

Case Name:

Decision No. 1584/08

Boyd v. Cooper

[2009] O.W.S.I.A.T.D. No. 266

2009 ONWSIAT 315

Decision No. 1584/08

Ontario Workplace Safety and Insurance Appeals Tribunal
Toronto, Ontario

Panel: B. Kalvin, Vice-Chair

Heard: January 22, 2009.

Decision: February 6, 2009.

(53 paras.)

Tribunal Summary:

Independent operator -- Right to sue -- Worker (test).

The plaintiff in a civil case worked on the defendant's farm, doing chores and training horses. She also gave riding lessons. The lessons were conducted on the defendant's farm, but the plaintiff was not paid for giving those lessons by the defendant. Rather, she billed the students directly. The plaintiff was injured while training a horse, when the horse became startled and she was thrown from the horse. The defendant applied to determine whether the plaintiff's right of action was taken away.

The evidence was overwhelming that the plaintiff was a worker of the defendant and that this work was the main source of her income. She also had a small independent business giving riding lessons. The accident occurred while she was in the course of her employment with the defendant training horses.

The plaintiff's right of action was taken away.

Statutes, regulations and rules cited:

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16.

Appearances:

For the applicant(s): M.P. Forget, Lawyer.

For the respondent(s): J.M. Chun, Lawyer.

For additional party: A.T. Grayson, Lawyer.

Interpreter: N/A.

DECISION NO. 1584/08

APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

REASONS

(i) Introduction

1 These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an application under section 31 of the *Workplace Safety and Insurance Act* (the "WSIA") by Farmers' Mutual Insurance Company (the "applicant"). The applicant seeks a determination that the right of Karen Leslie Boyd (the "respondent") to commence an action against John Lewis Cooper and Jude Marie Cooper (the "Coopers") is taken away by the WSIA.

(ii) Background

2 The background to this application is as follows. The respondent is 36 years old. In 1995, she graduated from the University of Guelph with an Honours Bachelor of Science. In 1996, she obtained certification from the Canadian Equestrian Federation as a Level I Coach. In December 1995, the respondent began employment as an assistant to a private investigator. She did that job for a just over a year before quitting in February 1997.

3 The Coopers own and operate a horse farm in Pefferlaw, Ontario. The Coopers own and breed horses, but also board and train horses owned by clients, for which they charge fees. Their farm has a riding arena in which horses are exercised and trained. The Coopers purchased liability insurance from the Applicant.

4 After she quit her job with the private investigator in February 1997, the Respondent was living with her parents, not far from the Coopers' farm. In March 1997, the Respondent dropped off a letter and résumé at the Coopers' farm. Her letter stated that she wished to secure a position at the farm. The letter reads as follows:

I am interested in securing a position at your facility. The enclosed resume outlines my work experience, educational background and other relevant personal data.

I feel I have much to offer because I am a productive and reliable individual who is not afraid of long hours and hard work. I have many years experience working

in the industry. Hands on knowledge has also been gained from my own horse stable. My recent accomplishment in the horse world was the successful completion of the Canadian Equestrian Federation Level I Coach (English Certification).

I would appreciate a personal interview concerning my qualifications and your needs. Thank you for your consideration and I look forward to meeting with you in the near future.

5 The Coopers did not have any permanent or regular employees on the farm. All the farm work was done by the Coopers themselves. Occasionally, they hired some local youngsters to help with basic chores such as cleaning out the stables and feeding the horses.

6 After the Respondent dropped off her resume at their farm in March 1997, the Coopers decided to interview the Respondent. Following that interview, the Respondent began working on the Coopers' farm. Her first day of work was on April 4, 1997.

7 The Respondent worked at the Coopers' farm four days a week, from Tuesday to Friday. Occasionally, she worked on a Saturday as well. The Respondent's duties initially involved cleaning out the stalls, and feeding and exercising the horses. Eventually, after she had been working at the farm for some time, she also began to train horses. The Respondent generally started these duties at 8:00 am and worked until mid or late afternoon. For this work, the Coopers paid the Respondent \$8 per hour.

