Workplace Safety and Insurance Appeals Tribunal

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Ontario

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CONFIDENTIAL

Distribution List:
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Mr. Chad M. Leddy
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WSIB

Decision No.:	**2177 18**
WSIAT #:	**2016-0001751**
WSIB File No.:	**27063242, 27057497, 27004023**
Case Name:	**Economical ats Delanty, J.**

Enclosed please find a decision made by the **Workplace Safety & Insurance Appeals Tribunal (WSIAT)** in this case.

A copy of this decision was also sent to the Workplace Safety & Insurance Board (WSIB) so that the WSIB can place the decision in the appropriate WSIB case file and if applicable, take the necessary steps to implement the decision.

Please note that if the decision requires the WSIB to take action, it may take at least one month for the WSIB to process the decision before implementing the Tribunal order(s). The WSIB may require additional information from you and if so, they will contact you directly.

If you have any questions concerning the implementation of this decision by the WSIB, please contact the WSIB officer or department handling the case file. You may contact the WSIB at 416-344-1000; toll-free within Ontario 1-800-387-0750 or TTY: 1-800-387-0050.

If the decision requires further action by the Tribunal (WSIAT) to process the case, a representative of the Tribunal (WSIAT) will contact you.

Yours truly,

Workplace Safety & Insurance Appeals Tribunal

This decision contains confidential information. It does not name the worker. Do not reveal the identity of the worker to anyone, either inside or outside your organization, except to people who need to know it for workplace purposes.

Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2177/18

BEFORE: R. Nairn: Vice-Chair

HEARING: June 5, 2019 at Ottawa
Oral
Post-hearing activity completed on February 6, 2020

DATE OF DECISION: March 17, 2020

NEUTRAL CITATION: 2020 ONWSIAT 605

APPLICATION FOR ORDER UNDER SECTION 31 OF THE *WORKPLACE SAFETY AND INSURANCE ACT, 1997*

APPEARANCES:

For the applicant - Economical: Ms. J. Griffiths, Lawyer

For the co-applicants – H. Ltd. and S.H. : Ms. M. Buccella/Mr. C. Leddy, Lawyers

For the Tribunal Counsel Office: Ms. K. Seyler, Lawyer

For the respondents – J.D. and K.R.: Self-represented

Interpreter: Not applicable

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* (the "WSIA") by the defendants in an action filed in the Ontario Superior Court of Justice as Court File No. 16-69227. The co-applicant in this application is the Economical Insurance Company ("Economical"), against whom the respondent J.D. has commenced a claim for Statutory Accident Benefits ("SABs").

(ii) Issues

[2] The issue in this application is whether the right of action of J.D. (and those of K.R. her mother) are taken away pursuant to section 31 of the WSIA and whether J.D. is entitled to claim benefits under the WSIA.

(iii) Background

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

- The respondent, J.D., worked as a mover and packer at the time of the events under consideration here.
- The respondent K.R. is J.D.'s mother.
- J.D. had her own company ("J Moving"), a sole proprietorship. Information provided by the WSIB and included in Addendum No. 1 indicates that at the time of the accident on July 8, 2014, J Moving was an active Schedule 1 employer.
- At the time of the accident on July 8, 2014, J.D. was performing residential packing services for another moving company – A. Ltd. J.D. was being assisted in that packing job by her sister, P.D.
- Information contained in Addendum No. 1 indicates that A. Ltd. is an active Schedule 1 employer with a coverage start date of April 10, 2000.
- To assist with the performance of her duties, J.D. had rented a cargo van from P. Ltd. J.D. signed the rental agreement but the costs were paid through a corporate account of A. Ltd.
- J.D. and P.D. arrived at the residence to commence their packing job at about 9:00 a.m. on July 8, 2014. Around 11:00 a.m., with the job not yet completed, they were standing near their van (which was parked on the street in front of their work location) when it was struck by a truck driven by S.H.. Both J.D. and P.D. sustained injuries as a result of the collision.
- The vehicle being driven by S.H. was owned by H. Ltd.. Information contained in Addendum No. 1 indicates that H. Ltd. is an active Schedule 1 employer with a coverage start date of April 20, 2001.
- A claim was established with the WSIB for J.D.

- Subsequently, in addition to commencing a claim for SABs from the applicant Economical, J.D. commenced an action for damages in the Ontario Superior Court of Justice (Court File No. 16-69227) against S.H. and H. Ltd..
- Economical, along with S.H. and H. Ltd., then commenced this section 31 application, requesting an order that the rights of action of J.D and K.R. are taken away and that J.D. is entitled to claim benefits under the WSIA.

(iv) The testimony of J.D.

[4] Under questioning from Ms. Seyler, J.D. testified that she recalled the events of July 8, 2014. She testified that she had come out of the house where she was working and walked to the cargo van that was parked on the street. She testified that after opening the back door to the van, the front of the van was struck by another vehicle and she was dragged backwards below the van.

