BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
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Noteworthy Decision Summary

Decision: WCAT-2005-03639 **Panel:** Herb Morton **Date:** July 11, 2005

Section 257 Determination – Status of Defendant – Incomplete Transcripts of Examination for Discovery – Inadequate Evidentiary Basis for Determination

In this section 257 determination, the panel could not make a determination concerning the status of one of the defendants because it was not clear from the incomplete transcript of the examination for discovery whether relevant information was being withheld. Complete transcripts should be provided when they are not too lengthy and deal with relevant matters.

The defendants in a motor vehicle lawsuit provided selected excerpts from two examinations for discovery and, despite two requests, did not provide complete transcripts. The issue in the section 257 determination was whether the defendant was driving in the course of his employment at the time of the accident. The information provided did not include the addresses of the individual defendant's home, office, or the store where he said he was going to purchase materials to replenish the supply in his truck.

From the material provided, it was unclear whether the defendant was traveling for work purposes at the time of the accident. In these circumstances, where the defendants did not provide the complete transcripts despite being asked to do so, an adequate evidentiary basis was not established for reaching a decision concerning the defendant's status at the time of the accident. In the particular circumstances of this case, the determination might no longer be required, because the panel determined that the injuries suffered by the plaintiff to the action did not arise out of and in the course of her employment.

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WCAT Decision Number: **WCAT-2005-03639**
WCAT Decision Date: **July 11, 2005**

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 042871-A

Section 257 Determination
In the Supreme Court of British Columbia
New Westminster Registry No. M87359
Carolle Blais Parent v. John Munro and J.L. Munro Fire Protection Ltd.

Applicant: John Munro and J.L. Munro Fire Protection Ltd. (the "defendants")

Respondent: Carolle Blais Parent (the "plaintiff")

Interested Person: Providence Health Care Society

Representatives:

For Applicants: Sherman W. Hood
Litigation Department,
INSURANCE CORPORATION OF BRITISH COLUMBIA

For Respondent: Jonathan D. Taylor
TAYLOR BARDAL

For Interested Person: Ronald H. Bohlin
PACIFIC RISK MANAGEMENT CORP.

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Introduction

At approximately 2:45 p.m. on Tuesday, April 8, 2003, the plaintiff was involved in a motor vehicle accident while driving home after taking an examination. She was employed as a licensed practical nurse, and her examination was part of a "Pharmacy Upgrade Program". Her husband picked her up after the exam, and they intended to go shopping before going home. Their car was rear ended by a car owned by the defendant J.L. Munro Fire Protection Ltd., and which was being driven by John Munro. At the time of the accident, both drivers were traveling eastbound on Southwest Marine Drive, at the intersection with Elliott Street**,** in Vancouver.

Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury or death. This application was initiated by counsel for the defendants on October 15, 2004. The legal action is scheduled for trial on September 6, 2005. Written submissions have been provided by the parties to the legal action, and by the plaintiff's employer. This application has been considered on an expedited basis in light of the September 6, 2005 trial date.

Preliminary - Examination for Discovery Transcripts

By letter dated March 3, 2005, the appeals coordination officer advised counsel:

> If counsel conducted any examinations for discovery in this matter, complete transcripts should be provided of your respective discoveries.

On May 20, 2005, WCAT received the submissions of defence counsel, with selected excerpts from two examinations for discovery. On May 24, 2005, the appeals coordination officer wrote to counsel requesting complete copies of the transcripts as previously requested. On June 27, 2005, counsel for the defendants provided rebuttal submissions, but did not furnish the transcripts as requested. On June 29, 2005, the

appeals coordination officer advised counsel that although he was referring this application to a WCAT panel on the basis that submissions were complete, the request for complete discovery transcripts remained outstanding. Given the impending trial date, I have proceeded to consider whether there is sufficient evidence before me on which I can make a decision.

Issue(s)

Certification is requested concerning the status of the parties to the legal action.

Jurisdiction

Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action.

Status of the Plaintiff

The plaintiff provided a sworn statement to ICBC dated April 9, 2003. She also gave evidence at an examination for discovery (date unknown). Pages 10, 7, 11, 12, 13, 14, 30 and 31 have been provided (in that order) from the transcript.