8 In addition to the work described above, the Respondent also gave riding lessons. These lessons were given on the Coopers' farm. The horses used during these lessons were owned by the Coopers. The Respondent was not paid by the Coopers for the work she did in giving riding lessons. Instead, the Respondent billed the students directly, usually charging about \$25 per hour for a lesson.

9 On August 6, 1998, the Respondent was training a horse named Camille. The Coopers had previously asked the Respondent to train this horse. While riding the horse in the training area, a dog owned by the Coopers ran into the training area and startled the horse. During the course of the commotion which followed, the Respondent was thrown from the horse and sustained serious injuries.

10 The Respondent sued the Coopers and claimed damages for personal injury. As noted earlier, to protect themselves from civil suit relating to their business operations, the Coopers had purchased liability insurance from the Applicant. The Applicant responded to the Respondent's civil action by bringing this application under section 31 of the WSIA for a declaration that the Respondent's right to the Coopers is taken away by the WSIA.

(iii) Issue

11 As noted, the Applicant seeks a determination from this Tribunal under section 31 of the WSIA that the Respondent's lawsuit against the Coopers is barred by the WSIA. Section 31 of the WSIA reads as follows:

31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

(3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.

12 There is no dispute that by virtue of the insurance policy requiring the Applicant to indemnify the Coopers for damages arising from the Respondent's lawsuit, the Applicant is a "party to an action" for the purposes of section 31. The Applicant seeks a determination from this Tribunal that the Respondent's right of action against the Coopers is taken away by the WSIA.

13 Under the WSIA, a worker who sustains a personal injury by accident arising out of and in the course of employment is entitled to benefits under the insurance plan established by the WSIA. However, that worker is prohibited by the WSIA from suing a Schedule 1 employer with respect to injuries arising from the accident. Subsection 28(1) of the WSIA provides as follows:

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

- 1. Any Schedule 1 employer.
- 2. A director, executive officer or worker employed by any Schedule 1 employer.

14 In this case, there is no dispute that in operating their horse farm, the Coopers were engaged in an industry listed in Schedule 1 for the purposes of the WSIA. The Applicant claims that when the Respondent was injured on the Coopers' farm on August 6, 1998, the Respondent was a worker in the course of her employment and, accordingly, is prohibited by subsection 28(1) from suing the Coopers who were a Schedule 1 employer.

15 The Respondent takes the position that at the time of the accident she was not a worker for the purposes of the WSIA, but rather, was an independent operator. Independent operators are distinguished from workers under the WSIA. The Respondent claims that since she was an independent operator rather than a worker, subsection 28(1) of the WSIA does not take away her right of action against the Coopers.

16 The only issue to be determined on this application is whether the respondent's right of action against the Coopers is taken away by subsection 28(1) of the WSIA. The pivotal question underlying that issue is whether at the time of the accident the Respondent was a worker or an independent operator for the purposes of the WSIA.

(iv) Law and policy

A. The WSIA

17 A "worker" is defined in the WSIA as follows:

"worker" means a person who has entered into or is employed under a contract of service or apprenticeship ...

18 The definition goes on to set out a non-exhaustive list of workers.

19 An "independent operator" is defined as follows:

"independent operator" means a person who carries on an industry included in Schedule 1 or Schedule 2 and who does not employ any workers for that purpose

B. Board Policy

20 Section 126 of the WSIA requires this Tribunal to apply the policies of the Workplace Safety and Insurance Board (the "Board") in circumstances where "there is an applicable Board policy with respect to the subject-matter of an appeal." Since an application under section 31 of the WSIA is not "an appeal," the Tribunal is not bound to apply Board policy in Right to Sue applications. Nevertheless, the Board has a policy dealing with the distinction between workers and independent operators which is instructive. The policy is set out in *Operational Policy Manual* Document #12-02-01, and reads, in part, as follows:

Law

s. 2(1)

An "independent operator" is a person who carries on an industry set out in Schedule 1 or Schedule 2 of the Act and who does not employ any workers for that purpose.

