DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT DECISION DATE: **January 18, 2022**

WCAT DECISION NUMBER: **A2002624**

WCAT PANEL: **Guy Riecken**

RE: Carolynn Wood v. Michelle Alexis Cameron
Penticton Registry No. PEN-S-M-43286
Certification to Court
WCAT No. A2002624

Applicant: Carolynn Wood
(the plaintiff)

Respondent: Michelle Alexis Cameron
(the defendant)

Representatives:

For Applicant: Vahan A. Ishkanian
Barrister & Solicitor
(acting as agent for):
Jeff Thomas
J.D. Thomas Personal Law Corp.

For Respondent: Natasha Little
Bilkey Law Corporation

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Introduction

[1] On January 27, 2018 Carolynn Wood, the plaintiff, was involved in a motor vehicle accident on Ward Street at the intersection of Innes Street in Nelson, British Columbia, when the vehicle in which she was a passenger collided with a vehicle driven by Michelle Alexis Cameron, the defendant (the accident).

[2] On June 8, 2018 the plaintiff commenced a legal action against the defendant with respect to personal injuries sustained as a result of the accident.

[3] On October 30, 2020 the Workers' Compensation Appeal Tribunal (WCAT) received a certification to court (CTC) application under section 311 of the *Workers Compensation Act* (Act) from counsel for the plaintiff seeking a determination with respect to the status of the defendant at the time of the accident. A determination of the plaintiff's status has not been requested.

Issue(s)

[4] The issues to be decided are, at the time of the January 27, 2018 accident:

1. Was the defendant, Michelle Alexis Cameron, a worker within the meaning of the compensation provisions of the Act; and,
2. Did the action or conduct of the defendant, which caused the alleged breach of duty of care, arise out of and in the course of her employment within the scope of the compensation provisions of the Act?

Jurisdiction

[5] Under section 311 of the Act, 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 WCAT to make determinations and to certify those determinations to the court.

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[6] Part 7 of the Act (Appeals to Appeal Tribunal) applies to proceedings under section 311 (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).

[9] Board policies have been amended since the date of the accident, including changes that came into effect on April 6, 2020 to make the Board's policies consistent with the numbering and language of the revised Act[1]. Unless otherwise indicated, the policies referred to in this decision are those in effect at the time of accident.

[10] 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.

[11] WCAT was provided with the transcript of the examination for discovery of the defendant, Ms. Cameron, as well as other documents.

[12] Legal counsel for the plaintiff and for the defendant each provided written submissions.

[13] WCAT was advised that there are no related actions, but that there is a claim to the Insurance Corporation of British Columbia (ICBC) on behalf of a passenger in the defendant's vehicle, the defendant's infant daughter, who was five years of age at the time of the accident. I did not consider it necessary to invite the daughter or anyone on her behalf to participate as an interested person.

[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 were changed. The revisions did not result in substantive changes to the Act.

[14] The Board opened claim files for the plaintiff and the defendant with respect to injuries sustained in the accident. The Board paid compensation to both of them. Both claim files have been disclosed to the parties to the legal action. I will consider the evidence in the claim files anew for the purposes of this application, and any prior Board decisions are not binding on me.

Method of Hearing

[15] As set out in item #7.5 of WCAT *Manual of Rules of Practice and Procedure* (MRPP), CTC applications generally proceed in writing, unless a party requests an oral hearing because of a significant issue of credibility, other disputed factual issues, or other compelling reasons for holding an oral hearing.

[16] In this case, in his initial written submission the plaintiff's counsel took a conditional position with respect to the need for an oral hearing. He argued that if the plaintiff's arguments with respect to the defendant's actions at the time of the accident were disputed by the defendant's counsel in her submissions, then an oral hearing should be convened to resolve credibility and disputed factual issues.

[17] The defendant's counsel provided a reply submission which did not address the question of whether an oral hearing is necessary. The defendant's arguments focused on the question of the defendant's status.

[18] WCAT invited counsel to provide further submissions addressing the method of hearing if they wished to do so. The plaintiff's counsel wrote that this issue entangles the defendant's credibility with her counsel's submissions. He submitted that most if not all of the argument at pages 12 to 16 of the submissions on behalf of the defendant involve attempts by the defendant's counsel to contradict her client. The plaintiff's counsel argued that the best way to "sort this out" is for the defendant to attend in person at an oral hearing to undergo cross-examination that would ask her to compare her evidence with her counsel's allegations of fact. The plaintiff's counsel wishes to ask the defendant if she instructed her counsel to make the submissions that were provided to WCAT. He argues that he is entitled to know whether the defendant specifically instructed her counsel to file her submissions with informed consent and with an understanding of her answers and their relationship to the fundamental issues in the appeal.

[19] The defendant's position is that an oral hearing is not necessary. There is no reason to incur the time and expense of a further examination after the defendant has already submitted to an examination for discovery and the transcript is before WCAT. As seen

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in the transcript, the defendant was extensively questioned about the circumstances of the accident in cross-examination style questioning by the plaintiff's counsel.

[20] I have had an opportunity to review the evidence and the submissions on behalf of the parties and I have determined that an oral hearing is not necessary.

[21] The essence of the argument by plaintiff's counsel is that the written submission from the defendant's counsel includes arguments based on allegations of fact that are inconsistent with the defendant's own evidence.