[5] J.D. testified she was at that location that day to perform a packing job, along with her sister. She testified that she was working that day for A. Ltd. and had obtained this job through a contract with them.

[6] J.D. confirmed that on or about August 13, she (on behalf of her company J Moving) had signed a "Driving Contractor's Agreement" with A. Ltd.. J.D. testified that pursuant to this contract, A. Ltd. paid her a lump sum and then she, in turn, was responsible for paying most of her expenses. These expenses included paying for the necessary packing supplies and anyone she wished to hire to help. She was also responsible for any damage that might occur while she was working.

[7] J.D. testified that she was paid by A. Ltd. on the first and 15th of each month. She testified that once she finished her packing services, the customer would sign a bill, which she would then forward to A. Ltd. The paper which the customer signed had A. Ltd.'s name on it.

[8] J.D. testified that while she may have worked for three other companies, A. Ltd. provided her with at least 75% of her work.

[9] After A. Ltd. had received the necessary paper work, the payment would be directly deposited into her business account. The payments would be arranged by M.F. of A. Ltd.. J.D. testified she never received a T4 slip from A. Ltd.. She would however, claim various expenses (such as fuel and food) from the income of J Moving.

[10] J.D. testified that she was not required to complete any training before starting work with A. Ltd. and she did not receive any benefits from them. J Moving was responsible for supplying all of the tools of the trade such as boxes, paper, tape and bubble wrap. She was not reimbursed for these expenses. She often wore a t-shirt with an "A. Ltd." logo.

[11] J.D. testified that she was able to refuse any work that she did not believe would be financially worth her while. She could take vacation whenever she wanted. She testified that there was no need for her to even be present on one of her jobs and she was able to send another crew to do the work.

[12] J.D. testified that A. Ltd. had an account with a truck rental company and she used that account to rent the cargo van she used on July 8, 2014. While the costs of the rental were covered on the corporate account of A. Ltd., J.D. testified those rental costs would eventually be deducted from any payment made to her by A. Ltd.

[13] J.D. testified that while she had her own pickup truck that she used, it did not work that particular day and therefore she had to rent a cargo van.

[14] J.D. testified that J Moving was a small business and was not incorporated. She could not recall if J Moving had an active H.S.T. number. She recalled requesting WSIB coverage for J Moving but had not applied for personal coverage.

[15] With respect to the events of July 8, 2014, J.D. testified that at the time of the accident, she was behind the van, lighting a cigarette. Had she finished her cigarette, she likely would have taken some materials back into the work site, as this was a normal part of her job. She understood that a WSIB claim was established for this accident but she did not receive any benefits.

[16] Under questioning from Ms. Griffiths, J.D. testified that she and her family had been involved in the moving business for many years. She and her sister learned the trade from their parents. She testified that she was very good at her job and companies like A. Ltd. would have learned about her through the industry.

[17] J.D. testified that she first started working with A. Ltd. around 2010. At that time, she was working with her spouse in the moving and packing business but when their relationship ended in about 2013, she continued performing only packing duties thereafter.

[18] J.D. was referred to the "Driving Contractor's Agreement" and confirmed that she signed this on behalf of J Moving, in August 2010. She testified that for her packing services, she was paid 30% of the contracted moving rate. Out of that amount, she was responsible for purchasing all of her own supplies. There was a hold back by A. Ltd. for any damage that might occur.

[19] J.D. testified that because of her experience, her services were highly sought after. During the high season, from the end of May to the middle of September, J.D. would be working "flat out".

[20] J.D. testified she would be in contact with S.F., the dispatcher for A. Ltd., and he would normally provide her with one or two days' notice of upcoming jobs. She would go into A. Ltd.'s office ahead of time to get the necessary paperwork, which would include the salesperson's reporting, information about the customer, the dates the packing was to be performed and the costs to be paid. She testified that packers could be paid either on the basis of units packed or by weight. J.D. testified that her packing services were part of a larger moving contract entered into between the customer and A. Ltd.. After J.D. had completed her packing, movers would arrive the next day to take the packed goods away. When J.D. completed her packing, she would have the customer sign a packing slip to confirm the number of boxes packed and that the job was done. She would then take the packing slip to S.F. at A. Ltd.'s office either that day or the next.

[21] J.D. testified that it was A. Ltd.'s problem if a customer did not pay for the move. J Moving would get paid in any event however, J.D. testified A. Ltd. would likely "get back at her some other way".

[22] J.D. acknowledged information contained in Exhibit #12 suggesting that in June 2013, there was a change in the relationship between she and A. Ltd. as her "commission" increased from 30% to 60%. This increase coincided with her undertaking solely packing duties after the breakdown of her relationship with her spouse.

[23] J.D. reviewed some of the statements provided by A. Ltd. setting out the commissions paid to J Moving in June and July 2014. She confirmed that on some of the jobs she had used A. Ltd.'s account at a packing supply company and these costs were deducted from her commission.

