BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

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WCAT Decision Number: **WCAT-2005-05297**
WCAT Decision Date: **October 7, 2005**

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 041309-A

Section 257 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 04 0095
MICHAEL URSEL v. HUMBERTO DA PONTE MEDEIROS and PONTE BROS CONTRACTING LTD.

Applicants: HUMBERTO DA PONTE MEDEIROS and PONTE BROS CONTRACTING LTD.
(the "defendants")

Respondent: MICHAEL URSEL
(the "plaintiff")

Representatives:

For Applicants: Bruce R. McConnan, Q.C.
McCONNAN BION O'CONNOR & PETERSON

For Respondent: John van Driesum
COX, TAYLOR

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Noteworthy Decision Summary

Decision: WCAT-2005-05297 **Panel**: Herb Morton **Decision Date:** October 7, 2005

Limitation of Actions - Worker or Independent Contractor – Out of Province Employer – Failure of Principal to Register Company – Section 257 of the Workers Compensation Act – Policy Items #5.0 and #7.44 of Rehabilitation Services and Claims Manual, Volume I – Items #20:10:20, #20:10:30, #20:30:20, #20:30:30, #20:30:40 and #AP1-1-3 of the Assessment Manual

This was a section 257 determination in the context of an action in the Supreme Court of British Columbia. In determining whether a person is a worker or an independent contractor, or whether a business is an independent firm, Workers' Compensation Board (Board) policies should not be treated as rigid rules when they have been drafted as guidelines. An active principal of a private company who is responsible for the company's failure to register with the Board is not entitled to compensation benefits.

The plaintiff and the defendant were involved in a motor vehicle accident. The plaintiff had recently incorporated a business in Alberta (Alberta company) and was its sole principal. The Alberta company evaluated other businesses. The plaintiff had worked for another Alberta firm (previous employer) immediately prior to forming the Alberta company.

The plaintiff flew to British Columbia (BC) to evaluate a business (BC firm). One hour after arriving in BC the plaintiff was involved in a motor vehicle accident. The plaintiff sued in the Supreme Court of British Columbia. The defendants applied to the Workers' Compensation Appeal Tribunal for a determination pursuant to section 257 of the *Workers Compensation Act* (Act).

The central issue to be determined was whether the plaintiff was a worker under the Act and, if so, whether his injuries arose out of and in the course of his employment. The plaintiff had performed prior work for the BC firm while still employed by the previous employer. The plaintiff had been referred by the previous employer to the BC firm.

The panel noted that the Alberta company did not employ any workers other than the plaintiff and there was insufficient evidence that it provided services to two or more firms at the same time. Thus, under policy items #20:30:20 and AP1-1-3 of the *Assessment Manual* the Alberta company would not automatically be considered an independent firm. The panel noted, however, that policy may be drafted either in the form of rigid rules or in the form of guidelines which allow flexibility in their application. Where the policy-makers have expressed a clear intent in the wording of a policy that it be treated only as a guideline, it would go against the policy to treat it as a rigid rule. Thus, the definitions in the *Assessment Manual* were only guidelines.

The panel noted that the Alberta company's business activities had not been fully developed. Therefore, the panel looked at the manner in which the Alberta company's services were being offered, rather than looking solely at whether it did, in fact, have multiple clients at the time. The panel further noted that both the BC firm and the previous employer would have considered the Alberta company to be an independent firm.

The panel concluded that the Alberta company was an independent firm and that the plaintiff would qualify as a worker of the Alberta company.

With respect to the Alberta company's obligation to register in BC, the panel noted that the Alberta company had only performed a half day of work in BC during the year in question. Accordingly, registration was not compulsory under the exemption criteria contained in item #20:30:40. However, under item #20:10:20, the Alberta company was only exempt if it was covered in another jurisdiction. As the Alberta company did not have workers' compensation coverage in Alberta, it was not exempt and therefore was an employer engaged in an industry within the meaning of Part 1 of the Act.

Item #5.0 of the *Rehabilitation Services and Claims Manual, Volume I* provided that a worker's claim is valid despite an employer not complying with its obligation to register. However, item #20:30:30 of the *Assessment Manual* provides that an active principal of a private company that is not registered with the Board is not entitled to compensation benefits. The plaintiff was responsible for the Alberta company's failure to register. The plaintiff was therefore acting, in effect, as a sole proprietor or independent operator. Therefore, the plaintiff was not a worker within the meaning of Part 1.

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Introduction

On November 19, 2001, the plaintiff flew from Calgary, Alberta, to the Vancouver airport. He intended to attend a work meeting in Fort Langley, and to look for a house and meet with friends. After leaving the airport by car around 8:30 a.m., the plaintiff was involved in a motor vehicle accident at approximately 9:30 a.m., approximately five or ten minutes' drive from the Langley township. The accident occurred while the plaintiff was traveling east on Highway 10, near the intersection with 137th Street, in Surrey.

Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury or death. This application was initiated by counsel for the defendants on April 29, 2004.

No examination for discovery has been conducted, but a statutory declaration has been provided by the plaintiff. The legal action is scheduled for trial on February 27, 2006. Counsel for the defendants, and plaintiff's counsel, have each provided a written submission. Counsel for the defendants declined the opportunity to provide a rebuttal submission.

