WCAT *Workers' Compensation Appeal Tribunal*

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WCAT Decision Number:	**WCAT-2005-04416-ad**
WCAT Decision Date:	**August 23, 2005**
Panel:	Herb Morton, Vice Chair
WCAT Reference Number:	031084-A

Section 11 Determination
In the Supreme Court of British Columbia
Vancouver Registry No. S011323
John WELCH v. Dr. James C. ROSE

Applicant:	John WELCH (the "plaintiff")
Respondent:	Dr. James C. ROSE (the "defendant")
Representatives:	
For Applicant:	Craig Paterson PATERSON & ASSOCIATES
For Respondent:	W. J. McJannet HARPER GREY LLP

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Noteworthy Decision Summary

Decision: WCAT-2005-04416-ad **Panel:** Herb Morton **Decision Date:** August 23, 2005

Section 11 Determination – Negligent Medical Treatment of a Work-Related Injury – Status of the Worker – Status of the Treating Physician – Injury Arising Out of and in the Course of Employment – Effect of Apparently Retroactive Policy contained only in Rehabilitation Services and Claims Manual, Volume II (item #22.00)

In a section 11 determination, a worker who suffers further injury as a result of negligence in the medical treatment of a work-related injury is a worker within the meaning of Part 1 of the *Workers Compensation Act*, and any further injury arises out of and in the course of his employment. In coming to this conclusion the panel preferred an interpretation guided by an apparently retroactive policy contained only in *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), even though it was unclear whether the policy was binding on a determination governed by *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). If a physician is registered with the Workers' Compensation Board (Board) as an employer, his action or conduct in negligently treating a work-related injury arises out of and in the course of employment, regardless of whether the physician himself purchased Personal Optional Protection coverage.

The plaintiff suffered an injury to his knee while at work, and his application for benefits was accepted by the Board. Ten years later, he underwent surgery for knee replacement. The plaintiff brought a legal action against the doctor performing the surgery, alleging negligence. The doctor was registered with the Board as an employer, but had not purchased Personal Optional Protection coverage.

Prior to 2002, a line of Appeal Division cases held that such treatment injuries arose out of and in the course of a worker's employment. One of those cases was upheld on a judicial review, at the Supreme Court of Canada (SCC) level. However, a new line of cases from both the Appeal Division and WCAT held that the SCC decision rested solely on the strength of the privative clause, and that a clear policy direction would be necessary to consider a treatment injury as an injury arising out of and in the course of employment.

Following the new line of cases, the Board issued a new policy adopting the reasoning in the first line of cases. Amendments were made only to item #22.00 of RSCM II; however, the policy stated that the amendments apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury. In two subsequent WCAT decisions, the panels refused to apply the new policy because it was only contained in RSCM II, and followed the new line of cases. In another WCAT decision, the panel applied the new policy because "the resolution is clear that the amendments were intended to apply to all decisions made after February 1, 2004."

The panel in this case stated that there is validity to both approaches. The explanatory notes in RSCM I and RSCM II, setting out their application, are not part of the policies approved by the Board so they are not determinative. Regardless of whether the new policy is binding, it resolved, at least from June 30, 2002 onward, the ambiguity which gave rise to the competing lines of cases. Therefore, the earlier approach, which was adopted in the new policy, should be

followed. The new policy did not offend the presumption against retroactivity as it was simply a clarification of a former policy already in place.

There are also competing lines of cases on the issue of whether an employer's conduct can be considered arising out of and in the course of employment where the employer has not purchased Personal Optional Protection coverage. Some distinguish between an employer's conduct as employer and as surgeon, and others reject this distinction. The panel rejected the distinction, referring to various court decisions upholding tribunal decisions which found that an employer's action or conduct could not be divided into different roles, or overturning tribunal decisions which recognized such distinctions. The panel found that the physician's conduct in relation to the plaintiff's medical treatment arose out of and in the course of employment.

