BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

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WCAT Decision Number: **WCAT-2003-03322-ad**
WCAT Decision Date: October 30, 2003

Panel: Marguerite Mousseau, Vice Chair

WCAT Number: **031454-A**

Section 11 Determination
In the Supreme Court of British Columbia
Kelowna Registry No. 12359
Norman GIESBRECHT and Marlene GIESBRECHT v. James GULLEKSON, and CANEDA FOREST PRODUCTS SALES LTD. and Cecilia GULLEKSON

Applicants: James GULLEKSON and CANEDA FOREST PRODUCTS SALES LTD. and Cecilia GULLEKSON (the "defendants")

Respondents: Norman GIESBRECHT and Marlene GIESBRECHT (the "plaintiffs")

Representatives:

For Applicants: Mr. J.W. (Jock) Craddock
DOAK SHIRREFF

For Respondents: Mr. Douglas Harrington
HARRIS & BRUN

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Noteworthy Decision Summary

Decision: WCAT 2003-03322-ad **Panel:** M. Mousseau **Decision Date:** October 30, 2003

Section 11 determination – Relevance of a section 11 determination where the accident occurred in Alberta and the applicable law to apply was likely Alberta law – Section 11 does not impose an obligation on the Board to analyze and determine the relevance of the certificate to a civil action before deciding whether to make a section 11 determination, particularly where this would involve a decision as to the law of which province is applicable to the action

The plaintiff was injured in a motor vehicle accident in Calgary. He applied for compensation from the Alberta Workers' Compensation Board (Board), and then elected to apply for compensation from the B.C. Board. The B.C. Board accepted his claim and authorized the plaintiff to bring a third party action under the Board's subrogated right of action. The defendants initiated civil action in B.C. with respect to the Alberta accident, and applied for a determination under section 11.

The plaintiff sought a preliminary decision from the Appeal Division as to whether the section 11 determination sought by the defendants was relevant to the civil action and within the competence of the Board. Both parties agreed that, given the accident occurred in Alberta, Alberta law was applicable and a determination regarding the status of the parties should be sought from the Alberta Board. The panel appreciated the argument that a section 11 certificate may not be ultimately relevant to the action in that, even if all the parties are workers and/or employers within the scope of the B.C. Act, there may still be a right of action in Alberta. However, section 11 does not impose an obligation on the Board to analyze and determine the relevance of the certificate before deciding whether to make the determination requested, particularly where this would involve a decision as to the law of which province is applicable. Rather, section 11 requires that a threshold level or prima facie case for relevance be met in order for the Board to accede to a request for a certificate. Beyond that, the Board, and now WCAT, clearly does not have the competence or jurisdiction to determine the issue of relevancy of a section 11 determination where the question of relevance is dependent on which law is applicable in the civil action. That issue is for the court to decide.

In this case, the plaintiff received benefits from the Board and his rights have been subrogated to the Board. He also initiated the civil action in B.C. and both parties rely on provincial legislation in their pleadings. The defendants requested a section 11 certificate and the plaintiff now requests that the determination under section 11 proceed. In the panel's view this satisfied the threshold level of relevance required under section 11. It may well be that ultimately the certificate is not relevant to the action, but it is for the court to make this determination. There was nothing to prevent the parties from also seeking a determination from the Alberta Board at the same time as the certificate is sought from B.C. Ultimately it is the court that will determine which law is applicable to the action and the effect of the certificate(s) with respect to that action.

RE: Section 11 Determination
In the Supreme Court of British Columbia
Kelowna Registry No. 12359
Norman GIESBRECHT and Marlene GIESBRECHT v. James GULLEKSON and CANEDA FOREST PRODUCTS SALES LTD. and Cecilia GULLEKSON

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Section 11 Determination
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Introduction

On December 13, 1990 the plaintiff, Norman Giesbrecht, had parked his tractor-trailer in the yard of the Western Grocers Warehouse in Calgary, Alberta. He went to sleep while he waited for the warehouse to open in order to unload his trailer. At approximately 5:15 a.m. that morning the defendant, James Gullekson, backed his tractor-trailer into the front end of the plaintiff's tractor-trailer.

The plaintiff, alleged that he was sitting on the edge of his semi-trailer's sleeper berth and was thrown to the floor as a result of the impact. He alleged personal injury and damage to his tractor. He applied for compensation from the Alberta Workers' Compensation Board (Alberta Board) with respect to his injuries then elected to apply for compensation from the British Columbia Workers' Compensation Board (the Board). The Board accepted his claim and authorized the third party action to pursue the Board's subrogated interest.

The defendants requested a determination regarding the status of the parties under section 11 of the *Workers Compensation Act* (the Act).

Jurisdiction

The defendant's 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.

The applicable law and policies are those which were in place at the time that the accident occurred.

Issue(s)

The issues on this appeal are, whether on the date of the accident, December 13, 1990: a) the plaintiff, Norman Giesbrecht was a worker within the meaning of Part 1 of the Act; and, if yes, whether any alleged injuries sustained in the accident arose out of and in the course of the employment; b) the defendant, James Gullekson, was a worker within the meaning of Part 1 of the Act and, if yes, whether the conduct which caused the alleged breach of duty arose out of and in the course of the employment; c) the defendant, Cecilia Gullekson, was a worker within the meaning of Part 1 of the Act and, if yes, whether the conduct which caused the alleged breach of duty arose out of and in the course of the employment; and, d) whether the defendant Caneda Forest Products Sales Ltd. was an employer in an industry within the meaning of Part 1 of the Act.

Preliminary Matter

A preliminary issue raised by counsel has resulted in a fairly significant delay with regard to this request for a certificate. This issue is whether the Appeal Division had and whether WCAT now has the jurisdiction to issue a certificate in this matter. After raising this issue, counsel took opposing positions which they subsequently reversed with the effect that they remained in opposition on the issue.

