WCAT Workers' Compensation Appeal Tribunal

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WCAT Decision Number: **WCAT-2013-03400**
WCAT Decision Date: **December 4, 2013**

Panel: Guy Riecken, Vice Chair

WCAT Reference Number: **121037-A**

Section 257 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. M116372
Justin Quillen v. Dueck Chevrolet Buick Cadillac GMC Limited and Shane Timothy Lennea

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Applicant: Dueck Chevrolet Buick Cadillac GMC Limited and Shane Timothy Lennea (the "Defendants")

Respondent: Justin Quillen (the "Plaintiff")

Interested Party: Cutting Edge Hardwood Restoration Inc.

Representatives:

For Applicant: Narvinder Gill, HARRIS & BRUN

For Respondent: Eric L. Goodman, MUSSIO LAW GROUP

For Interested party: Megan Wong, EMPLOYERS' ADVISERS OFFICE

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Introduction

[1] The plaintiff, Justin Quillen, commenced a legal action against the defendants Dueck Chevrolet Buick Cadillac GMC Limited (Dueck) and Shane Timothy Lennea in respect in damages for personal injuries resulting from an accident on January 10, 2011. In the statement of civil claim, the plaintiff states that he was struck by a vehicle owned by Dueck and leased and operated by Mr. Lennea.

[2] Under 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 where an action is commenced based on a disability caused by occupational disease or a personal injury or death and to certify those determinations to the court.

[3] Counsel for the defendants applied to WCAT on April 24, 2012, seeking determinations with respect to the status of the plaintiff and the defendants at the time of accident.

[4] The plaintiff and the defendants are participating in this application and are represented by legal counsel. The same counsel represents both defendants. Cutting Edge Hardwood Restoration Inc. (Cutting Edge), of which the defendant Lennea is a principal and which he identifies as his employer, is participating and is represented by an adviser from the Employers' Advisers Office.

[5] Written submissions were requested and received from counsel for the plaintiff and counsel for the defendants. The representative for Cutting Edge informed WCAT she is not providing a submission. Counsel for the plaintiff provided copies of the transcripts of the examination for discovery of the plaintiff and the defendant, both held on October 22, 2012. Counsel for the plaintiff also provided documents including copies of statements to the Insurance Corporation of British Columbia (ICBC) by the plaintiff (dated January 17, 2011), Mr. Lennea (dated February 11, 2011), and a witness to the accident (dated May 14, 2011), and a copy of the plaintiff's Declaration For Registration Of General Partnership or Sole Proprietorship. Counsel for the defendants provided a copy of the B.C. Registry Services B.C. Company Summary for Cutting Edge.

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[6] This application involves questions of law and policy which can be properly considered on the basis of the available evidence and written submissions, without the need for an oral hearing.

[7] The plaintiff commenced a claim with the Workers' Compensation Board, operating as WorkSafeBC (Board), with respect to the accident. Certain evidence from the plaintiff's claim file has been disclosed to the parties to the legal action. I will consider the evidence anew for the purposes of this application, and any prior Board decisions are not binding on me.

Issue(s)

[8] Determinations have been requested as to the status of the plaintiff and the defendants at the time of the accident.

Jurisdiction

[9] Section 257 provides that:

> 257 (1) Where an action is commenced based on
>
> (a) a disability caused by occupational disease,
>
> (b) a personal injury, or
>
> (c) death,
>
> the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.
>
> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
>
> (a) a person was, at the time the cause of action arose, a worker,
>
> (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
>
> (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

[10] Subsection 257(3) provides that Part 4 of the Act applies to proceedings under section 257 (except that that no time frame applies to the making of the WCAT decision).

[11] Pursuant to section 250(1) of the Act, WCAT is not bound by legal precedent.

[12] Under section 250(2) WCAT must make its decision based on the merits and justice of the case, but in doing so, must apply a policy of the board of directors of the Board that is applicable. The applicable policies include those found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

[13] Section 254 gives WCAT 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 matters 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)).

[14] The court determines the effect of the section 257 certificate on the legal action.

Status of the Plaintiff Justin Quillen

[15] The circumstances of the accident generally are not in dispute in this application. The plaintiff is a hardwood flooring installer and finisher. Cutting Edge is a company that provides hardwood flooring installation and refinishing services. The parties have both stated that the plaintiff worked for Cutting Edge as a subcontractor (Q 28 – 34 EFD of Mr. Lennea; statement to ICBC by Mr. Lennea; and, Q 159 – 160 and 174 – 175 EFD of the plaintiff). At the time of the accident the plaintiff lived at 7218 Fourth Street in Burnaby, B.C. On the morning of the accident he drove his own truck from his home to the residence of the defendant Mr. Lennea at 5412 Carson Street in Burnaby to get a ride with the Mr. Lennea to a job site. The evidence of Mr. Lennea, undisputed by the plaintiff, is that the job site was at an apartment near Cambie Street and 21st Avenue in Vancouver, which was to be the location of a two-day hardwood floor refinishing job.

[16] It is not disputed that Mr. Lennea leased his truck, a 2009 Chevrolet Silverado from the defendant (Q 190 – 191) Dueck. .

[17] The plaintiff parked his truck at the side of Carson Street across from Mr. Lennea's residence. Carson Street is a public roadway. Mr. Lennea drove his truck, which was towing a trailer, up beside the plaintiff's truck and stopped there so that the plaintiff could move some tools from his own truck to the back of Mr. Lennea's trailer. There is evidence that the tools included tools of Mr. Lennea or Cutting Edge that the plaintiff

had been using to work on a Cutting Edge job while Mr. Lennea had been away on vacation for the preceding two weeks (Mr. Lennea's ICBC statement).

[18] After the plaintiff moved the tools into the trailer he went back to retrieve his personal bag out of his own truck. Another vehicle arrived and had to stop because Mr. Lennea's truck was blocking the street. Mr. Lennea began to move his truck. The plaintiff was between his own truck and Mr. Lennea's truck. As Mr. Lennea's truck moved forward part of Mr. Lennea's trailer struck the plaintiff on his hip and he fell to the ground. The plaintiff says that a wheel of Mr. Lennea's trailer caught the plaintiff's leg and dragged it. At that point the plaintiff got Mr. Lennea's attention, and Mr. Lennea stopped his truck, and then moved it slightly to get a wheel off the plaintiff's leg. The plaintiff was taken to hospital by ambulance and treated for his injuries.