A "worker" includes a person who has entered into or is employed under a contract of service, or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

a learner or student

a member of a municipal volunteer fire brigade or a volunteer ambulance brigade

a person deemed to be a worker of an employer by direction or order of the WSIB

a person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so

a person who assists in any search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police Force

a person who assists in connection with an emergency that has been declared by the Lieutenant Governor in Council or the Premier under section 7.0.1 of the Emergency Management and Civil Protection Act or by the head of council of a municipality under section 4 of that Act

an auxiliary member of a police force

a person deemed to be a worker under Section 12, or

a pupil deemed to be a worker under the Education Act.

s. 11(1)

A "worker" does not include

an outworker (a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in the person's own home)

an executive officer of a corporation

or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's industry.

Policy

The WSIB uses questionnaires (a general questionnaire and six industry-specific questionnaires), to gather information to help determine if a person is employed under a "contract of service." The questionnaires reflect the principles of the organizational test (see below). Persons employed under a contract of service are workers. Independent operators are not employed under a contract of service.

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

Guidelines

General

A "contract of service", or employer-employee relationship, is one where a worker agrees to work for an employer (payer), on a full- or part-time basis, in return for wages or a salary. The employer has the right to control what work is performed, where, when, and how the work is to be performed.

Workers - those who work under contracts of service - are automatically insured and entitled to benefits if injured at work. In addition, their employers must pay premiums to the WSIB.

A "contract for service", or a business relationship, is one where a person agrees to perform specific work in return for payment. The employer does not necessarily control the manner in which the work is done, or the times and places the work is performed.

Independent operators - those who work under contracts for service - are not automatically insured or entitled to benefits unless they voluntarily elect to be considered "workers" and apply to the WSIB for their own account and optional insurance. (See 12-03-02, Optional Insurance.) Independent operators may not be insured through the hiring company's (payer's) WSIB account.

Organizational test

The organizational test recognizes features of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their own separate business.

21 The policy indicates that the Board uses a variety of questionnaires to assist with the determination of worker or independent operator status. It then sets out two tables: the first contains a list of characteristics of workers and independent operators, and the second, a list of other applicable criteria:

Characteristics of workers and independent operators

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

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



	Workers	Independent Operators
Instructions	Comply with instructions on what, when, where, and how work is to be done.	Work on their own schedule. Does the job their own way.
Training/ supervision	Trained and supervised by an experienced employee of the payer. Required to take correspondence or other courses. Required to attend meetings and follow specific instructions which indicate how the payer wants the services performed.	Use their own methods and are not required to follow instructions from the payer.
Personal service	Must render services personally. Must obtain payer's consent to hire others to do the work.	Often hires others to do the work without the payer's consent.
Hours of work	The hours and days of work are set by the payer.	Work whatever hours they choose.
Full-time work	Must devote full-time to the business of the payer. Restricted from doing work for other payers.	Free to work when and for whom they choose.
Order or sequence of work	Performs services in the order or sequence set by the payer. Performs work that is part of a highly coordinated series of tasks where the tasks must be performed in a well-ordered sequence.	Performs services at their own pace. Work on own schedule.
Method of payment	Paid by the payer in regular amounts at stated intervals. Payer alone decides the amount and manner of payment.	Paid by the job on a straight commission. Negotiates amount and method of payment with the payer.
Licenses	Payer holds licenses required to do the work.	Person holds licenses required to do the work.

	Workers	Independent Operators
Serving the public	Does not make services available except on behalf, or as a representative, of the payer. Invoices customers on employer's behalf.	Has own office. Listed in business directories and maintains business telephone. Advertises in newspapers, etc. Invoices customers on own behalf.
Status with other government agencies	Terms of the relationship are governed by a collective agreement. Canada Revenue Agency either makes no ruling on the person's status, or rules that the person is a worker under the Canada Pension Plan (CPP) and the Employment Insurance Act (EIA). (A ruling is made after the relevant parties complete the form "Request for a ruling as to the status of a worker under the CPP or EIA".) Collects and pays GST and other applicable taxes on payer's behalf. Payer deducts EI, CPP, insurance, income tax, etc. from pay.	Terms of the relationship not governed by a collective agreement. Canada Revenue Agency has made an official ruling that the person is not a worker under the CPP and the EIA. Collects and pays GST and other applicable taxes on own behalf. Takes no deductions from pay for EI, CPP, insurance, income tax, etc.

