WCAT **Workers' Compensation Appeal Tribunal**

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WCAT Decision Number: **WCAT-2015-02949**
WCAT Decision Date: **September 25, 2015**

Panel: Andrew Waldichuk, Vice Chair

WCAT Reference Number: 141325-A

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. M127391
Franco Mazzocchio v. City of Vancouver, Graham Sibley, Mainroad Lower Mainland Contracting Ltd. and Darrell D. Letendre

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Applicants: City of Vancouver and Graham Sibley
(the "defendants")

Respondent: Franco Mazzocchio
(the "plaintiff")

Representatives:

For Applicants: Sim Harry
HARRIS & BRUN

For Respondent: Britni M. Troy
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Introduction

[1] On January 12, 2011, the plaintiff, Franco Mazzocchio, was a passenger in a motor vehicle owned by the defendant, City of Vancouver (City), and driven by the defendant, Graham Sibley, when, on the Barnet Highway at or near Reed Point Way in the City of Port Moody, the motor vehicle collided with a truck equipped with a snow plow owned by the defendant, Mainroad Lower Mainland Contracting Ltd., and driven by the defendant, Darrell D. Letendre.

[2] At the time of the accident, the plaintiff and the defendant Sibley, and two other passengers, all of whom were employees of the City, were traveling in the motor vehicle on their way to work as part of a Ride-Share Agreement that the City had in place.

[3] The plaintiff has filed a Notice of Discontinuance with respect to Mainroad Lower Mainland Contracting Ltd. and Darrell D. Letendre.

[4] 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.

[5] Ms. Harry, counsel for the defendants Sibley and the City, initiated this application by letter of June 6, 2014. The defendants seek determinations regarding the status of the plaintiff and that of the defendant Sibley at the time of the January 12, 2011 accident.

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[6] The plaintiff has commenced a related Part 7 action against the Insurance Corporation of British Columbia (ICBC). WCAT invited ICBC to participate in this application as an interested person, but it did not indicate that it wished to do so.

[7] The plaintiff commenced a provisional 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 defendants Sibley and the City. I will consider the evidence anew for the purposes of this application, and any prior Board decisions are not binding on me.

[8] The plaintiff was examined for discovery on April 17, 2011. A copy of the discovery transcript was provided to WCAT. The trial of the legal action is scheduled to commence on July 4, 2016.

[9] Written submissions were invited and received from the plaintiff and the defendants Sibley and the City. I find that 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)

[10] Determinations are requested with respect to the status of the plaintiff and the defendant Sibley at the time of the January 12, 2011 accident.

Jurisdiction

[11] 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, Franco Mazzocchio

[12] Vania Tse, the Sustainable Commuting Program Administrator at the City, wrote the following in a January 10, 2013 letter with respect to the plaintiff's participation in a fleet rideshare program:

> This letter is to confirm that Mr. Franco Mazzocchio is an employee of the City of Vancouver. Mr. Mazzocchio is also a participant in the City of Vancouver's Fleet Ride Share Program, which allows city workers to use city vehicles to car pool with fellow city employees to and from work. City employees are not compensated for the time spent commuting to and from work in the City's vehicles.[1]

[13] The plaintiff and the defendant Sibley, along with the two other passengers who were in the motor vehicle at the time of the accident – Ray Chernoff and Navrus Engineer – in November 2010 signed a City Ride-Share Agreement as participants. The opening paragraph of the agreement stipulated that the City agreed to licence the use of vehicle number A0154 to the participants for the purpose of commuting between their residences and a common destination.

[14] The agreement also set out the responsibilities of the participants in numbered paragraphs, dealing with such things as the following: the approval of drivers by the ride-share program administrator, the use of the vehicle only for travel between the participants' residences and the common destination (approved by the administrator), the location where the vehicle was to be parked overnight and on weekends, the ability of the participants to make rules between themselves for the day-to-day operation of the ride-share, the payment of a monthly ride-share fee to the City, and the duty of the driver of the vehicle to report and provide details to the administrator of any accident or collision involving the vehicle.

