

WCAT Decision Number: WCAT-2013-00448
WCAT Decision Date: February 19, 2013

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 112303-A

Section 257 Determination
In the Supreme Court of British Columbia
New Westminster Registry No. NEW-S-S-128623
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian
Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as
Dr. Sally Clark

Applicants: Dr. Trevor B. Stone and Dr. Dorrit Klarke
("defendants")

Respondents: Larry Joseph Sigurdson
(the "plaintiff")

Fraser Health Authority operating as
Royal Columbian Hospital
("defendant")

Representatives:

For Applicants: Aaron D. Atkinson
HARPER GREY LLP

For Respondents:

Larry Joseph Sigurdson Stewart B. Elworthy / Gerhard A. Pyper
PYPER LAW GROUP

Fraser Health Authority
operating as
Royal Columbian Hospital Kristal M. Low
GUILD YULE LLP

An addendum was issued for WCAT-2013-00448 and is attached to this document.

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Introduction

- [1] The plaintiff, Larry Joseph Sigurdson, was a logging truck driver. He owned a truck with a mounted crane. He was injured in a work accident on June 10, 2008 when a log slipped out of a grapple and caused him to fall eight feet to the ground. At the time of the accident, the plaintiff was working under a contract with Bow River Specialty Woods Ltd. (Bow River). The plaintiff's claim for workers' compensation benefits for his June 10, 2008 injuries (and subsequent surgeries) was accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board).
- [2] The plaintiff is pursuing a legal action claiming medical malpractice by the defendants Dr. Trevor B. Stone and Dr. Dorrit Klarke in relation to the treatment of his work injuries between June 10, 2008 and January 29, 2009 (the Material Time). Following surgeries at the Chilliwack General Hospital on June 10, 2008 and June 15, 2008 by Dr. D. Grover, the plaintiff was referred to the cast clinic at the Royal Columbian Hospital (RCH) on June 18, 2008 for follow-up treatment. The worker was assessed by the defendant Dr. Trevor B. Stone on June 18, 2008, and further surgeries were performed by Dr. Stone on June 26, 2008 and January 19, 2009. The plaintiff also underwent surgery by Dr. P. A. Blachut at the Vancouver General Hospital on March 16, 2009.
- [3] Dr. Stone had incorporated on October 25, 2005, as Trevor B. Stone Orthopaedic Services Inc. (Stone Inc.). Stone Inc. registered with the Board on February 16, 2009, with an effective date of January 1, 2007. Stone Inc. employed Dr. Stone and Paula Francisco, a medical office assistant.
- [4] Dr. Klarke provided post-operative medical care to the plaintiff at RCH from June 27 to 30, 2008 and January 20 to 22, 2009. Dr. Klarke employed three medical office

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

assistants, and was registered with the Board as an employer (since January 1, 1994) for worker coverage only.

- [5] Pursuant to section 257 of the *Workers Compensation Act* (Act), the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury, or death. This application was initiated by counsel for the defendants Dr. Trevor B. Stone and Dr. Dorrit Klarke on September 16, 2011. On September 20, 2011, an application for a section 257 determination was also made by counsel for the defendant Fraser Health Authority.
- [6] Examinations for discovery have not been conducted. Affidavits have been provided by the plaintiff (October 11, 2012) and Abdel Bassit Taha (January 5, 2013), as well as by Sandra Burritt, legal administrative assistant (July 12, 2012), Dr. Dorrit Klarke (July 12, 2012), and Dr. Trevor B. Stone (July 12, 2012 and October 19, 2012).
- [7] It appears that Dr. Sarah Jane Clark was not served with the Writ of Summons, and no determination has been requested of her status.
- [8] Written submissions have been provided by the participating parties to the legal action. Bow River and Stone Inc. are not participating in this application, although invited to do so as interested persons.
- [9] An oral hearing has not been requested. As set out further below, I consider that any factual issues may be resolved using the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354. I find that this application can be properly considered on the basis of the written evidence and submissions, without an oral hearing.

Issue(s)

- [10] Determinations are requested concerning the status of the parties to the legal action (with the exception of Dr. Clark), at the time the cause of action arose. A contested issue in this application concerns the status of Dr. Stone.

Jurisdiction

- [11] Part 4 of the Act applies to proceedings under section 257, except that no time frame applies to the making of the WCAT decision (section 257(3)). WCAT is not bound by legal precedent (section 250(1)). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

and questions of fact, law, and discretion arising or required to be determined under Part 4 of the Act, including all matters that WCAT is requested to determine under section 257. The WCAT decision is final and conclusive and is not open to question or review in any court (section 255(1)). The court determines the effect of the certificate on the legal action: *Clapp v. Macro Industries Inc.*, 2007 BCSC 840.