The plaintiffs filed a writ and statement of claim in the Supreme Court Registry, Kelowna, British Columbia on December 4, 1991. The defendants pled the Workers Compensation Acts of British Columbia and/or Alberta in paragraph 5 of the statement of defence filed on February 28, 1992.

By letter dated August 27, 1997, Mr. Roger Watts, who was then defendants' counsel, requested a section 11 certificate from the Appeal Division. In letters dated October 15, 1997 and March 3, 1998 plaintiffs' then counsel, Mr. Robert Brun, objected to this request and submitted that the Alberta Board should be making the determination regarding the status of the parties. He submitted that, since the cause of action arose in Alberta, the Appeal Division did not have jurisdiction to provide a ruling.

By letter dated June 4, 1998 the defendants' then counsel advised the Appeal Division that he agreed with Mr. Brun and would seek the appropriate determination from the Alberta Board. However, by letter dated July 15, 1998 Mr. Watts advised that he had changed his mind and his clients wished to proceed with their request for a determination from the Appeal Division.

By letter dated June 17, 1999 plaintiffs' then counsel, Mr. Brun, requested a preliminary decision from the Appeal Division as to whether the section 11 determination sought by the defendants was relevant to the action and within the competence of the Board. In the accompanying submission, he argued that the law of the site of the accident was the applicable law. Citing *Tolofson v Jensen* (1994), 100 BCLR (2nd) 1 (SCC) counsel submitted that Alberta law was applicable to the motor vehicle accident and therefore the determination sought by the defendants was neither relevant to the action nor within the Board's competence.

Counsel also cited *Byers v Higgen* (1993), 80 BCLR (2nd) 386 for the proposition that a province cannot create legislation which has extra-provincial effect and that therefore, a Workers' Compensation Board in one province did not have the jurisdiction to determine the status of workers and employers with respect to a cause of action arising in another province. Furthermore, although the Board has jurisdiction to determine whether the parties were workers or employers in British Columbia pursuant to the Act such a determination had no relevance to the civil action given that the accident occurred in Alberta and the applicable law was the law of Alberta.

Mr. Watts responded by submission dated October 21, 1999 arguing that the preliminary determination sought by plaintiffs' counsel regarding the Appeal Division's jurisdiction was beyond the competence of the Appeal Division and was a matter for determination by the Supreme Court of British Columbia. Counsel submitted that it was not within the competence of the Appeal Division to determine the law applicable to the civil action.

He submitted that determinations with respect to the status of the parties as workers and employers were within the jurisdiction of the Appeal Division as defined in section 96 of the Act but it had no jurisdiction beyond that. Counsel cited *Smith et al v Vancouver General Hospital et al* (1981) 31 BCLR 358 (BCCA), stating that the Appeal Division only makes determinations with respect to the status of parties and the court decides the effect of those determinations.

On May 12, 2000 a panel of the Appeal Division informed counsel that she had concluded there were, prima facie, matters for determination by the Board. The panel noted that the male plaintiff had elected to claim compensation in British Columbia; the civil action was initiated in British Columbia Supreme Court with respect to the Alberta

accident, and the Board had authorized the plaintiff to bring this action under the Board's subrogated right of action. The panel stated that the relevance of any section 11 determination would ultimately be determined by the court.
Counsel for the defendants then undertook further investigations in Alberta and made several requests for extensions of time in which to make his rebuttal submission with respect to the certificate. By letter dated November 20, 2002 defendants' counsel, now Mr. Jock Craddock, advised the Appeal Division that he had requested the Alberta Board to make a determination regarding the status of the parties. Counsel said that he now agreed with the view of plaintiffs' counsel, as set out in the letter of June 17, 1999, that the matter should be determined in Alberta and he believed that such a determination would allow the British Columbia court to determine whether a stay of proceedings was appropriate. Mr. Craddock proposed to make no further submissions to the Appeal Division regarding a section 11 determination under the Act until the Alberta Board had made its determinations.

By letter dated November 21, 2002 plaintiffs' counsel, now Mr. Douglas Harrington, did not agree that there should be a cancellation of the request to the Appeal Division at such a late date and requested that the Appeal Division proceed with its determination.

By letter dated December 12, 2002, Mr. Craddock submitted a number of documents which indicated that the plaintiff had been entitled to compensation in Alberta and that the defendants were registered with the Alberta Board. Given that the accident occurred in Alberta and that all of the parties were covered under the Alberta Workers' Compensation Act, he argued that it would be most appropriate to obtain a determination regarding the status of the parties from Alberta.

Essentially, the position of defendants' counsel in December 2002 was now the same as that of plaintiffs' counsel in June 1999 in that both now agreed that Alberta law was applicable and a determination regarding the status of the parties should be sought from the Alberta Board. However, plaintiffs' counsel now argued that the Appeal Division should proceed with its determinations under section 11 of the Act in any case.

The panel that was at that time assigned to the file obtained and reviewed the additional information that defendants' counsel was relying on with respect to its request that the application to the Appeal Division not proceed. The panel was not persuaded that the new information provided grounds to grant a further extension of time to the defendants. This decision was communicated to the parties and final submissions were requested and obtained.

Section 11 obliged "the board" to make certain determinations on being requested to do so by the court or a party to an action. Specifically, section 11 stated, "Where an action

based on a disability caused by occupational disease, personal injury or death is brought, the board must, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this Act…"

By resolution dated April 8, 1991 the governing body of the Board delegated the Board's obligation to issue certificates under section 11 to the Appeal Division. I note that the responsibility for making determinations of this nature is now imposed directly on WCAT pursuant to section 257 of the *Workers Compensation Amendment Act (No.2), 2002*; however, the language of section 257 is permissive. It provides that "the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act" on being requested to do so by the court or a party to the action.

