WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1785/04

BEFORE: L. Gehrke: Vice-Chair

HEARING: June 28, 2005; December 7, 2006 and May 23, 2007 at Toronto
Oral
Post-hearing activity completed on August 22, 2007

DATE OF DECISION: November 22, 2007

NEUTRAL CITATION: 2007 ONWSIAT 2968

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicants:	J. Griffiths, Lawyer for the applicants, Mackie Moving Systems Corporation, Citicapital Commercial Leasing Corporation and Zurich Insurance Company of Canada;
	T. Hartley, Lawyer for the applicant, Shamsher Tiwana
For the respondents:	A. Suboch, Lawyer for the respondents Baltar Dhuga and Ranjit Dhuga
Interpreters:	A. Nasir, G. K. Nagra and S. Aman, Punjabi

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* by the Defendants in an action filed in the Ontario Superior Court of Justice in the City of Toronto as Court File No. 03-CV-248786CM, between Baltar Dhuga and Ranjit Dhuga, Plaintiffs and Tiwana Shamsher, Mackie Moving Systems Corporation and Citicapital Commercial Leasing Corporation(Citicapital). The insurer of the defendant Mackie Moving Systems Corporation (Mackie) , Zurich Insurance Company of Canada (Zurich), is also an applicant in this application.

[2] The Respondents have sued the Applicants Shamsher Tiwana, Mackie and Citicapital for injuries that Mr. Dhuga suffered in a motor vehicle accident on May 15, 2001. On that day, Mr. Tiwana was driving a truck on a regular run for Mackie from Ontario to Texas. While driving through Kentucky, Mr. Tiwana lost control of the vehicle. The truck left the road, travelled through a grass median, struck the left rear of a vehicle travelling north, left the roadway and went down a grass embankment, became airborne as it crossed over a creek, and struck a hillside Mr. Dhuga, his co-driver, was asleep in the back of the truck and suffered injuries. The truck was severely damaged and diesel fuel spilled on the roadway.

[3] The truck was owned by Citicapital's predecessor, Associates Leasing (Canada) Ltd. on Associates Commercial Corporation of Canada Ltd. (Associates). Associates leased the truck to Ajay Transport Ltd.(Ajay). Ajay provided transportation services to Mackie using this truck as part of its fleet. Mackie carried insurance coverage for the truck with Zurich

[4] Mr. Dhuga initially claimed WSIB benefits, but in 2003 decided to sue Mr. Tiwana and the other defendants instead. The defendants in the civil action commenced this section 31 application, submitting that Mr. Tiwana and Mr. Dhuga were workers in the course of their employment with a Schedule 1 employer or employers when the accident happened and that Mr. Dhuga's and his spouse's right to sue the defendants has been removed. The plaintiff/respondents reply that Mr. Tiwana and Mr. Dhuga were independent or dependant contractors, not workers.

[5] The respondents also submit that this Tribunal does not have jurisdiction over the matter because the accident occurred in Kentucky. For reasons given below, I conclude that the Tribunal does have jurisdiction over this application, since all the parties had a real and substantial connection to Ontario and based on a consideration of the provisions of *Workplace Safety and Insurance Act, 1997* (WSIA). I adopt the reasons in *Decision No. 2273/03I* on this point.

(ii) Law and Policy

[6] Under sections 27, 28 and 29 of the *Workplace Safety and Insurance Act, 1997* (WSIA), the issues are whether Mr. Dhuga's right of action against any party is removed because Mr. Tiwana and Mr. Dhuga were workers in the course of their employment with a Schedule 1 employer when the accident happened; and if so, whether s. 28(4) preserves Mr. Dhuga's right to sue Citicapital and whether s.29(4) protects any of the parties from liability. If Mr. Dhuga's

right of action is taken away under section 28 then s. 27(2) takes away the right of action of his spouse, Ranjit Dhuga under s. 61 of the *Family Law Ac.*. The relevant provisions of WSIA are:

> Rights of Action
>
> **27.**(1) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan. 1997, c. 16, Sched. A, s. 27 (1).
>
> Same
>
> (2)If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*. 1997, c. 16, Sched. A, s. 27 (2); 1999, c. 6, s. 67 (7); 2005, c. 5, s. 73 (7).
>
> Certain rights of action extinguished
>
> **28.**(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> Same, Schedule 2 employer
>
> (2)A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. The worker's Schedule 2 employer.
>
> 2. A director, executive officer or worker employed by the worker's Schedule 2 employer.
>
> Restriction
>
> (3)If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.
>
> Exception
>
> (4)Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.
>
> 1997, c. 16, Sched. A, s. 28.
>
> Liability where negligence, fault
>
> **29.** (1) This section applies in the following circumstances:
>
> 1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

> 2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
>
> Same
>
> (2)The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.
>
> Determination of fault
>
> (3)The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.
>
> Same
>
> (4)No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action. 1997, c. 16, Sched. A, s. 29.

[7] A critical sub issue in this application is whether Mr. Dhuga and Mr. Tiwana were "workers" of a Schedule 1 employer, or whether they were "independent operators" and also whether Mr. Tiwana was a "learner". Mr. Dhuga argues that he was an independent operator, not a worker, or that he was in some other category such as "dependent operator".

[8] Subsection 2(1) of the WSIA defines "independent operator", "learner", "worker" and "employer" and "Schedule 1 employer" for the purposes of the Act. The relevant provisions are as follows.

