WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 147/05

BEFORE:	V.R. Robeson: Vice-Chair B. Wheeler: Member Representative of Employers J.A. Crocker: Member Representative of Workers
HEARING:	January 18 and September 20, 2005 and September 28, 2006 at Toronto Oral
DATE OF DECISION:	March 8, 2007
NEUTRAL CITATION:	2007 ONWSIAT 615

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

APPEARANCES:

For the applicant(s):	Mr. V.T Bulger, Barrister and Solicitor Mr. W.A. McClelland, Barrister and Solicitor
For the respondent:	Mr. M.S. Green, Barrister and Solicitor
Interpreter:	P. Subramaniam, S. Kangat and C. Casinader interpreted in the Tamil language on January 18, 2005, September 20, 2005 and September 28, 2006 respectively.

REASONS

(i) The Right to Sue Application

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* (WSIA) by the Defendants in an action filed in the Ontario Superior Court of Justice as Action No. 64625/02.

[2] The Applicants/Defendants are Mr. Spritaran Selliah ("Selliah"), Financial Transport Inc. ("FT"), 1323109 Ontario Ltd. ("UK") and 1362038 Ontario Ltd. ("TMS"). The Respondents/Plaintiffs are Mr. Kandavanham Maria-Antony ("Maria-Antony"), his wife and his son. RBC General Insurance ("RBC") is the insurer under a standard motor vehicle liability insurance policy on Mr. Maria-Antony's wife and Mr. Maria-Antony is covered by the policy.

[3] This application arises from a single vehicle motor vehicle accident (MVA) which occurred on October 5, 2000 in Idaho, USA. Mr. Selliah and Mr. Maria-Antony were co-drivers of a truck transporting fruit from Washington state and Oregon to Ontario. At the time of the MVA, Mr. Selliah was driving the truck and Mr. Maria-Antony was sleeping in the truck's sleeping bunk. Mr. Maria-Antony was injured in the MVA.

[4] The Applicants/Respondents seek a declaration that the right of action of Mr. Maria-Antony, his wife and his son is taken away against Mr. Selliah, UK and TMS, and is limited against FT by the provisions of the WSIA.

[5] The Board advised the Tribunal of the results of status checks for Financial Transport Inc., 1323109 Ontario Ltd. and 1362038 Ontario Ltd. The Board has no record for Financial Transport Inc. or 1323109 Ontario Ltd. The Board advised that 1362038 Ontario Ltd. was a Schedule 1 employer with an effective date of January 1, 2000.

[6] Documents in the case materials indicate that the Board firm account for TMS (1362038 Ontario Ltd.) was set up after the MVA following a letter from RBC concerning the MVA involving Mr. Selliah and Mr. Maria-Antony. The Board advised TMS/Mr. Nelliah by letter dated May 4, 2001 that the firm account with the Board was registered retroactively to January 1, 2000.

(ii) Background

[7] The Panel heard testimony from Mr. Selliah, Mr. Maria-Antony, Mr. E. Jain (FT) and Mr. Nelliah (TMS). The Panel also heard testimony from Ms. T. Dixon from RBC.

[8] Mr. Bulger intended to have Mr. Kumar Ratnam testify. Mr. Bulger identified Mr. Ratnam as the owner of UK, which Mr. Bulger stated, went out of business in late 2000. The Process Server retained by the Tribunal was unable to serve Mr. Ratnam with a summons to attend the hearing on September 28, 2006. Mr. Ratnam did not attend the Tribunal hearing.

[9] After the questioning of the witnesses at the hearing on September 28, 2006, Mr. Bulger asked the hearing Panel to decide the application based on the evidence before us without testimony from Mr. Ratnam. Mr. McClelland agreed. Mr. Green stated that he would be asking the Panel to draw a negative inference from Mr. Ratnam's failure to testify.