**This decision has been published in the *Workers' Compensation Reporter*:
21 WCR 237, #2005-04416, Section 11 Determination**

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Introduction

The plaintiff suffered an injury to his left knee while at work on September 22, 1990. His application for workers' compensation benefits was accepted by the Workers' Compensation Board (Board). He underwent surgery on October 19, 2000 for a total left knee replacement. This surgery, which was accepted under his workers' compensation claim, was performed by the defendant, Dr. James C. Rose. The plaintiff has brought a legal action against Dr. Rose, alleging negligence in relation to the surgery. Dr. Rose was registered with the Board as an employer, but had not purchased Personal Optional Protection coverage from the Board.

This application was initiated by plaintiff's counsel on December 3, 2001 to the former Appeal Division of the Board. No examination for discovery has been conducted. Mr. Paterson has provided written submissions on behalf of the plaintiff dated December 16, 2004, April 14, 2005 and June 7, 2005. Mr. McJannet has provided written submissions on behalf of the defendant dated February 18, 2005 and May 3, 2005. Counsel have also provided letters dealing with preliminary or procedural matters. Although invited to do so, the plaintiff's employer is not participating in this application. The legal action was initially scheduled for trial on March 21, 2005, but this was rescheduled to April 3, 2006.

Issue(s)

The plaintiff's legal action alleges negligence in the provision of medical treatment for his work injury. At issue are the status of the plaintiff and his surgeon at the time of surgery, some ten years after the plaintiff's original work injury to his left knee. Related questions involve the effect of the January 20, 2004 policy amendments concerning the

status of treatment injuries, and whether any significance attaches to the fact the defendant had not purchased Personal Optional Protection coverage from the Board.

Jurisdiction

This application for a determination under section 11 of the *Workers Compensation Act* (Act) was filed with the Appeal Division before March 3, 2003. Effective March 3, 2003, section 11 of the Act was repealed, and the Workers' Compensation Review Board (Review Board) and Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

WCAT has jurisdiction to provide a certificate to the court under section 257 of the amended Act. However, as this application was pending before the Appeal Division on March 3, 2003, it must be completed as a proceeding before WCAT pursuant to section 39(1)(c) and 39(2) of the transitional provisions contained in Part 2 of Bill 63. Accordingly, WCAT will consider this application under the former section 11. In doing so, WCAT must apply the policies of the board of directors pursuant to sections 250(2) and 251 of the amended Act. Section 42 of the transitional provisions further provides:

> As may be necessary for the purposes of applying sections 250(2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

Section 11 of the Act obliged the Board to make determinations and provide a certificate to the court regarding certain matters relevant to a legal action. Pursuant to section 255 of the Act, a WCAT decision is final and conclusive and is not open to question or review in any court. The court determines the effect of the certificate on the legal action.

Preliminary

Many preliminary and procedural matters have been raised by plaintiff's counsel. My findings regarding the main such points are set out below. Other questions and requests were raised which are not specifically addressed in these reasons. Although those submissions were considered, I do not consider it necessary to expressly address every such point in my reasons. In the text *Administrative Law in Canada*, Third Ed. (Ontario: Butterworths, 2001), Sara Blake states at page 86:

> To be of any value to parties, reasons should explain how the tribunal reached its conclusions, both on fact and on law or policy. The essential findings of fact on which the decision is based should be stated and

> explanations should be given for rejecting important items of evidence pertaining to the central facts in issue, including an explanation of findings of credibility. If an application is dismissed by reason of insufficient evidence, the material deficiencies in the evidence should be identified.... If a statute requires that certain factors be considered before a decision is made, those factors should be discussed in the reasons. A significant departure from precedent should be explained. **However, reasons need not be given on every minor point raised during the proceeding nor must reference be made to every item of evidence.**
>
> [emphasis added]

These reasons focus primarily on the central issues in this application. To the extent additional questions or requests raised by counsel are not expressly addressed in these reasons, it may be inferred that I did not consider it necessary to grant the request or pursue the line of inquiry identified by counsel, in making my decision.