> "employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about and industry and includes,
>
> …
>
> (b) a person who authorizes or permits a learner to be in or about an industry for the purpose of training or probationary work,…
>
> "independent operator" means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose; …
>
> "learner" means a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of an industry for the purpose of training or probationary work;…
>
> "Schedule 1 employer" means an employer in a class or group of industries included in Schedule 1 but does not include an employer who is a Schedule 2 employer (other than a Schedule 2 employer declared by the Board under section 74 to be deemed a Schedule 1 employer); …
>
> "worker" means a person who has entered into or is employed under a contract of service

or apprenticeship and includes the following:

1. A learner.

2. A student.

[9] WSIA does not make any special provisions for "dependent contractors" or other categories. Under the Act, the question is whether a person was a "worker" or an "independent operator" , as these terms are defined by s. 2.

[10] Section 2 of WSIA defines a worker as a person who has entered into or is employed under a contract of service. As noted by the Vice-Chair in *Decision No. 271/03*:

[11] … a "contract of service is generally considered a contract under which a person agrees to perform tasks as directed by an employer. Conversely, an independent operator is a person who does not operate under "a contract of service". An independent operator is, in general, a person who enters into a "contract for services"- a contract to provide services as specified by the terms of the contract. The test for deciding whether a person is party to a contract of service or to a contract for services has been addressed in a number of Tribunal decisions that have considered the question of a person's status as a worker or an independent operator.

[12] *Decision No. 921/89*, 14 W.C.A.T.R. 207, a leading Tribunal decision, set out 11 factors to be considered in determining whether a person is a worker or an independent contractor. These factors are generally applied by Tribunal decisions in determining this issue. The factors are:

1. ownership of equipment used in the work or 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 risk of loss);
3. business indicia;
4. evidence of co-ordinational control as to "where" and "when" the work is performed;
5. the intention of the parties often evidenced by an agency agreement, employment agreement, contract for service, contract of service or limited term contract;
6. business or government records which reflect upon the status of the parties;
7. the economic or business market;
8. the existence of the same or very similar services supplied 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.

[13] Board *Operational Policy Manual* Document No. 12-01-03 sets out criteria for determining whether a person is a worker or an independent operator. These criteria generally reflect the criteria noted in Tribunal decisions. The Board policy provides in part:

> An " "independent operator" is a person who carries on an industry set out in Schedule 1 of the *Workplace Safety and Insurance Act* (the Act) and who does not employ any workers for that purpose.

Guidelines

General A "contract of service", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a fu1l- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.

Workers - those who work under contracts of service -are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.

A "contract for service", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.

Independent operators –those who work under contracts for service -are not automatically insured or entitled to benefits unless they voluntarily elect to be considered "workers" and apply to the WSIB for their own account and optional insurance. (See: 12-03-02, *Optional Insurance.)* Independent operators may not be insured through the hiring company's (payer's) WSIB account.

The organizational test recognizes features of control,

ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their" own separate business….

[14] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001) 204 DLR (4th) (SCC), Major J. writing for the Supreme Court of Canada discussed the tests for determining whether a person is an employee and an independent contractor and said that "the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account", at paragraphs 46 and following:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations. .." (p. 416). Further, I agree with MacGuigan J.A. in Wiebe Door, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties: "[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose…The most that can profitably be dome is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra.* The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or

> her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[15] Similar principles to those set out in *Sagaz, supra* have been applied by the Tribunal in its decisions to determine whether a person is a worker or an independent contractor for the purposes of the Act. See, for example, *Decision Nos. 805/03*, *1146/02*, *271/03* and *921/89*, *2801/01*, *257/03*, *51/03* and *2224/06*.

[16] Tribunal *Decision No. 2224/06* noted that the flexible and multi-factorial approach to the worker vs. independent contractor issue in Tribunal decisions is consistent with the Supreme Court of Canada's analysis in 671122 Ontario Ltd v. Sagaz Industries Canada Inc. (2001) SCC 59 (Sagaz), as follows:

> [32] The Board provided *Operational Policy Manual* (OPM) Document No. 01-02-03,
>
> "Workers and Independent Operators," which states in part as follows:
>
> To determine if an individual is employed under a contract of service, the decision-maker must identify the work the individual does, and examine the following 3 features of the work relationship between the individual and the hiring firm or purchaser:
>
> 1. The degree of **control** that the individual is subject to in doing the work.
>
> 2. The opportunity that the individual has to make a **profit** or suffer a **loss** in doing the work, and
>
> 3. Other applicable criteria that characterize the work relationship.
>
> The individual, as independent operator, has a business or organization that is separate from and not integrated into the organization or firm with which the individual has a work- or business-relationship.
>
> [32] The policy goes on to outline various factors which are characteristic of workers as compared to independent operators, in areas such as instructions, training, personal service, and so on. The policy emphasizes that no one factor is determinative and decision-makers must consider each factor in reference to all other features of the work relationship.
>
> [33] The Tribunal's decisions in this area also reflect a multifactorial approach to determining whether a person is a worker or an independent operator. …
>
> [36] In the Panel's view, the Tribunal's flexible and multifactorial approach to the issue is consistent with the Supreme Court of Canada decision in *Sagaz*. There is no "magic formula" – the relative weight of each factor must be assessed in view of the particular circumstances of the case. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account.

[17] I agree with the Panel's conclusion in *Decision No. 2224/06* that the Tribunal's flexible and multifactorial approach to determining whether a person is a worker or an independent contractor is consistent with the reasoning in *Sagaz*; that the relative weight of each factor must

be assessed in view of the particular circumstances of the case; and that the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. Applying a multifactorial approach to the circumstances of this case, I conclude that Baltar Dhuga and Shamsher Tiwana were not persons in business on their own account. Each of them was a "worker", not an "independent contractor" of a Schedule 1 employer or employers, as these terms are defined by section 2 of WSIA. My reasons follow.