Whether the plaintiff was a "worker" within the scope Part 1 of the Act

[19] The defendants' position is that the plaintiff was a "worker" within the scope of Part 1 of the Act at the time of accident, whether as an independent contractor with Personal Optional Protection (POP) coverage, or as a worker of Cutting Edge. The plaintiff does not expressly dispute his status as a worker.

[20] Section 1 of the Act provides the following definition:

> **"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;
>
> ...
>
> (f) an independent operator admitted by the Board under section 2 (2);

[21] Section 2(2) provides that:

> (2) The Board may direct that this Part applies on the terms specified in the Board's direction
>
> > (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
> >
> > (b) to an employer as though the employer was a worker.

[22] At the time of the accident policy item #AP1-1-3 of the Board's *Assessment Manual* set out a number of factors relevant for distinguishing an employment relationship from one between independent firms. It also provides a "major test" which largely encompasses these factors, namely whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

[23] #AP1-1-6 of the Board's *Assessment* Manual read, in part, as follows:

> 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.

[24] Policy item #AP1-2-3 provided that:

> Employers and unincorporated independent operators without workers are not automatically covered for compensation purposes. They may purchase optional coverage called Personal Optional Protection.

[25] In their examinations for discovery Mr. Lennea and the plaintiff provided the following evidence that tends to support the plaintiff, as a sole proprietor without employees, having an existence as a business independent from Cutting Edge.

[26] The plaintiff and Mr. Lennea both describe the plaintiff as a subcontractor performing work for Mr. Lennea's company Cutting Edge Hardwood which operates as hardwood flooring contractor (and sometimes as a subcontractor to other hardwood flooring contractors).

[27] The plaintiff and Cutting Edge did not have a written contract. The terms of their oral contract included the following. The plaintiff was paid by Mr. Lennea's company based on invoices he submitted to the company every two weeks (through Mr. Lennea) for his time (at an hourly rate) spent working on Cutting Edge jobs. When paying the plaintiff's invoices Mr. Lennea's company did not make deductions for income tax, Employment Insurance or Canada Pension Plan payments. The plaintiff paid his income tax remittances to the Government of Canada himself. The plaintiff had registered as a sole proprietor for Goods and Services Tax (GST) purposes under the name Quillen Industries. The plaintiff also registered as a sole proprietor with the B.C. Ministry of Finance and Corporate Relations under that name. The plaintiff and Mr. Lennea had agreed that the plaintiff would register with the Board to obtain his own workers'

compensation coverage rather than coming under the coverage of Cutting Edge. The plaintiff registered with the Board for POP coverage. The plaintiff maintained separate bank accounts for his business and personal transactions. The plaintiff did not employ other workers.

[28] In an October 12, 2012 Assessment Department Memorandum a research and evaluation analyst stated that the Board's assessment records show that the Justin Quillen, doing business as Quillen Industries, had an account with the Board for POP coverage effective from April 15, 2010. The account expired on August 23, 2011. The account was registered at the time of the January 10, 2011 accident.

[29] The registration of the plaintiff by the Board for POP coverage shows that the Board admitted him for coverage as an independent operator. The effect of his registration for POP coverage is that he comes within the definition of "worker" under section 1(f) of the Act.

[30] In their submissions the defendants have also referred to a number of factors that support the conclusion the plaintiff could be characterized as a worker of Cutting Edge, and not an independent operator. These include the fact that the plaintiff provided services of labour to Cutting Edge, and the extent to which the plaintiff's work schedule, work location, and quality of work were under the control of Mr. Lennea on behalf of Cutting Edge. In addition, the plaintiff estimated that 90% of his work was performed on jobs for Cutting Edge, and the plaintiff did work for only two other contractors during one-year period prior to the accident. The defendants refer to the policies in the *Assessment Manual* that provide guidance on distinguishing between employment relationships and relationships between independent firms, including items #AP1-1-3, #AP1-1-6, and #AP1-1-7.

[31] However, the defendant's position is that whether the plaintiff was a worker of Cutting Edge or was providing services to Cutting Edge as an independent operator with POP coverage, he was a worker within the meaning of Part 1 of the Act.

[32] I find that I do not have to determine whether the worker was in independent operator (with POP coverage) or a worker of Cutting Edge at the time of the accident. I agree with the defendants that whether he was providing services to Cutting Edge as an independent operator with POP coverage, or a worker of Cutting Edge, the plaintiff was a worker within the meaning Part 1 of the Act at the time of the accident on January 10, 2011.

Whether the plaintiff's injuries arose out of and in the course of employment

[33] The disputed issue is whether the plaintiff's injuries arose out of and in the course of employment.

[34] The plaintiff's position is that regardless whether he was an independent contractor or a worker of Cutting Edge, the majority of the relevant factors favour a finding that his injuries did not arise out of and in the course of employment.

[35] The defendants' position is that regardless of whether the plaintiff was an independent operator with POP coverage, or a worker of Cutting Edge, his injuries arose out of and in the course of his employment.

[36] The reference to "employment" in this context is not dependant on whether the relationship between the parties was one of employment or was between independent business entities. Section 1 of the Act includes the following definition:

> **"employment"**, when used in Part 1, means and refers to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1;

[37] In the context of determining the plaintiff's status in this application, the plaintiff's "employment" refers to the provision of his services to the undertaking and business operations of Cutting Edge, regardless of whether the plaintiff was providing the services as an employee of Cutting Edge or as an independent operator with POP coverage. At the time of the accident, the plaintiff did not have other contracts to provide services to other parties on other jobs. In addition, there is no evidence that he had any dealings or arrangement directly with the contractor (Silver Fern Ventures) that hired Cutting Edge for the hardwood job where the plaintiff was to be working on the day of accident (Q 15 – 17 EFD of Mr. Lennea). There is no evidence that he was engaged in other activities on behalf of Quillen Enterprises. His only employment at the relevant time, whether as an independent operator or a worker of Cutting Edge, would have been on a Cutting Edge contract.

[38] Policy item #C3-14.00 is the principal policy that provides guidance for determining whether a worker's injury arose out of and in the course of employment. Policy item #C3-14.00 includes the following:

> The test for determining if a worker's personal injury or death is compensable, is whether it arises out of and in the course of the

employment. The two components of this test of employment connection are discussed below.

In applying the test of employment connection, it is important to note that employment is a broader concept than work and includes more than just productive work activity. An injury or death that occurs outside a worker's productive work activities may still arise out of and in the course of the worker's employment.