Issue(s)

The central issue concerns the status of the plaintiff, as to whether he was a worker within the meaning of Part 1 of the Act, and if so, whether his injuries arose out of and in the course of his employment.

Jurisdiction

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

Status of the Plaintiff

(a) Background and evidence

In his initial statement to the Insurance Corporation of British Columbia (ICBC) on the day of the accident, the plaintiff advised:

> I AM A BUSINESSMAN AND WAS ON MY WAY TO A MEETING WHEN THE ACCIDENT OCCURRED…. I WAS TRAVELLING EAST ON HIGHWAY 10 IN THE LEFT OF TWO LANES. I CAME TO A STOP IN BACKED UP TRAFFIC NEAR 137TH – A VEHICLE ABOUT 5 CARS AHEAD OF ME WAS WAITING TO MAKE A LEFT TURN.

On November 19, 2001, the plaintiff provided an ICBC representative with two business cards. One identified the plaintiff as “Principal” of Cover-All Pacific, with a Calgary address. The other identifies him as the President of Enhanced Environmental Energy International, also with a Calgary address.

By memo dated June 14, 2005, the policy manager, Assessment Department, advised there was no record of a registration for Michael Ursel at 1247 Mariposa Avenue, Victoria, B.C. By memo dated July 11, 2005, the policy manager advised there was no record of a registration for Cover-All Pacific. By memo of August 8, 2005, the policy manager advised there was no record of a registration for Michael Ursel Financial Corporation.

Counsel for the defendants points out that the website for Cover-All Building Systems provides a list of dealer locations, including two in British Columbia. I note, in this regard, that the website provides information regarding Cover-All customers. One page

on the website sets out how the British Columbia Ministry of Transportation has purchased over 100 buildings for its use. The website reports:

> When the BC Ministry of Transportation needed to find the ideal salt storage facility for over 100 locations across the province of British Columbia, Cover-All Building Systems was the only building that exceeded all of their necessary requirements.
> …
>
> "The Cover-All BC Dealer and the Cover-All product easily exceeded all the necessary requirements," says Rob Buchanan, senior geo-scientist and a 30-year veteran with the B.C. Ministry of Transportation. "The Cover-All buildings performed excellently."
>
> They have since purchased over 100 Cover-All® buildings. Most of the buildings are 42' wide x 60' long Arch™ buildings; with the largest being a 50' wide x 200' long TITAN®. Not only are the buildings being used for salt storage, but also for equipment storage and maintenance.

On a further search of the Board's electronic assessment system, it appears that 546663 BC Ltd., operating under the trade name Cover-All Buildings – BC, registered under account 603605 with the British Columbia Board effective August 1, 1997, with a head office located at RR #1 S-9 C-14, Tappen, B.C. In addition, Mike Ursel Financial Corporation, operating under the trade name Cover-All Pacific, located at 1247 Mariposa Avenue, in Victoria, registered under account 740863 with the British Columbia Board effective January 1, 2004. While I would normally disclose any such additional evidence to the parties for comment, for reasons set out further below, I do not consider it necessary to do so in this instance (as not being relevant to my decision).

Counsel for the defendants argues that item #5.0 of the *Rehabilitation Services and Claims Manual* (RSCM, as it existed at the time of the November 19, 2001 accident) provides that a worker's claim is not prejudiced by the fact the employer had not complied with its obligation to register with the Board. He submits that even if Cover-All Pacific was not registered with the British Columbia Board, despite carrying on business in British Columbia, this would not prejudice the plaintiff's claim for workers' compensation coverage. (This argument concerning the effect of the policy at RSCM item #5.0 is addressed later in this decision.)

The plaintiff has provided a lengthy statutory declaration, sworn on August 2, 2005. He describes the range of business activities in which he was involved around November 19, 2001:

> I had not [*sic*] incorporated Michael Ursel Financial Corporation (MUF), which was an Alberta registered company. I had just successfully negotiated for a dealership from Cover-All for a territory encompassing Greater Vancouver, Vancouver Island and the Fraser Valley in British Columbia. The dealership issuance was pending as of November 19, 2001. I was also involved with a new company called Enhanced Environmental Energy, which was looking to deal with processing of bio-waste into energy. I was also taking a few clients on referral from my prior employer.

