WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2239/09

BEFORE: J. Josefo: Vice-Chair

HEARING: November 17, 2009 at Toronto
Oral

DATE OF DECISION: December 3, 2009

NEUTRAL CITATION: 2009 ONWSIAT 2818

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicant(s): Ms. C. McKenna, Barrister and Solicitor

For the respondent(s): Mr. P. Prashad, Barrister and Solicitor

For interested party Mr. L. Gurprasad,
President of Lee Trans Corporation: Mr. J. Gold, Registered Paralegal

Interpreter: Mr. A. Tahir, Punjabi Language

REASONS

(i) The right to sue application – parties, issues and background

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act*, brought by the Applicant, Nordique Insurance Canada, a Statutory Accident Benefits ("SABS") Insurer. This application arises out of an action commenced in the Ontario Superiour Court of Justice under court file No. CV-07-3995-00. The Applicant applies to the Tribunal for an order removing the right to sue of Mr. Talwinder Khaira, the plaintiff in that action and Respondent in this within proceeding.

[2] The facts which underpin this application involve a serious motor vehicle accident which occurred on December 15, 2005. On that date Mr. Khaira was operating a Peterbuilt truck owned by the civil action defendant Lee-Trans Corporation ("Lee-Trans"). Mr. Khaira proceeded to Lee-Trans's place of business in the early morning hours of December 15, 2005 to get the truck. After subsequently picking up a load of sand, Mr. Khaira was in the process of unloading the sand at a concrete plant in Pickering, Ontario, when the truck began to tip over on its right side. Mr. Khaira chose to jump out of the truck, falling 10 feet and landing on the hard ice below.

[3] It was conceded by counsel for the Applicant that, as a result of the fall, Mr. Khaira unfortunately sustained "catastrophic" injuries, including severe brain injuries.

[4] Mr. Khaira commenced the above-noted litigation against Lee-Trans. Pursuant to an agreement entered into between Mr. Prashad, counsel for Mr. Khaira in this within application and in the above-referenced civil action, and counsel for Lee-Trans (who was not participating in this within proceeding), a Statement of Defence in that action has not yet been delivered. I was informed that counsel for Lee-Trans was aware of this within proceeding but chose not to participate. The president of Lee-Trans, Mr. L. Gurprasad, did attend under summons and was represented by Mr. Gold.

[5] Ms. McKenna, counsel for the Applicant in this matter before me, represents the SABS insurer, who are presently providing Mr. Khaira with SABS as a result of the December 15, 2005 accident.

[6] The question I must determine in this within application is whether Mr. Khaira was a worker and in the course of his employment at the time of the December 15, 2005 accident, or if he was an independent operator. The Applicant asserts that Mr. Khaira was a worker and in the course of his employment, while the Respondent asserts that he was an independent operator who voluntarily structured his affairs with his principal, Lee-Trans and Mr. Gurprasad, specifically to maintain his previously-enjoyed status as an independent operator.

[7] Because of the significant injuries suffered in the December 15, 2005 accident, it was agreed by all representatives that Mr. Khaira would not testify in this proceeding. The sole witness was the interested party, Mr. Gurprasad, who was questioned by all counsel as well as by me.

[8] By way of further background facts, it was acknowledged that Lee-Trans is a Schedule 1 employer, pursuant to the status check result dated June 25, 2009 contained in the materials before me.

[9] Mr. Prashad further acknowledged that, should I conclude that Mr. Khaira was a worker, then he was in the course of his employment given that, at the time of the accident, Mr. Khaira was operating a truck owned by Lee-Trans and was in the process of unloading sand therefrom. Neither Mr. Gold nor Ms. McKenna took issue with that asserted fact and, indeed, it is amply supported in the materials before me.

[10] Thus, before me is a Schedule 1 employer and an individual clearly performing activities for either his employer or principal. The sole issue to be determined, again, is whether Mr. Khaira was a worker or an independent operator. If I find Mr. Khaira was a worker and in the course of his employment at the time of the unfortunate accident, then Mr. Khaira has no right to sue but may claim WSIB benefits.

(ii) Discussion of the evidence, and conclusions

[11] It is clear that a worker of a Schedule 1 employer who is in the course of employment at the time of an accident is not entitled to commence a civil action. In that regard, see section 28(1) of the *Workplace Safety and Insurance Act* ("WSIA").

[12] The Respondent contends that he was not a worker but was, at all material times, an independent operator who was engaged to perform the services of truck driving for his principal, Lee-Trans. Mr. Prashad and Mr. Gold rely heavily on what is submitted to be the intention of the parties pursuant to an "Application/Agreement" signed by Mr. Khaira on December 8, 2005, prior to his beginning to perform services for Lee-Trans.

