WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1543/19

BEFORE: L. Petrykowski: Vice-Chair

HEARING: September 4 and 5, 2019, March 6, 2020 at Toronto
Oral

DATE OF DECISION: June 25, 2020

NEUTRAL CITATION: 2020 ONWSIAT 1203

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

APPEARANCES:

For the Applicants (Valentin Salaoru, Transport Robert (1973) Ltee, Location Robert Ltee and Robert Transport Inc.): T. Macmillan, Lawyer

For the Co-Applicants (Duck Won Kim and Sunny Tours Inc.): E. Charleston, Lawyer

For the Co-Applicants (Candice Lynn and James Birmingham): B. Pedro, Lawyer

For the Co-Applicants (Timothy Poupore and OVE Industrial Design): A. Giel, Lawyer

For the Respondents: B.A. Edson, Lawyer

For the interested third party: Did not participate in the proceedings

Interpreter: J. Choi (Korean)

REASONS

(i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") made to the Tribunal in relation to an action filed in Toronto in the Ontario Court as File No. CV-14-517766. The plaintiffs (Mr. In Ho Chung and his wife, Ms. Hyun Ah Park) in that action are the Respondents in the application before the Tribunal. There are numerous defendants in that action, most of which are the Applicants/Co-Applicants in the application before the Tribunal, as explained below.

[2] The Applicants (Mr. Valentin Salaoru, Transport Robert (1973) Ltee, Location Robert Ltee and Robert Transport Inc.) were represented by Mr. Macmillan, a lawyer. The Co-Applicants (Duck Won Kim and Sunny Tours Inc.) were represented by Mr. Charleston, a lawyer. The Co-Applicants (Ms. Candice Lynn and Mr. James Birmingham) were represented by Ms. Pedro, a lawyer. The Co-Applicants (Mr. Timothy Poupore and OVE Industrial Design) were represented by Mr. Giel, a lawyer. The Respondents were represented by Mr. Edson, a lawyer, who noted at the Tribunal hearing that Mr. Chung's wife was not proceeding with the derivative *Family Law Act* claim, however, no formal order had been made to dismiss it.

[3] The Applicants/Co-Applicants (Duck Won Kim and Sunny Tours Inc.) seek a declaration from the Tribunal that Mr. Chung was a worker of a Schedule 1 employer and was in the course of his employment at the time of the accident on February 8, 2013 and a further determination that the right to sue of the Respondents is taken away pursuant to section 28 and subsection 27(2) of the WSIA. The Applicants also sought a determination that Mr. Salaoru, a trailer truck driver, was a worker of a Schedule 1 employer at the time of the accident. The Co-Applicants sought a determination that Mr. Kim, a tour bus driver, was a worker of a Schedule 1 employer at the time of the accident.

[4] The remaining Co-Applicants (Ms. Candice Lynn, Mr. James Birmingham, Mr. Timothy Poupore and OVE Industrial Design) seek recovery-related declarations affecting the civil action pursuant to subsection 29(4) of the WSIA concerning damages, contribution or indemnity caused by the fault or negligence of applicable parties. The Applicants/Co-Applicants (Duck Won Kim and Sunny Tours Inc.) also sought such recovery-related determinations, in the alternative, if their main application submissions were not successful.

[5] The Respondents seek a determination from the Tribunal that the application be dismissed as it was primarily submitted that Mr. Chung was an independent operator, rather than a worker of a Schedule 1 employer, at the time of the accident. The Respondents also seek a declaration that the Applicants/Co-Applicants remain jointly and severally liable in the civil action.

[6] The Tribunal also provided notice of the proceedings to a named defendant in the civil action, Paran Tours Inc., however, they did not provide any application-related materials for the Tribunal proceedings. However, the principal proprietor of Paran Tours Inc., Mr. K., was summonsed by the Tribunal to provide testimony and he did so on September 4, 2019.

[7] The Tribunal also provided notice of the proceedings to an interested third party, Mr. C., who did not attend the Tribunal hearing or participate in the Tribunal proceedings.

[8] The Tribunal arranged for a Korean language interpreter (Ms. Choi) to assist in the proceedings. While there were some preliminary discussions at the outset of the hearing about her familiarity with Mr. Chung from several years ago, the parties did not ultimately object to the use of this particular interpreter for the proceedings.

(ii) Issues

[9] In determining the above-noted matters, I note that the main issues in dispute concerning this application were whether Mr. Chung was a worker of a Schedule 1 employer, rather than an independent operator, and in the course of his employment at the time of the February 8, 2013 accident. There were also collateral issues of recovery-related determinations affecting the civil action to which all of the parties had an interest in these proceedings.

(iii) Background

[10] On February 8, 2013, Mr. Chung was a tour guide on a tour bus that was involved in a multi-vehicle collision on Highway #401 in the Leeds and Thousand Islands geographic area of Ontario. This multi-vehicle collision involved the various individuals and businesses that were above-described as parties in this application.

(iv) The testimony of Mr. K.

[11] While I have considered all of Mr. K.'s testimony, I find the following testimony to be particularly relevant to the application before the Tribunal.

[12] Mr. K. testified that he was the President of the company (Paran Tours Inc.) whose business was to provide guided tours. Mr. Chung was required to ride on the bus as a tour guide. The company sends out a tour bus and a tour guide is there almost always. The tour guide and bus driver discuss the route. The company decided the itinerary and the tour involved sightseeing. The tour guide makes sure the company itinerary is followed. The company had employees at the time of the accident but Mr. Chung was a freelancer. He decided that Mr. Chung was an appropriate person to work as a tour guide. The tourists are customers of the company and not Mr. Chung's customers. The decision to cancel the tour is made by the company or the bus company. The company would decide what hotels were to be used and when the tours would occur. The customers were picked up at different places but the company office location was the central spot.

