2018 ONWSIAT 715
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 2053/16

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DECISION NO. 2053/16

J. Josefo V-Chair

Heard: August 11, 2016; December 9, 2016; December 12, 2016
Judgment: March 2, 2018
Docket: 2053/16

Counsel: C. Korte, A. Gatensby, for Applicant, AIG Insurance Company
K. Cahill, R. Organ (Student at Law), for Respondent, G. Grebenyuk
R. Cronish, Q.C. (written), for Interested Party, WestTransAuto Inc.
K. Seyler (written) — Tribunal counsel

Headnote

Labour and employment law --- Workers' compensation legislation — Appeal of decisions of Board — Appeals tribunals — Jurisdiction — Compensation

Respondent was truck driver who was in single motor vehicle accident — Respondent claimed he was cut off by another driver, driver who was never found or identified — Respondent applied to his insurer for statutory accident benefits — Insurer brought application for determination that respondent could claim benefits pursuant to Workplace Safety and Insurance Act, 1997, as he was worker in course of employment when accident occurred — Respondent contended that, because other party to accident was purportedly unidentified motorist, existence of civil action by respondent against insurer ousted tribunal's jurisdiction even to decide insurer's application under s. 31(1)(c) of Act — Application granted — Tribunal had jurisdiction to decide issue — Whether insured could claim worker's compensation benefits or statutory accident benefits was issue that historically and habitually had been decided by tribunal, pursuant to clear statutory authority in Act — No other body had authority to decide this question — To not decide issue, properly place before tribunal, would be improper decline of jurisdiction.

Labour and employment law --- Workers' compensation legislation — Rights of action — Persons not covered by Act — Independent contractor

Respondent was truck driver who was in single motor vehicle accident — Respondent claimed he was cut off by another driver, driver who was never found or identified — Respondent applied to his insurer for statutory accident benefits — Insurer brought application for determination that respondent could claim benefits pursuant to Workplace Safety and Insurance Act, 1997, as he was worker in course of employment when accident occurred — Application granted — Respondent was worker pursuant to Act — Respondent made no capital investment — Respondent did not demonstrate entrepreneurial character, as he had no chance for profit and no risk of loss in his daily business activities — While contract purported to be relationship between independent operator and principal, that was fiction far removed from reality of situation — On all of evidence, respondent was company driver — Company was clearly respondent's employer.

***J. Josefo V-Chair*:**

(i) The application — overview of how it arises

1 This application arises out of a December 7, 2012 single motor vehicle accident ("MVA") occurring in the State of New York, in the United States of America. Mr. Grebenyuk, the respondent in this proceeding, was a truck driver for WestTransAuto Inc. (hereinafter, "WestTrans"), the interested party in this proceeding. On December 7, 2012 in New York State Mr. Grebenyuk

was involved in a single vehicle MVA. Mr. Grebenyuk claimed that he was cut off by another driver. The other driver was never found, nor identified.

2 Mr. Grebenyuk, claiming serious injuries arising out of the MVA, applied to his insurer AIG Insurance Company ("AIG"), the applicant in this within proceeding, for statutory accident benefits ("SAB's"). AIG asserted that Mr. Grebenyuk was not entitled to such benefits. Rather, the applicant asserted that Mr. Grebenyuk was entitled, pursuant to section 28 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA" or the "Act"), to claim WSIB benefits for any injuries sustained in the December 7, 2012 MVA.

3 AIG, relying on section 31(1)(c) of the WSIA, applies to this Tribunal for a determination that Mr. Grebenyuk can claim WSIB benefits because he was a worker, in the course of employment, when the MVA occurred. Mr. Grebenyuk asserts that he was not a worker but was rather an independent operator, thus maintaining the right to claim SAB's from the insurer.

4 Subsequently, on October 4, 2015, Mr. Grebenyuk commenced a lawsuit against AIG pursuant to the purported "minimum insurance coverage to insured persons injured in MVAs involving uninsured and unidentified automobiles, as provided for in the *Insurance Act* (...) as amended and incorporated into [his] policy" (excerpted from paragraph 3 of the Statement of Claim). In paragraph 6 of the Statement of Claim it is reiterated that the plaintiff claims against AIG "pursuant to the unidentified and underinsured motorist coverage provided by the policy of insurance".

5 In its statement of defense AIG admits that, pursuant to section 265 of the *Insurance Act*, Regulation No. 676, and section 5 of Ontario Automobile Policy — 1, there is such mandatory minimum coverage for unidentified/underinsured motorists. Yet AIG denies that the MVA was caused by an unidentified motorist in this case. AIG also raises other defenses in that civil action, which issues are not before me in this application.

6 Ms. C. Korte, counsel for AIG as applicant in this within proceeding (assisted by her associate Mr. A. Gatensby), is not counsel for AIG in the above-referenced court action. Moreover, counsel for AIG defending that above-referenced court action has brought no Right to Sue application before the Tribunal. Ms. K. Cahill represents the respondent Mr. Grebenyuk, assisted on the second and third hearing days by Student at Law Ms. Organ. The interested party, WestTrans, is represented by Mr. Cronish, Q.C.

(ii) Issues & various procedural matters

7 As alluded to above, the primary, indeed fairly typical, issue in this proceeding is the status of Mr. Grebenyuk. Was he an independent operator when the MVA occurred, or was he a worker, in the course of his employment, and employed by WestTrans at the relevant time?

8 The second issue raised by the respondent is more unusual. The respondent argued in essence that, because the other party to the MVA was purportedly an unidentified motorist, and given the existence of the above-referenced civil action commenced pursuant to the "minimum insurance coverage (...) involving uninsured and unidentified automobiles as provided for in the *Insurance Act*", the very existence of that civil action ousts the Tribunal's jurisdiction even to decide the insurer's application under section 31(1)(c) of the WSIA.