(a) Mr. Selliah

[10] Mr. Selliah testified about his relationship with Mr. Nelliah and UK and about the trips with Mr. Maria-Antony. Mr. Selliah's testimony included the following:

- Mr. Selliah started to work for Mr. Nelliah two or three months before the MVA. An instructor at the A-Z license school referred Mr. Selliah to Mr. Nelliah. Mr. Nelliah's truck was the first truck Mr. Selliah drove after completing A-Z school.
- TMS was the name of Mr. Nelliah's company.
- Mr. Selliah thought Mr. Nelliah owned the accident truck. Two drivers drove the truck so that the truck could keep moving.
- Mr. Nelliah or UK arranged for the co-driver. Mr. Nelliah arranged for the co-driver on the earlier trip. UK provided Mr. Maria-Antony for the accident trip.
- UK arranged loads for Mr. Nelliah to deliver and Mr. Nelliah got Mr. Selliah to deliver the loads. UK had a computer and knew about available loads.
- Mr. Selliah signed papers for the loads. The papers had either UK or TMS (Mr. Nelliah's company) on them. Mr. Selliah did not recall what name was on the papers for the accident load.
- While on the trip, Mr. Selliah or the co-driver had to call UK every 4-5 hours to let UK know where they were. Mr. Selliah spoke to one of two people at UK, the owner, "Kumar", (surname unknown) or the assistant. Mr. Selliah did not meet "Kumar" but recognized his voice on the telephone.
- UK mostly and Mr. Nelliah sometimes told Mr. Selliah and the co-driver where and when to pick up the loads.
- Mr. Selliah did not have a written agreement with UK or Mr. Nelliah.
- Mr. Selliah was hired and paid by Mr. Nelliah. Mr. Selliah was paid a flat rate for a trip. Mr. Nelliah made no deductions. There was no discussion about WSIB coverage.
- Mr. Nelliah paid for truck maintenance. Mr. Selliah thought that UK arranged and paid for the insurance.
- Mr. Selliah or the co-driver paid for gas en route using a debit card or "T-cheque" provided by Mr. Nelliah or UK. Gas was paid for on the accident trip with a "UK express code". Mr. Selliah understood that the express billing code was provided to Mr. Nelliah by UK because Mr. Nelliah did not have a system like that.

- UK introduced Mr. Maria-Antony to Mr. Nelliah. Mr. Maria-Antony worked for UK because "he was in the same truck" as Mr. Selliah was.
- Mr. Selliah was paid $1000 for a trip from Ontario to California and back. Mr. Selliah was paid twice by cheque and once in cash. Mr. Selliah did not recall whether the cheque was a company cheque or a personal cheque but it was signed by Mr. Nelliah.

(b) Ms. Dixon

[11] Ms. Dixon identified herself as a "senior accident benefits specialist at RBC Insurance Company" currently responsible for Mr. Maria-Antony's accident benefit claim. Ms. Dixon testified that, at the time of the MVA in 2000, RBC was the insurer of Mr. Maria-Antony under a standard motor vehicle liability insurance policy. Ms. Dixon testified that Mr. Maria-Antony claimed benefits for the MVA in question under this policy. Ms. Dixon identified the "Application for Accident Benefits" from Mr. Maria-Antony dated October 24, 2000 in the case materials. Mr. Maria-Antony indicated he was "self-employed" in the application. Ms. Dixon identified a letter in the case materials from Mr. Nelliah on TMS letterhead dated November 8, 2000 and explained that this letter was submitted to clarify Mr. Maria-Antony's employment status. The letter stated that Mr. Maria-Antony had been working with TMS as a "self-employed driver" at $.20/mile since September 17, 2000 and his earnings were $3600 for the period from September 17 to October 5, 2000. Ms. Dixon identified a letter in the case materials dated December 4, 2000 from D.S. Wilson (legal counsel for Mr. Maria-Antony at the time), stating that information previously submitted describing Mr. Maria-Antony as "self-employed" was inaccurate and his insurance benefits should be based on his income during the four weeks prior to the accident. Ms. Dixon explained that benefits differ depending on whether a person is "employed" or "self-employed". Ms. Dixon testified that RBC has been paying Mr. Maria-Antony statutory benefits payable as a result of the MVA in the amount of $400/week (the maximum payable under the Statutory Accident Benefits Schedule) based on information provided by Mr. Maria-Antony in a letter dated November 8, 2000 about his earnings as an "employee" for TMS in the four weeks prior to the MVA. Ms. Dixon explained that, if Mr. Maria-Antony's benefits were paid based on being self-employed, he would receive $278/week based on his earnings in the 52 weeks before the MVA as provided by a paralegal representing Mr. Maria-Antony when he completed the Application for Accident Benefits. Ms. Dixon testified that RBC raised some concern with Mr. Maria-Antony's representatives about Mr. Maria-Antony's entitlement to WSIB benefits, and obtained the "Assignment of Workplace Safety & Insurance Benefits" document dated December4, 2000 in the case materials.