[22] I recognize that, as set out in item #7.5 of the MRPP and *Weiss v. Workers' Compensation Appeal Tribunal*, 2021 BCSC 231, inconsistencies in a party's evidence or inconsistencies between the evidence of different parties or witnesses in the context of a CTC application may raise significant credibility issues that may need to be resolved through questioning at an oral hearing. However, in this case the plaintiff's counsel has not pointed to such inconsistencies in the defendant's evidence or with respect to the evidence of other witnesses. Instead, the crux of his argument concerns what he regards as inconsistencies between the defendant's evidence and the factual assertions in her counsel's arguments. He argues that the latter include allegations of fact not supported by the defendant's evidence. In my view that argument addresses the persuasiveness of defence counsel's submissions rather than the defendant's credibility. I do not view defence counsel's argument as raising a significant issue with respect to the defendant's credibility.

[23] In addition, I do not consider that it would be appropriate to convene an oral hearing to allow counsel for one of the parties to question another party about whether the other's counsel's submissions to WCAT reflect their client's instructions. While WCAT is not bound by the strict rules of evidence that apply in a court, and WCAT has the authority to conduct an appeal in the manner it considers necessary (section 297(1)), WCAT is not able to admit evidence that would be inadmissible in a court based on privilege under the law of evidence (section 298(3)). Since the categories of privilege includes solicitor-client privilege and litigation privilege, I am not persuaded by the argument of the plaintiff's counsel that an oral hearing should be held to allow him to question the defendant about matters contained in her instructions to her legal counsel.

[24] Having reviewed the evidence and submissions, I conclude that the application can be fairly decided without an oral hearing.

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Background and Evidence

[25] In addition to the defendant's discovery transcript and the parties' claim files, WCAT was provided with the following documents:

- A November 26, 2020 memorandum from the Board's Assessment Department stating that, according to the Board's records, Michelle Cameron is one of the business partners doing business as Apple Tree Maternity, registered with the Board as account #803226 for Personal Optional Protection (POP) coverage only. A notepad entry in the Assessment Department records indicates that separate accounts were established for each partner, in order to ensure that no personal information of one partner was disclosed to another. The account was registered at the time of the January 27, 2018 accident;
- A signed statement by the plaintiff to ICBC;
- A voluntary statement by Carolynn Wood to ICBC;
- Printouts of text messages that were sent between the defendant and one of her clients on the day of accident;
- A transcript of a December 6, 2018 interview of the defendant by an insurance adjuster;
- A letter from Elisabeth Sawyer, one of the defendant's business partners, dated August 15, 2019 regarding the accident; and,
- Printouts of Google maps showing the accident location, the location of the Apple Tree Maternity clinic, and locations relevant to the defendant's planned journey when the accident occurred.

[26] Unless otherwise indicated, the following matters are not disputed.

[27] The plaintiff worked on a casual basis as a support worker at Nelson Cares Society. In the application for compensation that she submitted to the Board, she reported that she was working when the accident occurred.

[28] The plaintiff reported that at the time of the accident she was a passenger in a vehicle being driven by her co-worker along Ward Street in Nelson. They were on a training shift (the co-worker was training the plaintiff). There was a client in the back seat and the plaintiff was in the front passenger seat. They were traveling in a work vehicle from a recreation centre to a client's residence where the plaintiff worked.

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[29] The defendant is a midwife. At the time of accident she worked out of Apple Tree Maternity, a clinic operated as an unincorporated business partnership by the defendant, other midwifes, and some physicians. The defendant had POP coverage with the Board.

[30] On the day of the accident the defendant was on call starting at 8:00 a.m. Her work plans for the day included doing a home visit at a client's home to take a blood sample from the client's newborn baby, dropping the blood sample at a hospital laboratory, and doing client visits at the hospital. Although the defendant kept some supplies and equipment at her home, before going to the client's house the defendant had to go to the clinic to pick up some supplies that she did not have at home which she needed for the client visits that day.

[31] The accident occurred on the day of the 5th birthday of the defendant's daughter (T). In the morning the defendant left home in her own car and picked up T from the house of T's father (the father) and brought T along to the clinic. After picking up the supplies she needed for the client visit later that morning, the defendant left the clinic on Lake Street to drive to the father's home on Falls Street where she planned to drop T off. A birthday party for T was planned at the father's home for later in the day. She planned to continue from the father's home to the client's home on Richards Street West in the Rosemont neighbourhood.

[32] While the defendant was driving her car westbound along Innes Street, with T still in the back seat, she drove through a stop sign at the intersection with Ward Street, and her car was struck (t-boned) by the vehicle in which the plaintiff was riding. The accident occurred approximately three blocks from T's father's house at or around 10:55 a.m.

The Act and Board Policy

[33] Section 1 of the Act includes the following definitions:

> "**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) [*extending application: independent operator who is neither an employer nor a worker*];

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[34] Section 4(2)(a) 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,

[35] *Assessment Manual* policy AP1-4-3 (Personal Optional Protection) explains that unincorporated independent operators without workers are not automatically covered for compensation purposes. They may purchase POP coverage from the Board.

[36] If the Board extends POP coverage to an independent operator, they are considered to be a "worker" under the definition in section 1 of the Act.

[37] The Board policies relevant to the "arising out of and in the course of" determination are set out in Chapter 3 of the RSCM II and include policy item C3-14.00 (Arising Out of and In the Course of Employment).

[38] Policy item C3-14.00 explains that "in the course of the employment"[2] generally refers to whether the injury or death happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the employment. "Arising out of the employment" generally refers to the cause of the injury.

[39] Policy item C3-14.00 sets out a list of nine non-medical factors to be considered in making a decision as to whether an injury arose out of and in the course of a worker's employment.

