## Noteworthy Decision Summary

**Decision:** WCAT-2005-04670-AD **Panel:** Heather McDonald **Date:** September 6, 2005

***Assessment – Status of a Contracting Party as a "Worker" – Labour Contractor vs. Independent Firm – Section 96(6) of the Workers Compensation Act – Policy Item #20:30:20 of the Assessment Policy Manual***

This decision is an example of the analysis used to determine the status of a party contracting to work for another party, namely whether that party is a worker, a labour contractor, or an independent firm. If a labour contractor is not registered as an employer, he is considered a worker of the person with whom he is contracting.

The appellant, a franchisee of a designated driving service, contracted with X to provide the driving services. X was injured in a motor vehicle accident, and inquired with the Workers' Compensation Board (Board) whether he was a worker under the *Workers Compensation Act* (Act). The Board obtained the appellant's franchise agreement, as well as the Interim Licensee Agreement between the appellant and X. Both a supervisor and a manager in the Board's Assessment Department concluded that X was a labour contractor, and, since he was not registered with the Board, he was considered a worker of the appellant. The appellant appealed to the Workers' Compensation Appeal Division, alleging an error of fact. As a result of the *Workers Compensation Amendment Act, (No.2), 2002* the worker's appeal was continued and completed as a Workers' Compensation Appeal Tribunal appeal.

The appellant established an error of fact since the decision below was based on an incomplete copy of the interim agreement between the appellant and X, and therefore the appellant met the threshold test for appeal under section 96(6) of the Act, as it was at the time the appellant appealed.

Under policy item #20:30:20 of the *Assessment Policy Manual*, the primary test is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done. The policy sets out guidelines to consider in applying the primary test. The determination will be made on the agreements and conditions that applied at the time of the determination, in this case, the *interim* agreement.

The panel applied the guidelines in the policy and found that X fit within guidelines (a) and (c) for a labour contractor, because he supplied labour only to the appellant, both his own and his workers, and he provided one piece of major revenue-producing equipment to the appellant (a car custom-fitted with the appellant's specific radio dispatch system).

The panel found that X did not fit within the guidelines (a) – (f) for an independent firm because he was not supplying materials, he did not require two or more pieces of revenue producing equipment to fulfill the designated driving service (the radio and cell phone did not qualify as revenue producing equipment), he was not incorporated, and he did not constitute a "manpower supply firm".

The panel found that guideline (g) for an independent firm is not helpful because it refers to persons who are "normally labour contractors who employ a worker and are not contracting to another employer under the Act" and requires a full-scale application and analysis of the primary



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test. The panel noted that this guideline has been deleted from the new policy. The guidelines under the heading "Workers" were similarly inconclusive because they also required a determination of whether the appellant was X's employer.

Since these are only guidelines, and since there was some question whether X might fall under paragraph (g) of the Independent Firm category, the panel went on to consider the primary test of whether X had a business existence independent of the appellant. This led to an analysis of the factors considered by the common law, because *Decision No. 255* adopted by item #20:30:20 expressly dealt with some of the common law considerations to adjudicate the test. These include considerations such as control, ownership of equipment or licenses, terms of work contract, independent initiative/profit sharing/piece work, employment of others, continuity of work, and separate business enterprise.

The panel determined that, although X supplied his own vehicle, assumed associated costs, and employed a worker, he did not have a business existence independent of the appellant. The panel determined that X was a labour contractor, with a worker of his own, working for the appellant under a contract of service whereby the appellant was X's employer. As X was not registered with the Board as an employer under the Act, X fell within the Board's policy as a worker for the purposes of Part 1 of the Act. The appeal was denied.


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**Panel:** Heather McDonald, Vice Chair

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## Introduction

The appellant is a franchisee of a business which provides a service to the general public in which a client who does not wish to drive his or her car (for example, after consuming alcohol), may contact the business to obtain a ride home (or to another specified destination). As well, the service offers to drive the client's vehicle to the client's home (or another specified destination). Thus the service generally requires a car and two drivers. One driver picks up the client to take him home. The other driver drives the client's vehicle home.

In this case, one of the drivers, "X" was injured in a motor vehicle accident on March 30, 2001. X retained a lawyer to consider possible legal action against the other person involved in the accident. X's lawyer contacted the Workers' Compensation Board (Board) to inquire whether X was a worker under the *Workers Compensation Act* (Act). The Board contacted the appellant and obtained a copy of the appellant's franchise agreement with the franchisor (hereinafter referred to as "F Driving Company"), and an Interim Licensee Agreement (interim agreement) between X and the appellant.

By letter dated June 28, 2001, the supervisor of the Board's Assessment Service Centre wrote to the appellant to communicate the Board's decision regarding the status of X on his date of injury, as well as to "clarify the status of other individuals engaged by your firm for the same type of operations." The supervisor concluded that the Board would consider the appellant's "proprietorship" to be an independent business, that is, a business independent of F Driving Company. However, based on a review of the contract between the appellant and X, as well as the Master Franchise Agreement (franchise agreement) between F Driving Company and the appellant, the supervisor found that the relationship between the appellant and X to be one of employer/employee. The supervisor concluded that the appellant was an independent firm. The supervisor also concluded that X was a labour contractor and as such, was a worker of the appellant unless X elected to obtain his own workers' compensation coverage by way of personal optional protection (POP).

The appellant challenged the supervisor's June 28, 2001 decision. By decision dated August 20, 2001, a manager in the Board's Assessment Department confirmed the supervisor's decision. The manager concluded that as X provided one piece of major equipment for the contract with the appellant, the Board would consider him a labour contractor, but as he was not registered with the Board, the Board considered him to be a worker of the appellant.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the appellant submits that its relationship with X was not one of employer/worker. The appellant submits that X had a business existence independent of the appellant, and was an independent firm.

**Issue(s)**

Did the manager of the Assessment Department err in fact, law or policy in concluding that X was a worker of the appellant?

**Jurisdiction**

Under section 96(6) of the Act as it existed at the time, the appellant initiated its appeal of the August 20, 2001 decision. It filed its appeal with the Appeal Division by letter dated September 17, 2001. On March 3, 2003, WCAT replaced the Appeal Division and the Workers' Compensation Review Board. In *WCAT Decision #2004-03133-AD* (June 15, 2004), the panel stated "I find that this appeal is properly viewed as an appeal which was pending before the Appeal Division prior to the March 3, 2003 transition. Accordingly, WCAT will complete the consideration of this appeal pursuant to section 39 of the transitional provisions of Bill 63."

*Grounds for Appeal*

Under section 96(6) of the Act, the appellant was required to establish, in order to succeed on appeal to the Appeal Division, that the Board had erred in fact or law, or had contravened published Board policy. The appellant's appeal was transferred to WCAT from the Appeal Division. As it was an appeal filed under section 96(6) of the Act prior to March 3, 2003, and the requirement for grounds applied at the time the appeal was initiated, WCAT decides the appeal on the same basis. In other words, as a prerequisite for success on appeal, the appellant must establish an error of fact or law or contravention of published policy. See *WCAT Decision #WCAT-2004-04880* (September 20, 2004), available on WCAT's website at www.wcat.bc.ca. In the September 17, 2001 letter to the Appeal Division, the appellant did not expressly identify the grounds under section 96(6) of the Act upon which it was relying. However, in its notice of appeal to WCAT, the appellant indicated it was relying on errors of fact in the Board's August 20, 2001 decision. In its submissions the appellant has alleged both errors of fact and law that it says justify WCAT changing the Board's decision.

*Request for an Oral Hearing*

A representative from F Driving Company represented the appellant in these proceedings. WCAT invited X to participate in the appeal, but he did not respond. The appellant requested an oral hearing for the reason that this would allow for any questions about the "interruption" of its relationship with X by virtue of the Board's decision. After reviewing the file documentation, including the evidence considered by the Assessment Department, and the written submissions made in these proceedings, I have decided that it is unnecessary to convene an oral hearing. Credibility of the evidence is not a significant matter affecting the issues in this case. The issues are primarily questions involving the interpretation of the Act and Board policy, applying the provisions to the situation between the appellant and X. Accordingly, I have concluded that I am able to decide the issues on the basis of the documentary evidence before me in these proceedings.

*Participation by the Board and Others in the Appeal Proceedings*

By letter dated February 14, 2005, WCAT invited the Board's Assessment Department to participate in this appeal by providing written comments with respect to the appellant's appeal, to assist the WCAT panel to fully consider the merits of the appeal. The letter referred to items #4.32 and #4.37 of WCAT's *Manual of Rules or Practice and Procedure* (MRPP) (accessible at WCAT's website under the topic of "publications"). The letter also referred to the statutory language in section 246(2)(i) of the Act that provides that WCAT may request any person to participate in an appeal "if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal." In response to the invitation, the manager of Assessment Policy provided a written memorandum dated March 4, 2005. WCAT disclosed that memorandum to the appellant, who provided a written submission dated March 24, 2005 in reply.

Item #4.32 of the MRPP indicates that where an assessment appeal concerns whether a putative employer is liable for assessments of its "workers," or whether the alleged workers are independent operators, WCAT may invite those workers/independent operators to participate in the appeal. Similarly, item #4.36 in the MRPP refers to WCAT's discretion in that regard, and provides that WCAT may determine the extent to which such persons may be permitted to participate in a proceeding. In this case, the August 20, 2001 decision under appeal expressly stated that the issue involved the situation between X and the appellant at the time of X's injury on March 30, 2001. At that time, an interim agreement was in place between X and the appellant. As the manager thus confined her August 20, 2001 decision, I am also confining this appeal to X's specific relationship with the appellant at the time of X's injury. Therefore I did not find it helpful or appropriate to invite participation in this appeal by other licensees of the appellant who were, or are, parties to a generic licensee agreement with the appellant. In this decision, I am not dealing with the status of persons who are parties to a generic licensee agreement with the appellant. It is X's status at the time of the March 30, 2001 injury which is at issue in this case.

