



WCAT

**Workers' Compensation
Appeal Tribunal**

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WCAT Decision Number:

WCAT-2003-01006-ad

WCAT Decision Date:

June 18, 2003

Panel:

Marguerite Mousseau, Vice Chair

WCAT Number:

S032306-A

Section 11 Determination

In the Provincial Court of British Columbia, Burnaby Registry No. 0038204

Harley Brian BINDER v. THE OWNERS, STRATA PLAN NO. NW2001

Applicant:

THE OWNERS, STRATA PLAN NO. NW2001
(the "defendant")

Respondent:

Harley Brian BINDER
(the "claimant")

Representatives:

For Applicant:

Ms. Suzanne Forestell
Harper Grey Easton

For Respondent:

Mr. Terry J. Hewitt
Columbia Square Law Office

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Noteworthy Decision Summary

Decision: WCAT-2003-01006-ad **Panel:** Marguerite Mousseau **Decision Date:** June 18, 2003

Section 11 determination - Whether a strata corporation that was registered with the Workers' Compensation Board and had an assessment payroll of \$1,500, but provided no evidence as to who received this remuneration, was an employer – Policy items #20:30:20 and #20:20:00 of the Assessment Policy Manual – Sections 10 and 11 of the Workers Compensation Act

The claimant, a courier with personal optional protection, slipped on the outside stairs of a building which is owned by a numbered company. The numbered company was registered with the Workers' Compensation Board (Board) and had one employee, a caretaker. The defendant, a strata corporation, was also registered with the Board as an employer; it had an assessment payroll of \$1,500. The defendant requested a determination under section 11 of the *Workers' Compensation Act* regarding the its status and that of the claimant. It pleaded section 10 in its Reply filed in Small Claims Court.

The claimant questioned whether the defendant was, in fact, an employer and thereby entitled to protection from civil liability under section 10(1). The claimant submitted that the strata corporation was not in fact an employer because it did not have any employees and did not pay remuneration to any party. The caretaker was simply an employee of the numbered company, and the strata corporation was a separate legal entity. There was no evidence as to who received the remuneration which was the basis of the strata corporation's payroll report to the Board. It was clear from item #20:20:00 of the *Assessment Policy Manual* that registration as an employer requires the existence of workers. However, mere acceptance by the Board of the strata corporation's registration as an employer is insufficient to establish the strata corporation was an employer for the purpose of section 10 of the Act. This is because the Board relies on information provided by the strata corporation, including payroll amounts submitted each year, to determine its status. Item #20:30:20 states that incorrect information may jeopardize a claim or the protection provided to employers by the Act. Although it seemed unlikely that a corporation would make payroll reports if it did not, in fact, paying remuneration to someone, the claimant was entitled to question whether the defendant was, in fact, an employer. Once the validity of registration is raised, the onus was on the defendant to provide the evidence that would support a bona fide registration because only it had access to records to substantiate its claim. The defendant did not provide that evidence. Accordingly, the panel found the strata corporation was not an employer engaged in an industry within Part 1 of the Act. It also found that the claimant was a worker within the meaning of Part I and that his injuries arose out of and in the course of employment.

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Section 11 Determination
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Introduction

On December 21, 1998 the claimant slipped and fell on a set of stairs at 6125 Sussex Avenue, Burnaby, British Columbia. The property on which the fall occurred is part of Strata Plan No. NW2001 and its owner is a member of the defendant, The Owners, Strata Plan No. NW2001 (the strata corporation).

The defendant requests a determination under section 11 of the *Workers Compensation Act RSBC 1996, c.492* (the Act) regarding the status of the claimant and the defendant. The defendant pleads the provisions of section 10 of the Act in paragraph (k) of the amended Reply filed in Small Claims Court on April 10, 2001.

Jurisdiction

This application for a determination under section 11 of the Act was filed with the Appeal Division before March 3, 2003. Effective March 3, 2003, section 11 of the Act was repealed, and the Review Board and Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in the *Workers Compensation Amendment Act (No. 2), 2002*. WCAT has jurisdiction to provide a certificate to the court under section 257 of the amended Act. Paragraph 39(1)(c) of the transitional provisions contained in *Workers Compensation Amendment Act (No. 2), 2002* provides that section 11 proceedings that were pending before the Appeal Division on March 3, 2003, are continued and must be completed as proceedings before WCAT (except that no time frame applies to the making of the WCAT decision). This means that WCAT will consider this application under the former section 11, but the new WCAT provisions apply (WCAT must apply policy of the board of directors pursuant to subsection 250(2) and section 251 of the Act and section 42 of the amending act, and WCAT precedent decisions are binding under subsections 238(6) and 250(3)).

Issue(s)

The issues are: whether the claimant was a worker on December 21, 1998, and whether the injuries he sustained on that day arose out of and in the course of his employment; and, whether the defendant was an employer engaged in an industry within Part 1 of the Act.

