



**WORKPLACE SAFETY AND INSURANCE  
APPEALS TRIBUNAL**

**DECISION NO. 397/24**

**BEFORE:** N. M. Perryman: Vice-Chair

**HEARING:** March 14, 2024 at Toronto  
Oral by Videoconference  
Post-hearing activity completed on March 26, 2024

**DATE OF DECISION:** July 23, 2024

**NEUTRAL CITATION:** 2024 ONWSIAT 1172

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

**APPEARANCES:**

**For the applicant(s)/co-applicant(s):** M. J. Cosentino, Lawyer

**For the respondent(s)/co-respondent(s):** M. Slomyanski, Lawyer

**Interpreter:** H. Elez, Croatian

**Workplace Safety and Insurance  
Appeals Tribunal**

505 University Avenue 7<sup>th</sup> Floor  
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle  
et de l'assurance contre les accidents du travail**

505, avenue University, 7<sup>e</sup> étage  
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## REASONS

### (i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* (the WSIA) by an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* (the Applicant) for a declaration that the Respondent is entitled to claim benefits under the WSIA.

[2] Thus, the applicant submits that the respondent, at the time of the motor vehicle accident in question, was a worker within the meaning of the WSIA.

[3] To determine these issues, the following questions must be answered:

1. Was the company, herein referred to as X, that the respondent was associated with at the time of the accident a Schedule 1 employer?
2. Was the respondent an employee or an independent operator?
3. Was the respondent in the course of his employment at the time of the motor vehicle accident?

### (ii) Analysis

[4] The application is allowed. Pursuant to section 31(1)(c), I find the respondent is entitled to claim benefits under the plan and, thus, is statute barred from proceeding with a claim for statutory accident benefits from the applicant. The reasons for this decision are set out below.

[5] Sections 26 through 31 of the WSIA are relevant to this application.

[6] 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.

[7] Accordingly, although the respondent is not currently a plaintiff to an action the Tribunal still has the jurisdiction to make an order pursuant to section 31(1)(C) in these circumstances (for example, see *Decision Nos. 964/10*, 2010 ONWSIAT 1176, and *1285/14*, 2014 ONWSIAT 1465).

[8] In *Decision No. 1460/02*, 2003 ONWSIAT 297, 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*, 2002 ONWSIAT 1488.

[9] In determining this application, I have considered the following Board documents from the WSIB's *Operational Policy Manual* (OPM), including OPM Document Nos. 12-02-01, "Workers and Independent Operators"; 15-02-02, "Accident in the Course of Employment"; and 15-03-05, "Travelling".

**(a) Was X a Schedule 1 employer?**

[10] A status check was performed by the Tribunal regarding X's status. X was registered as a Schedule 1 employer with the WSIA with a coverage start date of June 8, 2015. X has been inactive since February 19, 2020.

[11] Accordingly, I am satisfied that X was a Schedule 1 employer at the time of the accident.

**(b) Was the respondent a worker or independent operator?**

[12] In determining how to characterize the respondent's status, I had regard for all the evidence on file, including the viva voce evidence the documentary record, WSIB policy and case law.

[13] Further to the respondent's testimony, I note the following.

[14] The respondent testified that he started driving commercial trucks in 2011. The respondent established his own company in or around 2017. Through his incorporated company, the respondent leased a tractor, which is the same tractor that was involved in the motor vehicle accident in November 2018.

[15] The respondent testified that his relationship started with X in 2017. X was a transportation and freight company.

[16] The respondent entered into a written contract with X. The contract was provided by X and the respondent did not make any changes to the contract. There was no copy of the contract in the materials for this application; however, the respondent confirmed that he likely received a copy of the contract.

[17] The respondent decided to incorporate after he first started working with X. The respondent testified that incorporating allowed him to purchase his own tractor and improve his income. The respondent testified that the rate paid for mileage by X was greater with his own tractor.

[18] Accordingly, in 2017, the respondent worked for X for a short period before incorporating and acquiring his own tractor. The respondent then continued the relationship with X through his corporation.

[19] The respondent testified that he hauled exclusively for X. X's logo was on his tractor. X assigned all the respondent's assignments. The respondent testified that he was not permitted to reassign any assignment. The respondent was likely permitted to decline an assignment; however, he never did.

[20] The respondent did not know whether he was restricted from taking loads from other companies. The respondent testified that he was satisfied with the income he was receiving from X and therefore, did not have a need to obtain additional work. The respondent's rate of pay was based on mileage driven. He was paid roughly twice per month.

