Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1929/09

BEFORE:	R. Nairn: Vice-Chair
HEARINGS:	October 5, 2009 and January 13, 2010 at Windsor Oral
DATE OF DECISION:	May 3, 2010
NEUTRAL CITATION:	2010 ONWSIAT 1042

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicant Pafco:	Ms. J. Griffiths, Lawyer Ms. M. Robin, Lawyer
For the co-applicant Wiet Peeters:	Mr. Frank Del Giudice, Lawyer M. McKillop, Witness
For the respondent Kavenga:	Mr. M. Katzman, Lawyer
For the respondents Alla and Yak:	Mr. E. Michaels, Lawyer (by teleconference)
For the respondent Kafi:	Did not participate
For the respondent Abdalla:	Unrepresented
For the interested party Russell:	Mr. R. Weisser, Lawyer
For the interested party Schatz:	Mr. A. Paul, Lawyer
For the Tribunal Counsel Office:	Ms. S. Adams, Lawyer
Interpreter:	Ms. M. Robertin, Swahili Mr. G. Abdallah, Arabic

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workers' Compensation Act* by the defendants in an action filed in the Ontario Superior Court of Justice as File No. 07-CV-9322.

[2] The following background information is, generally speaking, not contested and I have relied on it in reaching my decision:

- This section 31 application arises out of a motor vehicle accident that occurred on February 4, 2006. One of the vehicles involved in the collision was a 1997 Dodge Caravan being driven by Kamal Abdalla and which was insured by the applicant Pafco Insurance Company ("Pafco"). At the time of the accident, Mr. Abdalla had five passengers in his vehicle, Nadia Fadol Alla ("Alla"), Selwa Yak ("Yak"), Omelhassan Kafi ("Kafi"), Grace Kavenga ("Kavenga") and Ekhlas Saadoun ("Saadoun").
- Information on file suggests that while driving northbound, Mr. Abdalla lost control of his vehicle and veered into the southbound lane, colliding with a vehicle owned by Richard Russell and operated by Rosalyn Russell.
- A third vehicle, owned and operated by Joanne Schatz, was also involved in the accident. Her vehicle was forced off the road because of the collision between the Abdalla and Russell vehicles. Representatives for Russell and Schatz appeared at this hearing as interested parties.
- At the time of the accident, the parties in Mr. Abdalla's van were coming home from having worked at a mushroom farm owned by the co-applicant Wiet Peeters. Work at the mushroom farm had been arranged for these individuals by the Jenien Placement Agency ("Jenien") which was owned and operated by Sawsan Atieh and Adel Issa. As noted in a memo from Ms. Adams dated October 26, 2009 (contained in Post-Hearing Addendum #1) despite several attempts, the Tribunal has been unable to locate either Atieh or Issa.
- As noted in Addendum #1, at the time of the accident, both Jenien and Wiet Peeters were Schedule 1 employers.
- As a result of the motor vehicle accident, Ms. Saadoun sustained fatal injuries. Her surviving dependents have not been named as respondents in this proceeding. As noted in Exhibit #18, the Workplace Safety and Insurance Board (the "Board") granted survivor benefits with the Claims Adjudicator (in Memo #9) indicating:

  > I have reviewed the investigation notes in the claim for the other worker involved in the MVA. Based on the information on file, I am accepting that Mrs. Saadoun was in the course of employment at the time of the accident. Based on the evidence, I feel that the driving arrangements were made by the employer. There is evidence to support that the employees were docked pay for transportation costs.

- As noted in Exhibit #5, the Board concluded, by means of an Appeals Resolution Officer ("ARO") decision of February 3, 2009, that Mr. Abdalla was also in the course of his employment at the time of the accident. The ARO noted in part:

  > Having assessed all the evidence before me, I accept Mr. Abdalla was a worker and was in the course of his employment when involved in the motor vehicle accident on February 4, 2006. *Operational Policy* 12-02-01 defines a worker as:

- a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise.

Mr. Abdalla worked for a temporary agency and worked 12 shifts on a mushroom farm. He was hired by this agency and was paid cash. The temporary agency employer worked alongside the other mushroom pickers at the farm and paid Mr. Abdalla cash. This satisfies a contract of service, supervision and control and remuneration. Therefore, Mr. Abdalla was a worker of a Schedule 1 employer on the day of accident.