Status of the plaintiff, Larry Joseph Sigurdson

- [12] The status of the plaintiff is not in dispute.
- [13] By memorandum dated June 17, 2008, a claims analyst, Assessment Department of the Board, noted that she had spoken with the plaintiff to obtain additional information. The plaintiff had a contract with Bow River. The contract involved unloading three loads of logs in their yard, for which the plaintiff provided his 1980 Freightliner. The plaintiff confirmed that he was operating as a proprietorship, providing only one piece of revenue generating equipment per contract. The claims analyst found that the plaintiff would be considered a labour contractor who was not required to register with the Board. The prime contractor who had hired him was responsible for his coverage pursuant to the policy at item AP1-1-7 of the *Assessment Manual*.
- [14] By memorandum dated May 7, 2012, a research and evaluation analyst, Audit and Assessment Department of the Board (the analyst), advised that Bow River, account number 585161, registered with the Board effective January 1, 1997 and remained registered in 2012. The analyst further advised that the plaintiff, operating as Sigurdson Trucking, account number 395152, had been registered with the Board from July 14, 1994 to January 1, 1997.
- [15] There is no evidence that Sigurdson Trucking was incorporated, notwithstanding a reference in paragraph 54 of the submissions of the Fraser Health Authority to it having been an incorporated company with no workers.
- [16] At the time of the plaintiff's June 10, 2008 work accident, policy at AP1-1-7 defined labour contractors as including proprietors or partners who may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual. In contrast, policy at AP1-1-3 provided, as a specific guideline, that parties who would be considered independent firms include any firm which has two or more pieces of revenue producing equipment, and service industry firms that enter into two or more contracts simultaneously.
- [17] In relation to labour contractors, policy at AP1-1-7 provided:
- Labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain Personal

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

Optional Protection as an independent operator if they do not have workers. A labour contractor who takes one of these actions is an “independent firm” for purposes of Item AP1-1-3.

Labour contractors who choose not to register as an employer (if they have workers) or obtain Personal Optional Protection as an independent operator (if they do not have workers) are considered workers of the firm for whom they are contracting, and that firm is responsible for assessments.

[all quotes reproduced as written, except for changes noted]

[18] By decision dated June 25, 2008, a client services representative of the Board advised the plaintiff that his claim for fractures of his left lower leg and ankle had been accepted under section 5(1) of the Act. In a subsequent letter dated May 3, 2010, a Board case manager advised the plaintiff that his claim was accepted for a left lower leg fracture, left ankle fracture, multiple left lower leg surgeries including ankle fusion, chronic pain of left ankle region, and a dislocation of left elbow. Wage loss benefits were paid up to May 2, 2010, at which time the plaintiff’s disability was considered to have stabilized and become permanent.

[19] I agree with the decisions by the Board officers. I find that at the time of the plaintiff’s work accident on June 10, 2008, he was a worker pursuant to the policy at AP1-1-7 (as an unregistered labour contractor working under a contract for Bow River). I find that the plaintiff’s injuries on June 10, 2008 arose out of and in the course of his employment.

[20] In his statement of claim, the plaintiff alleges negligence in his medical treatment. At the time of the plaintiff’s injury and subsequent medical treatment commencing in June 2008, the policies in Chapter 3 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) included the following:¹

#22.00 COMPENSABLE CONSEQUENCES OF WORK INJURIES

Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other.

¹ In this decision, I have applied the policies in Chapter 3 of the RSCM II in effect in June 2008, unless otherwise specified. While the board of directors of the Board has approved a revision to the policies in Chapter 3 of the RSCM II, those new policies only apply to injuries or accidents that occur on or after July 1, 2010.

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a “common sense” point of view, it should be considered whether the work injury was a significant cause of the later injury. **If the work injury was a significant cause of the further injury, then the further injury is sufficiently connected to the work injury so that it forms an inseparable part of the work injury. The further injury is therefore considered to arise out of and in the course of employment and is compensable.**

#22.10 Further Injury or Increased Disablement Resulting from Treatment

Where a further injury or increased disablement arises as a direct consequence of treatment for a compensable injury, it is sufficiently connected to the original work injury as to form part of that injury. The further injury is therefore considered to arise out of and in the course of employment and is compensable.

Where a worker is undergoing treatment for a compensable injury, the place of treatment is analogous to a place of employment. A further injury arising out of the place of treatment is compensable provided it is consistent with the worker being at the place of treatment for the purpose of treatment and does not result from activities of a personal nature. The further injury in these cases is compensable because it is sufficiently connected to the original work injury so that it forms part of that injury and is therefore considered to arise out of and in the course of employment. For example, if a worker is undergoing treatment at a hospital for a compensable injury and sustains a further injury by stumbling down the stairs in the hospital while en route to a treatment appointment, the further injury is also compensable.

[emphasis added]

- [21] The Board authorized and paid for the plaintiff’s surgeries on June 26, 2008 and January 19, 2009, and for the necessary follow-up.
- [22] The applicants cite the following WCAT decisions: *WCAT-2005-04416-ad*, “Section 11 Determination,” *Welch v. Rose*, 21 W.C.R. 237, *WCAT-2006-01932*, *Ferguson v. Sun*, and *WCAT-2006-02352*, *Blatchford v. Fraser Valley Health Region*. The applicants further cite the decision in *Kovach v. British Columbia (Workers’ Compensation Board)*, [1998] B.C.J. No. 1245 (C.A.), aff’d [2000] 1 S.C.R. 55. Detailed submissions to similar effect have also been provided by the Fraser Health Authority. I agree with and adopt

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

the reasoning in those decisions, regarding the status of a worker while receiving medical treatment for a work injury.

[23] Pursuant to the policies at RSCM II items #22.00 and #22.10, I find that at the time the cause of action arose (in relation to the plaintiff's medical treatment from June 10, 2008 until January 29, 2009), the plaintiff was a worker within the meaning of Part 1 of the Act and any injuries suffered by the plaintiff arose out of and in the course of his employment.

Status of the defendant, Dr. Trevor B. Stone

[24] The central issue in this application concerns the status of Dr. Stone.

