BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

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WCAT Decision Number: **WCAT-2005-05495**
WCAT Decision Date: October 18, 2005

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 040440-A

Section 257 Determination
In the Supreme Court of British Columbia
Kamloops Registry No. 34847
PAUL EDWARD HOMMEL v. CHERINA DAWN COOKE and DENNIS KATSUMI HORI

Applicant: Paul Edward HOMMEL
(the "plaintiff")

Respondent: Cherina Dawn COOKE and
Dennis Katsumi HORI
(the "defendants")

Interested Person: A & T PROJECT DEVELOPMENTS LIMITED

Representatives:

For Applicant: Leigh A. Pedersen
MORELLI CHERTKOW

For Respondents: Butch Bagabuyo
BAGABUYO & COMPANY

For Interested Person: Jeff Arnold

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Noteworthy Decision Summary

Decision: WCAT-2005-05495 **Panel:** Herb Morton **Date:** October 18, 2005

Section 257 Determination – Evidence – Examinations for Discovery – Examinations Under Oath – Oral Hearing – Sections 246, 247 and 257 of the Workers Compensation Act

Section 257 determination. When a legal action is adjourned before examinations for discovery have been performed, the Workers' Compensation Appeal Tribunal (WCAT) may, if necessary, require a party to the action to be examined under oath, pursuant to section 246 and 247 of the *Workers Compensation Act*.

Counsel for the defendants sought discovery of documents and an examination for discovery of the plaintiff in the civil action. Plaintiff's counsel took the position that he would not comply with these requests pending WCAT's section 257 determination. The defendants applied to a Master for an order seeking production and an order compelling the plaintiff to attend an examination for discovery. The Master ordered an adjournment of the defendant's application until WCAT issued its determination. On appeal, the Justice found that the Master's decision to adjourn the defendant's application was a proper exercise of her discretion. The Justice noted that WCAT, as master of its own procedure, may consider evidence obtained in the civil proceedings, but a party may not seek an order from the court requiring that evidence.

Counsel for the defendants requested that WCAT order the production of documentary evidence and convene an oral hearing to canvass the plaintiff's credibility. Under section 246(2)(f), WCAT may require the pre-hearing examination of a party on oath. The panel concluded that, where discovery in the legal action is not available, it may well be desirable that WCAT give liberal consideration to requests for such an order because there are obvious efficiencies for WCAT in having such evidence provided by the parties. In this case, there was sufficient affidavit evidence to proceed with the section 257 determination without requiring examinations under oath or an oral hearing.

RE: Section 257 Determination
In the Supreme Court of British Columbia
Kamloops Registry No. 34847
Hommel v. Cooke et al.

WCAT Decision Number: **WCAT-2005-05495**
WCAT Decision Date: October 18, 2005
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Section 257 Determination
In the Supreme Court of British Columbia
Kamloops Registry No. 34847
PAUL EDWARD HOMMEL v. CHERINA DAWN COOKE and DENNIS KATSUMI HORI

Introduction

The plaintiff was employed as a project manager overseeing construction projects for A & T Project Developments Limited (A & T). On September 14, 2001, the plaintiff met with a client in the Valleyview area of Kamloops. He subsequently drove into the "city centre" of Kamloops, and was involved in a motor vehicle accident near the intersection of Victoria Street and 5th Avenue at approximately 11:00 a.m. The other vehicle was being driven by the defendant, Cooke, who was employed by a law firm as an office runner to pick up and deliver documents and packages. Both vehicles were traveling west on Victoria Street at the time of the accident (in which Cooke's vehicle rear-ended Hommel's vehicle). The registered owner of the vehicle being driven by Cooke was the defendant, Dennis Katsumi Hori, a partner in the law firm for which Cooke was employed.

The accident occurred on Victoria Street at the intersection with 5th Avenue. This was two blocks prior to the intersection with 3rd Avenue, where the Canadian Imperial Bank of Commerce (CIBC) was located. The accident location was three blocks prior to the intersection with 2nd Avenue, where the Royal Bank (RB) was located. The plaintiff's evidence is that he intended to stop near the CIBC to engage in personal banking and to buy a sandwich for lunch, prior to proceeding to his work destination in the RB building.

