

WCAT Decision No. A1901318

British Columbia Workers' Compensation Appeal Tribunal Decisions

British Columbia Worker's Compensation Appeal Tribunal

Panel: Guy Riecken, Vice Chair

Decision: July 13, 2022.

WCAT Decision Number: A1901318

2022 LNBCWCA 429

Between Mandeep Singh Boyal (plaintiff), Applicant, and Xiaohui Cai (deceased), and Allgold BC Ltd. (defendants), Respondents

(153 paras.)

Appearances

For Applicant: Rita Sidhu, Brij Mohan & Associates.

For Respondents: Bailey Quinn, Hamilton Duncan Armstrong & Stewart Law Corporation.

DECISION

Introduction

1 On November 22, 2016 the plaintiff, Mandeep Singh Boyal, was traveling on the Trans-Canada Highway at or near Spences Bridge, British Columbia, when the semi-trailer rig he was driving was involved in a collision with a Ford F350 pickup truck driven by the defendant, Xiaohui Cai, and owned by the defendant, Allgold BC Ltd. (the accident). Xiaohui Cai died as a result of injuries sustained in the accident.

2 On December 7, 2017 the plaintiff commenced a legal action against the defendants Xiaohui Cai (deceased) and Allgold BC Ltd. claiming damages for personal injuries suffered in the accident which the plaintiff says was caused by the defendants' negligence.

3 Under section 311 (previously section 257) of the *Workers Compensation Act* (Act)¹, where an action is commenced based on a disability caused by occupational disease, a personal injury, or death, a party or the court may ask the Workers' Compensation Appeal Tribunal (WCAT) to make determinations and to certify those determinations to the court.

4 On May 24, 2019 WCAT received a certification to court (CTC) application from counsel for the plaintiff seeking determinations with respect to the status of the plaintiff and the defendant Xiaohui Cai at the time of the accident.

Issue(s)

5 The issues raised by the CTC application are, whether, at the time of the accident:

- (a) Was the plaintiff, Mandeep Singh Boyal, a worker within the meaning of the compensation provisions of the Act?
- (b) If so, did the injuries suffered by the plaintiff arise out of and in the course of his employment within the scope of the compensation provisions of the Act?
- (c) Was the defendant, Xiaohui Cai, a worker within the meaning of the compensation provisions of the Act?
- (d) If so, did the action or conduct of Xiaohui Cai, which caused the alleged breach of duty of care, arise out of and in the course of his employment within the scope of compensation provisions of the Act?

Jurisdiction and Method of Hearing

6 Part 7 of the Act (Appeals to Appeal Tribunal) applies to CTC applications (except that no time frame applies to the making of the WCAT decision (section 311(3)).

7 Pursuant to section 303(1) of the Act, WCAT is not bound by legal precedent. WCAT must make its decision based on the merits and justice of the case, but in doing so, must apply a policy of the board of directors of the Workers' Compensation Board (Board) that is applicable (section 303(2)).

8 The applicable policies are set out in the *Assessment Manual* and the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The policies have been amended since the date of the accident, including changes that came into effect on April 6, 2020 to make the policies consistent with the numbering and language of the revised Act. Unless otherwise indicated, the policies referred to in this decision are those in effect at the time of accident.

9 Section 308 gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined under Part 7 of the Act, including matters WCAT is requested to determine under section 311. The WCAT decision is final and conclusive and is not open to question or review in any court (section 309(1)). However, the court determines the effect of the section 311 certificate on the legal action (*Clapp v. Macro Industries Inc.*, 2007 BCSC 840).

10 WCAT invited the plaintiff's putative employer, Bill's Trucking Ltd., to participate as an interested person. Bill's Trucking Ltd. did not respond.

11 WCAT was informed of two related actions, namely: Her Majesty the Queen in right of the Province of British Columbia v. Xiao Hui Cai, Allgold BC Ltd., Mandeep Singh Boyal, and Bill's Trucking Ltd. (Victoria Registry No. 18-4871), and Mandeep Singh Boyal v. Insurance Corporation of British Columbia (ICBC) (New Westminster Registry No. NEW-S-S-207061), an action for benefits under Part 7 of the *Insurance (Vehicle) Act Regulations*.

12 WCAT has not received CTC applications with respect to the two related actions.

13 WCAT invited ICBC to participate in the CTC application as an interested person. Other than to adopt the submission of the counsel for the defendants in the tort action, ICBC did not participate.

14 I did not consider it necessary to invite the parties to the action commenced by the Province of British Columbia to participate in the CTC application as interested persons since that action relates only to damage to property caused by the accident and not to personal injury or death.

15 WCAT was provided with the transcripts of the examinations for discovery of the plaintiff and of Jennifer Trevitt, a representative of the defendant, Allgold BC Ltd. (Allgold) as well as a number of other documents. Ms. Trevitt is Allgold's corporate secretary and its vice president of corporate affairs.

16 Legal counsel for the plaintiff and for the defendants each provided written submissions.

17 The Board opened a provisional claim file for the plaintiff. The claim file was disclosed to the parties to the legal action. I will consider the evidence in the claim file anew for the purposes of this application, and any prior Board decisions are not binding on me.

18 As noted in item 7.5 of WCAT *Manual of Rules of Practice and Procedure* (MRPP) CTC applications generally proceed in writing. However, WCAT will usually grant a party's request for an oral hearing if an appeal (or CTC application) involves a significant issue of credibility, where there are significant factual issues in dispute, or where there are other compelling reasons for convening an oral hearing. In this case none of the parties requested an oral hearing. The application is being considered on the basis of the examination for discovery evidence, the documentary evidence, and the written submissions.

Background and Evidence

19 In addition to the discovery transcripts, the following documents were provided to WCAT:

- * Ashcroft RCMP narrative accident report;
- * Undated transcript of a statement taken by the RCMP from the defendant Xiaohui Cai's aunt, Mabel Cai;
- * Affidavit of Ken Zhikai Cai (Ken Cai) sworn on April 21, 2022 with a number of attached exhibits including a labour contract between Xiaohui Cai and Beijing Minco International Resources (Beijing Minco);
- * BC Registry Services company search for Minco Base Metals Corporation (Minco);
- * BC Registry Services company search for Allgold;
- * Translated copy of the labour contract between Xiaohui Cai and Beijing Minco;
- * Transcribed copies of WeChat messages between Xiaohui Cai and Wan Fang between November 8 and November 18, 2016 with an English translation;
- * three memoranda from the Board's Assessment Department with information from the Board's records respecting the plaintiff, Bill's Trucking Ltd., Xiaohui Cai, Allgold, Minco, and Beijing Minco.

20 The documents and written submissions include the following information which, unless otherwise indicated, is not disputed.

21 The plaintiff, a truck driver, was the owner and operator of Bill's Trucking Ltd. (plaintiff's EFD² Q 43).

22 Bill's Trucking Ltd. was registered with the Board as an employer since February 22, 2000 and was registered at the time of the accident (May 31, 2019 Assessment Department memorandum).

23 The plaintiff owned the 2007 Peterbilt tractor trailer rig he was driving at the time of the accident (plaintiff's EFD Q 109).

24 The plaintiff had a contract with Bill's Trucking Ltd. for the transport of goods (plaintiff's EFD Q 49).

25 The plaintiff had an account registered with the Board for Personal Optional Protection (POP) coverage since July 8, 2011. His account was in effect at the time of the accident (May 31, 2019 Assessment Department memorandum).