In *Smith*, supra, the court was dealing with a preliminary question raised by counsel after a section 11 certificate had been issued. The appellants argued that the determinations under section 11 should not be binding on the court pursuant to the privitive clause set out in section 96 of the Act because this would result in a potential conflict with the functions of a judge or, alternatively, that section 11 was unconstitutional because it purported to confer jurisdiction on the Board which was reserved to federally appointed judges pursuant to section 96 of the B.N.A. Act, 1987. The court concluded that section 11 could not be read independently of section 10, the effect of which was, "to take away a cause of action, not to adjudicate upon the cause of action". The court found that, under section 11, the Board was not concerned with the tort action only with determining status in relation to the compensation scheme under the Act.

Byers, supra, involved a motor vehicle accident in British Columbia. Legal action was initiated in the British Columbia Supreme Court. All of the parties to that civil action were either workers or employers under the Alberta Workers' Compensation Act and the plaintiff had claimed compensation in Alberta. The court concluded that this did not preclude civil action in British Columbia; the statutory bar under the Alberta legislation did not extend to actions outside of the province.

In view of the decision in *Byers*, I appreciate the argument that a section 11 certificate may not be ultimately relevant to the action in that, even if all of the parties are workers and/or employers within the scope of the British Columbia legislation, there may still be a right of action in Alberta.

But, I do not consider that section 11 imposed an obligation on the Board to analyze and determine the relevance of the certificate before deciding whether to make the determinations requested, particularly where this would involve a decision as to the law

of which province is applicable. Rather, I interpret section 11 as requiring that a threshold level or prima facie case for relevance be met in order for the Board to accede to a request for a certificate. Beyond that, the Board, and now WCAT, clearly does not have the competence or jurisdiction to determine the issue of relevancy of a section 11 determination where the question of relevance is dependent on which law is applicable in the civil action. That issue is for the court to decide.

In this case the male plaintiff received benefits from the Board and his rights have been subrogated to the Board. Plaintiffs' counsel initiated the civil action in British Columbia and both parties rely on provincial legislation in their pleadings. The defendants requested a section 11 certificate and the plaintiff now requests that the determination under section 11 proceed. In my view, this satisfies the threshold level of relevance required under section 11 of the Act. It may well be that, ultimately, the certificate is not relevant to the action, but it is for the court to make this determination.

I also note that there is nothing to prevent the parties from also seeking a determination from the Alberta Board at the same time as a certificate is sought from British Columbia. Ultimately, it is the court that will determine which law is applicable to the action and the effect of the certificate(s) with respect to that action.

Law and Policy

At the time of the accident, December 13, 1990, the *Workers Compensation Act RSBC 1979* c. 437 specified the industries to which it applied and also provided mechanisms for voluntary inclusion of specific employers and/or industries.

Section 1 defined "worker" to include:

> 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;

Section 2(1)(b) provided that Part 1 of the Act applied to employers and workers "in or about the operation of industrial undertakings listed in Schedule A".

Schedule A included "Teaming, transfer, or trucking business".

Section 2(2)(e) provided that, subject to section 3, Part 1 of the Act did not apply to "employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker resident in the Province".

Section 3 provided, among other things, for the voluntary inclusion of employers who were otherwise excluded from the Act. Section 3(3) provided that an independent operator could be admitted by the Board "as being entitled …to the same compensation as if he were a worker within the scope of the Act".

Section 75(1) authorized the Board to "issue the orders and directives it considers requisite for the due administration and carrying out of this Part". The *Rehabilitation Services and Claims Manual* (RSCM) and the *Assessment Policy Manual* (APM) in effect at the time of the accident, December 13, 1990, contain the applicable policies regarding the classification of parties as independent firms, labour contractors or workers and the rules applicable to out-of-province claims and out-of-province employers.

Item #5.20 of the *Rehabilitation Services and Claims Manual*, "Out-of-Province Employers", provided:

> Although the Act does not expressly require that the industries covered by the Act be industries carried on in British Columbia, for obvious constitutional reasons, this must be the case. In considering whether a company is carrying on an industry covered by the Act within this province, only activities actually carried on within the province can be taken into account.
>
> Section 2(2)(e) excludes "employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker resident in the Province".
>
> The coverage of employers who temporarily carry on business in this province is dealt with at No. 20:30:40 of the Assessment Department Policy Manual.

No. 20:30:40 of the *Assessment Policy Manual* stated:

> The Registration Section must administer registration requirements for two types of temporary employers: firms from outside the province who operate in B.C. in a compulsory industry on a temporary basis, and B.C. residents who become employers in compulsory industries for short-term projects only…
>
> 1. Out-of-Province Employers
>
> …

In the trucking industry, the following criteria outline what is considered trucking in British Columbia and therefore is a compulsory industry within the scope of the B.C. Act. The criteria are:

(a) hauling between B.C. points, or
(b) hauling out of B.C., or
(c) being incorporated in B.C., or
(d) employing B.C. workers.

(A non-British Columbia firm hauling goods into the province, dropping them off and dead-heading out is not regarded as being in the trucking industry in the province regardless of the number of trips they make.)

If an employer is in the trucking industry in B.C. they may be exempted from the provisions of the Act under Section 2(2) if:

(a) they are not incorporated in B.C., and
(b) they do not employ B.C. workers, and
(c) they are not hauling between B.C. points, and
(d) they haul goods out of B.C. six or less times per calendar year.

An employer who (or intends to) haul goods out of B.C. seven or more times per year must register.

(emphasis added)

Item #6:00 of the RSCM, “Coverage of Workers Within An Industry”, provided, in part:

It is a well established principle of workers’ compensation that where an industry comes within the scope of the Act, all workers in that industry are covered for compensation…

Item #7.40 of the RSCM, “Nature of Employment Relationships”, stated:

Where a person contracts with another to provide the labour of himself or himself and others in an industry covered by the Workers’ Compensation Act, the Board considers that the contract may create one of three types of relationship. The persons doing the work may be independent firms, labour contractors, or workers.

