BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

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Noteworthy Decision Summary

Decision: WCAT-2005-01937 **Panel**: Marguerite Mousseau **Decision Date:** April 18, 2005

Limitation of Actions – Worker-Employer Bar – Employment Activities – Casual Employees – No Employees at Time of Accident – Failure of Employer to Purchase Personal Optional Protection – Sections 10(1) and 257 of the Workers Compensation Act – Policy Items #14.00 and #111.30 of Rehabilitation Services and Claims Manual, Volume I

In determining whether an employer's activities arose out of and in the course of employment for the purposes of determining whether a court action for personal injury is barred by operation of section 10(1) of the *Workers Compensation Act* (Act), "employment activities" are those activities of the employer that relate to the business as a whole, as distinct from the employer's personal activities. Workers' Compensation Board (Board) policy does not support dividing up an employer's activities into activities related to the activities of his or her workers and activities related to the other aspects of the business. In the absence of any principles or guidelines, it is not possible to separate out a set of duties or tasks that make up an employer's employment activities for the purpose of obtaining the benefit of the worker-employer bar. The failure to purchase personal optional protection (POP) is not a significant factor in determining status as an employer.

This was a section 257 determination in the context of an action in the Supreme Court of British Columbia. The plaintiff and the defendant were involved in a motor vehicle accident. Among the issues to be determined was whether the defendant was an employer within the meaning of Part 1 of the Act; and whether the action or conduct which caused the alleged breach of duty of care arose out of and in the course of employment.

The defendant operated a business that had one licensed dump truck. The defendant was the only operator of the truck and was driving it at the time of the accident. The defendant had no employees on payroll at the time of the accident, although he occasionally hired casual employees and paid a Board premium for these employees. He was behind in these payments at the time of the accident. The defendant had not purchased POP.

The panel found the defendant was an employer at the time of the accident although he did not have any workers employed on any specific project at that time. The defendant's actions in registering with the Board and paying assessments for casual employees were sufficient to establish him as an employer during periods when he did not have employees.

In respect of the nature of the employer's conduct, the issue was whether all of the business or employment activities of an employer should be viewed as employment activities for the purposes of section 10(1). No Board policies exist that address this matter. Furthermore, there have been two distinct approaches taken by previous Workers' Compensation Appeal Division (Appeal Division) panels in addressing the issue.

In *Appeal Division Decision #93-0670* (Cesari) the panel determined that although the defendant surgeon in an action for medical malpractice was an employer for the purposes of section 10(1), his actions as a surgeon did not come within the course of his employment as an employer. The surgeon had two office employees. However, the employment activities of the office staff did not include attending operations. The surgeon himself did not have POP and would not been covered for compensation benefits if injured while performing the surgery. The reasoning in Cesari was followed in *Appeal Division Decision #98-0728*.

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In *Appeal Division Decision #2001-2240* (Kandola) a taxi-driver who owned his taxi and used spare drivers on occasion was found to be an employer although he was not properly registered with the Board at the time of the accident. The panel in that decision disagreed with the approach taken in Cesari. That panel noted that the statutory definition of employment does not distinguish between workers and employers and that item #14.00 of *Rehabilitation Services and Claims Manual, Volume I* provides for a broad interpretation of the term "employment". Board policies did not support defining an employer's employment by dividing up the employer's activities into activities related to the activities of his or her workers and activities related to the other aspects of the business. The purchase of POP was irrelevant to status as an employer.

The panel found the reasoning in Kandola more persuasive than the reasoning in Cesari. The Cesari analysis seemed appropriate and reasonable in relation to the facts of that decision because of the clear separation between the surgeon's role in relation to his office staff and his activities as a surgeon. However, it becomes more difficult to apply in a case where the employer performs the same work as his employees. In the absence of any principles or guidelines, it is not possible to separate out a set of duties or tasks that make up an employer's employment activities for the purpose of obtaining the benefit of the bar under section 10(1).

The panel concluded that "employment activities" for the purposes of section 10(1) is intended to include an employer's activities in relation to the business as a whole, as distinct from the employer's personal activities. Therefore, the panel concluded that the employer's conduct at the time of the accident that caused the alleged breach of duty arose out of and in the course of his employment.