(iii) Was Baltar Dhuga a worker in the course of his employment for a Schedule 1 employer at the time of the accident?

[18] In determining the nature of Mr. Dhuga's relationship with Ajay, Mr. Mann and Mackie, I find it necessary to assess the credibility of Mr. Dhuga's testimony before me, which frequently contradicted prior testimony in examination under oath and documents. Tribunal decisions frequently cite the judgement of O'Halloran, J.A. of the British Columbia Court of Appeal in *Faryna v. Chorny* , [1952] 2 D.L.R. 354, which has been quoted with approval by the Ontario Court of Appeal in *Re:Phillips et al. v. Ford Motor Co.,. et al.* (1971), 18 D.L.R. (3d) 641, which discusses the principles applicable in assessing the credibility of an interested witness as follows:

> The credibility of interested witnesses, particularly in cases of conflicts of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[19] I find Mr. Dhuga's testimony before me to be unreliable because of its inconsistency, lack of recall about key documents and events, and at times what appeared to be evasiveness in answering questions. His testimony before me internally contradicted itself on some key points, such as whether he claimed business expenses in his tax returns. He denied substantial segments of his prior examination under oath, where this contradicted his current position that he was self-employed at the time of the accident. While Mr. Dhuga testified before me that he had difficulties with the interpreter at his examination under oath, I do not find evidence of this in the transcript. He also denied signing a number of documents, including log sheets and claimed that he signed blank documents or documents that he did not understand routinely. I found these explanations not to be believable and not in keeping with the reasonable probabilities of the

situation. He testified that he was having difficulties with his memory because of the medications he takes as a result of his injuries, and I find that he likely was having memory problems when he testified before me. As a result, where there is a conflict between Mr. Dhuga's testimony before me and prior statements or testimony, or contemporaneous records, I prefer the prior evidence.

[20] I find the most direct and reliable evidence of the nature of Mr. Dhuga's relationship with Ajay to be an employment agreement that he signed on January 5, 2001. That agreement is discussed in detail in the section below on the intention of the parties.

[21] As general background to the relationship among the parties, it is necessary to consider the relationship of Mackie and Ajay, which is shown by an agreement between them. Under the agreement, Ajay provided the truck involved in the May 15, 2001 accident and the drivers for it, which included Mr. Tiwana and Mr. Dhuga. The agreement was signed by Parminder Mann on Ajay's behalf. Mr. Smith testified that this agreement applied at the time of the accident. Ajay was responsible for maintaining and repairing the truck, ensuring that it met Canadian and U.S. Standards, obtaining special permits for haulage and licensing of the truck. Ajay was responsible for hiring drivers as its employees and for paying withholding tax, workers' compensation, unemployment insurance and Canada Pension contributions for its drivers. Ajay was responsible for ensuring that its drivers met Mackie's driver qualification requirements, for maintaining a zero substance abuse policy, for ensuring that its driver obeyed the laws of the highways they drove and for the good conduct of its drivers. Ajay was responsible for any damage to cargo while in transit. Mackie paid Ajay for delivering the loads of Mackie's customers on a mileage basis. Mackie arranged insurance coverage on behalf of Ajay. Mackie charged back to Ajay the costs of the fleet insurance coverage, truck washes and repairs, licensing of Ajay's vehicles and fuel. Ajay paid road tolls. Mackie posted all run bids and load brokering opportunities and awarded work based on the length of the continuous relationship between the Independent Contractor (Ajay and others) and Mackie.

1. Ownership of equipment used in the work or business;

[22] It is an undisputed fact that Mr. Dhuga owned neither the truck nor the trailer involved in the accident. According to a lease agreement filed in the Applicants' section 31 statement, Associates owned the truck and leased it to Ajay. Under the agreement between Mackie and Ajay, Ajay provided the truck with drivers for delivery of loads for Mackie. Mackie owned the trailer. The name of the motor carrier was recorded in the accident report as Mackie Moving Systems Inc. Mackie held the license plate and registration for the truck. Associates held the vehicle permit. Mackie's logo was on the truck and trailer. Mackie supplied a satellite phone that enabled the drivers of the truck to communicate with its dispatchers while en route.

[23] Mr. Dhuga did not have any financial interest or ownership in the truck he drove or the equipment in it. The lack of investment in the equipment weighs in favour of the conclusion that Mr. Dhuga was not in business for himself. ;

2. The form of compensation

[24] Mr. Dhuga testified at the hearing before me and at his examination under oath in the civil action that Mr. Mann paid him a set rate per kilometer for the trips he made on a biweekly

basis. He completed and submitted log sheets to Mackie at the end of each trip. His biweekly pay was calculated from this. Mackie paid Mr. Mann for the loads that were driven by Mr. Dhuga. Mr. Mann in turn paid Mr. Dhuga.

[25] Mr. Dhuga submits that he was paid a commission. This form of compensation does not in itself indicate whether Mr. Dhuga was a worker or an independent operator. However, the fact that the payments were based on Mackie's log sheets as completed by Mr. Dhuga and that Mr. Dhuga did not invoice Mackie, Mr. Mann or Ajay on his own account weighs against an independent business relationship between Mr. Dhuga and Mann/Ajay and Mackie. He was paid a set rate per kilometer for each trip.