[40] The nine non-medical factors to be considered are:

1. Whether the injury occurred on the employer's premises;
2. Whether the injury occurred while the worker was doing something for the benefit of the employer's business;
3. Whether the injury occurred in the course of action taken by the worker in response to instructions from the employer;
4. Whether the injury occurred while the worker was using equipment or materials supplied by the employer;

[2] This is the version of the policy in effect at the time of the accident.

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5. Whether the injury occurred while the worker was in the process of drawing pay;
6. Whether the injury occurred during a time period for which the worker was being paid;
7. Whether the injury was caused by an activity of the employer or a fellow employee;
8. Whether injury occurred while the worker was performing activities that were part of the worker's job; and,
9. Whether the injury occurred while the worker was being supervised by the employer or a representative of the employer.

[41] The policy explains that all of these factors may be considered in making a decision but that no one of them may be used as an exclusive test. The policy states that this list is not exhaustive, and that other relevant factors may also be considered. Other factors relevant to the parties' status are found in policy item C3-18.00 (Personal Acts) and policy item C3-19.00 (Work-Related Travel).

[42] Policy item C3-18.00 provides guidance for differentiating between a worker's employment functions and a worker's personal actions, when determining whether a personal injury arose out of and in the course of employment. The policy recognizes that there is a broad intersection and overlap between employment and personal affairs. It states that an incidental intrusion of personal activity into the process of employment is not a bar to compensation. Conversely, an incidental intrusion of some aspect of employment into the personal life of a worker at the moment of an injury does not automatically entitle the worker to compensation.

[43] Policy item C3-19.00, under the sub-heading "A. Regular Commute," states the general principle that injuries occurring in the course of travel between a worker's home and the worker's normal place of employment are not compensable. An employment connection generally begins when a worker enters the employer's premises for the commencement of a shift, and terminates when the worker leaves the premises following the end of the shift.

[44] The policy also identifies a number of circumstances in which a worker's travel to and from a work location may be considered part of the worker's employment. The policy states that "traveling employees" are workers who:

- typically travel to more than one work location in the course of a normal work day as part of their employment duties; or

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- have a normal, regular or fixed place of employment, and are directed by the employer to temporarily work at a place other than the normal, regular or fixed place of employment.

[45] An employment connection generally exists throughout the travel undertaken by traveling employees, provided they travel "reasonably directly" and "do not make major deviations for personal purposes."

[46] The policy gives examples of traveling employees including, but not limited to, taxi drivers, emergency response personnel, transport industry drivers, cable installers, home care workers, many sales representatives, and persons attending off-site business meetings.

Status of the Defendant, Michelle Alexis Cameron

[47] It is not disputed that the defendant was a worker at the time of the accident.

[48] In light of the fact that the defendant's midwifery business was not incorporated, that she practiced as part of a business partnership with the other midwives and some physicians, and that she was registered with the Board for POP coverage, which was in effect at the time of the accident, I find that she was a person to whom the Board had extended coverage under section 4(2)(a). Accordingly, she was a worker within the meaning of the Act.

[49] The disputed issue is whether the defendant's actions or conduct at the time of the accident, which caused the alleged breach of duty of care, arose out of and in the course of her employment.

[50] The submissions of both counsel address the plaintiff's circumstances with respect to the principles in policy item C3-19.00. Both counsel appear to accept that but for her diversion to drop T off at her father's house, the defendant was a traveling employee with regard to her intended journey between the clinic and the client's home. Both counsel focus on the question of whether the defendant's travel at the time of her accident involved a substantial personal deviation from the route to the client's home such that she was not in the course of her employment.

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[51] The plaintiff's position is that the defendant's conduct at the time of the accident did not arise out of and in the course of her employment because her travel to drop off T at her father's house was entirely personal and not related to the defendant's work as a midwife. The plaintiff correctly submits that the Board's decision to allow the defendant's injury claim on the basis that she was engaged in employment travel is not binding in the context of the CTC application, since under the Act WCAT has exclusive jurisdiction to certify as to a party's status.

[52] The defendant's position is that her conduct at the time of the accident arose out of and in the course of her employment because she was on call from 8:00 a.m., was being paid, had to travel to multiple work locations in the course of the day, and was traveling between the clinic and a client's home to take a blood sample. She argues that dropping off T at the father's house en route to the client's home did not involve a substantial personal deviation from her work-related travel.

[53] Before considering the defendant's circumstances with regard to the traveling employee policy, I will address the non-medical factors in policy item C3-14.00.

[54] During her examination for discovery the defendant explained her midwifery practice, her role in the operation of the clinic, and the assignment of work among the partners as follows. At the time of the accident there were four partners other than the defendant. They all billed the Ministry of Health for their services during each trimester of a client's pregnancy. The billings were pooled each month, and from the pool (after expenses were paid) each partner was paid depending upon how many shifts they worked as the one on "first call," on "second call," or doing work at the clinic (Q 18 to 24).

[55] The defendant was asked about the schedule for the day of the accident, which showed that she was first on call, LS was the second day call and E was second night call. The defendant was the one first on call for 24 hours starting from 8:00 a.m. on the day of the accident (Q 49 to 53). This meant that, in addition to handling pre-scheduled services, calls coming in on the clinic's emergency number they would be first directed to the defendant.

[56] While on call, the defendant's responsibilities included receiving emergency calls from prenatal and postnatal mothers as well as calls from women having problems while in labour. She would also do assessments of clients in the hospital and attend clients in hospital while they were in labour. She would do prenatal and postpartum home visits, as well as daily postpartum visits to women still in hospital (insurance adjuster transcript Q 17).