[15] Under paragraph 17 of the agreement, each participant was to acknowledge and agree that the use of the vehicle "may constitute a taxable benefit over and above the Ride-share Fee," whereas paragraph 18 of the agreement stated that each participant "agrees that participation in the car pool is off-duty and is not in the course of or in furtherance of his or her employment."

[1] All quotes are reproduced as written except where indicated otherwise.

[16] An e-mail that Ms. Tse sent to Ms. Harry on October 28, 2013 confirmed that there were four participants registered with the ride-share vehicle (number A0154) at the time of the accident. Furthermore, according to Ms. Tse, each participant paid $72.68 per month, which was deducted from payroll. She stated that the payroll deduction covered the cost of gas, insurance, and vehicle maintenance.

[17] The plaintiff testified as follows during his examination for discovery. There was a "car pool situation" on the day of the accident (Q 19). The defendant Sibley was driving (Q 21). There was a location to meet just near the Barnet Highway (Q 26). The plaintiff had left his home at 5:55 (a.m.) and arrived at the pick-up location shortly thereafter (Q 30). The other passengers in the vehicle were Mr. Engineer and Mr. Chernoff (Q 33 to 36). They always took the same route from the pick-up location to the work location (Q 41). It involved traveling on the Barnet Highway to Hastings Street, followed by a left turn onto Clark Drive and a right turn onto Venables Street before approaching another street that took them to the National Avenue works yard (Q 42 to 44). That is the route they were going to take at the time of the accident (Q 45). There were no planned detours from the route (Q 48).

[18] The plaintiff was not being paid while traveling to work on the morning of the accident (Q 119). He had been participating in the City's ride-share program for approximately two weeks (Q 131). The "same group of guys" had been using their own vehicles in their own ride-share program for approximately three months (Q 132). It was not part of the City's ride-share program, which began in January 2011 (Q 133 to 136, Q 142). The plaintiff thought it was Mr. Engineer who contacted the City to obtain the documentation about the ride-share program (Q 153). The plaintiff understood, when signing up for the ride-share program, that they would take the City vehicle and each pay approximately $90.00 per month, which covered the use of the vehicle and the gas (Q 163 to 164, Q 167). The vehicle was used for traveling to and from work, and then a boss would fill it with gas while using it during the day (Q 169). To his knowledge, no one in his ride-share program put gas in the vehicle (Q 170).

[19] According to the Ride-Share Agreement with the City, the vehicle was to be driven only to and from work (Q 173). To the plaintiff's knowledge, the vehicle was never used for personal use (Q 181). He recalled signing the Ride-Share Agreement (Q 187). When the plaintiff was asked if it was his understanding the City could terminate the agreement or his participation in the ride-share program at any time, he responded:

> Actually, no I don't -- I mean, I don't really recall that. Like I stated, I -- it was a pretty simple thing. You know. $90 a month, back and forth to work, ah, we do the environment some good and, ah drive the City car. (Q 217)

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[20] The plaintiff knew that the City was responsible for the maintenance of the vehicle (Q 222). All of the participants in his ride-share were City employees (Q 226). After being asked about certain clauses in the Ride-Share Agreement, the plaintiff stated:

> Well, like I said, I briefed it over it. I mean, you know, um, being an employee of the City of Vancouver, you know, as I said, talking to Navrus, you know, I just -- yeah, I just felt it was a pretty basic agreement, you know. Like, um, you know, just, basically, my information that was needed and that was it. (Q 239).

[21] As well, when asked why he decided to participate in the ride-share program, the plaintiff said:

> Um, just mainly to, ah -- you know, it was -- it made sense for money reasons and, ah, it was just we were all coming from the same area. So it just kind of made sense. (Q 263)

[22] Documentation from the City about its action plan for becoming the world's greenest city by 2020, including information from its website about incentives under the "Sustainable Commuting" program for City employees to rely on carpooling, has been provided to WCAT.

[23] 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;

[24] Based on the parties' submissions, there is no dispute that the plaintiff was a worker within the meaning of Part 1 of the Act at the time of the January 12, 2011 accident, which I certify. The more contentious issue is whether his injuries arose out of and in the course of his employment.