3. Business indicia;

[26] Mr. Dhuga's answers about his tax affairs in his testimony before me were vague and evasive. He testified that he claimed business expenses on his tax returns. He then testified that he could not recall, when confronted with his personal tax return, which showed no business deductions and his only employment income in the same amount as Ajay paid him for driving. As a result, I rely on the records made at the time as the most reliable evidence. I find that he filed no business tax return and that his personal tax return does not show any business deductions. He reported receiving "other employment income" in the same amount as the amount Mr. Mann paid him. He did not report any income from self-employment.

[27] Mr. Dhuga did not have a registered business. He did not own any equipment. He did not invoice Mackie, Mann or Ajay. He did not have business cards. He did not have a business address or phone number.

[28] Mr. Dhuga testified that he registered for a GST account because Mr. Mann told him to do so. He did not file a GST return for 2001 until 2004. He testified this was because he could not afford it.

[29] The agreement between Mackie and Ajay indicates that the business was operated by Ajay, who provided transportation services to Mackie and employed Mr. Dhuga as one of its drivers. The agreement between Mr. Dhuga and Ajay indicates an employment relationship, not a business relationship. The chance of profit and risk of loss was Ajay's and Mackie's, not Mr. Dhuga's.

[30] The records do not indicate that Mr. Dhuga was in business for himself at the time of the accident. Except for GST registration, none of the usual indicia of a business are present. I find that the business indicia are insufficient to support a finding that Mr. Dhuga was in business for himself.

4. Evidence of co-ordinational control as to "where" and "when" the work is performed;

[31] According to Mr. Dhuga's examination under oath in the civil action, Mackie provided the instructions as to when, where and how the work was to be done. Mackie provided the schedule of trips indicating where and when to pick up the load and where and when to deliver it. While en route, the drivers were in touch with Mackie through its dispatcher.

[32] In his testimony before me, Mr. Dhuga indicated that he had no contact with Mackie and received his direction through Mann. However, he was in touch by satellite phone with Mackie's dispatcher while en route. As I have noted before, where there is a conflict between Mr. Dhuga's testimony before me and prior statements or records, I prefer the evidence in the business records close in time to the accident. I also prefer Mr. Dhuga's examination under oath, which seemed to be far more forthright and more consistent with what one would have expected to have occurred.

[33] I find that there is strong evidence that the co-ordinational control of the work performed rested with Mackie. Mackie determined the schedules, the routes and the loads to be driven. Mackie decided whether to give a route it posted to Ajay or to another operator (see discussion of Ajay's agreement with Mackie, above). Mackie's dispatcher was in regular contact with Mr. Dhuga and Mr. Tiwana while they were on the road. Mackie owned the log books and based payment to Ajay on them. Mackie required Ajay or its drivers to complete the books and submit them to Mackie along with all papers related to the loads.

[34] I conclude that Mr. Dhuga received his directions from a combination of Mackie and Ajay via Mr. Mann. He had no control over the type of load he drove or the route or the timing of the deliveries.

5. The intention of the parties;

[35] Again, because of the internal contradictions, contradictions with prior evidence and memory difficulties in his testimony before me, I find Mr. Dhuga's testimony before me on the intention of the parties less than reliable. Therefore, where there are conflicts with prior evidence he gave or records made closer to the time of the accident, I prefer the prior evidence and prior records. Mr. Dhuga signed an agreement with Ajay Transport Ltd., represented by Parminder Mann, on January 5, 2001. That agreement referred to the worker as the "Employee" and to Ajay Transport as the "Employer". The agreement indicates an employment relationship, as follows:

> 1. Employment
>
> A The Employer agrees to employ the Employee as DRIVER-SUB-CONTRACT to provide services pursuant to the terms of this Agreement and the Employee agrees to accept such position of employment.
>
> B The Employee agrees to perform such duties and assume such responsibilities as assigned by the Employer from time to time which are customarily associated with a position as DRIVER-SUB –CONTRACT.
>
> C During the term of this Agreement, the Employee undertakes to devote the whole of his or her time, attention, effort and ability as a full-time employee of the Employer and the Employee shall at all times perform the duties and responsibilities associated with such position as an employee.

[36] One of the terms of Ajay's agreement with Mackie was: " 3)b) All drivers employed and supplied by the Independent Contractor are deemed to be employees of the Independent Contractor and not Mackie". This agreement provides that Mackie engaged Ajay as an Independent Contractor to provide drivers to Mackie, and required that the drivers of the trucks supplied to Mackie be the employees of Ajay. Ajay was fully responsible for payment of taxes,

premiums for workers' compensation, employment insurance, CPP, etc for these drivers. Ajay was required to complete the Workers' Compensation Board questionnaire for determining worker/independent operator status in the trucking industry. Ajay was responsible for arranging and maintaining adequate coverage for injuries by accident arising out of and in the course of supplying services, including personal coverage. Ajay was required to provide proof of workers' compensation coverage or personal disability insurance.

[37] Mr. Dhuga's statement to the insurer made on July 12, 2001, two months after the accident, is that "At the time of the accident occurring May 15, 2001, I was employed full time with A.J. Trucking in Brampton Ontario. My position was that of a truck driver."

[38] In his application for Statutory Accident Benefits marked with a "received " stamp dated July 16, 2001, Mr. Dhuga stated that his most recent employer, from January 01 until May 15, was Ajay Transport, Parminder Mann, working as a truck driver from 99 to 100 per week with $1100 take home pay.

[39] On November 12, 2001, Mr. Dhuga made a solemn declaration that he "started working for Mr. Mann on or about January 1, 2001."

[40] Mr. Dhuga initially filed a WSIB claim for his injuries, indicating that he felt his injuries were work-related and that he was a worker in the course of his employment at the time of the accident. In 2004, he withdrew that claim after commencing the civil action that is the subject of this application on May 14, 2003.

