WCAT **Workers' Compensation Appeal Tribunal**

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WCAT Decision Numbers:	**WCAT-2013-00953 / WCAT-2013-00954**
WCAT Decision Date:	A**pril 10, 2013**
Panel:	Herb Morton, Vice Chair
Dates of WCAT Oral Hearings:	October 16, 2012 and February 18, 2013
Oral Hearing Location:	Richmond, British Columbia
WCAT Reference Numbers:	101004-A and 110584-A

Section 257 Determinations
In the Supreme Court of British Columbia
Victoria Registry No. 092469
Ry Tes and Seak Chhem v. Sokhom Chau and Insurance Corporation of British Columbia
Victoria Registry No. 102395
Khom Tes v. Sokhom Chau, Ry Tes and Insurance Corporation of British Columbia

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Applicant:	Sokhom Chau ("defendant")
Respondents:	Ry Tes and Seak Chhem ("plaintiffs") Khom Tes ("plaintiff")
Representatives:	
For Applicant:	Robert C. Brun, Q.C. HARRIS & BRUN
For Respondents:	Vahan A. Ishkanian Barrister & Solicitor
I**nterpreter**:	Ben Prom

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Introduction

[1] The plaintiffs, Ry Tes, Seak Chhem, and Khom Tes, were injured in a motor vehicle accident on September 26, 2008. They were passengers in a Toyota pickup being driven by Sokhom Chau (the defendant). The vehicle was owned by Ry Tes. The accident occurred at approximately 8:30 a.m. on Sooke Road, in the City of Victoria, British Columbia, when the pickup went off the road and hit a rock wall.

[2] The plaintiffs and defendant were salal pickers, and lived in Victoria. They picked salal near the Jordan River (on the west coast of Vancouver Island, northwest of Sooke). Ry Tes is the husband of Seak Chhem. Ry Tes and Khom Tes are brother and sister. Khom Tes is the wife of Sokhom Chau.

[3] After picking the salal, they would deliver it to a drop off point and clean the salal at that location (referred to as "Paul's Cooler," or Rose Isle Floral Distributors Ltd. (Rose Isle)). Rose Isle, which was owned by Paul Bulk, was located at 6536 West Saanich Road. The plaintiffs and defendant dealt with Chuong Van Nguyen (Nguyen) regarding the salal picking and sale, and were paid by cheque from Yumi Farms Inc. (Yumi Farms). Yumi Farms was owned by Doug Nagai.

[4] The salal was picked on land controlled by Western Forest Products (WFP). Delta River Trading Ltd. (Delta) had contracted with WFP to obtain access to the land in the Jordan River area for the purpose of picking salal. Chris Delich was the sole principal of Delta, and signed the contracts with WFP on behalf of Delta (and its predecessor, 0769805 B.C. Ltd.). For simplicity, I will primarily refer to Delta in this decision.

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[5] 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. These applications were initiated by counsel for the defendant on May 5, 2010 and March 21, 2011. By letter of March 21, 2011, counsel for the plaintiff Khom Tes also requested a separate certificate in the legal action in which Khom Tes is a plaintiff.

[6] Transcripts have been provided of the examinations for discovery of the plaintiffs, Seak Chhem and Ry Tes, on July 25, 2011, and of the plaintiff, Kohm Tes, on July 26, 2011. A transcript has been provided of a recorded statement provided by the defendant, Sokhom Chau, on October 1, 2008. An unsigned copy has been provided of a statement provided by Nguyen October 20, 2011. An e-mail summary was provided concerning information obtained from Doug Nagai, owner of Yumi Farms.

[7] Yumi Farms, Delta, and Nguyen were invited to participate as interested persons, but did not respond to those invitations. Written submissions were provided by the parties to the legal action.

[8] By submission of February 29, 2012, the plaintiffs requested an oral hearing so that witnesses could be called to testify and be cross-examined. The plaintiffs noted that Yumi Farms, Delta, or Nguyen might be found to have been the plaintiffs' employer, but none of them was participating as an interested person. On March 26, 2012, the defendant expressed agreement that it would be unfair to decide these applications without the direct involvement of the potential employers.