26 The Peterbilt tractor had a cab where the plaintiff could sleep. On the night prior to the accident the plaintiff slept in his tractor in Bear Lake, B.C. (plaintiff's EFD Q 122 and 124). On the morning of the accident the plaintiff picked up a load in Bear Lake.

27 On the day of the accident the plaintiff was driving the tractor trailer rig with two trailers

loaded with lumber southward on the Trans-Canada Highway toward his destination in Surrey, B.C. (plaintiff's EFD Q 129 to 132). He planned on leaving the tractor trailer in a truck yard in Surrey for the evening (plaintiff's EFD, Q 153 and 154).

28 The plaintiff made a number of stops for meal breaks and to check the load and the tractor trailer brakes. His last stop before the accident was in Cache Creek where he checked the load and got something to eat (plaintiff's EFD Q 133, 134, 139, 140, 143, and 144).

29 The defendant, Xiaohui Cai, was a geologist. He worked at a mine (the Quesnel River Mine) located near Quesnel, British Columbia, which was operated by Allgold.

30 Allgold, a B.C. company, had an account registered with the Board at the time of the accident.

31 Allgold is a wholly owned subsidiary of Minco, another B.C. company. Allgold, Minco, and Beijing Minco are part of the "Minco Group of Companies" (Trevitt EFD Q 63 to 70). Beijing Minco is based in China.

32 There is no record of Minco or Beijing Minco being registered with the Board (February 8, 2022 Assessment Department memorandum).

33 It is a matter of dispute between the parties as to which corporate entity, if any, employed Xiaohui Cai to work at the site near Quesnel. Ms. Trevitt stated on discovery that he was not employed by Allgold and that he was employed by Beijing Minco (Q 63 to 66). She also stated that Beijing Minco does not operate in Canada (Q 70). She stated that Xiaohui Cai was hired by the president of Beijing Minco, Ken Cai, who is Xiaohui Cai's uncle (Q 90 to 95).

34 Ms. Trevitt stated on discovery that in 2016 Allgold applied for a work permit for Xiaohui Cai to come to Canada to work for Allgold and he arrived in Canada on September 18, 2016 (Q 104 and 122).

35 Xiaohui Cai and two other people stayed at a "camp" in the vicinity of the mine near Quesnel (Trevitt EFD, Q 36, 48, and 49). The camp housing was paid for by Allgold (Q 139).

36 At the time of the accident Xiaohui Cai was driving a 2008 Ford F350 pickup truck that was owned by Allgold. A few days prior to the accident he had driven the Allgold pickup truck from the Quesnel area to the Lower Mainland. He spent the night before the accident in Vancouver at the home of his aunt and uncle Mable Cai and Ken Cai.

37 The nature and purpose of Xiaohui Cai's trip to the Lower Mainland is disputed. The plaintiff's position is that the trip was a personal one. The defendants say that its purpose was connected to Cai's employment with Allgold.

38 At the time of the accident Xiaohui Cai was returning to the Quesnel area. He was traveling northward on the Trans-Canada Highway. The plaintiff alleges that the pickup truck driven by Xiaohui Cai crossed the centre line and collided with the 2007 Peterbilt driven by the plaintiff head-on.

Law and Policy

39 Before addressing the status of the parties, it is useful to set out the relevant law and policy.

40 Section 1 of the Act includes the following definitions:

"**employer**" includes every person having in their service under a contract of hiring or apprenticeship, whether the contract is written or oral, express or implied, a person engaged in work in or about an industry;

...

"**worker**" includes the following:

(a) a person who has entered into or works under a contract of service or apprenticeship, whether the contract is written or oral, express or implied, and whether by way of manual labour or otherwise;

...

(e) an independent operator to whom the compensation provisions apply by the Board direction under section 4 (2) (a) ...

41 Section 4(2) of the Act provides that:

(2) The Board may direct that the compensation provisions apply on the terms specified in the Board's direction to

(a) an independent operator who is neither an employer nor a worker as if the independent operator were a worker, or

(b) an employer as if the employer were a worker.

42 Detailed rules concerning independent firms, labour contractors, employers, and workers are set out in a number of policies in the *Assessment Manual*, including:

- * AP1-1-1: Coverage under *Act* - Descriptions of Terms;
- * AP1-1-2: Coverage under *Act* - Types of Relationships;
- * AP1-1-3: Coverage under *Act* - Distinguishing Between Employment Relationships and Relationships Between Independent Firms;
- * AP1-1-4: Coverage Under *Act* - Employers;
- * AP1-1-5: Coverage under *Act* - Workers;

- * AP1-1-6: Coverage under *Act* - Independent Operators; and,
- * AP1-1-7: Coverage under *Act* - Labour Contractors.

43 At the time of the accident, the *Assessment Manual* policies included the following provisions.

44 Policy item AP1-1-1 provided the following general descriptions:

- * *Employer* - An employer is a person or entity employing workers. The employer may be a sole proprietor, a partner in a partnership, a corporation, or another type of legal entity. "Employer" is defined under section 1 for purposes of the compensation provisions of the *Act*. An employer is an "independent firm".
- * *Worker* - A worker is an individual who performs work under a contract with an employer and has no business existence under the contract independent of the employer. "Worker" is defined under section 1 for purposes of the compensation provisions of the *Act*. A worker cannot be an "independent firm".
- * *Independent Operator* - "Independent operator" is not defined in the *Act*. The term is referred to in section 2(2) [now section 4(2)] of the *Act* as being an individual "who is neither an employer nor a worker" and to whom the Board may direct that the compensation provisions of the *Act* apply as if the independent operator were a worker. An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an "independent firm".
- * *Labour Contractor* - The Board has created the term "labour contractor" to assist it in determining whether an individual is an employer, worker or independent operator. A labour contractor who is a worker cannot be an "independent firm". For more information about "labour contractors", see Item AP1-1-7.
- * *Firm* - A firm is any person or entity carrying on a business.
- * *Independent Firm* - The Board has created the term "independent firm" to identify those persons who are either required by the *Act* to register with the Board as employers of workers, or from whom, as unincorporated employers or independent operators, the Board will accept a registration through the purchase of Personal Optional Protection for themselves. An independent firm performs work under a contract, but has a business existence under the contract independent of the person or entity for whom that work is performed. An independent firm may be an individual, a corporation or another type of legal entity. A worker cannot be an "independent firm". For more information about "independent firms", see Item AP1-1-3.
- * *Independent Contractor* - An independent contractor is an independent firm.

45 The policy at AP1-1-3 (a), "General principles", sets out a non-exhaustive list of nine factors

and a general test that are used in distinguishing between an employment relationship and one between independent contractors. The nine factors are as follows:

- * whether the services to be performed are essentially services of labour;
- * the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;
- * whether the individual doing the work might make a profit or loss;
- * whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;
- * if the business enterprise is subject to regulatory licensing, who is the licensee;
- * whether the terms of the contract are normal or expected for a contract between independent contractors;
- * who is best able to fulfill the prevention and other obligations of an employer under the *Act*;
- * whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and
- * whether the individual doing the work is able or required to hire other persons.

46 The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

47 Policy AP1-1-4 (c) "Principals of corporations or similar entities", provides that since an incorporated entity is considered to be an employer, a director, shareholder or other principal of the company who is active in the business operations of the company is generally considered to be a worker under the Act.