A. Meaning of "Arising Out of the Employment"

"Arising out of the employment" generally refers to the cause of the injury or death. In considering causation, the focus is on whether the worker's employment was of causative significance in the occurrence of the injury or death. Both employment and non-employment factors may contribute to the injury or death. The employment factors need not be the sole cause. However, in order for the injury or death to be compensable, the employment has to be of causative significance, which means more than a trivial or insignificant aspect of the injury or death.

B. Meaning of "In the Course of the Employment"

"In the course of the employment" generally refers to whether the injury or death happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the employment. Time and place are not strictly limited to the normal hours of work or the employer's premises.

[39] The policy goes on to set out a non-exhaustive list of factors that may be considered, and states that no one of them may be used as an exclusive test for deciding whether an injury or death arose out of and in the course of employment. Other relevant factors may also be considered, including those not listed in policy. I will return to the factors listed in this policy later in this decision.

[40] Policy item #C3-14.00 also states that other policies in Chapter 3 of the RSCM II may provide further guidance as to whether the injury or death arises out of and in the course of employment. Other policies relevant to this application include items #C3-19.00, "Work Related Travel," and #19.10, and "Worker-owned Tools and Equipment."

[41] Policy item #C3-19.00 includes the following:

> The general policy related to travel is that injuries or death occurring in the course of travel from the worker's home to the normal place of employment are not compensable. On the other hand, where a worker is

> employed to travel, injuries or death occurring in the course of travel may be covered. This is so whether the travel is a normal part of the job or is exceptional. In these cases, the worker is generally considered to be traveling in the course of the employment from the time the worker commences travel on the public roadway.
>
> In assessing work-related travel cases, the general factors listed under Item C3-14.00, *Arising Out of and In the Course of the Employment*, are considered. Item C3-14.00 is the principal policy that provides guidance in deciding whether or not an injury or death arises out of and in the course of the employment.

[42] Policy item #C3-14.20 is also relevant in the circumstances of this case. This policy provides guidance in cases where the injury or death is caused by accident and section 5(4) of the Act applies. Section 5(4) provides that:

> In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

[43] I will refer to policy items #C3-19.00 and #C3-19.10 in the course of discussing the factors listed in Part C (ii) policy item #C3-14.00.

1. Did the injuries occur on the employer's premises?

[44] Policy item #C3-14.00 explains that an employer's premises includes any land or buildings owned, leased, or controlled for the purposes of carrying out the employer's business. However, the policy also recognizes that the employer's premises may also include an expanded notion of premises as described in the discussion of the access route in item #C3-19.00, and in the discussion of employer provided facilities in policy item #C3-20.00.

[45] The accident occurred on a public roadway outside Mr. Lennea's private residence. The place on the public road where the accident occurred was not part of the employer's premises in the general sense of land or buildings owned, leased, or controlled for the purposes of carrying out the employer's business.

[46] The defendant's counsel argues that although the public roadway outside Mr. Lennea's residence was not controlled by the company, it was part of the immediate approaches to the premises, and the hazard which caused the accident was part of the spill-over from the employer's premises. The defendants also argue that Mr. Lennea's truck

functioned as a crew bus for the transportation of workers, and as such was an extension of the premises of Cutting Edge. The employer's premises and the use of a crew bus are discussed in the following part of policy item #C3-19.00:

> **A. Regular Commute**
>
> An employment connection generally begins when the worker enters the employer's premises for the commencement of a shift, and terminates on the worker leaving the premises following the end of the shift.
>
> Therefore, a worker's regular commute between home and the normal, regular or fixed place of employment is not generally considered to have an employment connection. This includes injuries or death that occur on a worker's regular or routine commute where:
>
> - the employer provides the worker with a vehicle for the purpose of work and also allows the worker to use the vehicle for personal use outside of work hours; or
> - the worker commutes to work in his or her own vehicle and uses the vehicle for a work purpose during the worker's shift.
>
> There are, however, certain situations when a worker's regular commute may be considered part of a worker's employment.
>
> The following provides guidance as to how some of the factors in Item C3-14.00 may be applied when considering specific cases relating to a worker's regular commute.
>
> **1. On Employer's Premises**
>
> Did the injury or death occur on the employer's premises? If so, this is a factor that favours coverage. It is the responsibility of an employer to provide a safe means of access to and egress from the place of work. Thus, where a worker is traveling by public roadway to a place of work that is not adjacent to the public roadway, and must travel along a captive road or through a special hazard before reaching the employer's premises, the employment connection may begin at the point of departure from the public roadway rather than at the point of entry to the employer's premises.
>
> It is not considered significant that an injury or death occurs while a worker is seeking to gain access to the employer's premises by a method that is different from that which the employer intends. However, it may be considered significant if the worker chooses a method that he or she has been advised is specifically forbidden by the employer, or if the worker chooses a route that is clearly dangerous.

...

c. Extension of the Employer's Premises

An injury or death that occurs to a worker in the immediate approaches to the place of work, though still on the public roadway, may be considered to arise out of and in the course of the employment if the hazard causing the injury or death is a spill-over from the employer's premises.

As well, if an employer provides a specific vehicle, like a crew bus, to transport its workers to and from the employer's premises, injuries or death occurring while traveling in this employer-controlled vehicle may be considered to arise out of and in the course of the employment, as the crew bus is considered to be an extension of the employer's premises.

The employer's control of the transportation does not need to be exclusive for this factor to be in favour of coverage. For example, coverage may also be extended where the employer contracts out the crew bus service to transport its workers to and from work.

[47] The plaintiff submits that the roadway where the accident occurred is not an extension or spill-over from the premises of Cutting Edge. The plaintiff cites *WCAT-2006-03704* (*Friesen v. McAteer et* al) in support of his position that Mr. Lennea's residence was not a work location of the Cutting Edge. In that decision, the vice chair stated:

> The defendant did have a home office but there is no evidence that he worked in that office prior to leaving for the work site. Implicit in the WCAT decisions cited by counsel, *Decisions #2005-02294*, *#2005-05472* and *#2003-01173,* is the view that the existence of a home office is not, in itself, sufficient to establish a private residence as the employer's premises for the purposes of policy. Nor is the existence of a home office, in itself, sufficient to establish that a worker was travelling between two working sites during a journey from his home to a work site. There must be evidence that the worker was actually working in his home prior to leaving for a work site. I agree with that reasoning and, in this case, the evidence does not establish that the defendant was engaged in productive employment activity prior to leaving his home for the Solex plant.