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WCAT Decision Number: **WCAT-2005-01937**
WCAT Decision Date: April 18, 2005

Panel: Marguerite Mousseau, Vice Chair

WCAT Reference Number: **041223-A**

Section 257 Determination
In the Supreme Court of British Columbia
Chilliwack Registry No. S0012772
Gerald Christopher Anthony MONDOR v. Darren SEIFRED

Applicant: Darren SEIFRED
(the "defendant")

Respondent: Gerald Christopher Anthony MONDOR
(the "plaintiff")

Interested Party: CUSTOM AIR CONDITIONING LTD.

Representatives:

For Applicant: Ms. Janice Chadola
LINLEY DUIGNAN

For Respondent: Mr. Patrick J. Rose
BRONSON & COMPANY

For Interested Party: Mr. Peter Harteveld
Custom Air Conditioning Ltd.

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Introduction

The plaintiff, Gerald Christopher Anthony Mondor, and the defendant, Darren Seifred, were involved in a motor vehicle accident on October 23, 2001. The plaintiff initiated legal action regarding this accident by writ and statement of claim filed in the Supreme Court Registry in Chilliwack, British Columbia on July 15, 2002. On April 16, 2004 counsel for the defendants requested a certificate under section 257 of the *Workers Compensation Act* (Act).

Pursuant to section 257 of the Act, the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to court concerning actions based on a disability caused by occupational disease, a personal injury or death. Subsection 257(3) provides that Part 4 of the Act applies to proceedings under section 257 save for subsection 253(4) which imposes a statutory due date for decisions.

WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law or discretion arising or required to be determined under Part 4 (section 254). WCAT is not bound by legal precedent (subsection 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2)).

Issue(s)

The issues on this application are: (1) whether the plaintiff, Mr. Mondor, was a worker within the meaning of Part 1 of the Act; and, if yes, (2) whether injuries he sustained in the accident arose out of and in the course of his employment; and (3) whether the defendant Mr. Seifred was an employer within the meaning of Part 1 of the Act and; if yes, (4) whether any action or conduct which caused the alleged breach of duty of care arose out of and in the course of employment.

Applicable Policy

As noted above, section 250 of the Act provides that WCAT must apply a policy of the board of directors that is applicable in the case. Defendant's counsel submits that the applicable policy in this case is the policy in effect as of February 11, 2003. This is based on the analysis undertaken by the panel in *WCAT Decision No. 2004-05552* accessible at http://www.wcat.bc.ca/. That panel dealt with whether the *Assessment Policy Manual* or the *Assessment Manual* (which superseded the *Assessment Policy Manual* on January 1, 2003) was the policy to be applied regarding an accident on February 26, 2001. The panel considered that the Act did not make provision for the application of the policies of the governors to new applications under section 257 of the WCAT which came into existence on March 3, 2003 as a result of the *Workers Compensation Amendment Act, 2002 (No. 2)*.

I agree with the panel's interpretation and analysis of the relevant statutory provisions. I also note, however, the panel's comment at page 7, "While it would appear strange, possibly absurd, to apply current policies to an event in the past, that appears to be the approach required by the current statutory provisions."

With respect to the present case, the policies in effect at the time of the accident October 23, 2001 do not differ substantively from the current policies. Where I have referred to policies in this decision, they are the policies found in the *Assessment Policy Manual* and the *Rehabilitation Services and Claims Manual* (RSCM) which were in effect at the time of the accident.

I have also referred to *Decision 169* (2 WCR 262) which was retired on January 1, 2003. The explanatory note to Appendix 1 of RSCM II (which contains the list of retired decisions) states that "retiring" a decision does not affect its status as policy prior to the date it was "retired". It states: "A 'retired' Decision therefore applies in decision-making on historical issues to the extent it was applicable prior to the 'retirement' date'". This reflects board of directors' resolution #2003/02-24-02 that decisions of the former commissioners remain policy until they are retired and are applicable to the adjudication of historical issues.

Status of the Plaintiff, Gerald Christopher Anthony Mondor

At the time of the accident, the plaintiff was employed as a journeyman air conditioning, heating and refrigeration technician for Custom Air Conditioning Limited (Custom Air). As a result he was a worker within the meaning of Part 1 of the Act.

The disputed issue is whether the injuries sustained by the plaintiff in the accident arose out of and in the course of his employment. The plaintiff submitted an application for compensation after he was informed by ICBC that he should do so. Initially, a Board

officer decided that the plaintiff's injuries did not arise out of and in the course of his employment but, after receiving further information, this decision was readjudicated and the plaintiff was informed that his injuries were compensable.