*General Jurisdiction*

WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters of fact, law and discretion arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). 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) of the Act.)

Under section 42 of the *Workers Compensation Amendment Act (No. 2), 2002*, published policies of the governors are to be treated as policies of the board of directors.

**Applicable Law and Policy**

The Act creates three categories: employer, worker and independent operator. Employers are required to register and pay assessments on the wages of all their workers. Workers are not allowed to register. Independent operators can obtain workers' compensation coverage personally through voluntary registration with the Board. In that event, they are considered workers pursuant to clause (f) of the definition of worker in section 1 of the Act, which refers to "independent operators admitted by the Board" under section 2(2) of the Act. Section 2(2) of the Act provides that the Board may direct that Part 1 of the Act applies "on the terms specified in the Board's direction":

> (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker;
> (b) to an employer as though the employer was a worker.

The Board may make policies, regulations or directives which give the direction mentioned in section 2(2) of the Act.

"Worker" and "employer" are identified in section 1 of the Act. As I earlier indicated, the definition of "worker" includes an independent operator admitted by the Board under subsection 2(2) of the Act. The term "independent operator" is not defined in the Act. Although not defined in the Act, the term nevertheless appears in section 1, paragraph 2(2)(a), subsection 10(8) and subsection 39(1) of the Act. Board published policy refers to a fourth category not mentioned in the Act, namely, that of "labour contractor."

On January 1, 2003, the Board introduced a new format for assessment policy in the current *Assessment Manual*. Policy AP1-1-3 in the current Manual sets out the factors to consider and the specific guidelines for determining whether an individual is a worker or an independent firm. The Board decisions at issue in this case pre-dated the introduction of the current Manual. The supervisor's June 28, 2001 decision referred to policy 20:30:20 of the former version of assessment policy, found in the *Assessment Policy Manual* (Manual). This was the policy applicable at the time of her decision. In the August 20, 2001 decision, the manager did not expressly identify any policy, but in confirming the supervisor's decision, I find that she was relying on the policy indicated by the supervisor in the earlier decision.

I note that there is essentially not much difference in the spirit and intent of the two versions of assessment policy in AP1-1-3 and former assessment policy 20:30:20, although admittedly the words are slightly different.

The first paragraph of policy 20:30:20 stated as follows:

> The current operational policy for the administration of registration requirements or eligibility is set out in Workers' Compensation Reporter Series Decision Number 255. That decision sets out the spirit and intent of registering firms.

*Decision No. 255* (3 WCR 155) discussed the factors considered by the Board in determining how the relationship between the parties to a contract should be classified. Referring to some of the factors, the decision stated in part as follows:

> These factors *include*, for example, the degree of control exercised over the supplier of labour by the person for whom he works, whether the supplier of labour or the person for whom he works provides the necessary equipment or licenses, and whether the supplier of labour engages continuously and indefinitely for one person or works intermittently and for different persons. *The major test, which largely encompasses these factors, is to ask whether the supplier of labour has any existence as a business enterprise independently of the person for whom he works.*
>
> [italic emphasis added]

*Decision No. 255* also referred to other factors in earlier Reporter decisions, which can be summarized as follows:

(a) Control
(b) Ownership of Equipment or Licenses
(c) Terms of Work Contract



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(d) Independent Initiative, Profit Sharing, and Piecework
(e) Employment of Others
(f) Continuity of Work
(g) Separate Business Enterprise

It was clear from *Decision No. 255* and other Board jurisprudence that no single factor could be consistently applied. It was important to consider all of the circumstances in a relationship between parties in order to determine whether an employment relationship existed, or whether it was a relationship between independent firms.

Policy 20:30:20 went on to discuss three basic categories to consider: (a) independent firms, (b) labour contractors and (c) workers, and gave guidelines for determining which category would apply in determining the registration status of a person. However, it is clear from the first paragraph of the policy that the primary test was to determine whether a person had an existence as a business enterprise independently of the person for whom he worked. The discussion under the categories of "Workers, Independent Firms, and Labour Contractors" represented guidelines only, as assistance in applying the primary test of separate business existence.

It is interesting to note that in policy AP1-1-3 in the current *Assessment Manual* effective January 1, 2003, essentially the same statement is made regarding the primary test to distinguish an employment relationship from one between independent firms:

> The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

Policy AP1-1-3 refers to more factors to consider, and provides specific guidelines for whom would be considered independent firms that differ only slightly from the guidelines in policy 20:30:20 in the Manual. In the years preceding 2003, there was a significant body of Appeal Division jurisprudence that discussed and interpreted policy 20:30:20 and its primary test to distinguish an employment relationship from one between independent firms. My view is that policy AP1-1-3 represents a refinement of essentially the same policy in 20:30:20, based on the guidance provided in the Appeal Division jurisprudence that necessarily accompanied any attempts to interpret and apply policy 20:30:20. My view in that regard is supported by the wording of *Resolution 2002/11/19-02*, in which the panel of administrators stated that the panel had approved a "new policy manual format" and had worked with the Board's administration to "redevelop" the existing Manual into the new *Assessment Manual*. It

is also supported by the editorial comments at the end of AP1-1-3 which read as follows:

> **History**: Replaces in part Policies No. 20:10:30, 20:30:20 and 20:30:30 of the *Assessment Policy Manual* and Decisions No. 32, 138, 183, 229, 255 and 35 of Volumes 1 – 6 of *Workers' Compensation Reporter*.
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> **Application** This item results from the 2002 "editorial" consolidation of all assessment policies into the *Assessment Manual*. The POLICY in this item continues the substantive requirements of the policies and items referred to in the HISTORY as they existed prior to the Effective Date, with any wording changes necessary to reflect legislative and other changes since the policies and items referred to in the history were issued.

Thus I do not consider policy AP1-1-3 as representing a significant change in substantive assessment policy from the former policy 20:30:20. Rather, it represents a development in the explanation of the same fundamental test that, both before and after January 1, 2003, formed the basis for the Board's decisions in characterizing the relationship between parties as either employer/worker or independent firm/independent firm (employer/employer).

Having said that, I have found that the applicable policy in this case is policy 20:30:20 in the Manual, referred to by the supervisor in her June 28, 2001 decision, which decision was confirmed by the manager in the August 20, 2001 decision. This is because of the basic presumption that policy is not intended to have a retroactive application. As the appellant and the Board were working within the framework of the former version of policy, that is the policy which is applicable for purposes of deciding this appeal. See *WCAT Decision #2005-01226-AD* (March 10, 2005). For ease of reference, I will reproduce policy 20:30:20 in its entirety:

*Policy 20:30:20* in the Manual*:*

> The current operational policy for the administration of registration requirements or eligibility is set out in Workers' Compensation Reporter Series Decision Number 255. That decision sets out the spirit and intent of registering firms.
>
> From a registration viewpoint, there are three basic categories to consider when determining the registration requirements of an employer; independent firms, labour contractors and workers.
>
> Each of these categories is discussed below and represents *guidelines* in determining the registration requirements or eligibility. Individual cases

must be viewed as to whether the application or the policy is appropriate for that case.

**1. Workers**

Workers must not be registered under any circumstances. Workers include those persons defined as "workers" in section 1 of the Act. Workers include individuals not employing other individuals and who are:

(a) paid on an hourly, salaried or commissioned basis; or
(b) paid on commission or piecework, etc., where work is performed working in the employer's shop, plant or premises; or
(c) paid commission, piecework or profit sharing where they are using equipment supplied by the employer;
(d) operating under circumstances where the "lease" or "rental" of equipment or "purchase" of material from their employer is merely a device to arrive at a wage or commission amount.

**2. Independent Firms**

Where an independent firm is an employer, registration with the Board is mandatory. Partners or proprietors are not automatically covered unless Personal Optional Protection is in effect. (See Item 20:50:00 for information on Personal Optional Protection.)

Independent firms include the following:

(a) Any firm supplying labour and materials. (Nails, drywall tape, etc. are not considered materials.) Supplying materials does not include a subcontractor purchasing materials and turning the invoices over to the prime contractor for reimbursement.

(b) Any firm which requires 2 or more pieces of revenue producing equipment to fulfill a contract, e.g. an individual enters into a contract to load and haul logs, so must provide both the loader and the logging truck. (Power saws, hand tools and personal transportation vehicles or vehicles used to move equipment are not considered to be revenue producing equipment.)

(c) Service industry firms contracting to two or more clients simultaneously and employing workers.

(d) Incorporated companies, unless

(i) it is a personal service corporation (NOTE: a personal service corporation for this purpose is one where no help other than the principal active shareholders are employed, and if the firm were not incorporated, the principal active shareholders would clearly be workers and fall into the worker category. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation);

or

(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. (See also Item 20:30:30).

(e) Societies, cooperative associations.

(f) Manpower supply firms.

(g) Persons who are normally labour contractors who employ a worker(s) and are not contracting to another employer under the Act are considered independent for that period of time. (In most cases these would be temporary registrations which would be cancelled after the termination of the worker's employment providing the employer does not have Personal Optional Protection. This is an exception to our general policies).

## 3. Labour Contractors

Registration for labour contractors is not mandatory, but is allowed. Those labour contractors who do not elect to be registered, and any help they employ to assist them, which may include paid members of their families, are considered workers of the prime contractor or firm for whom they are contracting, and that firm is responsible for assessments and injury reporting.

If the firm is registered, and therefore considered an independent firm, the proprietor and spouse (see 20:50:10) are not covered unless Personal Optional Protection is in effect.