[13] Mr. K. then testified that a bad review for a tour guide could result in the termination of that tour guide. Mr. Chung was expected to be working as a tour guide when assigned on a tour. The tour guide cannot work full-time because it is on an on-call basis. Mr. Chung was paid exclusively in tips and the tipping instructions were from the company. The customers were told verbally and it was written on the itinerary. It is $10 per day for the tour guide and driver and this was told to the customers over the phone or in person if they walked in. This money is cash and is given to the tour guide. The tour guide takes care of giving the money to the bus driver. The bus driver is an employee of the bus company. Mr. K. rents the buses for the tours from the bus company. He also pays for Mr. Chung's meals and hotels. Mr. Chung did not have any independent expenses for his work as a tour guide. He understands that Mr. Chung did not get money from the customers on the date of accident but is not sure.

[14] Mr. K. then testified that his company refunds money to customers for cancellations. Mr. Chung did not rent the bus. The company had a continued need for tour guides. The company regularly used Mr. Chung as a tour guide from 2011 or 2012. There was a lot of tour

guide work in the summer and not that much in the winter. There was more than 40 hours per month. Sometimes Mr. Chung would do two tours in one week. The tour on the date of accident was scheduled to be three days. The company wanted their tour guides to report severe weather conditions back to them. Mr. Chung could be terminated if the company was unsatisfied with his performance. Mr. Chung could leave the company if he was not satisfied.

[15] Mr. K. further testified that his company would pay for the services of a bus. Sometimes people were only asking for a bus rather than a package. On the date of accident, it was a tour package. Mr. Chung could decide not to go on the tour but he could not cancel the tour for the customers. Mr. Chung was not responsible financially if there was a cancellation of the tour as that would be the company's responsibility. The company would take none of the $10 tip from the tour guide. The company would not take $3 dollars out of each $10 tip. He pays insurance to the bus company. He tells the customers that it is strongly recommended that they have their own insurance for personal injuries during the tour. The company would decide who Mr. Chung's replacements on a guided tour would be. He has no knowledge of Mr. Chung feeling an obligation to only work for his company. It was Mr. Chung's choice about working for other companies. The company could not accept total strangers to be replacement tour guides for them. There is no vacation and the company calls and asks tour guides for their availability.

[16] Mr. K. further testified that he does not think Mr. Chung applied or provided references for being a tour guide. He had known him for a long time and from before. He told Mr. Chung about some basic rules, including to address the customers as "clients". Mr. Chung was never provided a T4 and no CPP/EI deductions. The company would call their pool and Mr. Chung would be provided an itinerary if he accepted the tour. He would then be provided an itinerary by email or come to the office. Mr. Chung was not reimbursed for coming to the office. He never attended any meetings or orientation at the office. There was no system for punishing Mr. Chung. There was a customer survey about tour guide, hotels and restaurants. He talked with Mr. Chung about the surveys about him and whether they were good or bad. These were not used to terminate Mr. Chung's relationship with the company.

[17] Mr. K. then testified that the $10 per day tip was a requirement for customers. The tips were collected separately as that it was what tour companies do in Canada, the United States and South Korea. They did not make a rule that the tip was discretionary. It never happened that customer gave less than this. Mr. Chung did not submit reports about received tips. Mr. Chung was not provided a cell phone but needed one. He was not provided with pens, paper and stationary but could use those in the office. Mr. Chung did not have a specific office space or cubicle at the office. He did not remember if Mr. Chung wore a company t-shirt on the bus but sometimes this occurred for tour guides over the last ten years. There was no company hat, badge or sticker. The company did not pay for any licensing for Mr. Chung or for any travel to take the licensing test.

[18] Mr. K. also testified that Mr. Chung was not paid to travel to the company office for the pick-up point or other locations. Mr. Chung's remuneration was all in the tips. Mr. Chung already had experience with tours and knowledge of sites. Mr. Chung did not ask for permission to go on vacation for a month as other tour guides could be called upon. The tour guide could find a replacement among the company pool but was not sure if Mr. Chung did this. The company did not pay Mr. Chung on the date of accident. He has not worked with them since the accident. No ROE or termination pay was provided to him. Mr. Chung has not pursued an employment standards or wrongful dismissal claim against the company. The company entered

into a contract for the bus and driver and the latter was only allowed to drive the bus. The three months in the summer were busiest for them. The bus company decided who the bus driver was.

(v) The testimony of the Respondent (Mr. Chung)

[19] While I have considered all of Mr. Chung's testimony, I find the following testimony to be particularly relevant to the application before the Tribunal.

[20] Mr. Chung testified that he worked with the company since 2011. He received more than 90% of his income from the company between 2011 and the February 2013 accident. He also did some private tour guide work. His only source of income from 2011 to the accident was tour guide work. He did not have a corporation to receive earnings through this work. He did not carry liability insurance for this work. He met with Mr. K. and they said "let's work together, you as a tour guide" and that tour guide work was available. He understood what working together as a tour guide meant and later accepted this offer. His first tour assignment was in April 2011. He would normally get one-week advance notice. He could decline a job but a cancellation was done by the company. The company obtained all the customers for the tour and set the itinerary for the tour. The company decided the cities, the hotels and the dates. The customers were picked up at the company's office and he did not speak with them before the tour. Customers could talk with the company before the tour. He was expected to dress clean for his tour guide work. He was required to ride on the bus with the customers. The company had an orientation but he did not do it since he was an experienced tour guide.

[21] Mr. Chung then testified that the company used customer satisfaction surveys and began this right after he started working there. Negative surveys could result in big problems for the tour guide but he received positive reviews. He could find a replacement tour guide but Mr. K. of the company made the final decision. The itinerary for the trip included cities being scheduled for particular days and that was determined by the company. He was not sure whether he said full-time employment at the discovery but he tried to answer that he worked for the company consistently for those two years. The busy season was June, July and August and business increased from Victoria Day weekend. He averaged 1.5 tours during the busy season and each tour lasted two nights and three days. He was normally with the customers the whole time and started in the morning and finished when they were in the hotel room. He did not consider himself an employee of the company. He was paid exclusively through tips from customers. He knew about this arrangement when he started and it was the same for the previous company he was with. He never talked about money with Mr. K. but all the Korean tour companies operate in the same way.