Whether the plaintiff's injuries arose out of and in the course of employment is determined by applying the law and policies to the facts surrounding the trip during which he was injured.

The policy at item #18.40 of the RSCM, *Travelling Employees*, provides:

> Employees whose job involves travelling on a particular occasion or generally are covered while travelling. Where they do not travel to their employer's premises before beginning the travelling required by their work, they are covered from the moment they leave their residence. However, they will not be covered if they first travel to their employer's premises even though their vehicle has been provided by their employer and/or they need that vehicle to do the travelling required by their work.

The policy at item #18.41 of the RSCM, *Personal Activities During Business Trips,* describes the scope of coverage for a travelling employee. It provides in part:

> The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:
>
> > "Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." (5)
>
> This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

Item #18.42, *Trips Having Business and Non-Business Purpose*, has also been cited by counsel. It provides:

> Whatever other requirements there may be for accepting a claim for an injury occurring on a trip made for business and non-business purposes, one essential is that the injury occur at a time when the claimant is or is substantially on the route which leads to the place where the business purpose is to be carried out. No compensation is payable where the injury occurs while the claimant is making a significant deviation from that route for non-business purposes.

Custom Air has provided a submission, dated January 5, 2005. It is signed by Peter Harteveld, president, and it includes the following information about the plaintiff's terms of employment:

> Our service technicians are paid for hours they bill for work completed to equipment serviced on the client's sites. Technicians are not paid for such things as personal appointments or lunch breaks.
>
> The service technicians are paid for travel time between sites (meaning they are not paid to travel from home to a site in the morning or to return home in the late afternoon. The only exception to this rule is for emergency after-hours callouts.)
>
> If a service technician decides to leave a site to go home he is doing so on his own time and expense.

Mr. Harteveld states Custom Air's position is that the plaintiff was on his way home for lunch at the time of the accident and was not being paid by Custom Air.

The plaintiff provided evidence about the reason for his journey in a statement dated October 26, 2001 made to an insurance adjuster, followed by another statement provided to his counsel, dated February 11, 2002; an application for compensation dated October 29, 2001; and, his examination for discovery on February 24, 2004. There are also claim log entries from the plaintiff's file which report on information provided by the plaintiff to Board officers. In addition, there is a document from Custom Air, dated December 28, 2001 which consists of answers provided to questions from plaintiff's counsel.

According to the document from Custom Air, the plaintiff works 40 hours per week, with some overtime. The plaintiff stated at his examination for discovery that he usually starts work around 7:30 a.m. although the starting time may vary (Q 45). The employer provides a van for the plaintiff to use for work (Q 51). He travels from place to place primarily repairing heating, air-conditioning and refrigeration equipment using this van, which also carries his tools (Q 57-59).

According to a claim log entry dated November 13, 2001, the worker told a Board officer that he goes to the Custom Air office every Monday morning where he hands in his paper work from the previous week and gets his jobs for the rest of the week. During the rest of the week he goes directly to a job site from his home.

On the morning of the accident the plaintiff started work at 7:30 a.m. at Spruceland Forest Products (Spruceland) (Q 64 – 65). He had a "four-hour quoted job" to do there (Q 72). He said that he usually takes a bag lunch to work so that he can eat on the job

and he had one with him that day (Q 85 – 88). His wife knew though, that he was working a short distance away and she called him shortly after 11:00 a.m. to ask if he was planning on being home for lunch. He had said that he would "swing by there" when he was finished the job (Q 89).

When he completed the job and tried to run the equipment, he realized that more repairs were needed (Q 72). The additional repairs required some extra parts that the plaintiff was going to get from Refrigerative Supply Limited (RSL), a supplier in Langley. He called his employer to let them know that he needed another job number and authorization to complete the repairs (Q 73). He did not obtain an authorization at the time but he said that eventually they would approve it and give him a job number (Q 75). He would then go to pick up the parts after he had received approval to complete the repairs (Q 90). He left Spruceland at approximately ten minutes after 12:00 noon and the accident occurred shortly afterwards (Q 78).

At the time of the accident, the plaintiff was driving south on 200th Street which is the route that he would have taken to go either to his home or to RSL. The accident occurred at the intersection of 200th Street and 88th Avenue. In order to get to his home the plaintiff would have had to continue travelling south along 200th Street to 66th Avenue, which is the cross-street for his home (Q 83). In order to go to the supplier the plaintiff would have driven another two blocks along 200th Street then turned left on 64th Avenue. It is apparent from looking at a map that RSL is located just a few blocks from his home.