(a) Method of Hearing

Plaintiff's counsel requested an oral hearing. By preliminary determination dated November 3, 2004, I denied this request for the following reasons:

> I consider that the issues raised in this application primarily concern questions of law and policy, which are better addressed by way of written submissions. I also note that plaintiff's counsel has expressed the wish to engage in a far-ranging examination of Dr. Rose. It is open to him to pursue such inquiries by way of an examination for discovery. It does not appear that there is any issue of credibility arising in this application.

Upon further review, I find that the issues raised in this application can be properly considered on the basis of written evidence and submissions without an oral hearing, for the reasons previously expressed.

(b) Panel Assignment

By submission of December 16, 2004, Mr. Paterson requested a different panel assignment on the basis of a reasonable apprehension of bias. By memo of December 20, 2004, I advised that if he had any specific concerns he should identify these for consideration, bearing in mind the comments of the BC Court of Appeal in *Lorna Adams* v. *Workers' Compensation Board*, [1989] 42 B.C.L.R. (2d) 228 (see *WCAT Decision #2004-03794*). This objection does not appear to have been pursued in counsel's subsequent submissions (apart from general arguments that WCAT is not "independent" of the Board). I consider it appropriate, in any event, to proceed with consideration of this application.

Mr. Paterson further requested that a "precedent panel" be appointed under section 238(6) of the Act (see also item #8.20 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP)). This request was considered by the WCAT chair, who confirmed her November 2, 2004 assignment of this application to this one member panel under section 238(4) of the Act.

(c) Charter

A *Charter* argument was raised by plaintiff's counsel. No notice was provided to the provincial or federal Attorneys General. Effective December 3, 2004, WCAT's authority to address *Charter* issues was removed by section 44 of the *Administrative Tribunals Act* (ATA). Section 44 of the ATA provides:

> (1) The tribunal does not have jurisdiction over constitutional questions.
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Given the lack of notice to the Attorneys General and section 44 of the ATA, I find no basis for addressing the application of the *Charter* in my decision.

(d) Interest Groups

Plaintiff's counsel requested that a number of interest groups be invited to participate in this application. WCAT has authority to invite such participation under section 246(2)(i) of the Act (see also MRPP item #4.37). Both parties in this application were represented by legal counsel, who provided full submissions. I did not consider it necessary to invite additional persons to participate. This application involved a lengthy submissions process, in which the trial date has already been postponed. In this context, I did not consider it appropriate to extend the process for obtaining submissions by inviting other groups to participate.

Status of the Plaintiff

The plaintiff suffered a left knee injury while working as a millwright on September 22, 1990. At that time, the plaintiff was employed by International Forest Products Ltd., a company registered with the Board under account number 62251. The worker submitted a claim for workers' compensation benefits, which was accepted by the Board. A decision letter on the claim file dated November 14, 2000 summarized the history of the worker's claim as follows:

> ... you sustained a left knee injury on September 22, 1990. At that time, the claim was accepted for a left knee contusion and bucket handle tear of the left medial meniscus. You had surgery on January 18, 1991, and after recovering from the surgery you returned to work.
>
> In 1998 you developed increased left knee pain and discomfort. You were referred to the WCB Visiting Specialist's [*sic*] Clinic and saw Dr. Vaisler, Orthopaedic Surgeon. Dr. Vaisler obtained diagnostic tests and these tests showed that you had developed tricompartmental osteoarthritis. On March 26, 1999 he performed an arthroscopic debridement and the osteoarthritis was accepted under this claim. It is my understanding that in May 1999 you returned back to work.
>
> On March 2, 2000, Dr. Rose, Orthopaedic Surgeon, examined you and recommended that if you were not able to work because of left knee pain he would consider a total left knee replacement. On March 6, 2000 you stopped work because of left knee pain and discomfort, and wage loss benefits were re opened....
>
> On October 19, 2000, Dr. Rose performed a total left knee replacement.