Other applicable criteria

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



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

	Workers	Independent Operators
Working for more than one firm at a time	Usually works for one payer.	Works for more than one payer at the same time.

Determining Status

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

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

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

C. Jurisprudence

22 This Tribunal has, on numerous occasions, considered the question of whether a person is a worker or an independent operator. A number of tests have been used to examine the issue, most commonly the "business reality test." In *Decision No. 785/91*, [1992] O.W.C.A.T.D. No. 121, the Panel stated the following:

The best a panel can do in these situations is weigh the various indicia and form an impression as to the prevailing character of the relationship. *WCAT Decision No. 921/89* (1990), 14 W.C.A.T.R. 207, [1990] O.W.C.A.T.D. No. 286 traced the evolution of tests developed by the Tribunal to deal with these situations. It is not necessary to trace the evolution outlined in that decision. The decision went on to characterize the test which has evolved at the Appeals Tribunal as, in essence, a "hybrid test" or "business reality test".

23 In *Decision No. 921/89* [1990] O.W.C.A.T.D. No. 286 the Panel stated:

The actual name applied to the test, whether "integration" test, "organization" test, "hybrid" test or "business reality" test is not important. What is important is that parties have an idea of the factors to be considered by the Appeals Tribunal in determining status as a "worker" or "independent operator". By referring to these factors, parties may themselves develop a sense of the character or reality of the business relationship and thus make a realistic assessment of the situation. It is the opinion of this panel that the factors enumerated in this decision in this goal to a greater extent than merely asking whether the work is "integral" to the overall business operation. The question to be asked is 'what is the true nature of the service relationship between the parties, having regard to all relevant factors impacting on that relationship?' The resulting analysis, based on business reality, should lead to a decision in accordance with the real merits and justice of the case.

24 The criteria commonly considered under the business reality test are as follows:

- * whether the individual is in a business sufficiently independent that he or she bears the costs and risks of compensation;
- * ownership of equipment;
- * evidence of control;
- * method of payment;
- * business indicia;
- * the degree of integration;
- * furnishing of equipment;
- * chance of profit or loss;
- * the parties' intentions;
- * business or government records which reflect on the status of the parties;
- * whether the individual must supply the services personally or can substitute other persons;
- * the economic or business market;
- * the influence of legislative and licensing requirements; and
- * whether the person structures his or her affairs for various purposes as if he or she is an independent operator.

25 Finally, I note that the question of whether a person is an employee or independent contractor has been considered by the Supreme Court of Canada. In *71122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,¹ the court stated that there is no single, universal test to determine whether a person is an employee or an independent contractor. Major J. stated the following:

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

(v) Analysis

26 Having considered the evidence in this case in light of the jurisprudence and guidelines set out above, I find on an overwhelming preponderance of the evidence that the Respondent was a worker in the course of her employment when she was injured on August 6, 1998. In my view, the evidence in this case establishes that in 1997 and 1998 the Respondent had two distinct sources of income. The first, and by far her predominant source of income, was wages paid by the Coopers for work done on their farm. For reasons set out below, I find that this was income which the Respondent

earned from having engaged in an employee/employer relationship with the Coopers. In other words, this was income the Respondent earned as a worker. The second and less significant source of the Respondent's income came from riding lessons which she gave. This income was not paid by the Coopers but rather was paid by separate individuals to whom the riding lessons were given. With respect to this second source of income, I find that the Respondent did not earn it as a worker, but rather as an independent operator running her own riding lesson business. In short, I find that in 1997 and 1998, the Respondent was a farm worker, who also ran a small business on the side. My reasons for this conclusion are as follows.