9 In essence, the respondent argues that because nobody knows if the unidentified motorist was a worker in either schedule 1 or schedule 2, indeed, if a worker at all, no determination pertaining to the respondent's right to sue can be made.

10 In order to allow these arguments to be fully developed, at the conclusion of the third hearing day on December 12, 2016, I invited the parties to provide written submissions. They did so, other than Mr. Cronish, who was content to rely upon his above-referenced submissions on the record. I also invited Tribunal counsel to provide submissions, which were done on September 1, 2017. Ms. Cahill accepted the opportunity to respond to Tribunal counsel submissions, through hers of September 15, 2017. Shortly thereafter all this material was put before me. I regret my delay in turning my attention to the voluminous material, which included transcripts of testimony from the hearing.

11 A further note on process is appropriate at this juncture. On the first hearing day of August 11, 2016 the case commenced. The respondent Mr. Grebenyuk testified with the assistance of a Russian language interpreter. As described in my post-hearing memo of that day, "unfortunately there arose problems with the interpretation".

12 After the lunch break Mr. Grebenyuk expressed concern that his answers were not being accurately interpreted. Ultimately, Ms. Cahill requested an adjournment and a re-start of the testimony of the respondent with a different interpreter. Ms. Korte did not object to this request, while Mr. Cronish supported the request, referencing "procedural fairness". I thus granted the adjournment and provided other post-hearing direction as set out in my aforesaid memo.

13 The hearing re-started with testimony on December 9, 2016, continuing and concluding on December 12, 2016. Mr. Grebenyuk testified on the first and part of the second day, while Mr. M. Drozdov, the President of WestTransAuto, testified on December 12, 2016. He was examined in chief by Mr. Cronish on that day and then cross-questioned by those parties who wished to cross-question him.

14 The final point on process to be made is that on the first hearing day of August 11, 2016 I made a number of procedural rulings. That included my ruling that Mr. Drozdov, the President of WestTrans, could testify.

(iii) Law and policy

15 Section 31 of the WSIA provides that a party to a civil action, or an insurer from whom SAB's are claimed under section 268 of the *Insurance Act* may apply to the Tribunal to determine whether:

- a right of action is removed by the Act,
- a plaintiff is entitled to claim benefits under the insurance plan,
- the amount a party to an action is liable to pay is limited by the Act.

16 It is helpful to set out the relevant sections of the WSIA for context, especially given the jurisdictional argument raised by counsel for the respondent, which argument I will address subsequently in these reasons.

17 Sections 26 through 29 of the WSIA state as follows:

> **26(1)** No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.
>
> **(2)** Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.
>
> **27(1)** Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan.
>
> **(2)** If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the Family Law Act.
>
> **28(1)** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
> 2. A director, executive officer or worker employed by any Schedule 1 employer.

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.

2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

29(1) This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

18 In addition to the legislation, the WSIB (the "Board") has established policies which it applies when adjudicating matters before it. Pursuant to section 126 of the Act, in appeals the Tribunal is bound to apply Board policy. Yet in applications such as is this one, as discussed in Tribunal *Decision No. 1460/02* [2003 ONWSIAT 297 (Ont. W.S.I.A.T.)], the Tribunal is not bound by Board policy. That decision also observed, however, that it is beneficial that consistency with findings in an application be maintained with findings that could have been made had the same case come to the Tribunal by way of an appeal from a benefit-entitlement decision made by the Board. Accordingly, it is not in dispute that Board policy continues to be carefully considered and applied appropriately in applications such as this one.

19 In this case a policy which I find particularly relevant for my consideration of the matter is Board *Operational Policy Manual* ("OPM") Document No. 12-02-01, "Workers and Independent Operators". That policy, part of the record before me, discusses the factors considered when addressing if an individual is a worker in the course of employment or an independent operator. I have taken that policy into consideration as I address the evidence and law in this matter.

(iv) My approach to these reasons

20 In this thoroughly argued proceeding, I had testimony from two witnesses as well as the written and oral submissions from all counsel participating on behalf of their respective clients. The parties filed very detailed and helpful written submissions, including the helpful submissions from Tribunal counsel on the "jurisdictional question", if I may summarize it in that fashion.

21 Certainly, I have taken into account all what was said at the hearing by the witnesses, and all of the submissions made by counsel in their advancement of their respective cases. Yet, in order not to further delay the issuance of my decision or to elongate these reasons, I do not herein reiterate all of the testimony of the witnesses. Nor will I reiterate to counsel their cogently made submissions. Rather, when discussing the facts and law which I found important, I will follow the *dicta* from Tribunal *Decision No. 437/00R* [2004 ONWSIAT 2320 (Ont. W.S.I.A.T.)]. That decision stated in part as follows:

> [25] Yet, the standard for determining whether a decision is reasonable does not require that each and every piece of evidence be minutely sifted and commented on with conclusions then being stated for each item of evidence presented for the adjudicator. If that were the standard, even straightforward cases would require pages upon pages of decision writing. Complex cases such as this one would consume whole forests in an effort to provide such detailed written reasons.
>
> [26] Rather, the requirement for good reasons is that a decision:
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> • decide only what needs to be decided,
>
> • discusses what must be discussed,
>
> • considers the evidence so that it is obvious that the decision-maker arrived at a transparent, fair and reasoned conclusion.
>
> [27] Reasons must provide an analysis of the evidence so that the parties, and any superior reviewing body, can understand why and how the decision was made, and that it is clear that the decision was made upon consideration of relevant evidence, with an open mind, and not upon extraneous or irrelevant considerations.
>
> [28] In discussing the evidence, in my view it is not necessary to refer to all of the evidence in a decision. Rather, the evidentiary basis for the decision must be clear. Reasons must also address the relevant law being applied, and how that law applies to the facts before the decision-maker, to demonstrate how the decision-maker came to a reasoned conclusion.