[22] Mr. Chung then testified that the suggested daily tip was communicated by the company. It is sometimes on the itinerary. This is the document that the customers on the tour bus received and that the tour guide had. The $10 per day was usually written there. He did not negotiate this amount. If a customer sent the tip to the company, the company would send it to him. The company would take $3 from each of the $10 that he received. The company also paid for his hotel and meals during the trips. Sometimes he would spend money on pens and paper or preparing mineral water for the customers. He did not invoice the customers for the cost of the tour. He did not deal with refunds for customers. A full tour of people would include about 50 on the bus. The company provided for the bus. He did not receive any compensation for the work he did on the date of accident. He did not owe anything by contract to the company. He did not have to tell the bus driver the route because it was the same route and same location.

[23] Mr. Chung explained that his private work was in the low season for friends from South Korea. He accepted money privately from them. He did not mention the private work at the discovery because the subject was about the company work. It was his moral decision to not work for another company. If he did not work for the company and went to work for another one, he would have to come back to see if Mr. K. would accept him. He could have quit and worked elsewhere during his time with the company. He could have accepted other work if he quit with the company first. He had to keep receiving work from the company and it would not have been ethical to work for someone else. It was a moral and ethical obligation not to work for others but Mr. K. did not say he could not work for others. He did not ask the company to work for others. He would introduce himself as "your tour guide" to the customers on the bus. He checked the rooming list to make sure everybody was there. He assumed they knew it was the company's tour. Both he and the customers had a copy of the itinerary. The itinerary had the company's name and logo printed on the front of it.

[24] Mr. Chung then testified that one to two times people did not like the way they were spoken to and he was asked to correct it by a company employee. He saw the survey paper and corrected it on his own. He had ESL training for three months in Canada after arriving here. He worked most of his 27 years here as a tour guide. This was 98% of the time except for vacation. He was remunerated by tips from customers. He did not submit an application or references for the work with the company. He was not given a contract to sign or a list of rules to follow. He was not provided a T4 slip or paid CPP/EI premiums. Work was offered to him when an employee of the company called him to see his availability. He was not expected to accept whatever tours were offered to him. He received the itinerary by email and sometimes went to the office to pick it up. He drove to the office in his own vehicle but was not compensated for these expenses by the company.

[25] Mr. Chung also testified that he did about 40 tours with the company in the year before his accident. He felt he was earning enough income so that he did not have to look for work with other companies. He did not attend staff meetings at the company but did not know if they had them. He did not know about orientation meetings. He understood that the itinerary suggested or recommended $10 per day as the tip. He once received a tip of $100 but that did not happen very often. He did receive a little more than $10 per day around Christmas time and this happened sometimes. He received $5 per person per day from the student groups. The itinerary did not say $5 per day for students and there was no student discount. He did not receive a tip from a few people and the company did not collect it for him. It was his risk about receiving a tip or not. He received $10 per day per customer about 85% of his time with the company. He gave $2 per person per day to the driver as this was the custom in the industry. He sometimes increased the tip to the driver when he was doing a good job as he wanted to give the driver some more.

[26] Mr. Chung did not keep written records of the tips received nor did the company give any forms for this purpose. He bought equipment out of his own pocket and used his own cell phone for work purposes. The company did not pay for his cell phone bill nor did it provide a cell phone to him. He thinks his cell phone bills were generally $300 per month in the busy season and $100-$120 in the low season. His cell phone bill was $80 per month without working. He had to use the cell phone to book the restaurants and to double check with the hotels. He also sometimes called the hotel on behalf of customers who lost items. He sometimes gave his phone number to the seniors who had difficulty finding the gathering places. The tour guide license cost $60-$65 and it lasted for two years. He had to travel to Niagara Falls to write the test and it took

him two hours to travel there. He was not compensated for this travel time or the test-taking by the company. No other company that he had worked for compensated him for this. The company did not care whether he had a license but the parks commission did and requested it. He did not have a script or any direction about what to say about the tour sites. He sometimes had to meet groups in other locations but this was not often. He sometimes drove there himself and other times met with the bus driver first. The tour journey began 50% of the time in front of the office and 50% of the time at other locations.

[27] Mr. Chung testified that he used an accountant to send the tax returns that were listed in the documentary record. He told the accountant that he was self-employed and these were filed on his behalf. All the tour guides were reporting as self-employed and he knows that he is self-employed. He applied for accident benefits from an insurance company following the accident and indicated he was self-employed there. The accident occurred on the first day of the tour and about six hours into the journey. He did not have to clear his vacations with the company before he took them. He went to Costa Rica for one week before the accident and believes that was in late January 2013. Nobody at the company was upset with him that he took vacation. He declined longer trips from the company for personal reasons. Nobody at the company admonished him for this. He would choose to change a route if there was a traffic accident in front of them. He believes the money that he gave to the company was for the hotel room and meals. He did not remember wearing a company T-shirt, uniform, hat, sticker or badge. Sometimes he would help customers up if they fell down. He sometimes received complaints from the customers but explained that he was just the tour guide and not the operating company. He sometimes had to call the company to confirm what the company had said to a customer. He received an answer from the company and gave it back to the person who had the enquiry but this rarely happened. He received email communications from the company to his personal email account.

[28] Mr. Chung finally testified that he was responsible for $200 per month of company-related cell phone calls during the high season but did not bring this to the attention of the company. Mr. K. told him to do a good job as a tour guide. Mr. Chung wanted to look nice for the customers. He was usually dropped off and picked up by his wife for these tour trips. He would communicate with the company to let them know that the tour was finished when it was over. He thought it was ethical to do so. He did not make any deductions for expenses during his time with the company. He did not know why he did not claim the cell phone bills as expenses. There was difficulty in getting supplies from the office but he did so one to two times. The company did not care how much he received so long as they got their $3 dollars. A three-day trip involving 30 people at $3 per day would result in the company wanting $270 from him. The student group trips did not happen during the high season. It was rare but sometimes he received calls at the company office. He gave the company 30% of the tips. He received $5 per day from each customer as a minimum. The tour guide license was not a condition of employment. He knows that some tour guides in the Korean community work without one.

(vi) The testimony of Ms. L.

[29] While I have considered all of Ms. L.'s testimony, I find the following testimony to be particularly relevant to the application before the Tribunal.