27 As noted, an overwhelming number of the criteria set out in the jurisprudence and policy referred set out above strongly suggest that the Respondent was a worker with respect to the work done for the Coopers. I note that when the Respondent began working for the Coopers she was not retained to do a specific job, upon completion of which the working relationship would terminate. She was retained on an open-ended basis. Further, the evidence is that the Respondent worked for the Coopers four and sometimes five days a week, at fairly regular hours. Timesheets kept by the Respondent show that she almost always arrived at work at 7:45 am or 8:00. The extensive list of timesheets produced in evidence show that the Respondent very rarely worked fewer than 30 hours and often worked substantially more than that. In this regard, I note that the Board's policy indicates that where the payor has "a continuing need for the type of service that the person provides" the person will be regarded as a worker. Continuing need is defined in the policy as an average of more than 40 hours a month. In the present case, the Respondent worked substantially more hours a month at the Coopers' farm than that. Her timesheets show that she regularly worked well over 100 hours a month. In essence, until her working relationship with the Coopers was severed as a result of her accident, the Respondent regularly showed up at the Coopers' farm, four or five days a week, and worked from early morning until mid or late afternoon. This was an arrangement which was not time-limited but was expected to continue indefinitely. In my view, it is strongly indicative of an employment relationship.

28 The Respondent's work for the Coopers entailed no chance of profit or risk of loss. The Respondent was paid \$8 per hour by the Coopers during the entire course of the working relationship. The fact that a wage earner can increase his or her wages by working more hours is not a "chance or profit." This has been commented on by this Tribunal on several occasions. For instance, in *Decision No. 1648/02*, [2003] O.W.S.I.A.T.D. No. 237, the Vice-Chair stated the following:

There was no chance of profit or risk of loss, as he either worked the hours for the rate quoted or did not.

29 The evidence in the present case does not suggest that the Respondent had any significant control over setting or establishing the rate of pay, the conditions of work, or the place or time that the work was done. While both the Respondent and Jude Cooper testified that the Respondent was given autonomy to go about her work during the course of the day, the fact is that she was required to be at work early in the morning because that is when the horses needed to be fed and the stables cleaned out. Accordingly, the Respondent showed up for work early in the morning on a regular basis. The Respondent could not choose her own schedule for feeding the horses and cleaning out the stables. She had little or no control over the time and place of the work she was performing.

30 Further, although the Respondent went about her tasks on her own without constant or regular supervision of her tasks, she was provided with basic instruction as to how to do the work when she

first began her employment. In addition, Jude Cooper testified that the Respondent was not permitted to do any training of horses until she had been working at the farm for some time. Thus, there was training, supervision, and control of the Respondent in a manner which is indicative of a relationship between an employer and an employee. The fact that the Coopers were well satisfied with the Respondent's work and that she generally went about her duties unsupervised does not change the essential nature of that relationship.

31 The Respondent did render the services for which she was paid by the Coopers to any other employer or client. For the Coopers, the Respondent cleaned out stables, fed, exercised and eventually trained horses. For this work she was paid \$8 per hour. There is no evidence that the Respondent did this kind of work for anyone else. She did do work for which she was not paid by the Coopers, namely she gave horse-riding lessons. As noted above, I am prepared to accept that with respect to these lessons, the Respondent was running a small independent business operation. But that is not true of the work which she did for the Coopers. She did not clean stables, feed, exercise and train horses at other farms.

32 With respect to the method of payment, I have already noted that the Respondent was paid \$8 per hour by the Coopers. At the hearing of this application, counsel for the Respondent and for the Coopers noted that the Respondent was paid after she submitted to the Coopers timesheets which she made and kept herself. In my view, the fact that the Respondent kept track of her hours and then was paid after informing the Coopers of those hours indicates that there was a good and trusting working relationship between the parties. The fact remains that the Respondent was paid, not for specific tasks or projects completed, but for the number of hours she had worked at a pre-set hourly rate. Further, the evidence indicates that the Respondent's timesheets were usually submitted on a bi-weekly basis, thus ensuring fairly regular and predictable pay periods.

33 The indicia of a business operation are absent in this case. The Respondent had not registered a business. She did not have an office, a GST number, a business telephone number, logo or letterhead. There is no evidence that she advertised or sought out business from other prospective clients.