[24] J.D. testified that in the summer of 2014 she was helped on occasion by her sister, P.D. She did not have any regular helpers in 2014 however.

[25] J.D. testified that at the time of the events on July 8, 2014, she had to rent a truck because the truck she normally used was broken and she needed a vehicle to complete her duties. She testified that the amount of the commission she was paid was standard throughout the industry and the only way for her to make more money would be to work "faster and better" than others.

[26] J.D. testified that there were certain occasions when A. Ltd. might impose "penalties" on her. These included situations where she did not place appropriate covering runners on the customer's floors or where she was not using appropriate packing materials. She might also be penalized if, on jobs involving some of A. Ltd.'s larger clients, she was not wearing an A. Ltd. t-shirt. These larger clients would have inspectors who would visit the premises on occasion.

[27] J.D. testified that while she could be called to perform similar duties for other companies, she could not recall when she last worked for anyone other than A. Ltd.

[28] J.D. testified she was free to use the van she had rented from A. Ltd. for anything else she wished and did not require permission from A. Ltd.. She testified that she was free to turn down job offers from A. Ltd. but probably never did so in the four months before the accident.

[29] She testified that it was her practice "to work for A. Ltd. whenever they asked her to". She testified that J Moving did not advertise for work, it did not have a website or its own letterhead nor did J Moving invoice any of the customers directly.

[30] J.D. testified that she was not an employee of A. Ltd.. She testified that she "worked for herself and her crew worked for her". She paid her crew whatever she felt was appropriate.

(v) The testimony of K.R.

[31] Under questioning from Ms. Seyler, K.R. testified that she was not present at the time of the accident on July 8, 2014. She was notified about the accident by telephone and then went to the hospital. Her knowledge of the events surrounding the accident was based on what she has read and what she has been told by others.

[32] K.R. testified that J.D. and P.D. had gone to perform some packing duties on the morning of July 8, 2014 and around 11 a.m., they were opening the back doors of their cargo van to get some cigarettes when the vehicle was struck by another truck speeding down the wrong side of the road. The collision resulted in J.D. being dragged beneath the vehicle and striking another parked vehicle.

[33] K.R. testified that J.D. had to undergo 3.5 hours of surgery to remove gravel and dirt from her wounds and then was left with a number of other injuries including injuries to her back, hip, knees, pelvis, head and face. She understood that the driver of the other vehicle was eventually charged with dangerous driving.

[34] It was K.R.'s understanding that J.D. and her sister were performing a "pre-pack". She was aware of what her daughters were doing most days because she was their childcare provider.

[35] K.R. testified that J.D. had rented a van that day because the windshield wipers in her regular truck were not working. After expressing some reluctance, P.D. eventually agreed to go and help J.D. with the move that day as her other helper had backed out at the last minute.

[36] K.R. testified that P.D. worked for many companies and was able to pick and choose the jobs she wanted. If the pay wasn't high enough, she would turn the job down. J.D. was not required to take any work. J.D. paid all the expenses associated with performing the packing duties, which included paying for any damage they might cause.

[37] K.R. testified that J.D. had her own company (as did her sister P.D.) and in her opinion, she was not working for A. Ltd. at the time of the accident.

[38] K.R. testified that J.D. was lucky to be alive after the accident on July 8, 2014. While she acknowledged that the situation might be different if J.D. had been struck while in A. Ltd.'s yard, it was her view that what happened on July 8, 2014 "had nothing to do with what J.D. did for a living". She equated this accident with a pedestrian being run over on a city street.

[39] It was K.R.'s understanding that A. Ltd. handled the administration and billing while J Moving did all the work. She understood that if a customer did not pay A. Ltd., J Moving would still get paid.

[40] K.R. testified that on the day of the accident, J.D. picked up P.D. at her home where she was living at the time. They had worked together at another packing job the night before.

[41] Under questioning from Ms. Griffiths, K.R. testified that J.D.'s spouse had left the relationship just a short time before the accident. P.D. had been called in for assistance as a result of the staffing issues. P.D. had lived with K.R. for the previous three or four years. P.D., who had a young child at the time, really wasn't interested in working and wanted to remain off work until her child was in school.

[42] Under questioning from Ms. Buccella, K.R. confirmed that most of the work J.D. performed between 2010 and 2014 was for A. Ltd. She was unable to recall, with any certainty, other companies for which J.D. may have worked during that period. K.R. also confirmed that most of J.D.'s work for A. Ltd. would have been performed during the busy season.

(vi) Post-hearing activity

[43] At the conclusion of the hearing on June 5, 2019, I agreed that the Tribunal would obtain the non-medical portions of J.D.'s WSIB file and then provide that to the parties, with an opportunity to make further submissions in response. The WSIB file was received on about July 3, 2019 and Ms. Seyler assembled it into a Revised Case Record (Exhibit # 16) that was then forwarded to the parties. After receiving the Revised Case Record, Ms. Buccella indicated that she would like to obtain a copy of the hearing transcript before providing her submissions on the new material. In correspondence dated August 20, 2019, I agreed to that request and left it to Ms. Seyler's discretion to arrange an appropriate schedule for the receipt of submissions.

