DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT DECISION DATE: **February 13, 2020**

WCAT DECISION NUMBER: **A1606676**

WCAT PANEL: **Hilary Thomson**

RE: David Gordon Campbell v. Christopher John Elliott, Bowden Contracting Ltd., and Emcon Services Inc.
Vancouver Registry M166401
Section 257 Determination
WCAT No. A1606676

Applicant: Emcon Services Inc.
(the defendant)

Respondents: David Gordon Campbell
(the plaintiff)

Christopher John Elliott
(other defendant)

Bowden Contracting Ltd.
(other defendant)

Representatives:

For Applicant:

Emcon Services Inc. — Brianna Vickers / Savannah U. Hamilton
Whitelaw Twining Law Corporation

For Respondents

David Gordon Campbell — Robyn Wishart
Wishart Brain & Spine Law

Christopher John Elliott and
Bowden Contracting Ltd.

Grant Ritchey / Olena Gavrilova
QA Law

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

This decision has been the subject of a BC Supreme Court decision on application for judicial review. See 2022 BCSC 862

Introduction

[1] The applicant, Emcon Services Inc. (Emcon), is a defendant in a civil legal action initiated by David Gordon Campbell (Mr. Campbell). Mr. Campbell's legal action relates to a motor vehicle accident that occurred on or around March 1, 2016 on the Barkerville Highway. Mr. Campbell alleges that Emcon, which provides highway maintenance, was negligent in the way it maintained the highway. The other defendants in the legal actions are Christopher John Elliott (Mr. Elliott) and Bowden Contracting Ltd. (Bowden). Mr. Elliott was operating the vehicle (the logging truck) that struck Mr. Campbell's vehicle. Bowden owned the logging truck.

[2] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury, or death. The court then determines the impact of the certificate on the legal action.

[3] In November 2016, Emcon made an application for a determination and certification under section 257 of the Act. Submissions were completed in December 2019. Emcon requested a determination that, at the time of the accident, Mr. Campbell was a worker under the Act, and that his alleged injuries arose out of and in the course of employment. It also sought a determination that Emcon was an employer and was engaged in an industry within the meaning of Part 1 of the Act at the time of the March 1, 2016 motor vehicle accident, and that the alleged actions of Emcon, which allegedly caused or contributed to Mr. Campbell's injuries, arose out of and in the course of employment.

[4] Bowden, Mr. Elliott and Mr. Campbell are respondents in the legal action, and they all provided submissions. Mr. Elliott and Bowden are represented by counsel. Bowden and Mr. Elliot's counsel asked for a declaration that Bowden was an employer. They also asked for a determination that Mr. Elliott was Bowden's worker and that he was in the course of employment at the time of the accident. They asked for a determination that any actions of theirs which caused or contributed to Mr. Campbell's injuries arose out of and in the course of employment.

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[5] Mr. Campbell is also represented by counsel. His position is that the accident, and Mr. Campbell's injuries did not arise out of or in the course of employment.

[6] Before the accident, Mr. Campbell had been at a worksite where he was working for Ryan Campbell Contracting Ltd. (RCC). RCC was also invited to participate but is not doing so. The principal of that company, Ryan Campbell, provided a statutory declaration and attended an examination for discovery. To avoid confusion with the plaintiff, Mr. Campbell, who has the same last name, but who is not related to Ryan Campbell, I have referred to Ryan Campbell as "RCC's principal" in the body of my decision below, except when referencing his examination for discovery and statutory declaration.

[7] Mr. Campbell also commenced a separate legal action against the Insurance Corporation of British Columbia (ICBC), under Part 7 of the Insurance (Vehicle) Regulation, with respect to injuries suffered in the accident. WCAT invited ICBC to participate in this application as an interested person, but it advised that it would not, other than adopting the submissions of Bowden and Mr. Elliott.

Issue(s)

[8] Determinations are requested concerning the status of the parties to the legal action at the time of the March 1, 2016 motor vehicle accident.

Jurisdiction

[9] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Workers' Compensation Board, operating as WorkSafeBC (Board), that is applicable (section 250(2)). The policies that apply to this case are contained in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) and the *Assessment Manual*.[1]

[10] Section 254(c) of the Act provides that WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

[1] In this decision, I have applied the policies in effect at the time of the accident on March 1, 2016.

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

[12] As noted above, written submissions have been provided by the parties to the legal action. This application involves some issues of reliability and some disputed factual issues, but there are no significant issues of credibility. The parties have not asked for an oral hearing, but have provided transcripts of examination for discovery, as well as statutory declarations from various witnesses. To the extent that there are factual issues in dispute, I am satisfied that they can be addressed on the basis of the written record. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Background

[13] There were transcripts of examinations for discovery (XFD) of the following individuals: Mr. Elliott on November 28, 2018, John Andrushko (division manager at Emcon) on November 28, 2018, Mr. Campbell on November 29, 2018, and Ryan Campbell (principal of RCC) on September 20, 2019.