(v) Findings arising from the testimonial evidence

22 Again, both Mr. Grebenyuk and Mr. Drozdov, the President of WestTrans, testified. Each witness was examined, cross-questioned, and also examined in reply as counsel deemed necessary. Mr. Grebenyuk began his examination on December 9. His testimony was completed on December 12, 2016. Mr. Drozdov was examined on December 12, 2016.

23 For reasons discussed above, I do not herein reiterate all of the testimonial evidence. Yet I have considered all of it, along with the transcript of the examination under oath of Mr. Grebenyuk taken February 20, 2015 (wherein Mr. Grebenyuk was examined in the context of the SABs application). As I consider the testimony of the witnesses, it is necessary that I make findings of credibility. Such findings are not made lightly. After all, assessing credibility is a difficult, although important, issue. See, for example, Tribunal *Decision No. 684/04* [2004 ONWSIAT 990 (Ont. W.S.I.A.T.)] which addresses an approach followed in the assessment of credibility:

> I have carefully considered the worker's testimony as to her modified work duties, and the alleged lack of assistance she received from the accident employer. While no doubt intending to be a sincere witness, the worker is also indisputably an interested party in this matter. It is thus necessary to assess her credibility. A useful discussion with respect to the weight to be accorded to the testimony of an interested party is found in Tribunal *Decision No. 1832/00* as follows:
>
> > We turn now to the worker's own testimony. Assessing credibility is a delicate exercise. Often, there is genuine disagreement as to facts or their interpretation. An individual may, quite naturally and honestly, wish to provide his or

her perspective in the best possible light. This is by way of acknowledging that there are situations where strikingly different versions of events can be presented without loss of credibility to any of those offering a perspective. However in the case before us, certain versions must be preferred as more likely and/or more plausible than others. This is so because certain aspects of the events for the time in question are mutually exclusive and, even allowing for an individual shading of memory or emphasis, cannot all be true. It follows that the Panel must carefully explain why it prefers the evidence that it does.

The assessment of the credibility of interested witnesses has been discussed as follows in the following decision of the British Columbia Court of Appeal, *Faryna v. Chorney* (1951), 4 W.W.R. (N.S.) 171, (which was quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

24 Following that approach, the evidence demonstrates to me that there are some significant and unexplained inconsistencies between what Mr. Grebenyuk testified before me as contrasted with either the contemporaneous documentary evidence, or with his testimony given under oath on February 20, 2015. The impression with which I am left is that Mr. Grebenyuk very much attempted to put his "best foot forward", to try to convince me that he truly was an independent operator, not a worker in the course of employment, when the December 7, 2012 MVA occurred. Mr. Drozdov was also at least somewhat disingenuous in his evidence, albeit he acknowledged the accuracy of the contemporaneous documentation when such was put before him.

25 I begin with an overview of the testimony of Mr. Grebenyuk. It is necessary at this juncture that I refer to the first hearing day of August 11, 2016, which was in essence "thrown away" when questions arose about the adequacy of the interpretation. That determination made early in the course of this hearing, to make no use of the testimony from that day, gave Mr. Grebenyuk the benefit of the doubt that the interpretation that day was so flawed that his evidence could not fairly be used.

26 Counsel for the applicant took no issue with the request made by counsel for the respondent that the hearing be re-started. Counsel for the interested party urged that the testimony to that point be scrapped. Ultimately, I accepted the assertions made by the respondent in that regard so the hearing was adjourned (to be clear, in addressing this point no aspersion is cast on counsel for the respondent for agreeing with what her client told her regarding the adequacy, or purported lack thereof, of the interpretation that day).

27 I make mention of this claim of faulty interpretation because, when the hearing ultimately re-started, in his testimony Mr. Grebenyuk attempted to claim that the interpretation when he was examined under oath on February 20, 2015 was also faulty. Yet, as was demonstrated to him when he was cross-questioned, no objection at the relevant time was then made about the adequacy of interpretation on February 20, 2015.

28 When considering Mr. Grebenyuk's second claim of faulty interpretation to attempt to justify obvious inconsistencies in his evidence, what came to my mind was the old fable, "The Boy Who Cried Wolf". It may well have been that the interpretation on August 11, 2016, the first day of the Tribunal hearing, was less than adequate. Yet Mr. Grebenyuk used that same excuse months later when the hearing re-started in an attempt to explain his inconsistent answers from his examination under oath on February 20, 2015 with his testimony before me. That claimed coincidence of more than one faulty interpretation is of concern. It is also puzzling that the (lack of) adequacy of interpretation on February 20, 2015 were never previously raised — either during or subsequent to the completion of that examination — until the worker was cross-questioned before me. In my view, no timely concerns were raised about the adequacy of the February 20, 2015 interpretation because there probably were none. I thus find that I can rely on that testimony.

29 In his testimony, Mr. Grebenyuk described the various employment activities in which he was involved. After working in various other jobs he began driving as a limousine driver. He ultimately established his own numbered company which, pursuant to the documentation, was established on January 14, 2011. Mr. Grebenyuk took driver training, obtaining his A-Z license as well as his air brake endorsement. He worked for a number of trucking firms and was paid through his corporation based upon invoices issued.

30 Ultimately, Mr. Grebenyuk signed a contract with WestTrans on August 7, 2012. This multi-paged contract was written only in English, yet Mr. Grebenyuk claimed he read and signed it. He later added that his daughter ensured he understood it.