[44] Ms. Griffiths, on behalf of Economical, provided submissions dated October 11, 2019 which are included in Post-Hearing Addendum No. 1 (Exhibit #17). The essence of Ms. Griffiths' submissions was that the new material contained in the Board file confirmed the Applicants' position that J.D. was a worker of A. Ltd. at the time of the accident. In correspondence dated October 16, 2019, Ms. Buccella, on behalf of the co-applicants, advised

that she would be relying on the submissions provided by Ms. Griffiths and would not be providing any additional material.

[45] J.D. and K.R. provided their submissions (also contained in Post-Hearing Addendum No. 1) on about December 14, 2019. The Respondents repeated their belief that "this is not now or ever a matter for WSIB" because J.D. was self-employed and not an employee of A. Ltd.. The Respondents also submitted that the affidavit evidence of M.F. should be disregarded since he did not appear to testify at the hearing and that I should prefer the oral evidence given by J.D.

[46] Ms. Griffiths provided reply submissions on January 27, 2020 (contained in Post-Hearing Addendum No. 1). With respect to the issue of the evidence of M.F., Ms. Griffiths noted that no objection to the admission of that affidavit had been made by the Respondents at the time it was accepted into evidence by the Tribunal. She submitted that the affidavit ought to be given significant weight since its contents were consistent with the balance of the other evidence before the Tribunal.

[47] In correspondence dated January 28, 2020, Mr. Leddy advised that he had taken over carriage of this file from Ms. Buccella and that he was relying on the January 27, 2020 submissions provided by Ms. Griffiths.

(vii) Law and policy

[48] Section 31 of the WSIA provides that a party to an action or an insurer from whom statutory accident benefits ("SABs") are claimed under section 268 of the *Insurance Act* may apply to the Tribunal to determine whether: a right of action is taken away by the Act; whether a plaintiff is entitled to claim benefits under the insurance plan; or whether the amount a party to an action is liable to pay is limited by the Act.

[49] Sections 26 through 29 of the WSIA provide the following:

> **26(1)** No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.
>
> **(2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.
>
> **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.
>
> **(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.
>
> **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.
>
> **(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.

(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.

(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.

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.

(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.

(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.

(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.

[50] In *Decision No. 1460/02,* the Panel noted that the Tribunal is not required to apply Board policy in right to sue applications, as section 126 of the Act refers to appeals, not applications. The Panel, however, also noted that it is important to maintain consistency with findings that might have been made had the case come to the Tribunal by way of appeal from a decision regarding entitlement. Therefore, Board policy continues to be relevant in right to sue applications. See *Decision No. 755/02.*

(viii) Analysis

[51] The applicants bear the evidentiary burden of establishing their case on a balance of probabilities. In order to be successful in this application, the applicants must establish that at the time of the accident on July 8, 2014:

- S.H. was a "worker" of a Schedule 1 employer,
- S.H. was in the course of her employment,
- J.D. was a "worker" of a Schedule 1 employer and;
- J.D. was in the course of her employment.

(a) Was S.H. a "worker" of a Schedule 1 employer?

[52] Section 2 of the WSIA defines a "worker" as follows:

> "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 or 12.2.
>
> 11. A pupil deemed to be a worker under the Education Act. ("travailleur") 1997, c. 16, Sched. A, s. 2 (1); 1999, c. 6, s. 67 (2-4); 2002, c. 18, Sched. J, s. 5 (1); 2005, c. 5, s. 73 (2-4); 2006, c. 13, s. 4 (1); 2007, c. 3, s. 1; 2008, c. 20, s. 1; 2014, c. 10, Sched. 5, s. 1; 2017, c. 7, s. 6 (1).

[53] *Operational Policy Manual* Document No. 12-02-01 entitled "Workers and Independent Operators" provides further assistance to adjudicators in determining how best to classify individuals for WSIA purposes. The policy indicates 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*
>
> **Guidelines**
>
> 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. (See 12-03-02, Optional Insurance.) Independent operators may not be insured through the hiring company's (payer's) WSIB account.
>
> 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.

[54] The Tribunal generally uses an organizational test similar to that set out in the Board policy; however, this test has become known as the "business reality" or "hybrid" test. As noted in *Decision No. 921/89* for example, the actual name applied to the test in not important. What is important, however, is that the parties have an idea of the factors to be considered by the Tribunal in determining the status as a "worker" or "independent operator". The Panel in *Decision No. 921/89* was of the view that "the question to be asked is, 'what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship?'. The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case".