In view of the fact that registration is elective, the effective date of registration of a labour contractor for injury reporting and assessment purposes is the date registration is accepted. Prior to that the prime contractor is responsible for injury reporting and assessments.

Labour contractors include unincorporated individuals or partners:

(a) who have workers and supply labour to only one firm at a time (e.g. a framer with one or more workers in the construction industry).

(b) who are not defined as workers, do not have workers, or supply major materials or major revenue-producing equipment but who contract a service to two or more firms on an ongoing simultaneous basis (e.g. a janitorial contractor having simultaneous contracts with two or more unaffiliated firms).

(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 (e.g. a backhoe contractor supplying a backhoe).

The determination of an "independent firm/labour contractor/worker" relationship and the adjudication of claims are based on the facts that are available at the time an assessment is made or a claim adjudicated. Incorrect or incomplete information may jeopardize a claim or the protection provided to employers by the Act.

The responsibility to provide full and accurate initial information and to update this information by advising the Board of any material changes to the employer's operation rests with the employer.

When an employer asks for a determination of an individual's status at he time of an audit or at any other time of contact, a determination can be made and the employer so advised but the employer should always be advised that the determination is based

> on the information provided and that redetermination will be made whenever any new or different information comes to light.
>
> [italic emphasis added]

Policy 20:10:30 of the Manual stated that "Labour Contractors as defined in Policy 20:30:20 who are not registered with the Workers' Compensation Board are considered to be workers for the purposes of Part 1 of the Act."

**Background and Evidence**

The Board's supervisor of the Assessment Service Centre based her June 28, 2001 decision largely on her consideration of two written contracts. The first contract was an interim agreement between the appellant and X. The second contract was a franchise agreement between the appellant and F Driving Company.

The interim agreement between the appellant and X was made on March 4, 2001, several weeks before X's injury in the motor vehicle accident. The evidence is that this was the written agreement in place and in force between the parties at the time of the accident. The significant aspects of the interim agreement are summarized as follows:

1. The interim agreement described the appellant as owning certain equipment, including a dispatch system, to be used for the designated driver service, and that the appellant provided training and marketing.

2. The interim agreement described X as "desirous" of obtaining the appellant's consultation, training, assistance and advice "in connection with operating a designated driver's mobile vehicle."

3. The term of the agreement was for 90 days, commencing on March 8, 2001 and ending on June 2, 2001. After the termination of the agreement, the parties had the option of re-negotiating its terms and conditions, and then extending the term for five years. In that regard, the re-negotiated commission payable by X to the appellant would not exceed the amount as set out in the interim agreement. In the event of a re-negotiation of the interim agreement after its expiry, to extend it for five years, X would pay the appellant a renewal fee not to exceed $6,500.00.

4. In consideration of the assistance, advice and services provided by the appellant to X, X would pay the appellant an initial fee of $20.00. X further agreed to pay the appellant 5% of gross sales for each day or partial day worked by X. That payment would be applied by the appellant to the renewal fee owed by X to the appellant in the event of a re-negotiation and extension of the term of the interim agreement. If the parties did not renegotiate and extend the interim agreement,

the appellant would retain the funds from the 5% of gross sales payment, as liquidated damages.

5. X agreed to lease from the appellant equipment set forth in Schedule B. That Schedule referred to a 2 way radio and a cellular phone, but none of the information regarding the model or serial number was completed on Schedule B, and X did not sign in the "licensee signature for receipt" specified in Schedule B. However, X did initial Schedule B. The interim agreement stated that the lease cost for the 2 way radio was $70.00 per month, payable in advance. The interim agreement also referred to "signs," but a "nil" charge was indicated as the deposit for the signs.

6. X agreed to pay the appellant a commission equal to 22% of the gross sales made by X from the mobile vehicle, less amounts resulting from uncollected accounts, provided X could provide documentation of diligent and proper collection efforts. Further, X agreed to pay the appellant $2.00 per day worked or partial day worked, for the administration of liability insurance placed through F Driving Company. X further agreed to pay the appellant a daily administration charge equal to 5% of the gross sales made by X. All daily payments were to be received by the appellant no later than the day following the service being performed.

7. X was required to furnish, sign and verify to the appellant, in the form prescribed from time to time by the appellant: (a) by noon on the Friday following each of X's Accounting Periods (Sunday to Saturday), a report of gross sales for that accounting period; (b) all of X's financial information and records.

8. X was required to use only printed material obtained from the appellant, and to purchase any business cards or stationary forms required by X from the appellant.

9. X was required to record all sales on forms approved by the appellant. X was required to maintain during the term of the interim agreement, and to preserve for at least four years after the date of their preparation, full, complete, and accurate books, records and accounts in the form and manner prescribed by the appellant from time to time in writing.

10. X was required, at his expense, to provide to the appellant and F Driving Company an annual profit and loss statement and balance sheet, accompanied by a review report, within 60 days after the end of each fiscal year of the designated driver business, showing the results of operations of X's business during the fiscal year. The appellant also reserved the right to require submissions of financial statements prepared at X's expense, by an independent accountant approved by the appellant.

11. Except as provided in the interim agreement, X was to bear all the expenses in connection with the performance of the interim agreement and his activities in

carrying on the designated driver business, plus sales tax and goods and services tax.

12. The appellant would install the "signs and communication device" on the mobile vehicle to be used by X, and would ensure that this equipment was in good working order at the commencement of the interim agreement. This equipment remained the appellant's property and X was not entitled to move it to another vehicle without the appellant's prior written consent.

13. At least three days prior to the commencement of the term of the interim agreement, the appellant would provide initial training on the use and operation of the dispatch system and customer service to X.

14. The appellant would provide to X, in a timely manner, all business cards and other stationary forms as required by X.

15. The appellant would provide an adequate dispatch system to X.

16. Prior to the commencement of the term of the interim agreement, X would purchase or lease on his own behalf, a mobile vehicle, and would allow the appellant to install the signs and radios in the vehicle to be used in the operation of the designated driver business. If such equipment was lost or stolen, X would bear the replacement cost.

17. X agreed to commence operations of the designated driver business within 30 days after the commencement of the term of the interim agreement.

18. X agreed to ensure that "he and his employees" would use the mobile vehicle and equipment in a skillful and proper manner and "in accordance with any operating instructions provided by" the appellant.

19. After termination or expiration of the interim agreement, all rights granted to X would immediately terminate and X would immediately cease to operate the designated driver business and would not thereafter, directly or indirectly, represent to the public or hold itself out as a present or former operator of the appellant or F Driving Company.

20. X agreed to obtain all licenses and permits required, to operate the mobile vehicle and conduct the business in accordance with relevant laws and regulations, and to pay all and any fines or sanctions levied or imposed in connection with the possession, use or operation of the mobile vehicle or equipment, and to indemnify the appellant in respect of any such fines or levies.

21. X agreed to return the equipment to the appellant in the same good order and condition in which it was received, subject to normal wear and tear.

22. X agreed to use only the motor vehicle and provide only the services from the vehicle, which the appellant had previously approved in writing.

23. X agreed to maintain the motor vehicle in the highest degree of repair and condition, and take care to ensure that it was in safe operating condition. X also agreed to pay the cost of repairs and servicing of the appellant's equipment occasioned by willful neglect. X was not responsible for repairs caused by normal wear and tear to the appellant's equipment.

24. X agreed to secure at his own expense general liability insurance coverage, including personal injury as well as comprehensive automobile liability coverage and property damage liability coverage, in the amount of two million dollars.

25. X agreed to secure at his own expense "employer's liability, workers' compensation and such other insurance" as required by law.

26. X agreed to notify the appellant as soon as possible of any accident or circumstance giving rise to a claim, and to provide the appellant with particulars to enable the appellant to be fully acquainted with the circumstances of the matter.

27. "Events of default" of the interim agreement included any failure by X to report his gross sales, failure to pay any amount due under the agreement, breach of any term, X having recourse or being subject to bankruptcy, insolvency or winding up, X's death or incapacity, using the appellant's equipment in a manner that the appellant considered likely to cause its loss, damage or destruction, or failing to use the motor vehicle in an appropriate manner.

28. In a default event situation, the appellant would have the right to immediately terminate the interim agreement and recover amounts due, and take possession of the appellant's equipment.

29. The appellant was entitled to assign the interim agreement without X's consent, but X could not assign the agreement without the appellant's written consent. The appellant also had the right to purchase the proposed assignment on the same terms and conditions as offered by a third party.

30. The interim agreement describes X as an independent contractor, not an agent, partner, employee or servant or party to a joint venture with the appellant. During the term of the interim agreement, X was required to hold himself out to the public as an independent contractor operating the business "pursuant to a licensed operator" from the appellant.

31. The appellant granted X the right to operate the motor vehicle equipped with the appellant's equipment only in the geographic territory specified in schedule C to

the agreement. X would need the appellant's written consent to operate the vehicle outside that specified territory. If X received a request to conduct the designated driver business outside of that specified territory, he would be required to refer the request to the appellant. Schedule C specified thirteen Lower Mainland cities and municipalities.

32. The interim agreement contained a confidentiality clause requiring X to keep confidential the appellant's trade secrets and other business information. Further, X agreed that he would not, for two years following the expiration of the term of the interim agreement, be a party to or abet any solicitation of customers, clients or suppliers of the appellant or any of its subsidiaries, to transfer business from the appellant to any one else, or to seek in any way to persuade or entice any of the appellant's employees to leave that employment.

33. X agreed, for a period of two years following the expiration of the agreement, not to carry on or in any way be associated, directly or indirectly, with a business similar to the designated driver business carried on by the appellant, within the province of British Columbia.

34. The interim agreement was stated to be binding upon the parties and their heirs, successors, personal representatives and assigns.