There is some contradictory evidence as to whether the plaintiff was on his way home for lunch or on his way to RSL to obtain the extra parts when the accident occurred. I am satisfied, however, that the plaintiff was likely on his way home for lunch at the relevant time. The question remains whether the plaintiff was covered under the Act even while going home for lunch, given the policies previously cited.

Defendant's counsel takes the position that the plaintiff is a travelling employee and he is covered under the Act for all of his travel including travel between his home and various work sites. She submits that it is irrelevant whether the plaintiff was travelling to RSL or to his home for lunch at the time the accident occurred. Since he was a travelling employee, his journey would be covered in either case.

She also submits that even if the plaintiff was on his way to have lunch, there was still an employment purpose to the journey since he had to wait for authorization to purchase the parts. He could do that while at home and would be paid while waiting.

Plaintiff's counsel states that the plaintiff is only paid for the hours that he bills to each customer; if he bills only four hours, he is only paid for four hours. He states that his billing to Spruceland concluded when the warranty job that he was authorized to

complete was finished, which in this case was around noon. He submits, therefore, that at the time of the accident the plaintiff was on his own time, unpaid, until he received further authorization to obtain the parts, which in this case occurred at around 3:30 p.m.

He submits that the plaintiff's trip had a non-business purpose and that item #18.42 provides that no compensation is payable when an employee is making a significant deviation from his route for non-business purposes. He states that the plaintiff had to go as far out of his route to go home as he would have had to go if he were going to RSL, which counsel considered a significant deviation. He also submitted that there was a significant deviation in terms of time since the plaintiff would not be working for a period of approximately three hours had the accident not occurred.

With regard to the plaintiff's intentions had the accident not occurred, there was no evidence obtained from the plaintiff as to how his day would have proceeded had there been no accident. Accordingly, there is little evidence to support plaintiff's counsel's submission that the plaintiff would have stayed home, performing no work, while waiting three hours for an authorization. There is just as little evidence to support the submission of defendant's counsel that the plaintiff would be paid for sitting at home for three hours awaiting authorization to purchase parts.

The evidence on the whole, however, suggests that the plaintiff would likely not have spent three hours waiting for a telephone message in order to begin productive work once again. In his ICBC statement, the plaintiff said that he works from 7:30 a.m. to 4:00 p.m. When he is done for the day, he calls the dispatcher at his office to let them know. If he works more than 8 hours, he is paid time and a half. The submission of Custom Air is that technicians are paid for the hours they bill for work completed and the document from Custom Air dated December 28, 2001 states that the plaintiff normally works 40 hours per week. Given these factors, I consider it likely that the plaintiff was merely going home for lunch and he would have resumed productive activity, one way or another, after lunch.

Even if the plaintiff intended to stop working at noon and not start again until 3:00 that afternoon, the policies set out above provide that his journey home and then his journey from home to RSL would be covered. The plaintiff's pattern of employment was such that he would be considered a travelling worker in that his duties involved travelling from one location to the next over the course of a day in order to service equipment. As a result, he was covered under the Act from the time he left his residence and he was covered during all of his travel during the day until he returned home. This is in keeping with the basic principle described in item #18.41 which is set out above. This is true even though the employee is not paid for his travel from home to the work site and back.

The exception to this is that he would not be covered if he was on a distinct departure or substantial deviation from a travel route for personal reasons. Travel for lunch is not usually considered a distinct departure for personal reasons if the employee is a travelling worker because the scope of coverage extends to such personal activities where a travelling worker is involved.

If the plaintiff had travelled a substantial distance away from any work related route in order to have his lunch, such a trip might constitute a distinct departure for personal reasons. But, the evidence in this case does not suggest that this occurred. The evidence is that the plaintiff usually ate his lunch on the road. He went home for lunch on the day of the accident only because he was working in the area and he could "swing by" once he had finished the job. At the time that he agreed to go home, he did not realize that he would need additional parts to complete the job. But, once he became aware of this, the supplier from which he planned to obtain the parts is located so close to his home that stopping for lunch along the way would not involve a distinct departure.

For the above reasons, I find that the plaintiff was a worker at the time of the accident and any injuries sustained in the accident arose out of and in the course of his employment.