[13] That agreement in its entirely reads as follows:

> I/we, the undersigned, hereby agree with Lee-Trans Corporation as follows:
>
> 1. It is the intention of the parties that the undersigned be independent operator(s)/agent(s) and not employee(s) of Lee-Trans Corporation.
>
> 2. That the undersigned are required to register their own business name, provide their own invoices, letterhead and business cards as they may deem necessary. In any event, the undersigned clearly understand that they are not employees in any way, shape or form and that they work for themselves as independent operator(s)/agent(s).
>
> 3. That the undersigned carry on their own business as independent operator(s)/agent(s), pay their own expenses, as well as paying all deductions, such as all income taxes, unemployment insurance, CPP, etc., etc.
>
> 4. That the undersigned will receive a flat rate payment without any deductions of any kind on a bi-weekly basis or as otherwise agreed with Lee-Trans Corporation. Such flat rate payment shall represent the work undertaken by the undersigned for Lee-Trans Corporation as independent operator(s)/agent(s). The undersigned agrees to present an invoice for all such work performed as independent operator(s)/agent(s). Such payment may be made on an hourly basis to be agreed upon or by weight and/or distance of load or by flat rate as agreed upon, etc.

5. In certain cases Lee-Trans Corporation will pay various operating and maintenance expenses of the independent operator(s)/agent(s) and deduct such expenses from the payment due to them for the work performed. The undersigned agrees to such third party deductions including any damages or interest (24% per annum) and for money/cheque(s) advanced by Lee-Trans Corporation.

6. The undersigned agree and acknowledge that Lee-Trans Corporation has the right to place liens for any monies owing, interest (24% per annum) and any legal costs incurred on any assets of the undersigned, and in particular, all assets set out in detail in the first part of the broker's application/agreement.

7. Lee-Trans Corporation will also deduct any commission or brokerage fees owing to it from any payment due the independent operator(s)/agent(s) for the work performed. If such commission or brokerage fees are not deducted, the independent operator/agent will pay such commission or brokerage fees to Lee-Trans Corporation upon demand and as agreed upon.

8. The commission or brokerage fees payable to Lee-Trans Corporation will range between 6% - 10% to be agreed upon by the parties depending on the nature of the work, etc.

9. That the undersigned will have no set daily, weekly or monthly hours of work and will be available to work as required by Lee-Trans Corporation.

10. That the undersigned are not required to wear uniforms or carry the name or logo of Lee-Trans Corporation. However, if any such independent operator(s)/agent(s) happen to carry the name and/or logo of Lee-Trans Corporation or even drive tractors and/or trailers owned by Lee-Trans Corporation, they shall still be deemed to be independent operator(s)/agent(s). They will continue to enjoy the freedom of choice and association as independent operator(s)/agents(s).

11. The parties agree that the real and substantial connection between them is one of independent operator(s)/agent(s) and they do not form a relationship of employer/employee.

12. The undersigned agrees not to work directly and/or indirectly for any customers of Lee-Trans Corporation for 3 years after they stop working for Lee-Trans Corporation. Breach of that clause will be considered as penalty in addition to any other damages that may be claimed. The undersigned therefore consent to any court injunctions and all legal costs that may be sought by Lee-Trans Corporation in this regard.

13. The undersigned also acknowledge they will give one month notice to Lee-Trans Corporation before they stop working for the corporation. Lee-Trans Corporation may terminate at any time for cause.

14. The undersigned agree to indemnify Lee-Trans Corporation and hold it harmless from any accident/injury that the underisgned *(sic)* may be responsible for, including any legal proceedings in that regard.

[14] It was also submitted for the Respondent that Mr. Khaira, once he agreed to take on an assignment from Lee-Trans, was not told which route to drive or was in any way controlled by Lee-Trans. It was submitted that Mr. Khaira and Mr. Gurprasad were, in essence, two independent business people who very clearly structured their affairs to avoid a relationship of worker and employer.

[15] Indeed, Mr. Gurprasad testified that, in 2005, while Lee-Trans owned 15 trucks, he employed no drivers. Mr. Gurprasad made it clear that he deliberately chose to only engage independent contractors to avoid the "headache" of having employees, having to process source deductions, being exposed to certain liabilities, having to provide notices of lay-off if no work was available, and all the other myriad challenges of having employees.