[14] The following individuals also provided statutory declarations: Ryan Campbell on August 24, 2019, Savannah Hamilton (associate lawyer at Emcon's law firm) on August 21, 2019, Miriam Gibb (paralegal at the law firm representing Bowden and Mr. Elliott) on November 4, 2019, David Campbell on November 4, 2019, and Mona Mitchener (legal assistant from the law firm representing Mr. Campbell) on November 12, 2019.

[15] On March 1, 2016, Mr. Campbell was involved in a collision with the logging truck operated by Mr. Elliott on the Barkerville Highway. Around the time of the injury, Mr. Campbell was employed by RCC as a log processing machine operator. RCC is a subcontractor for another company.

[16] At the time of accident, Mr. Campbell was returning from his worksite at a logging block where he was doing work under contract for RCC. He was driving his own vehicle. Part of the journey between his home and the logging block and his home took place over radio-controlled logging roads. By the time of the accident, he had returned to the highway. There is some question as to whether, between leaving the worksite and having the accident, Mr. Campbell made any stops or detours. I will address this matter further below, in my decision.

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Reasons and Findings

RCC and Mr. Campbell

[17] Section 1 of the Act defines an "employer" as any 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. Section 2 of the Act stipulates that Part 1 of the Act (which deals with compensation to workers and dependents) applies to all employers, as employers, except where exempted by order of the Board.

[18] Policy item AP1-1-1 (Coverage under the Act – Description of Terms) of the *Assessment Manual* includes general descriptions of the following terms:

> 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".

[19] No party disputed that RCC was an employer or that Mr. Campbell worked for RCC on the day of the accident.

[20] In a memorandum dated December 14, 2016, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that RCC had been registered in 2011, and remained registered at the time of writing. RCC was also incorporated in British Columbia.

[21] Mr. Campbell is a British Columbia resident, working in British Columbia, and RCC was a registered employer at the time of the accident. Mr. Campbell's evidence was that, on the date of the injury, he was working on the logging block for RCC and was being paid an hourly wage by RCC for his work. When asked to describe his relationship with David Campbell, RCC's principal described Mr. Campbell as an employee, and Mr. Campbell also confirmed that he was employed by RCC. As of March 1, 2016, RCC had at least one worker performing work for it under a contract, Mr. Campbell. There was no record of a separate registration or business existence for Mr. Campbell.

XFD David Campbell, Q38-40
XFD Ryan Campbell, Q18

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[22] Given this undisputed evidence, I am satisfied that RCC was an employer and that Mr. Campbell was its worker, as those terms are used in the legislation and policy, as of March 1, 2016. The more contentious question before me relates to whether Mr. Campbell remained in the course of employment at the time of the motor vehicle accident, and whether the accident arose out of employment.

[23] Section 5(1) of the Act explains that compensation is provided where a worker has a personal injury arising out of and in the course of employment. Section 5(4) of the Act states that in cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

[24] Policy item C3-14.00 (Arising Out of and In the Course of the Employment) contained in RSCM II explains that an injury "arises out of employment" if the employment is of causative significance to the injury. An injury arises "in the course of employment" when it occurs during a time and place and during an activity consistent with, or reasonably incidental to, the obligations and expectations of the worker's employment. Policy item C3-14.00 sets out a number of factors to be considered when deciding if an injury has arisen out of and in the course of employment, which include:

- whether the worker was on the employer's premises;
- whether the worker was acting for the employer's benefit;
- whether the worker was acting on instructions from the employer;
- whether the worker was using equipment supplied by the employer;
- whether the injury occurred during a time period when the worker was being paid or receiving other consideration, or was receiving a payment (such as picking up a pay cheque);
- whether the worker's injury was caused by an activity of the employer, a fellow employee or the worker;
- whether the worker was performing activities that were part of his job; and
- whether the worker was being supervised.

[25] The policy stipulates that all factors "may" be considered but none of them are an exclusive test. It also explains that the list is not exhaustive. In my view, the correct approach under policy item C3-14.00 is not simply to tally the factors, but to assess them contextually while considering whether the worker's employment was more than a trivial or insignificant aspect of the injury. The analysis involves consideration of whether there was more than a trivial or insignificant connection between the journey and the

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worker's employment, and whether the activity of driving on the highway was reasonably incidental to Mr. Campbell's employment.

[26] Policy item C3-19.00 (Work-Related Travel) from the RSCM II informs how I consider the factors in policy item C3-14.00, and provides guidance on interpreting these factors in reference to traveling workers. It explains that the general policy related to travel is that injuries or death occurring in the course of travel from the 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. The policy also provides direction on specific circumstances.