[21] The respondent did not attend any functions hosted by X and he did not receive bonuses. The respondent was not aware of how many other drivers were associated with X and did not know how many employees were employed by X.

[22] The respondent declared on his income tax returns to be self-employed.

[23] X is no longer operates.

[24] Further to the documentary evidence, I had regard for the WSIB's clearance certificates for X indicates that the business activity is classified in classification unit 4561-000: General Freight Trucking.

[25] Moreover, I also considered the respondent's evidence provided on examination for discovery. In particular, I note that the respondent testified, under oath, to the following:

- The cargo that the worker was hauling, from out of province, on the date of the accident had been arranged by X. The accident occurred prior to arriving at his destination.
- The respondent, during discovery, advised that he was not allowed to drive or haul for anyone else.
- The respondent leased the tractor. The insurance for the tractor was arranged and paid for by X. X also provided the respondent with a fuel card. It was less expensive to use the fuel card to purchase fuel in Canada.
- The respondent reimbursed X for the insurance and fuel card.
- X was responsible for paying for tolls.
- The tractor was registered to the respondent's corporation.
- The respondent did not own the trailer that he was hauling on the date of the accident.
- X paid to put signage on both sides of the respondent's tractor. The signage was required to haul for X.
- The respondent was responsible for the maintenance of the tractor.
- The respondent was not part of a group benefits plan while working with X. He did not contribute towards a pension.
- The respondent owned and/or leased 3 different trucks at the time of the accident. The respondent used the same truck (with the signage of it) to haul for X. The respondent gave one truck to his daughter and leased the other truck to a friend.
- The only equipment that the respondent was required to wear was a safety vest for loading and unloading the trailer which he purchased himself.
- The respondent was not able to assign or hire other people to perform the work that was assigned to him by X.
- The respondent's corporation did not have any employees.

[26] OPM Document No. 12-02-01, entitled "Workers and Independent Operators," provides the following, in part:

**Policy**

The WSIB has the authority to determine who is a worker or an independent operator under the Workplace Safety and Insurance Act, 1997 (WSIA).

For all industries other than construction, the WSIB uses questionnaires (a general questionnaire and five 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.

(...)

### **Purpose**

The purpose of this policy is to outline the criteria used by the WSIB to determine a person’s status.

### **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 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.

#### **Questionnaires**

The questionnaires apply to persons, usually contractors and subcontractors, who are unsure of their own status, or whose status is in question by the hiring company or the WSIB. Elements of the organizational test are incorporated into the five industry specific questionnaires and the general questionnaire.

#### **Industry-specific questionnaires**

These questionnaires are geared to specific industries in which the question of worker/independent operator status arises most frequently.

They are

- Courier
- Logging
- Retail stores
- Taxis, and
- Trucking.

#### **General Questionnaire**

The WSIB uses a general questionnaire for persons who work in industries other than the five industries for which there are industry-specific questionnaires.

After completing and submitting the appropriate questionnaire to the WSIB, the WSIB determines whether persons are workers in an employer's organization, or independent operators running their own separate business.

(...)

### **Incorporation**

The WSIB does not automatically consider incorporation, on its own, as a sole factor in determining whether a person is an independent operator. One-person corporations still need to apply for independent operator status by completing the appropriate industry-specific or general questionnaire. The WSIB looks at whether the person operates a business or not, rather than just the incorporated structure of the operation.

(...)

### **Characteristics of workers and independent operators**

The following list compares worker/independent operator characteristics. The statements on the left are more characteristic of the behaviour or situations of workers, while those on the right characterize the behaviour of independent operators. No one statement determines a person's status. The seven questionnaires do not necessarily include all the characteristics listed since they are designed to capture key elements of business relationships in specific industries.

Decision-makers consider the statements on the questionnaires, and any other information relevant to the terms and conditions of employment.

	<b>Workers</b>	<b>Independent Operators</b>
<b>Instructions</b>	Comply with instructions on what, when, where, and how work is to be done.	Work on their own schedule.  Does the job their own way
<b>Training/supervision</b>	Trained and supervised by an experienced employee of the payer.  Required to take correspondence or other courses.  Required to attend meetings and follow specific instructions which indicate how the payer wants the services performed.	Use their own methods and are not required to follow instructions from the payer.
<b>Personal Service</b>	Must render services personally.  Must obtain payer's consent to hire others to do the work.	Often hires others to do the work without the payer's consent.