The plaintiff describes his trip to British Columbia as involving multiple purposes including looking for a home for his family (as he was planning to relocate to British Columbia), to socialize with friends, and to perform a business valuation for a customer. With respect to this specific work purpose, the plaintiff advised:

> Approximately two (2) weeks prior to November 19, 2001, I made travel arrangements to come to Vancouver and attend in Fort Langley for the valuation of a business. I had been retained by a company in Prince George to perform a business valuation of BC Master Blasters, which is involved in the cleaning of tanks and sewers. I am both a Professional Engineer and a Chartered Accountant. Until approximately two (2) months prior to the motor vehicle accident, I had been working with BDO Dunwoody LLP as a business valuator. I had ceased that work with BDO Dunwoody LLP to pursue business opportunities personally. As a result of having performed prior work for this specific client, BDO Dunwoody LLP had provided my name to do the valuation of BC Master Blaster. **I performed the valuation by my personally owned company, (MUF), for the client. MUF was an Alberta company as of November 2001. MUF was not registered with WCB in either Alberta or WCB [*sic*] as of November 2001. I was the only worker in MUF as of November 2001. As of November 2001 I had performed no other work in BC in MUF.**
>
> [emphasis added]

Following the accident, the plaintiff proceeded to meet with the president of BC Master Blasters around 1:00 p.m. His business at that company lasted until about 4:00 p.m. His flight back to Alberta was scheduled for November 21, 2001. The plaintiff concludes by stating that his work obligations lasted only one half day in Fort Langley at BC Master Blasters for a site inspection, and the remaining period of time was scheduled for the purposes of preparing for his move and visiting with friends.

(b) Was MUF an independent firm? Was the plaintiff a worker?

The plaintiff's work in British Columbia involved the valuation of a business in Fort Langley, on behalf of a client in Prince George. The unnamed Prince George firm had retained MUF, an Alberta company, to conduct this business valuation. The plaintiff had performed prior work for this specific client while working for his former employer, BDO Dunwoody LLP (which referred the Prince George client to him to do the valuation of BC Master Blaster).

Information regarding BDO Dunwoody LLP is accessible on its website at: http://www.bdo.ca/. This states that BDO Dunwoody LLP is the 6th largest accounting and advisory firm in Canada, with 95 offices in Canada. Its website describes the services provided as including business valuation services:

> With BDO, you have the confidence that comes from having the support of one of the largest, most capable business valuation firms in Canada.
>
> This "bench strength" includes many fully qualified professionals who are both Chartered Business Valuators and Chartered Accountants, combining both academic and practical experience. Our reputation for well supported reports reassures you that you have the best team on your side in any courtroom or boardroom appearance.

It is necessary to consider whether, in performing the business valuation in Fort Langley:

(a) MUF was an independent firm retained by the Prince George firm, or,
(b) the plaintiff was acting as a worker of the unnamed Prince George firm;
(c) the plaintiff was, in carrying out work referred to him by his former employer, a worker of BDO Dunwoody LLP.

Counsel for the defendants has not examined the plaintiff, and plaintiff's counsel has not disclosed the name of the Prince George firm. Very limited information has been provided regarding the extent of MUF's work activities. The evidence which has been provided concerning the plaintiff and MUF consists of the following:

- MUF was an Alberta registered company.
- MUF was not registered with the Workers' Compensation Boards of Alberta or British Columbia.
- The plaintiff was "taking a few clients on referral from [his] former employer."

- Until two months prior to the accident, the plaintiff had been working with BDO Dunwoody LLP as a business evaluator. In that employment, he had performed prior work for the Prince George client.
- The plaintiff ceased his work with BDO Dunwoody LLP to pursue personal business opportunities.
- The plaintiff was both a professional engineer and a chartered accountant.
- The plaintiff was the only worker of MUF in November 2001.
- As of November 2001, the plaintiff had performed no work in BC in MUF other than the November 19, 2001 business valuation.

Plaintiff's counsel submits as follows:

> Item #20:10:30 of the *Assessment Policy Manual* and several decisions of the former commissioners established the criteria for distinguishing between an employment relationship and a relationship between independent firms. The relevant policies are now found the *Assessment Manual*. Item #20:10:30 stated:
>
> > "The commencement and termination of an employment relationship and distinguishing a relationship of employment from a relationship between independent contractors is considered in Workers' Compensation Reporter Series Decisions 26, 32, 138 and 255…"
>
> Decision Nos. 26, 32, 138 and 255 listed several factors as being significant in determining whether a person is an independent firm, labour contractor or a worker. These factors were previously summarized at #7.44 of the Rehabilitation Services and Claims Manual (RSCM) as follows:
>
> (a) Control
> (b) Ownership of equipment or license
> (c) Terms of work contract
> (d) Independent initiative, Profit sharing, and piecework
> (e) Employment of others
> (f) Continuity of work
> (g) Separate business enterprise.
>
> These tests are now set out in item AP1-1-3 of the *Assessment Manual*.

This reasoning was similarly expressed in *Appeal Division Decision #95-1481*, "'Workers' Under the Act", 12 WCR 7.

The policy at *Assessment Policy Manual* item No. 20:30:20 set out various entities that were considered independent firms. This list included the following:

> (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);

The criteria regarding labour contractors are set out at *Assessment Policy Manual* item No. 20:30:20:

> 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).

Policy at item No. 20:30:30 of the *Assessment Policy Manual* provided:

> . . . an incorporated company is usually considered an independent firm by the Board, and therefore registration with the Board is mandatory. As the

> incorporated entity is considered the employer, a director, shareholders or other principal of the company who is active in the operation of the company is considered to be a worker under the Act.

On a strict application of the definitions given in the *Assessment Policy Manual* to the terms worker, independent firm, and labour contractor, I would be inclined to consider the plaintiff a worker. While MUF might be considered a service industry firm, it employed no workers other than the plaintiff, and there is a lack of evidence to clearly point to it providing services to two or more firms on a simultaneous basis.