Law and Policy

On the date of the incident, December 21, 1998, the governors had authority to approve and superintend the policies and direction of the Board under section 82 of the Act and those duties were then being discharged by a panel of administrators under section 83.1 of the Act. Governors' policy included the *Rehabilitation Services and Claims Manual*, the *Assessment Policy Manual*, and, Decisions No. 1-423 of the *Workers' Compensation Reporter*. (See governors' Decision No. 86 (*By-law No. 4 — Published Policy of the Governors*, 10 WCR 781), and the panel of administrators' Decision No. 1 (*Discharge of Governor Policy-making Function*, 11 WCR 465)).

Since then a number of relevant *Workers' Compensation Reporter* decisions were "retired" and the *Assessment Policy Manual* was superseded by the *Assessment Manual* as of January 1, 2003. My decision refers to the law and policy that existed as of the date of the accident. However, I also note that the above noted changes do not alter the substance of the applicable law and policy.

Status of the Claimant

On December 21, 1998, the claimant was employed as a courier. He was registered with the Board and had purchased personal optional protection (POP). Section 2(2) of the Act permits the Board to extend compensation coverage to independent operators as though the independent operator was a worker. At that time the applicable policy was policy #20.10.30 of the *Assessment Policy Manual*. This policy provided that an independent operator who had obtained POP was a worker for the purposes of Part 1 of the Act. Accordingly, the claimant was a worker on the relevant date.

Counsel for the defendant submits that the claimant was making deliveries when the injury occurred and that the claimant received compensation for injuries sustained as a result of that event, therefore, his injuries arose out of and in the course of his employment. Counsel for the claimant has made no submission with respect to the claimant other than to say that the only status in dispute is that of the defendant.

The claimant did receive compensation for the incident on December 21, 1998. I have reviewed the claimant's claim file, which was disclosed to the parties, and it does not disclose the information or evidence underlying the decision to accept the claimant's injuries as arising out of and in the course of his employment. There is only a statement that the claimant "slipped on the stairs of a commercial building". The claimant, however, has indicated on his application for compensation that his actions at the time of the injury were for the purpose of his business and that his actions were part of his regular work.

In considering an application for a section 11 determination, WCAT is not bound by the previous decision of a Board officer. The WCAT panel considers the evidence and argument afresh in making the determination. In this case, there is some evidence that the injuries arose out of and in the course of the claimant's employment. No evidence has been provided to the opposite effect and the Board's finding has not been challenged by either party.

In view of the above, I find that the claimant was a worker on December 21, 1998 and I find that his injuries arose out of and in the course of his employment.

Status of the Defendant

The claimant slipped on the outside stairs of the building at 6125 Sussex Ave (the property). The property is owned by a numbered company, 395315 B.C. Ltd. According to a memorandum from the policy manager of the Assessment Department, dated October 4, 2002, 395315 B.C. was registered with the Board as an employer at the time the cause of action arose, December 21, 1998.

Documents submitted by defendant's counsel reveal that 395315 B.C. Ltd. had one employee at the relevant time, Mr. Letvinchuk. He was hired and paid by 395315 B.C. Ltd. and, at the time of the incident, Mr. Letvinchuk was receiving \$600 per month from 395315 B.C. Ltd. for his services as a caretaker. This is supported by a statement from Mr. Glen Magnus, Director, 395135 B.C. Ltd., a photocopy of a check to A & P Letvinchuk for \$600 drawn on 395135 B.C. Ltd.'s bank account, and employer payroll and contract labor reports submitted to the Board for the years 1996 and 1998. These reports indicate a payroll of \$7200 specifically for the services of Mr. Letvinchuk.

Strata Plan No. NW2001 was also registered with the Board as an employer on the date of the accident, according to a memo from the director of the Assessment Department dated June 12, 2002. The type of business indicated in the registration application is "residential condominium".

Section 11 Determination

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Harley Brian BINDER v. THE OWNERS, STRATA PLAN NO. NW2001

An assessment calculation summary, which I disclosed to both parties, reveals that the strata corporation has been registered with the Board since January 1, 1994 and has paid assessments each year, up to and including 2001. In 1994, an assessment was paid on a payroll of \$6600. In subsequent years, the payroll on which assessments were paid varied between \$1000 and approximately \$2000. In 1998, the assessed payroll was \$1500.

There is also a letter on the assessment file for Strata Plan No. NW2001, which is dated June 1, 1995. This file was also disclosed to both parties. The letter indicates that there had been discussions between the Assessment Department and the strata corporation's management company regarding a penalty levied against Strata Plan No. NW2001 for late return of the employer's payroll and contract labor report for 1994. The unit manager of the Assessment Department states, in this letter, that he has decided to cancel the penalty on the assurance that future reports would be received by the Board on or before the appropriate date.

The fact of registration, the correspondence described, and the payment of assessments on a payroll would all indicate that the defendant strata corporation is an employer. Counsel for the claimant, however, questions whether the defendant is, in fact, an employer. He submits that the strata corporation does not have any employee(s) and does not pay remuneration to any party and therefore it does not have a relationship with any party which would satisfy the definition of employer under section 1 of the Act.