Item #7.41 of the RSCM, “Independent Firms”, provided, in part:

The following types of firms are regarded as independent unless circumstances indicate otherwise:

(b) any firm supplying and operating two or more major pieces of operating equipment, for example, trucks or skidders (not considered equipment are powersaws, hand tools or transportation vehicles to and from job site);

(c) incorporated companies, unless:

(i) it is personnel (sic) service corporation (as defined in Assessment Policy Manual 20:30:20);
(ii) its sole function is to provide a labour-only phase of another firm's operation and there is a degree of common ownership between the two;

Item #7.42 of the RSCM, "Labour Contractors", provided in part:

Labour contractors include unincorporated individuals or partners:

(c) who may or may not have workers but contract a service, including one piece of major revenue-producing equipment, to a firm or individual (for example, a backhoe contractor supplying his own backhoe).

The definitions of independent firms and labour contractors in items #7.41 and #7.42 were much the same as the definitions provided in item #20:30:20 which was in effect at the time.

Item #7.44 of the RSCM, "Principles Followed in Disputes over Status", provided a set of principles for resolving disputes as to whether a person was a worker or employer for compensation purposes, or, alternatively an independent firm, labour contractor, or a worker for assessment purposes. There are 7 guidelines provided under the headings:

(a) control
(b) ownership of equipment or licenses
(c) terms of work contract
(d) independent initiative, profit sharing, and piecework
(e) employment of others
(f) continuity of work
(g) separate business enterprise

The policy included some discussion regarding the application of each of these factors which were derived from several prior decisions of the commissioners published in the Workers' Compensation Reporter series: Decision Nos. 26, 32, 138, and 255.

Although the scope of the legislation was expanded substantially in 1994 the policies with respect to labour contractors, independent firms, and determinations regarding companies that are in the trucking industry in the province have not changed significantly.

Status of the Plaintiff, Norman Giesbrecht

At the time of the accident, Norman Giesbrecht and Marlene Giesbrecht were co-owners of a 1990 Freightliner Tractor. Norman Giesbrecht had a business relationship with H & R Transport Ltd. (H&R) pursuant to a lease agreement dated August 14, 1990 (the lease agreement). According to the terms of this agreement Norman Giesbrecht leased a Freightliner tractor unit and Great Dane trailer unit to H&R furnished with a driver. The terms and conditions in this lease agreement were supplemented by the terms of a second document entitled *H&R Hiring Standards and Specifications Owner Operator (Revenue Fleet)* which I will refer to as the "hiring standards".

Defendants' counsel submits that, pursuant to the terms of his agreement with H&R, the plaintiff had no independent business existence. Given the nature of this relationship the plaintiff was either an employee of H&R or a labour contractor and in either case he was a worker under the Act.

Plaintiffs' counsel does not dispute that the plaintiff was a worker within the scope of the Act when the accident occurred. He states that he meets the criteria under section 8(1) of the Act which sets out the criteria for deciding whether a worker is entitled to compensation in British Columbia for an injury occurring outside of the Province.

The policies regarding independent firms and labour contractors, item #7.41 and item #7.42 and the guidelines set out in item #7.44 are relevant with regard to the determination of Mr. Giesbrecht's status.

Item #7.42 defined a labour contractor to include unincorporated individuals or partners "who may or may not have workers but contract a service including one piece of major revenue-producing equipment, to a firm or individual"

For the purpose of applying these policies I have considered whether the tractor and trailer supplied by Mr. Giesbrecht should be viewed as one or two pieces of revenue producing equipment. The significance of this is that a party supplying and operating

two major pieces of revenue producing equipment is treated as an independent firm whereas a party supplying and operating one piece of revenue producing equipment is treated as a labour contractor.

Item #7.41 of the RSCM provided that "any firm supplying and operating two or more major pieces of operating equipment, for example, trucks or skidders" was an independent firm unless circumstances indicated otherwise. The equivalent policy in the APM, policy #20:30:20, stated that independent firms included: "Any firm which requires 2 or more pieces of revenue producing equipment to fulfil a contract, eg. an individual enters into a contract to load and haul logs, so must provide both the loader and the logging truck".

The relevance of this distinction is that the proprietor of an (unincorporated) independent firm had to obtain Personal Optional Protection (POP) in order to come within the scope of Part 1 of the Act. A labour contractor was not required to have POP. If a labour contractor chose not to register with the Board as an employer and did not obtain POP he or she was considered a worker of the prime contractor or firm for which they were contracting.

In this case, Mr. Giesbrecht contracted to lease his Freightliner tractor unit and Great Dane trailer unit and to provide his services as a driver. Given that neither the tractor nor the trailer would produce revenue independently of the other, I have treated these two units as one piece of major revenue-producing equipment i.e., a tractor-trailer unit. In arriving at this conclusion, I have also noted that the policy at item #7.41 referred to two pieces of "operating equipment" which suggests that each piece of equipment should have the capacity to function on its own in order to be recognized as a separate piece of equipment for the purposes of this policy.

As a result of the above, Mr. Giesbrecht would appear to be a labour contractor. However, there are also the guidelines in item #7.44 to be taken into account. The effect of this initial classification as a labour contractor or independent firm has been discussed in a number of Appeal Division decisions, most recently in Appeal Division Decision #98-0563. The panel in that decision noted that it is unclear what effect should be given to a determination that a party is a labour contractor under item #7.42 (or an independent operator under item #7.41) in light of policy item #7.44 which directs adjudicators to also examine the relationship between parties.

Bearing in mind that concern, I consider that the guidelines in item #7.44 must be taken into account in any event given the obligation on WCAT to apply a policy that is applicable. In this case, I consider that the result of applying those guidelines is consistent with the initial determination, that is, that Mr. Giesbrecht was a labour contractor. My reasons follow.

Mr. Giesbrecht was examined for discovery on May 1, 1997 but the discovery did not address his relationship with H&R to any extent. So, although the terms of the work contract are only one of the factors to be considered in determining the nature of the relationship between the parties under the policy at item #7.44, in this case the lease agreement and the hiring standards are the primary source of information.