Status of the Defendant, Darren Seifred

The first issue with regard to status is whether Mr. Seifred was an employer at the time of the accident. This determination is made on the basis of applicable policies.

Mr. Seifred provided evidence regarding the nature of his business and his activities on the day of the accident in an examination for discovery on February 24, 2004, a statement made to an insurance adjuster on January 19, 2002 and a supplemental statement made to the same insurance adjuster on December 9, 2004.

In the first statement, dated January 19, 2002, Mr. Seifred said that he owns Darren Seifred Contracting. He described it as a proprietorship which he operates out of his own home. The business is not incorporated. At the time of the statement, he had one licensed dump truck and he was the only operator of that truck. His business also owned a couple of excavators and a bulldozer. At the time of the accident, he was driving the dump truck. It had been parked for several days with mechanical difficulties, although it was driveable. He did not have any jobs lined up for the day of the accident; he had been quite sick and had not worked for several days.

In the supplemental statement dated December 9, 2004, Mr. Seifred stated that, at the time of the accident, he had no employees on payroll. With regard to the operation of his business, he made the following comment: "I owned several pieces of equipment and had 2 to 3 guys that I could call on to run them, if need be and if I was busy with

another piece of equipment." The main person he used was Bill McGowan, an experienced equipment operator. They had agreed on a contract price per job. Mr. McGowan had his own W.C.B. number and was viewed as an independent contractor. Mr. McGowan also worked for other companies at that time. The defendant described Mr. McGowan as "my main guy" and said that the other men he employed were used on a "very casual and sporadic" basis. He said that these other men "worked in a subcontractor capacity as well" and he paid a WCB premium for those casual employees. He said that he never purchased personal optional protection (POP). At the time of the accident, he did not have any projects which required him to use either Bill McGowan or any of the other men.

The defendant's examination for discovery evidence was consistent with the information provided in these statements. He said that he was self-employed, he worked for many clients, and he owned his own equipment, including the dump truck that he was driving at the time of the accident (Q 53-56).

He said that he obtained business by word of mouth and builders and others would call when they needed his services (Q 64 – 65). He did not do all of the work himself but used casual employees from time to time (Q 66 – 69). He said that he paid WCB for the people he employs who do not have their own WCB number (Q 73). He was behind in these payments at the time of the accident (Q 74). He thought that he had not worked for about a week prior to the accident (Q 76, 37 and 38).

A memorandum from the policy manager of the Board Assessment Department, dated November 23, 2004, confirms that Darren Seifred dba Darren Seifred Contracting was registered at the time of the accident; the coverage was for workers only.

Defendant's counsel submits that the defendant was an employer for the purposes of section 10 of the Act at the time of the accident because he hired employees to work for him from time to time. The absence of employees at the time of the accident did not affect his status as an employer.

Defendant's counsel states that the defendant had an established practice of hiring employees on a casual, as needed, basis and he had specific individuals that he called upon at those times. She submits that an employer does not cease to be an employer for the purposes of section 10 of the Act at the moment he has no employees once he has an established practice of having employees; is registered with the Board as an employer; and, has paid assessments so that his employees are covered.

She submits that it is irrelevant that the defendant had not obtained POP when it comes to his status as an employer. In this regard, she notes that policy at item #111.30 of the RSCM states:

> For the purpose of Section 10, "worker" includes an employer entitled to personal optional protection. (10) However, this does not affect status as an employer under this section in regard to other workers.

Counsel also refers to *Appeal Division Decision #2001-2240* published at 18 WCR 71 (Kandola) which involved determinations for a certificate under what was then section 11 of the Act. In that case a taxi-driver who owned his taxi and used spare drivers on occasion was found to be an employer although he was not properly registered with the Board at the time of the accident.

Plaintiff's counsel, on the other hand, states that the defendant was not an active registered account with the Board. Since he had chosen not to register with the Board, he was not covered by workers compensation nor could he be an employer. If, however, the defendant was found to be an employer, plaintiff's counsel submits that since the defendant said he was not working on the day of the accident he was not in the course of his duties, nor working at the time of the accident.

I found the discussion in the Kandola decision useful although the issue was somewhat different from that in the present case. Decisions of the Appeal Division and WCAT are not policy nor do they have authority as precedents. But, in some cases the analysis is useful and, for the purposes of consistency, it is appropriate to apply similar standards and approaches to similar cases.