I further find that Mr. Abdalla was in the course of his employment on February 4, 2006. Mr. Abdalla was asked by his employer to drive co-workers to and from the worksite. He had performed this activity for the benefit of his employer on three previous occasions. Mr. Abdalla was provided with reimbursement for gas expenses. These facts support Mr. Abdalla was engaged in the performance of a work-related duty and in an activity reasonably incidental to the employment. Therefore, I accept Mr. Abdalla sustained personal injury by accident, arising out of and occurring in the course of employment.

In the course of these proceedings, the applicants stated that as a result of the findings of the ARO, they were no longer seeking a section 31 order with respect to Mr. Abdalla.

- As a result of the motor vehicle accident, Ms. Alla suffered injuries which resulted in the Court declaring her incapable. Ms. Yak was appointed by the Court as her guardian of property and personal care. Ms. Yak is Ms. Alla's daughter. As is evident from a review of Exhibits 7 and 8, while Board claims were established for both Ms. Yak and Ms. Alla, no decision was ever made about whether they were entitled to benefits.
- From a review of Exhibit #9, while a Board claim was established for Mr. Kafi, it was treated as abandoned.
- As noted in Exhibit #6, a Board claim was also established for Ms. Kavenga. In Memo #5 of that claim, the Claims Adjudicator concluded:

  – Accid hx: mva on the way to mushroom farm – entitlement denied: not in the course of employment (may be reviewed) – no bens paid.

- As noted in its section 31 statement (Exhibit #1) each of the respondents has claimed "statutory accident benefits from Pafco as a result of the accident pursuant to the statutory accident benefits schedule, accidents on or after November 1, 1996". Pafco also brings this application in its capacity as statutory third party defendant to any civil actions arising as a result of the same accident. The co-applicant in this matter is Wiet Peeters.
- As confirmed in Post-Hearing Addendum #1, following the first day of hearing on October 5, 2009, the parties agreed to the following findings of fact
  - Mr. Abdalla (the driver of one of the vehicles involved in the collision) was a worker of the Schedule 1 employer Jenien Placement Agency and at the time of the accident, was in the course of his employment.
  - If Ms. Kavenga was a "worker" at the time of the motor vehicle accident, she was a worker of a Jenien Placement Agency.
  - At the time of the accident, Ms. Kavenga was a passenger in a vehicle being driven by Mr. Abdalla.
  - Ms. Kavenga had $5 deducted from her wages to pay for travel.
  - Ms. Kavenga never paid money directly to Mr. Abdalla.

(ii) Issues to be determined

[3] The issue to be determined in this case is whether, pursuant to section 31 of the *Workplace Safety and Insurance Act*, the rights of action of Kavenga, Alla, Yak and Kafi have been taken away.

(iii) The testimony of the respondent Kavenga

[4] In her testimony, Ms. Kavenga, born in 1966, confirmed that she came to Canada from Tanzania in approximately 2003. In approximately January 2006 she started working for the Wiet Peeters mushroom farm near Chatham, Ontario. She had been told about the job by a friend.

[5] Ms. Kavenga was a mushroom picker at the farm and was required to place the mushrooms she picked onto trays. She was paid 80 cents for each tray she filled.

[6] Ms. Kavenga, who lived in Windsor, had her transportation to the mushroom farm arranged by Sawsan of the Jenien Placement Agency. She paid $5 a day for this transportation. At the time of the accident on February 4, 2006, Ms. Kavenga and some co-workers were on their way home from the mushroom farm in a van being driven by Mr. Abdalla. As a result of the accident, Ms. Kavenga broke both her legs and some ribs and experienced pain in her lower back, hip and chest. She was four months pregnant at the time of the accident and was admitted to hospital. She estimated she has been operated upon on six occasions since the accident and has more treatment forthcoming.

[7] Under questioning from Ms. Robin, Ms. Kavenga confirmed that she started working at the mushroom farm on approximately January 17, 2006. It was Sawsan who told her she had a job at the farm and who indicated she would be paid 80 cents a tray of mushrooms. There was no negotiation about the rate to be paid. Ms. Kavenga estimated that she worked at the farm for about 17 to 20 days prior to the accident.