34 Virtually all the equipment used by the Respondent in the course of her duties was owned by the Coopers. While the Respondent owned her own boots, riding pants, helmet and gloves, all the other equipment used was owned by the Coopers. Thus, the saddles, bridles, lunge lines, and leg wraps were owned by the Coopers, as were all the tools and implements used in feeding the horses and mucking out the stables. The Coopers were responsible for the costs associated with the maintenance and repair of this equipment. The fact that the Respondent owned the clothing which she wore on the job is not evidence, in my view, that there was any substantial ownership of business equipment in this case. Further, the fact that the Respondent had her own locker or cubby which was assigned for her personal use on a permanent basis is more indicative, in my view, of a person who is an employee or a worker than it is of someone engaged in an independent business relationship with a client.

35 The work which the Respondent performed for the Coopers was not incidental, but rather was integral to the Coopers' business operation. It was work which had to be done, and had to be done on a regular and daily basis in order for the Coopers to operate a horse farm. When the Respondent was not there, it was work which had to be done by others.

36 The work which the Respondent did for the Coopers was work which the Respondent had to do personally. It was not work for which she could have sent in a substitute had she been unavail-

able on a particular day. At the hearing of this appeal, Jude Cooper testified that the work which the Respondent did had to be done by someone who was familiar with the individual horses and she, Jude Cooper, would not have allowed the Respondent to send in a substitute or replacement worker.

37 The intention of the parties is an important factor in this case. With respect to this criterion, the evidence is mixed, in my view. Some evidence suggests that the parties did intend to establish a relationship in which the Respondent was an independent operator, but there is also evidence to the contrary.

38 At the hearing of this application, the Respondent testified that when she began working for the Coopers she always intended to do so, on the basis that she was running her own independent business. Further, Jude Cooper testified that she always regarded the Respondent as an independent contractor rather than an employee.

39 The other significant piece of evidence which supports the Respondent's contention that she regarded herself as an independent contractor is her Income Tax Returns for 1997 and 1998. Both of those returns report the income which the Respondent earned from the Coopers as business income. She made deductions from that income for business expenses.

40 However, there is also evidence which clouds the picture with respect to the intentions of the Respondent and the Coopers with respect to the working relationship which they established. After the accident of August 6, 1998, the Respondent filled out an application for Employment Insurance benefits. Information contained in that application suggests, in my view, that the Respondent regarded herself as an employee or worker with respect to the Coopers, and as an independent operator with respect to her riding lessons. For instance, in response to question on the form asking for the applicant's "Business name and address of your last or current employer" the Respondent wrote:

Cooper Farms + Self Employed coaching.

41 In my view, this suggests that the Respondent regarded her work for the Coopers as different than the work which she did in her capacity as a self-employed person, namely coaching. Further, in response to a question asking "Were you the proprietor or a partner in the business for which you worked?" the Respondent answered "No." Again, this raises doubts as to whether the Respondent regarded herself as having established a *bona fide* business operation.

42 Further, the records which the Respondent kept with respect to her earnings in 1997 and 1998, show that she clearly separated the income which she got from "Work for Cooper Farms" from that which she got for giving riding lessons. Finally, the letter which the Respondent sent to the Coopers in March 1997 that initiated the working relationship, contains all the indicia, in my opinion, of someone seeking to be hired as an employee, rather than the announcement of an offering of business services. In particular, I note the reference to the Respondent's stated intention of "securing a position at your facility." A similar reference is made in the Respondent's resume which was attached to that letter.

43 There is also evidence which clouds the picture with respect to the Cooper's intentions. As noted earlier, Jude Cooper testified that she always regarded the Respondent as an independent operator. Her husband, John Cooper, did not testify at the hearing of this application. However, records which were kept by John Cooper list the amounts paid to the Respondent under a heading called "Wages" along with amounts paid to the casual employees. The amounts paid to the Respondent were not listed as expenses paid to obviously independent business operators such as the "Vet"

and the "Blacksmith." Thus, this evidence suggests that John Cooper did not regard the Respondent as an independent business person, but rather as an employee to whom wages were paid. The same approach was taken by the Coopers' accountant who deducted the amounts paid to the Respondent as a business expense for the Coopers, in particular, as "salaries, wages, and benefits."