	<b>Workers</b>	<b>Independent Operators</b>
<b>Hours of work</b>	The hours and days of work are set by the payer.	Work whatever hours they choose.
<b>Full-time work</b>	Must devote full-time to the business of the payer. Restricted from doing work for other payers.	Free to work when and for whom they choose.
<b>Order or sequence of work</b>	Performs services in the order or sequence set by the payer. Performs work that is part of a highly coordinated series of tasks where the tasks must be performed in a well-ordered sequence.	Performs services at their own pace. Work on own schedule.
<b>Method of payment</b>	Paid by the payer in regular amounts at stated intervals. Payer alone decides the amount and manner of payment.	Paid by the job on a straight commission. Negotiates amount and method of payment with the payer.
<b>Licenses</b>	Payer holds licenses required to do the work.	Person holds licenses required to do the work.
<b>Serving the public</b>	Does not make services available except on behalf, or as a representative, of the payer. Invoices customers on employer's behalf.	Has own office. Listed in business directories and maintains business telephone. Advertises in newspapers, etc. Invoices customers on own behalf.
<b>Status with other government agencies</b>	Terms of the relationship are governed by a collective agreement. Canada Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the Canada Pension	Terms of the relationship not governed by a collective agreement. Canada Revenue Agency has made an official ruling

	<b>Workers</b>	<b>Independent Operators</b>
	<p>Plan (CPP) and the Employment Insurance Act (EIA). (A ruling is made after the relevant parties complete the form “Request for a ruling as to the status of a worker under the CPP or EIA”.)</p> <p>Collects and pays GST and other applicable taxes on payer’s behalf.</p> <p>Payer deducts EI, CPP, insurance, income tax, etc. from pay.</p>	<p>that the person is not a worker under the CPP and EIA.</p> <p>Collects and pays GST and other applicable taxes on own behalf.</p> <p>Takes no deductions from pay for EI, CPP, insurance, income tax, etc.</p>

### **Profit or loss**

To determine what the opportunities are for the person to earn a profit or suffer a loss in doing the work, the decision-maker must consider

- what assets (labour, materials, tools, and equipment) are used, operated or put into action when doing the work, e.g., a lathe. These are to be distinguished from assets that are the subject of the work, or that are acted upon in doing the work, e.g., the table leg that is “turned” on the lathe.
- what costs are incurred in doing the work, including
  - costs of the acquisition, maintenance, operation and repair of assets;
  - financing and loan arrangements with respect to the work, and
  - licensing and insurance fees.
- who pays these costs – the employer or the person
- if the person pays the costs, does the person purchase items directly or indirectly from the employer or through an arrangement with the employer
- who makes and has the right (legal or otherwise) to make these decisions – the person or the employer
- the market mobility of the person or the demand that exists for these services.

Workers have the right to make decisions that, in comparison to those that the employer makes (or has the right to make), have an insignificant or lesser influence on the worker’s opportunity to make a profit or suffer a loss in doing the work.

### **Other applicable criteria**

To determine what other applicable criteria suggest about the status of the person, decision-makers consider the paired statements that follow. None of these statements, on its own, leads to the determination of status. Before making a determination, decision-makers must consider each statement in reference to all other features of the work relationship.



	<b>Workers</b>	<b>Independent Operators</b>
<b>Continuing need for type of service</b>	Payer has a continuing need for the type of service that the person provides. A payer has a continuing need for service if all persons who perform such services, collectively, spend more than 40 hours a month on average doing the work, or if the work continues full-time for more than 4 months.	Payer does not have a continuing need for the type of service that the person provides.
<b>Hiring / supervising / paying assistants</b>	Hires, supervises, and pays workers, on direction of the payer (acts as a supervisor or representative of the payer.)	Hires, supervises, and pays workers, on own accord and as the result of a contract under which the person agrees to provide materials and labour and is responsible for the results.
<b>Doing work on purchaser's premises</b>	Payer owns or controls the worksite.	Works away from the payer's premises using own office space, desk, and telephone.
<b>Oral and written reports</b>	Required to submit regular oral or written reports to the payer.	Submits no reports.
<b>Right to sever relationship</b>	Either the person or the payer can end the work relationship at any time without legal penalty for breach of contract.	Agrees to complete a specific job and is responsible for its satisfactory completion or is legally obligated to pay for damages or loss of income that the payer sustains because of the failure to satisfactorily complete the work.
<b>Working for more than one firm at a time</b>	Usually works for one payer.	Works for more than one payer at the same time.