By decision letter dated November 22, 2000, the worker was advised that his surgery and subsequent disability and time loss from work had been accepted by the Board. In total, the worker has received 1,213 days of wage loss benefits, and 299 days of rehabilitation benefits under his WCB claim.

The worker's statement of claim, filed in the legal action on May 1, 2002, alleges that the Defendant "was negligent in the preparation and/or performance of the 19 October 2000 left knee replacement surgery and/or the Plaintiff's post-operative care." In October, 2000, section 10(1) of the Act provided as follows:

> The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. **This provision applies only when the action or conduct of the employer, the employer's servant or agent,**

> **or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part**.
>
> [emphasis added]

Section 11 of the Act provided:

> Where an action based on a disability caused by occupational disease, personal injury or death is brought, the board must, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this Act and, without limiting the generality of the foregoing, may determine whether
>
> (a) a person was, **at the time the cause of action arose**, a worker within the meaning of this Part;
>
> (b) injury, disability or death of a worker arose out of, and in the course of, the worker's employment;
>
> (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer; and
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part,
>
> and must certify its determination to the court.
>
> [emphasis added]

The first issue to be addressed in this application is whether the plaintiff was, at the time the cause of action arose, a worker within the meaning of Part 1 of the Act. As the plaintiff's cause of action relates to the performance of surgery, this refers to the time the worker underwent surgery in October, 2000 rather than to the time he initially injured his knee at work on September 22, 1990.

Decision No. 152, "Re Injuries Arising Out of Treatment and Other Appointments", November 6, 1975, 2 WCR 186, established the compensability of treatment injuries. However, that decision concluded by commenting (at page 190):

> Where a subsequent injury within the scope of this directive is accepted as compensable, it is not accepted on the ground that the injury is one arising out of and in the course of employment. It is accepted on the ground that the subsequent injury is a compensable consequence of the original

> injury. Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.

Applications for certificates under section 11 of the former Act concerning treatment injuries gave rise to two lines of analysis. In the first line of cases, it was held that such treatment injuries arose out of and in the course of a worker's employment: *Appeal Division Decisions #92-1899* (November 27, 1992), *#93-1399* (October 6, 1993), *#00-1587* (October 10, 2000), *#2002-0003* (January 2, 2002) and *#2002-0607* (March 7, 2002). Most notably, *Appeal Division Decision #93-1399* (10 WCR 603) was the subject of an application for judicial review. Ultimately, by decision dated January 20, 2000, in *Kovach* v. BC (WCB), (2000) 184 D.L.R. (4th) 415, [2000] 1 S.C.R. 55, the Supreme Court of Canada found as follows:

> We are all of the view, substantially for the reasons of Donald J. A. in the British Columbia Court of Appeal, to allow the appeal, set aside the judgment of the Court of Appeal, and restore the s. 11 certificate order of the Workers' Compensation Board, with costs to the appellant Dr. Singh here and in the courts below.

Accordingly, the petition for judicial review of *Appeal Division Decision #93-1399* was dismissed. The judgment of the British Columbia Court of Appeal, with Mr. Justice Donald's dissenting reasons, is found at [1999] 1 W.W.R. 498, (1998) 52 B.C.L.R. (3d) 98.