The franchise agreement between the appellant and F Driving Company was made on September 6, 1999. Its term was five years. I will not review all the elements of the franchise agreement, but only the aspects of it that are significant for the purposes of this decision:

1. The franchise agreement provides that F Driving Company is the exclusive owner of a unique plan to establish, develop and franchise designated drivers who provide specialized services to the general public in chauffeuring and delivering individuals' vehicles. F Driving Company owns, uses, promotes and licenses certain commercial symbols in connection with the operation of its designated drivers' business.

2. The appellant received from F Driving Company an area franchise "to develop a number of Licensees" using F Driving Company's commercial service symbols and marks within an exclusive territory comprising the thirteen Lower Mainland cities and municipalities referred to in the interim agreement that the appellant had with X, with the addition of West Vancouver.

3. The appellant agreed to establish "mobile units" within the franchise area by marking the establishments that would use the service and "signing Licensee agreements with operators", and setting up a central dispatch system acceptable to F Driving Company.

4. The appellant was required to purchase all its equipment from F Driving Company, and all mobile units were required to conform to F Driving Company's specifications.

5. No equipment obtained from sources other than F Driving Company would be purchased or used by the appellant in the mobile units, and no services other than the services approved by F Driving Company would be offered by the appellant from the mobile units.

6. Every license agreement between the appellant and its licensees would provide for a payment by each licensee to the appellant of 22% of gross sales.

7. The appellant had a primary obligation to ensure that its licensees complied with all the relevant terms and conditions of the franchise agreement as well as the licensee agreements.

8. The appellant was required to pay F Driving Company an initial franchise fee (a substantial fee of $27,200.00) plus a fee of $500.00 for each licensee agreement issued by the appellant, as well as a continuing weekly royalty of 6% of gross sales payable by all of the appellant's licensees (this was stated to equate to 27.272% of the 22% gross sales payable by all licensees to the appellant pursuant to the licensees' agreements) in the area franchise operations, a continuing weekly royalty of 6% of gross sales of any mobile unit operated by the appellant, and a continuing weekly royalty of 6% of gross sales of any mobile unit operated by a licensee of the appellant in the area franchise territory. Gross sales were defined as the entire amount of the actual sale prices of all goods and services in respect of mobile units operated in the franchise area.

9. F Driving Company was entitled to, from time to time, prescribe standards, specifications and procedures to be observed and acted upon by the appellant and its licensees; these standards, specifications and procedures would be incorporated into the franchise agreement by reference and deemed to be part of it.

10. The appellant was required to require that it and its licensees devote no less than 40 hours per week to manage and/or supervise their mobile units, to continuously operate the business during all normal business hours or during such hours as required by the appellant, and to continuously exert their best efforts to promote and enhance the franchise business.

11. The appellant was required to require its licensees to exclusively use all identifying logos, signs and colours authorized by F Driving Company, to attend a training program, and to formulate advertising/marketing/public relations as required to the extent required by F Driving Company.

12. The appellant was required to use in its advertisements only programs and materials provided by F Driving Company, to obtain at its sole cost and expense a listing in the local classified telephone directory, and to participate in such advertising programs directed at the franchise area as F Driving Company deemed appropriate.

13. The appellant was required to permit F Driving Company to inspect the mobile units as well as the appellant's business operation and financial records at any time without notice.

14. The appellant was required to maintain and require its licensees to undertake such credit card arrangements as F Driving Company might from time to time require.

15. The appellant was required to "optimize sales from the mobile units" and to obtain F Driving Company's approval before introducing any new services in the mobile units or installing any equipment in the mobile units not purchased from F Driving Company.

16. The appellant was required to establish the bookkeeping, accounting and record keeping system approved by F Driving Company, and to require its licensees to keep and maintain such system "strictly in the manner from time to time prescribed" by F Driving Company.

17. The appellant was required to require its licensees to furnish, sign and verify to F Driving Company, in the form and manner prescribed by F Driving Company, a report of gross sales (and other information specified by F Driving Company) for specified accounting periods, as well as a fiscal year balance sheet, profit and loss statement, statement of retained earnings and statement of source and application of funds. F Driving Company was entitled without notice during business hours to inspect and audit the business records, bookkeeping and accounting records, cash register tapes, invoices, payroll records, check books and bank deposit receipts, income tax returns and any and all other financial or business records of the appellant and its licensees.

An Assessment Department memo dated June 20, 2001 noted that the appellant assigned the area in which X operated the motor vehicle, the appellant dispatched work to X, the appellant set the price of the designated driving service (through F Driving Company as franchisor) and the appellant supplied a two-way radio and cell phone. The memo also noted that the appellant received a percentage of X's fees, that is, a percentage of the service charged to the client, not a flat fee.

In the June 28, 2001 decision letter to the appellant, the Board's supervisor of the Assessment Service Centre concluded as follows:

> …a number of points would indicate a strong connection between [the appellant's business] and [X] which would normally be associated with an employer/employee relationship. The contract indicates that an area of operation is assigned to them and also the franchisee assigns (dispatches) the work to the individuals. The franchisee supplies a two-way radio and cell phone and business cards that enable the licensee to conduct business as a representative of your firm. The licensee pays a percentage of their incoming revenue to the franchisee and is not similar to the taxi industry in that they are not required to pay a flat lease or dispatch fee prior to starting their shift. In other words, a licensee is not in a situation of profit/loss as normally associated with independent business operations. In addition, the licensee is required to take specific training and must sign a competition agreement that indicates he cannot work for any other similar companies while under contract to the franchisee.
>
> As [X] is not in a situation of potential profit/loss as normally associated with independent business operations, and as he was operating essentially as a representative of your firm at the time of his injury I would not consider him to be independent for our purposes. As [X] supplies one piece of equipment in order to fulfill his contract with your firm I would consider his status and any others that operate in the same manner to be considered labour contractors. Your firm would be required to cover them if they don't maintain their own WCB account. Your proprietorship will be considered the employer for the purposes of the above claim and should report to the WCB for remittance purposes any earnings of the claimant or anyone else operating under a similar contract that is not registered with the WCB. The amount that you would report to his office would be the percentage of revenue that is kept by the licensee.
>
> An account will be established for your business operations and you will be advised of this under separate cover.

The appellant contacted the Board to advise that the supervisor's June 28, 2001 decision letter had misinterpreted the interim agreement. On July 5, 2001, the appellant

then wrote a letter to an employers' adviser in the Ministry of Labour's Compensation Advisory Services, and copied the letter to the manager of the Board's Assessment Department. That letter set out the appellant's reasons for concluding that there had been a misinterpretation of the interim agreement. The appellant put forth the following points:

1. A licensee such as X purchased his own business, allowing them to operate in the specified area. X would pay for the business "on time, based on their nightly revenue." A licensee agreement is "willable, saleable, transferable, entrustable, and giftable." X owned the licensee agreement. Dispatching by the appellant is a service supplied to X, who pays for the dispatching by way of the royalty paid.

2. X rents the two-way radio from the appellant. The radio is on a secured radio system so others cannot hear the information. The appellant arranges for the radio as the appellant can secure a lesser cost due to volume. X pays for the radio with the funds going directly to the radio company.

3. The appellant does not supply a cell phone to X. X supplies and pays for his own cell phone.

4. Business cards are receipts for the clients. A licensee such as X is entitled to supply his or her own receipts, and is not required to carry business cards supplied by the appellant.

5. The percentage that X pays the appellant is for services supplied by the appellant, such as dispatching and administration.

6. A licensee such as X is in fact in a position to profit/loss from the business.

7. The specific training for a licensee such as X is similar to the training given to a taxi driver. They are taught how to communicate on the radio, how to locate a client, and how to deliver them safely to their destination.

8. The non-competition clause does not indicate that X cannot work in a similar company, but rather that they cannot start one like it for two years. If a licensee such as X chooses to work for the competition, the licensee may not disclose the trade secrets of the appellant's business.

9. Just as the appellant is a separate, independent firm that purchases a business and pays for ongoing services from F Driving Company, so is a licensee such as X a separate, independent firm who pays the appellant to purchase a business and for ongoing services.

On July 30, 2001, after speaking with the manager of the Assessment Department, a representative of F Driving Company wrote to her, enclosing a copy of a "generic licensee agreement." In the letter, the representative advised that there was confusion between the interim agreement that the supervisor had referred to her in June 28, 2001 decision, and the generic licensee agreement enclosed for the manager. The representative explained that "we use an interim Licensee Agreement initially for a period of up to 90 days to afford the Licensee a short term agreement before entering into a long term commitment." The representative said that this enabled an individual to determine if the business was suitable for them, as the business did not suit all personalities.

There were differences between the interim agreement and the general licensee agreement. F Driving Company's representative explained that the appellant supplies a two-way radio to a licensee at a monthly rental and it is set up this way to enable bulk purchasing to lower costs. He confirmed the appellant's earlier information that the cell phone is a licensee responsibility, not supplied by the appellant. He also stated that business cards are supplied to the licensee "for the sole purpose of enabling a receipt to be given similar to the Taxi industry." The representative's position was that the licensee was in a position of profit/loss.

In her decision of August 20, 2001, the manager made it clear at the outset that she was dealing with the situation at the time of X's injury, when the interim agreement was in place between X and the appellant. She was making a decision about X's status at the time of the accident. Therefore it was the interim agreement that was relevant, not the generic licensee agreement.