[8] Ms. Kavenga described her duties and indicated she would take the mushrooms, cut them and place them into cups/trays. While the cups were provided by the farm, she supplied her own knife and gloves. No specific training was provided. She learned how to do the job by watching others. There was no specific schedule for work. She would call Sawsan the day before and would be advised whether there was work the following day. If there was, she had to be ready to be picked up by 5 a.m. the next morning.

[9] Both the schedule and the transportation were arranged by Sawsan. Ms. Kavenga described Sawsan as the "boss" who worked alongside with the others. Each day, Sawsan would direct Kavenga and the others to the appropriate jobs. When the trays were filled with mushrooms, she would bring them to Sawsan who would count them and determine how much she was going to be paid. Sawsan would keep a record of the number of trays filled and about every 12 days, they would be paid cash.

[10] Ms. Kavenga confirmed that she did not have any business expenses and no business name. She did not have a car and got rides to work arranged by Sawsan.

[11] On the day of the accident, she was being driven home by Mr. Abdalla. Normally, he would drop each of the other passengers off at their homes. She was the last one to be dropped off. At the time of the accident, no one had been dropped off at home.

[12] Ms. Kavenga confirmed that Sawsan would deduct $5 per trip directly from her pay. She did not known how Sawsan was paid. According to Ms. Kavenga, after the accident, both Issa and Sawsan came and asked her to lie by saying she wasn't working at the farm.

[13] Under questioning from Ms. Griffiths, Ms. Kavenga confirmed that on her first day at work, she brought her own knife and gloves. When they arrived at work, it would normally take 10 or 20 minutes for Sawsan to tell everyone where they were to go. They would continue working until all of the mushrooms had been picked. Normally, all of Sawsan's workers would finish at the same time.

[14] Under questioning from Mr. Del Giudice, Ms. Kavenga confirmed that she only worked at the one mushroom farm. It was her opinion that she worked for Sawsan. She didn't pick mushrooms everyday however, and might occasionally babysit for her sister if asked.

[15] Under questioning from Mr. Michaels, Ms. Kavenga confirmed that she knew Alla and Yak and that they worked with her at the farm. They were in the van with her at the time of the accident. She could not recall whether they all actually worked together but she remembered them riding home together. She did not know whether Alla and Yak paid for their ride or whether they were paid the same 80 cents a basket.

(iv) The testimony of M. McKillop

[16] Under questioning from Mr. Del Giudice, Ms. McKillop advised that in 2006 she was the controller for Wiet Peeters. In this capacity, she dealt with the WSIB claims of this family owned mushroom farm.

[17] Ms. McKillop confirmed that in addition to having some of their own employees, Wiet Peeters used agencies to hire individuals for harvesting. Jenien was one of these agencies.

[18] Referring to documentation contained in Exhibit #4, Ms. McKillop confirmed that a "contract for supply of mushroom harvesters" was signed between Wiet Peeters and Sawsan and Issa. Ms. McKillop was a witness to this particular agreement. The contract required that Jenien provide the necessary training and supervision of the harvesters it hired.

[19] According to Ms. McKillop, there were six groups involved in the harvesting. One group consisted of Wiet Peeters employees, while the other five were hired by different agencies. Each of the agencies was responsible for notifying their own workers about when to appear at the farm.

[20] Wiet Peeters would pay the agency $1.25 for each tray of mushrooms picked. Each of the agencies were responsible for making their own determination about how much they would pay per tray and they were responsible to handle their own payroll and various remittances. The agency would submit an invoice to Wiet Peeters every month.

[21] Each of the agencies was responsible for providing a WSIB clearance certificate every 60 days. This was to confirm that each of the agencies was responsible for their own WSIB coverage. Referring to information contained in Exhibit #1, Ms. McKillop confirmed that there was a valid clearance certificate in place for Jenien at the time of the accident on February 4, 2006.

[22] Ms. McKillop indicated that in October 2007, Wiet Peeters ended its ties with Jenien. They continued to use their services between the time of the motor vehicle accident and October 2007 however.

[23] Under questioning from Ms. Griffiths, Ms. McKillop confirmed that the only job performed by the agency workers was that of harvesting. Sawsan was responsible for the quality control of her workers as well as the transportation to and from the worksite. Ms. McKillop also confirmed that the mushroom farm was "out in the boonies" and was not accessible by public transportation.