48 Policy item AP1-1-6 explains that the term "independent operator" used in section 2(2) of the Act (now section 4(2)) is an individual who is neither an employer nor a worker and to whom the Board may direct that the compensation provisions apply as though the independent operator was a worker.

49 Policy item AP1-2-3, "Personal Optional Protection", provides that employers and unincorporated independent operators without workers are not automatically covered for compensation purposes. They may purchase optional POP coverage. Where a proprietor or partners who have POP coverage incorporate their business and are paid by the company, they become workers and POP coverage is no longer allowed.

Status of the plaintiff, Mandeep Singh Boyal

50 The plaintiff's status at the time of the accident is not disputed by the parties. The plaintiff acknowledges that it is likely that he would be deemed to be a worker in the course of his employment at the time of the accident. The defendants submit that the plaintiff was a worker within the meaning of the Act and that the injuries suffered by the plaintiff arose out of and in the course of his employment.

51 I do not see any basis on which to disagree with the parties' submissions respecting the plaintiff's status. The only question that might arise is with respect to whether he was a worker of Bill's Trucking Ltd. as a result of the Board having accepted his registration for POP coverage.

52 Bill's Trucking Ltd. paid the plaintiff by cheque every month according to his trips (plaintiff EFD Q 59 and 61). Bill's Trucking Ltd. deducted dispatch fees (Q 55), cargo fees, diesel, "everything" (Q 63), and insurance (Q 65). Bill's Trucking Ltd. paid for the plaintiff's insurance on his Peterbilt tractor trailer and deducted it from the plaintiff's pay cheques (Q 198). The plaintiff was responsible for paying his own maintenance expenses for his truck (Q 66 and 67).

53 The fact that the amounts paid to the plaintiff by Bill's Trucking Ltd. were based on his trips rather than an hourly rate or a salary could be consistent with a contract between independent business entities. However, such payments may also be part of an employment relationship. The deductions by Bill's Trucking of amounts for dispatch fees is also consistent with the plaintiff providing his services as an independent operator. However, the deductions for expenses paid by Bill's Trucking for diesel and insurance are indicative of an employment relationship.

54 Given the plaintiff's role as a principal of Bill's Trucking Ltd., who was active in its operations, under policy item AP1-1-3 he would be considered to be a worker of the company for compensation purposes.

55 Even if the plaintiff were an independent operator, the fact that the Board accepted his registration for POP coverage means that he is deemed to be a worker under section 4(2) and policy item AP1-2-3.

56 For the purposes of the CTC application it is not necessary to determine whether, at the time of the accident, the plaintiff was a worker of Bill's Trucking Ltd. or was worker due to the Board's acceptance of his registration for POP coverage. I find that in either case he was a worker within the meaning of the compensation provisions of the Act.

57 As a truck driver engaged in the transport of goods, the plaintiff was a traveling employee within the meaning of policy item C3-19.00. At the time of the accident he was transporting a load of lumber and under that policy his travel would have an employment connection throughout the time he began his journey on the public highway until he reached his destination, subject to

any substantial deviation for personal purposes. The evidence does not suggest that he was engaged in such a deviation when the accident occurred.

58 I find that the injuries sustained by the plaintiff as a result of the accident arose out of and in the course of his employment within the scope of the compensation provisions of the Act.

Status of the defendant, Xiaohui Cai (Deceased)

Was Xiaohui Cai a worker?

59 The plaintiff submits that that it is not clear whether Xiaohui Cai was a worker within the meaning of the Act. The defendants' position is that Xiaohui Cai was a worker of Beijing Minco who, at the time of the accident had been "lent" to Allgold to work at the Quesnel mine property. Accordingly, he was a worker within the meaning of the Act.

60 The plaintiff relies on the statements of Ms. Trevitt during her examination for discovery, that the defendant Cai was not an employee of Allgold but was employed by Beijing Minco. The plaintiff submits that it appears that Beijing Minco was not an employer covered by the Act, and that this means that as an employee of Beijing Minco, Xiaohui Cai was not a worker covered by the Act.

61 The plaintiff acknowledges that Allgold applied for a work permit for Xiaohui Cai to work at the Quesnel mine site. He says that other than Xiaohui Cai's permit to work for Allgold and his contract of employment with Beijing Minco, there is no information available to the plaintiff that indicates that Xiaohui Cai was a worker within the meaning of the Act at the time of the accident.

62 The defendants characterize Xiaohui Cai's work for Allgold as resulting from an intercompany arrangement between Beijing Minco and Allgold for the former to loan Xiaohui Cai to the latter. The defendants rely on the following evidence of the intercompany arrangement.

63 Ken Cai is the president of Minco and Allgold (affidavit of Ken Cai, paragraph 1). Xiaohui Cai was hired as a geologist by Beijing Minco in 2013 and he worked at Beijing Minco's head office in Beijing (Affidavit of Ken Cai, paragraph 2).

64 Beijing Minco is a subsidiary of Minco but does not operate in Canada (Trevitt EFD Q 67 to 70).

65 Xiaohui Cai had a contract with Beijing Minco dated January 1, 2016 (Exhibit A to Ken Cai's affidavit). According to the certified translation of the contract, it was styled as a "fixed-term labour contract" with a term of three years. Xiaohui Cai's job title was "geologist" and his primary work locations would be Gansu, Guangdong, and Canada.

66 The contract provided for a standard "work-hour" system of five working days followed by two days off each week. Xiaohui Cai was entitled to 115 days of holidays including vacation and public holidays each year. The contract specified an eight-hour work day and provided for overtime to be paid if Xiaohui Cai had to work overtime for special reasons. The contract provided that Xiaohui Cai would be paid monthly on the 10th day of each month. He was paid a base salary plus a performance bonus calculated at the end of the year. In addition, the contract stated that Beijing Minco's parent company is a company in Canada and that long-term incentives in the form of certain amount of stock options may be offered to those employees who are "the backbone of the business." Elsewhere, the contract states that Xiaohui Cai was considered to be part of the backbone of the business.

67 In spite of the contract stating that Xiaohui Cai's places of work would be Gansu, Guangdong, and Canada, according to Ken Cai, the defendant Xiaohui Cai normally worked at the Beijing Minco head office in Beijing (Ken Cai affidavit, paragraph 2).

68 In 2016, Allgold managed two projects near Quesnel, namely the Quesnel River Mine, an operational placer gold mine, and the Lucky Project, and exploration project. Minco (the owner of both Allgold and Beijing Minco) required a few key people to be loaned to Allgold for the 2016 mining season in Quesnel through an "intercompany relationship." (Ken Cai affidavit, paragraph 6).

69 With respect to Xiaohui Cai's work for Allgold, the defendants submit that although there was no written agreement, there was an oral agreement between the president of Beijing Minco (Xu Yong) and the president of Allgold (Ken Cai) to lend three employees, including Xiaohui Cai, to Allgold for the 2016 mining season. As part of the oral agreement, Xiaohui Cai was paid his regular salary by Beijing Minco while working in B.C. This continued until November 23, 2016. The payments went into Xiaohui Cai's bank account in Beijing. Allgold later reimbursed Beijing Minco for the amount of Cai's salary for the period that he was working in B.C. As part of the oral agreement, Allgold covered all of the expenditures for Xiaohui Cai while he was in B.C. for the 2016 mining season (Ken Cai affidavit, paragraphs 2, 7 and 8).