[25] By memorandum dated July 24, 2012, the analyst advised that Stone Inc., account number 821815, contacted the Board on February 10, 2009 and registered on February 16, 2009 with an effective date of January 1, 2007. The account remained registered in 2012. The analyst noted that the firm was not registered for the period June 10, 2008 to January 29, 2009. However, the account was later established with a retroactive effective date of January 1, 2007.

[26] Dr. Stone provided an affidavit on July 12, 2012. He is an orthopaedic surgeon, and provided medical treatment to the plaintiff between June 18, 2008 and January 29, 2009. On June 26, 2008, he performed an open reduction and internal fixation of the plaintiff's left tibial plafond fracture. On January 19, 2009, Dr. Stone removed the hardware in the plaintiff's left tibia and debrided necrotic bone. During the Material Time, Dr. Stone saw the plaintiff at RCH and at the office of Stone Inc. (located on Richmond Street in New Westminster). All of the medical services provided to the plaintiff by Dr. Stone were billed by Stone Inc. and paid for by the Board.

[27] Stone Inc. was incorporated on October 25, 2005. During the Material Time, Dr. Stone was the sole director, officer, president, and secretary of Stone Inc., and he owned all of the voting shares in Stone Inc. Dr. Stone was an employee of Stone Inc., and received a T4 in 2008 and 2009 from Stone Inc. for income tax purposes.

[28] During the Material Time, Stone Inc. also employed a medical office assistant, Paula Francisco. Her duties related to Dr. Stone's medical practice. Stone Inc. issued a T4 in 2008 and 2009 to Paula Francisco for income tax purposes.

[29] Dr. Stone states that when Stone Inc. was incorporated in 2005, he was not aware that the company was required to register with the Board and pay assessments on its employees' wages. He states that in 2009, he became aware that Stone Inc. was required to register with the Board. On February 10, 2009, he contacted the Board and registered Stone Inc. as an employer with an effective date of January 1, 2007.

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

Dr. Stone advises that he was not aware of a potential legal action by the plaintiff, and had no knowledge of a potential legal action at the time he contacted the Board and registered Stone Inc. as an employer effective January 1, 2007. Dr. Stone states that Stone Inc.'s lack of registration was not a deliberate attempt to deceive the Board in order to avoid paying assessments on its employees' wages.

[30] The plaintiff takes issue with Dr. Stone regarding the time at which Dr. Stone first became aware of a potential legal action by the plaintiff. In an affidavit of January 5, 2013, the plaintiff states:

2. I attended Dr Stone's office in January of 2009. At that meeting, Dr Stone examined my new X-rays and stated that the metal and screws were doing more damage than good to the joint. Dr Stone suggested that metal had to [be] removed and that the joint should be fused.
3. At my January 2009 meeting with Dr Stone, I asked Dr Stone if the joint was saveable. He responded by stating that he was unsure but saving the joint would be possible. I then mentioned to him that I believed that the damage was Dr Stone's fault because he did not tell me not to walk on the injured ankle. He never informed me not to bear any weight on the leg or ankle during the first three months after the June 2008 injury.
4. At my January 2009 meeting with Dr Stone, I told him that if my injured joint was not able to be saved and able to avoid a fusion, then I would sue him for medical malpractice.

[31] In a further affidavit on October 19, 2012, Dr. Stone provides a detailed account of the medical treatment he provided to the plaintiff on December 5, 2008, January 19, 2009, and January 20, 2009. The plaintiff requested additional opinions, and Dr. Stone arranged for the plaintiff to be seen by Dr. Viskontas, orthopaedic surgeon, on January 20, 2009, and by Dr. Blachut, orthopaedic surgeon, on January 28, 2009. Dr. Stone states:

7. On January 29, 2009, I saw Mr. Sigurdson in follow up at my office. We discussed the pros and cons of a variety of techniques for reconstruction ankle arthrodesis versus a below-knee amputation. I provided Mr. Sigurdson with the name of a patient who had a below-knee amputation following two years of failed reconstructive surgery. I left the decision up to Mr. Sigurdson regarding who he would like to continue his medical treatment with. I told Mr. Sigurdson I was happy to continue to provide medical treatment

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

for him. Mr. Sigurdson indicated he was likely to carry on further medical treatment with Dr. Blachut.

8. At no time did Mr. Sigurdson tell me he was going to sue me for medical malpractice.
9. If Mr. Sigurdson had told me he was going to sue me for medical malpractice "if [his] injured ankle joint was not able to be saved and able to avoid a fusion" I would have ended our doctor-patient relationship. I would not have continued to provide medical treatment to Mr. Sigurdson, in particular the surgery I performed on January 19, 2009, if he threatened to sue me.
10. My last consultation with Mr. Sigurdson was on January 29, 2009. At that time I offered to continue providing medical treatment to Mr. Sigurdson. I would not have done this if Mr. Sigurdson had threatened to sue me.
11. I would have recorded a threat by Mr. Sigurdson to sue me in my consultation records.
12. I contacted WorkSafeBC on February 10, 2009 and registered Trevor B. Stone Orthopaedic Services Inc. as an employer with an effective date of January 1, 2007. At that time, I had no knowledge of section 10 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, and I had no idea section 10 provided a defence to civil actions to eligible workers and employers.
13. At the time I contacted WorkSafeBC and registered Trevor B. Stone Orthopaedic Services Inc. as an employer, I had no idea Mr. Sigurdson was contemplating commencing a civil action against me.