In the Kandola decision the defendant taxi-driver owned his taxi and used spare drivers on occasion because he was limited by law to driving no more than 60 hours per week. The defendant had made payments to the Board for his workers through the company with which he contracted his services as a taxi-driver. These were submitted to the Board by the company although it appeared that the Board did not have an account for the defendant at the time of the accident because he had failed to reregister. The panel concluded that the defendant's failure to properly register in these circumstances did not alter his status as an employer.

In the present case, I conclude that the defendant was an employer at the time of the accident although he did not have any workers employed on any specific project at that time. In this regard, I have referred to *Decision 169*, which also dealt with a section 11 determination in relation to an accident. In that case, the defendant, who had last employed a waitress approximately one year before the accident, was found not to be an employer at the time of the accident. But, the reason for this conclusion was that the hotel owner had held himself out to the Board as not being an employer in order to avoid paying assessments. Accordingly, he could not now claim the benefit of the bar as an employer for that same period.

Of particular interest are the comments made by the commissioners when considering the question of the status of an employer who has casual employees. At page 263 – 264, the commissioners considered three sets of circumstances which might lead to a conclusion that an individual was an employer despite not having an employee at the relevant time. At page 264, the commissioners provided the following third example:

> Thirdly, there was evidence that the Defendant engaged people on a casual basis. He testified that he employed one or two people about twice a month for a period of an hour to two hours for casual jobs, such as driving garbage to the garbage dump. This employment appears to have been of a very casual kind, not continuous, at a low frequency, and for very temporary periods. Even so, it might well be enough to qualify the Defendant as an employer under the Act if it were not that the Board had earlier decided, for assessment purposes, and on the evidence of the Defendant, that he was not an employer.

I am satisfied that the defendant's actions in registering with the Board and paying assessments for casual employees were sufficient to establish him as an employer during periods when he did not have employees.

The next question has to do with the employer's conduct. Section 10(1) provides protection from liability "when the action or conduct of the employer … which caused the breach of duty arose out of and in the course of employment within the scope of this Part."

The submission of defendant's counsel is that the defendant was taking his dump truck, a piece of equipment used in his business, to be repaired. She states that the defendant earned his income through his equipment and this equipment had to be in good condition for the defendant's business to function. Maintaining the equipment of a business is a required activity in order for the business to be able to hire employees and earn income. As a result, the defendant was an employer and his journey to the repair service in his dump truck arose out of and in the course of employment.

Section 1 of the Act contains the following definition of employment:

> **"employment"**, when used in Part 1, means and refers to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1;

The question is whether all of the business or employment activities of an employer should be viewed as employment activities for the purposes of section 10(1). When a

worker is injured, consideration is routinely given to whether their activities arose out of and in the course of their employment since that it is the threshold question for entitlement to compensation. There are numerous policies which define the parameters of employment activities with respect to workers and the question of whether an injury arose out of and in the course of employment is determined in relation to those policies.

The question of whether an employer's activities arise out of and in the course of employment seldom arises outside of the context of section 10(1) of the Act and there are no policies which specifically address that matter. There are several Appeal Division decisions in which this issue was addressed and they reveal two different approaches to defining the boundaries of an employer's employment activities. One approach defines an employer's "employment" as those activities undertaken in relation to employees; the other approach defines an employer's "employment" as those activities undertaken in furtherance of the business – as distinguished from personal activities.

Appeal Division Decision #93-0670 published at 9 WCR 731 (Cesari) involved a request for a determination under section 11 with regard to the status of surgeon who was a defendant in an action for medical malpractice. The surgeon practiced in an unincorporated association with another doctor and they had two office employees. They had registered their office with the Board to provide compensation coverage for those employees but the defendant surgeon did not have POP. The panel found that the surgeon was an employer for the purposes of section 10(1) but his actions as a surgeon did not come within the course of his employment as an employer. The panel's reasons for arriving at this decision are set out below:

> The registration of any firm, including a private doctor's office, concerns the employment activities of its workers. Assessments are paid on the wages of the workers and the workers are covered for compensation benefits for injuries arising out of and in the course of that employment.
>
> Hospitals are required to register with the Board and, as a result, all employees of a hospital, including doctors, are workers under the Act and assessments are paid on their wages and they are covered for injuries arising out of and in the course of their employment.
>
> The practice of medicine, on its own, is not a compulsory industry within Part 1 of the Act. It is included only on application. When an unincorporated private doctor's office is brought within Part 1 of the Act on application, no assessments are paid on the doctor's wages. That would be done only if the doctor took out Personal Optional Protection.