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 plaintiff's counsel on January 28, 2004. Written submissions have been provided by the parties to the legal action. Plaintiff's counsel provided submissions dated January 28, 2004. Counsel for the defendants provided submissions dated July 7, 2004 (including a map showing the locations of the accident, CIBC, RB, and the Valleyview Drive area from which the plaintiff was traveling). Rebuttal submissions were provided by the

plaintiff on July 30, 2004. Sworn affidavits were provided by Paul Hommel (January 19, 2004 and July 29, 2004), Jeff Arnold (January 22, 2004), and Cherina Cooke (February 17, 2004). In effect, the parties' written submissions were completed prior to WCAT commencing its processing of this application on May 10, 2005. A submission was also provided by Jeff Arnold on behalf of the plaintiff's employer, A & T, on May 19, 2005. Additional correspondence was also provided concerning requests by counsel for the defendants for discovery of the plaintiff, and for documents. These requests are addressed below as a preliminary issue.

Certification has not been requested in the related action, *Hommel v. Insurance Corporation of British Columbia*.

Issue(s)

The central issue concerns whether the plaintiff's 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.

Preliminary: – Discovery and Hearing Method

Counsel for the defendants sought discovery of documents, and an examination for discovery of the plaintiff. It appears these requests were pursued following the initial completion of submissions by the parties in July 2004.

Plaintiff's counsel took the position he would not comply with these requests pending WCAT's determination under section 257. The defendants applied to a Master for an order seeking production of certain documents, and an order compelling the plaintiff to attend an examination for discovery. The Master ordered an adjournment of the

defendant's application until WCAT issued its determination. The parties agreed to adjourn the trial date (set for June 6, 2005) generally. The defendant appealed the decision of the Master. The appeal was heard on April 12, 2005. The decision of the Honourable Madam Justice Wedge is accessible at: http://www.courts.gov.bc.ca/jdb-txt/sc/05/06/2005bcsc0658.htm. She found, in paragraph 47:

> 1. The Master's decision to adjourn the defendants' application pending a determination by WCAT under s. 257 of the ***Act*** was a proper exercise of her discretion based on the circumstances before her, and is in accordance with the case law on the issue.
>
> 2. Where the parties to an action have obtained evidence in the course of discovery conducted in the civil proceedings, they may seek to adduce that evidence, and WCAT is entitled to consider it, in proceedings under s. 257 of the ***Act***. In my view, the Master did not conclude otherwise.
>
> [emphasis in original]

In the course of her reasons, she also noted at paragraphs 43-44:

> [43] On the appeal, the defendants filed the WCAT Manual of Rules, Practices and Procedures, which sets out the practice and procedure of WCAT in s. 257 applications. As a matter of practice, WCAT asks the parties to provide it with all materials and information that may be relevant to its deliberations under s. 257, including examination for discovery transcripts where discovery has already been conducted in the civil action.
>
> [44] WCAT is entitled, in my view, to request that the parties provide any relevant information that will assist it in its deliberations under s. 257. A party may not seek an order that WCAT consider information obtained by the parties in pre-trial disclosure pursuant to the ***Rules of Court.*** However***,*** WCAT is the master of its own procedures, and it is entitled to consider evidence obtained in the civil proceedings between the parties if it is relevant to the inquiry under s. 257.
>
> [emphasis in original]

At paragraph 46, the Court similarly noted:

> . . . it is my view that WCAT is entitled to ask the parties to provide information already obtained in the civil proceedings between them, as has been its practice for many years.

By letter dated June 15, 2005, counsel for the defendants requested that WCAT order production of evidence, in light of the plaintiff's unwillingness to allow discovery and to provide necessary documentary evidence. He further requested that WCAT convene an oral hearing, to ensure that the issues are fully canvassed prior to any determination, and to assess the plaintiff's credibility. Plaintiff's counsel points out that the plaintiff has complied with his obligations in the civil action, pursuant to the Court decision. He submits that the plaintiff has provided evidence under oath in his affidavits, and that it is inappropriate to suggest that the plaintiff has not lived up to his obligations. Plaintiff's counsel submits there is sufficient material before WCAT to determine this issue and nothing would be accomplished by having an oral hearing. By letter dated May 13, 2005, counsel for the plaintiff pointed out that "I believe that all the submissions that you need to process this application were provided to you about a year ago."