[16] The evidence regarding Mr. Khaira's intention is less clear, in part because of the severity of his injuries precluding his testimony. Yet, while Mr. Khaira had a business bank account prior to the accident, it appears from the financial records before me that this bank account was also used for personal matters. Mr. Khaira's income tax filings prior to 2005 are also somewhat equivocal, given references to "other employment income" therein. Only after the accident does Mr. Khaira take the position that he was an independent operator with respect to his subsequent 2005 income tax return submitted in 2006.

[17] Nevertheless, I agree that the parties, when they entered into their relationship in December 2005, wanted to establish a relationship other than that of worker and employer. Mr. Gurprasad testified that it is common amongst gravel drivers that they be treated as independent operators. Mr. Prashad emphasized that his client had previously been treated as an independent contractor.

[18] Even if it is correct that gravel drivers believe they are, and act as though they are independent operators and not employees, and there is no evidence before me to corroborate that statement, the case law is well settled that there has to be more than simply an intention or a desire to create a relationship of independent contractor and principal. Even if the respondent in the past had been considered by his principle to be not a worker, again, the wishes of the parties must be backed up by the actual facts as these exist.

[19] Indeed, the facts must support and corroborate the parties' intention. Thus, despite the intentions in this case, and despite the able argument of Mr. Prashad and the thorough submissions of Mr. Gold, the intentions of the parties does not displace the actual business reality. That reality is that the facts do not support, nor do they corroborate the intention of the parties. In this case before me, the facts lead me to conclude conclusively that the relationship that the parties formed in law was that of a casual worker and an employer. I now will discuss why I so conclude.

[20] In this case, Mr. Khaira was someone who could choose to accept delivery loads or not. Once, however, he chose to accept the work, Mr. Khaira would have to pick up the load and deliver it to its stated destination. He could not stop along the way to pick up another load free-lance, or ignore the obligations he undertook. The dispatcher could raise Mr. Khaira on the radio in the truck and provide him further instructions, *albeit* Mr. Khaira could choose his own route to the pick-up and drop-off locations.

[21] As a driver, especially considering the evidence of Mr. Gurprasad that there was a shortage of drivers in 2005, Mr. Khaira was performing an important role for Lee-Trans. His duties as a driver were not in some way peripheral to the operation of the business, a trucking firm, but rather these were integral to ensure that the "business of the business" was carried on and completed. A less integral role might be the IT technician who, on a periodic basis, would

attend to fix Lee-Trans' computer, or the electrician who would fix the lights in the office. Presumably the trucks would continue to run and the business could continue to function if these persons were delayed by a day in the performance of their duties. But, if a driver did not fulfil his/her duties, that would be an altogether different result. The role of a driver such as was Mr. Khaira was thus integral to the business of Lee-Trans.

[22] That Mr. Khaira could allegedly work or not as he chose, even if so, does not convert a casual employee into an independent operator. Moreover, considering Mr. Gurprasad's evidence that the drivers in 2005 would work, on average, a 50-hour work week, it is by no means clear that the drivers could come and go as freely as Mr. Gurprasad testified. To that end, I also note the contract provides that drivers must give Lee-Trans one month's notice before they stop working, while Lee-Trans may "terminate at any time for cause".

[23] As to the degree of control over the work, while Mr. Gurprasad testified that the drivers were very free to do as they please, choose any truck to drive, take any route, and take their own time to get to and from the requisite location, the written statement that he signed on June 18, 2006 is somewhat different. In his statement Mr. Gurprasad confirmed that Mr. Khaira "was employed" by Lee-Trans as a driver. The statement subsequently stated that Mr. Khaira was "employed as an independent driver who works on commission". The statement then indicates that Mr. Khaira was "employed to work specifically for my company".

[24] Page 2 of the statement states the following:

> Mr. Khaira is required to follow instructions about when, where and how work is to be performed.

[25] I find the statement by Mr. Gurprasad given in 2006, closer to the events in question, to be more accurate and reliable than is his uncorroborated testimony before me.

[26] It was submitted that the actions of Mr. Khaira in having a business bank account and an unregistered sole proprietorship prior to joining Lee-Trans demonstrated this man's intention of always being treated as an independent operator. While I need not make findings as to Mr. Khaira's status prior to December 15, 2005, being his first day of employment, which was also the day of the tragic accident, Mr. Khaira's intentions in those previous times are not at issue.

[27] What is at issue is whether the intentions ever actually matched the reality. Having a business bank account which is also used for personal needs, not having any business cards, advertising, ownership of tools, or the other indicia of entrepreneurship means that more probably Mr. Khaira always was a casual worker, given that he was using the tools of others to make a living.