[41] At his examination under oath in the civil action, Mr. Dhuga stated that his employer was Mackie, and that he had worked for Mackie since January 2001 as a truck driver.

[42] I conclude that the agreements signed by Ajay with Mackie and with Mr. Dhuga, read together, indicate an intent to create an employment relationship with Mr. Dhuga. His statement to the insurer within months of his accident, the filing of a WSIB claim, and his examination under oath confirm that he was employed full time as a truck driver for A.J. and/or Mackie at the time of the accident.

[43] Mr. Dhuga's testimony to the contrary before me, as I have said before, is not in my view reliable. I prefer the contemporaneous agreements and statements closer to the events in question as the most reliable indicators of the relationship between and among the parties. Those statements and agreements support the conclusion that there was an employment relationship between Mr. Dhuga and Ajay, Mann was acting as Ajay's principle and Mackie.

6. Business or government records which reflect upon the status of the parties;

[44] See the discussion of "business indicia" above. The worker did not register a business. While he had a GST number, he did not file a return for his 2001 earnings until 2004. In 2001, he filed a personal income tax return only. His 2001 income tax return indicates that he had net employment earnings of $9, 933.19, categorized as "other employment income". He did not report any self-employed income or other income. He did not report any business expenses.

[45] He made a claim for workers' compensation as a result of the accident. He did not maintain personal coverage with WSIB, as one might expect if he considered himself to be an independent operator.

[46] He filed a SABS application stating that Ajay Trucking /Parminder Mann was his employer.

[47] These facts support the conclusion that Mr. Dhuga was not in business for himself, and that he was a worker engaged as a truck driver by Ajay, Mann and/or Mackie.

7. The economic or business market;

[48] The agreement between Ajay and Mackie indicates that Ajay was a broker for Mackie, providing trucks and drivers, and that Mr. Dhuga as a driver was Ajay's employee. CLASS E of Schedule 1 to WSIA describes categories of employers in the transportation and storage industry, and includes:

[49] "xii. Business of supplying truck drivers."

[50] This appears to be the business in which Ajay was engaged. It is evident from the inclusion of this category in the schedule that the business of supplying truck drivers is common in the transportation industry. In this industry, it is common for transport firms to engage the services of truckers through a broker.

[51] The status of these truckers will depend upon an analysis of the factors that are discussed in the Tribunals' decisions and Board policy. The Board is sufficiently concerned with the status of truck drivers in the transportation industry that it has developed a checklist of factors to consider in determining, on an objective basis, whether a driver is a worker or an independent operator.

[52] Mr. Bob Smith testified on behalf of Mackie that Mackie hired drivers and also entered into relationships with independent owner/operators, some of whom were brokers such as Mr. Mann. These drivers were paid by the broker who hired them, with the brokers being paid by Mackie for the services rendered by the drivers. This is consistent with Mr. Dhuga's evidence concerning how he was paid.

8. The existence of the same or very similar services supplied to an "employer" by a person or persons who are classified as workers under the Act;

[53] As shown by the Board policy *OPM Document 12-01-03* discussed above, truck drivers may be engaged as employees in the transportation industry or as independent operators. Which category they fall in is determined by weighing the factors discussed previously.

[54] Mackie Moving engaged independent owner/operators and also hired drivers. Mackie paid WSIB insurance premiums and was registered as a Schedule 1 employer. Which status applies depends upon an analysis of the factors considered within this decision.

9. Substitute service;

[55] Mr. Dhuga was not permitted to engage others to drive for him. He testified that if he was sick, he called Mr. Mann. Ajay was responsible as an independent contractor with Mackie to ensure that suitable drivers were available to perform the services contracted. Mr. Smith testified that drivers were not allowed to hire co-drivers.

10. Size of the consideration or payments;

[56] Mr. Dhuga's SABS statement indicated that working 99-100 hours per week, he was able to earn $1100. His pay was a set amount per kilometer, based on the number of trips he made during a pay period.

11. Degree of integration.

[57] Mr. Dhuga's role as a truck driver was at the core of Mackie's business and Ajay's business as transport companies. He performed the essential duties of driving loads from one destination to another for the clients of Mackie. He was fully integrated into both businesses.

[58] In addition, an analysis of the factors contained in Board *OPM Document 12-01-03* indicates that Mr. Dhuga would be considered to be a worker under that policy. I conclude that the degree of control that he had over his work and his chance of profit or loss was minimal. His remuneration was determined as a set rate per kilometre. His routes were determined by Mackie. He did not own the equipment and was not responsible for expenses or losses related to the equipment or the goods he carried. He had no use of the truck apart from driving it for Mackie. He had no business of his own apart from driving Ajay's truck for Mackie. In similar circumstances, the Tribunal has held that the driver of the truck is a worker: see *Decision No. 207/05*.

[59] Considering the evidence as a whole, I find on a balance of probabilities that Mr. Dhuga was a worker of Ajay and/or Mackie when the accident occurred. All of the factors discussed above indicate that Mr. Dhuga was not in business for himself.

(iv) Was Shamsher Tiwana a worker in the course of his employment for a Schedule 1 employer at the time of the accident?

[60] Mr. Tiwana testified that during the two weeks before the accident, he worked exclusively for Mr. Mann. Mr. Mann did not pay him because, in his words, it would be decided after he worked for 2 to 3 weeks whether he would have a job driving for Mr. Mann driving Ajay's trucks or whether he would buy his own truck.

[61] Section 2(1) of WSIA provides that a learner is "a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of an industry for the purpose of undergoing training or probationary work. The definition of "worker" includes "1.A learner". I am satisfied on a balance of probabilities that Mr. Tiwana was a "learner" within the meaning of s. 2 of WSIA at the time of the accident.