[24] Under questioning from Mr. Michaels, Ms. McKillop acknowledged that Wiet Peeters did not care how the harvesters got to work.

[25] Ms. McKillop advised Mr. Katzman that Wiet Peeters had about 10 harvesters of their own and no transportation costs were paid for these employees. They were paid on a rate of $1.00 a carton. Wiet Peeters would make various deductions from the pay of their own employees including CPP, WSIB and EI.

[26] Ms. McKillop advised that Wiet Peeters had no interest in the relationship between the agencies and their workers. Jenien was responsible for the attendance of its own employees. It was expected that all of the harvesters would start around 7 a.m.

[27] Under questioning from Mr. Del Giudice, Ms. McKillop submitted that in her opinion, Ms. Kavenga was not an employee of Wiet Peeters.

(v) Analysis

[28] As noted earlier in this decision, there are a number of facts which are not in dispute in this case. These include:

- At the time of the motor vehicle accident, both Wiet Peeters and Jenien were Schedule 1 employers.
- Mr. Abdalla, who was driving the van, was an employee of Jenien and in the course of his employment.
- Ms. Saadoun, one of the passengers in the van and who was fatally injured in the accident, was determined to be a worker of Jenien and in the course of her employment.
- It has been agreed that if Ms. Kavenga is determined to be a "worker", then she was a worker of Jenien at the time of the accident.

[29] Given the facts agreed to, in order for this application to be successful, it must be established both that the respondents were "workers" at the time of the accident and they were in the course of their employment.

(a) Were the respondents in the course of their employment

[30] Although there is no legal requirement to apply Board policy in a right to sue application, I find it useful to consider Board policy and relevant Tribunal case law. *Operational Policy Manual* Document No. 15-03-05 entitled "Travelling" provides in part:

> **Policy**
>
> As a general rule, a worker is considered to be in the course of the employment when the person reaches the employer's premises or place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work.
>
> **Guidelines**
>
> [...]

Proceeding to and from work

The worker is considered to be "in the course of employment" when the conditions of the employment require a worker to drive a vehicle to and from work for the purpose of that employment, except when a distinct departure on a personal errand takes place enroute.

"In the course of employment" also extends to the worker while going to and from work in a conveyance under the control and supervision of the employer.

[31] As the above-mentioned policy makes clear, the general proposition is that workers are not covered for WSIB purposes while they are travelling to and from a workplace. Generally speaking, coverage begins once the worker arrives at the worksite and the coverage ends once he or she leaves. That being said however, there is an exception to this general premise which covers situations when a worker is travelling to and from work "in a conveyance under the control and supervision of the employer".

[32] With respect to the issue of the transportation arrangements in this case, I find as follows:

- The mushroom farm was about an hour drive away from where the various respondents lived.
- As noted by Ms. McKillop, the mushroom farm was in a sufficiently remote location that it could not be reached by public transportation.
- While some of the respondents may have had a driver's licence, none had their own vehicles and therefore needed assistance with transportation to get to the workplace.
- Jenien organized the pick up of the workers and the transportation. As Ms. Kavenga noted in her testimony, she was told to be ready to be picked up at 5 a.m. on the days which she was scheduled to work. This was consistent with Ms. McKillop's testimony that the harvesters were expected to be onsite by about 7 a.m. each day.
- In a voluntary statement provided on March 2, 2006, Mr. Abdalla confirmed that he was paid extra by Jenien to cover his gas expenses for taking various workers to and from the workplace.
- The contract between Wiet Peeters and Jenien provided that the latter was responsible, among other things, for "transportation and all related expenses to travel to Peeters' Mushroom Farm located in Charring Cross".
- Ms. Kavenga had $5 deducted from her pay to cover the daily trips to and from work.
- There is no evidence to suggest that any of the respondents were paid for the time they spent in the van travelling to and from work. The respondents' pay was determined solely on the basis of the number of mushrooms picked.

[33] A number of Tribunal decisions have considered fact situations where individuals were injured while travelling to and from work. For example, in *Decision No. 789/91* a Panel was faced with a situation where the plaintiff was a passenger in a motor vehicle being driven by the defendant. The plaintiff, defendant and other passengers were all members of the same work crew for the employer. The defendant drove them all to work in a carpool arrangement. The plaintiff paid $10 per week to the defendant for transportation. The plaintiff was not paid for the travel time.