[28] Certainly, Mr. Khaira never took steps to register his business name or any of the other steps that an entrepreneur, in business for his own account, would take to further his opportunity for profit, while also exposing himself to the risk of loss. Mr. Khaira did not own a truck, nor was he responsible for the operational costs of the trucks he was to drive for Lee-Trans. If fuel costs increased, this was of no concern to Mr. Khaira. If the truck broke down, unless it was

somehow his fault pursuant to the agreement he signed, the cost of repairs did not come from his wallet.

[29] Mr. Khaira simply had no risk for any loss, and would earn money pursuant to a per trip basis based upon a formula agreed upon with his employer. I further note that even if Mr. Khaira was paid on a "commission" basis, being paid by commission or for piece work does not necessarily convert an employee into an independent contractor.

[30] That Mr. Gurprasad preferred to structure his affairs to avoid the "headache" of having employees is clear. As Mr. Khaira sustained his accident only a few hours after starting his employment with Lee-Trans, the evidence given by Mr. Gurprasad addressed how his other drivers were treated and acted. My understanding of his evidence leads me to conclude that, despite his stated desire to avoid a relationship of employment, in fact, and at least for Mr. Khaira, that was indeed in essence the true nature of the relationship – one of employment.

[31] Tribunal *Decision No. 1370/06* also involved a truck driver who genuinely believed that he was an independent operator, working on his own account, and who even negotiated his own rate of pay. Tribunal *Decision No. 1370/06* summarizes the facts in that matter, which are quite similar to the within matter. Given the factual background is relevant, as is the subsequently excerpted legal analysis, it is helpful to reproduce a longer extract from this decision, as follows:

> [9] In my view Hodzic, the sole witness in this application, testified in a credible and complete fashion. It is clear that he genuinely believes that he was:
>
> • an independent operator,
>
> • working on his own account, and,
>
> • providing services to Law's and/or Morrice and, potentially, to anyone else who needed him to drive a truck in order to deliver a load.
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> [10] It is also clear that Morrice asked Hodzic to sign the "Determining Worker/Independent Operator Status" WSIB form, which Hodzic signed although he had no recall of reading it beforehand. Indeed, he testified that Morrice and Law's made it clear to him, and to all other drivers, that the intention was to structure a relationship between the parties as independent contractors, and not as employer/employee. Hodzic stated that it was clear that if he did not sign this document he could not drive with Morrice.
>
> [11] Hodzic negotiated his own rate per mile. When he was offered less than 20 cents per mile, he stated he would not accept that rate. He stated he would accept no less than 20 cents per mile. Similarly, when he agreed to take on Sabic as a co-driver, to provide "on the job training" to this individual, Hodzic negotiated an increase to 25 cents per mile. He stated that other drivers who provided training services also received an enhanced rate.
>
> …
>
> [14] Hodzic testified that since he was paid only per mile and not per hour, he tried to avoid waiting time. He also made it clear that he wanted long haul routes where he could earn more money. He described on instance when defective paperwork prevented an easy return through the Customs border. Rather than wait with the truck for potentially many hours for this problem to be resolved, he called the dispatcher at Morrice. He was told that he could leave the truck and a "company driver" would be sent to relieve him and to

ultimately bring the truck through the border. Hodzic could and did refuse loads and was able to put himself on the schedule as available, or not, as and when he wished.

[15] Hodzic stated that he was paid his earnings without any source deductions taken by either Law's or Morrice. The truck that Hodzic drove had the logo of both Law's and Morrice thereon. It did not have his name or anything identifying him as an owner of the vehicle.

[16] Indeed, it was not disputed that Hodzic did not own the truck. He rather simply drove it. He was not responsible for repairs, fuel costs or maintenance. The only exception was that if Hodzic somehow damaged the truck, he was then responsible for the damage.

[17] There is no question that Hodzic also considered himself as an independent operator in his prior dealings with other companies. He could and did work for more than one company at a time and was prepared to drive a truck for anyone who wished to engage him for that purpose, so long as it made economic sense to him.

[18] Counsel for the respondent submitted that the intention of the parties should be of primary importance when determining the nature of the relationship. It was submitted that, in this matter, Hodzic, Law's and Morrice all considered Hodzic to be an independent operator. After all, Hodzic incorporated his own personal services company, which was the corporate vehicle used to provide him with his compensation.

[19] Moreover, it was argued that Hodzic truly believed that he could control his own destiny by choosing:

• when he worked,

• with whom he worked and,

• what routes he agreed to drive, for whatever rate of compensation he negotiated.