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[57] The routine for the beginning of the on-call period was for the defendant to speak on the telephone to the partner whose shift was ending so they could hand over responsibility and provide information about tasks for the next on-call period (Q 77 to 84). She would then log into a profile on the clinic web site that included her schedule for the day. The defendant provided the following answers to questions about her schedule and activities on the day of the accident:

> 213 Q So you get ready, 'cause when you phone at 8:00, I guess you have to be ready to dash off to the hospital or someone's house?
>
> A Yes.
>
> 214 Q So by 8:00 o'clock, you were groomed and ready to hit the road?
>
> A Yes.
>
> 215 Q And you made your phone call at 8:00?
>
> A (Nods head)
>
> 216 Q Then you would go on your computer and look at your profile?
>
> A Yes.
>
> …
>
> 220 Q Then what did you do?
>
> A Well, I probably realized I didn't have to jet out of the house, and that I need to go do this visit for [client], the woman with the baby, first, because -- because once you collect the blood in the tube, you can't be driving around in your car very long. You need to take it straight to the hospital.
>
> 221 Q Right.
>
> A And so I needed to go to [the client's] house first and then go do the hospital visits after I dropped the lab sample off at the hospital lab. And so I was waiting for a decent time to call the woman who has a newborn baby.
>
> …
>
> 229 Q So we've got 8:05, and we got 10:55 is when the crash took place. And can you tell me what you did in between those two times?
>
> A I remember calling [client] at some time -- I don't remember what time -- and she didn't answer her phone, and so I had time to wait. And it was my daughter's birthday that day so I went and picked her up. She was in a cast, and so I went and picked her up, and so I had a little visit with her. And I took her to go get a

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> balloon at the dollar store, an inflatable balloon, and then I took her to my office to go get the stuff I needed; have a little visit with her. It was her birthday party that day and I didn't know if I would make it, so I thought having a little visit with her would be a good idea. And after the office, we were on our way to her dad's.
>
> …
>
> 235 Q You went to the office. You said you don't know what time you got there?
>
> A No.
>
> …
>
> 237 Q Okay. And when you say you wanted to have a visit with [T], that was at the office?
>
> A I probably kept her in the car, to be honest, because she needed to be carried.
>
> 238 Q Okay.
>
> A Yeah. So I probably just ran into the office to get what I needed.
>
> 239 Q Okay. So your visit with her was just in your car?
>
> A I took her into the dollar store, I carried her, we picked out a balloon.
>
> 240 Q Okay. Was that before you went to the office or after?
>
> A It was before.

[58] Policy items C3-14.00 and C3-19.00 refer in a number of instances to a worker's "employer." As the defendant was an independent operator who was provided POP coverage by the Board, she did not have an employer. Where the policies refer to the worker's employer, such as the question of whether the defendant was doing something for the benefit of the employer's business or acting on the employer's instructions, I have considered the matter in relation to the defendant's own business. This is consistent with the approach taken in *WCAT-2005-01937*, identified by WCAT as a noteworthy decision. That case involved the question of whether an employer's activities arose out of and in the course of employment. The panel concluded that the "employment activities" of an employer were those activities of the employer that related to the employer's business as a whole, as distinct from the employer's personal activities. While the defendant in this case is not an employer, as an independent operator her situation is analogous. It is appropriate to consider whether her activities had a sufficient connection to the operation of her business or were personal activities.

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[59] The first factor in policy item C3-14.00 (on the defendant's business premises) is of limited relevance to the circumstances of the accident. As an independent operator who traveled to various work locations, the clinic, her home, a hospital, and clients' homes would be would be analogous to an employer's premises. That the accident did not occur at such a work location does not support coverage under the Act. However, given the role of travel in the provision of the defendant's services, the fact that she was not at a work location when the accident occurred does not weigh strongly against an employment connection. It will be necessary to consider her travel at the time of the accident in relation to the factors in the traveling employee policy, to which I will return.

[60] With respect to the second factor (a benefit to the defendant's business), in her application for compensation the worker indicated that her actions at the time of her injury were for the purpose of her employer's business. In the employer's report of injury that was prepared by one of the defendant's business partners and submitted to the Board, the partner also stated that the defendant's actions at the time of the accident were for the purpose of the business. When questioned on discovery about those answers in the claim forms, the defendant gave the following answers:

> 342 Q That's not correct, is it?
> A Yes, I was on call on my way to a home visit.
> 343 Q Well, you weren't on call -- you weren't on your way to a home visit, you were on your way to [the father's] house to drop your daughter off; right?
> A Yep.
> 344 Q Okay.
> A So I was at my office, and dropping my daughter off, and going to a home visit, going to hospital visits. There was a snow storm that day --
> 345 Q Okay.
> A -- you know. I was working.
> 346 Q Okay. The question was at the time of the injury -- right? -- at the time of the injury, you were driving your daughter to her father's house; correct?
> A Yep.
> 347 Q And that's got nothing to do with your business; correct?
> A When I'm on call, I have children and I'm juggling. And I was working that day and I will not say "no" to that question. I do not agree with you.

348 Q Okay.
A I was in my car.
349 Q But you could answer my question.
A I was in my car to work.
350 Q Driving your daughter to her father's house had nothing to do with your business, do you agree with that?
A I don't want her to sit in the car when I'm doing a home visit so I'm going to drop her off at her father's house. It does have something to do with my business. I'm on call 24 hours a day 7 days a week currently, and everything I do is for my business.