Mr. Giesbrecht described himself as an independent operator under contract with H&R Transport in his application for compensation to the Alberta Board. He indicated that his hours of work were variable based on the trucking jobs available and that his rate of pay was 87% of the revenue generated "by truck" He also submitted two applications for compensation to the Board, one application used by workers and the other by independent operators. In both forms he gave essentially the same information as he had given to the Alberta Board. He indicated that he was self-employed and that his work was variable and that he worked on a contract basis.

The lease agreement also describes the lessor (Mr. Giesbrecht) as an independent contractor. However, the document indicates that H&R had considerable control over the manner in which Mr. Giesbrecht conducted his activities as a driver. The agreement states that the lessor will provide "exclusive service" to the carrier unless otherwise authorized by the carrier in advance. The lessor is required to read the carrier's "DRIVERS HANDBOOK" and abide by its contents. The lessor is also required to conform to the carrier's standards of performances, which are itemized. The items include the requirement to accept any load offered by dispatch and the requirement to comply with all dispatch instructions. The lessor is also required to attend scheduled safety meetings and to comply with the carrier's safety program, as well as a number of other miscellaneous obligations. In addition, the hiring standards refers to "hiring procedures" and indicates that successful applicants must attend a 2-day orientation program. These factors indicate a significant degree of control by H&R over the manner in which the lessor, in this case Mr. Giesbrecht, would have carried out the contract.

In addition, there was no opportunity for independent initiative or profit sharing since Mr. Giesbrecht was prohibited from driving for other companies except with the express permission of the carrier. According to his application for compensation he worked in response to calls from H&R's dispatcher.

With regard to the employment of others, there is no evidence that Mr. Giesbrecht had ever hired another person to assist him in this contract. And, although the leasing agreement provides that the lessor is fully responsible for any drivers he hired, all drivers (or passengers) had to be approved by the carrier before being permitted on the equipment.

As for continuity of work, the evidence is that Mr. Giesbrecht drove only for H&R under this contract. As previously noted, he was not permitted under the leasing agreement to drive for anyone else without the permission of H&R.

Mr. Giesbrecht owned the major equipment used for providing the service he had contracted to provide but all of the elements of the relationship point to a relationship of employment as opposed to a relationship between independent firms.

As a result, I find that Mr. Giesbrecht was an employee of H&R at the time the accident occurred. Since H&R was registered with the Board at the time of the accident (memorandum dated September 9, 1997 from the acting policy manager of the Assessment Department), I find that Mr. Giesbrecht was a worker within the meaning of Part 1 at the time the accident occurred.

The next issue is whether any injuries caused by the accident arose out of and in the course of his employment. According to the policies, Mr. Giesbrecht would have been a travelling employee at the time of the accident in that his job involved travelling generally. As a result, he would be covered under the Act while travelling. Although he has indicated that he was "off duty" at the time the accident occurred, the policy at item #18.41 states that an employee whose work entails travel away from the employer's premises is considered to be within the course of employment continuously during the trip except where there has been a distinct departure on a personal errand. Accordingly, I find that any injuries arising out of the accident, arose out of and in the course of the employment.

Status of the plaintiff, Marlene Giesbrecht

Defendants' counsel initially made a request for a determination that Marlene Giesbrecht was a dependent within the meaning of Part 1 of the Act. The plaintiffs took no position on the status of Marlene Giesbrecht. Defendants' counsel made no submission with respect to Marlene Giesbrecht other than to state that he "calls no evidence with respect to the issue of whether any injury or damage to Marlene Giesbrecht arose out of, or in the course of employment".

The plaintiff's evidence at his examination for discovery was that his wife did not work outside of the home. No other evidence was led and no submissions were made with regard to the status of Marlene Giesbrecht. On an initial review, the language of section 11 appears sufficiently broad to encompass a determination of this nature but in the absence of evidence and submissions there is no basis for making a determination.

Status of the Defendant, Caneda Forest Products Sales Ltd.

Caneda Forest Products Sales Ltd. (Caneda) was registered with the Board on the date of the accident according to a memorandum from the assessment department dated September 9, 1997. Accordingly, I find that it was an employer within the meaning of Part 1 of the Act.

Status of the Defendants, James Gullekson and Cecilia Gullekson

The question of whether the personal defendants were "workers" at the time of the accident depends on whether they were workers in an industry that came within the scope of the Act, that is, whether they were working in a compulsory industry in British Columbia. The criteria used to determine whether a company was "trucking in British Columbia" is set out in policy 20:30:40 as excerpted above.

According to the policies a person could be covered as a worker if he or she were an employee, a labour contractor, an independent operator with personal optional protection, or a principal or director of a corporation registered with the Board in an industry within the scope of the Act.

In this case, the industry in which the defendants operated was an industry listed in Schedule A of the Act. However, the evidence must also establish that this trucking industry was carried on in British Columbia.

Evidence

The defendant James Gullekson died on May 21, 1993. As a result, much of the evidence regarding the status of the personal defendants has been provided by Cecilia Gullekson in an examination for discovery on January 24, 2001 and two affidavits sworn on August 12, 1998 and February 7, 2003. A transcript of an examination for discovery of Richard Oldfield of May 1, 1997, a manager with Caneda, has also been submitted as well as a number of documents related to the defendants' dealings in Alberta.

According to an affidavit sworn by Cecilia Gullekson on February 7, 2003, she and her husband started a trucking business in 1988 or 1989 under a company established by Cecilia Gullekson called Challenging Ventures Inc. The records of the Board Assessment Department revealed that a company by this name was registered with the Board until January 2, 1990. She states that "they" leased with a trucking company called Quadra Cartage and operated out of Richmond, British Columbia, hauling in and out of British Columbia into the United States.

She states that, in the Spring of 1990, she and her husband changed to a lease with the corporate defendant Caneda Products Sales Ltd. and started operating out of Calgary, Alberta.