[9] An order was issued to WFP to require production of documents relating to Delta/769805 B.C. Ltd. and Nguyen, concerning salal picking on land owned or controlled by WFP, Jordan River Division. These documents were received by WCAT from WFP on May 17, 2012. An oral hearing was scheduled for October 16, 2012 (with an interpreter), and orders were issued to Doug Nagai (Yumi Farms), Chris Delich (Delta), and Nguyen to require their attendance at the oral hearing and to require production of documents. Delich, Nguyen, and Nagai attended the October 16, 2012 oral hearing to give evidence and to be cross-examined. The oral hearing was continued on February 18, 2013 to receive the evidence of the parties. The defendant. Sokhom Chau, gave oral evidence, as did the plaintiff, Ry Tes. Plaintiffs' counsel chose to provide the evidence of one plaintiff as being representative of the plaintiffs' circumstances at the time of the accident. The parties provided written submissions subsequent to the oral hearing.

Issue(s)

[10] Determinations are requested concerning the status of the parties to the legal action, at the time of the September 26, 2008 accident.

Jurisdiction

[11] 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 of the Workers' Compensation Board, operating as WorkSafeBC (Board or WCB), 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: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the parties

[12] A considerable volume of evidence was provided both in terms of written documentation and the oral testimony given on October 16, 2012 and February 18, 2013. In these reasons, I will refer to the key evidence which is important to my decision.

[13] The circumstances of the applicant and the three respondents were largely the same. Accordingly, I have addressed the circumstances of the parties to the legal actions, in respect of their salal picking activities, together. The first question concerns whether the four salal pickers were workers or independent operators. This question as to whether the pickers were engaged in a relationship of employment requires consideration as to the identity of any putative employer. If the pickers were workers, the further issues are whether the injuries suffered by the plaintiffs arose out of and in the course of their employment, and whether the action and conduct of the defendant arose out of and in the course of his employment.

[14] Various determinations were provided by Board officers at different times concerning the pickers as well as Nguyen and Delich/Delta, based on the information available to the Board at the particular point in time. Some of these determinations were inconsistent. To illustrate, Seak Chhem and Sokhom Chau (as well as Nguyen) applied

to the Board to register for Personal Optional Protection (POP) coverage in September 2006. By decisions dated September 22, 2006, a Board registration officer denied their applications on the basis that they were workers of Chris Delich. Delich was the owner of 0769805 BC Ltd., and then Delta. However, when Sokhom Chau applied for compensation for injuries sustained in the September 26, 2008 motor vehicle accident, his claim was denied on the basis that he was an independent operator.

[15] Chris Delich (Delta) was initially found by the Board to be the employer of the pickers, on the basis that Delta was paying $5,000.00 for the right to pick salal on the lands of WFP and therefore owned the "greens." He was subsequently found not to be the employer on the basis that apart from extracting a fee from the pickers so that they could access the WFP lands, he had no further contact with the pickers. The salal pickers were considered independent on the basis that they sold their harvest to unaffiliated third parties.

[16] I will not dwell on the Board's determinations, as WCAT is required to consider all the evidence afresh in a section 257 application and make its own determinations. Furthermore, the Board's determinations were provided on the basis of the limited information provided to it at particular points in time, and this information was incomplete or inaccurate.

[17] For the purpose of accessing the WFP lands to pick salal, Delta contracted with WFP on the basis that Delta would be employing workers, that Delta would provide workers' compensation coverage for the workers, that Delta would provide safety training to the workers, and that Delta would provide supervision to the workers in performing their work (through Nguyen acting as Delta's site supervisor). Delta conducted monthly safety meetings as well as crew meetings, and provided the minutes of these meetings to WFP as required. In addition, Delich provided WFP with a certificate of insurance for commercial general liability in the amount of $3,000,000.00. Accordingly, the information provided to the Board by Delich, that he had no involvement with the pickers apart from extracting the licence fees, was inaccurate. Under cross-examination, Delich admitted to providing information to the Board which was not true.

[18] A Certificate of Change of Name dated October 4, 2006 showed that 0769805 B.C. Ltd. changed its name to Delta River Trading Ltd. on October 4, 2006. Delich was the sole owner of these companies. The contract between 0769805 BC Ltd./Delta and WFP which was in effect at the time of the September 28, 2008 accident was dated September 12, 2008. Delich purported to provide WFP with Delta's WCB registration number, but in fact used the number 777607 (which had been obtained by Nguyen). Nguyen's application for POP coverage had originally been denied by the Board in September 2006 on the basis that he was a worker of Delich/Delta. However, after the

decision was made that Delich was not an employer as he had no involvement with the pickers apart from extracting the licence fees, Nguyen registered for POP coverage from March 20, 2007 until May 30, 2007 under account 777607.