31 The contract provides that Mr. Grebenyuk would be an "independent operator" to perform the supply of "transportation/ driving services". While not owning the truck, Mr. Grebenyuk testified that he was responsible for the condition of the load at delivery. He stated that WestTrans could otherwise charge him for the load if it was not in suitable condition.

32 Addressing the truck, he claimed that he wanted to eventually buy it, so he performed extra maintenance upon it. He testified that he bought lamps, changed the oil, as well as purchased tires. He also claims he purchased windshield wipers for this truck. Yet the truck was new in approximately August 2012. Accordingly, it is unclear to me why Mr. Grebenyuk would have to purchase lamps and tires, and even wiper blades, for which parts he would pay out of his own pocket (through his corporation's bank account) for a truck he did not own.

33 Mr. Grebenyuk also testified that he hired people to wash the truck as well as to help him load or unload the goods. Addressing the loading and unloading, it is a puzzle to me why he would need individuals to unload the truck at the location where the goods were delivered, given that the recipient of the goods would typically unload such merchandise. Similarly, the shipper of merchandise would typically at least assist with the loading of merchandise.

34 Mr. Grebenyuk testified that he could use the WestTrans truck if he wanted to for other business and other loads independent of those loads assigned to him by WestTrans through its dispatcher. Yet he claimed that, as he was sufficiently busy performing work assigned to him by WestTrans' dispatcher, he did seek out other loads.

35 This testimony, however, is contradicted by Mr. Grebenyuk's testimony under oath on February 20, 2015. At question #114 in that transcript, Mr. Grebenyuk made it clear that he did not work for anyone else, emphasizing that "it's the company truck belonging to the company and the dispatcher of the company gave me orders where to go and what to take". He further added that it was "like an army order, it wasn't to be disputed, it wasn't negotiated".

36 Mr. Grebenyuk claimed in his testimony before me that he intended to hire another driver in later 2012 or early 2013 so he could work more than the 70 hours per week limit. It is unclear, however, to me how this could be of any benefit to him if the truck was owned by WestTrans.

37 Mr. Grebenyuk reviewed his various tax returns in the course of his testimony including his tax returns for the year ending December 31, 2012. In that year he had gross income of $46,486 and operating expenses of exactly that same amount. Mr. Grebenyuk, while claiming to not remember the details, stated that this "reflects the costs for my truck".

38 The accounting documentation had a line for sub-contracts in the amount of $18,078. Mr. Grebenyuk, however, had no recall pertaining to this line item, nor could he explain how the total expenses equaled total sales. At the least, I found the accounting results to be surprisingly coincidental. The lack of back-up support for the various line items, such as sub-contracts, when there was no evidence of this, to lead me to very much doubt the reliability of these financial records.

39 In his testimony Mr. Grebenyuk denied having to report his actions, claiming that "no one ever cared" as he was an independent contractor. This testimony, however, is diametrically opposed to his testimony above-referenced at question #114 of the transcript of that earlier examination. In his testimony in that earlier examination Mr. Grebenyuk made it clear that the company truck belonged to the company, the dispatcher of the company "gave me orders where to go and what to take", and this

was the equivalent of being in the army with no discussion, no negotiation. In my view, this is the antithesis of someone being able to come and go as they pleased, including taking on different loads other than those assigned by the company dispatcher.

40 Mr. Grebenyuk in his testimony reviewed his numbered company account beginning in January 2012 through to August 2012, which documentations were part of the record. He agreed that there were no fuel, tire, or wiper blade purchases shown on this account. He also agreed that there were no purchases of any lamps for the truck. In September 2012 there was a Petro-Canada charge for $10.03 which, given the truck takes over 1000 liters of fuel, would hardly have been for the truck as contrasted with a personal use vehicle.

41 The witness acknowledged there were also no direct purchases for equipment for the truck in any of October, November, and December 2012. Ultimately, it was reluctantly acknowledged by Mr. Grebenyuk that, from February through December 2012 there were no direct debits for fuel, lamps, wipers, or tires from his business account. This was reluctantly acknowledged by Mr. Grebenyuk despite $31,091 shown in his income statement under operating expenses.

42 As for an insurance deduction of $1,452, which he claimed was paid on the WestTrans truck, Mr. Grebenyuk resiled from his earlier testimony that he paid for insurance on the truck even though he did not own it. In cross-questioning, Mr. Grebenyuk was unable to state what this amount shown on the statement was for.

43 Referring to the contract he had with WestTrans, while clause 6.1 provides that WestTrans is obliged to insure the truck, Mr. Grebenyuk nevertheless asserted that "in reality it was totally different". Yet he was unable to explain how it was different.

44 Referring to his motor vehicle convictions described in Exhibit #24, Mr. Grebenyuk readily acknowledged these. He also acknowledged WestTrans' November 12, 2012 letter of reprimand, addressed to him personally. Mr. Grebenyuk signed this letter and agreed to take remedial measures. He claimed, however, in his testimony that this letter was not a reprimand but was rather a simple reminder to maintain adherence to the rules. In my view, however, from any reasonable reading of it, the letter was one of reprimand given to him personally. It referred to "progressive discipline up to and including dismissal". Mr. Grebenyuk, however, claimed that the letter was not accurate.

45 When referring to the company rules which provided that violations of the rules would leave the violator subject to dismissal and discipline, he agreed that this was correct. Yet Mr. Grebenyuk stated that he signed these rules not on his own behalf but on behalf of his numbered company. This claim was made despite the personal obligations set out in the document that the signer confirmed he undertook and understood.

46 When addressing the contract between WestTrans and his numbered company, Mr. Grebenyuk claimed that the clause pertaining to 14 days of vacation was not really binding upon him. He claimed that if he wanted to take vacation he could even take one year. Yet he subsequently acknowledged that he was bound to the 14 day provision.