[20] It was submitted that the truck was not the essential tool for determining Hodzic's profit and loss. Rather, his status as a licensed truck driver was his "tool of trade". It was submitted that Board OPM Document No. 12-02-01, "Workers and Independent Operators" indicates, when considering the factors, that Hodzic was not a worker. It was submitted that Hodzic was, when considering the business reality of the situation, truly an independent operator or independent contractor and not an employee.

[32] In this matter before me, counsel for the Respondent and the representative of the Interested Party made a number of similar arguments as were raised in the above-referenced decision. Tribunal *Decision No. 1370/06* concluded in part as follows:

[21] In cases such as this it is rare to find a truly "black and white" relationship. Usually there are nuances and indicia of both sorts of relationship that must be carefully parsed in order to determine the correct result. The example of a "continuum" often applies to these cases: at one end of the continuum there is most clearly established a relationship between worker and employer, while at the other end of the continuum the relationship has all the hallmarks of independence, with the result of a relationship between independent contractor and principal.

[22] Yet for a case to reach the Tribunal it is usually because there are elements of both sorts of relationships. Certainly, there are elements and characteristics of an independent contractor relationship with Hodzic and the other parties. But, despite the able submissions of Ms. Dajczak and Mr. Sonoski, I conclude that the better descriptor of Hodzic is that of a worker or employee who was employed by either Law's or Morrice, or possibly both trucking firms.

[23] I so conclude because, as Mr. Jovanovic well summarized when referring to Tribunal *Decision No. 659/91*, the issue is "the substance and not the form" of the

relationship. In this case, I find that the substance of the relationship between the parties is more accurately described as that of worker and employer, rather than independent contractor and principal.

[24] While Hodzic could and indeed did refuse routes and negotiated a slightly higher rate of pay, these factors do not, in my view, indicate that he was an independent contractor. After all, casual employees often can choose when to work, for whom to work as well as negotiate the rate of compensation for their work.

[25] Yet, Hodzic did not own his own truck. He did not own the essential tool of his trade, which indeed was the truck and not merely the permit to drive one. Hodzic was not responsible for the operating expenses of this essential tool of the trade, and he really had no significant risk of loss or chance of profit. He knew in the main what he would earn based upon the flat rate that he would be paid. Even if Law's and Morrice were not paid by the shipper or receiver of goods, this did not impact Hodzic. He still would be paid regardless of the ability of the trucking firms to collect upon a receivable.

[26] If the truck had a serious mechanical problem and required a costly repair, Hodzic was not concerned about this expense. It would not impact his earnings at all. Indeed, Hodzic specifically testified that he did not want to own a truck because he did not want to be worried about all the expenses, including the operating expenses, associated with ownership. He was quite content to earn a good living as a driver, and had no aspirations to be an owner/operator.

[27] Other than an ability to agree to work or not work, once he agreed to work Hodzic had no choice over the ultimate destination and pick-up and drop-off points. These were assigned to him by the dispatcher at Morrice. Hodzic only could do the pre-determined run and could not on his own pick-up additional loads while on route for additional personal profit.

[28] That Hodzic could have worked elsewhere again does not take away his status as an employee. There is nothing that prohibits, in such circumstances, a casual employee from working for more than one employer. Thus, even if Hodzic had done so between July and November 2002 when he was driving for Law's and Morrice, I find that it would not have changed the nature of his relationship with Law's and Morrice.

…

[34] In my view the line of "trucking cases" relied upon by the Applicant more accurately fit the fact scenario in this matter. Tribunal *Decision No. 105/93* makes it clear that, despite the intention of the parties, the Plaintiff was a truck driver who had entered into an employment relationship with the purported contractor. Considering the lack of chance of profit or risk of loss, that Panel concluded that the Plaintiff was a worker in the course of employment with thus no right to sue.

…

[36] I find Tribunal *Decision No. 257/03* to be of particular applicability in this matter. The facts in *Decision No. 257/03* are very similar to the facts before me. A truck driver when in the course of employment suffered injuries from a MVA. The question was whether that driver was a worker or independent contractor. The Panel that decided Tribunal *Decision No. 257/03* stated in their analysis in part as follows:

> According to the Tribunal decisions the intention of the parties will be given a significant weight. Subject to the qualification that the stated intention of the parties must be consistent with and supported by objective factors. (For example, see *Decisions No. 522/91, 659/91, 422/93, 543/93, 395/94, and 472/94.*) …