[19] Pursuant to the contract with WFP, Delta agreed to employ sufficient competent and skilled workers to perform the work, and to provide adequate and competent supervision of the work. Delta was required to maintain an insurance policy of $3,000,000.00. Delta was prohibited from assigning any rights under the contract. Delta was required to ensure that all workers were registered under the Act, and that all WCB payments were paid when due. Delta was also required to ensure that the workers complied with all applicable health and safety laws, and to participate, at its sole expense, in safety programs including holding monthly safety meetings, and to provide records of these to WFP within three days of their occurrence. Schedule B to the September 12, 2008 contract between Delta and WFP set the licencing fee at $2,500.00 for the period September 12, 2008 until December 31, 2008. (The licencing fee under the October 1, 2006 contract was $5,000.00 for access to the licence area from September 2006 until July 31, 2007. The licencing fee under the August 24, 2009 contract was $10,000.00 for access to the licence area from August 24, 2009 to July 31, 2010.)

[20] At the October 16, 2012 oral hearing, Delich advised that he did not receive any money relating to the involvement of Delta in the contract with WFP. Delich's involvement primarily concerned his time. The insurance and licencing fees were all paid by Yumi Farms. Contrary to Delich's earlier statements to the Board, the pickers never paid any money directly to Delta or Delich for the licence fees payable to WFP. Delich had no knowledge as to how Nguyen was paid for his involvement in the salal picking.

[21] Nguyen gave evidence that he received payments by cheque from Yumi Farms of $500.00 to $600.00 every two to three weeks. All of the monies paid to the pickers and Nguyen came from Yumi Farms.

[22] Nagai used the term "joint venture" in describing the original plan under which Delta would contract with WFP, but Yumi Farms would provide the funds to pay the licencing fees and insurance costs. Delich/Delta had the goal of attempting to develop a market in selling salal to Europe. However, Delta was not successful in obtaining such sales. Nagai acknowledged that Yumi Farms made all of the monies available so that Delta could pay for the insurance and licence fees it was required to make under its contract with WFP. He put up all the money, but the pickers had to pay for these amounts in the end. Yumi Farms was advancing these funds as a loan to the pickers.

[23] The evidence of the pickers was that Yumi Farms was the sole purchaser for the salal that they picked. They primarily picked on the WFP lands. They were not in a position to negotiate the price for selling the salal. Yumi Farms determined the applicable price based on market conditions.

[24] Nagai advised that the group of pickers promised (through Nguyen) to provide repayment of the funds Yumi Farms advanced to Delta. Yumi Farms issued cheques to the pickers on a weekly basis which were distributed at Paul's Cooler.

[25] In response to questioning by plaintiffs' counsel, Nagai advised that there were 20 hands of salal in each bale. In 2008, Yumi Farms would sell each bale of salal for approximately $46.00 to $48.00, which was $16.00 or $17.00 above its cost. Yumi Farms would take about four to five bales of salal in kind (in product) from each picker per month, for the purpose of repaying the monies which had previously been advanced by Yumi Farms (for insurance and licencing fees). The cheques issued by Yumi Farms to the pickers did not show the bales taken by Yumi Farms in repayment of its loan.

[26] The hands of salal were tagged by the pickers, and Yumi Farms would determine the amount payable to each picker based on the number of hands they had picked. Most times, Nagai would go to Rose Isle to pick up the salal. On occasion, Paul Bulk would deliver the salal to Yumi Farms. The cooler at Rose Isle was locked to prevent theft. Nguyen had a key to the cooler.

[27] The records of Yumi Farms showed payments to Nguyen totaling $19,565.80 in 2008. The payments to Nguyen from January 8, 2008 until August 26, 2008 were all marked "salal," and totaled $15,673.60. The payments to Nguyen for the later part of 2008 totaled $3,892.20 and were primarily for other products such as fir and pine (but included three payments for salal).