47 Ultimately, and importantly, Mr. Grebenyuk agreed that he had no ownership interest in the truck when the MVA occurred.

48 Mr. Grebenyuk was asked how many drivers he would see at WestTrans' yard. He initially answered that he would see none. Yet at question 72 of his February 20, 2015 examination under oath Mr. Grebenyuk answered that he would see five to six drivers at the dispatch department of WestTrans.

49 At this juncture in his testimony before me, Mr. Grebenyuk again claimed that his above answer at the February 20, 2015 examination under oath demonstrated an error in interpretation. He did not elaborate on how or why there was such an error. Moreover, question #3 at that examination clearly urges the witness that if he has "any problem with interpretation today you will tell me immediately, correct?" To which Mr. Grebenyuk answered "allright". Question #4 also urged that if he had difficulty understanding a question he was to speak up. Mr. Grebenyuk again answered that he would do so. Yet the record does not reflect him doing so.

50 When asked if he got all his orders from the dispatcher of WestTrans, Mr. Grebenyuk testified before me that "mostly" he did. Yet he was more definitive at his prior examination. At question #93 he made it clear that "all orders, I received from

the dispatcher of the company". Mr. Grebenyuk further acknowledged that all equipment, whether purchased by him or not, that belonged to the truck belonged to the company (question #104). He further acknowledged at question #105 that he was "the worker of the company".

51 When asked before me if he was precluded from working for any other company while working for WestTrans, Mr. Grebenyuk in my view prevaricated and equivocated. He testified that if he got an order from a different company, he could discuss it with a WestTrans dispatcher because certain products could not be transported together. He stated that he was on occasion refused permission when he asked about transporting something for his prior company, because the shipment did not match with the WestTrans shipment.

52 Yet when referred to question #110 in his prior examination under oath which asked him if he was "precluded-stopped-from working for any other employer than WestTrans?", Mr. Grebenyuk simply answered "Of course, that's what the contract is for. I worked only for this company. How is it — how can it be different? It's their truck".

53 After his prior answer as excerpted above was reviewed with him, Mr. Grebenyuk acknowledged the accuracy of that prior answer.

54 In his re-examination, Mr. Grebenyuk attempted to re-visit the issue of whether he could take loads for other entities. He stated he could take any load from any company so long as he informed the dispatcher from WestTrans of this. Again, in my view, Mr. Grebenyuk was attempting to equivocate and deviate from his previous clear answer given under oath in his examination in February 2015.

55 I now briefly address the testimony of Mr. Drozdov, the President of WestTrans. He was examined in chief by Mr. Cronish. Mr. Drozdov confirmed that the contract represented the relationship and it established the conditions between his company and Mr. Grebenyuk's numbered company. He asserted that he could deal with:

- owner-operators (meaning those who owned the truck and the trailer),
- the owner of the truck who did not own a trailer,
- what he described as "lease operators". He claimed that lease operators leased the truck from WestTrans, and are provided an hourly rate minus deductions.

56 Mr. Drozdov testified that he considered Mr. Grebenyuk to be a lease operator.

57 When Mr. Drozdov was cross-questioned by Ms. Korte, however, he acknowledged that there was no lease agreement between his company and Mr. Grebenyuk or Mr. Grebenyuk's numbered company. He confirmed that the contract between the two numbered companies makes no mention of a lease. He confirmed that at clause 2.1 of the contract, in fact, the equipment was provided by WestTrans. He agreed that clause 4.1 of the contract provided that the equipment shall be operated by the driver, with again no reference to a lease.

58 He confirmed that the driver would be paid waiting time and that Mr. Grebenyuk could drive for other businesses so long as he had available hours to do so. He testified that the tolls were at the cost of the driver, although these were taken into account when determining the hourly rate.

59 Mr. Drozdov claimed that the drivers would not have to give notice if they took vacation. He so testified despite having testified at the outset that the contract between the parties governed the relationship. Clause 1.3 of the contract provided that the independent operators could take time off based upon written notice pursuant to a schedule attached to the agreement. I thus am puzzled that the witness, who on the one hand purported to state that the contract governed the relationship, on the other hand stated that the parties did not have to adhere to it. Mr. Drozdov also claimed that Mr. Grebenyuk leased a truck from him, yet without any evidence to support the existence of such a lease. Indeed, he confirmed that WestTrans itself leased the truck for $2,500 a month.

60 Mr. Drozdov confirmed in his testimony that:

- WestTrans found the customers,
- it was WestTrans' logo on the truck,
- Mr. Grebenyuk could not use the truck for loads other than WestTrans' loads.

61 He also confirmed that Mr. Grebenyuk received a fuel card which was intended to cover his fuel costs. He testified that there were no deductions if a customer does not pay a bill. WestTrans in that case bears the risk of loss while the driver (lease-operator) does not.

62 Despite both witnesses being rather challenging, at the end of the day the evidence which emerged (however reluctantly) was that:

- Mr. Grebenyuk had no ownership interest in the truck,
- He could only drive as WestTrans instructed him through its dispatcher,
- Mr. Grebenyuk was unable to challenge such directives,
- WestTrans bore the financial risk associated with operating the truck including the risk of loss if, for example, a shipper or receiver did not pay its bill to WestTrans,
- The driver, in this case Mr. Grebenyuk, bore none of those operating costs or operating risks,
- Mr. Grebenyuk did not pay for maintenance, he did not pay for fuel, and, notwithstanding the sketchy accounting records provided, he had as was demonstrated in cross-questioning no genuine operating costs for the running of the truck.