In her examination for discovery, Cecilia Gullekson stated that she and her husband had a weekly run from California to Calgary (Q 42). She said that they also did other trips for Caneda but Western Grocers was their customer. She said that they brought the Western Grocers contract with them to Caneda and that they had changed to Caneda because they were looking for downloads. She stated that they had had the same route – California to Calgary when leasing with Quadra Cartage. She said that they had leased with Quadra Cartage because they wanted downloads but had found that they were not adequate so they had stopped hauling for Quadra Cartage and had gone to Caneda (Q 81 and Q 82). When they contracted with Caneda they turned over the Western Grocers contract to Caneda, and Caneda "got the percentage for it". The Gulleksons took 85% and Caneda took the rest. She said that "when you lease onto someone else, it becomes their contract, not ours" (Q 43 and Q 44).

The personal defendants incorporated The Rothaviald Corporation (The Rothaviald) in Alberta; Cecilia Gullekson thought they had incorporated around the time that they started hauling for Caneda (Q 152 to 161). A copy of a record of the Alberta Corporate Registration System indicates that Co. 332751 Alberta Ltd. was renamed The Rothaviald Corporation on June 21, 1990. According to this document, there are two directors: Cecilia Gullekson and Jim Gullekson and a Calgary, Alberta address is provided for both. Cecilia Gullekson is listed as the only voting shareholder.

This corporation was registered with the Alberta Board from May 31, 1990 to February 28, 1994 according to a copy of a letter dated September 27, 2001 signed by a bodily injury adjuster with the Alberta Board which was submitted by the defendants. This letter also states that James B. Gullekson also had an account with the Alberta Board as of May 31, 1990. The letter states that Cecilia M. Gullekson did not have an account with the Alberta Board at that time but this is corrected in a letter signed by the same adjuster, dated June 20, 2002. In this subsequent letter he states that Cecilia M. Gullekson also had "personal coverage" with the Alberta Board as of May 31, 1990.

Neither The Rothaviald nor the personal defendants were registered with the Board at the time of the accident according to memoranda from the Board Assessment Department dated February 2, 2001 and September 9, 1997.

Cecilia Gullekson's evidence was that she was the owner of a tractor and her husband was the owner of the trailer. They transferred this equipment to Caneda for licensing and insurance purposes as part of the agreement to transport goods for Caneda.

She said that The Rothaviald was used just for trucking (Q 162). She no longer had any documents regarding the agreement with Caneda but her evidence was that Caneda did not contribute to the upkeep of the equipment or contribute to any expenses or pay for insurance. She and her husband received a percentage (85%) of the gross revenue from hauling goods (Q 133 to 139). Caneda paid The Rothaviald and both personal defendants took draws from the corporation (Q 152 and Q 165).

She stated that once the Western Grocers contract became Caneda's contract, Caneda gave the instructions regarding pick up and delivery (Q 140). Caneda provided a destination and a time to get there as well as the address. Depending on the pick-up, Caneda also provided the route to follow (Q 146 – 147). With respect to the Western Grocers delivery from California to Calgary, Caneda specified the route. She stated that Caneda required them to have compensation coverage and to provide Caneda with proof of coverage.

She stated that she and her husband worked as a team, covering 4,000 miles a week. It was not possible for one person to drive that distance given the regulations regarding the number of hours a person was permitted to drive without a rest (Q 106 and Q107).

Their weekly run was between California and Calgary (Q 42). They would pick up a load in California and drop it off at Western Groceries in Calgary then they would "reload meat for Robins" and haul it to Vancouver where it was unloaded. They would reload fish in Bellingham and from there go to Los Angeles. It was a triangular route (Q 185 to 187).

In the affidavit sworn on February 7, 2003 she stated that in the spring and summer the usual weekly run was to haul produce from California through Cranbrook to Calgary. After dropping the load in Calgary they would "haul meat to Vancouver and then continue back into the United States hauling fish and starting the circuit again" (para. 10).

She stated that, at the time of the accident they were not hauling to Vancouver. In the winter, between about November and March, they loaded peat moss in Alberta and hauled that to California through Montana and then reloaded produce to haul back to Calgary. On that route they did not usually pass through British Columbia because Montana was a shorter route.

In the same affidavit, she stated that she and her husband did not have a fixed address at the time. They used her mother's home in Fairmont Hot Springs in British Columbia as home base and her husband's brother's home in Calgary as a base in Alberta. They had a telephone there and they did their banking in Calgary (Q 45 to 46). In the affidavit

she said that in 1989 or 1990 they had put their property in storage and more or less lived in the truck and stayed overnight at the Relax Inn in Calgary.

Richard Oldfield was examined for discovery on May 1, 1997 as a representative of Caneda. He stated that he had been employed as general manager with Caneda since November 1996 when he joined the company. He stated that Caneda was comprised of several companies and that it operates throughout North America. He stated that it does business as Caneda Transport Incorporated and has offices in Edmonton, Calgary, Los Angeles and Toronto. When questioned about the relationship between Caneda Transport Inc. and Caneda Forest Product Sales Ltd. he said that they were one and the same.

Mr. Oldfield said that the current system is that the contractor obtains compensation coverage in their home jurisdiction and Caneda obtains the "intra-provincial compensation" coverage. But, he said that he could not say that this system had been in place in 1990.

He stated that Caneda had no records relating to any agreement with the Gulleksons other than the property transfer forms for the tractor and trailer. He had searched for documents and was unable to locate any record of any agreement between the Gulleksons and Caneda. He said that he had searched for any record indicating that Mr. Gullekson had been employed by Caneda but he had not found anything. It is worth noting that, at the time that plaintiffs' counsel examined Mr. Oldfield, evidence of the existence of The Rothaviald had not yet been submitted by defendants' counsel.