[28] Yumi Farms provided the funds to Delta so that it could make the payments it was required to make pursuant to its contract with WFP. The records provided by Yumi Farms show that the following payments were made to Delta during the period 2006 to 2008:

Yumi Farms

Date	**Amount**
August 31, 2006	$2,500.00
August 31, 2006	$5,200.00
September 7, 2007	$2,500.00
September 10, 2008	$5,000.00
December 20, 2008	$2,500.00
Total	$17,700.00

[29] Delta's handwritten chequing records indicate that the following payments were made:

	Delta	
Date	**Amount**	**Reason**
September 8, 2007	$2,500.00	liability insurance
December 6, 2007	$3,000.00	WFP
September 6, 2008	$2,500.00	insurance
December 19, 2008	$2,500.00	WFP
January 15, 2009	$2,550.00	Chris Delich, return equity
August 25, 2009	$2,575.00	insurance
June 8, 2010	$10,000.00	WFP
March 20, 2011	$2,500.00	Nguyen, Insurance

[30] The outlays by Delta in 2007 and 2008 totaled $10,500.00. The payments by Yumi Farms to Delta in 2007 and 2008 totalled $10,000.00, with payments of a further $7,700.00 in 2006.

[31] The outlays by Delta (excluding the $2,550.00 payment to Delich representing a loan repayment) totaled $25,575.00. The banking records provided by Delich (with handwritten notations to describe the amounts) indicated that Yumi Farms made the following payments:

Date	**Amount**
September 10, 2007	$2,500.00
January 13, 2009	$2,500.00
August 25, 2009	$12,698.50
January 6, 2011	$2,500.00
Total	$20,198.50

[32] While the records provided are not of good quality, I find that the weight of the oral and written evidence establishes that Yumi Farms provided the funds for all of the payments that Delta was obliged to make for licencing fees and insurance coverage pursuant to its contract with WFP in 2008. While Delta represented to WFP that Nguyen was its site supervisor, Nguyen was receiving payment from Yumi Farms for coordinating the work of the pickers.

[33] Yumi Farms also made arrangements for having the salal dropped off and kept in coolers at Paul's Cooler. The banking records from Yumi Farms show that it paid $300.00 a month to Rose Isle for this purpose.

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[34] Section 1 of the Act included the following definitions:

> "employer" includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry ...
>
> "worker" includes
>
> (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

[35] At the time of the accident on September 26, 2008, policy in the *Assessment Manual* at item AP1-1-2, "Coverage under Act – Types of Relationships," provided:

> **(a) General**
>
> Where a person contracts with another person or entity to do work, the contract creates one of two types of relationship. The relationship is either one of employment or one between independent firms.
>
> **(b) Employment relationships**
>
> If the contract creates an employment relationship, the individual doing the work is a "worker" covered by the *Act* and the other party to the contract is required to register with the Board as an "employer" and pay assessments on the earnings payable under the contract. In this situation, any application from the individual doing the work for registration as an employer will not be accepted by the Board.
>
> The definitions of "worker" and "employer" in the *Act* are not exhaustive, so that persons may be "workers" or "employers" even though they have not entered into or are not working under a contract of service or hiring.
>
> The definitions of "worker" and "employer" are treated as complementary. The question in each case is whether the relationship between two parties is to be classified as one of employment. The scope of the definitions must be determined in the context in which they appear and the overall purposes of the *Act*. The Board will not automatically attribute to each word or phrase the meaning that has been given by another tribunal for other purposes. Coverage under the *Act* may commence for a worker even though by common law principles no contract of service yet exists.
>
> **(c) Relationships between independent firms**
>
> If the contract creates a relationship between independent firms, the rights and responsibilities of the firms depend upon their specific circumstances:

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[36] Policy at item AP1-1-3, "Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms," provided:

> **(a) General principles**
>
> In distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The factors considered include:
>
> - whether the services to be performed are essentially services of labour;
> - the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;
> - whether the individual doing the work might make a profit or loss;
> - whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;
> - if the business enterprise is subject to regulatory licensing, who is the licensee;
> - whether the terms of the contract are normal or expected for a contract between independent contractors;
> - who is best able to fulfill the prevention and other obligations of an employer under the *Act*;
> - whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and
> - whether the individual doing the work is able or required to hire other persons.
>
> **The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.**
>
> No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time.

Yet they are often independent of the person with whom they are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.

Some regard must also be paid to the structure and customs of the particular industry involved. Where an industry makes much use of the contracting out of work, this should be recognized as a factor in considering applications for registration as employers by parties to contracts in those industries.

(b) Specific guidelines

Parties who would be considered independent firms include:

(1) Any firm supplying labour and materials on which a profit or loss may result. Items such as nails and drywall tape are not considered materials for this purpose.

(2) Any firm which has two or more pieces of revenue producing equipment. Hand tools and personal transportation vehicles or vehicles used to move equipment are not considered to be revenue producing equipment.