### Determining Status

The decision-maker reaches a decision about the status of the person. When the criteria indicate the person has a separate business that is not integrated into the employer's business, then the person is an independent operator. If the decision-maker finds

- that the person is subject to a high degree of control in doing the work, and
- that the decisions the person makes have an insignificant effect on the person's own opportunity to earn a profit or suffer a loss

the person is a **worker** [emphasis in original] and does not have a separate business, even if a review of "Other applicable criteria" suggests that some independence is afforded the person in the relationship with the employer.

[27] In addition to WSIB policy, there is an industry-specific questionnaire developed by the WSIB entitled "Determining worker/independent operator status: *Trucking industry*". While the questionnaire is not binding on decision-makers, the criteria set out in this questionnaire is consistent with the factors set out in WSIB policy and with Tribunal case law.

[28] Accordingly, I have considered the above-noted framework in determining the nature of the relationship between X and the respondent.

[29] Ms. Consentino, on behalf of the applicant, provided oral submissions at the hearing.

[30] Ms. Consentino submits that at the time of the motor vehicle collision, the respondent was hauling a load for X, with no evidence of significance that the respondent was engaged in any personal activity at the time. She submits that the respondent was actively engaged in transporting a load and, thus, was in the course of his duties at the time of the accident consistent with OPM Document Nos. 15-02-02, "Accident in the Course of Employment", and 15-03-05, "Travelling".

[31] Regarding the respondent's status, Ms. Consentino submits that further to *Decision No. 3089/18*, 2019 ONWSIAT 461, "status as a Schedule 1 employer is not determined by whether the entity was actually registered with the WSIB at the time of the accident, but rather, whether the entity operated a business that falls within Schedule 1".

[32] Ms. Consentino submits that the respondent worked within the transportation business and thus, the respondent's business activities fall within Schedule 1. In submitting this, Ms. Consentino relied on the WSIB's clearance certificates.

[33] Ms. Consentino submits that the relationship between the worker and X was more indicative of an employer and employee than an independent contractor. In submitting this, she relies on the following: the respondent did not pay for gas for the truck; the respondent was under a lease arrangement and X operated the lease and cab; insurance for the tractor was arranged by X and attached to the logos displayed on the vehicle, which were paid by X; the respondent worked exclusively for X; the respondent was not able to haul loads for other companies; and the respondent did not have any significant control on how and when to perform his duties.

[34] Ms. Consentino notes that the respondent was an employee of X prior to incorporating. She submits that the primary purpose of incorporating was to gain tax benefits and to increase his income. However, the relationship between the respondent and X did not significantly change.

[35] Ms. Slomyanski provided written submissions following the oral hearing for this application.

[36] Ms. Slomyanski, on behalf of the respondent, submits that the respondent was an independent operator. With respect to the above-noted factors, Ms. Slomayanski notes that the respondent: owned his own vehicle; his remuneration was variable and did not provide for any deductions; declared himself to be self-employed and operated through his own corporation; intended to operate under a contract for service; possessed the ability to contract out the work he received; and possessed the ability to enter into contracts for service with other entities.

[37] Ms. Slomyanski submits that the respondent “had full control over working conditions and remuneration”. She submits that the respondent was independent of the company to which he received his assignments.

[38] Ms. Slomyanski acknowledges that the respondent signed an assignment to the WSIB, but submits that this is not indicative of the respondent’s belief of his entitlement under the plan. Rather, she notes that the insurance company has demonstrated a willingness to assume responsibility for paying out benefits to the respondent.

[39] Ms. Consentino also provided written reply submissions which were also considered. Ms. Consentino, in her written reply submissions, took issue with the characterization of the evidence and some of the facts provided for in the respondent’s submissions. Ms. Consentino maintains the position of the applicant, that the respondent was a “worker” within the meaning of the WSIA and not an independent operator.

[40] There are several Tribunal cases that address the status of truck drivers, some of which was relied on by the applicant’s counsel, such as *Decision Nos. 1285/14*, 2014 ONWSIAT 1465, and *2053/16*, 2018 ONWSIAT 715, in the context of an application under section 31.

[41] Based on the facts in this application, I find that the respondent is a “worker” within the mean of the WSIA and not an “independent operator”. In coming to this conclusion, I find that the majority of factors identified in the WSIA and in case law are consistent with an employer and employee relationship or a contract of service. I find that the substance of the relationship between X and the respondent was a contract of service; however, their financial relationship was likely designed to provide an economic benefit for tax purposes.