70 Xiaohui Cai obtained a W-1 category visa from the Government of Canada for the period of August 3 to December 31, 2016. Allgold applied for a work permit for him to work for Allgold (Trevitt EFD Q 105). Xiaohui Cai received a work permit for the period of September 18 to December 31, 2016 (Ken Cai affidavit paragraph 3).

71 While not referred to by the parties, I note that the work permit (which is attached to Ken Cai's affidavit) specifies that Xiaohui Cai's employer in Canada would be "Minco Gold Corporation" and the place of employment would be Quesnel. There is no other evidence that refers to the "Minco Gold Corporation." In light of the other evidence concerning Xiaohui Cai's

relationship with Allgold, I find that for the purpose of the CTC application, little turns on the name of the employer stated in the work permit.

72 On September 18, 2016 Xiaohui Cai flew from Beijing to Vancouver, which expense was paid by Allgold (Trevitt EFD Q 194). On September 20, 2016 he flew from Vancouver to Quesnel.

73 Alex Rae was employed by Allgold as the mine manager of the Quesnel River Mine operations during the 2016 mining season. Wan Fang, one of the three employees of Beijing Minco who came to Canada to work for Allgold, was the project manager for the exploration work carried out at the Lucky Project during the 2016 season (Ken Cai affidavit, paragraph 10).

74 Xiaohui Cai reported to Alex Rae (Trevitt EFD Q 84). Xiaohui Cai was under the direction and control of Alex Rae while he was working in B.C (affidavit of Ken Cai, paragraph 11).

75 Allgold also arranged for two independent contractors from a Chinese equipment manufacturer to come from China to the Quesnel River Mine in the summer of 2016 to install and test jiggers and mill equipment that were purchased by Allgold. Their names were Mo Shiyong and Deng Hai (Mr. Mo and Mr. Deng). Allgold provided local support for them, including transportation from the Vancouver airport, food and accommodation, and transportation back to the Vancouver airport so they could fly back to China (affidavit of Ken Cai, paragraph 24).

76 The defendants cite *Assessment Manual* policy item AP1-1-5, which at the time of the accident provided:

(f) Lent employees

In determining whether a worker of one employer has become the seconded or lent employee of another employer, the question to be decided in each case is whether there is an employment relationship between the employee and the other employer for the purposes of the *Act*. The normal tests for determining whether an employment relationship exists are applied with the necessary modifications.

77 The defendants cite *WCAT-2014-03338*, a compensation appeal decision concerning a worker who had been seconded by his employer (PD) to a federal agency to work abroad. The worker was injured while working abroad.

78 The WCAT vice chair discussed a number of tests considered in previous appellate decisions that addressed the circumstances of seconded employees. The tests mainly concerned which company exercised direction and control over the seconded employee and whether the employee became part of the second employer's operations. The vice chair noted that while PD continued to pay the worker's salary, the evidence indicated that PD had little or no involvement in or control over the worker's employment circumstances while working abroad for the federal agency. The vice chair found that in effect, PD appears to have been providing a form of foreign aid by donating the services of paid personnel, while the federal agency directed the work to be carried

out by such personnel. The vice chair concluded that the worker had become part of the organization of the federal agency and was subject to its direction and control. Therefore, at the time of the injury he was a lent employee of the federal agency and not an employee of PD. This was a fundamental defect in the worker's claim for workers' compensation coverage for his injury that occurred outside of B.C.

79 Citing the tests discussed in *WCAT-2014-03338*, the defendants submit that while Xiaohui Cai was working in B.C. on projects managed by Allgold he was under the direction and control of Allgold in the person of its mine manager, Mr. Rae. The work Xiaohui Cai carried out was part of the operation of Allgold's projects in B.C., and Xiaohui Cai had become part of the enterprise of Allgold in B.C.. On the other hand, Beijing Minco exercised no control over him while he was working in B.C.

80 The defendants also submit that as seen by the analysis in *WCAT-2014-03338*, a worker may be a lent employee even if their salary continues to be paid by the original employer. In the present case, the factual scenario is similar, although the seconded employer (Allgold) went one step further by reimbursing the original employer (Beijing Minco) for Xiaohui Cai's salary, which solidified his relationship with Allgold.

81 The documents provided by the defendants with their submission included extensive evidence that was not available to the plaintiff at time of his counsel's written submission, including Ken Cai's affidavit. The plaintiff was invited to provide a rebuttal to the defendants' submission. The plaintiff's counsel wrote to WCAT to point out that Allgold had provided Ms. Trevitt as its representative for examination for discovery purposes. However, the defendants' counsel did not have an opportunity to question Ken Cai about his affidavit evidence, including the attached documents.

82 In a June 3, 2022 letter from a WCAT appeal coordinator, the plaintiff's counsel was given an opportunity to advise WCAT if she wished to utilize the provisions of MRPP Chapters 11 (Evidence) and 18 (Certification to Court). Chapter 11 includes item 11.7 (Orders (Subpoenas) for the Production of Existing Evidence and Attendance of Witnesses). The letter noted that it was open to the plaintiff to utilize those provisions to make an application to WCAT or to provide a written rebuttal (or both). The plaintiff's counsel did not respond within the time allowed in the appeal coordinator's letter. The WCAT appeal coordinator then wrote to the plaintiff's counsel to advise that written submissions were considered closed.

83 As noted in MRPP item 7.5 a WCAT panel has the discretion to change the appeal method, and may decide to convene an oral hearing if the panel considers it necessary or helpful to its decision. The plaintiff's counsel raised concerns with respect to Ken Cai's evidence, including the lack of an opportunity for her to question him, but she did not take any steps to request an oral hearing or to apply for an order for him to appear to be questioned.

84 In spite of the concerns raised by the plaintiff's counsel concerning Ken Cai's evidence, I consider that I am able to properly decide the application based on the transcript of Ms. Trevitt's examination for discovery, the affidavit evidence, the other documents that have been provided, and the written submissions. I am able to resolve evidentiary issues by weighing the available evidence.

85 The evidence of Ms. Trevitt and Ken Cai is not directly contradicted by other evidence provided by the plaintiff. While the plaintiff's counsel did not provide a full rebuttal, in her correspondence to WCAT she pointed out that much of Ken Cai's affidavit evidence appears to be hearsay and that he does not state the source of the second hand information that he provides. This is particularly so with much of Ken Cai's evidence concerning Xiaohui Cai's activities related to his trip to the Lower Mainland just prior to the accident. The plaintiff's counsel also points to some apparent inconsistencies between the evidence of Ken Cai and that of Ms. Trevitt. That evidence is more concerned with the "arising out of and in the course of" issue and I will return to it when considering that issue.

86 Unlike the courts, WCAT is not precluded from admitting hearsay evidence, although hearsay evidence will generally be given less weight than direct evidence (MRPP items 11.2 and 11.5.1).

87 Based on the evidence of Ms. Trevitt and Ken Cai, I accept that Beijing Minco and Allgold are part of a related group of companies in that they are both subsidiaries of Minco.