[55] As noted in *Decision No. 1443/06,* the Tribunal's business reality test takes a broad view, and looks to the substance of the relationship, rather than the form. The question to be asked is "what is the true nature of the service relationship between the parties having regard to all relevant factors impacting on that relationship?"

[56] The business reality test is a multi-factorial test, once all the factors have been weighed; the test should determine the true nature of the relationship between the workplace parties (see, for example, *Decisions No. 921/89, 395/94, 1146/02* and *1443/06).*

[57] The Tribunal has also considered the factors in light of the stated intention of the parties to a contract in question. According to Tribunal decisions, the intention of the parties will be given significant weight, subject to the qualification that the stated intention of the parties must be consistent with and supported by objective factors (see, for example, *Decisions No. 106/06* and *1034/07).*

[58] As noted in *Decision No. 2497/07*, the factors to be considered in determining the worker or independent operator status include:

- whether the individual is in a business sufficiently independent that he or she bears the costs and risks of compensation;
- ownership of equipment;
- evidence of control;

- business indicia;
- the degree of integration;
- furnishing of equipment;
- chance of profit or loss;
- the parties' intentions;
- business or government documents;
- the economic or business market;
- the influence of legislative and licensing requirements;
- whether the person structures his or her affairs for various purposes as if he or she is an independent operator.

[59] The Tribunal has also noted that the business reality test applies similar factors to those set out in the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries* (2001) SCC 59.

[60] Justice Major for the Court in *Sagaz* looked at the factors in determining an independent operator and found:

> 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.

[61] *Sagaz* and Tribunal decisions also make it clear that the factors that are listed are 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 (see, for example, *Decision Nos. 1785/04* and *88/09)*.

[62] There is no dispute in this case that at the time of the accident on July 8, 2014, H. Ltd. was a Schedule 1 employer. Information provided by the WSIB and included in Addendum #1 indicates that H. Ltd. is an active Schedule 1 employer with a coverage start date of April 20, 2001.

[63] Having had the opportunity to review all of the evidence before me, I find, on a balance of probabilities, that at the time of the accident on July 8, 2014, S.H. was a "worker" of H. Ltd.. In reaching that conclusion, I have taken particular note of the following:

- I have not been referred to evidence of any significance suggesting that at the time of the accident S.H. was an independent operator, operating her own business.
- In Exhibit #13, B.B., the President of H. Ltd., indicated that S.H. "was one of my employees and had been for approximately 2 summers, between the end of April

until the end of October approximately". B.B. also noted that H. Ltd. "paid WSIB premiums for [S.H.] as well as for 8-15 additional employee" and "in addition, source deductions for income tax purposes were made for all our employees".

- As noted in Exhibit #10, a WSIB claim was established for S.H.. The Employer's Report of Injury/Disease (Form 7) of July 2, 2014 (completed by B.B.) lists H. Ltd. as the employer and notes that S.H. was employed on a seasonal basis earning $14.00 per hour.
- A transcript of a statement S.H. provided on July 16, 2014 (Exhibit No. 15) provides in part:

  Q. What are your employment details? Where are you employed?

  A. H. Ltd..

  Q. What do you do there?

  A. A variety of things. I am a technician for weed and grub sprays. I also do estimates and I work in the office.

  (...)

  Q. How long have you been employed there?

  A. 4 years seasonal.

[64] Given the available evidence currently before me, I find that at the time of the accident on July 8, 2014, S.H. was a worker of the Schedule 1 employer, H. Ltd..

(b) Was S.H. in the course of her employment?

[65] *Operational Policy Manual* Document No. 15-02-02 entitled "Accident in the Course of Employment" provides:

> **Policy**
>
> A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to *place, time,* and *activity* indicate that the accident was work-related.
>
> **Guidelines**
>
> In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of *place, time,* and *activity* in the following way:
>
> **Place**
>
> If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment. If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.
>
> **Time**

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as:

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Application of criteria

The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily on the activity of the worker at the time the personal injury by accident occurred to determine whether it occurred in the course of employment.

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the worker was engaged in a personal activity that was not incidental to the worker's employment.

The decision-maker examines the activity of the worker at the time of the accident to determine whether the worker's activity was of such a personal nature that it should not be considered work-related.

In all other circumstances, the time and place of the accident are less important. In these cases, the decision-maker focuses on the activity of the worker and examines all the surrounding circumstances to decide if the worker was in the course of employment at the time that the personal injury by accident occurred.

[66] Having had the opportunity to consider all of the evidence before me, I find, on a balance of probabilities, that at the time of the accident on July 8, 2014, S.H. was in the course of her employment. In reaching that conclusion, I have taken particular note of the following:

- I was not referred to evidence of any significance suggesting that at the time of accident on July 8, 2014, S.H. was engaged in a personal activity which was not reasonably incidental to her employment.
- In his written statement (Exhibit #13) B.B. indicated in part:

> [S.H.] was in the course of employment on July 8, 2014 at the time of the accident. Her duties at the time consisted of attending approximately 20 homes per day to apply weed spray & fertilizer. In addition to the services, H. Ltd. also does weekly mowing, sodding, top dressing & garden bed restoration. On July 8, 2014, at the time of this accident, I was doing an estimate a few houses down the street. I observed our spray truck come around the turn. (...)
>
> Unfortunately [S.H.] did [not] quite make the full bend & she hit the front of the parked van on the opposite side of the road. (...)