Most applications under section 11 of the former Act, and section 257 of the current Act, include the provision of complete discovery transcripts. In some cases, the parties furnish affidavit evidence. There are efficiencies for WCAT in being provided with a body of evidence in this fashion. The provision of complete discovery transcripts means that WCAT is in a position to consider both the evidence specifically relied upon by the parties, and any additional details in the discovery evidence which might have significance.

Section 246 of the Act provides:

> **246** (1) Subject to any rules, practices or procedures established by the chair, the appeal tribunal may conduct an appeal in the manner it considers necessary, including conducting hearings in writing or orally with the parties present in person, by means of teleconference or videoconference facilities or by other electronic means.
>
> (2) Without restricting subsection (1), the appeal tribunal may do one or more of the following:
>
> (a) and (b) [Repealed 2004-45-183.]
>
> (c) inquire into the matter under appeal and consider all information obtained;

(d) request the Board to investigate further into a matter relating to a specific appeal and report in writing to the appeal tribunal;

(e) require the parties to the appeal to attend a pre-hearing conference to discuss procedural and substantive issues relating to the conduct of the appeal;

(f) require the parties to the appeal to make a pre-hearing disclosure of their evidence, including requiring the pre-hearing examination of a party on oath or by affidavit; . . .

Section 247 provides:

247 (1) At any time before or during a hearing, but before its decision, the appeal tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an appeal, or

(b) to produce for the appeal tribunal or a party a document or other thing in the person's possession or control, as specified by the appeal tribunal, that is admissible and relevant to an issue in an appeal.

(1.1) The appeal tribunal may apply to the Supreme Court for an order

(a) directing a person to comply with an order made by the appeal tribunal under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the appeal tribunal under subsection (1).

(2) On an appeal, the appeal tribunal may cause depositions of witnesses residing in or out of the Province to be taken before a person appointed by the appeal tribunal in a similar manner to that prescribed by the Rules of Court for the taking of like depositions in the Supreme Court before a commissioner.

Section 257(3) further provides:

This Part, except section 253 (4), applies to proceedings under this section as if the proceedings were an appeal under this Part.

This means that the provisions of Part 4 of the Act, concerning WCAT's authority to deal with appeals, apply to applications for determinations under section 257 (apart from the 180-day time frame for WCAT's decision-making).

Under section 246(2)(f), WCAT may require the pre-hearing examination of a party on oath. Accordingly, in the event that an examination for discovery in the legal action is not available, a party may ask WCAT for an order requiring another party to be examined regarding matters relevant to the section 257 application. Where discovery in the legal action is not available, it may well be desirable that WCAT give liberal consideration to such requests (particularly where the request for discovery is made early in the process with a view to obtaining evidence prior to the provision of written submissions). There are obvious efficiencies for WCAT in having such evidence provided by the parties. It is evident from section 234(2)(d) and (f), that the "efficient and cost effective conduct of appeals", and the "effective operation of the appeal tribunal", are values endorsed by the legislature.

In this case, full submissions (supported by affidavit evidence) were provided prior to the request for discovery being presented to WCAT. In the circumstances of this case, I found it appropriate to proceed to consider the evidence and submissions, bearing in mind the availability of the options of directing an examination for discovery or convening an oral hearing, in the event that I found this necessary. For the reasons set out below, I found that a sufficient evidentiary basis was provided to address the issues of law and policy raised in this application.

Status of the Plaintiff

The plaintiff was employed as a project manager for A & T, overseeing construction projects. He had worked for A & T since the fall of 1999. At the time of the accident, A & T was registered with the Board under account 473571. On the morning of September 14, 2001 (prior to the accident), the plaintiff had a work meeting with a client in the Valleyview area of Kamloops. I find that the plaintiff was a worker within the meaning of Part 1 of the Act. At issue is whether his injuries in the accident on September 14, 2001 arose out of and in the course of his employment.

The plaintiff did not file an application for workers' compensation benefits.