88 It appears to me that, given Ken Cai's role as the president of both Minco and Allgold, and the nature of Beijing Minco's relationship to Minco, Ken Cai's evidence concerning Xiaohui Cai's relationship with Beijing Minco and Allgold is information of which he would either have first-hand knowledge or would be able to obtain from company records. He has attached to his affidavit copies of a number of documents, including a labour contract between Xiaohui Cai and Beijing Minco. I place some weight on Ken Cai's evidence regarding Xiaohui Cai's relationship to Beijing Minco, Minco, and Allgold.

89 I accept that Xiaohui Cai was hired by Beijing Minco to work as a geologist and that he worked in the company's head office in Beijing, although his contract provided that he could be assigned to work in Canada.

90 The preponderance of the evidence concerning the factors in *Assessment Manual* policy item AP1-1-3 support a conclusion that Xiaohui Cai had an employment relationship with Beijing Minco. He was hired to provide services of labour. The written employment contract provided that he was subject to the direction and control Beijing Minco and that he was paid a monthly salary plus annual bonuses. The contract also stated that he had the opportunity to receive stock options from Minco. However, I do not interpret the annual bonuses and the possible stock options as an indication that he had an opportunity to profit or to suffer a loss through the

provision of his services. The written contract provides that Beijing Minco would arrange to enroll Xiaohui Cai in social benefits and pension plans in the jurisdiction where he worked, and would also arrange sickness and disability insurance. The written contract does not suggest that Xiaohui Cai had the ability to hire someone else to perform the geologist services on his behalf.

91 On the whole, the terms of the contract are more consistent with an employment contract than a contract between independent firms. I conclude that Xiaohui Cai was an employee of Beijing Minco and not operating as an independent business in his own right.

92 In her submissions the plaintiff's counsel has pointed to the fact that Beijing Minco was not registered with the Board as an employer at the time of the accident. Her submission implies that this means that Xiaohui Cai was not a "worker" within the meaning of the Act.

93 RSCM II policy item #5.00 states that it is a well-established principle of workers' compensation coverage that where an employer comes within the scope of the Act, all workers of that employer are covered for compensation. The policy also states that a worker's claim is not prejudiced by the fact that the employer has not complied with the obligation to register with the Board. While policy item #5.00 refers to claim coverage, the same principle applies to the determination of an individual's status under section 311. The fact that the employer is not registered with the Board does not result in a finding that an employee is not a "worker" within the meaning of the Act.

94 The fact that Beijing Minco was based in China and, according to both Ms. Trevitt and Ken Cai, did not operate in B.C. raises a question, not addressed by the parties, as to whether Beijing Minco was exempt from coverage. As noted in RSCM II item #4.00, detailed provisions regarding the exemptions of employers or workers from coverage are set out in item AP1-2-1 of the *Assessment Manual*.

95 AP1-2-1 explains that Part 1 of the Act (now referred to as the compensation provisions) applies to all workers and employers in B.C. except where the Act does not apply for constitutional reasons or where employers or workers have been exempted by order of the Board. The exemption orders made by the Board include:

- (3) Certain employers with no place of business in the province who temporarily carry on business in BC, but do not employ a BC resident, are exempt from Part 1 of the Act provided they are covered in another jurisdiction that provides compensation for occupational injuries and diseases and meet additional criteria set out below. However, unless required as a matter of constitutional law, the exemption described in this section does not apply to the occupational health and safety provisions in Part 3 of the *Act*.

96 The policy goes on to set out a table of additional criteria that apply if an employer is not in the trucking industry. The criteria involve the number of actual or proposed working days in B.C.

in a year and the number of actual or proposed visits to B.C. in a year. According to the criteria in the first row of the table, if the non-B.C. employer's actual or proposed working days in B.C. is 15 or more in a year, then regardless of the number of visits to B.C., the employer is not exempt from coverage.

97 Under the foregoing criteria, given the terms of Xiaohui Cai's work permit that was in effect from September 18, to the end of December 2016, and the fact that he worked in B.C. from September 2016 until November 22, 2016, if he was providing his services in B.C. as an employee of Beijing Minco, then Beijing Minco would not be exempt from the requirement to register with the Board in B.C. unless it had provided compensation coverage for occupational injuries and diseases in another jurisdiction.

98 However, I do not consider it necessary to determine whether Beijing Minco was exempt from coverage in B.C. Based on the evidence that has been provided, I conclude that the Board's policy on lent workers is applicable to Xiaohui Cai's status while he was working temporarily in B.C.

99 I accept that Beijing Minco agreed to provide Xiaohui Cai's services to Allgold and that Allgold arranged for the Government of Canada to issue a work permit to him so that he could work as a project geologist in B.C. during part of 2016. I accept that he arrived in B.C. in September 2016 and that he resided in accommodation provided by Allgold while he worked as a project geologist at the Allgold projects near Quesnel. I also accept that Beijing Minco continued to pay Xiaohui Cai's salary and that Allgold later reimbursed Beijing Minco for the amount of his salary that was paid during the time he worked in B.C. for Allgold.

100 Consistent with the defendants' submissions, the evidence concerning the assignment by Beijing Minco of Xiaohui Cai to work in B.C. at the Allgold projects near Quesnel supports the conclusion that he was seconded or lent to Allgold, that his work on the Allgold projects near Quesnel was directed and controlled Allgold, and that he become part of the Allgold enterprise in B.C. The evidence does not indicate that Xiaohui Cai was subject to control by Beijing Minco while he worked in B.C.

101 Ms. Trevitt's evidence is consistent with an ongoing employment relationship between Xiaohui Cai and Beijing Minco during the time that he worked in B.C. I do not interpret her evidence as directly addressing the question of whether he was a seconded or lent employee. She did not speak directly to that issue, but did confirm that Xiaohui Cai was working on the project in Quesnel because he was asked to work there by Allgold and that Beijing Minco was paying him to work there. While in her mind this may have meant that he was not an Allgold employee, I do not view her evidence as precluding Xiaohui Cai's status as a seconded or lent employee.

102 Ken Cai's affidavit evidence strongly supports the conclusion that Xiaohui Cai was a lent employee of Allgold at the time of the accident.

103 The evidence concerning the factors in *Assessment Manual* policy item AP1-1-3, support a conclusion that Xiaohui Cai had an employment relationship with Allgold. Xiaohui Cai provided services of labour to Allgold, Allgold exercised a significant degree of control over his work activities. Allgold provided the major equipment associated with the work carried out at the Quesnel projects. According Ken Cai, Allgold owned the mineral claim for the Quesnel River Mine, as well as all the licenses and permits for the work at the Quesnel River Mine. As the company managing the mine operations, Allgold was in the best position to fulfill the prevention and other obligations under the Act. There is no evidence that Xiaohui Cai was able to hire another individual to carry out the work he was assigned to perform for Allgold.

104 The strong weight of the evidence supports a conclusion that as a Beijing Minco employee lent to Allgold, Xiaohui Cai had an employment relationship with Allgold and was not providing his services in B.C. as an independent operator.

105 I conclude that from September 18 to November 22, 2016 Xiaohui Cai was a lent employee of Allgold and that at the time of the accident he was a worker within the meaning of the compensation provisions of the Act.

Did the defendant Xiaohui Cai's action or conduct at the time of the accident arise out of and in course of his employment?

106 The plaintiff's position is that Xiaohui Cai's actions at the time of the accident did not arise out of and in the course of his employment. The defendants disagree.