[48] In *WCAT-2008-01799* (*Bal v. Harrap*), which has been identified by WCAT as a noteworthy decision, another panel also found that the existence of a home office in the defendant's residence was not sufficient in itself to transform the residence into a work point for the purpose of determining whether the defendant was a travelling employee.

[49] While not bound by the previous WCAT or other appellate decisions, I agree with the reasoning in *WCAT-2006-03704* and *WCAT-2008-01799* with respect to Mr. Lennea's home office. The presence of the home office is not in itself sufficient to make Mr. Lennea's residence a work location for Mr. Lennea.

[50] However, the situation here is different than in the cases referred to above. Here the defendants appear to argue that Mr. Lennea's residence was part of the premises of Cutting Edge. This seems to underlie the argument that the public roadway where the accident happened was part of the spill-over of Cutting Edge's premises.

[51] Even if the home office in Mr. Lennea's residence is considered Cutting Edge premises, this does not draw me to the conclusion that the roadway outside the residence somehow involved "spill-over" from the company's premises. Other than the home office inside the residence, the only activity remotely connected with Cutting Edge at that location involved the plaintiff parking his truck on the roadway so he could get a ride from Mr. Lennea, and Mr. Lennea parking his truck (and presumably the trailer) outside his residence. However, the evidence does not lead me to the conclude that the hazard that caused the accident, Mr. Lennea's truck and trailer, were located on the roadway outside his residence for any reason other than his own convenience related to the start of his journey to a job site each day. It has not been suggested that Cutting Edge had a facility off the public roadway for Mr. Lennea to park his truck or that other company operations involving the truck and trailer occurred there. I do not accept that the presence of truck and trailer on the public roadway at the site of the accident near Mr. Lennea's residence was the result of spill-over of activities from the premises of Cutting Edge.

[52] The defendants also argue that the accident occurred within an extension of the premises of Cutting Edge because Mr. Lennea's truck that pulled the trailer which struck the plaintiff was a crew bus as described in policy item #C3-19.00. The plaintiff submits that the truck was not akin to a crew bus because it was not a "specific vehicle" provided by the employer "to transport its workers to and from the employer's premises." The plaintiff refers to his longstanding friendship with Mr. Lennea (they had known each other since high school), a fact acknowledged by Mr. Lennea on discovery. The plaintiff submits that he was getting a ride with Mr. Lennea as part of a carpooling arrangement.

[53] At the outset, I have some difficulty accepting that the policy on vehicles, such as crew buses, used to transport workers has application to the circumstances of this case. The policy on crew buses and similar vehicles relates to work-related travel. The policy is most often relevant to situations in which an individual is injured while traveling, and the issue is whether the travel occurred in the course of employment. The policy has the effect of extending an employer's premises so that a worker injured while riding in a

crew bus or similar vehicle is considered to be in the employer's premises after entering the vehicle. In this case, however, the plaintiff had not yet entered Mr. Lennea's truck.

[54] In spite of the plaintiff not having entered into the vehicle at the time of the accident, I will consider whether Mr. Lennea's truck was akin to a crew bus, such that the plaintiff's being injured by the vehicle (rather than in it) was connected to the premises of Cutting Edge.

[55] The evidence does not indicate that the truck was the property of Cutting Edge. The truck was leased from Dueck by Mr. Lennea (Q 190 – 191, EXD of Mr. Lennea; and, Mr. Lennea's statement to ICBC). Mr. Lennea drives the truck most days for his work for Cutting Edge, and 75% of the time is pulling the trailer in which he transports tools and equipment. The evidence indicates that Mr. Lennea also sometimes uses the truck to pick up supplies from a distributor, and to travel between different job sites. The frequency with which he does this is not clear in the evidence. The evidence does not state whether Mr. Lennea is the registered owner of the trailer.

[56] The fact that the truck was leased by Mr. Lennea from Dueck, and not by the company, is not determinative of the whether the vehicle is the vehicle used to transport the company's workers, since in discussing crew buses policy item #19.00 states:

> The employer's control of the transportation does not need to be exclusive for this factor to be in favour of coverage. For example, coverage may also be extended where the employer contracts out the crew bus service to transport its workers to and from work.

[57] It is therefore possible that Mr. Lennea's truck could be considered the company's crew bus.

[58] However, on the available evidence, I conclude that Mr. Lennea's truck was not Cutting Edge's "specific vehicle, like a crew bus, to transport its workers to and from the employer's premises." The evidence of Mr. Lennea is that at the time of the accident, other than him and his wife (who looked after the company's bookkeeping and paperwork, and also did some hardwood finishing work), the company had no workers. While the company sometimes hired other subcontractors, at the time of the accident it had only one subcontractor, the plaintiff.

[59] The pattern that has been described in the examinations for discovery did not involve the plaintiff travelling with Mr. Lennea in his truck all of the time. The estimates vary, but they range from the plaintiff travelling with Mr. Lennea about half of the time to almost all the time (except for one day per week or four or five days per month. The plaintiff stated that he took his own vehicle to work sites only four or five times per

month (EFD of the plaintiff Q 216 to 222). Since Cutting Edge did not have other employees or subcontractors to transport, even if the plaintiff was transported to job sites in Mr. Lennea's truck on most days, I would not characterize Mr. Lennea's truck as a typical crew bus. However, I recognize that the term "specific vehicle" does not require a particular configuration, such as a passenger van used to transport several workers together. For example, in *WCAT-2005-03187* (*Harkness v. Forseth et al.*) the vice chair found that a van used to transport equipment and supplies, as well as the proprietor of the employer and the plaintiff, could be characterized as a crew bus.

[60] In *WCAT-2005-03187* the vice chair found that the employer was not providing the plaintiff a ride to work due to a family or social relationship, or for personal reasons. The evidence supported the conclusion that the ride was primarily a work arrangement. While the longstanding friendship between Mr. Lennea and the plaintiff in this case is not determinative, I consider it a relevant factor.

[61] Mr. Lennea's evidence about his use of the truck does not indicate that it was acquired for the purpose of transporting workers or used predominantly for that purpose. Mr. Lennea used his truck to transport himself to various work sites, and to pick up supplies from the distributor. It was also used to tow the trailer used to transport tools and supplies. While policy item #C3-19.00 does not require a vehicle to be used exclusively to transport the employer's workers to and from the employer's premises, the policy contemplates that the vehicle will be a "specific" vehicle for the transportation of workers, as in the example of a crew bus. I do not accept that Mr. Lennea's use of the truck part of the time to transport himself and one other worker to job sites in itself is sufficient to characterize the truck as a specific vehicle for the transportation of workers, akin to a crew bus.