By affidavit of January 22, 2005, Jeff Arnold, owner of A & T, advised that the nature of the plaintiff's job was such that Arnold relied on the plaintiff to manage his time effectively with respect to the projects which were underway. As such, the plaintiff had liberty to organize his day to fit the work requirements. The plaintiff was not paid for travel time from home to work, nor was he paid mileage for the use of his vehicle. The plaintiff was responsible for keeping track of his time, and would be paid according to the hours worked each month. A & T did not pay the plaintiff for lunch hours or for

attending to personal matters. Arnold advises that when employees such as the plaintiff need time to attend to personal matters, they are expected to book time off or to do it outside of working hours. By letter received May 19, 2005, Arnold forwarded a copy of an "Employee Agreement" between the plaintiff and A & T, dated September 19, 2000. This included the following requirements:

> 2) You are responsible for tracking your own time and to turn in time sheets with estimating time allocated to each project.
>
> 3) A&T expects that you will arrange doctors appointments, personal errands etc on your own time.
>
> [reproduced as written]

In his January 19, 2004 affidavit, the plaintiff explained that his job as project manager involved dealing with clients of A & T "and generally we dealt with designing and implementing renovations and leasehold improvements in commercial buildings." The plaintiff's job included many aspects of the projects, such as drawing of plans, hiring architects, implementing designs, overseeing work done on the project, obtaining permits and approvals and inspections with respect to the projects, and to generally oversee the construction and the workers on the project. He generally worked from 7:30 a.m. to 5:00 p.m., Monday to Friday, although this would vary from day to day. He was paid an hourly rate, and kept track of the time worked. He submitted his billings to A & T on a monthly basis. He drove his own vehicle. He was not paid mileage or expenses for travel time during the work day, nor was he paid for travel time for driving to and from work. (I infer that he was paid for travel time, while driving for work purposes during the work day.) The plaintiff states (paragraph 20):

> I did not keep time and was not paid for doing personal errands and was not paid for the time that I was involved in doing such errands on September 14, 2001.

The plaintiff had been in Valleyview meeting with a client. It was his intention to drive into the Kamloops city centre to go to another project for a client located in the RB building on Victoria Street. However, he decided to take an early lunch hour to do personal errands. These errands were going to the CIBC to do personal banking (not involving depositing a paycheque), and having lunch. The plaintiff deposes:

> 15. If I had been going directly to the job at the Royal Bank building I would have traveled down Lansdowne Street in order that I could make a left turn on to Second Avenue and a right turn into the Royal Bank parking lot where I would park while working on the project located in that building.

16. At the time of the accident I was traveling on Victoria Street where the Canadian Imperial Bank of Commerce is located and was looking for a parking spot so that I could go to the bank and look after the business I had to conduct there.

17. Once I completed my errand at the Canadian Imperial Bank of Commerce and finished with my lunch break I would have moved my vehicle from wherever I had found a parking spot down to the Royal Bank building to park in their parking lot.

18. I had been stopped at a stop light at 5th Avenue behind a couple of other vehicles when I was struck from behind by a vehicle…

Defence counsel has provided a map, which includes markings to show the locations of the accident, CIBC, the RB, and the parking lots of CIBC and the RB. (The provision of such a map in cases of this nature is of assistance to WCAT.) He points out that the RB was located at 186 Victoria Street (at 2nd Avenue), and CIBC was located at 304 Victoria Street (at 3rd Avenue). Both banks have parking lots. The main entrance to the RB is located on Victoria Street. He submits:

12. Motorists traveling to the Royal Bank from Valleyview area in Kamloops can choose Victoria Street as a direct and convenient route. Arguably, Victoria Street is a more direct route to Royal Bank. Motorists traveling west on Victoria Street towards the Royal Bank from Valleyview would encounter the same amount of traffic lights along Victoria Street as one would on Lansdowne Street.

13. Lansdowne is one-way traffic; while, Victoria is two-way traffic. However, in this accident, both motorists were traveling in the same direction and this was not a head-on collision. Hence, the Defendants submit that there is no change of risk; especially that the Plaintiff could have conveniently chosen Victoria Street given that Victoria Street is a fairly direct route.

Counsel for the defendants further submitted that the CIBC free parking lot was only accessible from Lansdowne, while the RB parking lot was accessible from 3rd Avenue and could be equally accessed directly via Victoria Street and Lansdowne.

The plaintiff provided a supplemental affidavit dated July 29, 2004. The plaintiff confirmed that his personal bank account was the only account he had with CIBC. Due to the accident, he did not conduct any banking. He states in paragraph 7:

> My normal course on the day of the accident would have been to use Lansdowne Street as it is a one way street and the traffic lights are synchronized. As such, for vehicles traveling along Lansdowne drive it is usually significantly faster than trying to go down Victoria Street which has two way traffic and as a result the lights are not synchronized for traffic flowing in one direction.

