a contract, but has a business existence under the contract independent of the person or entity for whom that work is performed. An independent firm may be an individual, a corporation or another type of legal entity. A worker cannot be an "independent firm". For more information about "independent firms", see Item AP1-1-3.

- *Independent Contractor* – An independent contractor is an independent firm.

- *Principal* – A principal is a person who has the direct or indirect power or ability to control or influence the operations of a corporation or similar entity, through the ownership of voting securities, by contract, or otherwise. An officer, director or shareholder active in the operation of a corporation or similar entity is presumed to be a principal of that firm. However, the Board may find that such a person is not a principal where it is shown that the person does not possess direct or indirect power or ability to control or influence the firm's operations.

[24] Policy item #AP1-1-3 of the *Assessment Manual,* "Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms," lists the following factors to consider when distinguishing an employment relationship from one between independent firms:

- 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

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

[25] As set out in policy item #AP1-1-3, the "major test" that largely encompasses all of the factors listed above is whether the individual doing the work has a business existence under the contract independent of the person or entity for whom the work is done.

[26] Policy item #AP1-1-4 of the *Assessment Manual* reads, in part, as follows:

> **(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.

[emphasis added]

[27] The Board's Practice Directive (PD) #1-38-2(A)[1] on assessable payroll, which took effect on May 1, 2010, states that "a sole shareholder of a company is of necessity active in the company."

[28] The plaintiff submits that he was an independent operator who was not registered with the Board at the time of the accident, and therefore cannot be deemed to be a worker.

[29] The defendants, on the other hand, argue that the plaintiff was a worker at the time of the accident. They submit that the plaintiff had been working under an "oral contract for services" with the property manager of the Barclay Street apartments for several years, making the property manager his employer. Furthermore, the defendants argue that when applying the factors in policy item #AP1-1-3 of the *Assessment Manual*, the plaintiff's status as a worker becomes clear:

- The plaintiff was providing services of labour – general contract work to repair and maintain the buildings for which he worked.
- The plaintiff's employer imposed his duties. He was advised by email about what work needed to be done or by being told directly when he arrived at the work site.
- The plaintiff worked under a verbal contract. There were few terms.
- The property managers at the Barclay Street apartments and the Haro Street building were best able to fulfill the obligations of an employer.
- The plaintiff had worked for the Barclay Street apartments and the Haro Street building continually for several years.
- The plaintiff did not hire other persons.

[30] The parties to the legal action have missed the fact that the plaintiff owned his own business called Georgios Sageorgis Services Ltd. at the time of the accident. It is his evidence that he was the sole shareholder of the company, which was incorporated in January 2011. In keeping with PD #1-38-2(A), I accept that the plaintiff was active in the operation of Georgios Sageorgis Services Ltd. when the accident occurred. However, given that Georgios Sageorgis Services Ltd. was not registered with the Board as an employer at the time of the accident, I am unable to rely on policy item #AP1-1-4 to conclude that he was a worker.

[1] Available on the Board's website at www.worksafebc.com

[31] Policy item #AP1-1-3 also contains specific guidelines with respect to parties that would be considered independent firms. Paragraph 4 relates to incorporated companies. It provides the following:

> (4) Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms. If such circumstances exist, a full investigation will be made and the applicant's position determined in accordance with the policies in this *Manual.* Two common situations where corporations will not be considered independent firms are where:
>
> (i) **the corporation is a personal service corporation, (A personal service for this purpose is one where no worker other than a principal active shareholder is employed, and if the firm was not incorporated, the principal active shareholder would clearly be a worker. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.);** or
>
> (ii) the corporation's sole function is to provide an inescapable phase of another firm's business undertaking, it is providing essentially labour only for one firm at a time, and there is a degree of common ownership between the two firms. In such cases, the corporation will be assessed through the operating company at the assessment rate of the operating company. If the corporation is working for more than one firm, or there is not common ownership, the company will be considered a separate employer.
>
> [emphasis added]

[32] When considering the specific guidelines in policy item #AP1-1-3 on incorporated companies, I find that Georgios Sageorgis Services Ltd. was likely a personal service corporation. The plaintiff's evidence on discovery suggests that he did not have any employees at the time of the accident. Furthermore, I am of the view that if the plaintiff – the principal active shareholder – had not incorporated his business, he would clearly be a worker.