[25] 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," explains that "arising out of the employment" generally refers to the cause of the injury or death, whereas "in the course of the employment" generally refers to whether the injury or death happened at a time and place and during an activity that is consistent with, and reasonably incidental to, the obligations and expectations of the employment. As well, policy item #C3-14.00 provides a non-exhaustive list of 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?

[26] 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. Under the heading "Regular Commute," policy item #C3-19.00 provides the following:

> An employment connection generally begins when the worker enters the employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift.

[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.

> Therefore, 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. This includes injuries or death that occur on a worker's regular or routine commute where:
>
> - the employer provides the worker with a vehicle for the purpose of work and also allows the worker to use the vehicle for personal use outside of work hours; or
> - the worker commutes to work in his or her own vehicle and uses the vehicle for a work purpose during the worker's shift.
>
> There are, however, certain situations when a worker's regular commute may be considered part of a worker's employment.

[27] Under the heading "Extension of the Employer's Premises," policy item #C3-19.00 reads as follows

> …if an employer provides a specific vehicle, like a crew bus, to transport its workers to and from the employer's premises, injuries or death occurring while traveling in this employer-controlled vehicle may be considered to arise out of and in the course of the employment, as the crew bus is considered to be an extension of the employer's premises.
>
> The employer's control of the transportation does not need to be exclusive for this factor to be in favour of coverage. For example, coverage may also be extended where the employer contracts out the crew bus service to transport its workers to and from work.

[28] I have reviewed the extensive submission from the defendants Sibley and the City. Starting with the first factor (on the employer's premises) in policy item #C3-14.00 of the RSCM II, they argue that the vehicle in which the plaintiff was traveling at the time of the accident was akin to a crew bus provided by the City for its employees, so that it should be deemed an extension of the City's premises. To support their position, the defendants Sibley and the City cite *WCAT-2009-02426*[3], issued on September 18, 2009, which addressed the crew bus situation of workers who, at the time of an accident, were in a van owned by the blueberry farm that employed them. As the panel found in that decision, it was not significant whether travel time was being paid when the accident occurred.

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

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[29] In addition, the defendants Sibley and the City rely on *WCAT-2009-02574*, issued on October 1, 2009, where the panel considered the Board's former policy items #18.20, "Provision of Transportation by Employer," and #18.21, "*Provision of Vehicle by Employer,*" which dealt with the crew bus situation and the significance of an employer providing a worker with a vehicle for the purpose of work, and allowing personal use of the vehicle outside of work hours. The panel reasoned as follows at paragraphs 39 and 40:

> [39] The rule regarding the provision of workers' compensation coverage for travel in a vehicle provided by the employer (as involving a deemed extension of the employer's premises), does not apply when the employer provides the worker with a vehicle for the purpose of work and allows personal use outside of work hours. An injury occurring while travelling in that vehicle to and from work will not be compensable just because the employer provided the vehicle. **Where personal use of the vehicle is permitted, the vehicle is no longer viewed as an extension of the employer's premises.** Since commuting to and from work is generally viewed as being personal in nature, then such travel is reasonably characterized as being part of the personal use of the vehicle.
>
> [40] **Implicitly, the policy at item #18.21 appears to indicate that when the employer provides the worker with a vehicle for the purpose of work and does not allow personal use outside of work hours, an injury occurring while travelling in that vehicle to and from work will be compensable (as the vehicle is deemed to be an extension of the employer's premises).**
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> [emphasis added]

[30] The panel in *WCAT-2009-02574* then went on to address in paragraph 41 the interplay between policy item #18.21 and policy item #18.40, the latter of which concerned traveling employees, and proceeded with its analysis on the assumption that "workers' compensation coverage would apply if the plaintiff was provided with the use of a vehicle by her employer and was not permitted to use the vehicle except for work purposes."