[62] The characterization of Mr. Tiwana's relationship with Mr. Mann and Ajay is somewhat different from Mr. Dhuga's. Depending on what evidence I accept, Mr. Tiwana was a learner as

defined by the Act because he was undergoing training or probationary work, or else he was a volunteer who was simply trying out one of Ajay's trucks before deciding whether to go into business for himself or to work for Mr. Mann and Ajay Transport driving their trucks.

[63] Mr. Tiwana's situation was different from Mr. Dhuga's in that he had not been authorized by Mackie to drive and he had not yet been paid by Mann. Because he was not authorized to drive by Mackie, he could not use Mackie's debit card, as Mr. Dhuga did.

[64] In other respects, however, Mr. Tiwana's duties were the same as Mr. Dhuga's. He and Mr. Dhuga were taking turns driving the truck from Ontario to Tennessee to deliver goods on behalf of Mackie and its clients when the accident happened. I am satisfied that Mr. Tiwana was subject to the same hazards of the industry as Mr. Dhuga at the time of the accident.

[65] The fact that Mr. Tiwana drove for two full weeks with Mr. Dhuga on regular Mackie runs before the accident weighs in favour of the intent that this was a learning or probationary period when Mr. Tiwana would learn or "try out" the job of truck driving. The fact that he was not paid does not negate the inference that he was undergoing training or engaged in probationary work during the period from May 1 to 15, 2001.

[66] The documentary evidence is contradictory on the intent of the parties regarding Mr. Tiwana's relationship with Parminder Mann or Ajay Transport and on whether he was to be paid. There were no written agreements between Mr. Tiwana and Mr. Mann, Ajay or Mackie. Mr. Dhuga filed a copy of an affidavit signed by Shamsher Singh Tiwana, and that he wanted to open a business in the trucking field, and that " Parminder Mann offered me a chance to go with another driver to have a look at the business which involved driving to the U.S.A." This is consistent with his testimony before me, that after 2 or 3 weeks he would decide whether to work for Ajay or buy his own truck.

[67] A copy of a further document was submitted, purporting to be a statement by Inderjit Singh Sooch dated September 14, 2001. Mr. Sooch, according to Mr. Dhuga's examination under oath, was Mr. Dhuga's driving partner prior to Mr. Tiwana. The document states that Mr. Sooch brought Mr. Tiwana to Mr. Mann to work for him. The document states further that Mr. Tiwana was tested by Mr. Mann for driving proficiency and was hired by him at $700. per week. Further, that Mr. Tiwana worked for Mr. Mann for two weeks, during which he made six trips as co-driver with Mr. Dhuga and on the seventh trip met with an accident. I find this document is of dubious authenticity and reliability.

[68] Mr. Mann did not testify before me.

[69] Mr. Dhuga stated under oath in his examination for discovery that he first met Mr. Tiwana in the truck on May 1st or May 2nd, 2001. Prior to this, he had driven with Mr. Sooch. He did not know that he was going to have a new driving partner that day. He testified that Mr. Mann had given him the keys to the truck. Mr. Dhuga did not have any conversations with Mr. Tiwana about his relationship with Mr. Mann. On that day, Dhuga and Tiwana started driving from Ontario to Morrison, Tennessee, alternating six-hour shifts. Mr. Tiwana was Mr. Dhuga's driving partner from that day up until the date of the accident, approximately two weeks, from the beginning of May to the 15th. Mr. Dhuga worked full-time

during this period. Mr Dhuga and Mr. Tiwana both punched in the information on the computer that was required by Mackie to be provided to the dispatcher while they were enroute. Tiwana and Dhuga both prepared the trip sheets and log books required by Mackie and the customs forms. They shared the driving equally. They drove three complete runs together before the final run when the accident occurred.

[70] The documents in the case materials and the testimony of Mr. Dhuga do not indicate that Mr. Tiwana was in business for himself. There is no evidence that he had a registered business, that he had clients of his own other than Mann/Ajay and Mackie, that he advertised or had a business address or phone, that he filed business tax returns. He was working full-time for Ajay/Mann and Mackie for two weeks prior to the accident and at the time of the accident. His job duties were essentially identical to those of Mr. Dhuga, who was a worker and he was subject to the same hazards.

[71] Considering the evidence as a whole, I find on a balance of probabilities that Mr. Tiwana was not in business for himself at the time of the accident. He was engaged in probationary work that subjected him to the hazards of the trucking industry. He was a learner and therefore a worker of a Schedule 1 employer, being Ajay or Mackie, at the time of the accident.

(v) Were Mr. Dhuga and Mr. Tiwana workers of a Schedule 1 employer?

[72] The Tribunal has considered cases where an agent or broker for a third party engages the services of a person for the third party. In such circumstances the agent or broker has been held to be the employer of the person whom he contracts to provide the services. In *Decision No. 1097/*05, the agent or broker hired farm labourers to work at a farm, transported them to the farm in the agent's van, and paid them on the farmer's behalf. The Tribunal held that the plaintiff was a worker of the agent.

[73] A Schedule 1 employer is defined as an employer in a class or group of industries included in Schedule 1. In this case, both Mr. Dhuga and Mr. Tiwana were employed by Ajay, represented by Mr. Mann, to drive for Mackie. It is not in dispute Mackie is a Schedule 1 employer operating a transport business. Ajay was in the business of supplying truck drivers , which is found in Schedule 1 , CLASS E- TRANSPORTATION AND STORAGE, item 3.xii and may also have been engaged in carting, teaming and trucking, item 3.i. The fact that Ajay may not have been registered Schedule 1 employers does not bar a determination whether they were in fact Schedule 1 employers: See *Decision 207/05*, *785/91* and *525*.