[33] I consider the defendants' analysis of the evidence using the factors in policy item #AP1-1-3 to be persuasive. However, I will add that there was likely little opportunity for the plaintiff to make a profit or loss, given his evidence that there was no negotiation for the services he provided and the amount he billed for a particular task

had essentially been the same for years. It also appears that the property managers had significant control over the plaintiff with respect to assigning work, as reflected by May 30, 2014 affidavit from the property manager of the Barclay Street apartments, Ms. Eriksen, where she stated the following:

> I have reviewed my records. On the day of the Accident, I had not arranged for any work to be done on the Property by Mr. Sageorgis nor had I intended to instruct him to undertake any work on that day.

[34] It is not evident from the plaintiff's evidence that his work involved the provision of major equipment or regulatory licensing. Furthermore, his evidence that he would occasionally "bring somebody" if he needed help with something or he had too much to do in a particular month does not persuade me that he was able or required to hire people to assist him with his work. Perhaps the property managers hired the people he brought with him.

[35] All told, the weight of the evidence suggests that the plaintiff had entered into a "contract of service" with the property managers of the Barclay Street apartments and the Haro Street building. I am not convinced that the plaintiff, without incorporation, would have had a business existence under a contract independent of the property managers for the Barclay Street apartments and the Haro Street building. I find that the plaintiff was a worker within the meaning of Part 1 of the Act at the time of the March 21, 2011 accident.

[36] In the alternative, I have considered whether the plaintiff, without incorporation, would have been a labour contractor. Policy item #AP1-1-7 of the *Assessment Manual* states that "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.

[37] One could argue that the plaintiff, as a sole proprietor, was a labour contractor at the time of the accident by accepting that he was not defined as a worker, did not have workers, did not supply major materials or major revenue-producing equipment; however, he was contracting a service to two or more firms – the Barclay Street apartments and the Haro Street building – on an ongoing simultaneous basis.

Therefore, his firm would not be a personal service corporation; it would be an independent firm, as contemplated by policy item #AP1-1-3.

[38] However, since neither the plaintiff nor "Georgios Sageorgis Services" was registered with the Board at the time of the accident, the plaintiff would not be considered a worker owing to his failure to register the company with the Board, in accordance with policy item #AP1-1-4. The plaintiff's injuries would not have arisen out of and in the course of employment because he would not be a worker under Part 1 of the Act.

[39] While recognizing that it is debatable whether or not the plaintiff supplied major materials, given his evidence that he had tiles and drywall in his van when the accident occurred, I am of the view that my initial analysis under policy item #AP1-1-3 is stronger.

[40] I now turn to the issue of whether or not the plaintiff was in the course of his employment when the accident occurred.

[41] In his statement to ICBC, the plaintiff said that he had left home and was on his way to work in his Ford Aerostar van at the time of the accident. He also added:

> … I was heading to the corner of Barclay and Denman. It is like condos that I am working in. I have been on this site for months now. I am the business. …

[42] The plaintiff further indicated in his statement that he continued working after exchanging information with the defendant Barkan. His van, at the time of the accident, contained some paint, a bathtub, some tiles, and some drywall, according to his statement.

[43] The plaintiff wrote in his application for workers' compensation benefits that he was on his way to an apartment to change when the accident occurred.

[44] On the issue of what he was doing at the time of the accident, the plaintiff testified as follows. He was residing on West 11th Avenue in Vancouver on March 21, 2011 (Q 3 to 4). As of March 1, 2011, he had been renting in the Barclay Street apartments while waiting for the possession date of his new home in Port Moody (Q 6 to 7). Having sold his apartment on West 11th Avenue, he was moving his "stuff" between that location and the Barclay Street apartments (Q 8).

[45] On the morning of the accident, the plaintiff left his residence on West 11th Avenue. His destination was the Barclay Street apartments (Q 418, 422). He had slept at his West 11th Avenue residence the night before (Q 469). He did not make any stops between his home and the accident scene (Q 427). He had boxes of personal

belongings in his van and he was taking them to his new apartment (Q 428 to 430). Besides those items, he had an old tub, some drywall, and some minor tools in his van (Q 431). The tub was garbage (Q 437).