[61] I recognize that the defendant believes that she was always working while she was on call and in her car and that she did not want to have her daughter waiting in the car while she did a client visit. I accept that the defendant sometimes needed to juggle her midwifery activities and her personal activities related to her family. In my view, however, dropping T off at the father's house was predominantly a family matter and a matter of personal convenience related to her daughter's birthday which happened to fall on a day when the defendant was on call. I do not accept that dropping T off at her father's house was a component of the defendant's business operations or that it benefited her business.

[62] In the defendant's circumstances, the third factor (employer's instructions) is neutral, since as an independent operator the defendant was largely self-directed in how she arranged her work day, subject to the need to attend for scheduled appointments.

[63] The accident occurred while the defendant was driving her own vehicle, which she used both for work and for personal purposes. In the circumstances, I view this factor as relatively neutral.

[64] The accident did not occur while the defendant was drawing pay or traveling to draw pay.

[65] The defendant argues that, because she was first on call on the day of the accident, and her share of the business partnership's income reflected the number of first on-call shifts that she worked each month as well as the services provided to clients, the accident occurred during a period of time for which she was being paid. Given the business arrangement with the defendant's partners, and the manner in which she was compensated for her work, I accept that the accident occurred during a time for which

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the defendant was on call and was being compensated for her services. I find that this factor favours an employment connection.

[66] The accident was not caused by an activity of the employer or a fellow employee of the defendant.

[67] With respect to the eighth factor, driving to client visits was part of the defendant's regular employment activities. However, her driving on the day of the accident had mixed purposes related to her business and to her wish to spend time with her daughter. I do not consider the defendant's driving to drop off her daughter to be part of her regular employment activities and I find that this weighs against an employment connection.

[68] As an independent operator the defendant was largely self-directed and was not being supervised at the time of the accident.

[69] The only factor in policy item C3-14.00 which clearly favours an employment connection is that that the accident occurred during a shift when the defendant was receiving consideration for being first on call and providing services. The other factors either weigh against an employment connection or are neutral.

[70] Given the role of travel in the defendant's employment, it is also necessary to consider the factors in policy item C3-19.00.

[71] The plaintiff refers to the following WCAT decisions that have addressed personal deviations from work-related travel:

- *WCAT-2005-00668*, a decision in which a worker who had stopped to meet his wife to deliver some papers to her was found to be on a personal rather than a work-related trip;
- *WCAT-2005-01642*, in which a worker, who on his commute home when he stopped along the way to speak to his step-son, did not re-enter the course of his employment simply because he and the step-son spoke about a work-related matter during part of their conversation;
- *WCAT-2005-04021*, in which a worker's sojourn at a tanning salon was considered to be a substantial personal deviation that took him out of his employment, and the worker did not re-enter the course of his employment simply by virtue of stopping for lunch shortly after leaving the session at the tanning salon;

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- *WCAT-2007-03415,* in a worker's travel to pick up an aircraft engine for his personal plane was considered personal travel, even though the worker's employment involved working with aircraft;
- *WCAT-2007-03857*, in which a chef who finished work for the day, went out and got drunk, and returned to restaurant to "sleep it off" was not in the course of his employment when he was assaulted by some police officers who found him sleeping in the kitchen;
- *WCAT-2008-02533,* in which the panel distinguished between travel in the course of employment and commuting to work;
- *WCAT-2009-01068*, in which the panel distinguished between traveling between multiple work sites during the course of a day by a traveling employee and travel as part of a regular commute;
- *WCAT-2014-00811*, in which a worker's travel home (for about 90 minutes to have lunch, and to do laundry and housecleaning), after attending an off-site work-related conference in the morning was considered to have engaged in a substantial personal deviation; the personal deviation had not ended when the accident occurred on her way back to her regular work location because she had not yet returned to the route between the conference and her regular workplace;
- *WCAT-2014-02558*, in which the worker on the way home was engaged in a regular commute because they did not travel to multiple work locations in the course of the day; and,
- *WCAT Decision A1702632*, in which the defendant, who undertook a personal errand away from the worksite during the workday (moving his personal vehicle from public parking location to another public parking location) was found not to be in the course of his employment.

[72] The defendant submits that WCAT panels have consistently found that workers in the health care sector who provide in-home services to clients at a variety of locations in the course of a day are traveling employees. The defendant refers to *WCAT Decision A1603732* at paragraph 67 in which the panel agreed with the reasoning in *WCAT-2006-02659*, *WCAT-2008-01170*, and *WCAT-2012-02852* in finding that a home care worker who was employed to provide in-home services at multiple locations on a daily basis was a traveling worker, with workers' compensation coverage for such travel notwithstanding the fact that the travel may involve travel to see the same client or clients on a regular or routine basis.

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[73] With regard to the question of whether the defendant's travel at the time of the accident involved a substantial personal deviation from employment travel, the defendant refers to *WCAT Decision A1901124* in which the panel found that a care aide was a traveling worker and in the course of her employment during her travel from her last home visit of the day to her home.

[74] The defendant cites *WCAT-2005-01937* in which a traveling employee was found to be a worker in the course of his employment when he departed from his work-route by a few blocks in order to return home for lunch before continuing with his work. The panel concluded that the deviation was not substantial, even though the worker was not paid for the time. In reaching this conclusion the panel noted that under the policy respecting traveling employees, travel to a lunch stop is not usually considered a distinct personal departure because the scope of coverage for traveling employees generally extends to such personal activities. The panel noted that the result might be different if the worker had traveled a substantial distance away from the work-related route in order to have his lunch, but evidence indicated that the worker usually ate his lunch on the road and only went home on the day of the accident because he could "swing by" once he had finished a job.