> The employment activities of the office staff of a doctor's office would not include attending at operations at the hospital. The office staff would be concerned with the management of the office, the booking of appointments, accounting matters, etc. Those workers would be covered for compensation benefits for any injuries arising out of and in the course of that employment and their employer would be protected under section 10(1) from any legal action based on those employment activities. Those activities define the employment relationship and "employment" for the purposes of Part 1 of the Act for the doctor's office.
>
> Here, none of the workers of Dr. Ellis's medical office were engaged in attending to Mr. Cesari at the hospital. Dr. Ellis was not attending there as a worker, as he was not a worker under Part 1 of the Act. Assessments were not paid on his earnings for attending to Mr. Cesari. He would not have been covered for compensation benefits if he had been injured while attending to Mr. Cesari. I cannot see how this comes within the employment relationship or "employment" within Part 1 of the Act. Dr. Ellis declined to bring his activities into "employment" under Part 1 of the Act by not taking out Personal Optional Protection.
>
> As he did not take out Personal Optional Protection to cover himself while engaged in those activities, I find that Dr. yEllis [*sic*] was not in the course of employment within the scope of Part 1 of the Act while attending to Mr. Cesari at the hospital.

In *Appeal Division Decision #98-0728* accessible at http://www.worksafebc.com/ the panel again addressed the question of whether a surgeon's action, while performing surgery, arose out of and in the course of his employment as an employer of office staff. The panel in that decision adopted the reasoning in the Cesari decision and concluded that the defendant surgeon was an employer but his actions during surgery did not arise out of and in the course of his employment as an employer.

This question was also an issue in the Kandola decision, supra. The defendant taxi driver was involved in an accident while driving his taxi. He was not properly registered with the Board but he paid assessments for the spare drivers that he used. He did not have POP.

The panel in that decision disagreed with the approach taken by the panel in the Cesari decision. The panel noted that the statutory definition of employment does not distinguish between workers and employers and that item #14:00 of the RSCM provides for a very broad interpretation of the term "employment".

The panel expressed what appears to be its fundamental concern with the reasoning in Cesari at page 79 as follows:

> The *Cesari* decision would not apply the broad definition of "employment" articulated in the policy to employers seeking protection from suit. To the contrary, the person who is at the centre of the business activity, perhaps the only one whose effort generates the revenue and makes possible the jobs of the support staff, is not acting in the course of employment when doing the productive work at the core of the business plan.
>
> The fact that the employer fully funds the assessments on its workers' earnings is not mentioned in the *Cesari* decision, even though payment of assessments could be seen as the cost to employers for protection from suit.

The panel reviewed the legislative history of section 10(1) of the Act, concluding her review with the following comments at page 82:

> In sum, the *Act* has always afforded employers protection from suit by their own workers and other employers' workers. Various refinements were made to the bar, but none of them required the employer to obtain personal optional protection. Until 1974, workers could be sued by other workers, so obtaining personal optional protection to obtain the benefits under Part 1 afforded to "workers" would have been irrelevant. When the bar was extended to worker versus worker actions, no change was introduced requiring employers to obtain personal optional protection to maintain protection.

The panel also referred to *Fry v. Kelly* [1994] N.J. No. 373 (Nfld.S.C.T.D.) a decision of the Supreme Court of Newfoundland and Labrador, in which the court had addressed the issue of whether there is a distinction between an employer's "business" generally and an employer's "business as an employer" for the purpose of the statutory bar. The court determined that immunity from suit was not tied to personal coverage. In addition, there did not appear to be a valid basis for distinguishing between the employer's business and his business as an employer.

The panel found that the policies did not support an approach to defining an employer's employment which would require parsing the employer's activities into activities related to the activities of his or her workers and activities related to the other aspects of the business. Accordingly, the panel examined whether the defendant taxi driver's activities arose out of and in the course of trade or business, both terms that are included in the definition of employment. She found that his actions at the time of the accident (picking up fares) was the activity which generates revenue for the business and that it was

"central to the nature of the 'undertaking, trade or business' which was registered with the Board". He was an employer who was meeting his obligations as an employer by paying assessments on his workers' earnings and his not having purchased POP did not affect his status as an employer. For these reasons, the panel concluded that the taxi-driver's conduct arose out of and in the course of employment.