(c) Mr. Maria-Antony

[12] Mr. Maria-Antony testified about his relationship with Mr. Nelliah and UK and about his trips with Mr. Selliah. Mr. Maria-Antony's testimony included the following:

- Mr. Maria-Antony and Mr. Selliah were drivers of a truck involved in an MVA in October 2000.
- Mr. Maria-Antony filled in an application for employment and gave it to "Kumar" at UK. "UK Transport" was at the top of the application. Mr. Maria-Antony thought UK was "Kumar's" company.

- Mr. Maria-Antony first heard about TMS after the MVA from his wife and understood that TMS was Mr. Nelliah's company.
- After one week, "Kumar" sent Mr. Maria-Antony to Mr. Nelliah who sent him to Mr. Selliah and Mr. Maria-Antony drove a truck with Mr. Selliah on three trips to the United States.
- Mr. Maria-Antony was told that the accident truck belonged to Mr. Nelliah, but Mr. Maria-Antony was hired by UK.
- Mr. Maria-Antony did not know who owned the truck, just that "Kumar" sent him to Mr. Nelliah to drive the truck. Mr. Maria-Antony never asked who owned the accident truck.
- "Kumar" spoke to Mr. Maria-Antony about how much he would be paid, but Mr. Maria-Antony could not recall how much he said it would be.
- Mr. Maria-Antony did not recall any discussion about WSIB coverage.
- Mr. Maria-Antony was not sure who arranged for the loads, but Mr. Selliah told him UK did.
- Mr. Maria-Antony did not recall whether there was any signage on the accident truck.
- Mr. Maria-Antony drove for a courier company before driving on three trips through Mr. Nalliah and did not drive for anyone else at the time of the three trips.
- Mr. Maria-Antony thought "Kumar"/UK would pay him because he had given the application to "Kumar", but could not recall how much "Kumar" told him he would be paid. Mr. Maria-Antony was not paid for the first two trips before he left for the third (accident) trip.
- Mr. Maria-Antony recalled being paid for the three trips after the third trip. Mr. Maria-Antony recalled receiving one cheque from "Kumar"/UK for the first trip. "Kumar"/UK told Mr. Maria-Antony's wife to get the money for the second and third trips from Mr. Nelliah. Mr. Maria-Antony recalled his wife receiving two cheques from Mr. Nelliah for the second and third trips (Mr. Maria-Antony was in the hospital at the time), but they were NSF and he later received cash from Mr. Nelliah for the two trips.
- Mr. Nelliah gave Mr. Maria-Antony's wife a letter after the MVA dated November 8, 2000 stating that he worked for Mr. Nelliah.
- Mr. Maria-Antony recalled Mr. Selliah telephoning UK during the accident trip to report on the progress of the trip, but did not know the name of the person Mr. Selliah spoke to.
- Mr. Maria-Antony thought he was employed by "Kumar"/UK.

[13] Mr. Maria-Antony could not recall who paid for his airplane ticket to return home after the MVA. Documents in the case materials indicate that TMS paid for the airplane ticket. The documents include a copy of a TMS cheque signed by Mr. Nelliah to a travel company, a receipt

for the cheque from the travel company, and a letter to RBC from an insurance broker regarding reimbursement to TMS for the amount of the ticket.

(d) Mr. E. Jain

[14] Mr. Jain's counsel, C. Lui, was present during Mr. Jain's testimony, but did not ask questions or interject during questioning.

[15] Mr. Jain identified himself as a 50% owner of FT. Mr. Jain identified the document dated July 14, 1999 in the case materials as the lease between FT and TMS (lessee) and Mr. Nelliah (guarantor) for the accident truck. Mr. Jain described the major business of FT in 2000 as leasing vehicles, specifically, heavy duty tractor trailers. Mr. Jain testified that FT did not provide drivers for the trucks, because FT was "not in that business". Mr. Jain testified that he understood that the lease in question was in effect at the time of the MVA, but was unable to locate the documentation to confirm this. Mr. Jain testified that the accident truck was later sold to "one of the related parties of Nalliah".