[30] Ms. L. testified about her qualifications in English/Korean interpretation in a legal setting. She was a certified court interpreter since 2002, involved in criminal, family, civil and traffic-related proceedings. Korean was her native language and she had a university-level understanding of it. She is one of only four fully accredited interpreters in the province in this regard. She rated the translation in the reviewed discovery process as fair to poor. Some words were missing or added in that translation. She tries her best to give word for word meaning when she does her interpretation.

[31] The "ko-yong" word in Korean means to hire while "ko-yong-in" means the hired person. The latter could mean self-employed or employee. There are multiple meanings so long as the person is hired. Her review process involved reviewing the audio, pausing and interpreting. It took her 10 hours in total. She did this three times to be as accurate as possible. She provided a chart, which compared the words spoken by the plaintiff, the interpreter's version at that time, and her own interpretation. The third day of interpretation involved an interpreter who translated very shortly and not word for word. The interpreter from the first two days was also not good and did not meet her expectations. A later review is more accurate than real-time translation and the two cannot be compared. Her concerns with the translation were explained in her chart.

(vii) The testimony of Professor J.

[32] While I have considered all of Professor J.'s testimony, I find the following testimony to be particularly relevant to the application before the Tribunal.

[33] Professor J. testified that about her language and academic qualifications both in English and Korean. She teaches Korean at a Canadian university and has published in both languages. She is not a certified interpreter and does not do that for courts, tribunals or in a legal setting. She reviewed Mr. Chung's discovery-related statements/audio and Ms. L.'s comments about them. She found some errors and disagreed with the accuracy of some of the content. She reviewed the audio many times, re-winded it and had the ability to pause it. There were three stages to this process and she took 23 hours in total to do so. Her process was easier than real-time translation as there was no time pressure upon her. Her version was more accurate than the interpreter's as she had lots of time. While the interpreter (Ms. C.) did not translate word for word, the translation had an accurate meaning. The actual meaning was not lost there. Her report also included a review of Ms. L.'s comments/report. She agreed with Ms. L. most of the time and Ms. L.'s version was more accurate than the initial interpretation.

[34] Professor J. then explained that "ko-yong" means hiring someone for work for money while "ko-yong-in" means the person ("in") has been added to that meaning. "Ko-yong-in" means something very broad while the meaning of "jig-won" is narrow. Both were translated to "employee" by both interpreters. With respect to question 104 from the discovery transcripts, the plaintiff (Mr. Chung) responded "jig-won" and that means an employee who belongs to a company. Ms. L. also interpreted that response as employee. A temporary worker would not have used the word "jig-won". Her overall impression of the translation at the discovery was that the meaning was not lost.

[35] Professor J. then went on to testify that there were source deductions in South Korea. "Jig-won" means someone who belongs to the company, on their payroll and full-time. Self-employed is not "jig-won". The plaintiff used both words (jig-won and ko-yong-in) in the discovery process. She went on to explain the opinions and comments found in her report.

(viii) Law and policy

[36] 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.

[37] 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 dependent 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, dependent 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.

(ix) Analysis and conclusions

[38] In order to be successful in this application to the Tribunal on the main issues in dispute, the Applicants must establish that at the time of the accident on February 8, 2013, Mr. Chung was a worker of a Schedule 1 employer and in the course of his employment. Assessing whether Mr. Kim and Mr. Salaoru were also workers of Schedule 1 employers at that time in the course of their employment was also necessarily considered to determine the rights of civil action for the various parties involved in the multi-vehicle collision that gave rise to the application before the Tribunal. These matters are respectively considered in the analysis that follows.

(a) Was Mr. Chung a worker or an independent operator at the time of the accident?

[39] The main issue in dispute in this application was whether Mr. Chung was a worker or an independent operator at the time of the accident on February 8, 2013. I have carefully considered the respective submissions of the parties on this point alongside the totality of evidence before me. The Applicants' counsel submitted that there was substantial evidence that Mr. Chung was a worker of Paran Tours Inc. at the time of the accident. Conversely, the Respondents' counsel submitted that Mr. Chung was an independent operator and that substantial evidence supported that position.

[40] I note that the terms "employer", "independent operator" and "worker" are defined in subsection 2(1) of the WSIA, as follows:

> **2(1)** In this Act,
>
> "employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry and includes,
>
> (a) a trustee, receiver, liquidator, executor or administrator who carries on an industry,
>
> (b) a person who authorizes or permits a learner to be in or about an industry for the purpose of undergoing training or probationary work, or
>
> (c) a deemed employer;
>
> "independent operator" means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose;
>
> "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 municipal 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 to exist by the Premier of Ontario or the head of a municipal council.
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.
11. A pupil deemed to be a worker under the *Education Act*.

[41] 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 WSIA 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*).

[42] In that vein, the Board has provided a copy of OPM Document No. 12-02-01, entitled "Workers and Independent Operators". This policy provides the following, 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.
>
> (…)

[43] The Board's policy provides assistance to decision-makers in determining whether a person works under a contract of service (worker) or a contract for service (independent operator). The policy, which applies the "organizational test" to determine who is a worker and who is an independent operator, lists a number of factors to be considered in making that assessment. These include instructions, training/supervision, personal service, hours of work, full-time work, order or sequence of work, method of payment, licenses, serving the public, status with other government agencies, risk of profit or loss, continuing need for type of service, hiring/supervising/paying assistance, doing work on purchasers' premises, oral and written reports, right to sever relationship and working for more than one firm at a time.

[44] 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. In that light, I note that *Decision No. 921/89* stated as follows:

> The actual name applied to the test, whether "integration" test, "organization" test, "hybrid" test or "business reality" test 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.

[45] I have also considered that *Decision No. 1443/06* noted as follows:

> Citing *Decision No. 921/89*, *Decision No. 395/94* also emphasizes that no one factor is determinative, and it is the substance, rather than the form, of the relationship which determines whether a person is a "worker" or "independent operator" for the purposes of the Act. The name applied to the test, whether "integration", "organizational", "hybrid" or "business reality", is not important. As the Panel stated in *Decision No. 395/94*, 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?"