A second line of cases applied a different interpretation of the former policies. This new approach was set out in *Appeal Division Decisions #2002-1445* (June 11, 2002), *#2003-0120* (January 20, 2003), and *#2002-3030* (December 2, 2002), and *WCAT Decision #2003-02257* (August 28, 2003). *Appeal Division Decision #2002-1445* found, in paragraph 61, that while the prior approach had been upheld as viable on judicial review, this conclusion rested on the strength of the Board's privative clause rather than constituting agreement by Court with the Appeal Division decision in *Kovach*. *Appeal Division Decision #2002-3030* reasoned (at paragraphs 89-94):

> The historical approach, whereby a treatment injury is recognized as an injury arising out of and in the course of employment for the purposes of section 10, is a long established practice which forms part of this larger scheme of compensation for workers and the rights of potential litigants. As a result, it is a concern that a different interpretation of the *Act* which potentially affects the entitlement of a worker or the immunity provisions may have unintended consequences.

This concern was articulated by the panel in Decision #2002-0607, supra, which decided that any new interpretation of section 10 of the *Act* should be implemented by statutory amendment or policy revision. I consider this a very sound argument given the interrelationships involved and the complexity of the system. The value of consistency in decision making in this area also cannot be overestimated.

On the other hand, it is difficult to arrive at a conclusion that an alleged injury caused by surgery is an injury arising in the course of employment on the basis of any rational analysis that is consistent with principles of compensation law. There is a good deal of similarity between Mr. Justice Tysoe's definition of the phrase "arising out of and in the course of employment" and that of Professor Larson. Both indicate that the fundamental relationship which must be established is one of work causation (to paraphrase Justice Tysoe) or work connection, in the words of Professor Larson. When used as the threshold test for determining entitlement to compensation it is necessary to establish both aspects of the test to some minimal degree. It is conceivable that this phrase could support an alternative interpretation for the purposes of section 10 of the *Act*. But, in the absence of any foundation for an alternate interpretation in compensation law, the *Act* itself, or the policies, such an approach would fly in the face of the most basic rules of statutory interpretation.

In addition, there is substantial authority for the payment of compensation in relation to treatment injuries as compensable consequences and this goes some distance towards addressing the policy considerations raised by Mr. Justice Donald. Given these factors, it is difficult to find any sound basis in the legislation or policies for concluding that an injury allegedly caused by surgery arises in the course of employment. Even if one accepts that something occurred in the course of surgery which could be viewed as an "accident", thereby bringing into play the statutory presumption under section 5(4) of the *Act*, I would find that the presumption was rebutted by the fact of the worker being on a surgical table at the time the accident occurred.

If it is the intent of the legislature and/or the Board that these injuries have the status of injuries arising out of and in the course of employment, clear policy direction, or more likely, statutory amendment may be necessary. In the absence of such direction, I find that the alleged injury arose out of the employment in that there remained a sufficient work connection to establish this aspect of the test; I find, however, that it did not arise in the course of employment.

> In summary, I find that the plaintiff was a worker under Part 1 of the *Act* at the time of surgery but any alleged injuries caused by the surgery did not arise out of and in the course of employment.
>
> [emphasis added]

In *WCAT Decision #2003-02257*, a three member panel followed this second line of analysis. Both lines of analysis noted the lack of clear guidance in policy regarding the status of treatment injuries, and the fact that this issue might be one on which legislative or policy guidance would be helpful.

The status of treatment injuries was identified as a policy issue for the board of directors. A discussion paper concerning this issue was posted on the Board's website for public comment by stakeholders (currently accessible as an archived policy discussion paper at: http://www.worksafebc.com/law_and_policy/archived_information/policy_discussion_papers/default.asp). That paper succinctly outlined the background to this policy issue as follows (with footnotes placed within the text):