[42] In reviewing the factors and the evidence in this appeal, I note that the fact that an individual was paid through a corporation is not determinative of the relationship; but rather it is the substance of the relationship that governs whether an individual truck driver is a worker on an independent operator.

[43] Like *Decision No. 472/21*, 2021 ONWSIAT 550, the strongest factors that suggest that the respondent is an independent operator is the fact that he owned his own tractor through his corporation and that the respondent worked through a corporation.

[44] However, regarding most of the other factors, I find that the relationship between the respondent and X is more indicative of a contract of service.

[45] In concluding the above, I am guided by the reasoning in *Decision No. 472/21* which is based on similar facts.

[46] *Decision No. 472/21* reasoned:

[25] The fact that JT was paid through a corporation is not determinative of the relationship; as noted above, no one factor is determinative. As was noted in *Decision No. 2335/13*, it is the substance, not the form, of the relationship that governs whether an individual truck driver is a worker or independent operator.

[26] The strongest factor in favour of independent operator status in this case is the fact that JT owned and maintained the truck (though not the trailer). However, the evidence also shows that initially, for the first three to four runs, JT drove trucks owned by the company because his own needed repairs. In addition, the truck was plated by the company: without additional steps, JT could not have used that truck independently to earn income. The truck bore the trucking company's logo.

[27] The factors suggesting an employment relationship outweigh the fact that JT owned the truck. In particular, the company exercised a high degree of control over JT: JT did not and indeed could not drive for anyone else. That exclusivity is a very strong indicator of employee status. That conclusion is then bolstered by other factors, as listed above, including the fact that all payment terms were negotiated and were set by the company and all customers were those of the trucking company. JT had little or no opportunity to control his profit or loss, given no ability to drive for other customers and no ability to negotiate prices. There is also no documentation in which the parties stated a clear intention that JT's status was that of independent operator rather than employee. Overall, the indicia on balance show that JT was a worker employed by the trucking company.

[47] I find the facts of this case are analogous to those in *Decision No. 472/21* and adopt the reasons set out in that decision.

[48] Based on the respondent's testimony, I am satisfied that he worked exclusively for X. This exclusivity was demonstrated by the fact that X's logos were imprinted on the respondent's vehicle and by the fact that the respondent did not work for anyone else. Further, contrary to Ms. Slomyanski's submissions, I am persuaded, based on the evidence of the respondent, that he was not able to subcontract out the work he received.

[49] The respondent was not responsible for paying any highway tolls. The respondent did not arrange any of his own clients. The respondent was not responsible for finding his own clients nor was he responsible for negotiating directly with clients. The respondent did not arrange any of his assignments.

[50] Rather, the respondent's income was guaranteed based on the mileage he drove. As such, there was no significant opportunity provided for the respondent to control his profit or loss.

[51] I acknowledge that the respondent owned and maintained the tractor and did not receive a T4. However, I find that these factors are not significant enough to outweigh the other indicia present which suggest a contract of service.

[52] In summary, I find that the respondent is a worker in the meaning of the WSIA. Although there were characteristics of the relationship that suggested that the respondent was an independent operator, I find that the substance of the relationship was more indicative of an employer and employee relationship. X exercised a significant degree of control in the relationship as evidenced in the exclusivity of the relationship and the minimal risks for loss and opportunities for profit. For these reasons, I find that the respondent was a "worker" as defined in the WSIA.

(c) **Was the respondent in the course of his employment at the time of the accident?**

[53] OPM Document No. 15-03-05, "Travelling", states:

**Travel on employer's business**

When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such a vehicle. However, the employment must obligate the worker to be travelling at the place and time the accident occurred.

[54] The respondent was hauling a load for X when the accident occurred. This fact was not significantly challenged or disputed. The respondent was not on a personal errand at the time of the accident. Rather, the evidence before me was that the respondent was actively engaged in his duties as a truck driver at the time of the accident. Accordingly, I am satisfied that the respondent was in the course of employment at the time of the accident.

[55] In conclusion, I am satisfied that X is a Schedule 1 employer. For the reasons set out above, I find, on a balance of probabilities, that the respondent is a "worker" as defined by the WSIA who was in the course of his employment at the time of the accident. Accordingly, pursuant to section 13(1), the respondent is entitled to benefits under the insurance plan.

**DISPOSITION**

[56] The application is granted. Pursuant to section 31(4) of the WSIA, the respondent may file a claim for benefits within six months of the date of this decision.

DATED: July 23, 2024

SIGNED: N. M. Perryman