[27] Mr. Campbell was not on the employer's premises since he was driving. The injury occurred on the Barkerville Highway, which was not a captive road. The portion of the journey that took place on logging roads, arguably, had special hazards of access. However, the accident did not occur on the logging roads, but on the public highway. Therefore, it was not, in my view, an extension of the premises as foreseen by policy item C3-19.00.

[28] Policy item C3-19.00 also specifically addresses remote worksites, and says that the remoteness of a worksite and the limited availability of transportation are factors which may suggest that a journey to or from the worksite may be part of the employment. A journey between an established town and a remote place consisting only of a worksite may be more hazardous and therefore more likely to favour coverage than a journey between two towns or cities with regular and established means of transportation.

[29] Mr. Campbell was traveling between a town and a remote place. The journey from the town where he lived to the logging block was approximately one and a half hours to an hour and 45 minutes in winter conditions. The distance alone would not be sufficient to establish that it was not a regular commute. However, it is significant that a considerable portion of the journey took place along roads that were described as being in the "bush," including radio-controlled logging roads. Mr. Campbell described some of the roads and narrow and windy, as unpaved, and he agreed that there was more wear and tear on his vehicle because of these roads.

XFD David Campbell, Q115, 122-130, Q278, Q281-293

[30] The remoteness of the worksite, the limited availability of transportation to the site, the distance and the nature of the travel (with part of it along radio-controlled roads) show that the journey was not typical of a regular commute. I am not persuaded, therefore, that the general rule from policy C3-19.00, which states that a regular commute between home and the normal, regular, or fixed place of employment does not have an employment connection, applies in this case.

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[31] I acknowledge that Mr. Campbell made submissions that RCC had no control over the highway. Control of the premises can be considered when assessing whether an injury arises out of and in the course of employment. For example, when assessing injuries that take places in parking lots, the Board will consider control, as stipulated in policy item C3-20.00 (Employer-Provided Facilities) of the RSCM II. However, in my view it is somewhat simplistic to state that the employer had no control over the highway and therefore the travel was not related to work. The employer may have had little or no control over the highway, but it had some control over other aspects of the journey. For example, RCC could have put into place policies about finding hotel accommodation in certain weather conditions, and so on. Further, while control is a factor, it also evident from the broad scope of coverage for traveling employees set out in policy item C3-19.00, that lack of control is not a significant factor detracting from coverage.

[32] I have also considered whether the journey was for the employer's benefit. Mr. Campbell's position was that there was no benefit to the employer, RCC. In a sense, any time a worker arrives at work, it is for the benefit of the employer, and the mere arrival at work is not sufficient to find that the journey to work occurs in the course of employment. Given the general rule about regular commutes which is set out in policy C3-19.00, I am satisfied that there must be something more in order for me to find that the journey was work-related.

[33] Such factors did exist here, and they are again tied to the remote location of the place, as foreseen by policy item C3-19.00. Where the workplace is in a remote location, where there is no readily available workforce in the vicinity, there are additional benefits to the employer in having employees travel that go beyond the normal benefits of simply having a worker arriving at work. There was some evidence that the distance of the worksite was a deterrent to coming to work. RCC's principal gave evidence that if fuel was not paid, then his workers would not come to work (e.g. "You don't pay a guy's fuel to come to work, they are not showing up.") RCC's principal also agreed that getting to the job site in the bush was an essential part of the job.

XFD, Ryan Campbell, Q492, Q568

[34] Further, Mr. Campbell was also transporting items to be used at the workplace, namely a hose that Mr. Campbell picked up and also fuel for RCC's machines which he carried in a "Tidy Tank." RCC's principal said bringing parts for the machine was not part of Mr. Campbell's usual job duties. But he also acknowledged that they would not have been able to operate the second machine without the hose. With respect to the Tidy Tank, RCC's principal also acknowledged that Mr. Campbell typically brought fuel to the worksite, and typically did not leave with it since the machine burned more than the tank held. Receipts showed Mr. Campbell did purchase fuel on the day in question. After the accident, RCC's principal retrieved the Tidy Tank from the accident site, even though he said that it did not belong to him.

Ryan Campbell at Q229-230, Q236-237, Q248-253, Q282-297, Q613-624, Q812-828
Statutory Declaration of Savannah Hamilton, Exhibit G,
Invoice from Jepson Petroleum Ltd.

[35] Cases such as *WCAT-2006-00564 and WCAT-2006-00566 (Jensen v. Sjostrom et al.)* have found that delivery of fuel to a worksite is done for the employer's benefit, and it is a factor that favours a finding that Mr. Campbell's travel was work related. In *WCAT-2009-01611*, the panel also considered a worker who was transporting fuel to a worksite, and wrote that "I consider that the worker's transport of fuel to the worksite, for use by the bulldozer or other heavy equipment, constituted an additional circumstance which connected his journey with some particular aspect of his employment."