However, it is important to note the introduction to the policies set out at *Assessment Policy Manual* item No. 20:30:20. The policy stated:

> 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 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 [*sic*] the policy is appropriate for that case.

WCAT must apply the applicable policy. However, policy may be drafted in the form of rigid rules which must be followed, or in the form of guidelines which allow flexibility in their application. Where the policy-makers have expressed a clear intent in the wording of a policy that it be treated only as a guideline, it would contravene the policy to treat it as a rigid rule. Thus, the definitions in the *Assessment Policy Manual* are not conclusive. Regard must also be had to *Decision No. 255*, "Re Registration of Labour Contractors as Employers", 3 W.C.R. 155, which was part of the published policies of the Governors at the time of the November 19, 2001 motor vehicle accident, and which was expressly cited in policy at *Assessment Policy Manual* item No. 20:30:20 as setting the spirit and intent of registering firms.

Decision No. 255 quoted the following passage from *Decision 138*:

> One point that has been raised in discussion is the significance of incorporation. It is important to bear in mind here two separate questions.

1. Whether a person operating in an industry under the Act is a worker, or an independent contractor, in relation to the person or people for whom he works.

2. Whether an independent contractor is under the compulsory coverage provisions of the Act, or is covered only on application for optional protection.

Incorporation has crucial significance on the second question, but is only of evidentiary value on the first.

If the Board treated incorporation as being critical on the first question, it would open the door to serious abuse. Any employer who could persuade a category of workers to incorporate could then engage the company on a contract for services and evade the obligations of a employer under the Act. Thus when we are considering the relationship of people to the person or company for whom they are working, the question of whether those people are workers, or whether the group is an independent contractor, must be determined independently of whether the group has incorporated.

After a decision has been made that a business enterprise is an independent contractor, incorporation is then crucial on the nature of the coverage. If it is an incorporated business, all principals of the company are treated as employees of the company, and are therefore workers under the Act. But if it is unincorporated, the principal is treated as the employer and anyone that he hires is treated as a worker. The worker is covered by compulsory coverage, but the employer is only covered himself if he applies for and is granted optional protection.

Decision No. 255 stated the following, in reference to the above quotation:

The Commissioners still accept the validity of this statement of principle. However, in the case of individual applicants, applications by corporations for registration as employers are usually made bone fide in respect of properly registrable businesses. Only in a minority of cases is incorporation used a method of avoiding an employer's obligations under the Act. It is, therefore, reasonable for the Board to accept applications by corporations at face value unless there are circumstances which indicate that a full investigation should be made. In the latter case, the applicant's position will be determined by the principles laid down in *Decisions 32* and *138* and this directive rather than by virtue of its status as a corporation.

RESOLVED that:

1. Upon application, registration as an employer should be granted to contractors who, in essence, provide only labour services, unless there are circumstances suggesting that the contractor is really a "worker" under the Act. In the latter case, an investigation will be made and the applicant's status determined according to the principles set out in *Decisions 32* and *138* and this directive.

Plaintiff's counsel submits that the plaintiff was not a worker as defined under the Act. He argues:

> Mr. Ursel had absolute control of how and when he performed his work as a business valuator, engaged independent initiative with regard to how he performed the work, employed no other persons, had no continuity of work with the party for whom he was performing the business valuation, had a [*sic*] established a separate business enterprise for the purpose of performing business evaluation work and controlled how the terms of his work contract and the utilization of equipment related to that service. There is nothing in the evidence which points at all to an employment relationship.

Counsel for the defendants declined the opportunity to provide a rebuttal submission. There is very limited evidence on which to evaluate the activities of MUF (i.e. to assist in determining whether it was providing services to multiple clients, and whether it was contracting to two or more clients simultaneously).

In terms of control, the plaintiff was retained as an expert to perform a business valuation in another city, for the Prince George client. The client would have relied upon the plaintiff to perform this valuation, rather than exercising any control over the performance of this task. No ownership of equipment was involved. The plaintiff possessed the qualifications necessary for performing the work, and no license was held by the Prince George client. No evidence has been provided to show that the billing of the work was performed through BDO Dunwoody LLP. I accept at face value the plaintiff's evidence that he had ceased his work with BDO Dunwoody LLP, and the Prince George client was referred to him by BDO Dunwoody LLP. Presumably, this work did not involve the plaintiff's services being billed through BDO Dunwoody LLP. There is no information regarding any terms of the work contract which would be inconsistent with the relations of the Prince George client, BDO Dunwoody LLP, and MUF, being those of independent firms. In terms of continuity of work, it appears that MUF was offering its services to the world at large, was available to provide business

valuation services for individual clients as requested, and did not engage in providing ongoing services to a particular client.

As the plaintiff was in a state of transition, since he ceased his work with BDO Dunwoody LLP and began pursuing his personal business interests, it may well be that he had not had the opportunity to fully develop MUF's activities. Where an expert "hangs out his shingle" to offer consulting services to the world at large, there may not be an immediate lineup of clients. The intent of the expert may be to contract to multiple clients simultaneously, but there may be some delay in developing the client base to bring this to fruition. In such circumstances, I am inclined to have regard to the manner in which the services were being offered, rather than basing my decision strictly on whether, as a matter of fact, there were multiple clients being served simultaneously during the time period in question.