[46] The business reality test is a multifactorial 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 *Decision Nos. 921/89, 395/94, 1146/02* and *1443/06I).*

[47] The Tribunal has also noted that the business reality test applies similar factors to those set out by the Supreme Court of Canada in *671122 Ontario Ltd*. v. *Sagaz Industries Canada Inc.* (2001) SCC 59, a case referenced by the Applicant's counsel in the present proceedings. Justice Major for the Court in *Sagaz,* looked at the factors used 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.

[48] *Sagaz* and Tribunal decisions also make it clear that the factors 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).*

[49] As is the case with many section 31 (right to sue) applications, there are factors present in the instant application that support both interpretations concerning Mr. Chung's status on February 8, 2013. As the Tribunal case law makes clear, however, I must consider the evidence in its entirety and determine the true nature of the relationship between the parties. I must determine on a balance of probabilities, whether at the time of his accident on February 8, 2013, Mr. Chung was working under a contract of service (worker) or a contract for service (independent operator).

[50] After considering all of the evidence before me, including the testimony provided by the witnesses at the Tribunal hearing and the entirety of the documentary record, and the submissions provided by counsel for the various parties, I find on a balance of probabilities that at the time of the accident on February 8, 2013, Mr. Chung was a worker of Paran Tours Inc. with respect to his work-activities, which encompassed providing tour guide services for the customers of Paran Tours Inc.

[51] On the whole, the circumstances of this case were quite clear to me. Mr. Chung was hired as a tour guide in early 2011 to work during tours arranged by Mr. K.'s company, Paran Tours Inc. Mr. Chung already had significant experience as a tour guide with other tour-related companies when he accepted his first tour-related assignment around April 2011 with Paran Tours Inc. As noted in Mr. Chung's testimony, he worked "consistently" with Paran Tours for about two years prior to his accident on February 8, 2013. There was more work for him in the "high season", consisting of June, July, and August, which correlated to the increased demand for tourism/travel during these warmer months. Mr. Chung was required to board a tour bus chartered by Paran Tours Inc. and act as a tour guide for its customers. He followed an itinerary created by Paran Tours Inc. and the trips usually lasted two nights and three days in duration. Mr. Chung usually collected $10 (cash) per day from each customer and this was collected as "tips" as explained on the itinerary from Paran Tours Inc., which each customer was provided. Mr. Chung's usual remuneration was 50% of those collected tips while 20% of them were given to the bus driver and 30% were given back to Paran Tours Inc.

[52] In my view, there were many factors undergirding the existence of an employee-employer relationship in the working arrangement between Mr. Chung and Paran Tours Inc. In my further view, there were few factors supporting the interpretation that Mr. Chung was an independent operator at the material time.

[53] I find it significant that Mr. Chung was required to board a chartered bus and act as the face of Paran Tours Inc. as a tour guide during the course of a multi-day tour, which involved travelling to various sites, eating at restaurants and staying at hotels. The tour participants were the customers of Paran Tours Inc. rather than Mr. Chung's customers. Paran Tours Inc. also controlled almost every aspect of the tour, including arranging the bus transportation and setting the tour itinerary, dates, and scheduled stops. It was not open to Mr. Chung to revise the method of transportation or the main parameters of the scheduled tour in this regard. He was provided with an itinerary with the logo of Paran Tours Inc. and this same itinerary was provided to the customers. He played no role in the creation of this itinerary nor did he play any role in the written expectation on that itinerary that the tour guide should be paid $10 per day per customer for the duration of the tour. It was also not open to Mr. Chung to cancel the trip or issue refunds to these customers. These were solely in the purview of Paran Tours Inc. All of these circumstances support the interpretation that Mr. Chung was involved in an employee-employer relationship with Paran Tours Inc.

[54] More so, Mr. Chung did not control his work in a manner that resembled that of an independent contractor. It was Paran Tours that had the right to control what work was performed, where, when, and how it was performed. Mr. Chung was assigned work from Paran Tours Inc. and did not have the authority to designate that it be done in a different manner than was assigned to him. He was instructed to address the Paran Tours Inc. as "clients". He could not find a replacement tour guide for himself without the ultimate approval of Mr. K. who was the managing authority of Paran Tours Inc. Mr. Chung was merely his servant/employee while Mr. K. exercised complete control over the business of soliciting customers and implementing tours at Paran Tours Inc., which included controlling Mr. Chung's work activities there. Mr. Chung also did not issue invoices to Paran Tours Inc. for rendered services. In my view, Mr. Chung was clearly not engaged in activities as a "person in business on his own account" within these described parameters.

[55] I also find it significant that Mr. Chung was obligated to act as the tour guide for the duration of the tour until it was completed. He, and no one else, was responsible for acting as an intermediary and representative for Paran Tours Inc. during the tour. In fact, his testimony revealed that he sometimes had to call Paran Tours Inc. to deal with specific customer enquiries and would relay information from Paran Tours on their behalf. He also communicated with Paran Tours Inc. at the successful conclusion of each tour. He was also responsible for collecting monies from each customer and was obligated to provide Paran Tours Inc. with at least $3 per $10 collected during the duration of the tour. In this regard, he was entrusted with significant financial responsibility to collect and remit these monies to Paran Tours Inc. He was also not permitted to deviate from this remittance arrangement, which had been established by Paran Tours Inc.

[56] I have further considered that Mr. Chung claimed to be self-employed in this arrangement with Paran Tours Inc. However, the preponderance of evidence makes clear that he did not claim any self-employment expenses during his time with Paran Tours Inc. In this regard, Mr. Chung could not explain in his testimony why hundreds of dollars' worth of additional cell phone

charges, which he stated were related to his tour guide work, were not claimed as self-employment expenses. It was also significant that Mr. Chung was not financially responsible for any tour-related expenses such as meals at restaurants or stays at hotels as these were all paid for by Paran Tours Inc. Mr. Chung could also attend the offices of Paran Tours Inc. to pick up stationery for his work. He also sometimes attended those offices to receive the itinerary and even received calls there from the customers of Paran Tours Inc., albeit infrequently.

[57] I also cannot ignore that Mr. Chung's main work from 2011 to early 2013 was with Paran Tours Inc. The great majority of Mr. Chung's income was derived from his working relationship with Paran Tours Inc. over this time. He did not work for any other company over this time. He worked "consistently" with them over this time and testified that "he was earning enough income so that he did not have to look for work with other companies". This underlines both stability and longevity in the working relationship between Mr. Chung and Paran Tours Inc. In my view, these circumstances led him to be economically dependent on Paran Tours Inc. for his livelihood over approximately two years, which further supports the existence of an employee/employer relationship.