[62] When I consider the longstanding friendship between the plaintiff and Mr. Lennea, that at the time of the accident Cutting Edge did not have workers to transport other than Mr. Lennea and the plaintiff, and that the plaintiff did not rely exclusively on Mr. Lennea for transportation to work, I am drawn to the conclusion that the provision of transportation to job sites by Cutting Edge was not part of the contract between Cutting Edge and the plaintiff. The plaintiff's acceptance of rides in the truck was more akin to a carpooling arrangement between Mr. Lennea and the plaintiff than the provision of transportation by Cutting Edge. I find that Mr. Lennea's truck was not a specific vehicle for the transportation of workers under policy item #C3-19.00. It was therefore not an extension of the premises of Cutting Edge as contemplated by that policy.

[63] The defendants also argue that the public roadway where the accident occurred was an "assembly area" for the plaintiff to meet Mr. Lennea, and as such an extension of the premises of Cutting Edge.

[64] Travel to and from an assembly area is not discussed in policy item #C3-19.00 under the heading of "Extension of the Employer's Premises," but under the heading of "Travelling Employees." That section of policy item #C3-19.00 provides, in part:

> **Travelling Employees**
>
> ...
>
> Travel to different work locations has an employment connection where a worker:
>
> ...
>
> - travels from the employer's premises or assembly area, to another work location, after first reporting to the employer. This applies to a temporary worker who commutes to a labour supply firm each day, and then is dispatched to a client as, in these cases, the labour supply firm is the employer. This does not apply to a worker who goes to a union hiring hall and then is dispatched to an employer. The worker's travel from home to the employer's premises or assembly area would be considered a regular commute. The worker's travel from the employer's premises or assembly area to the point where he or she will begin work is normally considered to have an employment connection;

[65] The worker was not yet travelling from the road outside Mr. Lennea's residence (the assembly area according the defendants' argument). However, the defendants' position does not rely on the plaintiff having commenced his journey from the assembly area to the work site, but on the assembly area itself being an extension of the employer's premises.

[66] In my view, the notion of an assembly area in policy item #C3-19.00 does not extend to the situation in this case. The policy refers to a situation in which a worker travels from his or her home to the employer's premises, and then to another work location "after first reporting to the employer." The situation described in the examinations for discovery was that the plaintiff attended at Mr. Lennea's residence so he could meet Mr. Lennea and travel with him to the work site. The evidence does not lead me to conclude that the plaintiff "reported to" Mr. Lennea for some purpose such as clocking in, receiving a work schedule, or receiving instructions about the day's work. The

evidence does not suggest that the plaintiff reported to the roadway outside Mr. Lennea's residence for any reason other than to get a ride with him to work.

[67] In particular, I note Mr. Lennea's answer to the questions about why he and the plaintiff would ride together in Mr. Lennea's truck, since the plaintiff had his own vehicle. Mr. Lennea stated: "We were going to the same job." (Q43 – 44, EFD of Mr. Lennea.) This suggests an arrangement of convenience, particularly for the plaintiff, since it saved him from the need to drive his own truck to a job site on days when he would not need it. The convenience of this arrangement is apparent when I consider that the plaintiff and Mr. Lennea both lived in Burnaby and generally worked at job sites (most of the time together at the same site) all over the Lower Mainland. In addition to the convenience of getting a ride when going to the same location, the arrangement would mean that the plaintiff would not have to use gas in his own truck, a relevant factor when considering that he was not paid mileage unless using his truck to travel between job sites or to pick up supplies from a distributor.

[68] In addition, the evidence does not support the defendants' argument that the plaintiff reported to the meeting place at Mr. Lennea's residence as a result of instructions from Mr. Lennea. I recognize that the Mr. Lennea would generally text or phone the worker in advance to tell him whether to drive his own truck on a given morning or meet Mr. Lennea to get a ride. However, the evidence does not suggest that this was a feature of his contract with Cutting Edge such that the worker was required to travel to work in the manner chosen by Mr. Lennea. In particular, the evidence does not show that the plaintiff would be prevented from choosing to forego the convenience of a ride from Mr. Lennea in favour of driving his own truck if he wished to do so.

[69] I find that the evidence is more consistent with a ride-sharing or carpooling arrangement between workers than with the plaintiff reporting to an assembly area or the employer's premises with the purpose of continuing to the work site in transportation provided or arranged by the employer (or by the contractor).

[70] Nor is the situation here akin to the example in policy of a worker who attends daily at a labour supply office to be dispatched to different clients at different work sites each day.

[71] I conclude that the meeting point in the roadway outside Mr. Lennea's residence was not an assembly area as contemplated by policy item #C3-19.00, nor was it an extension of the premises of Cutting Edge. I accept the plaintiff's argument that the situation can be accurately described as a car pooling arrangement.

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[72] I conclude that, at the time of the accident, the plaintiff had not entered onto the premises of Cutting Edge, either in the narrow sense of a place owned, controlled, or operated by Cutting Edge, or in the expanded sense of an area with some spill-over of activity from the premises of Cutting Edge. Nor were Mr. Lennea's truck and the trailer it was towing an extension of the premises of Cutting Edge. This weighs against workers' compensation coverage for the plaintiff's injuries.

2. Did the injury occur while the plaintiff was doing something for the benefit of the employer?

[73] The plaintiff had just transferred some tools into Mr. Lennea's trailer, and was in the process of getting his own personal bag out of his truck so he could take it with him to the work site. This does not suggest he was doing something for the benefit of Cutting Edge.

[74] In addition, policy item #C3-19.00 provides that, generally, the fact that a worker is required to provide his or her own tools for a job does not mean that carrying or transporting the tools of equipment to work or away from work is part of the employment. In light of this policy, the fact that the accident happened just after the plaintiff had transferred his tools from his truck to Mr. Lennea's trailer does not support an employment connection.

[75] There is also evidence that the plaintiff also transferred Mr. Lennea's tools from his truck to Mr. Lennea's truck. Mr. Lennea stated in his written statement to ICBC that it was his first day back at work after a vacation and that during the vacation, the plaintiff had worked on his own on a Cutting Edge job. The plaintiff had been using Mr. Lennea's tools during Mr. Lennea's absence and, on the morning of the accident, he and Mr. Lennea had transferred them back to trailer.