107 With regard to the factors in policy item C3-14.00, the plaintiff submits that the accident did not occur on the premises of Xiaohui Cai's employer and that the accident did not occur while Xiaohui Cai was doing something for the benefit of his employer's business. Instead he was engaged in a personal activity, namely traveling to and from Vancouver solely for the purpose of visiting family and then returning to Quesnel to visit a friend.

108 The plaintiff relies on the statement by Mabel Cai to the RCMP in which she reported that Xiaohui Cai stayed in her home on Monday night (the night of November 21, 2016), she had breakfast with him on the morning of the accident at her home, and that he was driving back to Quesnel where he would stay in a hotel with a co-worker.

109 The plaintiff also relies on the discovery evidence of Ms. Trevitt. She stated that the mine season had ended on November 11, 2016, so that by the date of the accident the mine season was over (Q 165). Ms. Trevitt stated that Xiaohui Cai had permission to use the Allgold vehicle for personal reasons (Q 164) and that he had permission to drive the Allgold truck to Vancouver to visit family after the camp closed on November 11, 2016 (Q 155 and 156). At the time of the accident he was driving to Quesnel to return the truck to the mine manager's home (Q 166, 167).

Ms. Trevitt also said that at the time of the accident, Xiaohui Cai was on his way back to work but he was not intending to do any work (Q 172). He was scheduled to depart from Quesnel on December 18 or 22, 2016 and to fly back to China via Vancouver (Q 190 and 193).

110 In her submission (that was provided prior to Ken Cai's affidavit), the plaintiff says that there is no evidence whatsoever suggesting that Xiaohui Cai was acting on instructions from his employer while driving on the day of the accident. Although he was driving a vehicle registered to Allgold, the plaintiff submits that Xiaohui Cai was permitted to use the vehicle for personal purposes. On discovery Ms. Trevitt stated that Xiaohui Cai had asked her if he could use the vehicle to bring it to Vancouver after the mine season ended to visit family and she had agreed (Q 152 to 157). She also stated that at the time Xiaohui Cai had permission to use the vehicle, it was for personal reasons (Q 163).

111 The plaintiff submits that there is no evidence that Xiaohui Cai was engaged in his regular job duties at the time of accident or that the accident was caused by an activity of the employer or a fellow employee.

112 As I noted earlier, the defendants provided significant additional evidence with their submission in reply to the plaintiff's submission. Some difficulty in assessing the evidence before me arises from some apparent inconsistencies between the discovery evidence of Ms. Trevitt and the affidavit evidence of Ken Cai. One area of inconsistency concerns whether, after November 11, 2016, Xiaohui Cai was still involved in Allgold operations related to the Quesnel projects. Another area of inconsistency concerns the purpose of Xiaohui Cai's trip to Vancouver. Ms. Trevitt's evidence could support a finding that after the mine season ended on November 11, 2016, there was no further work for Xiaohui Cai to do for Allgold. Her evidence would support the position of the plaintiff that Xiaohui Cai's trip to Vancouver was for purely personal reasons. Ken Cai's evidence supports the defendants' position that the trip to Vancouver was for work reasons. Given this situation, it is necessary in some instances to choose between the evidence of Ms. Trevitt and that of Ken Cai.

113 In his affidavit Ken Cai described the situation of the Quesnel River Mine after the mining season ended on November 11, 2016 as follows. The end of the season meant that Allgold was no longer pulling minerals from the site, but other operations had to be carried out. These are described in his affidavit under the headings of "Care and Maintenance of Machinery" and "Mine Shutdown." Under the first heading, pieces of heavy machinery and mine equipment including jiggers and mill equipment needed to be properly cared for and maintained before being stored away for the winter. The necessary activities included checking fluids, oils, and filters on the mining trucks, excavators, and bulldozers (paragraph 18).

114 Activities required to shut down the mine for the season after production ended on November 11, 2016 included dewatering the water pumps, emptying the water trucks, removing oil from the site, removing unused diesel from the 16,000 gallon tank on site, shutting down the

generators and storing them away, shutting down the washing plant, shutting down the mill, and securing the Quesnel River Mine gate to protect the mine equipment. An inventory was also taken to determine the parts needed for the following season (paragraph 19).

115 Ken Cai stated that the care and maintenance of machinery and the mine shutdown at the Quesnel River mine took two weeks following the end of production on November 11, 2016 (affidavit, paragraph 20).

116 Ms. Trevitt testified as to the end of the mining season on November 11, 2016 but was not asked about and did not address the maintenance and shutdown phase. I do not read Ken Cai's additional evidence concerning the activities at the mine during two weeks following November 11, 2016 as directly contradicting her evidence. Moreover, it appears improbable to me that a placer mining operation would simply end production for the year without the necessity of additional steps related to maintenance and readying the mine for a period of inactivity. I accept that there were likely approximately two weeks of post-production activities as described in Ken Cai's affidavit.

117 As for Xiaohui Cai's job activities, Ms. Trevitt stated only that he was a project geologist (Q 36 and 72) and that he was doing "soil sampling" at the mine site (Q 79).

118 Ken Cai stated that as a geologist Xiaohui Cai did much more than soil sampling. He also did quality control, some digging, testing dirt, analysing samples, and giving advice to miners on where to mine. As a salaried employee he also was required to do any work that was reasonably asked of him by Mr. Rae, the mine manager (paragraph 12).

119 Ken Cai stated that Mr. Rae, the Allgold mine manager, oversaw the work done by Xiaohui Cai in B.C. and dictated the manner of completing the work. On the other hand, he said that Ms. Trevitt is not a person within Allgold to authorize what a geologist is to do (paragraph 13).

120 Ken Cai stated that Mr. Rae left Allgold in 2017 and that Ms. Trevitt left Allgold towards the end of 2020 (paragraph 44).

121 Ken Cai attached to his affidavit copies of a number of WeChat messages (with certified English translations) from Xiaohui Cai to Wan Fang, another worker from China working at the Allgold projects near Quesnel. The messages are dated November 16, 17, and 18, 2016, and relate to such topics as bringing food to the camp because there was not much to eat, changing a vehicle, taking "the boss" to the airport, meeting at a hotel, and remaining steps to be performed at the camp such as draining the water, shutting off the gas, locking the engine and main gate, and the location of the keys. These messages are consistent with Xiaohui Cai being active in the maintenance and shutdown phase after the end of production on November 11, 2016.

122 Ken Cai states that approximately 7000 pounds of gold concentrates were obtained from the

Quesnel River Mine during the 2016 season (the 2016 concentrates). The 2016 concentrates were loaded into large heavy-duty bags. They were too heavy to be loaded into a single truck so Mr. Rae had the concentrates loaded into two Allgold pickup trucks to be driven from the Quesnel River Mine to a storage facility in Surrey, B.C. on November 18, 2016 (paragraph 21).

123 Ken Cai states that Mr. Rae instructed Xiaohui Cai to drive one of the pickup trucks with part of the 2016 concentrates to the storage facility in Surrey (paragraph 22). In the early morning of November 18, 2016 Mr. Rae drove one of the Allgold pickup trucks containing about half of the 2016 concentrates and Xiaohui Cai drove the 2008 Ford F350 containing the other half of the 2016 concentrates to the storage facility. Mr. Rae drove himself and Xiaohui Cai drove Mo Shiyong and Deng Hai in the Ford F350 (paragraph 23). In afternoon of November 18, 2016 both of the Allgold trucks arrived at the storage facility in Surrey and the 2016 concentrates were unloaded (paragraph 26).