(3) Service industry firms that enter into two or more contracts simultaneously.

(4) Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms. If such circumstances exist, a full investigation will be made and the applicant's position determined in accordance with the policies in this *Manual*. …

…

These guidelines will resolve the question whether a particular person or entity is an "independent firm" in most cases.

The Board, for the purposes of the *Act*, has the exclusive power under section 96(1) to determine status. The Board's jurisdiction cannot be excluded by private agreement between two parties, whether the agreement does this expressly, or indirectly by labelling the parties as independent operators (who would therefore be independent firms). **The Board makes its own judgment of their status, having regard to the terms of the contract and the operational routines of the relationship.**

However, decisions made by the Board are for workers' compensation purposes only and have no binding authority under other statutes.

[emphasis added]

[37] Policy at item AP1-1-4, "Coverage under Act – Employers," provided, in part:

(a) General

An employer is a person or entity employing workers. The employer may be a sole proprietor, a partnership, a corporation, or another type of legal entity. An employer may also be an independent contractor who employs workers or a labour contractor who employs workers and elects to be registered as an employer. An employer is an "independent firm" for purposes of Item AP1-1-3.

(b) Proprietors and partners

Proprietors and partners of an unincorporated business are employers if the business has workers and independent operators if the business does not have workers. They do not have personal compensation coverage unless they have Personal Optional Protection.

The children of a proprietor or partner who are paid by the proprietorship or partnership and have an employment relationship are considered to be workers, regardless of age. Spouses of single proprietors have been exempted from coverage, but the spouse of a partner who is working for the partnership and is paid for his or her services is a worker.

[38] Policy at AP1-1-5, "Coverage under Act – Workers," provided, in part:

(a) General

Workers include individuals not employing other individuals and who fall into the following categories:

- individuals paid on an hourly, salaried or commission basis;
- individuals paid on commission or piecework where the work is performed in the employer's shop, plant or premises;
- individuals paid commission, piecework or profit sharing where they are using equipment supplied by the employer;
- individuals operating under circumstances where the "lease" or "rental" of equipment or "purchase" of material from their

employer is merely a device to arrive at a wage or commission amount; and

- labour contractors who elect not to be registered as independent operators.

A worker cannot be an "independent firm".

[39] Policy at AP1-1-6, "Coverage under Act – Independent Operators," provided:

> The term "independent operator" is referred to in section 2(2) of the *Act* as being an individual "who is neither an employer nor a worker" and to whom the Board may direct that Part 1 applies as though the independent operator was a worker. An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an "independent firm" for purposes of Item AP1-1-2.

[40] I do not consider that the salal pickers were independent operators. Their services were essentially services of labour, for which they were paid on a piecework basis (according to the amount of salal that they picked). They did not set their own prices and sell to their own contacts. Yumi Farms was the exclusive purchaser of the salal that they picked, and Yumi Farms determined the price to be paid for the salal. The pickers' access to the WFP lands depended on Yumi Farms providing the funds to Delta for this purpose.

[41] An unusual feature of this situation is that under the terms of its contract with WFP, Delta expressly accepted responsibility for being the employer of the pickers (in terms of paying premiums for workers' compensation coverage, providing safety training and supervision, and ensuring compliance with health and safety requirements). It is, however, difficult to characterize Delta as the employer of the pickers, as Delta was not acquiring the salal for the purpose of resale, and was not making any payments to the pickers.

[42] Delta represented to WFP that it was providing workers' compensation coverage for its workers (together with supervision and safety training), while at the same time representing to the Board that it had no involvement with the pickers. Arguably, Delta was effectively a shell company, used for the purpose of meeting WFP's requirements to obtain access to WFP's lands.

[43] The respondents submit that the circumstances of the pickers are similar to those addressed in *WCAT-2011-00431/00432*. That decision concerned the status of certain pickers of snake grass, and reasoned at paragraph 57:

> I find that the weight of the evidence supports a conclusion that the claimants were independent operators. I find that while it was to the mutual advantage of CFG [Canada Floral Green] and the claimants to maintain a continuing relationship for purchase and sale of snake grass, this relationship was essentially based on the purchase and sale of a product. I interpret the absence of other purchasers of the snake grass from the claimant as relating to the specialized nature of this product rather than signaling a relationship of employment. I consider that there were sound business reasons for CFG to seek to maintain long-term relationships with its pickers, as described on its website, and that the existence of such a relationship with the claimants did not involve a disguised relationship of employment. I find that this conclusion is consistent with the policy at AP1-1-5, which indicates that many small parties may only contract with one or two large firms over a period of time while remaining independent of the person with whom they are contracting in significant respects.