(e) Mr. Nelliah

[16] Mr. Nelliah testified about his relationship to TMS, FT, UK, Mr. Maria-Antony and Mr. Selliah. Mr. Nelliah's testimony included the following:

- Mr. Nelliah is the owner of TMS. He leased the truck involved in the MVA (accident truck) from FT as set out in the lease dated July 14, 1999 in the case materials identified by Mr. Jain.
- Mr. Nelliah was an "owner-operator" who used his truck to deliver goods for three other companies before delivering goods for UK.
- UK made one "past due" payment on the truck for Mr. Nelliah and deducted the amount of the payment from what UK paid him for the deliveries.
- UK gave Mr. Nelliah the opportunity to transport goods to and from the United States for UK. UK provided all the loads.
- Mr. Nelliah's business relationship with UK began about three weeks before the MVA and he did three trips for UK with the MVA occurring on the third trip.
- Mr. Nelliah had a written agreement with UK, but did not have a copy of the agreement.
- Mr. Nelliah understood what a "broker agreement" was, but did not have a "broker agreement" with UK. His agreement with UK was that, when UK handed over the goods to be delivered, Mr. Nelliah took charge of the goods, delivered them and provided the weigh bills.
- UK provided the license plate for the accident truck and arranged for insurance.
- The sign on the accident truck said "UK Transport".
- UK billed the client. Mr. Nelliah submitted an invoice from his company for the agreed amount for the trip and UK paid Mr. Nelliah deducting 10% commission.

- Mr. Nelliah paid for maintenance of the truck and UK paid for the fuel for each trip and for truck insurance.
- UK sent drivers to Mr. Nelliah and he paid the drivers by the trip from the money he received from UK for the trip.
- Mr. Selliah and another driver drove the first trip for UK. Mr. Selliah and Mr. Maria-Antony drove the second and third trip for UK.
- Mr. Nelliah told "Kumar" from UK he needed a driver and "Kumar" said he would send a driver and Mr. Maria-Antony appeared in the parking lot. "Kumar" said that Mr. Maria-Antony had a license to drive large trucks and that they ("Kumar"and Mr. Nelliah) would try him on one or two trips to see whether he could drive on other long trips. "Kumar" would decide whether Mr. Maria-Antony could drive Mr. Nelliah's truck.
- Mr. Nelliah thought that Mr. Maria-Antony was UK's employee at the time of the MVA, but would have been his employee if Mr. Maria-Antony had been OK on the trips.
- Mr. Nelliah did not have a written agreement with Mr. Maria-Antony or with Mr. Selliah. Mr. Nelliah thought he could have a written agreement with Mr. Maria-Antony only after he had driven on two trips.
- Mr. Selliah worked for Mr. Nelliah before Mr. Nelliah worked for UK. Mr. Nelliah considered Mr. Selliah to be his employee, but Mr. Selliah was "given to" Mr. Nelliah by another company.
- UK told Mr. Nelliah how much he was to pay Mr. Selliah and Mr. Maria-Antony. No deductions were made. There were no discussions about WSIB coverage.
- Mr. Nelliah explained that a WSIB account was opened after the MVA on the initiative of the insurance broker who handled the claim for damage to the accident truck.
- UK dispatched the goods to be transported. The drivers had to keep in touch with UK during the trip to let UK know how the trip was going and report any problems. The drivers did not contact Mr. Nelliah. UK contacted Mr. Nelliah to let him know how the trip was going.
- Mr. Nelliah explained that he wrote in the letter dated November 8, 2000 that Mr. Maria-Antony's earnings working for TMS as a self-employed driver from September 17 to October 5, 2000 were $3600, because Mr. Maria-Antony's wife asked him what Mr. Maria-Antony's earnings would have been if he had worked for one month, but that Mr. Maria-Antony only got $1800 because he only drove two trips.
- Mr. Nelliah explained that he set up his own company so that he could purchase the truck and work in the trucking business.

(iii) Law and policy and Tribunal decisions

[17] The MVA occurred on October 5, 2000. Accordingly, the *Workplace Safety and Insurance Act, 1997* applies.

[18] Section 31 of the WSIA provides as follows:

> **31(1)** A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) whether, because of this Act, the right to commence an action is taken away;
>
> (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan.
>
> **(2)** The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).
>
> **(3)** A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.
>
> **(4)** Despite subsections 22(1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).
>
> **(5)** The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

[19] Section 26(2) provides as follows:

> **26(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.

[20] Section 28 of the WSIA provides as follows:

> **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.

[21] Section 27 provides as follows:

> **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.