[34] In *Decision No. 789/91*, the Panel noted in part:

The Panel was referred to a number of previous Tribunal decisions. One of those decisions seems, in our view, to summarize comprehensively the approach taken in most of the Tribunal's prior decisions dealing with situations similar to the one before us in this appeal. Decision No. 217/88 (May 13, 1988), summarized what we see as the test to be applied in a case such as this. At pages 5-6 of the decision, the Panel stated as follows:

> In deciding whether a worker's activity is sufficiently connected to his or her employment to be "in the course of employment" within the meaning of section 8(9), Tribunal panels have viewed the concept of employment broadly. It has not, for example, been necessary to show that the worker was actually performing work at the time of the injury or that the work occurred during working hours, or that the worker had a contractual obligation to perform the activity he or she was performing.
>
> However, although a broad concept of 'employment' has been applied, Tribunal decisions have applied the general rule that a worker who is travelling to or from the workplace is not in the course of his or her employment.
>
> In the usual case of a worker travelling to and from work the only fact which connects the travel activity with the employment is the fact that the objective of the travel is to get to work or home from work. The 'general rule' has been applied because the mere fact a person is travelling in order to get to work is seen to be insufficiently related to employment to be "in the course of employment".
>
> This general rule is subject to a number of exceptions which have developed in cases where the facts are such that there is a stronger employment connection than usually exists with employees travelling to and from work. Panels therefore consider all the facts of each case to determine whether or not, on the facts of the case before them, the travel to or from work was sufficiently employment-related to be "in the course of employment".
>
> The following are some broad criteria which can be used in balancing the employment and the non-employment aspects of the activity:
>
> - whether the injury occurred on the premises of the employer;
> - whether it occurred in the process of doing something for the benefit of the employer;
> - whether it occurred in the course of action taken in response to instructions from the employer;
> - whether it occurred in the course of using equipment or materials supplied by the employer;
> - whether it occurred in the course of receiving payment or other consideration from the employer;
> - whether the risk to which the employee was exposed was the same as the risk to which he is exposed in the normal course of production;
> - whether the injury occurred during a time period for which the employee was being paid;
> - whether the injury was caused by some activity of the employer or of a fellow employer.

The Panel also found the following excerpt from Decision No. 674/89 (March 1, 1990), to be helpful:

> The words "course of employment" denote a broad and general view of the worker's connection with employment over a time period. The phrase is intended, in our view, to address the status of the worker at the relevant time. It is not specific to individual actions of the worker which gave rise to the accident, but seeks to determine whether the worker retains the status characterized by certain indicia of the employment relationship such as remuneration, other benefits, the requirement to follow instructions and rules from an employer, and the completion of certain employment-related tasks, either directly or indirectly. These words are intended to define that period when an individual's life is most significantly connected with employment. A determination respecting this status can best be made by a review of the facts to determine whether the worker's activities in general give rise to a significant connection with employment.

[35] In *Decision No. 789/91*, the Panel concluded that the parties were not in the course of their employment at the time of the accident. The Panel noted:

> As was indicated in Decisions No. 217/88 and 674/89 there are a number of other criteria that must be weighed in addition to that of whether there is a benefit to the employer. Those other criteria, broadly speaking, look to whether the worker has yet taken on the status of an employee or whether the employer has yet exerted control over the worker. In our opinion, neither of those can be said to have occurred in the present case.
>
> As we see the car-pool arrangement, the focus was not on work but on getting to work. Whatever rights and obligations flowed from that arrangement turn on that exclusive purpose. Whatever control Mr. Aurelio exercised over the members of the car-pool arose out of his status as the car-pool operator and not out of whatever status he had at work. In our opinion, it cannot be said that the hand of the employer can be seen in the car-pool arrangement or that the employer intended to exert any authority over the members of the car-pool as they travelled to and from work. It is noteworthy that, although not in itself of prime importance in our determination, the workers themselves testified that they did not perceive any involvement on the part of the employer in the arrangement. As regards Mr. Aurelio's decision not to take Mr. Simoes to the hospital as Mr. Simoes requested, in our view that was a decision made by Mr. Aurelio as the car-pool operator rather than a decision made by Mr. Aurelio as the worker's crew leader at work. In fact, it appears to us, that Mr. Aurelio's objective in taking Mr. Simoes to work was to bring the members of the crew under the umbrella of someone who was in a position of authority and could authorize the necessary time off for medical treatment.
>
> In our review of other possible indicia of employment status in this case, we could find nothing in the circumstances surrounding the accident that would warrant a conclusion that Mr. Simoes had yet taken on the status of an employee. Mr. Simoes paid Mr. Aurelio $10.00/week for transportation to and from work. This was, in our view, a private arrangement outside the scope of the worker's employment. During his travel to work, he was not being remunerated in any way. In fact, he was paying someone, pursuant to a private, contractual arrangement, to transport him to work. He was not involved in a course of action taken in response to instructions from the employer. He was not using equipment or material supplied by the employer, nor did his injury occur on or near premises that could in any way be construed as belonging to the employer. The only obligation to the employer that Mr. Simoes was under at the time of his accident was to get to work. In our view, there was nothing in the car-pool arrangement that significantly enhanced that obligation to the point where Mr. Simoes can be said to have entered the course of his employment.

[36] In Tribunal *Decision No. 33/93*, the issue was whether the plaintiffs were in the course of their employment at the time of a motor vehicle accident. The action was brought by the passengers in a carpool van against the driver/coordinator of the carpool van, the car company that employed the driver/coordinator and the passengers, the driver of the other vehicle and the owner of the other vehicle. In that case, the Panel concluded that the plaintiff passengers were in the course of their employment while in the van. In so doing, the Panel concluded:

In the Panel's opinion, this is a case where the general rule against finding a commuting worker to be in the course of his employment does not apply. In our opinion, the commuting workers in this case were in the course of their employment when they were in the van in which they travelled to work.

The simple reason for our conclusion is that the van pool in which the Respondents participated was so completely controlled and supervised by their employer that the status of worker was conferred upon them when they entered the van that took them to work.

Mr. Krkachovski suggested to us that the arrangement was essentially benefit neutral. That is, it was not intended to be an arrangement that was mutually beneficial to the employer and the worker. However, as we see the arrangement, the mutual benefits are obvious. From the worker's point of view, there was a substantial financial advantage. All of the workers reduced their commuting costs, and some of the workers - those who were picked up at their homes - did not have to use their own vehicles at all for commuting. The company, on the other hand, gained the advantages noted above in the Ford circular, advantages which enhance its image as a corporate citizen and benefit its labour relations position. Moreover, as was indicated in testimony, the van pool arrangement helped to reduce tardiness and relieved some of the congestion in the plant parking lot.

Hence, we see the program as something which was of benefit both to the employer and the worker. We view the benefit to the worker as something less than compensation but nonetheless a benefit.

However, in the end, the crucial factor, in our view, is the company's control over the program. We note again the excerpt above from the general information circular posted at the St. Thomas plant when the program was initiated. The description of the program describes the program as a "Ford van pooling program" available to employees who "meet company requirements". The description notes that the vans to be used in the program are "company-owned" and that the passengers must pay fixed fares.

Moreover, the contractual arrangements made with the selected driver/ co-ordinators, whose role could be terminated by Ford at will, marked those individuals as agents of Ford in the operation of the van pool program.

The effect of this arrangement was to create a situation in which the passengers in the van were not subject to the usual risks of highway transportation but rather were subject to risks attendant on riding in a company-owned van driven by a company-approved driver who drove that van pursuant to a detailed agreement with the company.

This was not a car pool arrangement in which the car pool operator exercised authority over the car pool based solely on his status as driver of the vehicle. In Decision No. 789/91 (cited above), the Panel concluded:

In our opinion, it cannot be said that the hand of the employer can be seen in the car pool arrangement or that the employer intended to exert any authority over the members of the car pool as they travelled to and from work.

In the present case, the facts dictate just the opposite conclusion. In our opinion, the hand of the employer can be seen quite distinctly in the van pool arrangement and it is clear to us that the employer intended to exert authority over the way in which the van pool program operated.