44 A similar ambiguity with respect to the Coopers' intentions in regard to their working relationship with the Respondent is evident in a signed statement, dated September 26, 2000, which the Coopers gave to an insurance adjuster. In that statement the Coopers say the following:

Karen Boyd who lived in the area, sent us a resume unsolicited, looking for employment, that was in March 1997. She was mature and reliable, with a good basic knowledge of the care of animals and, had broken and trained some of her own animals and, in her prior employment. We hired her to come in and feed, turn out and muck out the lower barn, consisting of stalls, basically wheel barrow work.

45 In my view, the description of the genesis of the relationship as described above strongly suggests that the Coopers regarded the Respondent as an employee or worker. Later in their statement, the Coopers state:

She progressed during her employment here to training some of the younger animals and, she gave lessons for which she was paid directly by her students - it was her business.

46 This suggests, in my view, that the Coopers regarded the Respondent as an employee who ran a business on the side giving riding lessons. This is in accordance with the description of her work history which the Respondent set out in her application for Employment Insurance benefits referred to earlier.

47 Later in their statement the Coopers say:

She paid nothing for the use of the horses that she used, or the facility. She gave lessons at home as well. We liked her and the interest that she showed in the business. We considered her a sub contractor.

48 While the passages from the Coopers' statement quoted earlier suggest that they regarded her as an worker, in my opinion, the last quote muddies the picture with respect to the Coopers' intentions.

49 Assessing all of the evidence in this case, I find that there was a clear distinction between the work which the Respondent did for the Coopers and the work which she did giving riding lessons. Both the Respondent and the Coopers referred to this distinction in her work duties, and the Respondent kept records in 1997 and 1998 which clearly differentiated the income earned from the Coopers' farm from that earned by giving riding lessons. When the evidence in this case is assessed in light of the "central question" set out in the *Sagaz* decision, I find, on an overwhelming preponderance of that evidence, that while the Respondent's riding lessons were services performed as a person in business on her own account, the services which she provided to the Coopers were not. With respect to the services which she performed for the Coopers, virtually all the indicia identified in *Sagaz* as being indicative of an independent business operation are absent. The Coopers did exercise a significant degree of control over the Respondent's work, albeit not on an hourly or continual basis. The Respondent did not own the equipment used in mucking out the stalls or in feed-

ing, exercising and training the horses. The Respondent did not hire her own helpers, nor would she have been permitted to send in a substitute to replace her when she was not available. The Respondent did not have exposure to any financial risk in the worker which she did for the Cooper's nor was there any opportunity for profit as a result of the services rendered. Thus, I conclude that work which the Respondent provided to the Coopers was provided under a contract of service. In performing that work the Respondent was a "worker" for the purposes of the WSIA.

50 There is no discrepancy in the evidence that when the accident occurred on August 6, 1999, the Respondent was performing work for which she was being paid by the Coopers and not giving riding lessons. The Coopers' statement of September 26, 2000 states:

There was no question that Karen was working at the time of her accident, exercising the horses including Camille would be part of her job.

51 That statement is endorsed by other aspects of the evidence including statements made by witnesses during Examinations for Discovery. No serious issue was taken at the hearing of this application with respect to the accuracy of this statement. Finally, as noted earlier, Camille was a horse which the Coopers asked the Respondent to train and was a horse which the Respondent never used to give riding lessons. Thus, I find that when the Respondent was injured while training Camille at the Coopers' farm on August 6, 1998, she was a worker in the course of her employment. I find further, that the Coopers were her employer, and since the Coopers were carrying out a business activity described in "Schedule 1," the Coopers were a "Schedule 1 employer." Subsection 28(1) bars a worker from commencing an action against a Schedule 1 employer with respect to the worker's injury or disease. Accordingly, I find that the respondent's right to bring an action against the Coopers for the injuries she sustained in the accident on their farm on August 6, 1998, is taken away by the WSIA.

DISPOSITION

52 The application is allowed.

53 The Respondent's right to commence an action against the Coopers with respect injuries the Respondent sustained as a result of the accident on the Cooper's farm on August 6, 1998, is taken away by the WSIA.

cp/e/qlrpv