It became apparent to me that in making her August 20, 2001 decision, the manager did not have a complete copy of the interim agreement between X and the appellant. Pages 2 and 3 of the interim agreement were missing, and thus the manager did not have clauses 1.01 through 3.01 as evidence before her. Those clauses dealt with the term of the agreement, payments to be made by X to the appellant, bookkeeping/financial records obligations of X, and other subjects referred to in items 3 through 11 of the significant items I earlier summarized in this decision about the interim agreement. Because the manager did not have those items on pages 2 and 3 of the interim agreement, and because she did not realize that the pages were missing from the interim agreement, her August 20, 2001 decision did not refer to them. This subsequently caused confusion, as the appellant and F Driving Company did not understand her lack of reference to the items in question. They believed the manager had the complete copy of the interim agreement.

On July 11, 2005, as I was considering the documentation on the appeal, I realized that the two pages of the interim agreement were missing from the Board's file and that in fact the Board had never received them. Someone at the Board had noted on a page of the interim agreement: "Pages 2 and 3?", so it appears that at some time it was noted that the pages were missing. But no one contacted the appellant or F Driving Company to obtain the missing pages. I requested a WCAT appeal coordinator to obtain the missing pages. On July 12, 2005, F Driving Company faxed to the appeal coordinator a complete copy of the interim agreement signed by X and the appellant. Therefore I have had the benefit of considering the entire interim agreement made on March 4, 2001 between X and the appellant.

In her August 20, 2001 decision, the manager responded to the points made by the appellant in its July 5, 2001 letter. She disagreed that X purchased his own business, as she could find no reference to the purchase price of the business by X in either the interim agreement or the franchise agreement. The franchise agreement made it clear that licensees such as X would pay the appellant 22% of their gross sales, which the manager found to be akin to a commission and/or a dispatch fee rather than a purchase price for a business. Further, the appellant's statement that X pays a percentage of gross sales for dispatching and administration services supplied by the appellant, confirmed the manager's position that there was no "purchase of a business factor" in the 22% payment.

The manager observed that X did not control the area he worked in or the dispatch of his customers. She stated that regardless of what he did or how he wished to operate the business, he could not make more than 78% of the gross intake.

The manager commented on the appellant's statement that X owned the licensee agreement and that it was "willable, saleable, transferable, entrustable and giftable." She stated that under the interim agreement, X's death was a default event, entitling the appellant to terminate the agreement and take possession of the equipment and signs; therefore the agreement did not appear to be "willable." Further, if X wished to assign the agreement, he would first require the appellant's approval, with the appellant entitled to object and place itself in the place of the assignee. The manager said that therefore X could not sell or transfer his rights under the agreement without control by the appellant.

Even accepting the appellant's information that X rented the radio from the appellant, and supplied his own cell phone with the option of also supplying business cards, the manager did not find those factors relevant because Board policy did not consider the radio, phone and business cards to be items of revenue producing equipment. The manager also did not find the training provided to X by the appellant to be significant in determining X's status.

The manager stated that if a licensee paid a flat fee for the services of the appellant and then could make as much or as little as they chose, she would find that type of arrangement to be like a taxi driver situation, allowing for profit or loss on a business. However, the written agreements (interim and Master Franchise) indicated that a licensee could not make more than 78% of the gross client sales.

The manager disagreed with the appellant's submission that the non-competition clause merely prevented a licensee such as X from starting a similar business within two years of the agreement's termination. She pointed out the words in the interim agreement that prohibited X from "in any capacity whatsoever…carry on or be engaged or associated in any way whatsoever in any operations, activities or businesses which are similar."

The manager concluded her August 20, 2001 decision by confirming the supervisor's finding that X was a labour contractor and as he was not registered with the Board at the time of his accident, the Board considered him to be a worker of the appellant.

The appellant wrote to the Board on September 17, 2001, challenging the manager's decision. He said that paragraph 2.01 of the interim agreement mentioned the maximum purchase price paid by X, and that "from the offset the Licensed Operator pays 5% of gross earnings towards this maximum purchase price." The appellant agreed with the manager's statement that the 22% of gross sales payment has no purchase factor, because the purchase payment is covered under paragraph 2.01 of the interim agreement.

The appellant also said that X's situation in not controlling the area where he works or who his customers were, was not any different from the taxi industry. The business card situation is the same as for taxi drivers, who use business cards as receipts for clients. As well, the fact that X could not make more than 78% of gross sales intake also did not differ from taxi drivers, whose rates are set down by the taxi commission, as taxi drivers cannot exceed the specified taxi rates. The appellant also pointed out that under its franchise agreement with F Driving Company, the appellant could only earn a maximum of a set percentage – yet the Board considers the appellant to be an independent firm.

The appellant said that licensees such as X have fixed costs: liability insurance, vehicle insurance, vehicle purchase or rental, and fuel purchases. The appellant submitted that if a licensee only worked a few hours a week, loss would certainly be an issue.

The appellant reiterated its interpretation of the non-competition clause in the interim agreement. The appellant stated that the clause was designed to restrict individuals from learning all of the trade secrets and then leaving to start their own business in direct competition with the appellant. The appellant submitted that Canadian courts would not uphold the non-competition clause if it were interpreted as restricting X from performing similar duties as an employee of a competitor. In the appellant's view, that

would be restriction of trade, whereas the non-competition clause is designed to protect trade secrets, not restrict trade.

That letter to the Board was followed by an October 8, 2002 letter sent by the representative of F Driving Company, on behalf of the appellant. The representative advised that in light of the "interpretation discrepancies" between the interim agreement and the generic license agreement, effective September 2001, interim agreements are no longer used. The representative then proceeded to address points made by the manager in her August 20, 2001 decision, referring to the generic license agreement now used by the appellant. As I earlier stated in this decision, the relationship between X and the appellant at the time of his injury was governed by the interim agreement, not the September 2001 generic license agreement. Thus arguments based on the generic license agreement are not relevant to this appeal, except in so far as the clauses were identical to those in the interim agreement signed by X. Therefore I will refer only to the relevant arguments, grounded in the relationship between X and the appellant at the time of X's injury on March 30, 2001, made by the representative on behalf of the appellant.

Many of the arguments referred to the similarities in X's situation with that of taxi drivers in the taxi industry. Some of those have already been mentioned in describing the appellant's earlier submissions to the Board. New points made in the October 8, 2001 letter were as follows:

1. Licensees such as X would have the final decision whether or not to provide a service to a potential client, just like a taxi driver. Therefore there was a certain amount of control exercised by X regarding the choice of who his customers would be. Further, a licensee may elect to work in a narrower geographical area within the specified business area, although that would have an adverse effect on potential earned revenue.

2. Gratuities for service are extremely high in the designated driving industry, and thus a licensee operating in a professional manner can see his gross intake far exceed 78% of gross sales intake.

3. The radio and the cell phone are both important pieces of equipment to generate revenue, even if the manager of the Assessment Department did not consider them revenue-producing items.

4. Not unlike a taxi driver's revenue, a licensee such as X has revenue controlled by many factors: the amount of business coming through dispatch lines, the number of no shows or cancellations, and whether a client has sufficient funds to pay the fare. On some nights, the fixed costs of a licensee may exceed revenue generated, so loss is certainly a reality.

In its notice of appeal to WCAT, the appellant relied on the arguments it made to the Board.

In its memorandum dated March 4, 2005, the Board's Assessment Department noted that X and the appellant were parties to the interim agreement dated March 4, 2001, but there is no evidence that at the time of X's injury, X was a party to the generic licensee agreement. The Board also observed that the manager's decision of August 20, 2001 was based on the signed interim agreement between X and the appellant.

The Board relied heavily on the New Brunswick Court of Appeal decision in *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)* [2001] N.B.J. 222; 2001 NBCA 17 (application for leave to appeal dismissed, [2001] S.C.C.A. No. 425 (Joey's Delivery case). That decision advocated a purposive approach to interpreting legislative schemes that classify working relationships. The decision suggested that when statutes that distinguish between employees and independent contractors are directed at providing benefits to employees, the law should lean towards a classification as an employee, at least where conventional common law analysis leads to an indeterminate conclusion. This was aimed at the "mischief" of outsourcing work that has the result of denying benefits to workers.

The Board referred to the common law principles in the Joey's Delivery case for determining whether an employment relationship existed:

> As is well known, the expression "contract <u>of</u> service" is a term of art that signifies that the contract involves an employment relationship. By contrast, the term "contract <u>for</u> service" connotes persons who are classified as independent contractors. Thus, the interpretative issue revolves around the application of the common law test(s) used to distinguish employees from independent contractors…
>
> [paragraph 32, Joey's Delivery case]

The common law four-fold test recognized by the Court in the Joey's Delivery case as a starting point for an analysis of a working relationship is a test considering four factors: control, ownership of tools, chance of profit, and risk of loss. The Court observed that "control" is meant in the sense of directing the "when and where" of the work, as opposed to the manner of its completion, as today professional employees and other highly skilled workers exercise a great deal of discretion in deciding how tasks are to be performed.

Beyond the "starting point" of the foregoing four factors and the "purposive" factor earlier mentioned, the Court in the Joey's Delivery case also referred to three other factors: the exclusivity factor (whether a worker is restricted from doing the same or similar type

of work for others), the sub-delegation factor (whether performance of the worker may be sub-delegated to another), and the business indicia factor (who is actually carrying on whose business). After referring to all those factors, however, ultimately the Court concluded that it was not helpful to isolate individual factors. The Court said that the focus of any analysis must be directed at the question of whether a worker is really carrying on business on his or her own account, or effectively carrying on someone else's business.