The plaintiff was employed by the Providence Health Care Society (Providence) as a licensed practical nurse. In her April 9, 2003 statement, the plaintiff advised she had been "AN LPN FOR 34 YEARS, WORKING FOR PROVIDENCE SINCE 1979 IN SHAUGHNESSY, THEN TO BROCK FARHNI [*sic*] AND THEN SAINT VINCENT, AND NOW BACK TO BROCK FARHNI [*sic*]." I find that the plaintiff was a worker within the meaning of Part 1 of the Act. At issue is whether her injuries on April 8, 2003 arose out of and in the course of her employment.

The plaintiff was participating in a Licensed Practical Nurse Pharmacology Upgrade Program. Information on this program is provided by a letter (Tab 5 of the Defendants' submissions). The program is described as a "Collaboration project with Providence Health Care and Vancouver Community College." The sessions were spread over a five week period, and included a mid-term and final examination. With this training, the

plaintiff would be qualified to administer medications, including the provision of subcutaneous and intermuscular medications.

The plaintiff was employed by Providence at the Brock Fahrni Pavilion, located at 4650 Oak Street in Vancouver. Her course was provided in a nearby facility, the Youville Residence, located at 4950 Heather Street. In her April 9, 2003 statement, the plaintiff advised that "I NORMALLY WORK AT BROCK FARHNI [*sic*] HOSPITAL BESIDES CHILDREN'S AND WOMAN'S HOSPITAL." On the day of her course she was paid from 9 a.m. until 4 p.m. She was not paid travel time or mileage. Her employer paid for the course.

On the day of the accident, the plaintiff's husband picked her up after her exam at about 2:20 p.m. (Q 75). They were planning to go to the Superstore and the liquor store (Q 52). The plaintiff lived in Coquitlam. She would normally drive home from work by traveling east on 33rd Avenue to Nanaimo, north on Nanaimo to the Lougheed Highway, and the Lougheed Highway to Coquitlam (Q 80). Her route was the same whether she was working or taking the course (Q 82). On the day of the accident, the plaintiff's husband drove south on Cambie to Marine Drive, and then east on Marine Drive in the direction of New Westminster. The plaintiff advised that they did not make any stops prior to the motor vehicle accident (questions 86 to 99, 216 to 217). The accident occurred at the intersection with Elliott Street (between Victoria and Kerr, on the east side of Vancouver)**.** No additional clarification has been provided by plaintiff's counsel as to where the plaintiff intended to do her shopping on the day of the accident.

It is evident from the route taken by the plaintiff that she would have driven by a large liquor store located on Cambie at 41st Avenue in Vancouver, and then past the Superstore located on Southwest Marine Drive at the foot of Main Street. The route taken on the day of the accident is described as having been selected for the purpose of going to such destinations, but the plaintiff and her husband apparently did not stop at the first such locations. It may be that they were heading to some other liquor store and Superstore, perhaps ones located closer to their home in Coquitlam. In that case, the "detour" taken by the plaintiff's husband may have simply represented an alternative route for traveling to Coquitlam. It does not appear that the plaintiff and her husband took a detour to stop at the closest liquor store and Superstore, since the evidence provided in this application is that they drove by both of these locations without stopping.

With respect to the plaintiff's training, she explained:

> AT WORK I AM RETRAINING BECAUSE PROVIDENCE HEALTH CARE DECIDED TO HAVE RN'S AND RESIDENT CARE AIDS INSTEAD OF LPN. WE HAD BEEN TAKING PATIENTS THAT NO ONE ELSE WANTED TO TAKE. THEY OPENED A NEW UNIT FOR US AND WE

> ARE TRAINING FOR THAT, THE SAME LPN JOB BUT WE WILL BE ALLOWED TO GIVE MEDICATION, WHICH WE WERE NOT ALLOWED TO DO BEFORE IN BC.

Submissions have been provided concerning the application of the policy of the board of directors contained at #20.30 of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II), concerning educational or training courses:

> A distinction must be drawn between things workers must do to become and continue to be qualified to perform a particular job and the things they must do as part of the job. Generally speaking, only the latter activities are covered. A person may, for example, need to spend some time in an educational or training institute to obtain or maintain the qualifications necessary for a particular job, but that person is not normally covered while attending that institution.
>
> Compensation coverage does not extend to injuries occurring in the course of first aid courses being taken off the employer's premises and outside work hours. This is so, even though the worker receives additional pay for a first aid ticket and is reimbursed the course fees by the employer.