> **3.3 How This Issue Arose**
>
> As early as 1980, the WCB, when requested to determine the status of parties to a legal action, routinely characterized treatment injuries as arising out of and in the course of the worker's employment. [Footnote 4: The case *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358 indicates that as early as 1980, the WCB provided certificates to court under section 11 of the *Act* describing treatment injuries as arising out of and in the course of employment. The Appeal Division panel in *Kovach* also noted that the WCB routinely made such determinations.] The Supreme Court of Canada upheld this approach in January 2000 in *Kovach* v. *British Columbia (Workers' Compensation Board)* ("*Kovach*"). [Footnote 5: [2000] 1 S.C.R. 55; 2000 SCC 3.]
>
> In *Kovach*, a worker, who was injured during surgery for a work injury, attempted to sue her treating surgeon for negligence. The former Appeal Division was requested to determine the status of the parties under the *Act* so that the court could then decide whether the statutory bar prevented the worker from suing the surgeon.
>
> The Appeal Division panel in *Kovach* found that the treatment injury arose out of and in the course of the worker's employment. [Footnote 6: Appeal Division Decision No. 93-1399.] As the panel also found that the surgeon was a worker under the *Act*, the ultimate result was that section 10(1) of the *Act* barred the worker from suing the surgeon for negligence.

The Supreme Court of Canada found that the decision of the Appeal Division panel was not patently unreasonable. This means that the Court found that the *Act* supported the Appeal Division panel's decision on the treatment injury in question. It does not mean, however, that the Court necessarily endorsed the approach in *Kovach* as the only interpretation of the *Act*. As a result, subsequent Appeal Division panels found that the Court's decision did not preclude them from adopting alternative approaches to the issues raised in *Kovach*, as long as they were consistent with the *Act*.

In the years following the Court's decision in *Kovach*, two lines of cases emerged from the Appeal Division. One line of cases followed the reasoning in *Kovach*, with the result that a worker could not sue a treatment provider who was either a worker or an employer for treatment injuries.

The second line of cases adopted a different approach, finding that a treatment injury is a compensable consequence of a work injury, but does not arise out of and in the course of employment. The implication of this second line of cases is that the statutory bar to legal action does not apply, leaving the worker with the choice of either suing the treatment provider for negligence or receiving workers' compensation benefits, or possibly pursuing both of these options at once.

A WCAT decision was recently released on this issue. [Footnote 7: WCAT Decision 2003-02257 was issued on August 28, 2003.] The case involved an injured worker who sustained a further injury while travelling to an appointment with a pain management specialist. The worker was injured when the taxi he had just entered was struck from behind by a second taxi. The worker's subsequent injury was compensable. However, the WCAT adopted the second line of reasoning described above, finding that the injury did not arise out of and in the course of employment. As a result, the worker was free to sue the second taxi driver, who was a worker under the *Act*, and the taxi company, which was an employer. As the WCAT is generally not bound by precedent, it is uncertain whether future WCAT panels will also follow this line of reasoning.

As a result of the inconsistent decisions that have emerged from the Appeal Division and the uncertainty about how future WCAT panels will view this issue, the status of treatment injuries is unclear. In particular, it is uncertain whether a worker may elect to sue a treatment provider for negligence, or whether section 10(1) of the *Act* bars legal action against a treatment provider who is either a worker or an employer.

The discussion paper identified three options and invited feedback on these options, or any additional comments, by December 12, 2003.

By resolution dated January 20, 2004, the board of directors approved policy amendments regarding the status of treatment injuries (*Resolution No. 2004/01/20-01*, "Re: The Status of Treatment Injuries", 20 WCR 1, also accessible at: http://www.worksafebc.com/law_and_policy/policy_decision/board_decisions/2004/default.asp). The resolution stated in part:

> THE BOARD OF DIRECTORS RESOLVES THAT:
>
> 1. Amendments to policy items #22.00, #22.10, #22.11, #22.15 and #22.21 of the *RS&CM*, Volume II, attached as Appendix A, are approved and apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury.
>
> 2. Policy item #74.11 is deleted and amendments to policy item #111.10 of the *RS&CM*, Volume II, attached as Appendix B, are approved effective February 1, 2004.
>
> 3. Decision No. 152 of the *Workers' Compensation Reporter*, Volume 2 is retired effective February 1, 2004.
>
> 4. This resolution is effective February 1, 2004.