- In her July 16, 2014 statement (Exhibit No. 15). S.H. indicated in part:

> Q. That's fine. We just want to make sure. So you were attending an address on the street the incident took place on or where were you headed?
>
> A. No, I had just come from the owner's house actually. I was fertilizing his lawn.
>
> Q. Ok.
>
> A. An my tank had already been emptied at the other customer's lawn and I was coming back to switch out trucks.
>
> Q. Back to the office?
>
> A. That's right.
>
> Q. So you were effectively in the course of your employment when this happened?
>
> A. Yes I was.

[67] Once again, after reviewing all of the evidence before me, I find that at the time of the accident on July 8, 2014, S.H. was in the course of her employment.

(c) Was J.D. a "worker" of a Schedule 1 employer?

[68] There is no dispute in this case that at the time of the accident on July 8, 2014, A. Ltd. was a Schedule 1 employer. Information provided by the WSIB and included in Addendum #1 indicates that A. Ltd. was an active Schedule 1 employer with a coverage start date of April 10, 2000.

[69] The applicants in this case, take the position that at the time of the accident under consideration here, J.D. was a worker of A. Ltd. In the alternative, the applicants submit that J.D. was a dependent contractor. On the other hand, J.D. does not believe she was employed by A. Ltd. but was an employer in her own right. As is the case with many section 31 applications, there is evidence which supports the position of both parties. My task however, involves reviewing all of the evidence and determining the true nature of the relationship between these workplace parties. As suggested in Board policy, the question to be determined is whether J.D.

was working under a contract of service ("worker") or a contract for service ("independent operator").

[70] As the Court noted in *Sagaz*, the central issue involves determining whether J.D. was performing the packing tasks as an individual in business for herself or on behalf of A. Ltd.. After reviewing all of the evidence before me, including the testimony and submissions provided, I find on a balance of probabilities that at the time of the accident under consideration here, J.D. was a worker of A. Ltd.. In reaching that conclusion, I have taken particular note of the following:

- While J.D. had established a sole proprietorship (J Moving), the available evidence establishes that this entity was established primarily for income tax reasons. As J.D. acknowledged in her testimony, J Moving did not solicit clients on its own, it did not advertise its services nor did it have its own website or letterhead.
- As J.D. acknowledged in her testimony, neither she nor J Moving billed any of the customers directly for their packing services. Any of the clients for whom she performed packing services were customers of A. Ltd..
- J.D. was told where and when the packing services would be required, by the dispatcher of A. Ltd. - S.F.. She would report to A. Ltd.'s offices before each job in question to pick up the necessary paperwork with instructions on how, when and where the job was to be done.
- In her testimony, J.D. indicated that she could, in theory, decline work offered to her by A. Ltd. but she could not specifically recall ever having done so. She testified that she worked "full out" for A. Ltd. during the busy season. J.D.'s testimony in that regard is consistent with the June 4, 2019 affidavit from M.F. in which he advised:

  > [16] It is my belief that [J Moving/J.D.] worked exclusively for [A. Ltd] and/or its affiliates, in the months and years leading up to the accident. It is [A. Ltd.] requirement for contractors to work exclusively for A. Ltd. and we believe that we are able to offer our clients superior services through a stable and reliable workforce. (...)
  >
  > [18] J.D. never turned down work during her time with A. Ltd. as a contractor, 19 packing jobs would be assigned to J Moving/J.D. by S.F. who was/is our operations manager and who, together with his staff, would coordinate the different components of a moving job.

- There is no evidence of substance before me confirming that J.D. performed packing services for other employers in the months and years immediately preceding the accident in 2014. In his affidavit evidence, M.F. stated that there was a "requirement" for their contractors to work exclusively for A. Ltd.. Similarly, in her Examination for Discovery evidence given on August 7, 2015 (Exhibit #14), J.D. testified that the majority of her work was done for A. Ltd. and if she ever worked for any other affiliate of A. Ltd., the work would be brokered through A. Ltd. or S.F. and paid through A. Ltd. (see questions 181 – 184).

- In her testimony at this hearing, J.D. indicated that when she was performing packing duties for some of A. Ltd.'s larger clients, she was required to wear a t-shirt with an A. Ltd. logo on it.