[76] To the extent that Mr. Lennea was a principal of Cutting Edge, the transfer of the tools belonging to Mr. Lennea back to Mr. Lennea's trailer can be seen as benefitting Mr. Lennea and the company. However, this is does not weigh strongly in favour of an employment connection to the accident. That activity was already complete when the accident occurred. The plaintiff testified on discovery that when the accident happened, the tools had been transferred to the trailer and he had gone back to his own truck to retrieve his personal bag. This part of his testimony is not expressly contradicted by Mr. Lennea.

[77] I find that the worker was not doing something for the benefit of the Cutting Edge or Quillen Enterprises at the time of the accident. This factor is neutral.

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3. *Did the accident occur while the plaintiff was in the course of action taken in response to instructions from the employer (or from the prime contractor)?*

[78] In discussing work-related travel, policy item #C3-19.00 provides, in part:

> **2. Instructions from the Employer**
>
> Was the worker instructed or otherwise directed by the employer? When considering specific cases relating to a worker's regular commute, this factor may favour coverage in the following circumstances.
>
> **a. Deviations From Route**
>
> An employment connection may be found where a worker is instructed by the employer to perform some activity related to work, which requires the worker to deviate from the worker's normal route while commuting. Generally speaking, an employment connection will only be found where, because of the employer's instructions, the worker is required to do something that would not normally be done while traveling to or from work, or to go somewhere where the worker would not normally go. A minor diversion from what is essentially a normal commute to or from work does not favour coverage.
> Where an employer instructs or otherwise directs a worker to temporarily work at a place other than the normal, regular or fixed place of employment, an employment connection may be found for travel from the point at which the worker commences travel on the public roadway to the temporary work location. These workers are considered "traveling employees", which is discussed in Section C below. Once the temporary assignment becomes routine or consistent in nature, the travel will be considered a regular commute. This is assessed in the context of each individual case.
> ....

[79] For the worker to be deviating from his normal route to work at the instruction of Mr. Lennea, as contemplated by policy item #C3-19.00, the worker would need to have a normal route of commuting to a normal, regular or fixed place of employment. However, the worker did not have such a regular or fixed place of employment, since the normal pattern of his employment was to work at a different job sites for various periods of time, as assigned by Mr. Lennea. Mr. Lennea's instruction to the plaintiff to meet him at Mr. Lennea's residence on the day of accident did not involve a deviation from a regular commute to work, but was part of the usual pattern of commuting to various starting points of productive work activity around the Lower Mainland.

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[80] Aside from the question of a deviation from a normal, regular commuting route, the defendants' counsel submits that because the plaintiff's work schedule was determined solely by Mr. Lennea, the plaintiff's presence on the roadway outside Mr. Lennea's residence at the time of the accident was in response to instructions from Mr. Lennea. This follows from the fact that the plaintiff only travelled to work in Mr. Lennea's truck on the days that Mr. Lennea assigned him to perform work at sites where the plaintiff would not need his own truck (for instance to pick supplies up from distributors or to travel between different job sites).

[81] While I accept that the plaintiff's means of travelling to work (in his own truck or Mr. Lennea's truck) was determined by the schedule established by Mr. Lennea, the instruction to go to Mr. Lennea's residence on the morning of the accident simply reflected the general arrangement between them that when he did not need his own truck, the plaintiff would get a ride with Mr. Lennea. In these circumstances, I do not consider the instruction from Mr. Lennea for the plaintiff to meet him at his residence on the day of the accident to weigh significantly in favour of employment coverage.

4. Did the accident occur while the plaintiff was using equipment or materials supplied by the employer?

[82] The plaintiff was not using work-related equipment at the time, either supplied by Cutting Edge or his own equipment or materials as an independent operator. He was in the process of getting his personal bag out of his own truck. This factor is neutral.

5. Did the accident occur while the plaintiff was in the process or receiving payment or other consideration?

[83] This applies to act of drawing pay or receiving other consideration, and not the period for which the worker is paid. This factor does not apply in this case.

6. *Did the injury occur during a time period in which the worker was paid a salary or other consideration or during paid work hours?*

[84] The plaintiff and the defendant both testified on discovery that the plaintiff was paid an hourly rate from the time he arrived at a work site, and generally was not paid for his time while he was travelling from home to a work site. This was so whether he travelled in his own truck or in Mr. Lennea's truck. When he travelled to a work site with Mr. Lennea, he typically arrived at Mr. Lennea's home at about 7:00 a.m., and arrived at a work site by about 8:00 a.m., the same time he generally arrived at work when he drove his own truck to a work site. The work sites were generally at various locations around the Lower Mainland. An exception identified by Mr. Lennea on discovery would be when the worker travelled to a more remote job site, more than a one-hour

commuting distance away, such as a job at Whistler (EFD of Lennea Q 113 – 116). In that case the plaintiff would be paid for his travel time to the job site.

[85] On the morning of the accident the plaintiff arrived at Mr. Lennea's home at 7:00 a.m., and the accident happened at about 7:05 a.m. Mr. Lennea stated in his written statement to ICBC (exhibit 5 for identification at the examination for discovery of Mr. Lennea) that the work site on the day of the accident was to be an apartment building at Cambie and 21st in Vancouver. The day of the accident (a Monday) was to be the first of what was planned as a two-day job.

[86] Given the location of the job site on the day of the accident, and its commuting distance from Burnaby, the usual arrangement between the plaintiff and Mr. Lennea would have prevailed, as there is no indication the commute would exceed one hour. The defendants have not suggested that the accident happened at a time when the plaintiff was being paid.

[87] I find that the accident did not happen at a time when the plaintiff was being paid a salary or other consideration, or during paid working hours. This weighs against an employment connection to the accident.

7. Was the injury caused by an activity of the employer or a fellow employee?

[88] The plaintiff's injury is alleged to have resulted from Mr. Lennea's operation of his truck. As Mr. Lennea was both a principal and a worker of Cutting Edge, this factor weighs in favour of a finding that the plaintiff's injuries had an employment connection.

8. Did the injury or death occur while the worker was performing activities that were part of the worker's job?

[89] The defendants argue that the answer to this question can only be "yes" since, in their view, the plaintiff had arrived at an assembly point outside Mr. Lennea's residence at his direction, his regular commute from home was complete, and "all that remained was for the plaintiff to enter the crew bus." The defendants rely on various provisions in policy item #C3-19.00 that I have already summarized with respect to the extension of the employer's premises, the crew bus, and the assembly point.