[58] I have further considered that Paran Tours Inc. reviewed Mr. Chung's work as a tour guide. The worker testified that Paran Tours Inc. implemented customer surveys to monitor the efficacy of tour guides like him and acknowledged that negative survey results "could result in big problems for the tour guide". This dovetails with Mr. K.'s testimony that "a bad review for a tour guide could result in the termination of that tour guide". In my view, these surveys were a method by which Paran Tours Inc. assessed the ongoing viability of the working relationship with their tour guides and the possibility of the cessation of that relationship, which further resembles the existence of an employee/employer relationship.

[59] I have also considered that Mr. Chung did not hire helpers or substitute tour guides when he worked as a tour guide for Paran Tours Inc. The degree of financial risk taken on him during his activities with Paran Tours Inc. was minimal outside the infrequent occurrence where he could not collect tips from some customers. More so, the responsibility for investment and management held by Mr. Chung under these circumstances was nil. Similarly, Mr. Chung's opportunity for profit or loss in the performance of these tasks was nil. These circumstances continue to militate in favour of recognizing that Mr. Chung was involved in a contract of service or employee/employer relationship with Paran Tours Inc.

[60] I acknowledge the submissions of the Respondent's counsel that Mr. Chung was paid in "tips" from the tour bus passengers without common deductions and without a T4 statement being issued to him by Paran Tours Inc. This is an unusual arrangement, however, I recognize that it was the common arrangement in the Korean-speaking tourism industry according to both the testimony of Mr. Chung and Mr. K. The fact that Paran Tours Inc. organized the remuneration of Mr. Chung in this manner does not invalidate that he worked for Paran Tours Inc. It was Paran Tours Inc. who explicitly included this on the itinerary and Mr. K.'s testimony importantly explained that this was a requirement for his customers, it was not discretionary, it was customary and that non-compliance with this requirement never happened. These circumstances of remuneration to Mr. Chung do not strip away the fact that the true nature of the relationship between Mr. Chung and Paran Tours Inc. was that of an employee/employer.

[61] As to the submission of the Respondent's counsel that Mr. Chung's relationship with Paran Tours Inc. was transient, involved an ability to decline assignments, and encompassed lengthy vacation-related absences, I must note that employment relationships come in many forms, including fluctuations between full-time and part-time employment. Variable compensation/remuneration totals relating to fluctuating volume of business is not uncommon in many industries, including in the tourism industry. It does appear that there was less work available from Paran Tours Inc. at the time of the accident, since it was the "low season", but this does not mean that the employee/employer relationship was severed by that time. The key point is that Mr. Chung remained "consistently" employed by Paran Tours Inc. up to the time of his accident and remained in an economically dependent relationship with them. The employment arrangement entered into between Mr. Chung and Paran Tours Inc. had not ceased to exist nor had it substantially differed from the above-described circumstances by the time of the accident.

[62] I further recognize that both parties spent significant time and effort in providing expert witnesses to address the matter of the evidentiary worth of Mr. Chung's discovery-related evidence and whether it had been properly and fairly translated/interpreted. I have earlier summarized the relevant evidence from both Ms. L., whom I have accepted to be an expert in Korean-English translation, and Professor J., whom I have accepted to be an expert in the Korean language. Having reviewed their evidence, alongside the totality of the evidence before me, I must emphatically note that this case does not turn on whether Mr. Chung's discovery-related evidence encompassed stating that he was a "ko-yong-in" or a "jig-won". In my view, the varied use of these terms by him at the discovery and their disputed translation into English in the transcripts were not determinative of whether he was a worker or an independent operator. Rather, I have to consider the reality of the business relationship between Mr. Chung and Paran Tours Inc. (see for example *Decision No. 1370/06*). As described earlier, I have assessed that matter by looking at the true relationship between the parties and concluding that there were far more factors supporting that Mr. Chung was working under a contract of service (worker) rather than a contract for service (independent operator).

[63] In my view, the above-described factors and circumstances militate in favour of recognizing that Mr. Chung was involved in an employee/employer relationship at the time of the accident on February 8, 2013. After considering all of the evidence before me, I find, on a balance of probabilities, that at the time of the accident on February 8, 2013, Mr. Chung was not performing a business on his own account. He was involved in a contract of service with Paran Tours Inc. where "a worker agrees to work for an employer on a full- or part-time basis in return for wages or a salary". In my view, the essence of the relationship between Mr. Chung and Paran Tours Inc. was one of worker and employer on February 8, 2013. In my further view, there was a paucity of evidence that pointed to any alternate conclusion about that particular matter.

(b) Was Paran Tours Inc. a Schedule 1 employer at the time of the accident?

[64] On the issue of whether Paran Tours Inc. was a Schedule 1 employer at the time of the accident, I first note that the status check memorandum dated February 5, 2019 contained in Addendum No. 1 of the documentary record confirmed that there was "no record" of Paran Tours Inc. I interpret this to mean that Paran Tours Inc. had not registered for coverage with the Board by the time of the creation of that memorandum. That memorandum also noted that Mr. Chung did not make a claim for workers' compensation to the Board for the accident of February 8, 2013.

[65] It is well-established in the Tribunal's case law that 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 (see for example *Decision Nos. 3536/18, 1821/15* and *2190/16*). This is also explained in Board policy, specifically OPM Document No. 14-02-02 entitled "Registration", which states that an employer is a person who has carried on, or is carrying on, a Schedule 1 or Schedule 2 business activity.

[66] I have then considered that at the time of the accident, *Ontario Regulation 175*/98 enacted pursuant to the WSIA included "conveying passengers by automobile or trolley coach" as a Schedule 1 activity under Class E entitled "Transportation and Storage". More specifically, the Board's applicable Employer Classification Manual (document number E-580-17) listed "Charter, Tour, and Sightseeing Bus Services" (classification unit 4574-099) as "compulsory under Schedule 1". I am therefore satisfied that Paran Tours Inc. was a Schedule 1 employer at the time of Mr. Chung's accident on February 8, 2013 due to its business activity notwithstanding the existence of documentation suggesting that there was "no record" of their registration with the Board. Regardless of the reason for this lack of registration, I find that Paran Tours Inc. was an employer carrying on a business activity within Schedule 1 on February 8, 2013.