[74] I conclude that at the time of the accident Mr. Dhuga and Mr. Tiwana were workers in the course of their employment with Ajay and/or Mackie; and that Ajay and Mackie were Schedule 1 employers.

(vi) The status of Citicapital

[75] Citicapital was a Schedule 1 employer, as it was engaged in the business of leasing trucks. Based on the undisputed fact that Citicapital leased the vehicle involved in the accident to Ajay, s. 28(4) would apply. Subsection 28(4) provides that s. 28(1) does not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on

a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

[76] *Decision No. 2652/01* reviewed the Tribunal's decisions interpreting the s. 28(4) exception and concluded that its purpose is to ensure that the protection against suit is directly related to workers who are injured in the course of their employment. An employer that supplies a truck without supplying workers is not within the scope of the historical trade-off that gave rise to workers' compensation legislation. The panel stated in part:

> *Decision No. 309/90* quoted the above passage, then stated its agreement with the Tribunal decisions which hold that a panel must look at the language of the equipment exception in the overall context of the statute and the resulting compensation. However, the Panel did not state that this necessarily results in a "narrow" construction of subsection 28(4). Instead, this means that right to sue applications must be considered in light of the historical trade-off which formed the basis for the legislation and the compensation system which evolved. The significance of the historical trade-off in right to sue applications was also enunciated by the Supreme Court of Canada in Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890.
>
> > [43] In light of this authority, I find that it is important to keep in mind the role of the historical trade-off in considering right to sue applications generally. However, this does not necessarily mandate a "narrow" construction of the exception found in subsection 28(4). Professor Weiler's paper, referred to in Decision No. 503/87, was written for the purpose of the workers' compensation reform which eventually took place in 1990. That paper did not form the basis for any significant amendments to the right to sue provisions of the Workers' Compensation Act. As such, I find that it does not provide much guidance on how the right to sue provisions should be interpreted. Accordingly, I find there is no reason to depart from the general principle of statutory interpretation that the plain meaning of the language ought to be considered before applying other rules of interpretation.
> >
> > [44] In *Decision No. 309/90*, the Panel explained the rationale for the motor vehicle, machinery and equipment exception as follows:
> >
> > The apparent underlying basis for this exception to the subsection 8(9) protection, is an attempt not to involve the compensation system in situations relating only to purchase, lease, or other contractual arrangements concerning property. The legislation is concerned primarily with compensation benefits for injured workers and, unless the equipment is accompanied by a worker who may be injured and thus entitled to benefits under the Act, the employer supplying the equipment is not functioning primarily in its role as an employer of workers for purposes of the compensation legislation. In other words, unless it is also supplying workers to "operate" the equipment, its role for subsection 8(10) purposes is primarily that of a vendor or lessor and not that of an employer of workers who could be injured. This approach is aptly summarized by the Panel in *WCAT Decision No. 725* (Robinson et al v. Clark et al) at page 274 where the Panel stated:
> >
> > What is the rationale of section 8(10)? It draws a distinction between a situation where an employer merely supplies a vehicle and a situation in which that employer also supplies workers. If the employer also supplies workers section 14 and 8(9) apply and the employer is immune from suit for an injury for which benefits are payable under the Act, and he can be relieved of any portion of assessment which is otherwise liable to be charged against him. These things do not apply where the employer is merely supplying machinery. Without the essential element of the supply of a worker, who can be injured under the Act, section 8(9) does not apply. Why would this be? It seems clear that the reason is that the Workers' Compensation Act is a statute which provides for the compensation of injured workers. It does not provide for the resolution of disputes that

> relate only to the supply of equipment or a plan for financing automobiles through leasing. It is not a statute which concerns itself with property damage or questions of negligence in the provision of leased vehicles.

[77] In this case, Citicapital supplied a truck to Mackie on a lease basis without supplying workers to operate it. Therefore subsection 28(4) applies. The result is that the right of action of the Dhugas is not removed against Citicapital, because Citicapital did not supply workers when it leased the truck involved in the accident to Ajay.

[78] *Decision No. 3240/0* discussed the extent of the section 28(4) exemption where the defendants include an Schedule 1 employer who supplied a truck and also an employer of workers who were in the course of their employment at the time of the accident, and concluded that the exemption only applies to the employer who supplied the vehicle without also supplying workers , as follows:

> In reviewing the sequence of events pertaining to this accident, the Panel finds that the leased truck is not part of the chain of causation. Further, while Section 28(4) may exempt the actual supplier of the vehicle, we are satisfied that Section 28(4) does not apply to the hospital employer. Section 28(4) replaces section 10(9) of the pre-1997 Act, which provides:
>
> > 28(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.
>
> [38] It has been established that the effect of the prior section is to preserve the right of action only with respect to the employer who supplied the equipment without also supplying workers to operate it. Any other Schedule 1 employer continues to be protected by the Act. See for example *Decision No. 309/90*. While the wording in section 28(4) is slightly different, the Panel is satisfied that it is clear that the Legislature's intention in this area remains the same.

[79] I agree with the reasoning in *Decision No. 324/00* and *2652/01*. The purpose of s. 28(4) is to ensure that where the right to sue is removed there is a workers' compensation nexus consistent with the historic trade-off between the worker's right to sue and entitlement to benefits under the compensation scheme. The removal of the right to sue applies therefore to employers who had workers in the course of employment at the time of the accident, but not to employers who do not have that essential compensation nexus.