124 During the nights of November 18, 19, and 20, 2016, Xiaohui Cai, Mo Shiyong, and Deng Hai stayed in a bed and breakfast rental in Richmond, B.C. (paragraph 28).

125 On November 20, 2016 Xiaohui Cai, Mo Shiyong, Deng Hai, and Ken Cai had a lunch meeting in Vancouver to discuss the issues of the jiggers and the mill and how to improve performance of the mill for the 2017 season (paragraph 29).

126 On the morning of November 21, 2016 Xiaohui Cai drove Mo Shiyong and Deng Hai to the Vancouver International Airport and helped them check in for the flight to Beijing. Ken Cai also flew back to China on November 21, 2016, but on a separate flight (paragraph 30).

127 According to Ken Cai, during the afternoon of November 21, 2016 Xiaohui Cai went to Allgold's office in Vancouver and delivered some gold samples produced from testing programs at the Quesnel River Mine, an expense report, and some receipts (paragraph 31).

128 Xiaohui Cai left Allgold's office in Vancouver in the early evening of November 21, 2016, and then had a dinner meeting with Liu Hanzhe to discuss details of shipping the 2016 concentrates to China for smelting. Liu Hanzhe is not an employee of Allgold but had prior experience on the shipment of gold concentrates to China for smelting (paragraphs 32 and 33).

129 Xiaohui Cai stayed at the home of Ken and Mabel Cai in Vancouver for one night on Monday, November 21, 2016. At that point Ken Cai had already left for China. Mabel Cai reported that Xiaohui Cai had been at the Allgold downtown office until about 6:00 p.m. on November 21, 2016 because he had so much work to do. He arrived at her house at approximately 10:00 p.m. (Mabel Cai statement to RCMP, lines 58, 169 and 189).

130 On the morning of November 22, 2016 Xiaohui Cai had breakfast with Mable Cai and left

her house at 9:30 a.m. She reported that Xiaohui Cai told her that he was going to stay with his co-worker in a hotel in Quesnel (Mabel Cai statement lines 38, 99, 148, 221, and 225).

131 Mr. Rae and Xiaohui Cai were going back to the Quesnel River Mine to complete the care and maintenance and mine shutdown. This would have lasted a few days (Ken Cai affidavit, paragraphs 35 and 39).

132 Because it is dangerous to be driving the logging road from Quesnel to the Quesnel River Mine at night in November, Ken Cai had advised Xiaohui Cai to stay at the Airport Inn Hotel in Quesnel on the night of November 22, 2016 before driving to the mine the next day (affidavit of Ken Cai, paragraph 38).

133 Once the maintenance and shut down at the Quesnel River Mine was completed, Xiaohui Cai was to drive back to the Airport Inn Hotel in Quesnel and then work alongside Mr. Fang completing some exploration work for the Lucky Project (affidavit of Ken Cai, paragraph 40).

134 Xiaohui Cai was to leave the Allgold vehicle at Mr. Rae's home in Quesnel prior to flying from Quesnel to Vancouver on or about November 29, 2016 (paragraph 45). Upon his anticipated arrival in Vancouver on November 29, 2016 Xiaohui Cai was going to write geological reports for the 2016 season and make arrangements to ship the 2016 concentrates to China for smelting. He was scheduled to fly from Vancouver to Beijing on December 14, 2016 (paragraphs 33, 46, and 47).

135 In considering the evidence about Xiaohui Cai's trip to Vancouver, I have taken into account the positions of Ms. Trevitt and Ken Cai in the group of related companies.

136 The evidence of Ken Cai and Ms. Trevitt is consistent with respect to Xiaohui Cai's reporting to and receiving direction from to Mr. Rae with respect to his involvement in the Allgold operations. In light of that evidence, and Ms. Trevitt's role in the companies, I consider it likely that Mr. Rae was more directly involved in and knowledgeable of Xiaohui Cai's day to day employment activities than was Ms. Trevitt. I would not understand her role of corporate secretary to include day to day involvement in the mining operations, and she did not testify as to such involvement. As the mine manager with direct oversight of Xiaohui Cai's work, I accept that Mr. Rae was likely more knowledgeable than Ms. Trevitt about those matters. Unfortunately, no evidence from Mr. Rae has been provided with respect to Xiaohui Cai's work activities or the circumstances of his trip to Vancouver in the Allgold pickup truck in November 2016.

137 As the president of both Allgold and Minco, Ken Cai appears to have had some direct involvement in and knowledge of matters related to Allgold's operations. For example, he states in his affidavit that he was present at a lunch meeting in Vancouver with Xiaohui Cai, Mr. Mo, and Mr. Deng on November 20, 2016 to discuss the issues of the jiggers and the mill and how to improve performance of the mill for the 2017 season. I accept that as the company president Ken

Cai would have had knowledge of the activities related to shutting down the mine for the season and of transporting the 2016 gold concentrate. Although some of this may have been second hand information obtained from Mr. Rae and Xiaohui Cai, I accept that it was within the scope of matters Ken Cai would be familiar with.

138 In his affidavit, Ken Cai provides a much more detailed account than does Ms. Trevitt of Allgold's operations, including the process of maintaining the mining equipment and shutting down the mine for the season. He also provides a more detailed account of Xiaohui Cai's trip to Vancouver, including being at a lunch meeting with him and Mr. Mo and Mr. Deng, whereas Ms. Trevitt simply stated that Xiaohui Cai went Vancouver to visit family after the mining season ended.

139 Ken Cai's evidence about Xiaohui Cai working at the Allgold office in Vancouver until the early evening of November 21, 2016 is consistent with Mabel Cai's statement to the RCMP. She stated that she had asked Xiaohui Cai to come home early so that he would be able to see her son. Initially he said he would do so, but at 6:35 p.m. he left her a message telling her that he had "so much work at head office in downtown" and had "just finished his work around 6 or something" and then was going out with his friend to have a dinner" (lines 159 to line 172 of Mabel Cai statement).

140 Ms. Trevitt's evidence that Xiaohui Cai borrowed the Allgold truck to go to Vancouver for purely personal reasons is not consistent with Mabel Cai's statement to the RCMP.

141 Of the various statements concerning Xiaohui Cai's trip to Vancouver, I consider Mabel Cai's to be the most reliable as it was based on her own experience and was given to the RCMP shortly after the accident when her memory of Xiaohui Cai staying with her would have been fresh in her mind. The transcript does not state the date of the RCMP interview, but its contents indicate that it occurred in November 2016. The RCMP officer refers to the accident earlier "this month." Ken Cai's affidavit evidence about Xiaohui Cai working at the Allgold office in Vancouver on November 21, 2016 is strengthened by its congruence with Mabel Cai's statement.

142 Where the evidence of Ms. Trevitt and Ken Cai conflicts with respect to Xiaohui Cai's job duties and the circumstances of his trip to Vancouver in the Allgold pickup truck, I place more weight on the evidence of Ken Cai.

143 I consider the Board's policy respecting business trips to have a strong bearing on the circumstances of Xiaohui Cai's travel to Vancouver and his partially completed journey back to Quesnel. Policy item C3-19.00 provides:

D. Business Trips

The general factors listed under Item C3-14.00 are used to determine whether a trip undertaken by a worker is sufficiently connected to the worker's employment as to be a business trip. For example, if the trip is taken for the employer's benefit, on the instructions

of the employer, or paid for by the employer, these are all factors that weigh in favour of finding that the trip is a business trip.