(c) Was Mr. Chung in the course of employment at the time of the accident?

[67] I have next considered whether Mr. Chung was in the course of his employment at the time of the accident on February 8, 2013. I have considered that OPM Document No. 15-02-02, entitled "Accident in the Course of Employment", is relevant to consideration of this matter. It states as follows:

> **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.

[68] With respect to the issue of the "place" where an accident occurs, OPM Document No. 15-03-03, entitled "On/Off Employer's Premises," provides that as a general rule, a worker is considered to be in the course of employment on entering the employer's premises, as defined, and the "in the course of employment" status ends on leaving the employer's premises, unless the worker leaves the premises for the purpose of employment.

[69] Tribunal jurisprudence has dealt with the issue of "in the course of employment" on many occasions, and has utilized a multifactorial approach to making related determinations. In that light, I note that *Decision No. 165/96* sets out ten factors to consider in determining whether a worker is in the course of their employment. The Panel explained their approach in that decision, stating in part, as follows:

> …In our view, the test employed for "course of employment" is essentially a work-relatedness test - a relatively flexible test which involves an examination of a number of factors including:
>
> 1. the nature of the activity performed by a worker at the time of the accident;
>
> 2. the relationship of the specific activity to the worker's normal employment activity or routine;
>
> 3. any personal aspect to the activity which gave rise to the accident;
>
> 4. the nature of the risk associated with the activity - i.e. whether primarily an employment related risk or a public risk;
>
> 5. employer control or supervision of the activity;
>
> 6. the time of the accident - i.e. whether within or outside working hours;
>
> 7. the location of the accident - i.e. whether on premises controlled by the employer or on public premises;
>
> 8. the type of equipment or tools involved in the accident - i.e. whether it was equipment supplied by the employer;
>
> 9. specific remuneration (if any) for the activity at the time of the accident; and
>
> 10. contribution to the injury by the activity of the employer or co-worker(s).
>
> While no one factor will normally be determinative of the issue, a consideration of all of the factors may allow a panel to determine the overall character of the activity - whether primarily work-related or primarily personal.

[70] I find that the above-noted factors are relevant to consider in determining whether a worker was in the course of employment, bearing in mind that the Tribunal's multifactorial approach is adaptable to the circumstances and that no one factor is determinative.

[71] The basic parameters concerning Mr. Chung's accident on February 8, 2013 are clear. On the date of accident, he boarded a bus chartered by his employer (Paran Tours Inc.) to act as a tour guide. He then attended the offices of his employer aboard the tour bus to pick up its tour customers. Since Mr. Chung worked as a tour guide, travelling to tourist sites was a regular part of his employment pattern. I also find it significant that he was on the tour bus for the exclusive purpose of working as a tour guide. He was on the first day of a multi-day tour assignment heading toward Ottawa and Quebec when the bus he was travelling on was involved in a multi-vehicle collision on Highway #401. Prior to this accident, he was engaged in tour guide activities on the tour bus. There was no "distinct departure on a personal errand" with the meaning of OPM Document No. 15-03-05, entitled "Travelling", that removed Mr. Chung from the course of his employment at the time of the accident. All of the indicia concerning time, place, and activity establish a strong nexus between his employment and the workplace accident.

[72] Therefore, I find that Mr. Chung was in the course of his employment at the time of the accident on February 8, 2013.

(d) Was Mr. Kim a worker of a Schedule 1 employer in the course of employment at the time of the accident?

[73] With respect to whether Mr. Kim was a worker of a Schedule 1 employer in the course of his employment at the time of the accident, I note that this matter has not been disputed by the parties. Mr. Kim was the bus driver assigned by Sunny Tours Inc. to drive a tour bus for the customers of Paran Tours Inc. on February 8, 2013.

[74] Mr. Kim was driving the bus when the multi-vehicle accident occurred on February 8, 2013. He was on the tour bus for the exclusive purpose of working as the driver. He was on the first day of this multi-day driving assignment when the bus was involved in a multi-vehicle collision on Highway #401. There was no "distinct departure on a personal errand" with the meaning of OPM Document No. 15-03-05 that removed Mr. Kim from the course of his employment at the time of accident. All of the indicia concerning time, place, and activity establish a strong nexus between his employment and the workplace accident. Additionally, the status check memorandum dated February 5, 2019 explained that Mr. Kim's employer, Sunny Tours Inc., was a registered Schedule 1 employer with the Board at the time of the accident.

[75] Accordingly, I find that Mr. Kim was a worker of a Schedule 1 employer in the course of his employment at the time of the accident.

(e) Was Mr. Salaoru a worker of a Schedule 1 employer in the course of employment at the time of the accident?

[76] With respect to whether Mr. Salaoru was a worker of a Schedule 1 employer in the course of employment at the time of the accident, I note that this matter has largely not been disputed by the parties. However, the Respondent's counsel did provide written submissions in his application to suggest that the Applicants did not have a substantial connection to the province of Ontario. I accept the extensive submissions of the Applicants' counsel in his reply statement that conclusively demonstrated that the Applicants had a significant commercial presence in the province of Ontario and that the Applicant (Mr. Salaoru) was sufficiently engaged in driving a trailer truck in the province of Ontario.

[77] Furthermore, I note that Mr. Salaoru was a transport truck driver assigned to haul dairy goods by his employer, Robert Transport, at the time of the accident on February 8, 2013. His trailer truck was involved in a multi-vehicle collision on Highway #401 at the time of accident. There was no "distinct departure on a personal errand" with the meaning of OPM Document No. 15-03-05 that removed Mr. Salaoru from the course of his employment at the time of accident. All of the indicia concerning time, place, and activity establish a strong nexus between his employment and the workplace accident.