The plaintiff explained that he had not intended to use the CIBC parking lot, as he intended to park on Victoria Street near CIBC, do his personal banking, and then buy a sandwich at the Subway store on Victoria Street. The parking lot at CIBC was monitored to ensure that people did not park there unless they were in the bank. He further states:

> 9. If my intention was to simply go to the Royal Bank I would have used Lansdowne Street because it is much easier to access the parking lot at the Royal Bank from Lansdowne Street. To access the Royal Bank parking lot from Lansdowne Street you make a left turn at 2nd Avenue and then the parking lot is half a block up 2nd Avenue where you can make a right hand turn into the parking lot.
>
> 10. . . . the Royal Bank parking lot cannot be accessed directly from Victoria Street as there is a sign indicating no entry from Victoria Street. In order to access the Royal Bank parking lot from Victoria Street one would have to make a right hand turn on 2nd Avenue and then make a left-hand turn across a solid yellow line into the parking lot. 2nd Avenue is a busy street, certainly during business hours, and it is not always possible to access the Royal Bank parking lot in this fashion and that is the reason why Lansdowne Street would be the appropriate route to travel.

I find no inconsistencies in the plaintiff's evidence. The plaintiff's supplemental evidence provides additional explanation, but is not inconsistent with his earlier evidence in any way. I find that the plaintiff's evidence is credible, as being in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Faryna v. Chorny* (1951) 4 W.W.R. (N.S.) 171, at page 174). Accordingly, it is necessary to consider the plaintiff's status in light of the relevant policies of the board of governors in effect at the time of the accident, based upon the factual foundation provided by the plaintiff's evidence. These policies included the following extracts from the *Rehabilitation Services and Claims Manual* (RSCM):

#18.00 TRAVELLING TO AND FROM WORK

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

#18.22 Payment of Travel Time and/or Expenses by Employer

The payment of wages or travelling allowances etc. may in some circumstances be a factor to be considered, but it usually will not be a significant factor, nor is it ever the sole criteria in determining the acceptability of a claim.

#18.30 Journey to Work Also Has Employment Purpose

There may be situations where the journey is not simply a routine matter of driving to and from work, but there are also some additional circumstances which connect the journey with some particular aspect of the claimant's employment. This additional circumstance may be sufficient to bring all or part of the journey within the scope of the employment.

#18.32 Irregular Starting Points

There are a number of different situations that have to be considered under this heading. One is where the worker is injured in the course of a journey between home and a normal or regular operating base. That situation is substantially similar to the case of a worker travelling between home and a fixed place of employment and an injury occurring in the course of that journey would not be covered.

Another situation is where there is an injury occurring in the course of a journey between what might be called two working points. That is, where the worker terminates productive activity at one point and then has to travel to commence productive activity at another point. If that occurs in the course of a working day, then the travel is one of the requirements of the job. It is one of the functions that the worker has to perform as part of the employment whether or not the worker is paid for it. **Where the worker terminates productive activity at one point and is required to commence productive activity at another point, travel between those points is part of the employment and is in the course of employment**

as long as the worker is travelling reasonably directly and is not making major deviations for personal reasons.

[emphasis added]

#18.33 Deviations From Route

Where an employee is instructed by the employer to perform some activity related to work while on the way to or from the normal place of work, this does not necessarily provide coverage for the whole journey. Generally speaking, it will only provide coverage to the extent that the employee has, because of these instructions, to do something which would not normally be done while travelling to or from work or go somewhere where the employee would not normally go. This is particularly so when the instructions only require a minor diversion from what is essentially a normal journey to work.

In one case, an employee was asked to stop on his way to work and have snow tires put on his employer's car that he was driving. His claim was denied because he was injured close to his home and at the beginning of a normal journey to his office. He still had a fair distance to travel before he would divert from this route to work to carry out his employer's instructions. The place where the snow tires were to be fitted was close to his office and the fact that he had to go there did not appear to have significantly affected the initial part of his journey. Though road conditions were bad and thus provided some risk, this risk was one that he would, in any event, have to meet in travelling to work. He had to leave earlier to enable him to carry out his employer's instructions, but this reduced rather than increased the risks of the journey.