[75] The defendant notes the different result in *WCAT Decision A1803240* in which the plaintiff was found to be on a distinct departure for a personal reason when he met a friend at McDonald's for breakfast. Significantly, he was not found to be on a distinct personal departure simply because he traveled the McDonald's for breakfast, but because he had not yet had any other work locations to attend that day.

[76] The defendant acknowledges that her travel at the time of the accident had a personal component since she was on her way to drop off her daughter but argues that, in light of the fact that she was on call, was being paid, and had to travel to the clinic and then to the client's home, her employment activity of traveling to carry out the home visit was her overriding activity when the accident occurred. The defendant submits that there is no reason to treat the activities she engaged in with her daughter – picking her up at the father's, taking her to the store to buy a balloon, and dropping her off back at the father's after going to the clinic, any differently from a lunch break or an incidental intrusion of a personal nature during a time when a natural break occurred during the defendant's 24-hour shift.

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[77] I have considered the decisions cited by the plaintiff and the defendant. They demonstrate that the application of the principles regarding work-related travel in policy item C3-19.00 is reliant on the particular factual matrix in each case. The decisions cited by the plaintiff illustrate the application of the policy to a number of situations in which the WCAT panel found that the individual was either engaged in personal travel, or in a substantial personal deviation from their employment travel at the time of their injuries. Most of the decisions cited by the defendant illustrate situations in which a worker was found to be in the course of employment-related travel. The decisions cited by the parties are factually different from the present case.

[78] I have also considered *WCAT Decision A1605182* (*Knox v. Cameron et al.*), which concerned a plaintiff who worked as a sales representative who lived in Victoria. On the day of the accident she drove from Victoria to Duncan to perform work at several retail locations. After her work at the last worksite, she stopped at a Walmart store and did some personal shopping before again commencing her travel home, with the intention of stopping en route at a Thrifty's store to do some personal shopping. The accident occurred before she reached Thrifty's.

[79] The panel in *WCAT Decision A1605182* concluded that the accident arose out of and in the course of the plaintiff's employment. She was a traveling employee, and the shopping trip to Walmart and the planned trip to Thrifty's involved a substantial deviation for personal reasons from her employment-related travel back to Victoria, since she had no assigned duties at those two stores. However, the panel reviewed a number of previous decisions which clarified that the exclusion of compensation for injuries occurring during major deviations for personal reasons applies only during the period of the deviation (including: *Appeal Division Decision #99-1242*;[3] *WCAT-2009-01496*; *WCAT-2006-03394*; and, *WCAT-2014-00811*).

[80] Applying the reasoning from those cases, and in particular *Appeal Division Decision #99-1242*, the panel concluded that the plaintiff's accident arose out of an in the course of her employment because she had completed her personal shopping at Walmart and returned to the only route home when the accident occurred. She had not yet departed from that route to stop at the Mill Bay Thrifty's. The accident occurred on a section of the highway she would have to travel to get home after completing her work, regardless of her personal errands at Walmart and Thrifty's. As a traveling employee, the plaintiff's trip home at the end of day was covered for workers' compensation purposes.

[3] The Appeal Division is a former division of the Board.

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[81] *WCAT Decision A1603497* (*Godard v. ICBC)* concerned a worker on a work-related trip who intended to stop for lunch and then go on to a golf course driving range to hit some golf balls. The panel considered that under policy item C3-19.00 a stop for lunch could be considered to be in the course of the worker's employment, but that stopping to hit golf balls would be a personal deviation. The panel followed the analysis in *WCAT Decision A1605182* in applying a route-based analysis to the factual matrix. The panel found that, because the worker had not yet started along the route to the golf course, he was not on a substantial personal deviation at the time of the accident.

[82] I agree with the analysis in *WCAT Decisions A1605182* and *A1603497* with respect to personal diversions from employment-related travel and have taken the same approach in this appeal. In applying the policy concerning work-related travel to the question of whether the defendant was in the course of her employment at the time of the accident, I have considered the following:

- given the pattern of the defendant's employment, whether she was a traveling worker; and,
- considering the business and personal purposes of her travel and the route she was traveling at the time of the accident, whether she was engaged in a major deviation for personal purposes.

[83] In light of the evidence summarized earlier concerning the pattern of the defendant's employment, I find that she was a traveling employee during the shifts when she was on call, either as first on call or second on call. While on call, the defendant's responsibilities typically included traveling to different locations in the course of a normal day to provide her services, and travel was an essential part of the her employment. Her circumstances during shifts when she was on call are consistent with those of home care providers and community health care workers whose employment includes travel to visit clients at multiple sites during a normal work day. Such workers have been characterized as traveling employees within the scope of policy item C3-19.00 in numerous WCAT decisions, including those cited by the defendant and *WCAT Decision A1603732*, *WCAT-2014-01595*, and *WCAT-2014-02671*.

[84] As a traveling worker, the defendant would be generally considered to be in the course of her employment from the time she left her home in the morning throughout the day until her return to her home at the end of the day. However, this is subject to the requirement that she travel reasonably directly between the work locations and the exception for substantial deviations of a personal nature.

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[85] On the day of the accident, the defendant was on call starting from 8:00 a.m. and undertook some employment activities before she left home. Those included the handover call, checking the schedule on the clinic website, and calling and texting the client to arrange the appointment time. I do not view them as so trivial that they lacked an employment connection. In my view, the defendant was in the course of her employment once her shift began and she was engaged in those tasks.