[22] The Tribunal has addressed the issue of the status of truck drivers for the purpose of workers' compensation in several decisions. The Vice-Chair in *Decision No. 2801/01* (February 5, 2002) summarized the factors to be considered in determining the nature of the relationship between two parties:

> Out of these principles has evolved a test referred to as the "Business Reality" or "Hybrid" test. The leading case in the development of this test was *Decision No. 921/89*, 14 W.C.A.T.R. 207. At page 225, the Panel, in that decision, offered the following reasoning for the development of this particular test:
>
> > The actual name applied to the test, whether "integration" test, "organization" test, "hybrid" test or "business reality" is not important. What is important is that parties have an idea of the factors to be considered by the Appeals Tribunal in determining status as a "worker" or "independent operator". By referring to these factors, parties may themselves develop a sense of the character or reality of the business relationship and thus make a realistic assessment of the situation. It is the opinion of this Panel that the factors enumerated in this decision assist in this goal to a greater extent than merely asking whether the work is "integral" to the overall business operation. The question to be asked is, "What is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship?" The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case.
>
> The Panel, in that decision, proposed 11 factor that might be considered in determining the nature of the relationship between two parties to a service contract. They are:
>
> 1. ownership of equipment used in the work or business;
> 2. the form of compensation paid to the worker or independent operator (i.e., whether a fixed rate is agreed to or a variable remuneration with an attendant prospect of profit or risk of loss);
> 3. business indicia;
> 4. evidence of co-ordinational control as to "where" and "when" the work is performed;
> 5. the intention of the parties often evidenced by an agency agreement, employment agreement, contract for service, contract of service or limited term contract;
> 6. business or government records which reflect upon the status of the parties;
> 7. the economic or business market;
> 8. the existence of the same or very similar services supplied to an "employer" by a person or persons who are classified as "workers" under the *Act*;

9. substitute service (i.e. the right to hire others);
10. size of the consideration or payments;
11. degree of integration.

> The criteria applied by the Board to determine "worker/independent operator status" are found in Minute #8, December 6, 1990, page 5410. Appendix II to that Minute sets out specific guidelines related to the trucking industry. By and large, they reflect the criteria cited above with some additional criteria particular to the trucking industry, such as route selection, load selection, and licensing arrangements.

[23] The Tribunal has also addressed the issue of whether a worker can have two employers. See, for example, *Decision Nos. 805/03* (June 19, 2003) and *1370/06* (August 15, 2006).

[24] In *Decision No. 805/03*, a truck driver died in a motor vehicle accident in February 2002. The driver's widow applied for accident benefits from the insurer of the carrier. The insurer applied to the Tribunal to determine whether the driver was a worker in the course of employment. The hearing Panel found that the driver was driving a truck owned by a transport company and leased to a carrier which retained the transport company to supply driver operators. The hearing Panel concluded that the driver was not an independent operator, noting that he did not own the truck and was not responsible for any of the operating expenses of the truck, he was paid a flat rate, and he had no opportunity for profit or loss. The hearing Panel concluded that the driver was a worker, noting that he was dispatched by the carrier and took loads as the carrier directed, but that he was paid by the transport company which also provided the truck and, although the truck was leased to the carrier and plated by the carrier, it was owned by the transport company. The hearing Panel concluded that, in these circumstances, the driver was a worker in the course of employment at the time of the accident and the carrier and the transport company were both employers of the driver. The hearing Panel concluded that the widow was entitled to claim workplace insurance benefits, and granted the application of the insurer.

[25] *Decision No. 805/03* discussed the issue of a worker having more than one employer as follows:

> Does anything prohibit a finding that there are two employers of this worker? The possibility of two employers of an employee has been recognized both by various statutes and also in common law. For example, the *Employment Standards Act* (S.O., 2000) does address the possibility of "related" employers, and the need to treat more then one party as "the employer" to ensure the intent and purpose of that Act is achieved. See also the decision of Ellis, E.S.C., in Re Regent Park Community Improvement Assn., May 26, 1980, wherein the Employment Standards Referee concluded that there can be a number of different employers at any one time.
>
> The possibility of an employee having two employers has been definitely recognized in the common law context. The helpful discussion of the law in the recent British Columbia Superior Court decision of *B. (W.R.) v. Plint* (1998) 16 D.L.R. (4th) 538 at 566 is useful to our analysis of the facts of the case before the Panel, and is excerpted in part as follows:
>
> The question as to whether there can be more than one employer was considered in *Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.). This was a wrongful dismissal case. Sinclair was held out to be an employee of Dover although he was actually paid by Cyril Management Ltd. which handled Dover's payroll. Cyril billed Dover each month for the gross amount of the employees' wages plus an

administration fee. It then used this money to pay the employees, make remittances to governments and keep a certain profit. It also leased office furniture and cars to Dover.