I note with interest a recent practice directive of the Assessment Department concerning "Labour Contractor Criteria" (Practice Directive 1-1-7(A), effective May 1, 2005), accessible at: http://www.worksafebc.com/law_and_policy/practice_directives/assessment_and_revenue_services/default.asp. This explains the meaning of the phrase "ongoing simultaneous basis" as follows:

> Labour contractors are also identified in policy as being those who "contract a service to two or more firms on an ongoing simultaneous basis." Policy goes on to provide an example: "a janitorial contractor having simultaneous contracts with two or more unaffiliated firms."
>
> For the purposes of this policy, "ongoing simultaneous basis" means any simultaneous contractual obligations. Consider a subcontractor (in any industry) who contacts the Board for registration July 30, has a contract due for completion on August 20, and one due for completion on September 5. While the subcontractor may be unable to work on both contracts at the same moment, they overlap in time. The subcontractor has simultaneous contracts on an ongoing basis, subject to the subcontractor finding other contracts to complete after the due dates of the current contracts.
>
> In order to register because of ongoing simultaneous contracts, the subcontractor must be contracting to at least two unaffiliated prime contractors.

In making my decision, I will apply the policy in effect at the time of the accident in 2001. As I find the reasoning in this practice directive useful, I consider that I may reasonably use it in interpreting the policy which existed in 2001. While the plaintiff could only carry

out contracts on a consecutive basis, to the extent he had more than one contractual booking at a time he may be viewed as being a service industry firm contracting to two or more clients simultaneously.

In considering the factors outlined in the submission of plaintiff's counsel, I agree that the evidence does not appear to support a conclusion that the plaintiff was a worker of the Prince George firm, or a worker of BDO Dunwoody LLP, in performing the business valuation. The plaintiff had previously worked for the Prince George client while working for BDO Dunwoody LLP. The plaintiff had left BDO Dunwoody LLP and incorporated. The Prince George client would reasonably have considered that it was engaging the services of an independent consultant. Similarly, in referring the client to its former employee, who had ceased working for them and registered his own company, BDO Dunwoody LLP would reasonably have viewed him as independent.

In *WCAT Decision #2004-05930* dated November 10, 2004, the panel noted that determinations as to status rarely involve cases where all of the factors point to one status as opposed to another, and that cases often involve considerations that point to and away from worker status for one of the parties to a contract or agreement. The panel further reasoned:

> Of interest is the fact that item 20:30:20 provided that the categories were guidelines, and individual cases must be viewed as to whether application of the policy was appropriate for that case. Thus, the fact that Ms. D (i) did not supply labour and materials, (ii) did not require two or more pieces of revenue-producing equipment to fulfill a contract and (iii) was not a service industry firm contracting to two or more clients simultaneously and employing workers, would not automatically preclude her from having independent operator status. Yet, it is noteworthy that her circumstances do not resemble, in any significant way, the examples of independent firms set out in item 20:30:20.

I agree that in many cases, the evaluation of the competing factors may require consideration as to whether a party's circumstances "resemble, in any significant way", the examples provided in the *Assessment Policy Manual*, and that the definitions should not be applied as being definitive. Notwithstanding the fact that MUF did not employ any workers apart from the plaintiff, and the fact that evidence is lacking regarding the scope of MUF's activities for other clients, I am led to the conclusion that MUF was independent.

(c) Alberta firm performing work in B.C. – obligation to register

At the time of the November 19, 2001 accident, section 2(1) of the Act provided:

> This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board.

Policy at No. 20:10:20 of the *Assessment Policy Manual* set out the criteria established by the governors for the exemption of employers or workers from coverage under the Act. These criteria were established by *Decision of the Governors No. 60*, "Exemption from Coverage under Part One of the *Workers Compensation Act*", 10 W.C.R. 167. Policy at *Assessment Policy Manual* No. 20:30:40 stated:

> Certain employers with no place of business in the province who temporarily carry on business in B.C., but do not employ a B.C. resident, have been exempted from coverage under the Act by order of the Governors of the Board. (see policy 20:10:20).

Policy at *Assessment Policy Manual* No. 20:30:40 further stipulated (in connection with all firms other than those engaged in the trucking industry):

> The determination of whether an out-of-province firm in all other industries is carrying on business in B.C. "temporarily" is made on the basis of the number of occasions the firm comes (or intends to come) into the province:
>
> (a) If the firm comes (or intends to come) into the province for a total of 15 or more days per year, registration is required regardless of the number of occasions the firm comes into the province.
>
> (b) If the firm comes (or intends to come) into B.C. for a total of ten to fourteen days as the result of three or more visits within the year, registration is required.
>
> (c) If the firm comes (or intends to come) into B.C. for a total of ten to fourteen days as the result of one or two visits within the year, registration is not required.
>
> (d) If the firm comes (or intends to come) into British Columbia nine days or less within the year, registration is not required regardless of the number of visits.
>
> It must be noted that if an out-of-province employer establishes a place of business in B.C. or employs B.C. residents, that employer must register with this Board….