#18.40 Travelling Employees

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

#18.41 Personal Activities During Business Trips

The basic principle followed by the Board is set out in Larson's *Workmen's Compensation Law* as follows:

> "Employees whose work entails travel away from the employer's premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." (5)

This principle covers the activities of travelling, eating in restaurants, and staying in hotels overnight where these are required by a person's employment.

What is meant by the reference to a "distinct departure on a personal errand"? It clearly does not simply refer to such everyday activities as eating, sleeping or washing which, in the case of most non-travelling employees would be regarded as personal activities outside the scope of the employment when performed outside normal work hours. Such activities will normally be regarded as within the scope of the employment of an employee who is required to travel. On the other hand, if, for example, a person on a business trip attends a theatre or spends the evening in a public house, these would probably not be regarded as activities in the course of employment.

The test to be applied is set out in #21.00.

Normal activities such as eating, sleeping and washing can be regarded as personal activities which are incidental to the stay in the hotel required as a result of the employment. Where a worker goes out for a purely social evening, the worker may be staying in a hotel as a result of employment, but this employment feature of the situation may be clearly outweighed by the personal nature of the social activity.

In a Board decision, the deceased worker was an independent truck operator. Having delivered his loads earlier in the day, he went to a hotel for a social evening, drinking beer with friends from 7:00 p.m. until approximately 1:00 a.m. At that time, he left the hotel. While driving the truck from there to the place where he usually parked it for the night, he was unfortunately killed. **If the deceased had simply stopped for a short refreshment break after completing his deliveries and before returning home with his truck, the Board might well have concluded that he was still in the course of employment.** But here the deceased had long since finished his employment functions of the day. The social evening was not a brief and incidental diversion. This was not a small feature of private life featuring in a sequence of employment activity. Rather, this was a case where an incident of the employment (i.e. the truck) featured incidentally in the social activity and private life of the

> deceased. The death was, therefore, not one arising out of and in the course of employment.
>
> [emphasis added]
>
> **#21.00 PERSONAL ACTS**
>
> There is a dilemma that is always inherent in workers' compensation. The difficulty, of course, is that the activities of workers are not neatly divisible into two clear categories, their employment functions and their personal lives. There is a broad area of intersection and overlap between work and personal affairs, and somewhere in that broad area the perimeter of workers' compensation must be mapped. An incidental intrusion of personal activity into the process of work will not require a claim, otherwise valid, to be denied. . . . In the marginal cases, it is impossible to do better than weigh the employment features of the situation in balance with the personal features and reach a conclusion (which can never be devoid of intuitive judgment) about which should be treated as predominant.

I find, first of all, that the conditions of the plaintiff's employment contract, and his employer's policies, constitute relevant evidence but are not determinative as to whether or not the plaintiff was working at the time of the accident. The jurisdiction given to the Board and to WCAT under the Act to determine such issues, and the policies established under section 82 of the Act, support applying a consistent approach guided by certain general principles rather than being dependent on the specific contractual arrangements of the parties. Policy at RSCM item #18.22 provides that payment of wages or traveling allowances will usually not be a significant factor, nor is it ever the sole criteria in determining the acceptability of a claim for workers' compensation benefits.

On September 14, 2001, the plaintiff was driving from one worksite (in Valleyview), to a second worksite (in the RB building). Policy at RSCM item #18.32 provides that where a worker terminates productive activity at one point and is required to commence productive activity at another point, travel between those points is part of the employment and is in the course of employment as long as the worker is traveling reasonably directly and is not making major deviations for personal reasons. Accordingly, the question to be considered is whether or not the plaintiff was traveling reasonably directly without making a major deviation for personal reasons. In the absence of such a deviation, I find that the plaintiff's travel between the two work locations would be covered for workers' compensation purposes.