[46] When providing his statement to ICBC, the plaintiff did not go into detail about purchasing a "new place" and renting an "other place" on Barclay Street, or how he had been moving his stuff every day to his "new residence" (I assume he was referring to the apartment in the Barclay Street apartments). He was just trying to explain briefly and as quickly as possible what he was doing (Q 452). On the day of the accident, if there was work for him at the Barclay Street apartments, he would not have known until he got there (Q 455). He could not remember if he had any work to do at the Barclay Street apartments on the day of the accident (Q 463). Furthermore, he could not remember if he had any active jobs at the time of the accident besides those at the Barclay Street apartments and the Haro Street building (Q 660 to 661).

[47] When asked why he said in his statement to ICBC that he continued to work after exchanging information with the defendant Barkan, the plaintiff responded:

> I guess - - I don't know. After the accident I could have been a little bit traumatized. I guess that was the easiest way to put it. I didn't get into detail where - - what exactly I'm doing, where I'm going (Q 467).

[48] In addition, when asked why his statement to ICBC listed certain contents, including paint, a bathtub, some tiles, and some drywall, but not the boxes of personal belongings, the plaintiff responded:

> I don't know. That stuff is always in my van. I think it was just easier to say what I had in my van. That's always in my van (Q 471).

[49] After the accident, the plaintiff called his friend, Mr. Karkoglou, to come and unload the "boxes and stuff" from his van (Q 484 to 485).

[50] When questioned by Mr. Ishkanian on redirect, the plaintiff testified as follows. He did not have a job to do at the Barclay Street apartments on the day of the accident (Q 497). When asked if he had dual purposes for going to the Barclay Street apartments – to move his personal belongings and to work at the building – the plaintiff said that he only went there to take his "personal stuff" (Q 499). Furthermore, he did not agree with the part of his ICBC statement where he said he had left his home and was on his way to work at the time of the accident (Q 502). Nor was it true that he

continued to work after exchanging information with the defendant Barkan, as mentioned in his statement to ICBC (Q 505). The plaintiff recalled ICBC asking him if he had stopped anywhere before the accident, but his answer – "no" – is not in his statement (Q 513 to 516). He did not attend to an ICBC office in Surrey to sign his statement and he had not seen his statement prior to litigation (Q 506 to 511).

[51] Policy item #C3-14.00[2] of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), "Arising Out of and in the Course of the Employment" lists nine non-medical factors that are considered in determining whether an injury has arisen out of and in the course of a worker's employment:

- Did the injury or death occur on the employer's premises?
- Did the injury or death occur while the worker was doing something for the benefit of the employer's business?
- Did the injury or death occur in the course of action taken in response to instructions from the employer?
- Did the injury or death occur while the worker was using equipment or materials supplied by the employer?
- Did the injury or death occur while the worker was in the process of receiving payment or other consideration from the employer?
- Did the injury or death occur during a time period in which the worker was being paid a salary or other consideration, or did the injury or death occur during paid working hours?
- Was the injury or death caused by an activity of the employer or of a fellow employee?
- Did the injury or death occur while the worker was performing activities that were part of the worker's job?
- Did the injury or death occur while the worker was being supervised by the employer or a representative of the employer having supervisory authority?

[52] Policy item #C3-19.00 of the RSCM II, "Work-Related Travel," provides the general rule that injuries occurring in the course of travel from a worker's home to the normal place of employment are not compensable. An employment connection generally begins when the worker enters the employer's premises for the commencement of a shift, and terminates when the worker leaves the premises following the end of the shift. As such, a worker's regular commute between home and the normal, regular or fixed place of employment is not generally considered to have an employment connection.

[2] The board of directors of the Board has approved a revised Chapter 3 to the RSCM II. As the revised Chapter 3 applies to injuries or accidents occurring on or after July 1, 2010, it applies in this case.

[53] Policy item #C3-19.00 also addresses traveling employees by providing the following:

> "Traveling employees" are workers who:
>
> - typically travel to more than one work location in the course of a normal work day as part of their employment duties; or
>
> - 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.
>
> An employment connection generally exists throughout the travel undertaken by traveling employees, provided they travel reasonably directly and do not make major deviations for personal reasons. This is so regardless of whether public or private transportation is used.
>
> An employment connection may not exist for the portion of travel between the traveling employee's home and the employer's premises that is undertaken at the commencement or termination of each work day. These workers may be considered to be on a "regular commute" for that portion of their travel, which is discussed in Section A above.
>
> Examples of traveling employees include, but are not limited to, taxi drivers, emergency response personnel, transport-industry drivers, cable installers, home care workers, many sales representatives, and persons attending off-site business meetings.