Interpretive issues concerning the application of the policy at RSCM II item #20.30 are described in a recent policy discussion paper, "Coverage during Educational or Training Activities", accessible at: http://www.worksafebc.com/law_and_policy/archived_information/policy_discussion_papers/default.asp. Section 11 determinations of the Appeal Division concerning the application of the policy at item #20.30 include:

#98-1726	October 27, 1998
#99-1242	August 19, 1999
#00-0659	May 8, 2000
#2003-0296	February 12, 2003

Another policy which is relevant to this application is contained at RSCM II item #18.32, concerning irregular starting points. This provides:

> Where a worker has a regular or usual place of employment and is assigned temporarily to work at a place other than the regular place of employment, the worker is covered for compensation while travelling to and from that temporary place, and this is so whether the worker goes there from the regular place of employment or goes there directly from home. The same rule applies, for example, to a delivery person who goes direct from home to make deliveries.

Policy at RSCM II item #18.33 concerning deviations from route further provides:

> Where a worker is covered while travelling to a place of work, that worker must proceed with reasonable expedition and without substantial deviation from the most convenient route. Otherwise the worker may be regarded as no longer in the course of employment.

Submissions have been provided concerning whether the plaintiff's attendance at the training program was part of her employment, or whether that training was part of what the worker had to "do to become and continue to be qualified to perform a particular job." Submissions have also been provided as to whether the plaintiff's travel prior to the accident involved a substantial deviation for personal reasons from her normal work journey.

In her examination for discovery, the plaintiff described the relative locations of the Brock Fahrni Pavilion and the Youville Residence as follows (Q 51):

> Q Are they across the street from each other?
>
> A Across the street, yes. Not really. I'm sorry. Not really. But like there is some St. Vincent Hospital, so Youville is very close. It's almost across the street. You know, Youville is across from RCMP building on Heather.

By submission dated June 13, 2005, Providence's representative submits:

> . . . on Ms. Parent's evidence, the course location was directly across the street from the her [*sic*] usual work location. That being so, there was really nothing to distinguish her commute home from ordinary traveling to and from work. . . . Ms. Parent attended the course on a day she otherwise would have been at work, at virtually the same location. She left that location at about 2:30 p.m., being close in time to when she would leave work if she was working one of her two usual shifts, one of which ended at 3 p.m.

By rebuttal dated June 27, 2005, counsel for the defendants notes:

> . . . the Plaintiff's attendance at the course clearly benefited the employer by giving the Plaintiff knowledge relevant to the performance of her job. Attendance at the course was required. Also, the Plaintiff was paid regular pay while attending the course and attended the course during regular working hours. Further, the course was not held at a separate

> educational institution; it was held across the street from her normal place of work.

I have looked at the internet website for Providence, accessible at: http://www.providencehealthcare.org/index.html. Inasmuch as this information is readily obtainable from a public source, I do not consider it necessary to disclose this information for submissions. This shows that both the Brock Fahrni Pavilion and the Youville Residence are Providence facilities.

The Brock Fahrni Pavilion and Youville Residence are located in a large complex of health care facilities, which include the British Columbia Children's Hospital, British Columbia's Women's Hospital and Health Centre, and Sunny Hill Health Centre for Children. A map of this complex is accessible at: http://www.cw.bc.ca/maps/pdf/Site%20Map.pdf. Both the Brock Fahrni Pavilion and Youville Residence are at the south side of this large site, in relatively close proximity to one another (as set out in the evidence and submissions provided by counsel).

The question does not appear to have been posed to the plaintiff as to whether, on the days she drove to work or to her course, she continued to utilize the same parking lot. Whether this was the case, or whether she had the choice of different parking spots, it is evident that the two Providence facilities were relatively close to one another, and may be viewed as being part of the same physical site. Thus, the plaintiff was attending a course which was being conducted on her employer's premises (albeit another facility), on the same general physical site as the plaintiff's normal place of employment.