63 That the employer and Mr. Grebenyuk in this case preferred to structure their affairs, calling themselves independent operator and principle, does not negate from the reality of the circumstances as shown by the evidence.

(vi) Overview of the law

64 OPM Document No. 12-02-01 helps to flesh out section 2 of the Act which defines "worker" and "independent operator", so I take into account and apply that policy. I also consider the relevant case-law. In this matter, however, I need not go into huge detail pertaining to the law given that, as likely emerges from my above summary of the facts, my findings are clear (I will reiterate those findings, however, subsequently).

65 Decisions which have considered the Act and Board policy are numerous. Counsel referred me to many decisions in their well-argued briefs. Yet I need not review all of these. In my view, Tribunal *Decision No. 608/11* [2011 CarswellOnt 18889 (Ont. W.S.I.A.T.)] describes the legal principles thoroughly, as this decision summarizes various earlier Tribunal and Court decisions. While a lengthy excerpt, it helpfully describes how the Tribunal uses the applicable policy and approaches matters such as this:

> [26] As the above-mentioned policy suggests, the Board applies the "organizational test" to determine who is a worker and who is an independent operator. 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". The policy seeks to determine whether a person works under a "contract of service" or a "contract for service".
>
> [27] The Tribunal generally uses an organizational test similar to that set out in Board policy. However, this test has become known as the "business reality" or "hybrid test". In *Decision No. 921/89*, the Panel, after reviewing the evolution of Tribunal case law on the matter, noted:

> 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.

[28] As *Decision No. 921/89* suggests, the Tribunal takes a broad view of the relationship between the parties and looks to the substance of that relationship, rather than its form. In *Decision No. 1443/06*, for example, the Vice-Chair noted:

> The Tribunal's decisions in this area reflect a multifactorial approach to determining whether a person is a worker or an independent operator. *Decision No. 395/94* (November 17, 1995), a leading case on this issue, relies upon the "business reality test" to determine the true nature of the relationship between parties — either employer/worker or contractor/independent operator. This test was described as "flexible and highly adaptable" in *Decision No. 564/96* (April 14, 1997). *Decision No. 395/94* sets out the following non-exhaustive list of factors to consider in determining whether a person is a worker or independent operator:
>
> 1. Ownership of equipment used in the work or business;
>
> 2. The form of compensation paid to the worker or independent operator;
>
> 3. Business indicia;
>
> 4. Evidence of co-ordinational control as to "where" and "when" the work is performed;
>
> 5. The intention of the parties;
>
> 6. Business or government records which reflect upon the status of the parties;
>
> 7. The economic or business market;
>
> 8. The existence of the same or very similar services supplied to an "employer" by a person or persons who are classified as workers under the Act;
>
> 9. Substitute service;
>
> 10. Size of the consideration or payments;
>
> 11. Degree of integration.
>
> 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?"
>
> Several decisions of this Tribunal have also considered the reasons of the Supreme Court of Canada in *671122 Ontario Ltd v. Sagaz Industries Canada Inc*. (2001) SCC 59. In that decision, Major J., for the Court, reviewed a number of earlier authorities and concluded (at paragraphs 46-48):

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan*, *supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 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.
>
> It bears repeating that the above factors constitute 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.
>
> [Emphasis added]

The Tribunal's flexible and multifactorial approach to the issue is consistent with the Supreme Court of Canada's approach in *Sagaz*. There is no "set formula" — the relative weight of each factor must be assessed in view of the particular circumstances of the case. 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. The Tribunal has numerous decisions which address this issue in the specific context of the trucking industry. Counsel for the parties reviewed a number of these decisions, including: *Decision Nos. 2801/01* (February 5, 2002), *257/03* (April 11, 2003), *805/03* (June 19, 2003), and *1362/06* (July 25, 2007)

[29] Tribunal *Decision Nos. 2224/06* and *1785/04* have noted that the Tribunal's application of a multi-factorial determination process is consistent with the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*. (2001) (204 DLR) 4th (SCC). *Sagaz* provided that "the central question to determining if a person is an employee or an independent operator, is whether the person who has been engaged to perform the services is performing them as a person in business on his own account".

66 Another decision of interest is *Decision No. 611/10* [2010 ONWSIAT 1915 (Ont. W.S.I.A.T.)], which describes a "real world" business relationship which involved the obligation of the contracting party to follow certain rules. The decision also discusses the importance of the ownership of tools. Tribunal *Decision No. 611/10* states in part as follows:

> [28] I agree with the Applicants' submission that any business relationship will involve some degree of control. In my view, in the present case that degree of control does not extend so far as to transform the relationship into one of employer and employee.

[29] In my view, the requirements that Mrs. Spencer only operate the courier route assigned to her, that she present herself to the MDS office in the morning, that she was not allowed to refuse any pick-ups or deliveries set by MDS, and that she deliver certain packages first are all factors that are necessary for the relationship to work. The nature of the courier business, dependent in its essence upon the timeliness of pick-ups and deliveries, requires central coordination involving a geographical division of routes and a commitment that the pick-ups and deliveries be performed as required, when required. It is difficult to conceive how MDS, or any other courier company, could have functioned competitively if individual carriers had discretion to refuse to perform pick-ups or deliveries.

(...)

[35] With respect to the ownership of the tools/equipment, it is my conclusion that Mrs. Spencer falls on the side of an independent operator. While MDS provided her with a two-way radio, and an electronic scanner it is clear that the principal asset necessary for the performance of delivery services was the cube van. The value of the cube van was far greater than that of the equipment provided by MDS.