[36] Given that the log processing machines could not operate without fuel, and given that the worksite was in a remote location and fuel had to be transported there, I find that the fact that Mr. Campbell transported a fuel vessel to and from the worksite weighs in favour of a finding that there was an employment connection on the journey. I appreciate that, in this case, Mr. Campbell was on his way home. However, if one transports fuel to a location, it is obvious that the vessel will also need to be transported home. I do not find that it was less beneficial because he was traveling home with the Tidy Tank, not to the worksite.

[37] I have also considered whether the injury was caused by an activity of the employer, a fellow employee or the worker himself. The accident in this case was not caused by a fellow employee, nor is there persuasive evidence that Mr. Campbell was at fault. But it was caused by the activity of another person connected with the worksite. The injury was the result of a collision with a logging truck operated by Mr. Elliott. Mr. Elliott was driving to pick up logs at the same worksite where Mr. Campbell had been processing logs. On the day in question, Mr. Campbell started his shift early, and RCC's principal gave evidence that when they discussed him coming in early, he confirmed that he could leave early and miss the incoming logging trucks, which had recently switched to a night shift from a day shift. Despite starting early, Mr. Campbell did not miss the train of trucks, and instead collided with one of them. There was, therefore, some connection between the logging truck and the worksite.

XFD Christopher Elliott Q121-122
XFD David Campbell, Q214-216
XFD Ryan Campbell Q590-Q606

[38] The list of factors in section C3-14.00 is not exhaustive, and this particular factor alone might not weigh in favour of finding an employment connection. I recognize that the risk of a collision on a highway with a logging truck is an ordinary risk of highway travel. However, for workers traveling along remote highways to logging sites where there are a significant number of such trucks to be expected, and where a worker has been

employed on the same logging block where the trucks are going, that does weigh at least slightly in favour of a finding that the collision has an employment connection.

[39] I have also considered whether Mr. Campbell was using equipment supplied by RCC and whether the injury occurred during a time period for which he was being paid or receiving other consideration. RCC's principal explained that Mr. Campbell was paid when he entered the block. Mr. Campbell also said that he was paid only while at work. As a result, he was not being paid a salary or wages while he traveled.

XFD Ryan Campbell Q451-453
XFD David Campbell, Q84

[40] That said, while he was operating his own vehicle, it is significant that the employer bore many of the costs of the travel, including subsidizing the use of Mr. Campbell's truck. RCC had offered Mr. Campbell the use of a company vehicle. Mr. Campbell declined, in part because he did not want to transport other workers, and also because at times he used his truck for personal trips on the way to or from the worksite, such as stopping to ski, or dropping off his child at daycare. Mr. Campbell gave evidence that when he was hired he was told to "name his price" and he requested $75 a day for the wear and tear on his truck, apparently in lieu of using one of Mr. Campbell's trucks. RCC agreed to pay this travel allowance.

XFD Ryan Campbell, Q340-345
XFD David Campbell, Q137-140, Q158-163

[41] RCC also gave Mr. Campbell a fuel card, and the fuel card agreement stipulated that it was for "work-related travel." The fuel agreement also stipulated that the fuel card was only for RCC's vehicles, but Mr. Campbell's evidence was that he was permitted to use the card for his own personal vehicle. RCC's principal acknowledged that RCC's fuel card paid for gas, but initially responded "yes" to a question which asked whether he was only paying for gas on the way to the worksite. At the examination for discovery, RCC's principal appeared to take the position that the card was not intended for use on the way home. However, his testimony also supported a finding that, in practice, the fuel card was used for travel to and from the worksite. While RCC's principal said he "never looked at it that way" he also confirmed that if a worker was going to leave the bush on a forestry road he would be doing so using the fuel paid for with the RCC fuel card. He also acknowledged that employees were fueling their cars up on the way to work, and that there was no expectation that they would later replace the fuel they had used to get home. He confirmed that he did not require Mr. Campbell to track his kilometres, and that he had nothing in writing advising that he was not paying the gas on the way home. In weighing his evidence, along with that of Mr. Campbell's, I find that the fuel card was used to cover fuel costs between home and work, and also between work and home. I am satisfied that, in paying the $75 a day travel fee and the cost of fuel, that RCC bore the costs of travel.