Counsel for the defendant submits that Mr. Letvinchuk is the defendant's employee. In the alternative, counsel submits that it is not necessary that the defendant have an employee so long as the corporation has been registered with the Board as an employer. In this regard, she refers to a number of Appeal Division decisions in which it appears that the panels have accepted registration with the Board as proof that the registered company is an employer.

On the first point, defendant's counsel submits that Mr. Letvinchuk is an employee of the strata corporation because he is an employee of 395315 B.C. Ltd. and the owner of 395315 B.C. Ltd. is a member of the strata corporation.

Mr. Letvinchuk is clearly an employee of 395315 B.C. Ltd. This company is, apparently, appropriately registered with the Board and pays an assessment fee on the basis of the wages paid to Mr. Letvinchuk. The strata corporation is a separate legal entity. Counsel has not cited any law or policy that would serve to establish an employment relationship between Mr. Letvinchuk and the strata corporation in these circumstances nor am I aware of any. All of the evidence is that Mr. Letvinchuk is simply an employee of 395315 B.C. Ltd.

This begs the question of the basis for the \$1500 payroll report submitted by the strata corporation to the Board. No evidence has been provided as to who receives this remuneration. And, if the strata corporation is, in fact, paying remuneration to one or more persons one has to question why counsel would go to some length to try to establish Mr. Letvinchuk as an employee of the strata corporation.

Counsel for the defendant submits, in the alternative, that the strata corporation should be considered an employer by virtue of the policy at item #20:30:30, “regardless of whether the Defendant had what might traditionally be called ‘employees’”.

The section of the policy #20:30:30 on which counsel relies is as follows:

...an incorporated company is usually considered an independent firm by the Board and therefore registration with the Board is mandatory. As the incorporated entity is considered an employer, a director, shareholders or other principal of the company who is active in the operation of the company is considered to be a worker under the Act. The earnings of these active principals are also fully assessable, as will be discussed in Section 40:10:30.

There is some question in whether this policy would apply to a strata corporation since it is not a corporation in the usual sense. I take counsel’s point though that it is not necessary to have employees in the traditional sense in order to register as an employer under the Act. However, it would be inconsistent with the overall purposes of the Act to extend the protection from liability to any individual or company purely on the basis that it has registered with the Board. The fact that the defendant was required to submit payroll information annually for assessment purposes underscores the requirement for some type of employment relationship.

Section 1 of the Act provides a definition of employer as follows:

“employer” includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

This definition is inclusive and does not, therefore, necessarily preclude persons other than those described from being recognized as employers. However, it is clear from the policy respecting the registration process, policy #20:20:00, that registration as an employer requires the existence of workers. This policy provides, in part:

Employers can be registered prior to them actually becoming employers providing:

- (a) it is definite that workers or unregistered labour contractors will be employed, and
- (b) they will be employed in the current year or in approximately the next three months, whichever is greater.

Counsel's final point is that acceptance by the Board of the strata corporation's registration as an employer is sufficient to establish the strata corporation as an employer for the purposes of section 10 of the Act. The Board, however, relies on information provided by the party in order to determine the status of that party. In this regard, the policy at #20:30:20 states, "Incorrect or incomplete information may jeopardize a claim or the protection provided to employers by the Act". In this case, the Board would have relied on information provided by the strata corporation, including the payroll amounts submitted each year.

It seems unlikely that a corporation would make such payroll reports if the corporation was not, in fact, paying remuneration to someone. But, the claimant is entitled to question whether the defendant is, in fact, an employer and thereby entitled to protection from civil liability under section 10(1) of the Act. Once the validity of the registration has been raised, there is an onus on the defendant to provide the evidence that would support a bona fide registration. This is not unreasonable; only the defendant has access to the records which would substantiate the defendant's claim to protection under the Act as an employer. The defendant has not provided that evidence. Accordingly, I find that the strata corporation is not an employer engaged in an industry within Part 1 of the Act.

Conclusion

I find that, on December 21, 1998, the claimant was a worker within the meaning of Part of the Workers Compensation Act. I find that his injuries arose out of and in the course of his employment.

I find that, on December 21, 1998, the defendant strata corporation was not an employer engaged in an industry within Part 1 of the Act.

Marguerite Mousseau
Vice Chair

MM/gw

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

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

BETWEEN:

Harley Brian BINDER

CLAIMANT

AND:

THE OWNERS, STRATA PLAN NO. NW2001

DEFENDANT

CERTIFICATE

UPON APPLICATION of the Defendant, THE OWNERS, STRATA PLAN NO. NW2001, in this action for a determination pursuant to Section 11 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 Board;

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 THE ACTION AROSE, December 21, 1998:

1. The claimant, Harley Brian BINDER, was a worker within the meaning of Part 1 of the *Workers Compensation Act* and his injuries arose out of and in the course of his employment.
2. The defendant, THE OWNERS, STRATA PLAN NO. NW2001, was not an employer within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of June, 2003.

Marguerite Mousseau
VICE CHAIR

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

BETWEEN:

HARLEY BRIAN BINDER

CLAIMANT

AND:

THE OWNERS, STRATA PLAN NO. NW2001

DEFENDANT

SECTION 11 CERTIFICATE

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