67 Tribunal *Decision No. 953/11* [2011 ONWSIAT 1512 (Ont. W.S.I.A.T.)] also is relevant as it addresses a trucking scenario. In Tribunal *Decision No. 953/11* it is found that exclusivity does not always lead to a relationship of employment. The decision also discusses, when considering the relationship between an independent operator and a trucking firm, the difference between that relationship and the relationship of an employer and a company driver employed with no risk.

68 At the end of this excerpt Tribunal *Decision No. 953/11* also discusses the importance of the right to sue, which I of course keep firmly in mind (along with the right to claim SABs, which is the particular question before me in this within application):

[28] In this matter, as I have already stated, I find it beyond doubt that Mr. Beader made a true capital investment and also demonstrated an entrepreneurial character given he clearly had the chance for profit and also faced the risk of loss in his daily business activities. In other words, the reality of the relationship matched the contractual intention that was so clearly set out in the agreement which both parties made.

[29] Tribunal *Decision No. 1774/07* is also relevant to this matter. That case also involved an independent operator who had an "independent contractor agreement" with a trucking company, and who was responsible for all his own operating costs. Tribunal *Decision No. 1774/07*, after reviewing the law and some of the particular facts at issue in that case, made the following points:

> Contrast this situation with that of a company driver. If the truck breaks down, the company driver is still paid his salary. If there is a business interruption for any reason, the company driver still gets paid. The various operating costs such as insurance are borne by the employer and not the company driver. The company driver truly has no risk, and no chance of profit either. Mr. Lavigne, on the other hand, if he operated efficiently and effectively, had the opportunity to make more than the company drivers but also bore certain risks as discussed above, some of which he insured against.
>
> . . .
>
> That Laidlaw and Mr. Lavigne had a mutually beneficial business relationship does not render Mr. Lavigne integral or as part of Laidlaw's business. Rather, he was operating his own business and providing a necessary service to Laidlaw as an independent operator.
>
> Accordingly, the agreement and the facts that underpin the agreement all lead to the clear conclusion that the relationship between Laidlaw and Mr. Lavigne was one of principle and independent operator, and not one of employment. Mr. Lavigne in my view was "carrying on business on his own account", using the words from the Market Investigations decision as discussed in Sagaz and in the various Tribunal decision referenced above.
>
> That some indicia could point in the opposite direction, toward the end of the continuum wherein lies a relationship of employer and employee, is not surprising. These cases are usually not completely clear-cut. But that Mr. Lavigne

could not refuse more than three loads without valid reason or face the ending of his independent relationship with Laidlaw does not, in my view, mean that Mr. Lavigne was in reality an employee of Laidlaw. After all, if the parties draw-up an agreement that sets out the parameters of their relationship as principal and independent contractor, then it only stands to reason that the relationship was made because there was work to be done. Anyone who fails to perform, whether an employee or an independent operator, absent valid excuse will find the relationship, in whatever form it takes, to be ended.

Similarly, that Mr. Lavigne may have been obligated to paint his truck in Laidlaw colours is of no consequence. That he had to use certain Laidlaw identification numbers, such as the CVOR and other government issued numbers, is again a function of government requirements and does not change the nature of the relationship. On all the main items, I find that the parties clearly expressed their intentions in the agreement and also lived up to the agreement in reality. In short, the agreement was a true expression of the nature of the relationship and it was not a sham.

It is also helpful to consider in Right to Sue cases that, while the "historic bargain" that prohibits workers from suing has been in existence for nearly 100 years at this point, the common law right to sue has existed for a far longer time, ever since the Magna Carta. Thus, the prohibition against suit by workers against their employers as set out in the Act is an exception to the long established, indeed ancient, common law right to sue. This exception must thus be construed narrowly and in accordance with the well established principles discussed above [*emphasis added*].

(vii) Findings

69 While this might be stating the obvious, in this within matter, as contrasted with Tribunal *Decision No. 953/11* excerpted above, Mr. Grebenyuk made no capital investment. He also had not demonstrated an entrepreneurial character, as he had no chance for profit and no risk of loss in his daily business activities. While the contract between Mr. Grebenyuk and WestTrans purported to be a relationship between independent operator and principal, that was a fiction far removed from the reality of the situation.

70 Mr. Grebenyuk, on all the evidence, was a company driver. He had no operating expenses associated with the truck. As I have already reviewed in detail herein, he had no risk of loss, nor any real chance of profit. Mr. Grebenyuk, pursuant to the evidence, and applying the policy and the law, was a worker, not an independent operator, and WestTrans was clearly his employer.

71 On that basis, if there was nothing else, I would accordingly grant the application and declare that Mr. Grebenyuk may claim WSIB benefits for injuries suffered arising out of the December 7, 2012 work accident. Yet, the respondent raised the jurisdictional argument, as I describe it, and as discussed above. I now turn to my consideration of this argument.

(viii) The Tribunal's jurisdiction — is the application properly before the Tribunal?

72 Notwithstanding the September 15, 2017 reply submissions made by Ms. Cahill, I do not agree that the Tribunal's assumption of jurisdiction in this straight-forward case would "result in a substantive and procedural injustice" to Mr. Grebenyuk. I also do not see how, if the application is granted, that the License Appeals Tribunal is precluded from addressing matters within the jurisdiction of that Tribunal such as may be put before it. Rather, pursuant to section 31(2) of the Act, this Tribunal has exclusive jurisdiction to determine the matters described in subsection 31(1) of the Act.

73 I respectfully disagree with the respondent that an applicant does not have standing to apply pursuant to section 31(1)(c) of the Act when there is an ongoing tort claim against a third party which has not been disposed of or determined to be improper by the Superior Court, the Financial Services Commission of Ontario, or the License Appeals Tribunal.