Submissions

Before setting out the initial submission by defendants' then counsel I note that this submission, which was received at the Appeal Division on August 13, 1998 pre-dates the examination for discovery of the defendant, Cecilia Gullekson, on January 24, 2001. At the time of the defendants' submission, there was no evidence that the Gulleksons conducted their trucking activities via an incorporated company at the time of the accident.

The submission does not refer to The Rothaviald and counsel's arguments are directed entirely towards establishing an employment relationship between the Gulleksons as individuals and the corporate defendant Caneda. In this regard, defendants' counsel submits that the defendants were workers either as employees of Caneda or as labour contractors supplying equipment to Caneda. He submits that Caneda was an employer under the Act at the time of the accident because it had a registered and records office in B.C., it employed B.C. residents in a compulsory industry, and it was registered with the Board in British Columbia.

Counsel submits that Decision 255, (1975) 3 WCR 155 should be applied to a determination of the status of the defendants. He states that this decision lists seven criteria used as guidelines for determining the status of party: a) control; b) ownership of equipment or licences; c) terms of work contract; d) independent initiative, profit sharing and piece work; e) employment of others; f) continuity of work; and, g) separate business enterprise.

With regard to the application of these criteria, counsel states that there is no evidence the Gulleksons had any control over where they worked; he submits that Caneda controlled them, and they could not deliver for other companies. He submits that the terms of the agreement between the Gulleksons' company and Caneda was a standard inter-jurisdictional trucking agreement of which neither party had retained a copy. Accordingly, the personal defendants were "workers" within the scope of the Act.

Plaintiffs' counsel made his submission to the Appeal Division subsequent to the examination for discovery of Cecilia Gullekson and the evidence regarding the establishment of The Rothaviald by the personal defendants. He submits that the personal defendants were neither workers nor employers within the scope of the Act. Counsel submits that the contract was between Caneda and The Rothaviald. He submits that the personal defendants were principals of The Rothaviald and not workers of Caneda. The Rothaviald was responsible for maintaining workers' compensation coverage with regard to its trucking enterprise. The Rothaviald was registered with the Board in Alberta but not in British Columbia. Accordingly, the personal defendants were not workers within the scope of the Act.

Counsel cited the policies regarding the obligations of principals with regard to registration of an incorporated company and several decisions of the Appeal Division interpreting those policies. Counsel submitted that the principals of The Rothaviald, James and Cecilia Gullekson had failed to register the corporation with the Board in British Columbia. Had they done so they would be covered as workers in British Columbia; having failed to do so, they were not entitled to the benefits of workers' compensation in British Columbia or the benefit of the statutory bar under section 10 of the Act.

In this regard, counsel cited Decision 335, 5 WCR 101 a decision of the former commissioners which deals with principals of limited companies. In that decision, the commissioners concluded that, except in unusual circumstances, principals of small unregistered companies who fail to register their corporation with the Board should not receive benefits under the Act since the responsibility to register the company lies with the principal(s).

In reply, defendants' counsel submitted that Caneda was responsible for "picking up" workers' compensation coverage for the Gulleksons outside of Alberta. Counsel relied on Mr. Oldfield's discovery evidence in this regard; however, I note that Mr. Oldfield stated he could not attest to Caneda's practices at the time of the accident.

Counsel submitted that if there was an obligation on The Rothaviald to register with the Board, the Gulleksons were not aware of this obligation. Counsel submitted that it was not appropriate to pierce the corporate veil and to hold the Gulleksons responsible for The Rothaviald's failure to register with the Board in British Columbia. Rather, they should be recognized as workers in British Columbia as would the workers of any corporation that fails to meet its obligations to register. In this regard, he states that Mr. Gullekson was not a shareholder and did not perform the work of a director. Their circumstances were distinguishable from those in Decision 335

Plaintiffs' counsel submitted in response that the evidence fell short of establishing that Mr. Gullekson was not a shareholder. Counsel submitted that based on the evidence of the Gulleksons' weekly runs, The Rothaviald had to be registered with the Board.

Generally, it appears that plaintiffs' counsel's position is that the corporate structure should be respected for the purposes of the agreement between Caneda and The Rothaviald but the corporate veil should be pierced in relation to any obligation on The Rothaviald to register with the British Columbia Board. Defendants' counsel argues that the corporate structure should be ignored with respect to the hauling agreement with Caneda with the effect that the Gulleksons have the status of workers as employees of Caneda. If, however, The Rothaviald is recognized as a separate entity and the agreement for hauling was between Caneda and The Rothaviald, then the corporate veil should not be pierced in relation to The Rothaviald's obligations to register with the Board. The Gulleksons should be treated as workers of The Rothaviald in British Columbia and not penalized for the corporation's failure to register in British Columbia.

The Rothaviald – Obligation to Register with the Board

The submissions of both counsel are based on the assumption that there was an obligation on The Rothaviald to register with the Board. But, according to policy #20:30:40 respecting the trucking industry, the trucking activities of the Gulleksons were such that they would not be regarded as being in the trucking industry in the province.

During the winter months, from November to March they did not usually pass through British Columbia. During the other months, they regularly hauled meat from Alberta to Vancouver but they dead-headed out of British Columbia, picking up a load of fish in Bellingham for California. The Rothaviald, given that it was incorporated in Alberta and

given the trucking activities of the Gulleksons would not be in the trucking industry in British Columbia.

Given the above, there was no requirement for The Rothaviald to register with the Board.

Relationship between Personal Defendants, The Rothaviald, and Caneda

Cecilia Gullekson, as a shareholder and director of The Rothaviald would be considered a worker under Part 1 of the Act if, under the policies The Rothaviald was "in the trucking industry in the province" but it was not. Similarly, whether or not James Gullekson was a shareholder and/or director of The Rothaviald (there is conflicting evidence on this point) he was reimbursed for his trucking activities by The Rothaviald and would be considered a worker under Part 1 of the Act but only if The Rothaviald was "in the trucking industry in the province".