As the plaintiff's work purpose for the November 19, 2001 trip involved his Alberta company, MUF, I find that the evidence concerning the various firms other than MUF, which were carrying on "Cover-All" business, is not relevant to my decision.

The evidence which has been provided to WCAT does not reveal whether MUF intended to carry on any other work activities in British Columbia during the remainder of 2001 (apart from the half day of work on November 19, 2001). For the purposes of my decision, I will assume that MUF's activities in BC during 2001 were less than the minimums specified in (a) to (d) of Policy No. 20:30:40 quoted above. Accordingly, registration was not compulsory, subject to consideration of the governors' exemption criteria.

Policy at *Assessment Policy Manual* No. 20:10:20 provided that non-resident employers and workers temporarily working in British Columbia, who were excluded by Policy No. 20:30:40 of the *Assessment Policy Manual*, were exempt, provided they were covered in another jurisdiction that provided compensation for occupational injuries and diseases. *Decision of the Governors No. 60* provided, at page 169:

> 3. Non-resident employers and workers temporarily working in British Columbia, who would have been excluded by Policy 20:30:40 of the *Assessment Policy Manual* prior to January 1, 1994, are exempt, provided they are covered in another jurisdiction that provides compensation for occupational injuries and diseases. The reasons for making this exemption order are set out in Appendix C to this Schedule.

The effect of the policy was that employers present in British Columbia for less than the minimums specified in *Assessment Policy Manual* Policy No. 20:30:40 were not required to register in British Columbia so long as they were covered for workers' compensation purposes in another jurisdiction. The reasons for this requirement were provided in Appendix C as follows:

Appendix C — Non-Residents

> Some non-resident workers and employers are excluded from coverage under the *Act* as a matter of constitutional law, for example, non-resident air line flight crews who work in the province for short periods (See Policy No. 20:20:31 of the *Assessment Policy Manual*.) This position is not changed by *Bill 63*.
> Prior to January 1, 1994, Section 2(2)(e) of the *Act* also specifically excluded "employers with no place of business in the Province who temporarily carry on business in the Province but do not employ a worker

> resident in the Province." Existing Policy No. 20:30:40 determines when non-resident workers and employers who temporarily enter the province fall within the scope of this provision.
>
> Though Section 2(2)(e) has been repealed, *Bill 63* limits coverage to workers and employers "in British Columbia." This raises issues as to when coverage should commence for non-resident employers and workers entering the province. The same concerns arise as to predictability and the Board's ability to effectively administer compensation and safety and health coverage as are discussed in Appendix A in regard to domestic workers.
>
> Employers now covered by Policy No. 20:30:40 be exempted under *Bill 63*. The policy reflects the Board's experience as to what is a practicable and reasonable solution to the question where to draw the line between coverage and non-coverage. The industries affected are aware of and accustomed to these policies. **The employers in question will usually have compensation coverage for their employees in another jurisdiction. To cover the few situations where they do not have coverage, it is proposed that the existing policy be modified to specifically require this.**
>
> [emphasis added]

In *British Airways Board v. WCB (BC)* (1985) 61 B.C.L.R. 1, the British Columbia Court of Appeal concluded, in connection with the British Airways flight crews who were on turn-around in B.C. for short periods of time, and who had workers' compensation coverage in their home jurisdiction (at page 23):

> 1. The Act cannot apply to these employees. The scheme of the Act is to secure civil rights of workers in the province. The Act does not apply to persons, such as these employees of British Airways, who do not have a sufficient connection with the province to bring them within the legislative competence of the province. These employees do not have a sufficient connection with the province to bring them within the constitutional reach of the Workers' Compensation Act because their residence and usual place of employment is in the United Kingdom, where their contract of employment was made, and where they are paid. They have only a transitory presence in the province, and no substantial connection with it.

2. The Board misinterpreted s. 5 of the Act, and particularly the meaning to be given to the word "worker", and thereby extended the reach of the Act beyond the constitutional limits of the province. The construction given to the Act by the Board, having regard to s. 92(13) of the Constitution Act, 1867, was not one which the legislation could reasonably bear.

Policy at *Assessment Policy Manual* No. 20:10:20 also addressed the criteria for considering whether workers or employers were excluded from coverage under the Act as a matter of constitutional law (as having no attachment to B.C. industry). The policy provided the following examples:

(a) Consulates and trade delegations from foreign countries. They have no attachment to B.C. industry and are not considered employers for the purposes of B.C. or Canadian law.

(b) Air crew of a foreign carrier who are on turn-around in B.C. for a short period of time. They are not considered to have an attachment to B.C. industry (see British Airways vs. WCB, ALSO POLICY 20:10:31).

(c) Experts or subcontractors from other Canadian jurisdictions who are in B.C. ON A TEMPORARY BASIS and who do not employ B.C. residents, and who are also covered by their home jurisdiction for workers' compensation.