[31] The defendants Sibley and the City also cite other WCAT decisions (*WCAT-2010-01309* and *WCAT-2014-00887*), decided under the Board's former and current policy on crew bus situations, to support their position that the first factor in policy item #C3-14.00 of the RSCM II has been satisfied. Also mentioned within their

submission is *Appeal Division Decision #93-0073*, *"Provision of Transportation by Employer*," 9 *Workers' Compensation Reporter* 679,[4] where the panel reasoned, under the Board's former policy, that it did not matter whether the employees were required to use the employer's transportation, as set out below:

> Where transportation to and from work is provided by the employer, in the form of a specific vehicle and a driver, it does not matter whether or not the employees are required to use the employer's transportation. If they do, then, for the purposes of workers' compensation, their employment begins when they enter the vehicle and would only cease if they agreed to and took a significant deviation from their route for personal reasons. Thus, on the nights when these employees were riding to and from work in the van provided by the employer, they were covered under workers' compensation while riding in the van. That clearly would fall within Item #18.20 of the Claims Manual.

[32] As for the factor regarding the employer's benefit, the defendants Sibley and the City argue that the plaintiff's participation in the "Ride-Share Program branch of the Sustainable Commuting Program was a direct benefit to the City in achieving its goal to become the greenest city in the world by 2020." They also rely on that argument to say that the plaintiff's injuries occurred while he was performing activities that were part of his job.

[33] The other factors under policy item #C3-14.00 that support Board coverage for the plaintiff, according to the defendants Sibley and the City, include the following: instructions from the employer – as reflected by the nature of the Ride-Share Agreement; equipment supplied by the employer – given that the City provided the vehicle and imposed restrictions over its use; and, activity of the employer or of a fellow employee – as reflected by the fact that the plaintiff's injuries occurred while the defendant Sibley was operating the vehicle.

[34] The plaintiff, on the other hand, submits that he was not in the course of his employment at the time of the accident. Looking at the factors in policy item #C3-14.00 of the RSCM II, the plaintiff argues that his injuries did not occur on his employer's premises. He maintains that the monthly payment he made each month to be part of the ride-share program distinguished his circumstances from those involving a crew bus. In a crew bus situation, according to the plaintiff, the employer "typically bares [*sic*] all of the costs associated with the transportation, and has total practical control over delivery of the services." Moreover, the plaintiff points to the fact that the Ride-Share

[4] Decisions of the former Appeal Division are available at www.worksafebc.com

Agreement allows for individuals who are not City employees to be participants, with certain conditions.

[35] In addition, the plaintiff argues that he was not doing anything for his employer's benefit when the accident occurred. He was commuting to work. Little or no weight should be given to the argument of the defendants Sibley and the City about the plaintiff's participation in the City's ride-share program benefitting the City's goal to be the greenest city because the offered incentives would essentially apply to anyone commuting to and from work under the City's "Sustainable Commuting" program. By extension, this would be contrary to the Board's general rule that there is no coverage while commuting to and from work.

[36] As for the factor regarding instructions from the employer, the plaintiff submits that the ride-share program was voluntary and there is no evidence from the defendants Sibley and the City with respect to the application and enforcement of the Ride-Share Agreement. He argues that this factor does not support Board coverage, as is the case with respect to the following factors: the receipt of payment or other consideration; the exposure to the same risk as while traveling during a normal commute; an injury caused by the activity of a fellow employee; an injury occurring while performing regular job duties; and, an injury occurring while being supervised by the employer. The plaintiff also highlights paragraph 18 of the Ride-Share Agreement, which states that a participant participating in the carpool is off duty and not in the course of his or her employment.