[54] The plaintiff submits that he was taking personal belongings to his new residence at the time of the accident, and therefore was not in the course of his employment. He maintains that his travel when the accident happened was entirely for personal reasons and the connection to any employment was so tenuous that it was overtaken by personal factors.

[55] The plaintiff relies on a July 8, 2013 statement from Mr. Karkoglou. He said that he met with the plaintiff on the morning of the accident between 9:00 a.m. and 11:00 a.m. at the Barclay Street apartments to assist him with his move. Upon Mr. Karkoglou's arrival, the plaintiff mentioned that he had been in a car accident and asked him to empty the van because he did not want to lift anything. According to Mr. Karkoglou, he unloaded the van for the plaintiff and assembled a few things in his apartment; however, most of the plaintiff's things were already there from the weekend.

[56] The defendants submit that the plaintiff was a traveling employee at the time of the accident. They cite *WCAT-2012-00911*[3], issued on April 3, 2012, which involved a plaintiff who provided cleaning and janitorial services. The panel, after considering other decisions on traveling employees, provided the following reasoning at paragraphs 84 to 86 to supports its conclusion that the plaintiff was a traveling employee:

> [84] Husnain's employment for Quest involved travel to both the Oak Dental Centre and Hycroft Centre. **A question to be addressed is whether travel to two work locations in the course of a normal workday as part of the worker's employment duties is sufficient to make the worker a travelling employee, or whether travel to multiple (three or more) locations is required.**
>
> [85] The decisions cited above generally concern workers who travelled to multiple work locations. However, the decision involving the worker who returned to his usual place of employment at the mine every night to throw the switch only involved one location (but an additional trip for the purpose of throwing the switch). Workers' compensation coverage applied because the travel to throw the switch was such a significant aspect of the service he was employed to provide. This supports a conclusion that travel to two work locations can support a finding that a worker is a travelling employee, where such travel is a regular feature of the normal workday.
>
> [86] I consider that an analogy may be drawn to the situation of a home care worker, assigned by an agency to provide services to two different clients in their homes. I agree with and adopt the reasoning set out in *WCAT-2006-02659*. **The regularity of the home care worker's travel to the home of the first client, and the fact that a home care worker only had two clients, would not change the fact that travel was an integral or essential aspect of the service provided. Accordingly, the worker is appropriately categorized as a travelling employee. I consider that the same reasoning applies to Husnain's travel to perform cleaning services for Quest, which involved travel to two work locations in the course of a normal workday as part of her employment duties.**

[3] WCAT decisions are available at www.wcat.bc.ca

[emphasis added]

[57] It is worth noting that the panel in *WCAT-2012-00911* referred to the July 1, 2010 policy amendments to Chapter 3 of the RSCM II and how the definition of the term "traveling employee" contained in policy item #C3-19.00 expressly includes workers who typically travel to more than one work location in the course of a normal work day as part of their employment duties.

[58] The defendants also point to the fact that the plaintiff was transporting drywall, paint, and tiles at the time of the accident, further evidence that he, as a traveling employee, was in the course of his employment when the accident occurred. Moreover, the defendants submit that the main purpose of the plaintiff's travel at the time of the accident was work. His intention to drop off personal belongings at the Barclay Street apartments was no more than an incidental intrusion into the work-related purpose of his travel. The fact that Mr. Karkoglou's July 8, 2013 statement does not specify the nature of the items that he unloaded from the plaintiff's van supports such a conclusion, as the defendants argue.

[59] In rebuttal, the plaintiff submits the errors and speculation in the defendants' submission stem from an erroneous application of the wrong time frame to the plaintiff's status. For instance, the plaintiff argues that he provided services of labour, but only when he was working, which he was not doing at the time of the accident. The plaintiff also claims there is no evidence to support the allegation that he was engaged in any work-related activity at the time of the accident. He says that statements by a party to ICBC cannot determine their status. The statement he provided to ICBC has certain defects, as addressed during his discovery. Furthermore, the plaintiff submits that his sworn discovery evidence should be preferred over the "unsigned extemporaneous statement" he provided to ICBC. Stating the courts have ruled discovery evidence is preferable to written documents, the plaintiff cites the following passage from *Cambie Surgeries Corporation v. British Columbia*, 2014 BCSC 361, where the Associate Chief Justice concluded:

> [79] I considered the Physicians['] assertion that they should be permitted to answer the questions in writing and conclude that the inquiries should be made orally under oath or solemn affirmation. I foresee that permitting written answers could cause the process to become protracted by disagreements about the nature of the question or the appropriate scope of reply, perhaps even resulting in a further court application. I view oral testimony as more efficacious than written.