Out of the reasoning on this matter has evolved a test referred to as the "business reality" or "hybrid" test. The leading case in the development of this test was *Decision No. 921/89*, 14 W.C.A.T.R. 207. At page 225, the Panel, in that decision offered the following reasoning of the development of this particular test:

> The actual name applied to the test whether "integration" test, "organization" test, "hybrid" test or "business reality" is not important. What is important is that parties have an idea of the factors to be considered by the Appeals Tribunal in determining status as a "worker" or "independent operator". By referring to these factors parties may themselves develop a sense of the character or reality of the business relationship and thus make a realistic assessment of the situation. It is the opinion of this panel that the factors enumerated in this decision assist in this goal to a greater extent than merely asking whether the work is "integral" to the overall business. The question to be asked is, "what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship"?
>
> The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case.

The Panel in that decision proposed 11 factors that might be considered in determining the nature of the relationship between two parties to a service contract. They are:

> 1. ownership of equipment used in the work of business;
>
> 2. the form of compensation paid to the worker or independent operator (i.e. whether a fixed rate is agreed to or a variable remuneration with an attendant prospect of profit or a risk of loss);
>
> 3. business indicia;
>
> 4. evidence of coordinational control as to "whether" and "when" the work is performed;
>
> 5. the intention of the parties often evidenced by an agency agreement, employment agreement, contract for services, contract of services or limited term contract;
>
> 6. business or government records which reflect upon the status of the parties;
>
> 7. economic or business market;
>
> 8. the existence of the same or very similar services applied to an employer by a person
>
> or persons who are classified as workers under the Act;
>
> 9. substitute service i.e. the right to hire others;
>
> 10. size of the consideration or payments;
>
> 11. degree of integration.

[37] I agree that these factors referenced above are useful in my consideration of the matter before me. The conclusions of the Panel that decided Tribunal *Decision No. 257/03* are equally apt to this matter. That Panel concluded as follows:

> Having considered the evidence in this case and the submission made by Mr. Gold we are persuaded, on a balance of probabilities, that the relationship between the appellant and the owner of the trucking company is that of an employer and worker and not one between two independent operators.
>
> In particular, we note that the appellant does not own the truck, he merely drives the truck for those who have hired him.
>
> The Panel notes that the appellant was involved in making deliveries. In our view, the individual bringing forth this appeal was employed as a truck driver only. He worked as a long-haul truck driver and collected payment on a mileage basis in accordance with the usual standard for truck drivers in the industry.
>
> We are not persuaded that there was any entrepreneurial benefit to this appellant in the relationship with the employer. The appellant testified that basically he was driving a truck to places designated by the employer that hired him and essentially made deliveries of goods for those people. It appears to this Panel the intention of both parties was to obtain the labour of a truck driver to make deliveries. The purpose for those hiring the appellant was to have someone who had a suitable truck driving licence and who could perform the duties of a truck driver.
>
> The Panel was persuaded that all copyrights in the vehicle operated by the appellant were controlled by the person that hired the individual. The appellant made no capital investment and in essence took no financial risk in the arrangements of the deliveries.
>
> The remuneration arrangements between the parties closely resembled the remuneration arrangements between a worker and an employer and a driver and an employer. In essence, the remuneration paid was at a rate of miles travelled and the payment consisted of what amounted to a bi-weekly pay cheque according to the testimony we received.
>
> The appellant testified that he virtually had no control as to the destinations of the deliveries, although he may have had some control over the route taken. He had no control over load selection and simply picked up whatever loads he was directed to by the dispatcher of the company and drove the truck and made deliveries as a “truck driver”.
>
> As indicated earlier the essential tool of the trade, the truck, belonged to the employer.
>
> The employer provided all the necessary out of country relevant licences to operate the vehicle, paid for all maintenance, fuel, insurance and repairs. The appellant in essence derived all his work and all his income from the employer. In our view, without the employer the appellant had no work in the trucking delivery business.

[38] In my view, as was found by the Panel that authored Tribunal *Decision No. 257/03*, the essential tool of the trade is the truck. I again disagree that the essential tool of the trade is the license, or even the service, offered by Hodzic. I further agree with the analysis from the above decision.

[39] Tribunal *Decision No. 805/03* again noted that the truck driver was not responsible for the operating expenses of the truck, did not own the truck, was paid a flat rate, and thus had no opportunity for profit or loss. The truck driver in that decision was found to be a worker. I adopt and rely upon the analysis in that decision as I consider the facts before me.