[90] Although the worker had not yet arrived at a work site, nor begun productive work activities, his activities at the time of the accident would be considered part of his normal work activities if he was a travelling employee for whom travel is part of the service that he provides. For the purposes of the plaintiff's status in this application, nothing turns on the term travelling "employee." This category of worker could include

an independent operator with POP coverage who typically travels as part of their employment.

[91] Part C of policy item #C3-19.00 includes the following:

> **C. Traveling Employees**
>
> "Traveling employees" are workers who:
>
> - typically travel to more than one work location in the course of a normal work day as part of their employment duties; or
> - have a normal, regular or fixed place of employment, and are directed by the employer to temporarily work at a place other than the normal, regular or fixed place of employment.
>
> An employment connection generally exists throughout the travel undertaken by traveling employees, provided they travel reasonably directly and do not make major deviations for personal reasons. This is so regardless of whether public or private transportation is used.
>
> An employment connection may not exist for the portion of travel between the traveling employee's home and the employer's premises that is undertaken at the commencement or termination of each work day. These workers may be considered to be on a "regular commute" for that portion of their travel, which is discussed in Section A above.
>
> Examples of traveling employees include, but are not limited to, taxi drivers, emergency response personnel, transport-industry drivers, cable installers, home care workers, many sales representatives, and persons attending off-site business meetings.
>
> One factor from Item C3-14.00 that may require further explanation in its application to specific cases relating to traveling employees is whether the travel is part of the job.
>
> Travel to different work locations has an employment connection where a worker:
>
> - terminates productive activity at one work location and travels to another work location to commence productive activity for the same employer. This is so regardless of whether the worker was paid a salary or other consideration for the travel;
> - travels from the employer's premises or assembly area, to another work location, after first reporting to the employer. This applies to a temporary worker who commutes to a labour supply firm each day,

and then is dispatched to a client as, in these cases, the labour supply firm is the employer. This does not apply to a worker who goes to a union hiring hall and then is dispatched to an employer. The worker's travel from home to the employer's premises or assembly area would be considered a regular commute. The worker's travel from the employer's premises or assembly area to the point where he or she will begin work is normally considered to have an employment connection;

- routinely commences or terminates productive activity at varying work locations in the course of a normal work day. In these situations, the worker is generally considered to be in the course of the employment from the time the worker commences travel on the public roadway. This could apply, for example, to cable installers and pharmaceutical sales representatives; or
- travels from home to a temporary place of work without first traveling to the normal, regular or fixed place of employment. Again, the employment connection begins when the worker commences travel on the public roadway.

An employment connection generally exists for traveling employees during normal meal or other incidental breaks, such as using the washroom facilities, so long as the worker does not make a distinct departure of a personal nature.

[92] The policy goes on to provide a number of examples of travelling employees. The pattern of the plaintiff's employment was not similar to the examples in the policy, such as taxi drivers, emergency response personnel, transportation industry drivers, cable installers, home care workers, many sales representatives, and persons attending off-site business meetings. The list of examples is not exhaustive, and the plaintiff may be considered to be a travelling worker if he comes within the definition in the policy.

[93] Both the plaintiff and Mr. Lennea testified that the plaintiff travelled to more than one work location in the course of some days, although they differed somewhat in their descriptions of how frequently this happened.

[94] In describing the circumstances in which the plaintiff would be paid mileage to compensate him for the use of his own vehicle, Mr. Lennea stated that this would result from the need for the plaintiff to bring his own vehicle to work rather than getting a ride with Mr. Lennea. At one point Mr. Lennea said that the worker took his own vehicle approximately 50% of the time. However, Mr. Lennea estimated that the worker needed his own vehicle to move between multiple work locations on the same day) on average "maybe once a week" (EFD Lennea Q 124 – 141).

[95] The plaintiff stated that he was paid for fuel if he used his own vehicle to make trips to pick up supplies up from a distributor, or if he was going from job site to job site (EFD of plaintiff Q 194 – 197). He was not paid for travel, unless he was going from one job to the next, for example, if he had coated one floor and then went on to another job (EFD of plaintiff Q 198). The plaintiff stated that he would go to more than job site in a day "weekly." However, for some bigger jobs he might be working at one job site all week (EFD of plaintiff Q 201 – 205).

[96] At one point Mr. Lennea testified that the worker only took his own vehicle because he had to work at different work sites four or five times per month.

[97] I accept that the plaintiff took his own vehicle because he needed it to travel to multiple work locations during a single day on average one day per week, or four or five days per month.

[98] The plaintiff submits that the plaintiff's situation is similar to that of the plaintiff in *WCAT-2012-03242* (*Von Einsiedel v. Ge*). In that case the plaintiff, a carpenter, was driving from his home to a job site at the time of the accident. His evidence was that he would not typically travel from one job site to another in the course of a day because he did not usually work on simultaneous jobs. On the day of the accident he would have worked at a job site for the day, before moving onto a different job the next day. The vice chair found that the plaintiff was not a travelling employee at the time of the accident since his evidence did not establish that he typically travelled to more than one work location in the course of a normal workday.

[99] The circumstances here are different than those in *WCAT-2012-03242*. The worker in that case did not travel between work sites in the course of a day at all. In this case the plaintiff travelled between different work sites in the same day, but did so a minority of the time.

[100] Given that the plaintiff travelled between two or more work sites on the same day only once per week or four or five times per month, I find that he did not "typically" travel between different work sites during the same day as contemplated by the policy on travelling employees.

[101] Aside from the question of whether the plaintiff "typically" travelled between work sites during the same day, it is significant that on the day of the accident he would not have been travelling between different work sites. Under his arrangement with Mr. Lennea this was inherent in the fact he was getting a ride with Mr. Lennea. This follows from the fact that, as Mr. Lennea testified, it was to be the first day of a two-day job. I conclude that, on the day of the accident, it is unlikely the worker would have travelled

between job sites or been required to travel to the distributor. He would have worked at one job site for the whole day.

[102] I find that the plaintiff was not a travelling employee on the basis of travel between job sites in the course of the same day.

[103] Nor does the evidence support the conclusion that the worker was a travelling employee on the basis that he had a normal, regular or fixed place of employment from which he was on some occasions dispatched to work temporarily at another work location or locations. Instead, the pattern of his employment involved irregular starting points at various work locations around the Lower Mainland.