[44] I consider that the facts of that case are distinguishable, however, as the plaintiffs in that case were picking snake grass found in the wild. That case did not involve a situation in which the snake grass was located on privately owned or controlled lands, where a licence fee had to be paid to acquire the right to pick “greens” on those lands.

[45] Policy at item AP1-1-3 of the *Assessment Manual* provides that the Board makes its own judgment of status “having regard to the terms of the contract and the operational routines of the relationship.” I consider that the actions of Yumi Farms, in advancing all of the necessary funds to Delta to make the payments for the licencing fees and insurance, were in effect to secure the right to access the WFP lands to pick salal. The practical reality is that Yumi Farms was the party providing the funds necessary to make the payments necessary to acquire the right to harvest the salal, Yumi Farms was the exclusive purchaser of the salal, Yumi Farms determined the amounts payable to the pickers for the salal that they picked, and Yumi Farms ensured that it was repaid for the monies it had advanced by taking repayment in kind from the pickers. I consider, therefore, that Yumi Farms was in fact the employer of the pickers.

[46] An alternative interpretation might be that Yumi Farms and Delta were engaged in a joint venture or partnership arrangement. For the purposes of my decision, it is ultimately not necessary to determine whether the pickers were employed by

Yumi Farms alone, or by Yumi Farms and Delta operating in a partnership or joint venture. In either case, the pickers were workers.

[47] By memorandum dated December 14, 2010, a research and evaluation analyst advised that account 654291 for Yumi Farms Inc. was established with the Board on August 1, 2000, and then cancelled on October 12, 2000. This registration was revived on November 8, 2008 and registration was made retroactive to January 1, 2005. The firm was not registered at the time of the September 26, 2008 accident. Delta was also not registered with the Board. However, policy at item #5.00, "Coverage of Workers," of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) provided:

> It is a well established principle of workers' compensation that where an employer comes within the scope of the Act, all workers of that employer are covered for compensation….
>
> 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 the policy in Item AP1-1-4 of the *Assessment Manual*.

[48] A further question concerns whether the injuries suffered by the plaintiffs, and the action or conduct of the defendant which caused the alleged breach of duty of care, at the time of the September 26, 2008 accident, arose out of and in the course of their employment.

[49] Sokhom Chau and his wife Khom Tes resided on Lampson Street in Victoria. They lived about one kilometre away from where the plaintiffs Ry Tes and Seak Chhem resided. On days that the vehicle belonging to Ry Tes was used, the normal routine was that Ry Tes would drive to the residence of Sokhom Chau and Khom Tes to pick them up.

[50] At the time of the accident, Sokhom Chau was driving the vehicle owned by his brother-in-law, Ry Tes. This was a 1995 Toyota pickup truck (which had seats for four people). Ry Tes, Seak Chhem, and Khom Tes were passengers. The parties were travelling from their homes to WFP's land to pick salal.

[51] Printouts from Google Maps were used to obtain estimates of the travel distance and times between the pickers' residences, the WFP lands near Jordan River, and the location at which the salal was dropped off at the end of each day. The approximate travel distance and time from the parties' residences in Victoria to the Jordan River area was 65 kilometres / 1 hour and 18 minutes. The return journey was much longer, given the necessity to make a substantial deviation to the north to go to "Paul's Cooler" to drop off the salal.

[52] Google Maps indicated that the approximate travel distance and time from the Jordan River area to Victoria, with a trip to 6536 West Saanich Road, would be 90.8 kilometres (73.8 plus 17.0 kilometres). This would involve travel time of 1 hour and 50 minutes, in addition to the time spent at "Paul's Cooler" in dropping off the salal.

[53] The defendant submits that the plaintiffs were travelling workers. They were employed to travel to various locations around Southern Vancouver Island to pick salal which would then be taken to the cooler for distribution. There were no employer's premises at which they could perform work. It was necessary for them to travel from their residences to wherever the picking would be done. Once the picking had been done, it was necessary for them to deliver the salal to the drop off point so that the salal could be distributed. Travel was an essential aspect of the production process involving harvesting and drop off of the product. The defendant submits that the parties were travelling employees in the course of their employment during their journey.