An employment connection generally exists continuously during a business trip, except where the worker makes a distinct departure of a personal nature.

This means that injuries or death that result from a hazard of the environment into which the worker has been put by the business trip, including hazards of any overnight accommodation itself, are generally considered to arise out of and in the course of the employment. However, injuries or death resulting from a hazard introduced to the premises by the worker for the worker's personal benefit may not be considered to arise out of and in the course of the employment, if no other factors demonstrate an employment connection.

Personal activities associated with and incidental to business trips, such as traveling, eating in restaurants, staying in overnight accommodations (including sleeping, washing etc.) are normally regarded as within the scope of the employment where a worker is on a business trip.

On the other hand, when a worker makes a distinct departure of a personal nature while on a business trip, this may be regarded as outside the scope of the employment. There is an obvious intersection and overlap between employment and personal affairs while a worker is on a business trip. However, a "distinct departure" is more than a brief and incidental diversion.

If a worker simply stops for a short refreshment break, this may be regarded as a brief and incidental diversion from the business trip and an employment connection may still be found. The employment connection may be broken where the injury or death occurs as a result of the worker's involvement in social or recreational activities that are not incidental to the business trip.

In the marginal cases, it is impossible to do better than weigh the business trip features of the situation against the personal features to reach a conclusion as to whether the injury or death arises out of and in the course of the employment.

144 I rely on the affidavit evidence of Ken Cai in finding that Xiaohui Cai undertook the November 18, 2016 trip to Vancouver at the direction of the employer in the person of Mr. Rae, who was in a supervisory position with respect to Xiaohui Cai's employment with Allgold. I also accept that Xiaohui Cai's services of driving the Allgold pickup truck with part of the 2016 gold concentrates from the Quesnel River Mine to the Surrey storage location benefitted the employer's business operations, since this was one step in the process of getting the concentrate from the mine near Quesnel to China where it would be refined.

145 I also accept that the lent workers of Beijing Minco, including Xiaohui Cai, had all of their expenses while in B.C., such as food, gas, and supplies, paid for by Allgold (Ken Cai's affidavit, paragraphs 8 and 43). Although Ken Cai has not provided details of the expenses related to Xiaohui Cai's November 18 to 22, 2016 trip to the Lower Mainland, I consider it reasonable to

infer that, since Allgold generally paid for Xiaohui Cai's expenses while he was on loan to Allgold, his expenses related to the Vancouver trip were paid by Allgold.

146 Based on the foregoing I find that Xiaohui Cai's November 18 to 22, 2016 travel between Quesnel and the Lower Mainland was a business trip and that there was a strong employment connection to his travel.

147 Under policy item C3-19.00, the employment connection existed continuously during Xiaohui Cai's trip to and from the Lower Mainland, except where he made a distinct departure of a personal nature. It is arguable that his visit to the home in Vancouver of Ken and Mabel Cai on the night of November 21, 2016 was a departure of a personal nature from his business travel. I agree, however, with the defendants' argument that having worked into the early evening of November 21, and planning to drive back to Quesnel on November 22, Xiaohui Cai had to stay somewhere in the Lower Mainland that night. Accommodation that is incidental to business travel is not considered to a personal deviation. The fact that he stayed at his aunt and uncle's home instead of in a hotel, does not in itself amount to a "distinct departure of a personal nature" from the business trip.

148 Even if the I were to consider the time Xiaohui Cai spent at this aunt and uncle's home on the night of November 21, 2016 and the morning of November 22 to amount to a "distinct departure" of a personal nature, its relevance is diminished by the fact that their home is not where Mr. Cai experienced the fatal accident. When the accident occurred, he was on Highway 1 and well into his journey back to Quesnel on the most direct route from Vancouver.

149 A number of WCAT decisions concerning traveling employees have considered both the purpose of the employee's travel and their route at the time of the accident and concluded that the exclusion of compensation due to a personal deviation from employment travel only applies during the personal deviation. Once the worker has completed the personal deviation and returns to the route of employment travel, workers' compensation coverage resumes. See for example, the analysis of this issue in *WCAT Decision A1605182 (Knox v. Cameron)*. While previous WCAT decisions are not binding, I agree with the vice chair's reasoning in *WCAT Decision A1605182* and I take the same approach in this case.

150 I find that even if Xiaohui Cai's time at his aunt and uncle's house in Vancouver on the night of November 21 and the morning of November 22 is considered a substantial personal deviation, once he left their house on the morning of November 22 and resumed his travel on the direct route to Quesnel, the personal deviation from his employment related travel ended. There is no basis in the evidence to conclude that at the time of the accident Xiaohui Cai was engaged in any further personal deviation from his employment travel.

151 Having considered the evidence before me with respect to the factors in policy items C3-

14.00 and C3-19.00, I find that there was a strong employment connection to Xiaohui Cai's travel at the time of the accident and that non-employment factors did not play a significant role.

152 I find that the action or conduct of Xiaohui Cai, which caused the alleged breach of duty of care, arose out of and in the course of his employment.

Conclusion

153 I find that at the time of the accident on November 22, 2016:

- (a) the plaintiff, Mandeep Singh Boyal, was a worker within the meaning of the compensation provisions of the Act;
- (b) the injuries suffered by the plaintiff, Mandeep Singh Boyal, arose out of and in the course of his employment within the scope of the compensation provisions of the Act;
- (c) the defendant, Xiaohui Cai, was a worker within the meaning of the compensation provisions of the Act;
- (d) any action or conduct of the defendant, Xiaohui Cai, which caused the alleged breach of duty of care, arose out of and in the course of his employment.

Guy Riecken
Vice Chair

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NO. NEW-S-M-196819

NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION

ACT REVISED STATUTES OF BRITISH

COLUMBIA 2019, CHAPTER 1, AS AMENDED

BETWEEN:

MANDEEP SINGH BOYAL

PLAINTIFF

AND:

XIAOHUI CAI (DECEASED), and ALLGOLD BC LTD.
DEFENDANTS

CERTIFICATE

UPON APPLICATION of the plaintiff, MANDEEP SINGH BOYAL, in this action for a determination pursuant to section 311 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of action arose, November 22, 2016:

1. The plaintiff, MANDEEP SINGH BOYAL, was a worker within the meaning of the compensation provisions of the *Workers Compensation Act*.
2. The injuries suffered by the plaintiff, MANDEEP SINGH BOYAL, arose out of and in the course of his employment within the scope of the compensation provisions of the *Workers Compensation Act*.
3. The defendant, XIAOHUI CAI (deceased), was a worker within the meaning of the compensation provisions of the *Workers Compensation Act*.
4. Any action or conduct of the defendant, XIAOHUI CAI (deceased), which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of the compensation provisions of the *Workers Compensation Act*.

CERTIFIED this 13th day of July, 2022.

Guy Riecken
VICE CHAIR

¹ Effective April 6, 2020, revisions to the Act were made under the *Statute Revision Act*, RSBC 1996, c 440. The revisions mean that the organization, section numbers, and some of the language in the Act have changed since the time when WCAT received the application. With respect to the issues to be decided in this application, nothing turns on those changes.

² examination for discovery transcript

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