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XFD Ryan Campbell, Q464, Q481-488, Q493, Q511-519
Statutory Declaration of Ryan Campbell, Exhibit C, Fuel Card Use Employee Agreement
XFD David Campbell Q191-193

[42] The fact that the employer bore the fuel costs and paid a travel allowance supports a finding that the travel was work-related. As explained in *WCAT-2014-01473*, the fact that the worker receives a payment described as a travel allowance does not necessarily support a finding that the travel is related to employment. For example, in *Decision No. 190*, "Re The Coverage of Workers' Compensation," 2 W.C.R. 299, the tribunal considered a case where the applicant, and all workers, received a "travel allowance" of $1.50 a day payable after six months of employment, regardless of whether they traveled on their own or in a subsidized bus. In that case, the travel allowance was not sufficient to establish an employment connection as there was no clear relationship between the payment and actual travel time or expenses.

[43] However, in this case, there was a clear relationship between the expenses paid and the actual costs of travel. The $75 per day was tied to the wear and tear posed by the logging roads, and was paid because Mr. Campbell had agreed to use his own truck. The fuel card covered the expense of traveling to and from these logging blocks. Given RCC's principal's evidence, referenced above, about the fact that workers were unlikely to arrive without such funding for fuel, I find that covering these expenses was an inducement to take employment that was more remote. The payment of that cost is an additional circumstance that connects the journey to the specific aspects of Mr. Campbell's employment.

[44] In summary, there are several factors that tie Mr. Campbell's journey to his employment in more than a trivial or insignificant way. In the first place, the journey was not a regular commute, but a journey to a remote worksite in the bush. The employer benefited by having Mr. Campbell travel to these remotes sites since the work needed to be done on-site, and there was no readily available workforce in these bush locations. Even though Mr. Campbell was not paid an hourly wage, the employer bore the costs of travel, and provided fuel for the travel. It would have provided a truck as well, had Mr. Campbell not negotiated to use his own. The hazard that resulted in the accident was connected to the worksite, because there were trains of loggings trucks going to the site to collect the processed woods. All of these factors support a finding that the connection to employment was more than trivial or insignificant, and that the travel was reasonably incidental to Mr. Campbell's employment.

[45] I acknowledge that there are other factors which do not support such a finding. Mr. Campbell had some autonomy once he left the worksite, and was not specifically operating on anyone's instructions. While travel costs were reimbursed, he did not receive an hourly wage for travel. That said, as noted above, the approach is not to tally

the factors but to assess them contextually. In weighing the factors, I find that the connection is more than trivial or insignificant.

[46] I have also considered whether there was some sort of deviation from employment which would have taken Mr. Campbell out of the course of employment. Policy item C3-17.00 (Deviations from Employment) explains that policy item C3-14.00 is the primary policy that provides guidance in deciding whether or not an injury arose out of and in the course of employment. However, in some circumstances, evidence supporting one component of the employment-connection test may be clear, while evidence supporting the other component is questionable, because the worker did something that was unauthorized by the employer, the employer condoned an unsafe practice, or some emergency forced the worker to act. Policy item C3-18.00 (Personal Acts) recognizes that there is a broad intersection and overlap between employment and personal affairs. It says that an incidental intrusion of personal activity into the process of employment is not a bar to compensation, and conversely an incidental intrusion of some aspect of employment into the personal life of a worker at the moment of an injury or death does not automatically entitle the worker to compensation.

[47] Mr. Campbell usually worked from 1:30 p.m. until 12:30 at night, but the job at the particular block where they were processing logs was winding down. According to RCC's principal, Mr. Campbell arrived at the job site earlier than usual, at 11 a.m. RCC's principal said that the plan was to lay him off the following day, because it was the end of the season. No steps had been taken to do so at the time of the accident.

XFD David Campbell, Q92-Q94
XFD Ryan Campbell, Q53-55, Q369-370

[48] As I noted above, Mr. Campbell's evidence was that he had no clear memory of the events leading up to the incident or immediately after the incident. RCC's principal had been told by someone else that Mr. Campbell left the worksite around 7:30 p.m. or 8:00 p.m. He suggested that it would have only have taken approximately an hour to get from the worksite to the accident site, and he also thought that Mr. Campbell had left the worksite around 7:30 p.m. or 8:00 p.m. He attempted to drive the route slowly, recreating winter conditions, and it took only one hour and nine minutes. RCC's principal was of the view that there was a missing hour and a half since the accident did not occur until approximately 10:30 p.m.

XFD David Campbell, Q207-209, Q224-226
XFD Ryan Campbell, Q257-Q274, Q691-694
Statutory Declaration of Ryan Campbell

[49] In his statutory declaration, Mr. Campbell gave evidence that he had been told by RCC's principal that he had left the logging block at 8:30 p.m. and he verily believes it. He now believes that he had stopped at a nearby ski hill for a drink, a smoke, and to

change out of his work clothes. He gave some reasons for this belief, including the fact that it was his last day of work, and that it was common for him to make such stops. He believes that he had alcohol and marijuana in his system.