[54] The plaintiffs submit that their travel to the work site was merely a commute. They were not working or engaged in any work activities at the time of the accident. The vehicle was owned personally by Ry Tes, and was being driven by his brother-in-law, Sokhom Chau. The vehicle was occupied by family members (two couples), who car-pooled to save money by travelling in one vehicle. They paid their own expenses, with no financial contribution by the employer. The family members were doing each other favours. Driving family members as a favour does not amount to either a crew bus situation or a work-related activity. Had the accident occurred during a trip to Paul's Cooler the result may well have been different, since they would have been in the course of delivering product as part of their employment. However, the accident occurred when they were merely commuting to the job site to begin working. Any activities they conducted after they arrived at the job site may well be covered by the Act, but the travel to the job site was not.

[55] At the time of the accident on September 26, 2008, the policies in Chapter 3 of the RSCM II included the following:[1]

> **#14.00 ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT**
>
> Before a worker becomes entitled to compensation for injury under the *Act*, the injury must arise out of and in the course of employment.
>
> Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.
>
> Lack of control of a situation by the employer is not a reason for barring a claim otherwise acceptable. Control by an employer is an indicator that a situation is covered under the *Act* at a particular time, but if that control does not exist there may be other factors which demonstrate an employment connection.
>
> No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:
>
> (a) whether the injury occurred on the premises of the employer;
>
> (b) whether it occurred in the process of doing something for the benefit of the employer;
>
> (c) whether it occurred in the course of action taken in response to instructions from the employer;
>
> (d) whether it occurred in the course of using equipment or materials supplied by the employer;
>
> (e) whether it occurred in the course of receiving payment or other consideration from the employer;

[1] In this decision, I have applied the policies in effect at the time of the accident on September 26, 2008. While the board of directors of the Board has approved a revision to the policies in Chapter 3 of the RSCM II, those new policies only apply to injuries or accidents that occur on or after July 1, 2010.

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

(g) whether the injury occurred during a time period for which the employee was being paid;

(h) whether the injury was caused by some activity of the employer or of a fellow employee;

(i) whether the injury occurred while the worker was performing activities that were part of the regular job duties; and

(j) whether the injury occurred while the worker was being supervised by the employer.

This list is by no means exhaustive. All of these factors can be considered in making a judgement, but no one of them can be used as an exclusive test.

#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.

#18.32 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.

#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.

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

#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 travelling 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."

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

[56] Policy at RSCM II sets out the general position that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. Policy at item #18.32 provides that 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.

[57] I consider that the WFP lands near the Jordan River area could reasonably be viewed as a normal or regular operating base for the pickers. While the journey from Victoria to the Jordan River area was long (approximately 80 minutes), it was not so long as to warrant being characterized as being other than a commute to a normal or regular operating base.

[58] The plaintiffs' travel at the end of their workday involved different circumstances, as they were required to travel a considerable distance in a different direction for the purpose of dropping off the salal. Pursuant to the policy at RSCM II item #18.33, this would support the provision of workers' compensation coverage at least to the extent that the workers had (because of the requirement to deliver the salal) to do something which would not normally be done while travelling to or from work or go somewhere where they would not normally go. Workers' compensation coverage would likely apply at least in respect of the substantial detour required to drop off the salal, where they were deviating from the route required in their normal commute.

[59] I am not persuaded, however, that the requirement to drop off the salal during the pickers' return journey had the effect of making them travelling employees (so that workers' compensation coverage would apply from the time they left their residences in the morning). Their picking activities took most of the workday, and were performed within the area for which a licence to pick salal had been obtained. While their return journey had a significant employment connection in relation to the need to drop off the salal, this did not affect their travel to the Jordan River area in the morning.

[60] I find the plaintiffs' submissions persuasive on this issue. I am not persuaded that the pickers' travel between their own residences and the WFP land, in their own vehicle and at their own expense, was part of their employment. The WFP land was at a fixed location, although the pickers did their work at various locations within that property. I consider that travel from the pickers' homes to the WFP lands in the Jordan River area in the morning may reasonably be characterized as commuting, for which workers' compensation coverage did not apply. Apart from the length of the journey to the Jordan River area, there were no additional special characteristics of the pickers' journey from their residences in Victoria to the Jordan River area to connect that travel to their employment. I consider that this travel was in the nature of a journey (albeit a

somewhat lengthy one of about 80 minutes) between home and a normal or regular operating base. Pursuant to the policy at RSCM II item #18.32, 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.