- In the Examination for Discovery testimony J.D. was questioned about A. Ltd.'s requirements around labour and whether those requirements were verbal or in writing. J.D. responded (in question #139) "They're just verbal. Well no, they have strict, like they're not just verbal. The work shirts is in writing. You have to have a proper work shirt on or we get – I get penalties". In questions #140 and #141, J.D. confirmed that the work shirts in question had an A. Ltd. logo on them. This evidence is consistent with the comment of M.F. in Exhibit #12 that J.D. and P.D. "were required to wear a basic uniform for work. The uniform consisted of a golf shirt with [A. Ltd.'s] logo on it and blue shorts or pants".

- In her testimony at this hearing, J.D. indicated that she was able to hire whoever she wished to assist with packing duties and she did not even have to be present when the work was performed. As Ms. Griffiths noted in her submissions however, in her Examination for Discovery J.D. never alluded to substituting workers for herself and there is no evidence of substance before the Tribunal that she ever did so. That conclusion is consistent with the testimony of M.F. who, in Exhibit # 12, noted:

> Pursuant to the terms of the contract between J Moving and A. Ltd., all labour hired by J.D. had to meet A. Ltd.'s requirements. My staff and I would interact with anybody hired by J.D. or any other contractor. We would want to meet any person hired by a contractor. We would want to satisfy ourselves that the person was presentable to our clients and had the right attitude. We would also track the claims ratio for each of our contractors, meaning that people who were not good at the work would not be permitted to continue to work for A. Ltd.. A. Ltd. performed background checks on workers.

- The comments from M.F. in Exhibit # 12 are consistent with the Examination for Discovery testimony provided by J.D. and recorded in Exhibit #14. In question #134, J.D. indicated in part:

> (…) The labour, all labour has to be required-meet the requirements of A. Ltd. I don't get them through A. Ltd. but I have to respect the fact that they can't have a criminal record. That they can't go in – you know, not showered and looking all grubby. They have to have a proper work shirt on. They have to have proper shoes on their feet. That's my responsibility for my labour (…)

- Exhibit #1 contains a copy of a statement provided by M.F. to an insurance adjuster ("N.C.") on September 25, 2014. In that statement, M.F. advised that A. Ltd. paid WSIB premiums on J.D.'s behalf.

- Exhibit #1 contains a transcript of a conversation between an insurance adjuster ("N.C.") and J.D. and K.R. on September 8, 2014. The statement notes in part:

N.C.: Okay, and were you working there at the time?

J.D.: Yes

N.C.: And who is it that you work for?

J.D.: A. Ltd.

- In her testimony at this hearing, J.D. indicated that she required the use of a truck to complete her duties. Information contained in Exhibit #1 confirms that J.D. rented a cargo van the day before the accident on July 14, 2014 and did so through the corporate account of A. Ltd. Similarly, the statements of commission payments made by A. Ltd. to J.D. (contained in Exhibit #12) confirm that J.D. purchased a number of her materials using A. Ltd.'s account at a particular supplier.
- The testimony of the witnesses was consistent in indicating that J.D./J Moving would be paid irrespective of whether the customer paid A. Ltd.. J.D would be paid the agreed upon commission (60% at the time of the accident) which was standard for the industry. There was no chance of profit or loss for J.D..
- Information contained in J.D.'s Board file (and included in the Revised Case Record) suggests that the WSIB, after reviewing the evidence provided, decided that J. D. was a worker of a Schedule 1 employer at the time of the accident. In Board Memorandum ("Memo") No. 8 of January 23, 2015, a Board Eligibility Adjudicator noted, after speaking with K.R., that "we discussed the fact that her daughter was ruled a worker (…) and the woman who was driving the other company vehicle which hit her daughter were both Schedule 1 employees, that this was why they could not personally sue the other driver".
- As noted in J.D.'s Board file, on September 25, 2014, the Administration Manager with A. Ltd. completed an Employer's Report of Injury/Disease (Form 7) which listed J.D.'s employer as A. Ltd. and indicated that she was a "contract" employee who worked a "regular schedule" of 8 hours per day, Monday to Thursday. J.D. also completed a Worker's Report of Injury/Disease (Form 6) on July 27, 2014 in which she described her "employer" as "sub-contractor for A. Ltd.".
- With respect to the Respondents' submission about the weight that ought to be given to the affidavit evidence of M.F., while it is generally preferable to have witnesses provide oral testimony so that the veracity of their evidence can be tested on cross-questioning, I cannot agree that M.F.'s testimony ought to be disregarded, given that it is generally consistent with the balance of other evidence available on the issue of the relationship between J. D. and A. Ltd..

[71] For the reasons noted above, I find that while J.D. had established a sole proprietorship – J Moving – at the time of the accident on July 8, 2014, she was not operating a business on her own account. J Moving did not advertise or solicit clients of its own. The balance of evidence establishes that since starting a contract with A. Ltd in 2010, J.D. worked almost exclusively for it. A. Ltd., through its dispatcher, would provide J.D. with the names of the customers and directions as to when and where the packing jobs were to be performed. Packing was part of the larger moving services provided by A. Ltd. to its customers. J.D. had the customers sign an A. Ltd. packing slip once the job was completed and she in turn, would submit these documents to

A. Ltd. for payment. She was paid regularly, twice a month, by A. Ltd. based on an agreed upon rate of commission.

[72] In my view, J.D. was employed under a contract of service where A. Ltd. had the right to control what work was performed, where, when and largely how, it was done.