[86] However, once the defendant left home in the morning, spending time with T on her birthday played a substantial role in her travel. The defendant stated that she shares custody of her children on a 50-50 basis with the father, and that typically she does not do first call shifts on days when she has her children (adjuster interview Q 76 to 78).

[87] The defendant did not have custody of her daughter for the day of the accident, but she normally did not work first call shifts on her daughter's birthday. She tried to get one of her partners to take the first call shift on the day of the accident, but she was unable to do so (examination for discovery Q 314 to 317).

[88] The defendant did not have a client appointment until 11:00 a.m., and she made arrangements to pick up her daughter from her father's home on the way to the clinic so she could spend time with her, and then to drop T off at the father's home before driving on to the client's home in Rosemont.

[89] The purpose of the defendant's travel both before and after she made a brief stop at the clinic was mixed, in that it combined her arrangement to pick up and later drop off T at her father's house as well as the travel to the client's home in Rosemont.

[90] Consistent with the defendant's submission, I accept that the time spent with her daughter on the day of the accident fitted into a time when she was on call, but when she had no other responsibilities except for picking up the supplies at the clinic that she needed for the client visit later in the morning.

[91] Given that the defendant was largely self-directed in scheduling her time while on call, she enjoyed considerable latitude with respect to how she spent her time while on call but was without specific responsibilities. Contrary to the plaintiff's submission, I do not view the fact that the defendant had T with her in the car as she went about her morning activities to amount, in itself, to indicate a substantial personal deviation from the defendant's employment.

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[92] With regard to the defendant's travel routes on the day of the accident, the plaintiff asserts that the defendant said that she had no idea how to get to the client's house on Richards Street West because she had never been there before and that she relied on Google Maps.

[93] The plaintiff's assertion that the defendant did not know how to get to the client's home is not consistent with the tenor of the defendant's evidence. The plaintiff's evidence on discovery indicates that although she had never been to the client's house before, she had spoken to and texted with client that morning. She had been given the client's address and knew it was in the Rosemont neighbourhood and how to get there. Her evidence was as follows:

> 146 Q Okay. But -- so you would agree that that map depicts the streets in Nelson?
> A Yeah.
> 147 Q It shows where the clinic is up here on Lake Street?
> A Yeah, that's Apple Tree.
> 148 Q And 1502 Falls?
> A Yeah.
> 149 Q And 124 Richards West?
> A I didn't end up going there.
> 150 Q No, but you agree that that's where you were supposed to go?
> A I have no idea. I guess so.
> 151 Q Okay.
> A 'Cause I -- I didn't go --
> 152 Q No.
> A -- so I didn't make it there. And I had never been to her home, nor have I been ever to her home so if that's where 124 Richards Street is according to Google, I guess that's where it is according to Google, but I had not been there.
> 153 Q So at the time of the crash, you didn't know how you were going to get to West Richards?
> A I don't recall if I Googled it or -- I know where West Richards is --
> 154 Q Right.
> A -- in my mind. It's in Rosemont, a neighbourhood of Rosemont.
> 155 Q But you hadn't figured out how you were going to get to [client's] place at the time this car crash took place; is that correct?

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A I don't recall.
156 Q Okay.
A I don't recall looking at a map or not. I don't know.
157 Q Okay. So you knew at 8:00 o'clock that you had to go to this address that you knew generally where it was.
A Yes.
158 Q But you didn't have a route planned out as to how you were going to get there; is that fair?
A Well, I know how to get to Rosemont, and I know how to get to West Richards, in my mind.
159 Q Okay.
A 'Cause there's only -- I mean, there's two ways up into Rosemont.
160 Q What are they?
A Yeah. There's one up Vancouver Street, I believe, and Mines Road.
161 Q Okay.
A Yeah, so I could show you, like --
162 Q Sure.
A Yeah. This is an overpass here, and you can go this way or this way.
163 Q Okay.
A To get to Mines Road, I don't –
164 Q I'm sorry, "you can go this way or this way," the first way, just so we can get this on the record --
A Yeah, this takes you up into Rosemont, and this way takes you up into Rosemont. You go left or right, and it curves around and comes up.
165 Q Okay. So just for the record, you're talking about an overpass across the highway --
A Yeah.
166 Q -- which is Highway 6; is that correct?
A Sure, yes.
167 Q Okay. The overpass is on Observatory Street; would you agree with that?
A Yes.

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[94] I find that on the day of the accident the defendant knew of two routes to the client's house. Although the evidence does not indicate which of those routes the defendant planned on taking from the father's house to the client's house, I find that it is likely the defendant would have taken one of the two routes that she described during discovery.

[95] When the accident occurred the defendant was not traveling on either of the routes between the father's house and the client's house. She was still on her way from the clinic to the father's house. During the discovery the defendant was again shown a street map of Nelson and asked about her route from the clinic to the father's house and the planned route from the father's house to the client's house. The transcript of her evidence is as follows:

> 386 Q Okay. Well, if you look at the map, where it says "MVA," [motor vehicle accident] that's the intersection of Innes and Ward; correct?
>
> A Yes.
>
> 387 Q Okay. And you said you thought you were coming down Houston Street, which is two blocks south of Innes Street; is that correct?
>
> A No, I think it's one block.
>
> 388 Q All right. And how did you come to be on Innes Street approaching Ward if you were coming from your clinic at 518 Lake Street?
>
> A Well, my office is a one-way street and so I turned right out of the parking lot and came up Josephine the whole way. And then I turned down Innes and got in a car accident.
>
> 389 Q Okay. So you came down where it says "Josephine Street" on this map?
>
> A Well, if you go back to my office, my office is a one-way. I can't go left.
>
> 390 Q Okay.
>
> A So I went right, and then I went all the way up Josephine until I hit Innes, and then I turned right on Innes.
>
> …
>
> 392 Q Okay. Now, your clinic's up here where it says Apple Tree Maternity; correct?
>
> A Yeah, might be where that red dot is.