[60] Again, the plaintiff contends that the sole purpose of his journey was to take personal belongings to his new residence. He disputes that he was a traveling employee, on the basis that he was not traveling between two work points at the time of the accident.

[61] Besides Ms. Eriksen's affidavit, where she deposed, based on a review of her records, that she had not arranged for the plaintiff to do any work or intended to instruct him to do any work at the Barclay Street apartments on the day of the accident, the plaintiff relies on the May 30, 2014 affidavit from Mr. Karkoglou. It is consistent with his July 8, 2013 statement, except he added that he did not have any intention to work that day and was not asked to do so. He was simply there to assist his friend, the plaintiff, with his move to his apartment.

[62] In reply, the defendants, while agreeing that WCAT is the ultimate finder of fact, submit that considerable weight should be given to the plaintiff's statement to ICBC. They further submit that the plaintiff's "complete failure to mention in his initial statement to ICBC that the purpose of his travel was to move his personal belongings leads to the conclusion that either no such purpose existed, or this purpose was no more than an incidental intrusion to the main purpose of working." Furthermore, the defendants discount Ms. Eriksen's affidavit by pointing to the plaintiff's discovery evidence that he was told what work had to be done by email or, as occurred most of the time, by "word of mouth" – being told when he got there which suites were moving at the end of the month and what work had to be done (Q 299).

[63] The defendants also argue that Mr. Karkoglou's affidavit suggests that the plaintiff's intention to drop off his personal belongings was only an incidental intrusion of personal activity into work activity, since he said in his affidavit that most of the plaintiff's personal belongings had been moved into his apartment on the weekend.

[64] In *Cambie Surgeries Corporation*, the defendants had applied for an order that certain physicians be examined under oath on the matters in question in the legal action. The order was granted, subject to exceptions. The Court in *Cambie Surgeries Corporation* considered discovery evidence to be preferable to written documents. However, I am of the view that when analyzing evidence, the contents of a statement that was given contemporaneously with the happening of an event must be compared to the sworn discovery evidence of the individual who provided the statement. In this case, the plaintiff has put forth three scenarios as to why he was going to the Barclay Street apartments: he was going there to work, as mentioned in his unsigned statement to ICBC; he was going there to change, as indicated in his December 19, 2012 application for workers' compensation benefits; or he was delivering personal belongings, as stated on discovery.

[65] As mentioned, the inconsistency in the plaintiff's evidence puts his credibility in issue. My assessment of the plaintiff's credibility is based on *Faryna v. Chorny*, [1952] 2 D.L.R. 354, where the British Columbia Court of Appeal said that the credibility of a witness "cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth." Rather, "…the real test of the truth of the story of a witness…must be its harmony with the preponderance of the probabilities

which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[66] Despite the plaintiff's evidence on discovery, I give considerable weight to the statement he provided over the telephone to ICBC on March 21, 2011. It was taken on the day of the accident, presumably at a time when neither litigation nor the need to commence a claim with the Board was contemplated. Granted the plaintiff did not sign his statement; however, at no time during his discovery did he deny providing a statement to ICBC.

[67] I have considered the evidence from Ms. Eriksen and Mr. Karkoglou. It is worth noting that Mr. Karkoglou's evidence is inconsistent with the plaintiff's evidence, in that the plaintiff said on discovery that he called Mr. Karkoglou after the accident to come and unload the "boxes and stuff" out of his van. Mr. Karkoglou did not say in his statement or affidavit that the plaintiff had called him. I also consider the defendants' argument about Mr. Karkoglou's affidavit to be persuasive.

[68] Ms. Eriksen's affidavit, on one hand, supports the plaintiff's evidence, since she had no record of him working on the day of the accident and specifically recalled providing him with an elevator key to move into his apartment. On the other hand, if the plaintiff was usually assigned his work duties by "word of mouth", it raises the question whether Ms. Eriksen would have had any record of the work he did on the day of the accident. Furthermore, her evidence that she recalled giving the plaintiff an elevator key so he could move into his apartment is not inconsistent with the plaintiff having worked on the day of the accident, since he may have received the elevator key at an earlier time.