[32] An affidavit dated January 5, 2013 has been provided by Abdel Bassit Taha, businessman. He states that he went to visit the plaintiff in the RCH in the beginning part of 2009. The plaintiff had just been told by Dr. Stone that they were going to have to amputate his leg. Taha states that he was at the plaintiff's bedside as a female attendant, who appeared to be a physiotherapist, was trying to advise the plaintiff what to expect after an amputation. The plaintiff was extremely upset and loudly voicing his displeasure to the attendant. Taha states:

5. Two men then came to speak with the Plaintiff Larry Sigurdson. I immediately gained the impression that the men were his doctors. I specifically heard Larry Sigurdson told the doctors that he (Larry Sigurdson) - "*I am going to sue you for what you guys did to my leg.*"

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

6. The Plaintiff Larry Sigurdson was livid at the men and emphatically stated to the men that he was going to sue them.

[33] The plaintiff's affidavit refers to his having advised Dr. Stone in a meeting at Dr. Stone's office in January of 2009 that he might pursue a legal action. Taha refers to a visit to the plaintiff at the RCH, where the plaintiff told two men of his intention to sue.

[34] The plaintiff's affidavit was provided in January 2013, approximately four years after the events in question. The affidavit by Taha refers to two unidentified men, who could have been employed as nurses or in some other role rather than doctors.

[35] In *Faryna v. Chorny*, the Court of Appeal reasoned (albeit in the context of evaluating oral hearing evidence):

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

[36] Given the passage of four years, I do not find the plaintiff's recollection reliable in terms of identifying the particular time at which he began to contemplate pursuing a legal action and communicated this to Dr. Stone. I consider that Dr. Stone's records are more likely to be accurate in this regard, as they were prepared at the time in question. I accept Dr. Stone's evidence that if a threat of legal action had been communicated to him, he would have recorded this in his notes. I further accept Dr. Stone's evidence that he would have ended his involvement in the plaintiff's care had the plaintiff threatened to sue him. It is readily apparent that the plaintiff's medical condition was complex, and that the courses of medical treatment being considered had serious risks. It strains credulity to consider that Dr. Stone would have continued to participate in treating the plaintiff, had the plaintiff communicated his threat of legal action during the Material Time. Accordingly, I prefer Dr. Stone's evidence although, for reasons set out below, this finding does not affect my conclusion.

[37] I accept as accurate Dr. Stone's evidence regarding the circumstances in which he registered with the Board. I accept that his prior failure to register did not involve any intent to avoid paying assessments, but was due to a lack of awareness of Stone Inc.'s obligation to register with the Board as an employer (notwithstanding the fact that

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

medical offices and physicians employing workers have been obligated to register with the Board since the Act was amended effective January 1, 1994 to provide “universal coverage” to workers rather than being limited to particular industries). Accordingly, I do not consider that there was any *mala fides* on the part of Dr. Stone in respect of either his prior failure to register with the Board, or his action in February 2009 to register with the Board. I accept Dr. Stone’s evidence that at the time he registered with the Board, he did not know of the plaintiff’s intention to pursue a legal action, and he was not aware of the defence to a legal action which might be available to a worker or employer pursuant to section 10 of the Act. Rather, he was merely complying with his legal obligation to register as an employer once he became aware of it.

[38] At the Material Time, policy at item AP1-1-4 of the *Assessment Manual* provided, in part:

(c) Principals of corporations or similar entities

As the incorporated entity is considered the employer, a director, shareholder or other principal of the company who is active in the operation of the company is generally considered to be a worker under the Act. A spouse, child or other family member of a principal or a shareholder for whom earnings are reported for income tax purposes is considered to be active in the business and a worker.

If a sole, active principal of a limited company is injured at a time when the company was not registered as an employer with the Board, the principal will not be considered a worker at that time and a claim by the principal or his or her dependents will be denied. For the same reason, a claim from one of several principals of a company that was unregistered at the time of the injury, or in the case of fatality, his or her dependents, will be denied unless the evidence indicates that the principal was not personally responsible for the failure to register.

In determining whether a principal was personally responsible for a failure to register, the factors considered include whether the principal was:

- a minority or majority shareholder;
- a director of the company;
- carrying out management functions or simply doing work that an employee would normally do; and
- responsible for doing other functions equivalent to those associated with the Board, such as dealing with income tax or employment insurance.

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

If an injured principal of a company is denied compensation benefits under this policy, that principal's earnings prior to the date of injury are not assessed.

[emphasis added]

- [39] The applicants note that this policy is framed with reference to an injury to a principal. The applicants submit that the policy should only apply to those situations where a sole active principal is injured as the wording is not any broader than that.
- [40] The applicants cite *WCAT-2010-02852, Wangansteen v. Gitzel*, which also concerned the situation of a responsible principal of an unregistered company (Ace). An additional factor in that case, however, was that assessment premiums were being remitted to the Board by another corporation by way of a deduction from the payments owing to Ace. *WCAT-2010-02852* reasoned (in paragraph 72):

I consider it significant that the relevant portion of the policy at AP1-1-4 begins with the wording: "If a sole, active principal of a limited company is injured at a time when the company was not registered as an employer with the Board..." In this case, Gitzel did not suffer any personal injury in the September 20, 2007 accident. On a strict reading of the wording of AP1-1-4, it does not apply to Gitzel's circumstances. It is only by analogy that this policy applies to a determination of his status at the time of the motor vehicle accident. Accordingly, there is room to take into account the merits and justice of the case as mandated by section 250(2) of the Act, in determining the fashion in which AP1-1-4 should be applied by way of analogy.