The example provided in the policy at RSCM II item #20.30 indicates that compensation coverage does not extend to injuries occurring in the course of first aid courses being taken off the employer's premises and outside work hours. In this case, the training was being provided on the employer's premises, within work hours. For the purposes of my decision, I will assume that the worker's training was part of her employment. (This finding is not necessary to my decision, for the reasons provided below).

Policy at RSCM II item #18.00 sets out the Board's general policy regarding travel to and from work:

> The general position is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional.

Given the fact that the two Providence facilities were located at the same general physical site or location, I do not consider that the plaintiff was assigned temporarily to

work at a place other than the regular place of employment (so as to provide compensation coverage for her travel between her home and the temporary place of employment). I find that the plaintiff was, in essence, commuting between her home and her regular place of employment. Where the workplace and training facility are essentially located on the same site, or are adjacent to one another, the nature of the plaintiff's travel between her home and that site does not change depending on whether she would be working or participating in training on the day in question. Such travel did not arise out of and in the course of the plaintiff's employment. Accordingly, my decision is the same whether or not workers' compensation coverage extends to the worker's training under the policy at RSCM II item #20.30.

In other words, if workers' compensation coverage did not apply to the plaintiff's training, her travel to and from the training did not arise out of and in the course of her employment. Even if workers' compensation coverage applied to the plaintiff's training, her travel to and from that training involved the same commute as she would make in traveling to her regular place of employment. I find that such travel did not arise out of and in the course of her employment. In light of my findings on these grounds, I need not consider whether the plaintiff's travel on April 8, 2003 involved a deviation from work travel for personal reasons. (If it had been necessary to consider the arguments on this point, additional factual evidence would have been required as to the liquor store and Superstore locations at which the plaintiff intended to do her shopping on the day of the accident. In cases involving arguments regarding a deviation from the route for personal or work travel, it is often helpful to provide a map of the route taken to the point of the accident, and showing the remaining portion of the journey the party intended to take.)

I find that the plaintiff was a worker within the meaning of Part 1 of the Act, but her injuries on April 8, 2003 did not arise out of and in the course of her employment.

Status of the Defendants

In his examination for discovery, the defendant John Munro (JM) advised that the corporate name of his company was J. L. Munro Fire Protection Ltd. (Q 57). At question 58, JM was asked whether he was the sole operator of the company, and he responded "Myself and my wife." The business involved the installation and testing of sprinkler systems (Q 62). His wife's involvement in the business was limited to administrative work (Q 83).

By memo dated March 8, 2005, the policy manager, Assessment Department, advised that J.L. Munro Fire Protection Ltd., account number 568719, was registered with the Board at the time of the April 8, 2003 accident.

I find that at the time of the April 8, 2003 accident, the defendant, J.L. Munro Fire Protection Ltd., was an employer engaged in an industry within the meaning of Part 1 of the Act.

Counsel for the defendants has provided copies of pages 9, 13, 11, 15, 16, 18, 19, 16 [duplicate copy], 20 and 25 from the defendant's examination for discovery (in that order). Page 25 was the last page. Plaintiff's counsel furnished page 17 as well. This was not a situation in which there was a very lengthy examination dealing with matters which were not relevant to this application (i.e. such as a hundred pages dealing only with the effects of the injuries suffered by a plaintiff). In circumstances such as this, it is greatly preferred that the complete transcript is provided, so that the WCAT panel might consider the possible significance of responses to other questions, or review the complete context in which the evidence was provided.

At the day of the accident, JM had been working at another site located between Cambie and Kent, below Marine Drive (Q 108-112). He left that job at 2:45, and did not have another job scheduled (Q 114). At the time of the accident, he was driving to National Fire Equipment, his main supplier (Q 129-131). He was going to replenish the materials which he normally carried in his truck (Q 132-135). These were supplies that he carried in his truck, which he commonly used. They were not being purchased for any particular job (Q 136). Following the accident, JM received a call to go to another job site in Burnaby, which he attended and then went home (Q 145).

The location of National Fire Equipment has not been provided. An internet search indicates a business with this name is currently located at 7972 Winston Street in Burnaby. It is not apparent whether this was the location of National Fire Equipment at the time of the accident.