[61] Accordingly, I find that the plaintiffs' injuries in the September 28, 2006 motor vehicle accident did not arise out of and in the course of their employment. I further find that the defendant's action or conduct, which caused the alleged breach of duty of care, did not arise out of and in the course of his employment within the scope of Part 1 of the Act.

Expenses

[62] The three witnesses (Delich, Nguyen, and Nagai) were provided with conduct money when ordered to attend the October 16, 2012 oral hearing. Nagai waived any additional claim for reimbursement of expenses. Delich submitted a claim for wage loss, and reimbursement was provided to him following the October 16, 2012 oral hearing in the amount of $312.31 ($332.31 minus the $20.00 witness fee already paid to him as part of the conduct money). Nguyen advised he was not working so was not claiming wage loss. He requested reimbursement of his ferry expense but did not provide a receipt. He was previously provided with $143.74 in conduct money in relation to his travel from Victoria. I am not persuaded that any additional amount should be paid to him.

[63] The plaintiffs requested reimbursement of expenses relating to their travel from Victoria to attend the oral hearing on October 16, 2012 and February 18, 2013 in Richmond. Item #16.1.2.1 of WCAT's *Manual of Rules of Practice and Procedure* states that if, on its own initiative, WCAT schedules an oral hearing at a location that is not the closest, WCAT will order reimbursement of the appellant's travel expenses. Ry Tes submitted a hotel receipt in the amount of $124.52 for February 17, 2013, and requested reimbursement for mileage. The defendant did not request reimbursement of expenses, on the basis that such expenses are normally addressed in the legal action.

[64] As the plaintiffs are not pursuing claims for workers' compensation benefits, and as expenses relating to section 257 applications are normally addressed in the legal action, I am not persuaded that WCAT or the Board should pay the expenses of the plaintiffs relating to their attendance at the oral hearing. The plaintiffs' expenses may be addressed in the legal action.

Conclusion

[65] I find that at the time of the September 26, 2008 accident:

(a) the plaintiff, Ry Tes, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Ry Tes, did not arise out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the plaintiff, Seak Chhem, was a worker within the meaning of Part 1 of the Act;

(d) the injuries suffered by the plaintiff, Seak Chhem , did not arise out of and in the course of her employment within the scope of Part 1 of the Act;

(e) the plaintiff, Khom Tes, was a worker within the meaning of Part 1 of the Act;

(f) the injuries suffered by the plaintiff, Khom Tes, did not arise out of and in the course of her employment within the scope of Part 1 of the Act;

(g) the defendant, Sokhom Chau, was a worker within the meaning of Part 1 of the Act; and,

(h) any action or conduct of the defendant, Sokhom Chau, which caused the alleged breach of duty of care, did not arise out of and in the course of his employment within the scope of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

NO. 092469
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:

RY TES and SEAK CHHEM

PLAINTIFFS

AND:

SOKHOM CHAU and INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the defendant, SOKHOM CHAU, 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 UPON HEARING the evidence of the parties in an oral hearing on October 16, 2012 and February 18, 2013;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, September 26, 2008:

1. The Plaintiff, RY TES, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

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

3. The Plaintiff, SEAK CHHEM, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

4. The injuries suffered by the Plaintiff, SEAK CHHEM, did not arise out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

5. The Defendant, SOKHOM CHAU, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

6. Any action or conduct of the Defendant, SOKHOM CHAU, which caused the alleged breach of duty of care, did not arise out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of April, 2013

_____

Herb Morton
Vice Chair

NO. 092469
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:

RY TES and SEAK CHHEM

PLAINTIFFS

AND:

SOKHOM CHAU and INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

SECTION 257 CERTIFICATE

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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:

KHOM TES

PLAINTIFF

AND:

SOKHOM CHAU, RY TES and
INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the defendant, SOKHOM CHAU, and also upon application by the plaintiff, KHOM TES, 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 UPON HEARING the evidence of the parties in an oral hearing on October 16, 2012 and February 18, 2013;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, September 26, 2008:

1. The Plaintiff, KHOM TES, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

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

7. The Defendant, SOKHOM CHAU, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

8. Any action or conduct of the Defendant, SOKHOM CHAU, which caused the alleged breach of duty of care, did not arise out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of April, 2013.

_____

Herb Morton
Vice Chair

NO. 102395
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:

KHOM TES

PLAINTIFF

AND:

SOKHOM CHAU, RY TES and
INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

SECTION 257 CERTIFICATE

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