- [41] *WCAT-2010-02852* further reasoned (at paragraph 78):

Given the merits and justice of the case relating to the fact that assessment premiums were being received by the Board in connection with Gitzel's earnings, I consider that the evidence and policies cited above support a conclusion that Gitzel was, at the time of the accident, a worker of Ace Tire Services Ltd. I find that I am not precluded from reaching this conclusion by reason of the policy at AP1-1-4, given that the wording of the policy does not expressly concern situations other than those involving an injury to an active principal of an unregistered company. **While I consider that the principles underlying the policy at AP1-1-4 would generally apply, in a similar fashion, to circumstances involving the non-injured principal involved in a motor vehicle accident or other event requiring a determination of status, in this latter situation there is room to consider whether there**

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

are unusual circumstances warranting a different conclusion in the particular circumstances of the case.

[emphasis added]

- [42] The applicants note that assessment premiums were similarly accepted and received by the Board in connection with Dr. Stone's earnings. They submit that Dr. Stone paid retroactive assessments on both his wages and those of the other worker dating back to January 1, 2007. It would be unjust to permit the Board to require Stone Inc. to pay assessment premiums and some years later hold that he was not a worker. The Board should be estopped from taking advantage of premiums it has accepted.
- [43] I consider that there is a significant distinction between the circumstances of this case, and those addressed in *WCAT-2010-02852*. In *WCAT-2010-02852*, assessment premiums were being made to the Board both prior to and at the time the cause of action arose. In the present case, Dr. Stone was not registered with the Board at the time the cause of action arose, and is seeking to rely on his subsequent registration on a retroactive basis.
- [44] While the policy at item AP1-1-4 only refers to the situation of an injured principal, it would be consistent with that policy to interpret the occurrence of either an injury to a principal, or the occurrence of an event giving rise to a cause of action against the principal, as having the effect of crystallizing the principal's status at that time. Accordingly, a subsequent registration does not alter the principal's status in relation to the time period when the company was not registered, and the event in question occurred. However, the principal could then claim a return of the assessments paid on his own earnings in relation to the period for which workers' compensation coverage was not extended. Policy at AP1-1-4 of the *Assessment Manual* provides that if an injured principal of a company is denied compensation benefits under this policy, that principal's earnings prior to the date of injury are not assessed.
- [45] The applicants acknowledge that *WCAT-2006-01747, Simpson v. Silver* (summarized as noteworthy on the WCAT website)², reasoned:

Counsel for the physicians submits that the Ellington case [*WCAT-2004-05552*] and Decision #335 are distinguishable in the circumstances of this case. This is not a case in which Dr. Stewart has

² As set out in item #19.3 of WCAT's *Manual of Rules of Practice and Procedure*, noteworthy decisions may provide significant commentary or interpretive guidance regarding workers' compensation law or policy, comment on important issues related to WCAT procedure, or serve as general examples of the application of provisions of the Act, policies, or adjudicative principles. Noteworthy decisions are not binding on WCAT. Although they may be cited and followed by WCAT panels, they are not necessarily intended to be leading decisions.

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

been injured and is claiming worker status in order to claim compensation for his own injuries, in the face of failing to register his corporation.

It is true that the Ellington decision, as well as the two published Appeal Division decisions cited above, concerned the status of an injured plaintiff.

However, the essential conclusion in those decisions was that the policy concerning a responsible principal of an unregistered company did not merely prevent the payment of a claim for compensation by the responsible principal, but also concerned their status under the Act. I find that this policy applies equally to a plaintiff or a defendant.

[emphasis added]

[46] The applicants note that this was not the approach applied in the *Wangansteen v. Gitzel* decision.

[47] In *Appeal Division Decision #2000-0684*, "Status of Principals of Unregistered Companies (No. 1)," 17 WCR 475, the panel majority reasoned in this regard (in *obiter dicta*) at paragraph 35:

We have considered the application of our interpretation of Decision No. 335 to a scenario involving the principal of an unregistered company who, following a motor vehicle accident, is claiming benefits under section 5 and is also the defendant in a law suit. If the corporate veil was pierced and he was denied the status of a worker, he would not be able to claim benefits and he would not have the status of a worker for the purposes of the defence under section 10. This result is not inconsistent with subsection 10(1) since the principal would not be claiming benefits in lieu of pursuing a legal action because he or she would have no right of action.

[48] *Appeal Division Decision #2001-1217*, "Status of Principals of Unregistered Companies (No. 2)," 17 WCR 559, reasoned at paragraph 29:

...A determination of a principal's status under this policy would apply both to a claim for workers' compensation benefits, as well as to a determination of the principal's status for the purposes of sections 10 and 11 of the Act. We consider that the later passages in the decision, which refer to the denial of a claim for compensation by a responsible principal of an unregistered company, must be read in light of the context established by the introduction. Such denial of a claim for compensation was based on a determination that the responsible principal was really an independent operator without workers' compensation coverage, rather

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian
Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also
known as Dr. Sally Clark

than a worker. Much of the analysis in Decision No. 335, which outlines that at common law an active principal is not necessarily an employee of the company, is directed at establishing the foundation for this determination of the principal's status. We are satisfied that Decision No. 335 was concerned with the larger issues of status, rather than being limited to addressing eligibility for compensation.