One possibility is that JM was a traveling employee. To the extent JM's circumstances are comparable to those addressed in *WCAT Decision #2005-01937*, it may be considered that his action or conduct, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act. Another possibility is that at the time of the accident, he was commuting to his home (as was the case in *WCAT Decision #2005-02294*) but had to make a deviation for work reasons to pick up supplies.

Plaintiff's counsel has furnished page 17 of JM's examination for discovery, in which he indicated he was "heading back towards the office and would probably have gone to National Fire Equipment to pick up material." Particulars have not been provided as to the meaning of JM's statement that he was heading back to the office. Defence counsel has not argued that JM intended to perform work at his home office.

Policy at RSCM II item #18.33 provides:

> Where an employee is instructed by the employer to perform some activity related to work while on the way to or from the normal place of work, this does not necessarily provide coverage for the whole journey. Generally speaking, it will only provide coverage to the extent that the employee has, because of these instructions, to do something which would not normally be done while travelling to or from work or go somewhere where the employee would not normally go. This is particularly so when the instructions only require a minor diversion from what is essentially a normal journey to work.
>
> In one case, an employee was asked to stop on his way to work and have snow tires put on his employer's car that he was driving. His claim was denied because he was injured close to his home and at the beginning of a normal journey to his office. He still had a fair distance to travel before he would divert from this route to work to carry out his employer's instructions. The place where the snow tires were to be fitted was close to his office and the fact that he had to go there did not appear to have significantly affected the initial part of his journey. Though road conditions were bad and thus provided some risk, this risk was one that he would, in any event, have to meet in travelling to work. He had to leave earlier to enable him to carry out his employer's instructions, but this reduced rather than increased the risks of the journey.
>
> Where a worker is covered while travelling to a place of work, that worker must proceed with reasonable expedition and without substantial deviation from the most convenient route. Otherwise the worker may be regarded as no longer in the course of employment.

JM's home address at the time of the address has also not been provided. While his current address in Coquitlam is provided on the pleadings, it is not clear whether this was his address at the time of the accident April 8, 2003. A complete discovery transcript might have revealed that information. Counsel for the defendants has not provided a copy of any statement by the defendant to ICBC.

In some circumstances, it is necessary to proceed with making a decision despite limitations in the evidence. Where counsel have made diligent efforts to obtain and present all relevant evidence in a section 257 application, it falls to WCAT to render a judgment based on that evidence notwithstanding the difficulties this may present. As I have only been provided with selective excerpts from the examination for discovery transcripts (despite requests for complete transcripts), it is not apparent whether relevant information is being withheld. I do not consider that an adequate evidentiary

basis has been established for reaching a decision with confidence concerning JM's status at the time of the accident.

In view of my conclusion regarding the status of the plaintiff, it may be that a determination of JM's status may no longer be required. Accordingly, I will proceed to issue my decision concerning the status of the plaintiff alone. In the event that certification is required concerning JM's status, a supplemental certificate may be requested. In that event, additional particulars concerning his travel on the day of the accident would be necessary.

Conclusion

I find that at the time of the April 8, 2003 motor vehicle accident:

(a) the plaintiff, Carolle Blais Parent, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Carolle Blais Parent, did not arise out of and in the course of her employment within the scope of Part 1 of the Act; and,

(c) the defendant, J.L. Munro Fire Protection Ltd., was an employer engaged in an industry within the meaning of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

NO. M87359
NEW WESTMINSTER 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:

CAROLLE BLAIS PARENT

PLAINTIFF

AND:

JOHN MUNRO and J.L. MUNRO FIRE PROTECTION LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, JOHN MUNRO and J.L. MUNRO FIRE PROTECTION LTD., 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, April 8, 2003:

1. The Plaintiff, CAROLLE BLAIS PARENT, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, CAROLLE BLAIS PARENT, did not arise out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, J.L. MUNRO FIRE PROTECTION LTD., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of July, 2005.

_____

Herb Morton
VICE CHAIR

NO. M87359
NEW WESTMINSTER
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:

CAROLLE BLAIS PARENT

PLAINTIFF

AND:

JOHN MUNRO and J.L. MUNRO FIRE PROTECTION LTD.

DEFENDANTS

SECTION 257 CERTIFICATE

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