After reviewing the Joey's Delivery case criteria, the Board submitted that its policies in the *Assessment Policy Manual*, especially policy 20:30:20, in effect parallel the analysis favoured by the Court in the Joey's Delivery case. Considering the policy criteria of control, ownership of equipment or licenses, terms of work contract, independent initiative, employment of others, continuity of work, and separate business enterprise, the Board submitted that the preponderance of evidence points to X as an employee of the appellant. The Board in particular observed that X was "fully integrated and subsumed within the appellant – through, for example, the livery requirements and the dispatch system. That is, [X] had fully integrated his activities into the appellant's commercial activities: in the limousine industry, [X] was acting on behalf of the appellant, was connected with the appellant's business, and was dependent on it." The Board also pointed to the non-competition clause in the interim agreement: X's "business" or existence as a separate business enterprise within the industry would come to an end (or at least an abeyance of two years) upon the expiration or termination of his contractual arrangement with the appellant.

In its submission, the appellant stated that it no longer used the interim agreement. The appellant rejected the analysis of the law in the Joey's Delivery case, and instead relied on *Decision 422/93* of the Ontario Workers' Compensation Appeal Tribunal (Ontario Tribunal) (November 21, 1994). *Decision 422/93* involved the status of drivers for a courier company. The Ontario Tribunal (the Ontario Tribunal) decided that the drivers were independent operators, and that the courier company was not required to pay assessments on their earnings. The appellant submits that X's situation was similar to that of the drivers in *Decision 422/93*. The drivers owned or leased their vehicles and paid for repairs, gas insurance and licenses. The courier company paid the drivers 70% of the billed amounts, and the company retained 30% for acting as a dispatcher and providing clerical staff responsible for dealing with paperwork. Drivers did not do work for other companies, could hire replacement drivers if unavailable because of holiday or illness, but were responsible for paying the replacement drivers. Most drivers had an assigned run in a particular geographical area and had regular customers, but could increase earnings by accepting additional work, seeking out new customers, reducing vehicle maintenance expenses, and choosing the most efficient way to make and coordinate deliveries.

The appellant submitted that X could obtain his clients from dispatch or pursue clients on his own accord, and was encouraged to do so. The appellant submitted that X could increase revenues through independent initiative and this factor weighed in favour of a

separate, independent business. The appellant also observed that profit and loss were inherent in the business, noting that X was required to pay for his vehicle, pay for fuel, insurance, vehicle maintenance, communication devices, licencing, legal advice, clothing, stationary, and he also would have to pay wages to his worker.

The appellant also advised that the designated driver service required two people and thus either the licensee had to hire a worker or be working in a partnership. At this point I note that in X's claim file there is a letter dated July 19, 2001 from X's lawyer to the Board, in which it advises that X had an employee. A claim log memo dated April 30, 2001 refers to X contracting to work with F Driving Company, using his car to pick up those who have been drinking and drive them home using their car. The claim log indicated that another worker would drive X's vehicle for him while he was driving the client in the client's vehicle. With this evidence in mind, and also considering that the interim agreement with the appellant was with X and no one else was named as a party, I conclude that X had hired a worker. The evidence does not support a business partnership arrangement between X and another person.

In response to the Board's submission that the relationship between the appellant and X was not transaction-based but a continuing one, in which X reported for and discharged his duties day after day, the appellant said that the licensees supplied the days and times they were available.

With respect to the correct interpretation of the non-competition clause, the appellant advised that X was not restricted from carrying on as a separate business enterprise but only that he could not carry on a role similar to that of the appellant in a designated driving business.

The appellant concluded that the Board had erred in identifying X as a worker of the appellant, and requested WCAT to vary the Board's decision by finding X to have been operating as a business independent of the appellant.

**Reasons and Findings**

*Threshold Issue – Grounds of Appeal*

The appellant has established an error of fact made by the manager in her August 20, 2001 decision, which meets the threshold test for appeal under section 96(6) of the Act as it existed when the appellant initiated its appeal before the Appeal Division. The error of fact was the manager's statement that the interim agreement contained no reference to a flat fee payable by X to the appellant, but only referred to a payment that was 22% of X's gross sales. This error occurred because the manager was missing two pages of the March 4, 2001 interim agreement between X and the appellant, and therefore she was unaware of items 1.01 and 2.01 in the interim agreement. Item 2.01 referred to an initial fee of $20.00 to be paid by X to the appellant, as well as a payment of 5% of daily gross sales that, if the parties renegotiated and extended the term of the

interim agreement, would be applied by the appellant to a renewal fee of no more than $6,500.00 to be paid by X to the appellant.

Having established an error of fact in the manager's August 20, 2001 decision, the appellant has fulfilled the requirement under section 96(6) of the Act for me to review the manager's decision and determine whether or not her she erred in her ultimate conclusion about X's status at the time of his injury on March 30, 2001.

*At the time of his injury on March 30, 2001, was X a "worker" of the appellant under the Act and Board policy?*

As the Board's submissions in this appeal relied extensively on the Joey's Delivery case, it is important to comment on the relevance and usefulness of the case in these proceedings. Joey's Delivery case is an important decision which analyzes and applies the common-law tests for determining an employer/employee relationship. As noted by another WCAT panel in *WCAT Decision #2003-0556/0557* (April 23, 2003), reported on the WCAT website, section 99 of the Act (unlike the New Brunswick workers' compensation statute) expressly exempts the Board from a requirement that it follow legal precedent. While legal precedent in the form of common-law decisions may provide assistance to a decision-maker, the Board is not required to apply the common law when deciding who is and who is not a worker.

Having said that, however, the definition of "worker" in the Act includes a person who has entered into or works under a "contract of service." Therefore the use of the phrase "contract of service" in the Act does incorporate the common-law concept into the statutory definition of a "worker." Board policy in item 20:10:30 confirms that the Board adopts the general common law concept of a "contract of service" in deciding that where a person is working under a contract of service, the person is a worker under the Act.

Although the general common law concept of the master/servant or employer/employee relationship is adopted by the Act, the definition of worker "includes" people working in

those relationships. Thus people outside of that category are not necessarily excluded from the Act's definition of worker. Policy 20:10:30 states as follows:

> It is important to note that the commencement of compensation coverage for a worker is not bound by the common law principles relating to a contract of service. The Board, for the purposes of the administration of its Act, has the exclusive power to determine whether a particular relationship is one of employment or whether it is between two independent contractors. However, decisions made by the Board are for workers' compensation purposes only and they have no binding authority in connection with other statutes.

The reference in the foregoing quote to "exclusive power" is a reference to section 96(1)(j) of the Act. That statutory provision confers upon the Board exclusive jurisdiction to determine whether a person is a worker. Section 99 of the Act requires the Board to make such a determination by reference to the merits and justice of a case and by applying relevant board of directors' policy without being bound to follow legal precedent.

The Act's definition of worker also expressly includes an independent operator who would not ordinarily be considered either a worker or an employer, if the Board has admitted that independent operator under section 2(2) of the Act. Thus it is clear that the Board has the exclusive jurisdiction under the Act to determine that an individual is a worker, albeit that by applying the common law tests, the person would not be a worker. If according to the merits and justice of the case and applicable Board policy, the Board determines a person to be a worker, that decision should be respected notwithstanding that the person might not be considered a worker under a strictly common law analysis. It is clear that the common law concepts of master/servant, employer/employee relationships may be relevant but in any given case may not necessarily be determinative of whether an individual comes within the Act's definition of a worker.

The Act's definition of a worker is expansive and thus it is usually necessary to turn to Board policy when making a determination about a person's status in a working relationship. Under sections 250(2) and 251(1) of the Act, I am bound to apply Board policy unless it is so patently unreasonable that it is not capable of being supported by the Act and Regulations. In this case there has been no argument that policy in items 20:10:30 or 20:30:20 are patently unreasonable. Given the wide definition of "worker" in the Act as well as the Board's broad and exclusive jurisdiction to determine who is a worker, it would be difficult to reach a conclusion of patent unreasonableness. It is sufficient to state that in this case, I have not found the relevant Board policy to be patently unreasonable. Therefore I am required to apply it in deciding X's status.

Board policy in item 20:30:20 gives guidelines for determining registration status with the Board, under the categories of "Worker", "Independent Firms" and "Labour Contractors." The major test under policy, however, is whether the supplier of labour

has "any existence as a business enterprise" independent of the entity to which the labour was supplied. At this point I note that while the phrase "any existence" might be interpreted to mean any indicia whatsoever of independence, it is clear from the policy context that the test is whether the supplier of labour is an independent business in its own right, carrying on business on its own account rather than effectively carrying on someone else's business. Thus the three categories represent guidelines to apply the primary policy test of "separate business existence."

In this case, the evidence is clear that X was an employer in the sense that he had hired a worker to assist him with the designated driving services. X was working under a contract with the appellant whereby he supplied labour (his own and his worker's labour) to the appellant. The evidence is that he was supplying that labour only to the appellant. I agree with the Board's interpretation of the non-competition clause in the interim agreement, namely, that in March 2001, when he was injured, X was not entitled to participate in any way in a designated driving business or similar business with anyone else. These findings would bring X within the definition of a "labour contractor" under item (a) of the "Labour Contractor" heading in policy 20:30:20.

I also agree with the supervisor's June 28, 2001 finding that X, in providing his vehicle to perform the designated driving service, was providing one piece of revenue producing equipment to the appellant. Policy 20:30:20 provides that personal transportation vehicles or vehicles used to move equipment are not considered to be revenue producing equipment. Practice Directive 1-1-7(A), however, clarifies that it is "major" revenue producing equipment that is relevant to determining status questions, and it also states that single-axle motor vehicles in the trucking/delivery/courier industry qualify as major revenue producing equipment. A designated driving service is akin to a delivery service (it delivers people and their cars) and by analogy, in this case X's vehicle may be considered major revenue producing equipment. The Directive further states that custom outfitted service vehicles qualify as major revenue producing equipment. In my view the installation of the appellant's specific radio dispatch system in X's vehicle qualified the vehicle as an item of major revenue-producing equipment. This finding also, therefore, brings X within the definition of a "labour contractor" under item (c) of the "Labour Contractor" heading in policy 20:30:20.