[49] *Appeal Division Decision #2001-1217* further reasoned at paragraph 66:

We appreciate the difficulties with this approach, which are outlined in the dissent to #00-0684. We note in particular the apparent contradiction between Decision No. 335 and the policy at Nos. 20:30:30 and 40:10:30 of the Assessment Policy Manual. These latter policies require an assessment of a principal's earnings when backdating the registration of a company, so long as a claim by an injured principal has not been denied. As set out in paragraphs 32–33 of the reasons of the majority in Decision #00-0684, **this raises thorny issues with respect to the principal's status being indeterminate, requiring crystallization upon the occurrence of an event such as the injury to the principal or an application for compensation.** The majority found that piercing of the corporate veil is triggered when the principal is injured, rather than when a claim for compensation is made. The majority found the principal's status between the date of "employment" and date of injury may be regarded as being in a state of flux. **If, prior to the injury, steps were taken involving registration with the Board, he would be a worker. However, in the absence of such registration or contact with the Board, when an injury occurs the principal is not a worker.** The fact that the policy set out in Decision No. 335 requires such strained analysis to support it points to certain inherent difficulties with the policy.

[emphasis added]

[50] *WCAT-2008-00716, Stolz v. Anderson*, similarly commented, in *obiter dicta*:

If the status of one of the principals of Canusa Transportation Ltd. were in issue, I would apply the policy at #20:30:30. To the extent any of the principals of the limited company might have been active in respect of the operation of the company, the principal would normally be viewed as a worker of the company. However, it appears that both Jarvis and Vincent may be viewed as having shared responsibility for the failure to register the company prior to February 20, 2002. **I would distinguish between the company's usual liability for retroactive assessments from the date it commenced operations, and a determination with respect to the status of one of the principals in respect of a time period prior to**

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

the actual date of registration by the company with the Board. I adopt, in this regard, the reasoning in WCAT Decisions #2004-05552, October 26, 2004, #2005-05297, October 7, 2005, summarized as noteworthy on the WCAT website, and #2006-01066, March 2, 2006. **I agree with the submissions of plaintiffs' counsel regarding the fact that a subsequent registration, and a backdating of the effective date of the registration, cannot change the fact that the company was not registered on the date of the accident. Accordingly, to the extent Jarvis or Vincent might have engaged in activities on behalf of Canusa Transportation Ltd. prior to the registration of the company on February 20, 2002, I would consider them to have been acting in similar fashion to a sole proprietor or independent operator (notwithstanding the obligation to register the business with the Board).** On that basis, I would find that Jarvis and Vincent were not workers within the meaning of Part 1 of the Act, in respect of any activities on behalf of Canusa Transportation Ltd. prior to the registration of the company on February 20, 2002. My reasoning on this point is in the nature of obiter, as the evidence does not in fact establish that Canusa Transportation Ltd. was involved in the business arrangements regarding the use of the 1999 Freightliner truck which was involved in the accident.
[emphasis added]

- [51] The applicants point out the seeming anomaly regarding the fact that had Dr. Stone not incorporated, his status as an employer of his medical office assistant would not be affected by his failure to register with the Board. The reasoning to this effect provided in *Appeal Division Decision #93-0336*, "Out of Province Employer: Compulsory Industry," 9 W.C.R. 705, has been followed in many WCAT decisions (see, for example, *WCAT-2012-02569*, and *WCAT-2009-01647*, *Huala v. Oxley*, *WCAT-2004-04112-ad*, *MacLean v. Case*, and *WCAT-2006-02352*, *Blatchford v. Fraser Valley Health Region*). In *WCAT-2009-01647* and in *WCAT-2006-02352*, defendant physicians, who were neither incorporated nor registered with the Board at the material times, were found to be employers despite the failure to register with the Board as they employed staff related to their medical practices.
- [52] Notwithstanding this anomaly, I consider that certain legal consequences flow from a decision to incorporate. This is a significant legal step, which has the effect of making the relationship of employment one between the employee and the company (subject to the separate considerations relating to the status of a responsible principal). A person taking action to incorporate might reasonably be expected to obtain information regarding the legal rights and liabilities attached to this status in relation to the various statutory obligations of the company (relating to Employment Insurance, Canada Pension Plan, income tax, and workers' compensation).

RE: Section 257 Determination

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

[53] If the responsible principal is acting in the manner of a proprietor or independent operator, it is only a matter of chance whether the principal suffers an injury which might give rise to a claim for compensation or is involved in a situation giving rise to a legal action against the principal. The principal's actions were undertaken during a period in which the company was not registered with the Board. I consider that it is logically consistent with the policy at AP1-1-4 to find that Dr. Stone was operating in similar fashion as an unregistered proprietor or independent operator without workers, as his medical office assistant was a worker of the company.

[54] Accordingly, I find that at the time the cause of action arose, Dr. Stone was not a worker or an employer within the meaning of Part 1 of the Act. It necessarily follows that Dr. Stone's action or conduct, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act.

Status of the defendant, Dr. Dorrit Klarke

[55] By memorandum dated July 24, 2012, the analyst advised that Dr. Klarke, account number 500812, registered with the Board effective January 1, 2004 and remained registered in 2012 for worker coverage only. Dr. Klarke did not apply for Personal Optional Protection coverage.

[56] The plaintiff's submissions do not contest Dr. Klarke's status.