[80] In this case, Citicapital provided the truck that was involved in the accident without supplying drivers. Section 28(4) applies, and as a result, subsection 28(1) does not apply to Citicapital. The right of the Applicants to sue Citicapital is not removed. Section 29 (4) limits Citicapital's liability in the civil action.

(vii) The Tribunal's jurisdiction

[81] The respondent has raised a jurisdictional issue, based upon the fact that the accident happened in Kentucky and not in Ontario. Therefore, he argues that the law of Kentucky applies. If I were to accept this argument, then the result would be that WSIA would not apply and the Tribunal would not have jurisdiction to consider this application.

[82] The respondent relies upon two court decisions to support the argument that this Tribunal has no jurisdiction over this application: *Tolofson v. Jensen; Lucas (litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 (S.C.C.); and *Leonard et al. v. Houle et al.*, (1997) 36 O.R. (3d) 357 (Ont. C.A.). Both of these judgments have concluded that the substantive law that applies is the law of place where the accident occurred (*lex loci delicti*). Both judgments apply to inter-provincial tort litigation. However, the Supreme Court suggested in *Tolofsen* that the same principle would apply to international litigation.

[83] It is not in dispute that Mackie is registered with WSIB as a Schedule 1 employer in Ontario. Mackie's address is in Oshawa, Ontario. Ajay Transport was also located in Ontario and the evidence indicates that Mr. Mann resided in Ontario at the time of the accident. It is also not in dispute that Mr. Dhuga and Mr. Tiwana resided in Ontario at the time of the accident. At the time of the accident, Mr. Tiwana and Mr. Dhuga were driving Mackie's truck from Oshawa, Ontario to Morrison, Tennessee on a regular route. The purpose of the trip was to deliver a load that was picked up in Ontario and delivered to a location in Tennessee. The respondents reside in Ontario and commenced their action in an Ontario court. The respondent Baltar Dhuga initially claimed WSIB benefits for injuries suffered in the accident.

[84] Section 19(4) of WSIA is relevant to the question of the Tribunal's jurisdiction in this application. It provides:

> 19(4) If the accident happens outside of Ontario on a train, an aircraft or a vessel or on a vehicle used to transport passengers or goods, the worker is entitled to benefits under the insurance plan if he or she resides in Ontario and is required to perform his or her employment both in and outside of Ontario.

[85] I conclude that section 19(4) applies in this case. Both Tiwana and Dhuga were workers of a Schedule 1 employer or employers located in Ontario and they themselves resided in Ontario. Their employment with Mackie and/or Ajay required them to drive both in and outside of Ontario. Therefore they were entitled to benefits for an accident occurring in the course of their employment outside of Ontario in accordance with s. 19(4). If they were entitled to benefits and was also entitled to compensation under the laws of Kentucky, then section 20 of WSIA provides that the worker "shall elect whether to receive benefits under the insurance plan or to receive compensation under the laws of the other jurisdiction and shall notify the Board of the option selected."

[86] In this case, there is no evidence that Tiwana or Dhuga have notified the Board of any election to receive compensation under the laws of Kentucky. There is no evidence of any claim or civil action being commenced by Mr. Dhuga or Mr. Tiwana in Kentucky. Mr. Dhuga's actions indicate that he has consistently pursued his civil and statutory rights in Ontario, not in Kentucky. Mr. Tiwana has not indicated any attempt to pursue his civil or statutory rights in Kentucky.

[87] I find that except for the location of the accident, the parties and the relations among the parties have a real and substantial connection to Ontario. WSIA sets out a complete statutory code intended to cover workplace accidents involving Ontario workers and employers regardless of where accidents occur. In these circumstances, cases such as the one before me should be treated as an exception to the *lex loci delicti* rule which applies to civil tort actions. I adopt the

reasons in WSIAT *Decision No. 2273/01* . Therefore, I conclude that the Tribunal has the jurisdiction to consider and decide this application.

(viii) Conclusion

[88] The respondent argued that the significant impact of the decision to remove the right to sue requires a decision on the clearest of evidence. I note that WSIA requires that the merits and justice of the case be considered, which I have done. The accepted standard of proof in cases under WSIA is the balance of probabilities, which I have applied.

[89] Mr. Dhuga's right to claim benefits under WSIA is not foreclosed. He has the right, under subsection 31(4) of WSIA, to file a claim for benefits within six months of this decision.

[90] I conclude that the Tribunal has jurisdiction to consider this application. Shamsher Tiwana and Baltar Dhuga were workers in the course of their employment for a Schedule 1 employer or employers and were entitled to benefits under WSIA for the accident that occurred on May 15, 2001. Therefore, section 28 (1) bars Mr. Dhuga's right of action against his employer and any other Schedule 1 employer, and against his co-workers, subject to the exception under section 28(4).

[91] The right of action of the Dhugas against Mackie Moving Systems Corporation and Shamsher Tiwana is removed. Subsection 27(2) removes Ranjit Dhuga's right of action under section 61 of the *Family Law Act* against Shamsher Tiwana and Mackie Moving Systems.

[92] The respondents' right of action against Citicapital Commercial Leasing Corporation is not removed. Citicapital's liability is limited by section 29 of WSIA.

DISPOSITION

[93] The application is allowed in part. The right of action of the respondents Baltar Dhuga and Ranjit Dhuga is removed against Mackie Moving Systems Corporation and Shamsher Tiwana. The respondents' right of action against Citicapital Leasing Corporation is not removed. Citicapital's liability is limited by section 29 of WSIA.

DATED: November 22, 2007

SIGNED: L. Gehrke