[37] The plaintiff takes the position that his circumstances are distinguishable from those in the WCAT decisions upon which the defendants Sibley and the City rely. He cites *WCAT-2009-00878,* issued on March 27, 2009, where the panel addressed the situation of workers traveling from Squamish to Whistler B.C. to work as housekeepers at a hotel. It typically involved a carpooling arrangement whereby the workers paid the travel allowance of $7.25, which they received from the employer, to the driver of the vehicle. The panel reasoned as follows at paragraphs 32 and 33:

> [32] I consider it significant that, on the evidence provided, the employer played no role in arranging or facilitating the travel arrangements of its workers apart from the payment of a travel allowance. The evidence does not show, for example, that the employer contracted with any particular worker to provide transportation to other workers. For example, consideration might be given to whether a worker's personal vehicle amounted to a crew bus, where that worker was being paid a premium for providing such transportation. In this case, the workers were free to make whatever transportation arrangements they wished. It is conceivable that some workers might choose to drive their own vehicle, others might car pool and

> share expenses, or a worker might elect to provide a ride to another worker without charge. The actual transportation arrangements which were described in this case, whereby each passenger would normally pay the driver $6.00 a day towards the cost of transportation, would appear to have been a practical and economical method of travel.
>
> [33] Policy at RSCM I item #18.20 stipulates that the fact that coverage does not extend to include routine commuting could override the fact that the worker is being paid a travel allowance or a wage to cover the commuting. I find that this policy applies to the plaintiff's circumstances. I am not persuaded that there are sufficient factors linking the plaintiff's travel to her employment, so as to support a conclusion that her travel arose out of and in the course of her employment. I consider that her travel was in the nature of routine commuting, and the payment of a nominal travel allowance of $7.25 per day in connection with her daily travel between Squamish and Whistler is not sufficient to support a conclusion that her travel was part of her employment.

[38] The plaintiff also cites *WCAT-2010-02558*, issued on September 23, 2010. In that case, the plaintiffs were employed by Ucluelet Harbour Seafoods Ltd. (UHS) in Ucluelet B.C., and were returning to their homes in Port Alberni B.C. at the end of their work shift when they were involved in a motor vehicle accident. The evidence showed that UHS, to encourage carpooling, offered a $25.00 fuel card for each return trip between Port Alberni and Ucluelet to the driver of a vehicle when three or more UHS employees elected to carpool together. The panel reasoned as follows at paragraphs 25 and 26:

> [25] With respect to the general criteria at RSCM II item #14.00, the majority of these factors do not point to the plaintiffs' accident as being one which arose out of and in the course of their employment. The accident did not occur on the employer's work site. As travel to and from the work site is normally necessary for workers, and as workers' compensation coverage does not generally extend to commuting, such travel would not normally be viewed as being for the employer's benefit. The travel in this case was not taken in response to an employer's instructions. The employer did not provide equipment or materials. The employer's contribution towards travel expenses was $25.00, or approximately $5.00 per employee for a 200 kilometre round trip. Employees were not normally exposed to the risks of travel as part of their employment (except where they availed themselves of travel in the

bus service provided by the employer). At the time of the accident, the vehicle was being driven by a co-worker. The workers were not being supervised, and the workers were not performing activities that were part of the regular job duties at the time of the accident.

[26] Policy at RSCM II item #18.20 explains that in some situations, the employer may let the worker choose her or his own mode of transportation, but pay for all or part of the costs of this transportation. I consider that the situation of an employer paying each worker a travel allowance of $5.00, and that of an employer providing the driver a fuel card of $25.00 in relation to the travel of five employees, to be essentially the same. I consider that the plaintiffs' travel in such a carpooling arrangement is reasonably viewed as being in the nature of commuting. The fuel card credit paid by the employer essentially involved reimbursement of the expenses for the 200 kilometre round trip. **Pursuant to the policy at RSCM II item #18.20, I find that the fact that workers' compensation coverage does not extend to include routine commuting overrides the fact that the plaintiffs were being paid a travel allowance to cover the commuting. This is distinct from the crew bus situation which can be deemed to be an extension of the employer's premises. The lack of direct involvement by the employer in coordinating or directing the carpooling arrangements reinforces the conclusion that the plaintiffs were not being provided with transportation by the employer.**

[emphasis added]

[39] In reply, the defendants Sibley and the City raise a number of points, including an argument in response to paragraph 18 of the Ride-Share Agreement, which they maintain has no bearing on this determination because compensation under the Act is compulsory unless specifically excluded under the Act. Moreover, they argue that an employer or employee cannot opt out of or waive compulsory coverage by contract. The defendants Sibley and the City further submit that it is reasonable the Ride-Share Agreement had not been enforced because it was relatively new by the time of the accident. Lastly, in response to the plaintiff's position that the requirement for him to make a monthly payment to participate in the ride-share program can be distinguished from the crew bus situation where an employer typically bears the costs associated with the transportation and exudes control over the delivery of the services, the defendants Sibley and the City maintain that Board policy does not require an employer to cover the costs associated with transportation in a crew bus situation.