[78] Additionally, correspondence from the Board's Employer Service Centre to the Applicants' counsel dated May 12, 2017 explained that Mr. Salaoru's employer, Robert Transport, had a registered account as a Schedule 1 employer with the Board as Robert Transport Inc. but that it was not active as of February 8, 2013. That same letter identified that there was an active account for Transport Robert (1973) Ltee as a Schedule 1 employer as of February 8, 2013. I have also considered that the status check memorandum dated February 5, 2019 confirmed that same information and further noted that company 1641-9749 Quebec Inc. was an active Schedule 1 employer since December 24, 2010. The latter was the

associated payroll company for Robert Transport that paid drivers, including Mr. Salaoru, but it was not named as a defendant in the above-described civil action.

[79] I have further considered that the Applicants' written materials sufficiently explained that Mr. Salaoru worked for Robert Transport, which was a group of related/affiliated companies working under the business operations of Transport Robert (1973) Ltee. As noted earlier, they had a registered Schedule 1 account with the Board, which was active as of the date of accident.

[80] Accordingly, I conclude that there is sufficient evidence to establish that Mr. Salaoru was a worker of a Schedule 1 employer in the course of his employment at the time of the accident.

(f) The Respondents' right to sue

[81] I have next considered the right to sue consequences flowing from my earlier findings that all three of the involved individuals (Messrs. Chung, Kim and Salaoru) were workers of Schedule 1 employers at the time of the multi-vehicle accident on February 8, 2013.

[82] The Applicants/Co-Applicants (Duck Won Kim and Sunny Tours Inc.) have requested that Respondents' right to sue them be taken away pursuant to section 28 and subsection 27(2) of the WSIA. I find that the Respondents' right to sue the Applicants and Co-Applicants (Duck Won Kim and Sunny Tours Inc.) is barred by virtue of subsection 28(1) and subsection 27(2) of the WSIA. The Respondent (Mr. Chung) was a worker of a Schedule 1 employer and is not entitled to commence an action against his Schedule 1 employer (Paran Tours Inc.). He is also not entitled to commence an action against the other Schedule 1 employers and their workers who were involved in the workplace accident of February 8, 2013. This includes Sunny Tours Inc. and Robert Transport (and its affiliated companies) and both Messrs. Kim and Salaoru. The application to remove the Respondents' right to sue these parties is therefore granted.

(g) The Respondent's (Mr. Chung) eligibility for workers' compensation benefits

[83] While I have determined that Mr. Chung's right to sue the above-described Applicants/Co-Applicants has been taken away, I must note that he sustained a workplace accident on February 8, 2013 while in the course of his employment with a Schedule 1 employer. This means that he is now entitled to apply for workers' compensation benefits pursuant to subsection 31(4) of the WSIA for that workplace accident within six months following the release of this decision.

(h) Applicability of subsection 29(4) WSIA declaration

[84] I have finally considered the application-related materials and submissions put forth by the Co-Applicants (Ms. Candice Lynn, Mr. James Birmingham, Mr. Timothy Poupore and OVE Industrial Design). Their respective counsel have sought recovery-related declarations affecting the civil action pursuant to subsection 29(4) of the WSIA, which concern damages, contribution or indemnity caused by the fault or negligence of applicable parties. They have submitted that such declarations are necessary to ensure that their clients, being "strangers to the Act", have their liability limited in the civil action from "joint and several liability to several liability" only.

[85] I note that subsection 29(4) of the WSIA has the effect of limiting damages, contribution or indemnity, for parties who remain in an action, where a determination has been made that the right to sue of one or more parties, has been taken away from the plaintiff(s), by the WSIA. The consequence of this is that defendants who are not protected by the WSIA from civil actions

being brought will be protected against liability for the negligence or fault of defendants, or potential defendants, who are protected by the WSIA (see *Decision Nos. 2960/16, 1097/05, 2197/05* and *2107/07*). This is applicable to the present case as I have earlier determined that the Respondents' right to sue the earlier described parties has been taken away by the due application of the WSIA.

[86] Subsection 29(4) of the WSIA provides that "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" (i.e. the parties protected from the civil action by the WSIA) and that the amount shall not be recoverable in the action against the remaining parties. In the present case, the remaining parties/defendants in the civil action are listed as Ms. Candice Lynn, Mr. James Birmingham, Mr. Timothy Poupore and OVE Industrial Design.

[87] In my view, these remaining parties are entitled to the sought declaration by the due application of subsection 29(4) of the WSIA to the circumstances of this case. I thus declare that no damages, contribution, or indemnity for the portion of loss or damage determined by the court under subsection 29(3) of the WSIA to be caused by the fault or negligence of Paran Tours Inc., Sunny Tours Inc., Robert Transport (and its affiliated companies), and Messrs. Kim and Salaoru are recoverable in the action.

DISPOSITION

[88] The application is allowed.

[89] The Respondent (Mr. Chung) was a worker of a Schedule 1 employer in the course of his employment at the time of the February 8, 2013 accident.

[90] The Co-Applicant (Mr. Kim) was a worker of a Schedule 1 employer in the course of his employment at the time of the February 8, 2013 accident.

[91] The Applicant (Mr. Salaoru) was a worker of a Schedule 1 employer in the course of his employment at the time of the February 8, 2013 accident.

[92] The Respondents are barred by virtue of the WSIA from proceeding with their civil action in the Ontario Superior Court of Justice filed as CV-14-517766 against Paran Tours Inc., Sunny Tours Inc., Robert Transport (and its affiliated companies), and both Messrs. Kim and Salaoru.

[93] The Respondent (Mr. Chung) is entitled to apply for workers' compensation benefits pursuant to subsection 31(4) of the WSIA within six months following the release of this decision.

[94] The Co-Applicants (Ms. Candice Lynn, Mr. James Birmingham, Mr. Timothy Poupore and OVE Industrial Design) are entitled to a subsection 29(4) WSIA declaration that no damages, contribution, or indemnity for the portion of loss or damage determined by the court under subsection 29(3) of the WSIA to be caused by the fault or negligence of Paran Tours Inc., Sunny Tours Inc., Robert Transport (and its affiliated companies), and Messrs. Kim and Salaoru are recoverable in the action.

DATED: June 25, 2020

SIGNED: L. Petrykowski