[73] As a result, I find that at the time of the accident, J.D. was a worker of A. Ltd.

(d) Was J.D. in the course of her employment?

[74] As noted earlier in this decision, OPM Document No. 15-02-02 entitled "Accident in the Course of Employment" indicates that in considering these issues, the circumstances relating to place, time and activity are taken into consideration.

[75] In this case, there has been no significant dispute taken with the suggestions that the accident occurred during the course of J.D.'s normal workday. The documentary evidence and the testimony from the witnesses is consistent in suggesting that J.D. and her sister arrived at the work location at about 9 a.m. and the accident happened about two hours later, around 11 a.m., while they were in the process of completing their packing duties.

[76] Similarly, there has been little dispute that the circumstances relating to the "place" the accident occurred would suggest that it was work-related. OPM Document No. 15-02-02 suggests that "a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities".

[77] In this case, the evidence of the witnesses is consistent in indicating that there was no reason for J.D. and her sister to be at the accident location except to perform the packing duties assigned to them. In my view, it is also reasonable to suggest that the worker would reasonably be expected to be standing near the van she had rented to transport her supplies which was parked in front of the home where the work was being done.

[78] In my view therefore, the circumstances relating to the "place" where the accident occurred support a conclusion that it occurred in the course of the worker's employment.

[79] As I understand the position taken by J.D. and K.R., one of their primary objections to the applicants' claims is that J.D. and her sister were not working at the time the accident occurred but rather, were taking a cigarette break.

[80] The applicants questioned what J.D. and her sister were doing at the time of the accident, referencing J.D.'s comments in her Form 6 that "my sister and I were standing behind a van getting packing material when a woman driving a truck hit the van that we were behind".

[81] Similarly, in its Form 7, the employer's Administration Manager, described the mechanics of the accident noting that J.D. "along with another employee were struck by another motor vehicle while unloading packing materials from their packing van".

[82] J.D.'s testimony at this hearing is consistent with the account of the accident she provided in her Examination for Discovery evidence (Exhibit #14). In that transcript (Question #289) J.D. advised:

> I came down the driveway to the van – was parked in the street. So when we came down the driveway we were just talking. I opened the back doors. My cigarettes were in the

> back. I opened the back of the van I picked up my cigarettes and I just heard the – big crash. And then it hit me.

[83] In her testimony at this hearing, J.D. also indicated however, that after she finished her cigarette break, she likely would have taken more packing materials up to the job site.

[84] Even accepting, for the sake of argument, that J.D. was on a cigarette break at the time the accident occurred, I find that the provisions of OPM Document No. 15-02-02 suggest that this occurred in the course of employment. The policy provides that "similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment". The policy continues and indicates that "if a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment".

[85] OPM Document No. 15-03-08 entitled "Personal Activities/Removing Self from Employment" provides:

> **Policy**
>
> An accident shall be considered to occur in the course of the employment when it happens on the employer's premises as defined, unless at the time of the happening of the accident the worker is performing an act not incidental to the work or employment obligations.
>
> **Guidelines**
>
> Compensation benefits are not payable to a worker who is voluntarily out of the course of the employment. Such situations may include
>
> - doing something outside the worker's normal duties, such as transacting personal business, or
> - going places having nothing to do with the worker's employment or doing something not reasonably expected of the worker.

[86] In my view, this "brief interlude of personal activity" which involved standing outside the work van having a cigarette before returning with additional supplies was reasonably incidental to the nature of the work tasks being performed by J.D. on the day of the accident.

[87] In my view, the circumstances surrounding place, time and activity lead to a conclusion that the injuries J.D. sustained on July 8, 2014 arose in the course of her employment.

[88] Given my findings that both J. D. and S.H. were workers of Schedule 1 employers and were in the course of their employment at the time of the accident on July 8, 2014, the application, as it concerns J.D., is granted.

[89] With respect to the issue of the right of action of K.R., section 27(2) of the WSIA provides:

> (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).

[90] Given that K.R. is J.D.'s mother (and not her spouse, child or survivor) and given there is no evidence of significance before me that K.R. was a dependant of J.D., I find that I have no jurisdiction under the WSIA to take away the right of action of K.R. (see for example *Decision Nos. 1921/06* and *1921/06R*).

DISPOSITION

[91] The applications are granted in part.

[92] The rights of action of J.D. are taken away by the Act.

[93] A claim with the WSIB may be filed in this regard within 6 months of the date of this decision pursuant to section 31(4) of the WSIA.

[94] The right of action of K.R. is not taken away.

DATED: March 17, 2020

SIGNED: R. Nairn