[57] An affidavit was provided by Dr. Klarke on July 12, 2012. Between June 10, 2008 and January 29, 2009, her office was located on Columbia Street East in New Westminster. At the Material Time, she had three medical office assistants, and their duties related to her medical practice. Copies were provided of the T4s issued by Dr. Klarke to her three medical office assistants in 2008 and 2009.

[58] At the Material Time, she practiced as a general practitioner and hospitalist in New Westminster. She saw patients in her office and provided medical care for post-operative orthopaedic patients admitted to RCH. Dr. Klarke states that she provided post-operative medical treatment to the plaintiff at RCH on June 27, 28, 29, and 30, 2008, and January 20, 21, and 22, 2009.

[59] Dr. Klarke's affidavit does not address whether she was being paid by the Medical Services Plan, Fraser Health Authority operating as Royal Columbian Hospital, or the Board, in relation to her provision of medical care to the plaintiff. (In contrast, Dr. Stone's affidavit states that all of his medical services to the plaintiff were billed to and paid for by the Board.) However, the Fraser Health Authority operating as Royal Columbian Hospital denies that the defendant physicians were its employees, servants, or agents (at paragraph 59). Although the evidence on this point is weak, I infer that Dr. Klarke's medical services at the hospital were billed to the Medical

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian
Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also
known as Dr. Sally Clark

Services Plan or the Board, and that she was not being paid by the Fraser Health Authority operating as Royal Columbian Hospital.

- [60] Relevant decisions regarding the status of a party registered as an employer without Personal Optional Protection coverage include *Appeal Division Decision #2001-2240*, “Section 11 Determination (Craig Sidney Parker v. Ravinderjit Singh Kandola and Yellow Cab Company Ltd.),” 18 WCR 71 (*Kandola*), *WCAT-2005-01937*, *Mondor v. Seifred* (summarized as noteworthy on the WCAT website), and *WCAT-2005-04416-ad*. *WCAT-2005-04416-ad* found as follows:

Upon consideration of the foregoing, I agree with the reasoning expressed in *Kandola* and in *WCAT Decision #2005-01937*. The fact that Dr. Rose did not purchase Personal Optional Protection coverage, so as to be eligible for workers’ compensation benefits for any work injury or occupational disease he might suffer, is not a relevant consideration. Dr. Rose’s actions or conduct were incidental to being engaged in an industry within the meaning of Part 1 of the Act. There is no basis for considering that Dr. Rose’s action or conduct, in relation to the plaintiff’s medical treatment and surgery, did not arise out of and in the course of employment. I find that at the time the cause of action arose, Dr. Rose was an employer engaged in an industry within the meaning of Part 1 of the Act, and his action or conduct, which caused the alleged breach of duty of care, arose out of and in the course of employment.

- [61] I agree with and adopt the reasoning from these cited decisions. I find that Dr. Klarke was an employer engaged in an industry within the meaning of Part 1 of the Act. I further find that any action or conduct of Dr. Klarke, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act.

Status of the defendant, Fraser Health Authority operating as Royal Columbian Hospital

- [62] By memorandum dated May 7, 2012, the analyst advised that the Fraser Health Authority, account number 687502, registered with the Board effective January 1, 2003 and remained registered in 2012. The analyst further advised that the RCH is listed as operating location 52 of the Fraser Health Authority.
- [63] The Fraser Health Authority operating as Royal Columbian Hospital (FHA) submits that the plaintiff did not particularize his claim of negligence against the FHA. The FHA denies that the defendant physicians were its employees, servants, or agents. The FHA submits that at all material times, it was an “employer” as defined by the Act.

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

- [64] I find that at the time the cause of action arose, the FHA was an employer engaged in an industry within the meaning of Part 1 of the Act.
- [65] Certification is not requested concerning any action or conduct of the FHA, or its servant or agent. In the event that any further certification is necessary, a request may be made for a supplemental certificate.

Conclusion

- [66] I find that at the time the cause of action arose, between June 10, 2008 and January 29, 2009:
- (a) the plaintiff, Larry Joseph Sigurdson, was a worker within the meaning of Part 1 of the Act;
 - (b) the injuries suffered by the plaintiff, Larry Joseph Sigurdson, arose out of and in the course of his employment within the scope of Part 1 of the Act;
 - (c) the defendant, Dr. Trevor B. Stone, was not a worker nor an employer engaged in an industry within the meaning of Part 1 of the Act;
 - (d) any action or conduct of the defendant, Dr. Trevor B. Stone, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the Act;
 - (e) the defendant, Dr. Dorrit Klarke, was an employer engaged in an industry within the meaning of Part 1 of the Act;
 - (f) any action or conduct of the defendant, Dr. Dorrit Klarke, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act; and,
 - (g) the defendant, Fraser Health Authority operating as Royal Columbian Hospital, was an employer engaged in an industry within the meaning of Part 1 of the Act.

Herb Morton
Vice Chair

HM:gw

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

LARRY JOSEPH SIGURDSON

PLAINTIFF

AND:

FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL,
DR. TREVOR B. STONE, DR. DORRIT KLARKE and
DR. SARAH JANE CLARK also known as DR. SALLY CLARK

DEFENDANTS

CERTIFICATE

UPON APPLICATION of the Defendants, DR. TREVOR B. STONE and
DR. DORRIT KLARKE, in this action for a determination pursuant to section 257 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, between June 10, 2008 and January 29, 2009:

1. The Plaintiff, LARRY JOSEPH SIGURDSON, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, LARRY JOSEPH SIGURDSON, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.
3. The Defendant, DR. TREVOR B. STONE, was not an employer nor a worker engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
4. Any action or conduct of the Defendant, DR. TREVOR B. STONE, which caused the alleged breach of duty of care, did not arise out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
5. The Defendant, DR. DORRIT KLARKE, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
6. Any action or conduct of the Defendant, DR. DORRIT KLARKE, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.
7. The Defendant, FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of February, 2013.