74 As was well submitted by Tribunal counsel, "the Tribunal's jurisdiction is separate and distinct from the jurisdiction of the Superior Court, the License Appeals Tribunal or the Financial Services Commission of Ontario". I further agree that the Tribunal's jurisdiction is found within the plain wording of the Act, subsection 31(2) and subsection 31(1). I further agree with Tribunal counsel when the following is stated:

In the current application, the relief sought by the applicant is that the respondent is a person entitled to claim benefits under the Act. As noted in *Decision No. 897/09*, "The reason that an applicant seeks this type of declaration is that, under the Insurance Act and regulations, an insurer is not required to pay statutory accident benefits to a person entitled to receive benefits under any Worker's Compensation law or plan. Thus, it appears that the applicant seeks a declaration under section 31 (1)(c) in order to avail itself of any remedies or determinations available to it under the Insurance Act and regulations. Further, if the applicant is successful in its application, the respondent may be entitled to pursue a claim with the WSIB.

(...)

On a plain reading of the Act, the applicant has the right to come to the Tribunal for the determination it seeks in order to properly avail itself of any further remedies before the Financial Services Commission or the License Appeals Tribunal.

(...)

The first negative outcome raised by the respondent is that a multiplicity of proceedings and hearings is not desirable and will result in inconsistencies.

(...)

The second outcome raised by the respondent is that it would constitute a denial of procedural fairness to injured parties to have the substantive issue of whether a person is a worker adjudicated separate and apart from the issue of whether the right to sue has been taken away or without a ruling on the merits of the tort action.

In response to the first and second negative outcomes raised by the respondent, Tribunal counsel submits that Tribunal decisions are clear that the Act does not extinguish all rights of action of a worker injured in the course of employment. Presumably, if the applicant was seeking to remove the respondent's right to sue, the applicant would have requested this relief. To the contrary, the applicant has stated that the only issue to be decided in this application is whether or not the respondent was a worker of a Schedule 1 employer at the time of the accident and is thereby entitled to claim benefits under the Act.

(...)

75 Tribunal counsel continues in her thorough submissions to address the third negative outcome raised by the respondent, which is that injured parties could be prevented from claiming accident benefits and prevented from claiming WSIB benefits due to the election scheme. Yet Tribunal counsel makes clear that the Act provides that the Tribunal does not have the jurisdiction to hear and decide an appeal from decisions made under sections 26 to 30 of the Act, meaning the Tribunal does not have jurisdiction to hear an appeal by a party from an election decision made by the Board under section 30. Tribunal counsel points out that the status memo, commonly provided in Right to Sue applications, demonstrates that no WSIB claim was established by Mr. Grebenyuk. Thus, pursuant to section 30(6) of the Act the respondent would be deemed to have elected not to receive benefits under the Act.

76 In any case, Tribunal counsel points out that the Tribunal is without jurisdiction to address the issue of an election, with such issues referred to the WSIB. Tribunal counsel also refers to section 30(14) of the Act which would allow an individual to preserve entitlement to future WSIB benefits by complying with section 30(14).

77 In short, and without redundantly excerpting all of the submissions by Tribunal counsel, I am persuaded to agree with Tribunal counsel that any alleged prejudice which Mr. Grebenyuk may conceivably suffer is illusory rather than real. If, moreover, Mr. Grebenyuk suffers prejudice by proceeding with a tort action as he has done, his request for relief is to the Board (the WSIB), not to the Tribunal for reasons well stated by Tribunal counsel in her submissions.

78 I conclude that whether an insured can claim Worker's Compensation Benefits or SABs is an issue that historically and habitually has been decided by the Tribunal, pursuant to the clear statutory authority in the Act to do so. I also observe that

no other body has the authority to decide this question. I find that the Act clearly confers jurisdiction upon the Tribunal. To not decide whether the insured can claim WSIB benefits or SABs, which question is properly placed before me by Application made pursuant to the Act, as the respondent suggests, would in my view be an improper decline of jurisdiction. I find that the Tribunal has the exclusive jurisdiction to decide such questions pursuant to section 31(1) of the Act.

79 I attach the final conclusory paragraphs of Tribunal counsel, which I find to be a correct statement of the law.

(ix) Conclusion

80 For all these reasons, accordingly, the application of AIG under section 31(1)(c) of the Act is granted. I find that Mr. Grebenyuk was a worker pursuant to the WSIA, and that he is entitled to claim benefits pursuant to the WSIA.

DISPOSITION

81 The application of the applicant AIG is granted. The respondent Mr. Grebenyuk was a worker pursuant to the WSIA. He is thus entitled to claim benefits pursuant to the WSIA. I further find that the Tribunal has the jurisdiction and duty to decide this issue.

Application granted.

Appendix — EXCERPT FROM TRIBUNAL COUNSEL SUBMISSIONS

94. The Respondent's position that the Applicant lacks standing to seek the relief sought appears to be inconsistent with the plain and ordinary wording of the *Act* and Tribunal decisions.

95. There is no dispute that the Applicant is an insurance company from whom accident benefits have been claimed under section 268 of the *Insurance Act*. This has been held to be sufficient under section 31 of the *Act* to create standing for the Applicant.

96. There are numerous Tribunal decisions in which an accident benefits insurer has brought an application under section 31(1)(c) of the *Act* when there in an ongoing tort claim against a third party that has not been disposed of or determined to be improper in another forum.

97. The *Act* does not extinguish all rights of action of a worker injured in the course of employment.

98. The mechanism for resolving any question concerning an insured's entitlement to claim workers' compensation benefits is this Tribunal.

99. The Respondent's position that the Tribunal lacks jurisdiction to make the determination sought by the Applicant also appears to be inconsistent with the wording of the *Act* and Tribunal decisions.

100. The Tribunal has exclusive jurisdiction to determine a matter under section 31(1) of the *Act*.