The approach in Kandola requires a determination of whether the employer was conducting business activities as opposed to personal or other non-business activities when the impugned conduct occurred, whereas the approach in Cesari requires consideration of whether the employer was engaged in conduct related to the activities of the workers upon which assessments have been paid.

On the whole, I find the reasoning of the panel in Kandola more persuasive than that in Cesari. I do not consider that the failure to purchase POP is a significant factor when considering questions related to status as an employer. The consequence of failing to purchase POP is that an employer is not entitled to compensation if injured while working. I have found no policy, however, to support a conclusion that the failure to purchase POP has an impact on a party's status as employer.

I also find that the facts in this case reveal some of the practical difficulties associated with the application of the reasoning in the Cesari case. In that case, the panel said that the registration of any firm concerns the employment activities of its workers and therefore the scope of employment activities for the surgeon *qua* employer was confined to the activities he performed in his role as an employer. Accordingly, the surgeon was only protected under section 10 for activities related to the management of his office staff. Since the conduct that formed the basis of the legal action against him was his conduct as a surgeon he was not protected from legal action.

That analysis seems appropriate and reasonable in relation to those facts because of the clear separation between the surgeon's role in relation to the office staff and his activities as a surgeon. It seems reasonable to treat his activities in relation to his office staff as employment activities and his activities in surgery as a realm of activity unrelated to his functions as an employer of office staff. On the other hand, there would be no reason to have office staff other than to support his activities as a surgeon and his activities as a surgeon financed the operation of the office and paid the wages of his staff. So, if the surgical practice is viewed as a whole with very different but interdependent parts, it is more difficult to carve out those activities which would attract the benefit of the bar as an employer's employment activities and those that would not.

The line of reasoning in Cesari becomes even more problematic when applied to a case where the employer performs the same work as his employees. On what basis does one delineate those activities which are his employment activities as an employer? Would the employer only have the benefit of the bar when completing paperwork? Or,

perhaps he would have coverage while negotiating a bank loan or purchasing new equipment. If it extended to purchasing new equipment would that be limited to situations where his employees would be using the equipment? Would he have coverage if he purchased equipment that only he would be using? Would he have coverage when taking equipment in for servicing? Would it make a difference if it was equipment used only by him?

No principles have been articulated to assist in characterizing a particular activity for this purpose. There are numerous policies to assist in defining the parameters of employment activities for workers but these are not relevant to determining the employment activities of an employer. In the absence of any principles or guidelines, I do not consider it viable to embark on a task of carving out a set of duties or tasks that constitute an employer's employment activities for the purpose of obtaining the benefit of the bar.

In view of all of the above, I consider that the term "employment activities" in section 10(1) is intended to include an employer's activities in relation to his business as a whole as distinct from his personal activities. Since the defendant was driving a dump truck used by his business when the accident occurred and he was on his way to have the dump truck serviced, I find that his conduct at the time of the accident arose out of and in the course of his employment.

Conclusion

I find that at the time the cause of action arose, on October 23, 2001:

- The plaintiff, Gerald Christopher Anthony Mondor, was a worker within the meaning of Part 1 of the Act
- The injuries sustained by the plaintiff arose out of and in the course of his employment
- The defendant, Darren Seifred, was an employer
- The conduct of the employer that caused the alleged breach of duty arose out of and in the course of employment.

Marguerite Mousseau
Vice Chair

MM:gw

NO.S0012772
CHILLIWACK 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:

GERALD CHRISTOPHER ANTHONY MONDOR

PLAINTIFF

AND:

DARREN SEIFRED

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the defendant, Darren SEIFRED, in this action for a determination pursuant to Section 257 of the *Workers Compensation Act*;

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

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

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

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, October 23, 2001:

1. The plaintiff, Gerald Christopher Anthony MONDOR, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the plaintiff, Gerald Christopher Anthony MONDOR, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The defendant, Darren SEIFRED, was an employer within the meaning of Part 1 of the *Workers Compensation Act*.

4. Any action or conduct of the employer, Darren SEIFRED, which caused any 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 day of April, 2005.

_____

MARGUERITE MOUSSEAU
VICE CHAIR

NO. S0012772
CHILLIWACK REGISTRY

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IN THE MATTER OF THE WORKERS COMPENSATION ACT
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PLAINTIFF

AND:

DARREN SEIFRED

DEFENDANT

SECTION 257 CERTIFICATE

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