It would be very difficult for these employers to determine their responsibilities and for the Board to effectively administer these very short term attachments to the B.C. work force. (see Policy 20:30:40)

As the plaintiff did not have workers' compensation coverage in his home jurisdiction, the policy indicates he would not be exempt from the compulsory application of Part 1 of the Act under either the governors' exemption authority, or as a matter of constitutional law regarding a lack of connection to British Columbia.

Section 250(2) of the Act provides:

The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

Section 251(1) provides:

> The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Effective December 3, 2004, WCAT's authority to address constitutional issues was removed by section 44 of the *Administrative Tribunals Act*. This section provides:

> (1) The tribunal does not have jurisdiction over constitutional questions.
>
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

With respect to the plaintiff, the effect of the policies would appear to be that even a half day of work in British Columbia comes within the scope of Part 1 of the Act so as to require workers' compensation coverage (based on his lack of workers' compensation coverage in his home jurisdiction). I note, however, that the policy at *Assessment Policy Manual* No. 20:10:20 concerning whether workers or employers were excluded from coverage under the Act as a matter of constitutional law (as having no attachment to B.C. industry), provides a list of "examples" quoted as (a) to (c) above. The policy does not indicate that this list of examples is exhaustive. There may be room for consideration of other circumstances on the basis of constitutional principles, as set out in the British Airways case. For the purpose of my decision, I will proceed on the assumption that a half day's work in British Columbia constitutes sufficient connection with the province so as to come within the scope of Part 1 of the Act. As an incorporated company, MUF was required to register in British Columbia in carrying out temporary work in British Columbia (as it was not registered in Alberta).

I find that at the time of the accident on November 19, 2001, MUF was an employer engaged in an industry within the meaning of Part 1 of the Act.

(d) Effect of Failure to Register in British Columbia

Counsel for the defendants cites policy at RSCM item #5.0 regarding the fact that a worker's claim is not prejudiced by the fact the employer had not complied with its obligation to register with the Board. RSCM item #5.0 provided:

> A worker's claim is not prejudiced by the fact that the employer has not complied with the obligation to register with the Board. This is subject to

> the principles set out in Workers' Compensation Reporter Decision 335 and 20:30:30 of the Assessment Policy Manual.

In policy set out in *Decision #335*, "Re Principals of Limited Companies", 5 WCR 101, the former commissioners found as follows:

> The general rule followed by the Board is that a worker's claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure to register. If the corporate form of the business were ignored, the claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair to allow for him to receive the benefits of the Act without meeting his obligations. The Board, therefore, concluded that, except in unusual circumstances, claims from principals of small unregistered companies or their dependants should be denied.

Assessment Policy Manual No. 20:30:30 provided:

> . . . in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits. This is based on two principles established in WCB Reporter Decision No. 335:
>
> 1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
>
> 2. Except under unusual circumstances, a person who in essence is both a "worker" and an "employer" cannot be given the benefits due to a "worker" unless that person's obligations have been met under the Act as an "employer".

Decisions of the former Appeal Division are accessible at: http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp. WCAT decisions are accessible at: http://www.wcat.bc.ca/research/appeal-search.htm. Selected decisions have also been published in the *Workers' Compensation Reporter*. *Appeal Division Decision #92-1606*, "Principal of Unregistered Firm", 9 WCR 621, reasoned as follows:

> In this case, Mr. Ha was not solely responsible for all of the management functions of Gnath. I find that Mrs. Ha, as a principal, was jointly

> responsible for the failure to register Gnath with the W.C.B. Thus, the policy found in item #7.52 and Decision No. 335 applies.
>
> Therefore, based on the evidence and material submitted by the parties, I find that, at the time the cause of action arose on April 17, 1990, Mrs. Ha was not a "worker" within the meaning of Part 1 of the *Workers Compensation Act*.

In *Appeal Division Decision #2000-0684*, "Status of Principals of Unregistered Companies (No. 1)",17 WCR 475, the majority reasoned, at paragraph 26:

> . . . we have concluded that the passages we have quoted from Decision No. 335 indicate that the former commissioners were dealing with the status of a principal of an unregistered company under the Act and not merely his or her entitlement to benefits. . . . Decision No. 335 likens the principal of an unregistered company to an independent operator without personal optional protection. In other words, it seems to say that once the corporate veil is pierced and the existence of the company is disregarded, such a principal becomes analogous to a sole proprietor (if it is a one-person company) or a partner in a partnership (if there is more than one principal). Pursuant to subsection 2(2), an independent operator with personal optional protection may become a worker under the Act. It follows that an independent operator without personal optional protection is not a worker under the Act and is not entitled to benefits. In light of the statement in Decision No. 335 concerning status under the Act and the analogy of the independent operator considered by the former commissioners, we conclude Decision No. 335 provides that the piercing of the corporate veil affects the principal's status as a worker under the Act.

Appeal Division Decision #2000-0684 further reasoned, at paragraph 31:

> . . . in our view, the decisions of the former commissioners provide policy guidance in a general sense. Although the issue before the former commissioners was related to claims from principals of unregistered companies, we are satisfied that Decision No. 335 also provides guidance in relation to the status of such principals under subsection 10(1). We interpret Decision No. 335 as meaning that the principal of an unregistered company (who is responsible for the failure to register) is not a worker for the purposes of sections 10 and 11.