[40] Though WCAT panels are not bound by precedent, the reasoning in prior decisions may provide useful guidance.

[41] I note with interest how the panels in *WCAT-2009-00878 and WCAT-2010-02558* considered whether there was compelling evidence of a connection between an employer and a carpooling arrangement so as to bring it within a crew bus situation. In this case, the plaintiff's evidence establishes that he and Messrs. Sibley, Chernoff, and Engineer had an informal carpooling arrangement among themselves before the City's ride-share program started in January 2011. The Ride-Share Agreement shows that all of them became participants in the ride-share program by signing the agreement in November 2010. Furthermore, the City's Sustainable Commuting Program Administrator confirmed that each participant paid $72.68 per month to cover the cost of gas, insurance, and vehicle maintenance. I find that the participants had, for all intents and purposes, entered into a contract with the City for the use of a particular City vehicle (number A0154) when commuting to and from work.

[42] I distinguish the plaintiff's carpooling arrangement with the City from that of workers making a daily commute to and from work in a personal vehicle with the benefit of an employer paying a travel allowance or providing a fuel card to offset the financial burden. The evidence in this case establishes that the City's ride-share program was part of its action plan for becoming the world's greenest city by 2020, which encourages carpooling, among other things.

[43] Policy item #C3-19.00 of the RSCM II includes the statement about the personal use of an employer-provided vehicle outside of work hours. Consistent with the panel's reasoning in *WCAT-2009-02574,* it seems to suggest, implicitly, that Board coverage may apply during a worker's commute to and from work where personal use of the employer-provided vehicle outside of work hours is not permitted. I also recognize that policy item #C3-19.00 leaves open the possibility that some crew bus situations may not be viewed as an extension of the employer's premises. That said, given that the plaintiff was traveling in an employer-provided vehicle at the time of the accident, coupled with the compelling evidence that the plaintiff's circumstances were akin to a crew bus situation, I find that I am able to decide this matter by applying policy item #C3-19.00. I do not consider it necessary to address all of the factors in policy item #C3-14.00 of the RSCM II to determine if the plaintiff was in the course of his employment when the accident occurred.

[44] The Ride-Share Agreement is central to this determination. It outlines the stringent requirements that the City imposed with respect to, for example, the approval of participants in the ride-share program, how the vehicle was to be used, the safe and courteous manner of operating the vehicle, and where the vehicle was to be parked

when not in use. Provisions in the agreement also governed the powers of the administrator and the ability of the City or any participant to terminate participation in the ride-share program.

[45] To say the least, the Ride-Share Agreement set the parameters for the plaintiff and his co-workers with respect to the use of the City vehicle. As well, the plaintiff's discovery evidence suggests that it made sense for him to take advantage of the ride-share program for financial reasons and because the "same group of guys" were driving in to work from the same area. It appears that he also wanted to help the environment, consistent with the City's 2020 greenest city action plan. Unlike the commuters in *WCAT-2009-00878 and WCAT-2010-02558*, there is persuasive evidence of a connection between the City and the plaintiff's commuting arrangement. This is reflected by the clause in the Ride-Share Agreement that allowed the participants to make rules among themselves about the day-to-day operation of the ride share, provided that they were not inconsistent with the agreement or directions from the administrator.