The decision most forcefully cited by Mr. Krkachovski, Decision No. 808/92, is distinguishable from the present case. In that case, the travel arrangements were informal and not marked by rules, contracts, reporting forms, and provision, on an ongoing basis, of a company owned vehicle. In our opinion, these distinctions are crucial.

In summary then, we conclude that the employment aspects of the van pool program were such that the workers who participated in that program were in the course of employment while passengers in a company van. Hence, the Respondents in this case,

> who were injured in an accident while passengers in the company's van, were in the course of their employment at the time of the happening of that accident. As a result, their right to take legal action against the Applicants is barred.

[37] Reviewing the Tribunal case law, in conjunction with the Board policy, it becomes apparent that while workers normally are not covered for WSIB purposes while they are travelling to and from work, there can be situations where coverage will be extended when workers are injured while travelling in this sort of carpool arrangement. As the case law suggests, a significant factor to be assessed in determining whether or not one was in the course of one's employment involves the degree of control exercised by the employer over the transportation arrangements. For example, in *Decision No. 789/91*, the Panel had determined that given the facts of that case, it could not be said that "the hand of the employer can be seen in the carpool arrangement". In that case, the Panel decided that the carpooling arrangements were more in the nature of a private agreement between the parties.

[38] After considering all of the information before me, I am satisfied that the facts of this case more closely resemble those in *Decision No. 33/93* leading me to a conclusion that the workers were in the course of their employment at the time of the accident.

[39] While it is true that the respondents were not paid for their time spent in the van, I am satisfied, like the Panel in *Decision No. 33/93,* that "the van pool in which the respondents participated was so completely controlled and supervised by their employer that the status of worker was conferred upon them when they entered the van that took them to work".

[40] Like the fact situation in *Decision No. 33/93*, there was a benefit to both the workers and employers in using this transportation. Jenien and Wiet Peeters had the advantage of having harvesters appear at work on time and the respondents, not only had their commuting costs reduced (since they were picked up at their homes), but without this particular assistance, it is apparent that they would likely have been unable to get to work at all.

[41] The employer's control can also be seen in this situation in the fact that the driver, Mr. Abdalla, was compensated by them for picking up these passengers and the respondents had an amount deducted from their pay to cover the costs of transportation. In my view, unlike *Decision No. 789/91*, this was not a situation where the transportation arrangement was merely a private agreement between Mr. Abdalla and the respondents. Rather, the balance of evidence satisfies me that this particular transportation arrangement was something over which the employer, Jenien, exercised control.

[42] In summary, I am satisfied that the employment aspects of this transportation arrangement were such that the individuals who participated in it were in the course of their employment while passengers in Mr. Abdalla's van.

[43] For the sake of completeness, I would note that of all the respondents, only Ms. Kavenga provided oral testimony at the hearing. While Mr. Michaels participated in the hearing, he elected not to have his clients Ms. Yak and Ms. Alla provide testimony. Mr. Kafi elected not to participate. In light of the above, I am satisfied that the relationship Ms. Kavenga had with Jenien and Wiet Peeters was, more likely than not, largely identical to those of the other respondents.

(b) Were the respondents "workers"

[44] Section 2 of the *Workplace Safety and Insurance Act, 1997* (the "Act") defines a "worker" as:

"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.
3. An auxiliary member of a police force.
4. A member of a volunteer ambulance brigade.
5. A member of a municipal volunteer fire brigade whose membership has been approved by the chief of the fire department or by a person authorized to do so by the entity responsible for the brigade.
6. A person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so.
7. A person who assists in a search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police.
8. A person who assists in connection with an emergency that has been declared by the Lieutenant Governor in Council or the Premier under section 7.0.1 of the *Emergency Management and Civil Protection Act* or by the head of council of a municipality under section 4 of that Act.
9. A person deemed to be a worker of an employer by a direction or order of the Board.
10. A person deemed to be a worker under section 12.

[45] *Operational Policy Manual* Document No. 12-02-01 entitled "Workers and Independent Operators" provides in part:

Policy

The WSIB uses questionnaires (a general questionnaire and six industry-specific questionnaires), to gather information to help determine if a person is employed under a "contract of service." The questionnaires reflect the principles of the organizational test (see below). Persons employed under a contract of service are workers. Independent operators are not employed under a contract of service.