[33] The above excerpt refers to Tribunal *Decision No. 257/03,* which case was referenced and relied upon by the parties before me. Referring to the 11 factors discussed in Tribunal *Decision No. 257/03*, it is clear that Mr. Khaira owned no equipment that was used in the business. I further agree that the formula for his compensation was based on his number of trips, and therefore was determined formulaically. Mr. Khaira had no genuine indicia of his own business. He did not have business cards, advertising, or anything other than a bank account in which he mixed his business and personal use. The unregistered business name does not go nearly far enough to demonstrate an attempt to carry on business on his own account.

[34] The records which reflect the status of the parties indicate that Mr. Khaira did not have his GST account, and his other business records have been discussed above.

[35] Despite the attempt to demonstrate a lack of coordinational control as to how the work was done, I prefer the written statement signed by Mr. Gurprasad in 2006. In my view, the practical reality is that, once a driver of his accepts a load, the driver must fulfil his obligations and is subject to coordinational control from the employer's dispatcher during the trip.

[36] There was evidence led that Mr. Khaira could engage someone else to perform work in place of himself. Mr. Gurprasad stated that in 2005 it would happen on occasion that a driver would bring in another individual whom Mr. Gurprasad would qualify as a driver and, after satisfying himself, would use this new recruit in place of the driver who brought him forward.

[37] But there was no evidence led that the new recruit would be engaged by the driver who brought him in, and subcontracted. Rather, it appears that an individual would simply refer someone else whom Mr. Gurprasad would then engage or hire, after Mr. Gurprasad satisfied himself that the new recruit possessed the requisite licences and skill to perform the work. In my view, the evidence in this matter falls far short of what is required to establish the right of the independent operator to hire someone else to perform part or all of the work for which that independent operator was retained. All this shows is that one casual employee could refer another casual employee to the employer.

[38] The evidence as discussed above convinces me that the duties of a truck driver were highly integral for a trucking company. I need not belabour that obvious point.

[39] Tribunal *Decision No. 1720/03* is also, I find, a succinct summary of why a relationship of employment, and not one of independent contractor and principal was found. Tribunal *Decision No. 1720/03* states in part as follows:

> [32] While the agreement the worker signed stated that the worker was a "subcontractor" and the worker was paid without deductions for CPP or EI, the evidence on a balance of probabilities shows that the worker was not in business for himself. He worked exclusively for Marko Polo, under its control and direction and using its equipment and resources. He did not employ nor does the agreement permit him to employ other workers. He did not carry his own insurance. He did not own his own equipment. He did not have a risk of loss or chance of profit as a result of the agreement. I read the agreement as in its essence, a contract of employment. Its terms are consistent with the characterization of the relationship as a worker-employer relationship and not a contractor-subcontractor relationship.

[40] Tribunal *Decision No. 2801/01* is also relevant. Another case involving a truck driver who was injured in the course of delivering goods while on foot, that decision concluded as follows:

> [55] In so concluding, I acknowledge the existence of a contract between the parties the intention of which was to create an independent relationship. I am not persuaded, however, that the contract was any more than a *pro forma* document. In my view, the substance of the arrangement between the Third Party and the Respondent was a contract for service and, hence, a contract between an employer and a worker.
>
> [56] The evidence establishes that there was a clear benefit to the Third Party to have its drivers function outside an employment relationship. The Third Party had six trucks that it wished to maintain in operation to the fullest capacity. The Third Party found that the optimal way of doing this was to have a larger stable of drivers available to operate its vehicles. To have all those drivers on the payroll as workers would have resulted in expense and administrative inconvenience that the Third Party clearly wished to avoid. Hence, I am persuaded the Respondent entered into a contract with the Third Party that essentially directed the Respondent to adopt the formal status of an independent operator.
>
> [57] However, I am not persuaded that there was any entrepreneurial benefit to the Respondent in doing so. The Respondent stated, in his testimony, that he had a vague interest in remaining independent. He also stated that he hoped, at some future time, to purchase his own truck. However, given the nature of the arrangement between the Third Party and its drivers, I am not persuaded that there would have been a continuing contract between the Third Party and the Respondent had the Respondent managed to obtain his own truck. It appears that the intent of the contract was not to obtain the services of a truck and its operators, but rather, to obtain the labour of a truck driver. In other words, the only item of any significance that the Respondent brought to the contract was his A-Z driver's licence.