I have also considered whether X falls within the "Independent Firm" category in policy 20:30:20. My assessment is that paragraphs a, b, c, d, e and f under the "Independent Firm" heading do not apply to X. Paragraph g is ambiguous, and I will deal with that matter later.

With respect to policy 20:30:20's "Independent Firm" category, X was not supplying materials (paragraph a). He did not require two or more pieces of revenue producing equipment to fulfill the designated driving service (paragraph b). Although the appellant has argued that the radio and the cell phone qualify as revenue producing equipment, Board practice directives and Board policy are clear that not every piece of equipment used in a business is considered to be "revenue producing." It is only major equipment of sufficient cost, size or scarcity/specialty that will qualify. X was not incorporated (paragraph e) and he did not constitute a "manpower supply firm" (paragraph f).

Paragraph g is not helpful, because it refers to persons who are "normally labour contractors who employ a worker(s) and are not contracting to another employer under the Act." I note that paragraph g has been deleted from the current Assessment Manual's "specific guidelines" as to who would be considered independent firms. The reason paragraph g is unhelpful in this case is because in order to determine whether X, as an employer of a worker, was contracting to another employer under the Act, it becomes necessary to assess the relationship between X and the appellant to determine whether the appellant was the "employer" of X or whether X was an independent firm. This brings us back to the primary test under policy 20:30:20, which analyzes whether X had a separate business existence from the appellant, or was in effect a worker of the appellant carrying on the appellant's business. A guideline such as paragraph g, that requires a full-scale application and analysis of the primary test, is not much of a guideline.

The guidelines under the heading "Workers" in policy 20:30:20 are similarly inconclusive regarding X's status as a "worker." They also require a determination of whether the appellant was X's employer.

With respect to the guidelines in policy 20:30:20, I am only definite that X was an employer and that he also came within the guideline definition of a labour contractor. Provided that he was not also an independent firm at the time of his injury (that is, not contracting to another employer under the Act), X would therefore fall within the definition of a worker. This is because at the time of his injury on March 30, 2001, X was not registered with the Board as an employer. As an unregistered labour contractor, under policy 20:30:20, X and any help he employed to assist him, would be considered a worker of the appellant, with the appellant responsible for assessments and injury reporting. Notwithstanding X's status as an employer, Board policy would treat him as one of the appellant's workers (see also policy 20:10:30, which expressly states that unregistered labour contractors are considered to be workers for the purposes of Part 1 of the Act). This is consistent with the Act's definition of "worker," which does not exclude those persons who might employ workers themselves.

As policy 20:30:20 refers to the "Labour Contractor" category as a guideline only for determining registration status as either an employer or a worker, and because there is some question whether X, albeit a labour contractor, might fall under paragraph g of the "Independent Firm" category, I find it necessary to consider the major test in the policy,

which asks whether X had a business existence independent of the appellant. This leads directly into an analysis of the factors considered by the common law. This is because Policy 20:30:20 adopts *Decision No.* 255, which refers to the major test and which in turn expressly deals with some of the common law considerations to adjudicate the test, such as control; ownership of equipment or licenses; terms of work contract; independent initiative/profit sharing/piece work; employment of others; continuity of work; and separate business enterprise.

In this decision I have earlier noted that the Board has the exclusive jurisdiction under the Act to determine that an individual is a worker and may find a person to be a worker albeit that by applying the common law tests, the person would not be a worker. If according to the merits and justice of the case and applicable Board policy, the Board determines a person to be a worker, that decision should be respected notwithstanding that the person might not be considered a worker under a strictly common law analysis. In the context of British Columbia's workers' compensation statute, the common law concepts of master/servant, employer/employee relationships may be relevant but in any given case may not necessarily be determinative of whether an individual comes within the Act's definition of a worker. Where common law considerations are relevant, it is also important to be aware that the nature of the common law is to develop, and thus the common law tests and considerations have expanded since *Decision No. 255* was published many years ago.

With the foregoing in mind, while I do not consider the reasoning in Joey's Delivery case to be binding upon me, nor do I agree with all of the statements made by the majority of the Court in that case, I have found some of the approach and analysis of the majority opinion to be of assistance to me in assessing the relationship between X and the appellant in this case.

I agree with several significant points made by the majority in the Joey's Delivery case. First, the Court majority observed that the case law dealing with determinations of whether a particular working relationship constitutes "employment" is of central importance in Canadian law, because "classification as an employee is the gateway to numerous statutory benefits, both federal and provincial, that remain unavailable to the independent contractor." Further, the Court majority revealed that the most problematic situations involve services provided by persons who own and operate their own vehicle, such as truck, tax and courier drivers. The Court majority stated that courts and tribunals are carefully scrutinizing working relationships with a view to ensuring that employers are not exploiting workers who have one of two options: either accept the work and the appellation of independent contractor without the benefits of employment insurance and workers' compensation, or find alternative employment if it exists. The Court majority observed that there are certainly advantages to carrying on business for oneself, such as tax write-offs and the potential for a self-employed income that makes

adequate provision for retirement. The "real task," according to the Court majority, is to:

> …isolate those cases in which the employer is effectively exploiting workers, that is, cases in which no discernible advantage accrues to those whom the employer has labelled "independent contractor". Perhaps it is not surprising that very few classification cases involve highly skilled workers or home-based entrepreneurs. Much of the jurisprudence has been concerned with the legal status of those possessing a driver's license and a vehicle. Presumably, persons falling within the first category are better able to look after their own economic interests than those who come within the second. This is why the purposive or mischief factor or approach cannot be ignored.
>
> [paragraph 101]

In the Joey's Delivery case, the Court majority found the drivers in question to be independent operators. My analysis of the decision is that the Court was significantly influenced by the unique facts of the case in which the business in question was a very informal, casual "penny-ante" operation in which no one, not the appellant dispatching firm or the drivers, were making much of a profit. Neither the appellant nor the drivers had any control over the fixing of delivery rates, rates that were so low that drivers relied on gratuities to retain any expectation of profit. In the "informal economy" described in the decision, the customers set the rates. Although the Court majority referred to numerous common law factors in deciding whether the drivers had a separate business existence, it placed heavy emphasis on the mischief or purposive factor. In concluding that the drivers were independent operators, the Court majority observed that there was no need to take a paternalistic attitude toward the drivers or to consider that the appellant was somehow exploiting the vulnerabilities of the drivers. While the Joey's Delivery case is helpful in its analysis of the common law factors relevant to deciding the status of a working relationship, the facts of the case are so unique that it is not of much assistance in this case as an analogy to the situation.

Applying the common-law test of "independent business existence" referred to in policy 20:30:20, and keeping in mind the developing common-law jurisprudence relevant to that test, I have concluded that at the time of the injury on March 30, 2001, X was not carrying on business as an independent firm in the designated driver's industry. My assessment of the evidence and the relevant law and policy is that X was carrying on work in the industry as a labour contractor under a contract of service for the appellant, supplying both labour (his labour and the labour of the other driver) as well as his motor vehicle. Thus X was both a worker and an employer at the time, but fell within item 3(c) in the "Labour Contractor" definition in policy 20:30:20.

In considering the general test for determining whether a person has sufficient existence as a business enterprise independent of the person or entity for whom the work is done,

the test is one of degree. I have kept in mind the policy and common law reminders that no business organization is completely independent of all others.

I have concluded that under the interim agreement, the appellant had a degree of control over X's conduct of the designated driving business that was consistent with the type of control exercised by an employer over an employee. That degree of control was also required by F Driving Company in its franchise agreement with the appellant. X was required to provide the appellant with financial information and records, including reports of gross sales, in the form and according to the schedule decreed by the appellant. Despite the short term of the interim agreement, X was required to preserve his accounts relating to the designated driver's business for four years after the termination of the agreement, in the form and manner required by the appellant. X's choice of an accountant needed the appellant's approval. F Driving Company and the appellant were entitled to inspect, without notice and during business hours, X's financial records, including payroll records, check books, bank deposit receipts, and so on. The interim agreement specified that all stationary and business cards were to be supplied by the appellant. Although the appellant indicates that X could supply his own business cards, the interim agreement makes it clear that at the very least, the appellant had the right of approval over the form of the stationary and the recordkeeping utilized by X. All these forms of control, taken as a whole, are not consistent with X operating his own business.

It is also telling that under the interim agreement, X could use his motor vehicle and provide only the services from that vehicle to which the appellant had previously approved in writing. Further, X could only operate the vehicle equipped with the appellant's equipment in the geographic territory specified and approved by the appellant. The Master Agreement between F Driving Company and the appellant also specified that F Driving Company was entitled to prescribe standards to be acted upon by the appellant and its licensees, and that F Driving Company could inspect any mobile units in the appellant's franchise at any time. These are all important factors in assessing the degree of control exercised by the appellant over the "when and how" the worker would be carried out. Those facts are an important distinction from the situation in the Ontario case, *Decision 422/93*, relied on by the appellant. The couriers in *Decision 422/93* promoted the courier company business in order to get work for their own independent operations, which included using their vehicles to move furniture. Thus the couriers, by contrast with the appellant, were entitled to and did use their vehicles as part of a broad entrepreneurial enterprise of which the courier business was only one aspect.

I agree with the Board's interpretation of the interim agreement that X could not assign the agreement without the appellant's consent, that death or incapacity of X was a default event entitling the appellant to terminate the agreement and repossess its equipment, and that after the termination of the agreement, X was not entitled to in any way associate himself with a designated driver's business (or similar business) for two years. Thus the evidence does not support a finding that X "owned" the interim

agreement in the sense that he owned a designated driver's business that according to his decision he could sell or bequeath to another of his choice. Neither does it support a finding that X owned a designated driver's business, with an existence sufficiently separate and apart from that of the appellant, which he could continue to operate despite the severing of his business relationship with the appellant. There would be no continuity of such a business existence for X after he severed his relationship with the appellant.