The WSIB has the authority to determine who is a worker or an independent operator under the *Workplace Safety and Insurance Act.*

General

A "**contract of service**", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- 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. [...]

Organizational test

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.

[46] The policy continues on to list a number of "characteristics" which will be considered in making a determination as to whether an individual is a worker or an independent operator. Those characteristics include "instructions, training/supervision, personal service, hours of work, full time work, order or sequence of work, method of payment, licenses, serving the public, status with other government agencies, risk of profit or loss, continuing need for the type of service, hiring/supervising/paying assistants, doing work on purchasers premises, oral and written reports, right to severe relationship, working for more than one firm at a time".

[47] Having had the opportunity to consider all of the information before me, I am satisfied that on balance, the evidence supports a conclusion that the respondents were "workers" at the time of their accident. In reaching that conclusion, I have taken particular note of the following:

- While not determinative, it is worth nothing that the WSIB has concluded that both Mr. Abdalla and Ms. Saadoun were workers in the course of their employment at the time of this accident.
- Jenien provided the respondents with directions on when they were to report for work. Jenien was responsible for training the respondents on how to perform their jobs.
- The respondents were expected to arrive at the worksite at about 7 a.m. each morning and were instructed by Jenien to be ready to be picked up at 5 a.m.
- Workers were not, generally speaking, free to come and go from the worksite as they pleased. They would stay until the work was done.
- The rate of pay, 80 cents per tray, was established by Jenien. There was no negotiation about this rate of pay. Jenien determined both the amount and manner of payment.
- There is no evidence to suggest that any of the respondents were considered to be self-employed individuals with the Canada Revenue Agency.
- While Ms. Kavenga noted that she also worked as a babysitter for her sister, I am satisfied that this was only done occasionally and was not sufficient to characterize her as an independent operator.
- The respondents were paid 80 cents for each tray of mushrooms they filled. They had no other risks of suffering a loss or chances of making additional profit.
- The respondents did not invoice Jenien for their services. They were paid every 10 to 12 days. The transportation costs were deducted directly from their pay.
- The respondents rendered their services personally. There is no evidence to suggest that they could have hired someone to appear in their places.
- The tasks performed by the harvesters were done in a certain sequence and these sequences were determined by Wiet Peeters and Jenien.
- The respondents worked for only one farm.

- The respondents' work would be quality checked and counted before they would be paid. The harvesting duties were an integral part of the mushroom farming business.

[48] In summary, after reviewing all of the evidence provided and the submissions of the parties, I am satisfied that on balance, it supports a conclusion that the respondents, at the time of their motor vehicle accident, were employed under a "contract of service". As *Operational Policy Manual* Document No. 12-02-01 suggests, this was a relationship where the employer had the right "to control what work was performed, where, when and how the work is to be performed".

[49] As noted above, the parties have agreed that if it were determined that the respondents were workers, then they would be deemed to be workers of Jenien. While I am not bound by any agreement the parties may reach, I am satisfied that there is sufficient evidence on file to support such a conclusion. That evidence includes:

- In her testimony, Ms. Kavenga suggested that in her opinion, she was employed by Jenien.
- It was Jenien who told the respondents when, where and how they were going to work.
- Jenien was responsible for paying the harvesters.
- Jenien arranged the transportation to the worksite.
- Jenien had provided Wiet Peeters with a WSIB clearance certificate which was effective on the day of accident.
- As the contract between Wiet Peeters and Jenien makes clear, the latter was responsible for hiring, supervising, quality control, personnel problems, training, tracking of hours, all employer remittances, transportation, all related reporting and all personal files.

[50] In light of the above, I am satisfied that at the time of their accident, the respondents were workers for the Schedule 1 employer, Jenien.

DISPOSITION

[51] The application is allowed.

[52] The rights of action of the respondents Kavenga, Kafi, Alla and Yak are taken away. The respondents were workers in the course of their employment at the time of the February 4, 2006, motor vehicle accident.

[53] Pursuant to section 29(4) of the Act, no damages, contribution or indemnity for the portion of the loss or damage caused by the fault or negligence of the parties who are found by this decision to be covered under the Act, is recoverable in an action.

DATED: May 3, 2010

SIGNED: R. Nairn