[46] I also give weight to the fact that the Ride-Share Agreement only allowed the vehicle to be used for travel between the participants' residences and the common destination (approved by the ride-share program administrator). The fact that it did not allow for the vehicle to be driven for personal use outside of work hours weighs in favour of the plaintiff having Board coverage during his commute to work on the day of the accident, as supported by the panel's reasoning in *WCAT-2009-02574.*

[47] Ms. Tse's January 10, 2013 letter suggests that the plaintiff was not being paid by his employer while commuting to and from work under the City's ride-share program, which would not support Board coverage, according to policy item #C3-14.00 of the RSCM II. I have considered, however, the requirement of participants in the ride-share program to pay a monthly fee to the City. According to Ms. Tse's October 28, 2013 e-mail, the monthly payroll deduction of $72.68 covered the cost of gas, insurance, and vehicle maintenance. I distinguish it from a travel allowance or a fuel card that an employer may provide to its employees to offset fuel expenses that are incurred for traveling to and from work, as discussed in *WCAT-2009-00878* and *WCAT-2010-02558*. Owing to the evidence that the operation of the vehicle depended on the plaintiff's payment of the monthly fee, since it was used to cover the cost of gas, insurance, and maintenance, I consider the City's use of a payroll deduction to be a further indication of its direct involvement in the plaintiff's carpooling arrangement.

[48] I find there is sufficient evidence to conclude that the City had a direct involvement in the plaintiff's carpooling arrangement so that his circumstances at the time of the accident should not be considered under the Board's general rule on routine commuting to and from work. Rather, I find that the vehicle in which the plaintiff was traveling at

the time of the accident should be viewed as an extension of the employer's premises, as contemplated by policy item #C3-19.00 of the RSCM II. I agree with the defendants Sibley and the City that the provision in the Ride-Share Agreement about participation in the carpool being off-duty and not in the course of or in furtherance of the participant's employment, as mentioned in paragraph 8, is not determinative of the plaintiff's status. As a result, I find that the plaintiff was in the course of his employment when the accident occurred.

[49] Section 5(4) of the Act establishes a presumption where a worker sustains an injury as a result of an accident. If the accident occurred in the course of employment, it is presumed that it arose out of the employment unless the contrary is shown and *vice versa.*

[50] The plaintiff's injuries were caused by the motor vehicle accident. I find that his injuries occurred while he was in the course of his employment. A rebuttable presumption arises that his injuries arose out of his employment. I find that this presumption is not rebutted by the evidence in this case. Accordingly, I find that the plaintiff's injuries arose out of and in the course of his employment within the scope of Part 1 of the Act.

Status of the Defendant, Graham Sibley

[51] The defendant Sibley said in a January 19, 2011 statement to ICBC that he had worked for the City as an electrical helper since 1985. I also note that the plaintiff testified on discovery that all of the participants in his ride-share were City employees.

[52] The parties are in agreement that the defendant Sibley was a worker within the meaning of Part 1 of the Act at the time of the January 12, 2011 accident, which I certify.

[53] In addition, for the same reasons mentioned above, I find that the defendant Sibley was in the course of his employment when the accident occurred because the City vehicle he was operating under the Ride Share Agreement was an extension of the employer's premises. As a result, I find that any action or conduct of the defendant Sibley, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

[54] There has not been a request for a deterimination of the City's status at the time of the accident. If a determination of the City's status is necessary for the legal action, a request may be made for a supplemental certificate, which could be addressed on an expedited basis.

Conclusion

[55] I find that at the time of the January 12, 2011 accident:

(a) the plaintiff, Franco Mazzocchio, was a worker within the meaning of Part 1 of the Act;

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

(c) the defendant, Graham Sibley**,** was a worker within the meaning of Part 1 of the Act; and

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

Andrew Waldichuk
Vice Chair

AW:ml

NO. M127391
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:

FRANCO MAZZOCCHIO

PLAINTIFF

AND:

CITY OF VANCOUVER, GRAHAM SIBLEY, MAINROAD
LOWER MAINLAND CONTRACTING LTD. and DARRELL D. LENTENDRE

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, CITY OF VANCOUVER and GRAHAM SIBLEY, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, January 12, 2011:

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

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

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

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

CERTIFIED this day of September, 2015.

_____

ANDREW WALDICHUK
VICE CHAIR

NO. M127391
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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DEFENDANTS

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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