[104] I conclude that at the time of the accident the worker was in the course of commuting between his home in Burnaby and the starting point for that day's work at a job site in Vancouver. His presence at the site of the accident on the roadway outside Mr. Lennea's residence was incidental to the ride-sharing or carpooling arrangement with Mr. Lennea, which was part of the plaintiff's normal commuting pattern. The general principle, that injuries during a regular commute from home to work are not in the course of a worker's employment, applies here.

[105] I find that the worker had not yet begun his regular job activities at the time of the accident. This weighs against workers' compensation coverage for injuries resulting from the accident.

[106] While there are some factors that favour workers' compensation coverage for the injuries, including the fact that the accident resulted from the actions of a co-worker (and a principal of the employer or contractor), and that it involved the co-worker's vehicle, I do not consider these sufficient to conclude that the accident arose out of or in the course of the plaintiff's employment.

[107] Other factors weigh more strongly against the accident arising out of or in the course of employment. These include the fact that at the time of the accident the plaintiff was still in the course of his commute from his home to the work location where he would be providing services, he had not yet entered onto the employer's premises, he had not yet started his regular job duties, and was not being paid for his time.

[108] I find that the accident that caused the worker's injuries did not arise out of his employment or in the course of his employment. Accordingly, the presumption under section 5(4) does not arise.

[109] The injuries suffered by the plaintiff, Justin Quillen, did not arise out of and in the course of his employment within the scope of Part 1 of the Act.

Status of the Defendant Shane Timothy Lennea

Was Mr. Lennea a worker?

[110] Although Cutting Edge is not a named party to the legal action, and WCAT has not been asked to certify as to its status, it was invited by WCAT to participate as an interested person in accordance with item #18.3.1 of the WCAT *Manual of Rules of Practice and Procedure*. As the entity identified by the defendant Mr. Lennea as his employer, the company has in interest in the outcome of this application. In addition, the status of the company is critical to the status of the Mr. Lennea.

[111] Section 1 of the Act includes the following definition:

> **"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;

[112] Policy item #AP1-38-1, "Registration of Employers," provides that all employers must register with the Board. The policy provides that an employer is required to contact the Board to determine if it is required to register, and describes the process of registration.

[113] As seen in the corporate search for Cutting Edge Mr. Lennea is a director of the company and its president. Policy item #AP1-1-4 provides, in part, that where an incorporated entity is considered an employer, a director, shareholder, or other principal of the company who is active in the operation of the company is generally considered a worker under the Act.

[114] The October 12, 2012 Assessment Department Memorandum states that the company was registered with the Board since September 28, 2004, and was registered at the time of the accident.

[115] Neither the parties nor Cutting Edge have disputed the company's status as an employer.

[116] I find that Cutting Edge Hardwood Restorations Inc. was an employer at the time of the accident on January 10, 2011.

[117] As explained by Mr. Lennea in his statement to ICBC, he and his wife were both employees of the company and are both paid wages by it. Policy item #AP1-1-4 provides, in part, that where an incorporated entity is considered an employer, a director, shareholder or other principal of the company who is active in the operation of the company is generally considered a worker under the Act.

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[118] The defendants' position that Mr. Lennea was a worker of Cutting Edge is not disputed by the plaintiff.

[119] I find that at the time of the accident Mr. Lennea was a worker.

Whether any action or conduct of Mr. Lennea, which caused the alleged breach of duty of care, arose out of and in the course of his employment

[120] The defendants' position is that Mr. Lennea was a travelling worker because he travelled to multiple work sites and had variable work locations from day to day and from week to week. In addition, at the time of the accident, he was operating the vehicle that would be used to transport supplies, tools, and equipment to an irregular work site. The truck would also be used to transport the plaintiff, a subcontractor, or a fellow worker. The defendants' submit that these activities were in furtherance of the business of Mr. Lennea's employer, Cutting Edge.

[121] The plaintiff submits that the evidence fails to establish that Mr. Lennea typically travelled to more than one work location in the course of a normal work day at the time of the accident. The plaintiff refers to Mr. Lennea's statement to ICBC that, at the time of the accident, he and the plaintiff were about to start a two-day job. The plaintiff submits that there is no mention in the evidence that they had any other ongoing projects, or that they would be travelling to any other job sites that day.

[122] In reviewing the submissions and the evidence provided by the parties, including the discovery transcripts and the ICBC statements, there is little or no evidence in relation to many critical factors under policy items #C3-14.00 and #C3-19.00. For example, there is little evidence about how Mr. Lennea was paid by Cutting Edge (particularly with respect to whether it could be considered that he was being paid for his time when the accident occurred). In addition, the pattern of his day to day employment activities, including to what extent he typically travelled between different work locations in the course of the same day, or the frequency with which he normally travelled to the distributor or elsewhere to pick up supplies or run other company errands, is not set out in any detail in the available evidence. Nor is there evidence with respect to Mr. Lennea's expected movements, if any, during the course of the two-day work days of the job that he was about to begin when the accident happened.

[123] I considered whether to make inquiries of the parties with respect to additional details about matters relevant to the factors in policy items #C3-14.00 and #C3-19.00 to enable me to determine whether Mr. Lennea was covered for workers' compensation purposes at the time of the accident.

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[124] However, in light of my determination that the plaintiff's injuries did not arise out of and in the course of his employment, it appears unnecessary to determine whether any action or conduct of Mr. Lennea, which caused the alleged breach of duty of care, arose out of and in the course of his employment. If the parties require a determination of that issue, they may request a supplemental determination.

Status of Dueck Chevrolet Buick Cadillac GMC Limited

[125] The October 12, 2012 Assessment Department Memorandum confirms that Dueck Chevrolet Buick Cadillac GMC Limited has been registered with the Board since May 21, 1987 and was registered at the time of the January 10, 2011 accident.

[126] The defendants seek a determination that the defendant Dueck was an employer at the time of the accident. The plaintiff has not taken a position on Dueck's status.

[127] I find that Dueck Chevrolet Buick Cadillac GMC Limited was an employer at the time of the accident on January 10, 2011.

Conclusion

[128] I find that at the time of the January 10, 2011 accident:

(a) the plaintiff, Justin Quillen, was a worker within the meaning of Part 1 of the Act;

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

(c) the defendant, Shane Timothy Lennea, was a worker within the meaning of Part 1 of the Act; and,

(e) the defendant, Dueck Chevrolet Buick Cadillac GMC Limited, was an employer within the meaning of Part 1 of the Act.

Guy Riecken
Vice Chair

GR:gw