At trial the judge "lifted the corporate veil", finding that Dover and Cyril were essentially owned by the same people and hence jointly and severally liable for damages for wrongful dismissal. On appeal the Court of Appeal agreed with the result but not the analysis [reported 49 D.L.R. (4th) 297]. Wallace J.A. speaking for a unanimous Court, decided that it was not necessary to "lift the corporate veil" and that the interrelationship between the two companies was not relevant. He stated:

> My opinion differs in some respects from the rationale expressed by the learned trial judge as to the relevance of the interrelationship of the various corporations referred to in his reasons for judgment. In my respectful opinion there is no need to concern oneself with the concept of "lifting the corporate veil" or with the vicarious responsibility of one company for the acts of another, since I consider the issue to be one of determining the company or companies with which the respondent Sinclair had a contract of employment. It must be kept in mind that one may be employed by a number of companies at different times for different purposes, or even at the same. This is a matter of agreement reached between the employee and his respective employers and as long as they are aware of the employee's various activities or roles it is a matter with respect to which the parties can reach what they consider the most commercially convenient arrangement [p.299 D.L.R.].
>
> In my opinion, all of the circumstances of this case clearly support the inference that the plaintiff was employed under a contract of service with Cyril Management Ltd. and Dover Engineering Services Ltd., both of whom exercised control over Mr. Sinclair and his affairs. This arrangement, with which the plaintiff, Mr. Sinclair acquiesced, was devised because of the various beneficial aspects to the employer companies. They cannot, in my opinion, now deny its existence or the responsibility which it imposes upon them respecting their employee and the notice to which he is entitled upon dismissal [p.301].

As stated by Atiyah on *Vicarious Liability in the Law of Torts at p. 149:*

> There is, of course, no reason why two employers should not jointly employ a servant, and this would normally be the case with the employees of a partnership. Here the servant of each partner and of all jointly, and they are jointly and severally liability for the servant's torts.

This proposition was applied by the Court of Appeal in *Sinclair*.

In the worker's compensation context, an American text is also of use to this analysis. Larsen's *Workers' Compensation Law* at Chapter 68 notes there can be two employers, as follows:

> ...
>
> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers... .

While the WSIA does not specifically provide for two employers, neither is such excluded. As was stated in Tribunal *Decision No. 1012/96I*, when commenting on the Act then in force, the specific definition of "employer" while suggestive of a single person is not necessarily exclusive of all other definitions. That decision also observed that the Board must be able to interpret the purposive and remedial legislation in accord with the real merits and justice of each case. We believe that the current definition of "employer" in the WSIA does not, by any means, exclude the possibility in the appropriate case of there being more than one employer.

> Accordingly, and following from the analysis in *Decision No. 1012/96I*, this Panel concludes that reasonable latitude with respect to the definition of what constitutes an "employer", which can thus be more then one singular entity, must exist. If the facts of the particular case at issue support a conclusion that there is more then one employer, then such a conclusion, supported by the evidence, as it is in this case, is eminently sustainable in law.

[26] In *Decision No. 1370/06*, the plaintiff in a civil case was one of the co-drivers of a truck. He was in the truck when it was involved in a motor vehicle accident as it was being driven by the other co-driver. The plaintiff brought the action against the driver, the owner of the truck and the trucking company for which the load was being transported. The defendants applied to determine whether the plaintiff's right of action was taken away. The issue was whether the plaintiff was a worker or an independent operator. In deciding the case, the hearing Vice-Chair noted that the substance, and not the form, of the relationship was critical. The Vice-Chair found that the plaintiff could and did refuse routes and was able to negotiate a slightly higher rate of pay, but stated that this factor was not determinative since casual employees can often choose when to work, for whom to work and can also negotiate their rate of pay. The Vice-Chair found that the plaintiff did not own the truck, was not responsible for operating expenses, and did not have a significant risk of loss or chance of profit. The Vice-Chair concluded that the plaintiff was a worker of either or both of the truck owner and trucking company, and his right of action was taken away. The hearing Vice-Chair commented as follows on the relationships:

> In cases such as this it is rare to find a truly "black and white" relationship. Usually there are nuances and indicia of both sorts of relationship that must be carefully parsed in order to determine the correct result. The example of a "continuum" often applies to these cases: at one end of the continuum there is most clearly established a relationship between worker and employer, while at the other end of the continuum the relationship has all the hallmarks of independence, with the result of a relationship between independent contractor and principal.
>
> Yet for a case to reach the Tribunal it is usually because there are elements of both sorts of relationships. Certainly, there are elements and characteristics of an independent contractor relationship with Hodzic and the other parties. But, despite the able submissions of Ms. Dajczak and Mr. Sonoski, I conclude that the better descriptor of Hodzic is that of a worker or employee who was employed by either Law's or Morrice, or possibly both trucking firms.

[27] The Tribunal has considered applications involving the issue raised by section 28(4) of the WSIA, the right of action against a supplier of a motor vehicle, machinery or equipment. See, for example, *Decision Nos. 834/04* (May 28, 2005), *618/05I* (May 18, 2005), *2273/03* (October 26, 2004), *1265/03* (November 14, 2003) and *2652/01* (April 4, 2003).

(iv) Submissions

[28] Mr. Bulger submitted for the Applicants/Defendants that Mr. Maria-Antony and Mr. Selliah were workers in the course of their employment for one or more Schedule I employers (UK and TMS) at the time of the MVA on October 5, 2000. Mr. Bulger submitted that Mr. Maria-Antony almost certainly worked for TMS, and that an argument could be made that he also worked for UK. Therefore, he submitted, Mr. Maria-Antony's right of action is taken away against Mr. Selliah, UK and TMS. Mr. Bulger submitted that *Decision No. 805/03* is not novel in concluding that there can be more than one employer, but built on earlier Tribunal decisions involving executive officers.

[29] Mr. Bulger submitted that FT, the owner of the truck driven by Mr. Maria-Antony and Mr. Selliah, leased the accident truck to UK without drivers, and, pursuant to section 28(4) of the WSIA, Mr. Maria-Antony's suit is not taken away with respect to FT but is limited pursuant to section 29(4) of the WSIA.

[30] Mr. McClelland submitted on behalf of RBC that, at the time of the MVA on October 5, 2000, Mr. Maria-Antony was a worker in the course of his employment for one employer (UK or TMS) or for two employers (UK and TMS), and, therefore, his right of action is taken away and he is entitled to workers' compensation benefits under the WSIA.

[31] Mr. Green submitted on behalf of Mr. Maria-Antony that, at the time of the MVA on October 5, 2000, both Mr. Maria-Antony and Mr. Selliah were workers in the course of their employment for TMS but not for UK, and, therefore, that Mr. Maria-Antony's right of action is taken away with respect to TMS but not with respect to UK. Mr. Green submitted that the drivers were referred to TMS by UK, but would be kept on only if they proved to be "OK". Mr. Green submitted that, while UK paid Mr. Maria-Antony for one trip, this was perhaps an indication of a sense of some responsibility on UK's part for what had happened but did not mean that UK was Mr. Maria-Antony's employer. Mr. Green submitted that UK referred Mr. Maria-Antony to TMS, but TMS was the employer. Mr. Green submitted that effectively the truck was being driven at the time of the MVA by an employee of TMS (i.e., Mr. Selliah) and a probationary employee of TMS (i.e., Mr. Maria-Antony). Mr. Green submitted that the intention of the WSIA is that there be one employer, and that the conclusion in *Decision No. 805/03* that the current definition of "employer" in the WSIA does not exclude the possibility in the appropriate case of there being more than one employer was not correct. Mr. Green submitted that a worker having two employers would not be workable in many situations, and would be a "complete mess" and open up a "can of worms". Mr. Green further submitted that he agreed with Mr. Bulger with respect to the right of action against FT.

(v) Conclusions

[32] The central issue in this application concerns the employment status of Mr. Maria-Antony. Was Mr. Maria-Antony a worker in the course of his employment at the time of the MVA on October 5, 2000, and, if so, for whom was he working?

[33] The parties' representatives agree that both Mr. Selliah and Mr. Maria-Antony were workers in the course of their employment at the time of the MVA on October 5, 2000. In our view, the evidence supports this conclusion and the conclusion is consistent with Tribunal case law. With respect to Mr. Maria-Antony, he did not own the truck and was not responsible for any of the operating expenses. He was assigned to work on particular runs and was paid a flat rate. He had no chance of profit and no risk of loss because of these arrangements.