Statutory Declaration of David Campbell

[50] I do not find that there is any reliable evidence about when Mr. Campbell left the worksite which would support a finding that he took an extended personal break or otherwise. RCC's principal was not present at the worksite when Mr. Campbell left. RCC's principal relied upon evidence of others who gave him that evidence after the accident. Those individuals did not provide statements. Mr. Campbell's belief about when he left the worksite and the logging block is based on what he was told by RCC's principal, who was in turn relying on information given to him by others. While I do not doubt that they believe that information, I am not persuaded it is reliable evidence. Despite his belief, Mr. Campbell had no recollection of when he left the site or how many hours he worked. The evidence about Mr. Campbell's departure time was relayed to RCC's principal, who in turn relayed it to Mr. Campbell. It is hearsay, and, therefore, I must be cautious in giving it weight. I appreciate that Mr. Campbell worked a shortened shift that day, but I am not satisfied that there is reliable evidence that he left around 8 p.m. He may very well have left later.

[51] Given that I do not have evidence about when Mr. Campbell left, I consider it highly speculative to make a finding that he took a break. He has speculated that he may have done so based on his employer's hearsay evidence about when he may left the worksite, and some evidence about his usual habits on the last day of work. In my view, there are multiple other reasonable explanations for the timing of the accident. Even if he did leave the worksite at 7:30 p.m. or 8:00 p.m., there was evidence from Mr. Elliott describing blizzard-like conditions that night. Mr. Campbell's statutory declaration also provided copies of weather reports showing snowfall around the time of the accident. I therefore find it conceivable that even if Mr. Campbell did leave the worksite at 8:30 p.m., it could have taken significantly longer than usual to travel, given the weather conditions.

XFD Christopher Elliott, Q127, Q185-188
Statutory Declaration of David Campbell

[52] Further, even if Mr. Campbell did take a break, policy item C3-19.00 gives the guidance that the 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.

[53] Perhaps most importantly, even if Mr. Campbell did take a break that was more than an incidental meal break, that would not necessarily sever the relationship for the remainder of the journey. Once he resumed his travel, the connection could be restored.

Multiple prior WCAT and Appeal Division[2] cases have some to that conclusion, such as *Appeal Division Decision #93-0520*, *WCAT Decision A1603711* and *WCAT Decision A1700365*.

[54] I acknowledge that Mr. Campbell has suggested he may have consumed alcohol or smoked marijuana. The employer has a policy against use of these substances. Policy item C3-17.00 specifically deals with alcohol and says that even if a worker undertakes unauthorized activities such as alcohol consumption, that does not automatically mean that an injury or death involving alcohol consumption did not arise out of and in the course of employment. Where the causative significance of the alcohol consumption is predominant in the resulting injury or death, and the employment factors are neutral or non-existent, this does not favour coverage. In my view, similar factors would apply for marijuana usage.

Statutory Declaration of Ryan Campbell, Exhibit A, Employee Policy Handbook
Statutory Declaration of David Campbell, Exhibit E, Excerpt from Employee Policy Handbook

[55] In this case, there is no reliable evidence that Mr. Campbell took a break to have a drink or a smoke, let alone that it played a predominant role in the accident. I appreciate that he now believes he did, but his belief is based on speculation since he has no memory of the event. He said he believed he had alcohol and marijuana in his system. Marijuana was found in the vehicle and Mr. Campbell had THC[3] in his blood, according to medical records attached to his statutory declaration. However, the evidence before me does not show that having THC in one system is evidence of impairment. According to *Workplace Strategies: Risk of Impairment from Cannabis* (3rd ed) published by the Canadian Centre for Occupational Health and Safety:

> While development of testing methods is underway, in many cases results of current results of current testing methods can often only determine if THC is present in a person (e.g., that person has used cannabis at some point). Unlike testing for blood alcohol levels, obtaining a positive test result that indicates the presence of cannabis is not necessarily a clear indication of the risk of impairment.[4]

[56] Further, the police reports indicate that Mr. Campbell was lucid at the time of the accident, and that he told the police officer that he had not used marijuana on the date of the incident. Even if he had not made that statement, there is no reliable evidence

[2] former division of the Board
[3] tetrahydrocannabinol
[4] September 2018, Online at https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf) Statutory Declaration of Savannah Hamilton (Exhibit H – RCMP General Occurrence Report

that he used marijuana on the day of accident, other than his own theorizing many months later. The police reports do not describe blood or breathalyzer testing for alcohol at the time of the accident. There was opened alcohol located in Mr. Campbell's truck. However, according to the police report, Mr. Campbell's evidence in a statement provided to police in May 2016 was that the opened alcohol was left over from the Christmas holidays. I further note that it was the other driver, Mr. Elliott, who got a ticket for excessive speed. For all these reasons, the evidence before me does not establish that his alcohol or marijuana use played a role in the accident.