Plaintiff's counsel cites the section 11 determinations provided in *Appeal Division Decisions #03-0520* and *#92-0355*. *Appeal Division Decision #93-0520* ("Deviation from Route (No. 2)", 9 W.C.R. 725), concerned a worker who deviated from her normal work route for the purposes of dropping off a suitcase at a friend's house along the way. The panel reasoned, at page 727:

> In this case, the actual deviation appears not to be significant as the Plaintiff was headed in the same direction and could have taken the Lougheed Highway as an alternative route to the Trans Canada Highway in travelling to her appointments. However, her evidence was that she took a different route in order to stop at her friend's house and, otherwise, she would have been on the Trans Canada Highway. I find that to be a substantial deviation, having regard to the relevant policy items. The Plaintiff was exposed to a risk that she would not otherwise have been exposed to - she was stopped at an intersection which she would not have otherwise used. If she had not been travelling to her friend's house, she would have been on the Trans Canada Highway. While the deviation to her friend's house was a deviation from a business trip, I find that it was a distinct departure for personal reasons and took her out of the course of her employment.

Plaintiff's counsel also cites *Appeal Division Decision #92-0355* ("Deviation from Employment", 9 W.C.R. 559). A worker was engaged in a work journey (bringing a crew back from a logging site), when he observed a grouse and stopped the truck to shoot at the grouse with his rifle. In the course of replacing his rifle in the vehicle, it discharged accidentally and injured the plaintiff. The panel found the driver's decision to stop the vehicle, retrieve the rifle, and embark on a pursuit of game represented a significant deviation from the course of his employment (notwithstanding the fact the vehicle was still on the work route). The driver was engaged in the personal pursuit of hunting at the time of the injury.

Counsel for the defendants cites *Appeal Division Decision #92-1541* ("Deviation from Route (No. 1)", 9 W.C.R 601). That case concerned a worker who chose to travel over the Knight Street Bridge, rather than the Oak Street Bridge, in driving from Vancouver to his hotel in Richmond, so that he could check on the existence of a cherry tree at his grandmother's former residence. The plaintiff had made a work visit to Main and 11th in Vancouver, located between Oak and Knight Streets. The panel reasoned (at page 602):

> According to the map furnished in the submissions, there is very little difference in distance between taking the Oak Street route or the Knight Street route from the Legion Hall at 11th & Main to Mr. Foan's hotel in Richmond. Either is a fairly direct route between those two points. Even if

> Mr. Foan had not had a personal interest that took him along the Knight Street route, he might have decided to take that route to return to his hotel. I do not view it as a significant deviation in comparison to the Oak Street route.
>
> Therefore, even though he chose the Knight Street route to allow him to also attend to a personal matter, I find that it was not a "distinct departure on a personal errand" as set out in #18.41. If he had been in an accident in the back lane while he was looking for the cherry tree, my finding might be different. However, at the time of the accident he was back on a direct and normal route to his hotel. It appears that the deviation from this route was a brief and incidental diversion and did not significantly alter his route nor the timing of his trip. Thus, he was in the course of his employment when the accident occurred.

Counsel for the plaintiff submits that the plaintiff's deviation for personal reasons resulted in his taking a different route. He submits that the plaintiff was looking for a parking spot in a different area of the City which exposed him to a different risk than would have existed had he taken his usual work route and had not taken his lunch break. He submits that the plaintiff was engaging in this deviation at the time of the accident. Counsel for the defendants submits that any alleged deviation from the plaintiff's work route was brief, if any, and did not significantly alter his route given that Victoria Street was a direct route to the work destination.

The plaintiff's evidence is that if he had been going directly to the RB, he would have used Lansdowne Street. The plaintiff has not disputed the assertion by counsel for the defendants that the CIBC parking lot was only accessible from Lansdowne. I infer, therefore, that if the plaintiff's only personal business was his CIBC banking, he would have used the CIBC parking lot which was accessible from Lansdowne.

It appears, therefore, that the reason for the plaintiff's decision to drive on Victoria Street, with the intention of parking on Victoria Street near CIBC, was that he intended to stop to purchase a sandwich for lunch (which meant he could not use the CIBC parking lot). Inasmuch as the plaintiff's work required him to travel from one work location to another, I consider that his stop for lunch would not involve a personal deviation from his employment. I find that such a stop may reasonably be viewed as being required by his employment.

The plaintiff's work destination was on Victoria Street. At the time of the accident, he was driving on Victoria Street, on a direct route leading to his work destination. The plaintiff's plan to stop for lunch on Victoria Street did not involve any substantial deviation from his work route. At the time of the accident, the plaintiff had not yet begun any deviation from his route for the purpose of conducting his personal banking.