[69] I do not accept the plaintiff's evidence that any references about him working at the Barclay Street apartments in his ICBC statement were made in error. His reference to going to work and continuing with work once he exchanged information with the defendant Barkan, coupled with the absence of any reference to him being in the process of moving to the Barclay Street apartments, precludes me from concluding that his statement was completely flawed. If the plaintiff's reason for going to the Barclay Street apartments on the day of the accident was to continue with his move, I assume he would have mentioned it to ICBC, at least in passing. The fact that he did not list the boxes of personal belongings among the contents of his van is telling.

[70] At the same time, I am puzzled why the plaintiff did not indicate in his application for workers' compensation benefits that he was delivering personal belongings to his new residence when the accident happened. The lack of consistency between the plaintiff's evidence on discovery, what he wrote in his application for workers' compensation benefits, and his statement to ICBC is problematic for the plaintiff in terms of his credibility. The fact that the plaintiff provided his statement to ICBC on the day of the accident leads me to conclude that it is likely the most reliable account of what he was

doing at the time of the accident. I find that the plaintiff was likely on his way to work when the accident occurred, as conveyed to ICBC.

[71] I do not accept that the plaintiff was a traveling employee, as contemplated by policy item #C3-19.00 of the RSCM II, when the accident occurred. There is no compelling evidence that he typically traveled to more than one work location during the course of a normal work day as part of his employment duties. It is his evidence that the bulk of his work was done at the Barclay Street apartments and the Haro Street building. He could not remember if he had any active jobs at the time of the accident besides the work he did at those two locations. Furthermore, he did not testify if he typically traveled between the Barclay Street apartments and the Haro Street building during the course of a normal work day to perform his work duties. Therefore, I can distinguish *WCAT-2012-00911* from this matter.

[72] By accepting the plaintiff was going to work on the day of the accident, I find that his normal place of employment was the Barclay Street apartments. The indication in his statement to ICBC that he had been on the site for months buttresses my conclusion in this regard. Since the accident happened in the course of the plaintiff's travel from his residence on West 11th Avenue to his normal place of employment, I find on the basis of policy item #C3-19.00 of the RSCM II that his injuries would not attract Board coverage because he was commuting to work.

[73] In the event that I am wrong, and the plaintiff's sole reason for driving to the Barclay Street apartments on the morning of March 21, 2011 was to deliver personal belongings to the apartment he rented as of March 1, 2011, his activities at the time of the accident, when addressed under policy item #C3-14.00 of the RSCM II, would not have had a work connection. In other words, if I were to accept the plaintiff's evidence on discovery, I would reach the same conclusion that he was not in the course of employment when the accident occurred.

[74] I find that the plaintiff's travel from his residence on West 11th Avenue to the Barclay Street apartments on the morning of March 21, 2011 would not have attracted Board coverage. Accordingly, I find that the plaintiff's injuries resulting from the March 21, 2011 accident did not arise out of and in the course of his employment.

[75] Given my conclusion on this issue, it appears unnecessary to address the status of the defendant Barkan. I have therefore restricted my certification to the status of the plaintiff. If further certification regarding the status of the defendant Barkan remains necessary to the legal action, counsel may notify WCAT and the request will be addressed on an expedited basis.

Conclusion

[76] I find that at the time of the motor vehicle accident on March 21, 2011:

(a) The plaintiff, Georgios Sageorgis, was a worker within the meaning of Part 1 of the Act; and

(b) The injuries suffered by the plaintiff, Georgios Sageorgis, did not arise out of and in the course of his employment within the scope of Part 1 of the Act.

Andrew Waldichuk
Vice Chair

AW:ml/gw

NO. M124180
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

GEORGIOS SAGEORGIS

PLAINTIFF

AND:

PETER KIEWIT INFRASTRUCTURE CO. and
ANNA BARKAN

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, GEORGIOS SAGEORGIS, 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, March 21, 2011:

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

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

CERTIFIED this day of June, 2014.

_____

ANDREW WALDICHUK
VICE CHAIR

NO. M124180
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

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PLAINTIFF

AND:

PETER KIEWIT INFRASTRUCTURE CO. and ANNA BARKAN

DEFENDANTS

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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