Statutory Declaration of Savannah Hamilton, Exhibit H, Police Reports
Statutory Declaration of David Campbell
Statutory Declaration of Ryan Campbell, Exhibit A Employee Handbook
Statutory Declaration of Mona Michener, Exhibit A, Violation Ticket

[57] In summary, given that there are multiple other reasonable explanations for why Mr. Campbell may have been on the road at 10:30 p.m., including the fact that he did not leave as early as suggested by RCC's principal, and the weather conditions, I find it more likely than not that he did not take a break. Even if he did take a break, I am not persuaded that the break was a substantial deviation or personal act that took him out of the course of employment, and in any event the employment connection was restored once he began driving home again.

[58] In summary, I find that Mr. Campbell was in the course of employment at the time of the accident. Where an injury is caused by an accident that occurred in the course of employment, unless the contrary is shown, it is presumed that the accident arose out of employment. Having found that Mr. Campbell was in the course of employment at the time of the accident, the accident presumption contained in subsection 5(4) of the Act applies, and it is presumed the accident arose out of employment. For the reasons detailed above, I do not consider the evidence about his possible impairment is sufficient to rebut the presumption, nor is there other persuasive evidence to rebut the presumption.

[59] In summary, David Campbell was a worker, and RCC was his employer. He was in the course of employment at the time of the accident, and the injuries sustained during that accident arose out of employment.

Bowden and Mr. Elliott

[60] In the memorandum dated December 14, 2016, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that Bowden had been registered in 1988, and remained registered at the time of writing. Therefore, I accept that it was a registered employer at the time of the March 1, 2016 accident. There was no record of a separate registration in Mr. Elliott's name.

[61] Bowden requested a determination that it was an employer and that Mr. Elliott was its worker. Bowden is not the applicant but one of the respondents. The MRPP contemplates additional issues being raised by the respondent, as item 18.5.2 (Evidence and Written Submissions) of the MRPP specifies that respondents must identify the determinations requested. The MRPP also does not require separate applications for a section 257 determination except in situations where there are separate legal actions for which a second certificate is requested, which is not the case here. In this case there is a second legal action, but no certificate was requested in that action. I am satisfied that Emcon and the plaintiff had notice that Bowden and Mr. Elliot were seeking such a determination and it has not provided submissions that dispute this determination, or my ability to address it.

[62] Bowden is incorporated in British Columbia, and it was registered with the Board at the time of the accident. It employed Mr. Elliott, who was under contract with Bowden to drive logging trucks. He was paid by the load, and the amount depended on various factors such as time, road conditions, and so on. Bowden issued him T4 slips, and Mr. Elliott had no independent business presence. Mr. Elliott was, at the time of the accident, driving a logging truck owned by Bowden. I accept that Bowden had a person under a contract of service to perform work in or about an industry. Bowden was an employer, and Mr. Elliott was its worker, within the meaning of section 1 of the Act.

Statutory Declaration of Miriam Gibb
XFD Christopher Elliott, Q111, Q429-430

[63] The factors to be considered in deciding whether Mr. Elliott was in the course of employment are the same as those listed above, and are listed in policy item C3-14.00. Mr. Elliott was not on the employer's premises, but I am satisfied that he was a "traveling employee" as described in policy item C3-19.00. Traveling employees are workers who travel to more than one work location in the course of a normal work day as part of their employment duties. Mr. Elliott's work location includes his dispatch location and the logging block. His job involves traveling to more than one location in an employer-owned truck. The policy provides a list of examples of traveling employees and the list includes transport-industry drivers, which is an accurate description of what Mr. Elliott does. The policy also explains that coverage generally exists for traveling employees throughout the travel.

[64] I am also satisfied that Mr. Elliott's driving to get the logs and transporting them was for the benefit of his employer, Bowden. Since Bowden contracted with him to perform this function, it was, presumably, part of their business operations. Mr. Elliott was operating equipment, namely the logging truck, owned by the employer. The accident occurred when he was being paid, and while he was performing an activity (driving) that was part of his job. All of these factors weigh in favour of a finding that there was an employment connection. I appreciate that some of the other factors, such as questions about whether he was supervised, do not necessarily support an employment connection.

However, after considering the facts above, I am satisfied that the connection between his driving and his employment was more than trivial.

XFD, Christopher Elliot, Q120-125, Q425-429

[65] Though it was not argued, I have also considered whether the fact that Mr. Elliott was arguably negligent, has taken him out of the course of employment. Mr. Elliott did receive a violation ticket, and there was some evidence he was traveling at excess speed.