I have also considered whether the situation could be interpreted as X contracting intermittently for a variety of clients, or whether the situation is more correctly viewed as X working continually for the appellant under the term of the interim agreement. I am satisfied that the latter is the more appropriate characterization of the situation. I note that the interim agreement was for a three month period only (albeit subject to renewal) and described X as wanting to obtain the appellant's training and advice in connection with operating a designated driver's mobile vehicle. The Master Agreement between F Driving Company and the appellant referred to the appellant establishing mobile units under the franchise by signing licensee agreements with operators, and stated that all mobile units were required to conform to F Driving Company's specifications. I also note that the Master Agreement provided that the appellant and licensed operators were required to devote no less than 40 hours per week to manage and/or supervise their mobile units and "to continuously operate the business during all normal business hours or during such hours as required by the appellant." The appellant has stated that licensed operators such as X simply indicated when they would be available. The context of that availability, however, becomes clearer after reading the interim agreement in conjunction with the Master Agreement. The context indicates that the designated driving business was that of F driving Company and the appellant. Under the interim agreement, X was working as an operator of a mobile unit in the appellant's franchise business, not working for a variety of clients in his own separate business under a contract for service with the appellant. X was working for the appellant under a contract of service with the appellant.

Other important factors to consider, when deciding the degree of business independence, are "ownership of equipment or licenses," "independent initiative" and "chance of profit and risk of loss." The appellant has referred to the $20.00 initial fee required by the interim agreement, and the payment of 5% of daily gross sales to be applied to the $6,500.00 "renewal fee" if X chose to renew the agreement, or otherwise to be forfeited. I do not agree that those payments represent a significant investment by X. Certainly I do not agree that X's situation in this regard was akin to that of the appellant, who paid a significant $27,000.00 initial franchise fee to F Driving Company, in addition to the other continuing royalties.

The fact that X supplied a motor vehicle (which could be either his own car or a leased vehicle) and needed to obtain the requisite licenses and permits at his own expense, are factors which weigh in favour of a separate business existence. There were also other costs such as fuel and maintenance costs associated with the vehicle. Those

costs suggest an assumption by X of the risk of loss, akin to that of an entrepreneur. I have earlier noted that X was an employer, as he had hired a hired worker, and thus this factor also suggests an independent business existence. However, as noted by the Court majority in the Joey's Delivery case, referring to the Tax Court of Canada's decision in *Cerasoli v. Canada (Minister of National Revenue)* [1997] T.C.J. No. 858, (the Cerasoli case), the fact that drivers are required to provide an insured vehicle in good repair, and are designated under their hiring contract as independent contractors without employment insurance benefits, may not avoid a finding that they are employees rather than independent contractors. In the Cerasoli case, the degree of control exercised by the company which hired them was the significant factor in determining that an employment relationship existed.

I agree with the Board that the cell phone provided by X is not a significant piece of revenue producing equipment and in any event, is not considered by the relevant Board directive to be revenue-producing equipment for purposes of Board policy. The situation of the two-way radio is, in my view, a situation of the appellant supplying the equipment, not X. My assessment of the interim agreement, including the "rental" of the radio from the appellant by X, the administration fee and royalty percentage calculations, and the $2.00 a day insurance provided by the appellant, is that they are provisions which suggest a device to arrive at a wage/salary amount or commission amount for persons that the appellant has essentially "hired" for its franchise territory to perform the designated driving services using their own vehicles.

The appellant has made several references to the taxi driver analogy, in support of its argument that under the interim agreement X was an independent operator. In *Appeal Division Decision #2001-2240* (November 9, 2001), reported at 8 W.C.R. 71, the appeal commissioner stated at one point that Board policy and Appeal Division decisions have found that a taxicab operator "with a flat rate lease, or shift lease is an independent operator. He is not obliged to register with the WCB unless he has workers. For coverage of himself, he could apply for personal optional protection." I do not agree that the Board or the Appeal Division ever used such a truncated test to decide the status of taxi drivers. It is essential that Courts and tribunals examine the substance of a working relationship and not limit the inquiry to the "form" of remuneration. For example, in the case at hand, although X paid a $20.00 flat fee as an initial fee under the term of the interim agreement, it would be wrong to focus on the "flat fee" form of payment as establishing that X was conducting a separate business venture, with the risk of loss and profit for him as an entrepreneur to experience after paying the flat fee to the appellant. The reality of the situation was that the flat fee was a minimal one, and that no matter how many clients X might find on his own initiative, he would always be required to remit the appropriate royalty percentage to the appellant. In terms of money, every client in the designated driver's business, including clients X obtained on his own, would also be clients of the appellant with the appellant profiting according to the same royalty calculation that applied to clients the appellant dispatched by radio to X.

With respect to the taxi driver analogy relied on by the appellant, in the Appeal Division cases in which taxi drivers were found to be independent operators, there were important distinguishing facts from the case at hand. For example, the flat fee payments were substantial but after the taxi driver paid the company the daily flat fee, his profits were his own (as well as the losses, if it were a bad day). In this case, the flat fee under the interim agreement was only $20.00, and thereafter every client transaction was subject to the commission split and other fees mentioned in the interim agreement. The appellant also referred to X having the final decision to turn down a potential client, just like a taxi driver, and that X could elect to work in a narrower geographical area than specified in the interim agreement. While that may be true, both those choices would affect X only adversely with respect to potential earned revenue. In that sense, such "control" by X was narrow and unrealistic in terms of its exercise in an entrepreneurial scheme of operation. In this case, my assessment of the interim agreement was that the risk of loss was more real to X than the chance of profit. In any event, both the risk of loss and the chance of profit were substantially minimized compared to the taxi driver situations in which the Board's Appeal Division concluded the drivers were independent operators. Further, in many of those cases, the taxi drivers were rarely using the company dispatch system, but were able to attract a substantial clientele on their own by simply, for example, driving to the airport and waiting in the taxi line for customers. The degree of freedom regarding when to work, where to work, and accounting over money/profits was substantially higher than in the case at hand, where the appellant and F Driving Company exerted considerable control over X's activities as an operator of a designated driver's vehicle in the franchise territory owned by the appellant. I also note that in the taxi industry, the taxi commission controls the rates for all taxi companies in a given area, whereas in the case at hand, it was F Driving Company (and the appellant as its agent) who set the rates for the designated driving business – not an independent commission or X. Thus on the whole, I do not find the taxi driver analogy to be a comparable one in this case.

Another factor is which party is best able to fulfill the prevention and other obligations of an employer under the Act. This is part of a "mischief" or "purposive" analysis. I emphasize that in this case, I have not found any exploitation by the appellant or any significant vulnerabilities on the part of X under the interim agreement, which would lead me to place weight on finding X to be a "worker" in the relationship. However, with respect to the prevention obligations, given the training of the franchise holders by F Driving Company, and the training of the licensees by the appellant, I find that the appellant would be best able to provide safety training to X and his worker(s). With the appellant's obligations under the interim agreement to provide "training, assistance and advice in connection with operating a designated driver's mobile vehicle", and with X's corresponding obligation under the interim agreement to operate the mobile vehicle and equipment "in accordance with any operating instructions provided by" the appellant, it would seem logical that the appellant would be in the best position to fulfill the training and other prevention obligations of an employer under the Act. With respect to the assessment obligations under the Act, I am satisfied that under the interim agreement, both X and the appellant would have full knowledge of the financial records involved in

X's operation of the mobile vehicle, including the payroll associated with X's workers. Thus that factor is equivocal in determining X's status, although it does not detract from the appellant being able to satisfy the assessment obligations of an employer under the Act with respect to X and any of X's workers. Applying a purposive or mischief approach, and considering both the prevention and assessment obligations under the Act, I find that this factor weighs in favour of the appellant being viewed as X's employer.

Under the interim agreement, it was X's responsibility to pay workers' compensation remittances, employment insurance and other types of insurances and "taxes." As well, the agreement expressly characterizes X as an independent contractor. Under Board policy and the common law, however, the Board's jurisdiction cannot be excluded by private agreement between two parties labelling one of them as an independent contractor. Further, merely because the parties agree that one party should bear the typical expenses of an independent contractor will not suffice to impose independent operator status upon that party. However, I have taken into account that X did have sufficient expenses under the interim agreement, in weighing whether he had sufficient independence as a business entity separate and apart from the appellant to qualify as an independent operator.

After considering the various criteria relevant to the existence of a separate business enterprise, I have concluded that at the time of his injury on March 30, 2001, X's relationship with the appellant more closely resembled that of a worker rather than that of an independent operator or independent firm. I agree with the Board's decision dated August 20, 2001 that X was a labour contractor, with a worker of his own, working for the appellant under a contract of service whereby the appellant was X's employer. As X was not registered with the Board as an employer under the Act, X fell within the Board's policy as a "worker" for the purposes of Part 1 of the Act. Again, I note that this finding is consistent with the Act's definition of "worker" which does not exclude those persons who might employ workers themselves.

**Conclusion**

For the foregoing reasons, I deny the appellant's appeal. Although the manager of the Assessment Department erred in a finding of fact in her August 20, 2001 decision because she did not have a copy of the entire interim agreement, I find that she did not err in concluding that under the Act and Board policy, X was a worker of the appellant at the time of his March 30, 2001 injury. Accordingly, I confirm the manager's August 20, 2001 decision in that regard.

Expenses were not in issue in this appeal and none are awarded.

Heather McDonald
Vice Chair

HM/hb