Given the above, if The Rothaviald was an "independent firm" vis-à-vis its relationship with Caneda, the Gulleksons were not workers under Part 1 of the Act. If, on the other hand, the Gulleksons were employees of Caneda despite the incorporation of The Rothaviald, they could be workers under the Act given that Caneda was registered with the Board. I note, however, that no evidence was provided regarding the activities with respect to which Caneda was registered with the Board.

The argument that the Gulleksons were employees of Caneda was more persuasive prior to the revelation that the Gulleksons had incorporated The Rothaviald with respect to their trucking activities and had registered this company with the Alberta Board.

Policy item #7.41, which contained the definition of "independent firms", stated that a firm which has incorporated is viewed as an independent firm "unless circumstances indicate otherwise".

As previously noted, this raises the issue of the interrelationship between the definition of an independent firm in item #7.41 and the use of the guidelines in item #7.44. In the Gulleksons' situation, there is the added difficulty of very limited evidence regarding the agreement between the Gulleksons, The Rothaviald, and Caneda. All of the records have apparently been destroyed.

It seems likely that there would be established practices in an industry that crosses provincial and national boundaries and is subject to a variety of licensing and other regulatory requirements. Such evidence might have assisted in filling the gaps in evidence regarding the relationships between the parties in this case. But, no evidence of this nature has been provided.

Given the paucity of the evidence available, I am reluctant to attempt to apply the guidelines set out in policy item #7.44 because it is difficult to do so without speculating about the relationship.

The significance of factors such as Caneda's control over the route and destination could vary depending on the terms of the agreement between Caneda and the Gulleksons/The Rothaviald. There is no evidence as to extent that the Gulleksons' trucking activities were determined in relation to the contract with Western Grocers which they had brought to Caneda.

With regard to the ownership of equipment, the Gulleksons owned the major revenue producing equipment in the business. The policy refers to a case where taxi drivers were found to be workers and a significant consideration in arriving at that conclusion was that the company owned all the taxi licenses as well as the taxis. On the other hand where taxi operators lease a taxi, they are considered as independent operators rather than workers.

The ownership of licenses, which is also a factor, appears to have been within the control of Caneda although the Gulleksons apparently paid the costs of the licenses. Here also there is little evidence.

Since there is no record of the agreement with Caneda, the terms of the agreement, which would appear to be a fairly critical component, cannot be taken into account in determining the nature of the relationship between the parties.

The application of the criteria of independent initiative and profit sharing appears to weigh against a relationship between independent businesses given that the Gulleksons did not have freedom to haul for another carrier. On the other hand the Western Grocers contract represented a significant part of their trucking activities and they brought that contract to Caneda. Their intention in taking the contract to Caneda was to obtain sufficient downloads in relation to that contract that they would be working to capacity. This suggests more a relationship of interdependence between two firms. The Gulleksons brought the Western Grocers contract to Caneda and Caneda provided them with downloads. In addition, there was some element of profit sharing in that Caneda and The Rothaviald each received a percentage of the revenues from hauling.

The overriding test described in policy item #7.44 is "whether one party has an existence as an independent businessperson separate from this relationship with the other party". In this case, the missing evidence is such that the application of the guidelines in item #7.44 do not assist greatly in resolving the dispute as to the relationship between the parties.

I have given some weight to the fact of incorporation and the statement in policy item #7.41 that an incorporated company is an independent firm. To the extent that it is possible to apply the guidelines in item #7.44 I do not consider that they result in a conclusion that the Gulleksons would more properly be viewed as labour contractors. The relationship between the parties is not clear and there are some factors which suggest a level of dependence inconsistent with an independent firm. However, I do not consider that these outweigh the evidence of independence combined with the fact of incorporation. In this regard, I also note the statements in Decision 255 to the effect that no business organization is completely independent.

I find that The Rothaviald was an independent firm. The trucking activities of The Rothaviald as carried out by the Gulleksons did not involve trucking in British Columbia. The Rothaviald had no obligation to register in British Columbia and was not registered in British Columbia. The Gulleksons, therefore, were not workers within the meaning of Part 1 of the Act.

Conclusion

I find that at the time of the December 13, 1990 accident:

a) the plaintiff, Norman Giesbrecht was a worker within the meaning of Part 1 of the Act; and, any alleged injuries sustained in the accident arose out of and the course of the employment;
b) the defendant, James Gullekson was not a worker within the meaning of Part 1 of the Act;
c) the defendant, Cecilia Gullekson was not a worker within the meaning of Part 1 of the Act; and,
d) the defendant Caneda Forest Products Sales Ltd. was an employer in an industry within the meaning of Part 1 of the Act.

Marguerite Mousseau
Vice Chair

MM:gw

NO. 12359
KELOWNA 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:

Norman GIESBRECHT and Marlene GIESBRECHT

PLAINTIFFS

AND:

James GULLEKSON and CANEDA FOREST PRODUCTS SALES LTD.
and Cecilia GULLEKSON

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the defendants, James GULLEKSON and CANEDA FOREST PRODUCTS SALES LTD. and Cecilia GULLEKSON, 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 13, 1990:

1. The plaintiff, Norman GIESBRECHT, was a worker within the meaning of Part 1 of the *Workers Compensation Act*; and any alleged injuries sustained in the accident arose out of and in the course of the employment;

2. The defendant, James GULLEKSON, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

3. The defendant, Cecilia GULLEKSON, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*, and

4. The defendant, CANEDA FOREST PRODUCTS SALES LTD., was an employer in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of October, 2003.

_____

Marguerite Mousseau
VICE CHAIR

NO. 12359
KELOWNA 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:

NORMAN GIESBRECHT and MARLENE GIESBRECHT

PLAINTIFFS

AND:

JAMES GULLEKSON and CANEDA FOREST PRODUCTS SALES LTD.
and CECILIA GULLEKSON

DEFENDANTS

SECTION 11 CERTIFICATE

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