Statutory Declaration of Savannah Hamilton, Exhibit H, Police Report
Statutory Declaration of Mona Michener, Exhibit A, Violation Ticket

[66] In *Appeal Division Decision #00-1360*, issued on August 31, 2000, the panel considered a case where a truck driver who was towing two trailers filled with lumber was found to be criminally negligent. The driver in that case was sentenced to five years imprisonment and his license was suspended for ten years. I do not wish to suggest that Mr. Elliott's conduct approached the level of the conduct in that case, but I do find the case useful in terms of assessing whether Mr. Elliott's actions took him out of the course of employment. The panel cited other jurisdictions where tribunals have not found that dangerous driving takes a worker out of the course of employment. The panel accepted that where the worker is engaged in doing the work for which he has been hired, compensation should be paid, even if he was doing that work in a negligent manner.

[67] More recently, in *WCAT Decision A1603732* (petition for judicial review dismissed, *Aujero v. BC (WCAT)* 2018 BCSC 764) the panel wrote that "breach of a traffic regulation, such as by speeding or going through a red light or stop sign, due to inadvertence, negligence, or bad driving, would normally not constitute a basis for finding that a worker who was otherwise engaged in carrying out a work activity had embarked on a substantial deviation from his or her employment." I find the reasoning in these cases persuasive. While I accept that Mr. Elliott was likely speeding, I am satisfied that he remained in the course of employment at the time of the accident, and that his conduct arose out of employment.

[68] In summary, I accept that Bowden was an employer within the meaning of the Act, and that Mr. Elliott was its worker. Mr. Elliott was acting in the course of employment at the time of the accident, and his conduct arose out of employment.

Emcon

[69] Emcon had a contract to perform highway maintenance on the Barkerville Highway and it is a defendant in the legal action, and the applicant in this application. The nature of Emcon's operations were described in some detail by its division manager. Emcon has requested a determination that it was an employer.

XFD John Andrushko

[70] In the memorandum dated December 14, 2016, a research and evaluation analyst, Audit and Assessment Department of the Board, advised that Emcon had been registered in 2015, and remained registered at the time of writing. Therefore, I accept that it was a registered employer at the time of the March 1, 2016 accident.

[71] Emcon was a registered employer with the Board at the time of the accident. It is a British Columbia based company incorporated in the province. It was engaged in an industry, namely road maintenance. On its face, these facts supports a finding that it was an employer within the meaning of Part 1 of the Act. There is no evidence to the contrary to suggest it was not an employer. The other parties did not dispute the status of Emcon. I therefore conclude that it was an employer within the meaning of Part 1 of the Act.

[72] Emcon can only act through its employees. The allegation against Emcon is that it acted negligently in performing highway maintenance, for example by failing to inspect and keep the highway clear, failing to have a proper system in place, failing to adequately salt the highway, failing to provide adequate personnel, failing to warn motorists or vehicle operators of the road and weather conditions, and of failing to require that they take an alternate route. If Emcon was negligent as claimed, any action or conduct of Emcon, its agents or servants, which caused the breach of duty arose out of and in the course of employment within the scope of Part 1 of the Act.

Conclusion

[73] I find that at the time of the March 1, 2016 accident:

(a) The plaintiff, David Gordon Campbell, was a worker within the meaning of Part 1 of the Act;

(b) The injuries sustained by the plaintiff, David Gordon Campbell, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) The defendant, Bowden Contracting Ltd., was an employer engaged in an industry within the meaning of Part 1 of the Act;

(d) Any action or conduct of the defendant, Bowden Contracting Ltd., or its agents or servants, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act;

(e) The defendant, Christopher John Elliott, was a worker within the meaning of Part 1 of the Act; and,

(f) Any action or conduct of the defendant, Christopher John Elliott, 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.

(g) The defendant, Emcon Services Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(h) Any action or conduct of the defendant, Emcon Services Inc., or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.

Hilary Thomson
Vice Chair

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NO. M166401
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:

DAVID GORDON CAMPBELL

PLAINTIFF

AND:

CHRISTOPHER JOHN ELLIOTT, BOWDEN CONTRACTING LTD. AND EMCON SERVICES INC.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendant, EMCON, in this legal action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this legal action and other interested persons of the matters relevant to this legal 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 legal 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, on or around March 1, 2016:

1. The plaintiff, DAVID GORDON CAMPBELL, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries sustained by the plaintiff, DAVID GORDON CAMPBELL, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.
3. The defendant, BOWDEN CONTRACTING LTD., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
4. Any action or conduct of the defendant, BOWDEN CONTRACTING LTD., or its agents or servants, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
5. The defendant, CHRISTOPHER JOHN ELLIOTT, was a worker within the meaning of Part 1 of the *Workers Compensation Act.*
6. Any action or conduct of the defendant, CHRISTOPHER JOHN ELLIOTT, 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*.
7. The defendant, EMCON SERVICES INC., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act.*
8. Any action or conduct of the defendant, EMCON SERVICES INC., its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this 13th day of February, 2020.

Hilary Thomson
VICE CHAIR