The plaintiff's preference for traveling directly to the RB was to use Lansdowne Street. I question, however, whether his use of Victoria Street should be characterized as a major deviation, given that the RB was located on Victoria Street. In any event, I find that the factor governing the choice of the Victoria Street route was the plaintiff's intention to stop for lunch. I find that this stop did not involve a deviation for personal reasons. A stop for lunch was reasonably incidental to the plaintiff's pursuit of his work activities on the day in question. At most, he may be viewed as taking an alternate route leading directly to the work destination. He did not embark on a significant departure for personal reasons, such as would be the case if he had taken a significant detour in order to meet friends for lunch. Nor, as noted above, had he begun any deviation from his route for the purpose of conducting his personal banking.

The plaintiff and his employer both considered that the plaintiff was not working at the time of the accident. They have valid reasons, from their own perspectives, for holding this view. However, upon consideration of the applicable policies concerning the determination of status under the Act, I find that the plaintiff's injuries on September 14, 2001 arose out of and in the course of his employment.

Status of the Defendant, Cherina Dawn Cooke

By letter of January 28, 2005, plaintiff's counsel requests a determination of Cooke's status.

Cooke did not submit an application for workers' compensation benefits in relation to the September 14, 2001 accident. Although invited to do so, Fulton & Company is not participating in this application (per appeals coordination officer's letters dated May 10 and 31, 2005).

In her February 17, 2004 affidavit, Cooke states she was employed by the law firm Fulton & Company as an office runner from September 2001 to February 2002. Her duties involved delivering and picking up documents and packages from various offices in the Kamloops area conducting business with the law firm. She was driving a vehicle provided by her employer. The registered owner of the vehicle was the defendant, Dennis Hori, a partner in the law firm. At the time of the accident at 11:00 a.m. on September 14, 2001, she was returning to the law firm after delivering the morning run. At the time of the accident, she was performing her job duties and was on her way to the law firm to bring documents she had picked up that morning.

I find that at the time of the accident, Cooke was a worker within the meaning of Part 1 of the Act, and her action or conduct, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Act.

Status of the Defendant, Dennis Katsumi Hori

No determination has been requested concerning the status of the defendant Hori. He was a partner of the law firm for which Cooke was employed, and was the registered owner of the vehicle she was driving.

In some circumstances, such as were recently addressed in *WCAT Decision #2005-05276*, a determination regarding the status of the registered owner of a motor vehicle may be required. The effect of such determinations has been addressed in various Court decisions including:

- *Munro and Schroeder v. Gibb*, S.C.C., [1981] 1 S.C.R. 42;
- *Raymond Gordon Colling v. Wilfred Kirk Peckham and David Anthony Lewis*, B.C.S.C. Vancouver Registry No. B831056, [1985] B.C.J. No. 1255;
- *Dyck v. Lohrer* , B.C.C.A. (2000) 184 D.L.R. (4th) 676, (2000) 75 B.C.L.R. (3d) 392.

In the event that certification is required concerning the status of this defendant, a supplemental certificate may be requested.

Conclusion

I find that at the time of the September 14, 2001 motor vehicle accident:

(a) the plaintiff, Paul Edward Hommel, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Paul Edward Hommel, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the defendant, Cherina Dawn Cooke, was a worker within the meaning of Part 1 of the Act; and,

(d) the action or conduct of the defendant, Cherina Dawn Cooke, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

NO. 34847
KAMLOOPS 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:

PAUL EDWARD HOMMEL

PLAINTIFF

AND:

CHERINA DAWN COOKE and DENNIS KATSUMI HORI

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, Paul Edward Hommel, 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, September 14, 2001:

1. The Plaintiff, PAUL EDWARD HOMMEL, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, PAUL EDWARD HOMMEL, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, CHERINA DAWN COOKE, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

4. Any action or conduct of the Defendant, CHERINA DAWN COOKE, which caused the alleged breach of duty of care arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of October, 2005.

_____

Herb Morton
VICE CHAIR

NO. 34847
KAMLOOPS 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:

PAUL EDWARD HOMMEL

PLAINTIFF

AND:

CHERINA DAWN COOKE and DENNIS KATSUMI HORI

DEFENDANTS

SECTION 257 CERTIFICATE

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