[34] Having concluded that Mr. Maria-Antony was a worker in the course of his employment at the time of the MVA on October 5, 2000, we now turn to the remaining issue: Who was Mr. Maria-Antony working for at the time of the MVA?

[35] We agree with the reasoning in *Decision Nos. 805/03* and *1370/06* that the current definition of "employer" in the WSIA does not exclude the possibility in the appropriate case of there being more than one employer. We are satisfied that the facts of this case support the conclusion that Mr. Maria-Antony was a worker of both UK and TMS at the time of the MVA.

[36] Mr. Maria-Antony filled in an application to work for UK and spoke to UK about how much he would be paid. UK paid him for one trip, but Mr. Nelliah/TMS paid Mr. Maria-Antony for two trips. TMS/Mr. Nelliah paid for the airplane ticket for Mr. Maria-Antony to return from the United States after the MVA. UK sent Mr. Maria-Antony to Mr. Nelliah at Mr. Nelliah's request to drive Mr. Nelliah's truck. Mr. Nelliah assigned Mr. Maria-Antony to drive the truck with Mr. Selliah. Mr. Nelliah was to see how Mr. Maria-Antony did on one or two trips before it was decided whether Mr. Maria-Antony could drive on more trips in Mr. Nelliah's truck delivering loads for UK. Mr. Nelliah thought that Mr. Maria-Antony was UK's employee at the time of the MVA, but would be Mr. Nelliah's employee if Mr. Maria-Antony had been "OK" on the trips. Despite thinking that he worked for UK, Mr. Maria-Antony through his wife obtained a letter from TMS after the MVA stating that he was employed for TMS as a self-employed driver since September 17, 2000. The truck driven by Mr. Maria-Antony had UK signage but was leased by FT to Mr. Nelliah. UK provided the loads for Mr. Nelliah's truck and the drivers of Mr. Nelliah's truck delivered these loads, keeping in touch with UK during the trip.

[37] This evidence indicates to us that that Mr. Maria-Antony was controlled by and performed services simultaneously for both UK and TMS at the time of the MVA. In these circumstances, we conclude that Mr. Maria-Antony was a worker in the course of his employment for UK and TMS at the time of the MVA on October 5, 2000. Accordingly, his right of action is taken away against UK and TMS.

[38] The remaining question to be determined is whether Mr. Maria-Antony's right of action against FT is taken away or limited by the WSIA. Section 28(4) states that the immunity from action does not apply where 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. Section 29(4) of the WSIA states that no damages, contribution or indemnity for thee amount determined by the court under section 29(3) to be caused by a person described in section 29(3) is recoverable in an action.

[39] Mr. Green agrees with Mr. Bulger that FT leased the accident vehicle to TMS without drivers, and that Mr. Maria-Antony has a limited right of action against FT pursuant to section 28(4) and section 29(4) of the WSIA.

[40] In our view, the evidence from Mr. Nelliah and Mr. Jain and in the lease agreement supports the conclusion that FT leased the accident truck to TMS without drivers. In these circumstances, we conclude that Mr. Maria-Antony has a right of action against FT pursuant to section 28(4) but his right of action is limited pursuant to section 29(4) of the WSIA.

DISPOSITION

1. The application is allowed.
2. Mr. Maria-Antony and Mr. Selliah were workers in the course of their employment at the time of the MVA on October 5, 2000. Accordingly, the right of action of Mr. Maria-Antony, his wife and his son action against Mr. Selliah is taken away.
3. Mr. Maria-Antony was a worker for UK (1323109 Ontario Ltd.) and for TMS (1362038 Ontario Ltd.) at the time of the MVA on October 5, 2000. Accordingly, the right of action of Mr. Maria-Antony, his wife and his son against UK (1323109 Ontario Ltd.) and against TMS (1362038 Ontario Ltd.) is taken away pursuant to section 28(1) of the WSIA.
4. The right of action of Mr. Maria-Antony, his wife and his son against Financial Transport Inc. is not taken away pursuant to section 28(4) of the WSIA, but is limited pursuant to section 29(4) of the WSIA.
5. Mr. Maria-Antony is entitled to claim workplace safety and insurance benefits.

DATED: March 8, 2007

SIGNED: V.R. Robeson, B. Wheeler, J.A. Crocker