[41] Tribunal *Decision No. 51/03* also involved a truck driver injured while returning from delivering a load in the United States. Notwithstanding the intention of the parties in this case, it was found that the individual was a worker and not an independent operator. The reasons for this conclusion are well stated by the Vice-Chair as follows:

> [14] Considering the elements of control, integration, and the business reality of the relationship between the respondent and AQ, I have concluded that the respondent was a worker rather than an independent operator, for the following reasons:
>
> • According to the owner-operator agreement between the respondent and AQ and according to the testimonies of Mr. S. and Mr. H., the relationship between the respondent and AQ was exclusive. AQ held the plates, insurance and CVOR, so that it was impossible for the respondent to drive his truck for anyone else while working with AQ. AQ paid for the licence and the insurance and provided the respondent with decals so that the truck was identified as an AQ truck by name.
>
> • The respondent was paid a flat mileage rate regardless of whether his trailer was full or empty. The mileage amount ($1.04 per mile) was set by AQ. The respondent did not bear any risk of loss or profit. He was not responsible for seeking out customers and was ultimately paid whether or not AQ was paid by its customers. While the respondent was responsible for the payment of repairs and gas, he was given an AQ fuel card. As a result, the gas was paid initially by AQ and then deducted from the respondent's mileage cheque. AQ also administered the fuel tax paperwork.

> • AQ had sole control over the respondent's driving schedule. It scheduled where and when the respondent drove as well as the route he was obliged to take. According to the owner-operator agreement, the respondent was required to promptly notify AQ of any breakdowns or delay, which could result in the inability to complete transportation and delivery in accordance with AQ's instructions.
>
> • There was some question as to whether the respondent operated through a corporation. Some – not all - of the cheques were made payable to GJ Company. However, I am satisfied that according to the respondent's testimony and the applicant's corporate search, GJ company was not an incorporated company and that the respondent operated the company as a sole proprietor. Mr. S. also testified that the truck was owned in his name and not in the name of GJ Company. I am therefore satisfied that the business reality of the relationship was that the respondent worked as a worker of AQ and not under a contract for service between one incorporation and another. While Mr. S. drove with a co-driver, apparently a relative, AQ reserved the right to prohibit any person other the contractor from operating the equipment. Both Mr. S. and Mr. H. testified that AQ needed to approve all co-drivers. Therefore, even the choice of a co-driver was ultimately at AQ's discretion.
>
> • A possible element that might point to an independent operator status was the owner-operator agreement provision concerning worker's compensation coverage. According to this agreement, AQ expected its owner operators to obtain their own WSIB coverage for themselves and their employees. However, I do not find that this agreement is determinative for the purposes of this application. As testified by Mr. H., while AQ began discussions with the WSIB towards designating all of its owner operators as independent owners, these discussions occurred after the respondent's accident and it was clear that Mr. S. had never signed a waiver. The fact that he does not appear to have complied with the owner-operator agreement may be relevant for contract law purposes but is not relevant to the application at hand.
>
> [15] All of the above-noted factors point towards a relationship in which the control over the work, the means by which the work was done and the payment for the work rested predominantly with AQ. I find that the respondent was a worker of a Schedule 1 employer, AQ, at the time of the accident. The accident occurred in Ontario while on a regular working route from Calgary to Pennsylvania back to Toronto. The respondent was injured as a result of that accident and would therefore be entitled to benefits under the WSIA.

[42] The intention of the parties in this matter is clear: they wished their relationship to be other than worker and employer. I accept that Mr. Khaira perhaps preferred this for his own reasons, and it is clear that Mr. Gurprasad wanted to avoid having employees. But, at least in this matter involving each of them, neither party was successful in carrying that intent through to reality.

[43] Thus, in conclusion, notwithstanding the intent of the parties to structure their relationship other than that of worker and employer, the intention was not corroborated nor borne out by the reality of the situation, as the evidence demonstrates. Mr. Khaira was not acting in an entrepreneurial fashion when he commenced what I find to be employment of a casual nature, which employment was integral to Lee-Trans' business, on December 15, 2005. Rather, given that Mr. Khaira had no chance of profit, nor any risk of loss, he was a worker.

[44] I further agree that there is no doubt whatsoever that Mr. Khaira was in the course of employment when the accident occurred, given that he was in the process of attempting to dump a load of sand that he had picked up as part of his work assignment.

[45] Thus, given that Mr. Khaira was a worker and in the course of employment for a Schedule 1 employer, he has no right to sue. Mr. Khaira may claim for WSIB benefits as advised by counsel, and within the timelines that govern these circumstances.

[46] I wish to express my appreciation to all representatives for their thorough written and oral submissions, and for their efficient presentation of this matter.

DISPOSITION

[47] The application is granted. The Respondent has no right to sue for reasons set out herein, but may claim WSIB benefits.

DATED: December 3, 2009

SIGNED: J. Josefo