Herb Morton
Vice Chair

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

LARRY JOSEPH SIGURDSON

PLAINTIFF

AND:

FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL,
DR. TREVOR B. STONE, DR. DORRIT KLARKE and
DR. SARAH JANE CLARK also known as DR. SALLY CLARK

DEFENDANTS

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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WCAT Addendum Decision Number: WCAT-2013-00448a
WCAT Addendum Decision Date: March 19, 2013

Panel: Herb Morton, Vice Chair

WCAT Reference Number: 112303-A

Section 257 Determination

In the Supreme Court of British Columbia

New Westminster Registry No. NEW-S-S-128623

Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also known as Dr. Sally Clark

Applicants: Dr. Trevor B. Stone and Dr. Dorrit Klarke
("defendants")

Respondents: Larry Joseph Sigurdson
(the "plaintiff")

Fraser Health Authority operating as Royal
Columbian Hospital
("defendant")

Representatives:

For Applicants: Aaron D. Atkinson
HARPER GREY LLP

For Respondents:

Larry Joseph Sigurdson Stewart B. Elworthy / Gerhard A. Pyper
PYPER LAW GROUP

Fraser Health Authority
operating as
Royal Columbian Hospital Kristal M. Low
GUILD YULE LLP

WCAT Addendum Decision Number: WCAT-2013-00448a
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Section 257 Determination

In the Supreme Court of British Columbia

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- [1] This is an addendum to *WCAT-2014-00448* which was dated February 19, 2013. That decision found in paragraph 64 that at the time the cause of action arose, the Fraser Health Authority operating as Royal Columbian Hospital (FHA) was an employer engaged in an industry within the meaning of Part 1 of the Act. That decision further noted in paragraph 65 (in error):

Certification is not requested concerning any action or conduct of the FHA, or its servant or agent. In the event that any further certification is necessary, a request may be made for a supplemental certificate.

- [2] On July 27, 2012, counsel for the FHA had requested an affirmative response to the following issue which had been set out in paragraph 1(d) of its submission:

Did any action or conduct of the FHA or its employees, servants or agents, which caused the alleged breach of duty of care arise out of an[d] in the course of employment within the scope of Part 1 of the Act?

- [3] At page 20 of the July 27, 2012 submission, the FHA submitted that it was entitled to the determination it had requested.

- [4] By letter dated February 25, 2013, counsel for the FHA requested a supplemental certificate on this issue. Although submissions had previously been completed, an additional opportunity to comment was provided to the parties. In a letter dated March 1, 2013, the WCAT appeal coordinator invited any submissions the parties wished to provide by March 11, 2013, following which this request would be addressed as an addendum to *WCAT-2013-00448*. On March 4, 2013, counsel for Dr. Trevor B. Stone and Dr. Dorrit Klarke advised that no further submission would be provided. By letter dated March 11, 2013, the appeal coordinator advised that submissions were complete.

RE: Section 257 Determination
Larry Joseph Sigurdson v. Fraser Health Authority operating as Royal Columbian
Hospital, Dr. Trevor B. Stone, Dr. Dorrit Klarke and Dr. Sarah Jane Clark also
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- [5] I consider it appropriate to address this request by way of an addendum and supplemental certificate.
- [6] Paragraph 12 of the plaintiff's statement of claim alleges that he suffered injury due to negligence on the part of the FHA in his medical care and treatment. I find that the FHA could only act through its employees, servants, or agents. Any actions, or failure to act, on the part of the FHA, or its employees, servants, or agents, in relation to the treatment and care of the plaintiff, would relate to the FHA's functioning as a hospital. No submission has been provided to suggest that any action or conduct by the FHA, or its employees, servants or agents, which caused the alleged breach of duty of care, was such that it did not arise out of and in the course of employment within the scope of Part 1 of the Act.
- [7] I find that at the time the cause of action arose, between June 10, 2008 and January 29, 2009, any action or conduct of the defendant, Fraser Health Authority operating as Royal Columbian Hospital, or its employees, servants or agents, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

Herb Morton
Vice Chair

HM:gw

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

LARRY JOSEPH SIGURDSON

PLAINTIFF

AND:

FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL,
DR. TREVOR B. STONE, DR. DORRIT KLARKE and
DR. SARAH JANE CLARK also known as DR. SALLY CLARK

DEFENDANTS

S U P P L E M E N T A L C E R T I F I C A T E

UPON APPLICATION of the Defendant, FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL, in this action for a determination pursuant to section 257 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, between June 10, 2008 and January 29, 2009:

8. Any action or conduct of the Defendant, FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL, or its employees, servants or agents, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of March, 2013.

Herb Morton
Vice Chair

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

LARRY JOSEPH SIGURDSON

PLAINTIFF

AND:

FRASER HEALTH AUTHORITY operating as ROYAL COLUMBIAN HOSPITAL,
DR. TREVOR B. STONE, DR. DORRIT KLARKE and
DR. SARAH JANE CLARK also known as DR. SALLY CLARK

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