393 Q Okay. And we've already talked about you know where Richards Street West is, and it's over here somewhere near where this red dot is?

A Yep.

394 Q If you were leaving from your clinic to go to this red dot on Richards, you wouldn't take Josephine Street, would you?

A Possibly. I don't -- I don't have one route that I take. But I wasn't going straight to Richards, I was dropping [T] off at her father's house.

395 Q Right. But to get from the clinic to this address on Richards, you'd have to be on the other side of the highway from Falls Street; correct?

A Correct.

396 Q So would you agree with me the best way to get from the clinic to West Richards would be to take the highway down to Mines Road?

A No, not necessarily.

397 Q Okay.

A Sometimes I take the overpass.

398 Q Which way is the overpass?

A I pointed it out to you earlier where the overpass is. That takes you up into Rosemont.

399 Q So you're talking about Observatory Street?

A Yeah.

400 Q Well, would you agree with me that from 1502 Falls Street, you'd have to backtrack to get back to Observatory towards your clinic?

A I don't know what you're asking me.

401 Q Okay. Well, you can't go from Falls Street directly across the highway to Richards, can you?

A No, you can't. You have to take the overpass.

402 Q So you have to go back down Falls Street and take Robson Street and then Stanley Street or Kootenay Street up to Observatory and then across the highway; correct?

A Yeah.

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[96] Having considered the Google maps of Nelson and the defendant's testimony, I find that in order to travel to the father's house, the defendant departed from either of the two routes that she said would have taken her directly from the clinic to the client's house (one involving travel on Highway 6 to the Mines Street exit and the other involving travel on Josephine Street to Observatory Street and then along Observatory Street to reach an overpass across Highway 6). This is reflected in her evidence that it was necessary to cross to the other side of Highway 6 in order to reach the client's house and that to do so from the father's house she would have had to double back towards the clinic in order to reach Observatory Street.

[97] While the parties have not referred to the exact distance the defendant traveled away from the direct routes between the clinic and the client's house, from the Google maps I estimate that the intended diversion was approximately seven blocks off the more direct route. That is, upon leaving the clinic the defendant planned to drive south on Josephine Street three blocks past Observatory Street to reach Innes Street, and then four blocks west on Innes to reach Falls Street. The location of the accident part way along that route (at Innes and Ward) was four blocks away from the direct route between the clinic and the client's neighbourhood along Josephine and Observatory Streets. Had the defendant reached the father's house, after dropping off her daughter she would have had to drive approximately seven blocks (depending on the route taken) back to Observatory Street in order to return to a route to the client's house.

[98] I do not agree with the defendant's argument that her diversion to drop off T at the father's house is no different than a worker's diversion to stop for lunch. Had the defendant taken a diversion of seven blocks in order to go for lunch, I would not consider this to involve a substantial personal deviation. Policy recognizes that traveling employees remain in the course of their employment while attending to such personal matters as stopping for lunch or coffee breaks. Coverage of traveling employees during such stops is equivalent to coverage of workers who take lunch or coffee breaks on their employer's premises. Travel to a location off the most direct route between work locations in order to stop for lunch may not be considered a substantial deviation, as explained by the panels in *WCAT-2005-01937* and *WCAT Decision A1603497*. Travel to drop off a child does not have a similar employment connection.

[99] I find that the journey to drop T off at her father's house involved a substantial deviation for a personal purpose from either of the two reasonably direct routes the defendant could have taken between the clinic and the client's home.

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[100] I conclude that although the defendant was on call at the time of the accident and receiving remuneration for her shift, and had to travel from the clinic to the client's house, her travel at the time of the accident did not have a sufficient employment connection to attract workers' compensation coverage. The substantial deviation from her work-related travel for a personal purpose took her out of the scope of the activities related to the operation of her business.

[101] Having considered the evidence as a whole in relation to the factors in policy items C3-14.00 and C3-19.00 I find that the defendant's actions at the time of the accident arose neither out of nor in the course of her employment.

Conclusion

[102] I find that at the time the cause of action arose on January 27, 2018:

(a) the defendant, Michelle Alexis Cameron, was a worker within the compensation provisions of the Act; and,

(b) the action or conduct of the defendant, Michelle Alexis Cameron, which caused the alleged breach of duty of care, did not arise out of and in the course of her employment within the scope of the compensation provisions of the Act.

Guy Riecken
Vice Chair

NO. PEN-S-M-43286
PENTICTON 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:

CAROLYNN WOOD

PLAINTIFF

AND:

MICHELLE ALEXIS CAMERON

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, CAROLYNN WOOD, 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, January 27, 2018:

1. The Defendant, MICHELLE ALEXIS CAMERON, was a worker within the meaning of the compensation provisions of the *Workers Compensation Act*.

2. The action or conduct of the Defendant, MICHELLE ALEXIS CAMERON, which caused the alleged breach of duty of care, did not arise out of and in the course of her employment within the scope of the compensation provisions of the *Workers Compensation Act*.

CERTIFIED this 18th day of January, 2022

Guy Riecken
VICE CHAIR

NO. PEN-S-M-43286
PENTICTON 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:

CAROLYNN WOOD

PLAINTIFF

AND:

MICHELLE ALEXIS CAMERON

DEFENDANT

SECTION 311 CERTIFICATE

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