The reasoning of the majority in *Appeal Division Decision #2000-0684* has been followed in subsequent decisions of both the Appeal Division (*Appeal Division Decision*

*#2001-1217, "*Status of Principals of Unregistered Companies (No. 2)"*,* 17 WCR 559, and *#2002-1563/1564*) and WCAT *(#2004-02270*, *#2004-02568*, *#2004-03077*, *#2004-04553* and *#2004-05552*).

WCAT Decision #2004-04553 dated August 30, 2004 found:

> I find that it was an independent firm and as such there was an obligation to register with the Board as an employer. Since Mr. Jessiman, the sole shareholder and active principal, did not register the company with the Board, he is not entitled to coverage as a worker. He is not a worker for the purposes of Part 1 of the Act.

WCAT Decision #2004-05552 dated October 26, 2004 similarly concluded:

> I find that at the time of the February 26, 2001 accident, the plaintiff was the principal of a company which employed workers and was obliged to be registered with the Board. I find that as the sole principal of the company, she was responsible for the failure to register with the Board. She was, in effect, acting in similar fashion to a sole proprietor or independent operator, notwithstanding the obligation to register the business with the Board. I find that she was not a worker within the meaning of Part 1 of the Act.

Upon consideration of the foregoing, I similarly find that the plaintiff was responsible for MUF's failure to register with the Board. He was, in effect, acting in similar fashion to a sole proprietor or independent operator, notwithstanding the obligation to register MUF with the Board. Accordingly, I find that the plaintiff was not a worker within the meaning of Part 1 of the Act.

(d) Arising out of and in the course of employment

The motor vehicle accident occurred while the plaintiff was traveling east on Highway 10, near the intersection with 137th Street, in Surrey. The plaintiff describes his initial planned route for attending his business meeting as follows:

> The initial plan was to proceed directly from the airport to the BC Master Blasters office in Fort Langley via a more direct route to Fort Langley from the airport on Highway 91 and up through Scott Road and the Number 1 Highway to Fort Langley.

At the time of the accident, the plaintiff was proceeding east on Highway 10. Highway 91 connects with Highway 10, which would appear to provide a reasonably direct route for traveling to Fort Langley.

In view of my conclusion that the plaintiff was not a worker within the meaning of Part 1 of the Act, it necessarily follows that the injuries suffered by the plaintiff did not arise out of and in the course of employment within the scope of Part 1 of the Act. Accordingly, it is not necessary that I consider the further evidence and submissions concerning whether, at the time of the accident, the plaintiff was engaged in personal activities unrelated to his business trip.

Status of the Defendants

Counsel for the defendants advised he was not seeking a determination as to the defendants' status. Plaintiff's counsel requests determinations as to the status of the defendants. However, he submits there is no evidence before WCAT regarding the status of the defendants. By letter dated September 8, 2005, plaintiff's counsel argues:

> The simple fact remains that there is no evidence which has been provided regarding the status of the Defendants and the panel is entitled to make a determination based on the absence of evidence.

In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at page 191:

> Findings of fact are reviewable only if patently unreasonable. An unreasonable finding of fact is one that is not supported by any evidence. A court will not review the evidence considered by the tribunal to determine whether there was sufficient evidence to support a finding of primary fact. A court will go no further than to determine whether there was any evidence, and only essential findings of fact upon which the decision of the tribunal turns will be reviewed in this manner.

I consider that it would amount to an error of law going to jurisdiction to make a determination which is not supported by any evidence. I will therefore not proceed with such determinations. This approach is consistent with prior WCAT and Appeal Division decisions: see *WCAT Decisions #2005-03639*, *#2005-01694*, *#2004-03729a-Supplemental*, and *#2004-02742-Supplemental*.

In view of my conclusion regarding the status of the plaintiff, determinations as to the status of the defendants may be unnecessary. In the event that such determinations are required, counsel may request a supplemental certificate. Counsel would then be asked to furnish evidence and submissions relevant to these issues.

Conclusion

I find that at the time of the November 19, 2001 motor vehicle accident:

(a) the plaintiff, Michael Ursel, was not a worker within the meaning of Part 1 of the Act; and,

(b) the injuries suffered by the plaintiff, Michael Ursel, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

NO. 04 0095
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

MICHAEL URSEL

PLAINTIFF

AND:

HUMBERTO DA PONTE MEDEIROS
and PONTE BROS CONTRACTING LTD.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, HUMBERTO DA PONTE MEDEIROS and PONTE BROS CONTRACTING LTD., in this action for a determination pursuant to Section 257 of the *Workers Compensation Act*;

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

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

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

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, November 19, 2001:

1. The Plaintiff, MICHAEL URSEL, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

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

CERTIFIED this day of October, 2005.

_____

Herb Morton
VICE CHAIR

NO. 04 0095
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

BETWEEN:

MICHAEL URSEL

PLAINTIFF

AND:

HUMBERTO DA PONTE MEDEIROS
and PONTE BROS CONTRACTING LTD.

DEFENDANTS

SECTION 257 CERTIFICATE

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