Policy item #22.00 of Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II) was amended as follows:

> 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 ~~previous~~ **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**.
>
> [reproduced as written]

The new policy had the effect of adopting the approach applied in the *Kovach* decision. Under section 82 of the Act, the board of directors has authority to provide policy direction for the workers' compensation system. Even if the *Kovach* line of analysis represents a strained interpretation of the Act, it has been found by the Courts to be legally viable (not patently unreasonable). Section 251(1) of the Act provides that WCAT may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. In view of the Court decisions in the *Kovach* case, it is clear that the policy direction provided by the board of directors is viable under the Act.

By submission dated April 14, 2005, plaintiff's counsel argues at paragraph 27 that:

> ... there is no evidence that the "board of directors" solicited representations from surgical patients or from disabled workers, such as the Plaintiff. The failure to give notice to the Plaintiff was a breach of the common law rules of natural justice and renders the decision void, certainly of no force and effect in relation to the Plaintiff.

For the purposes of my decision, I do not consider it necessary to determine whether the board of directors had a legal obligation to consult with stakeholders prior to approving policy amendments. Even if such a duty existed, an opportunity for public comment by stakeholders was provided by the Policy and Regulation Development Bureau. I adopt, in any event, the reasoning expressed in the June 2004 *WCAT Decisions #2004-03362, 03429, 03430, 03431* and *03445* (flagged as noteworthy on WCAT's internet site at: http://www.wcat.bc.ca/research/noteworthy_decisions.htm):

> In considering which option to choose, and in ultimately formulating *Resolution 2003/02/11-06*, which adopted option 4, the board of directors needed to weigh the advantages and disadvantages of at least five different options. Those advantages and disadvantages included considering the impact of the options on other employers in the classification system, the problem of cross subsidization of industries, the need to treat employers fairly, the Board's interest in maintaining effective operating systems, and the need to try to adhere to current published Board policy (or at least the spirit of it). Therefore I am satisfied that **the *Resolution 2003/02/11-06*, including its aspect relating to the interim effective date of January 1, 2002 for the new lower assessment rate for resort timeshare employers, was the exercise of a quasi-legislative function (or a policy-making function) by the board of directors. The needs of employers who fell into the new resort timeshare classification were considered by the Board, and those employers were undoubtedly affected by the Resolution. But I find that they did not have, as individual firms, legal procedural rights**

> **requiring the board of directors to engage in a process of direct consultation with each employer or a designated representative of each employer.**
>
> With that in mind, I have found no breach of natural justice or unfairness in the way the Board developed *Resolution 2003/02/11-06*. In the context of its policy-making function, the Board's process for developing the Resolution was reasonable.
>
> [emphasis added]

The January 20, 2004 policy resolution concerning the status of treatment injuries gave rise to a further interpretive issue regarding the wording of its effective date. On the one hand, the resolution stated that it would "apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury." This broad wording would by itself provide clear and unambiguous direction that the policy was not intended to be limited in any fashion, with reference to the date of the original work injury or the further injury. On the other hand, the policy resolution only approved amendments to RSCM II. No amendments to the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) were approved by the board of directors under section 82 of the Act. The scope of Volume II of the RSCM is explained in Chapter 1 of the RSCM II:

> **1.02 Scope of Volume I and Volume II of this Manual**
>
> The *Rehabilitation Services & Claims Manual* was restructured into two volumes to facilitate the implementation of the new benefits policies resulting from the *Amendment Act, 2002*. The new policies were incorporated into Volume II, and the policies in place immediately prior to June 30, 2002 became Volume I. (For policies in effect prior to the Volume I policies, readers are referred to the Board's archives.)
>
> Volume I and Volume II apply to different categories of injured workers and surviving dependants. Whether the benefits for an injured worker are to be determined under Volume I or Volume II depends upon the transitional rules set out in policy item #1.03 below. It is the responsibility of decision-makers to determine whether Volume I or Volume II applies to each case before them. In terms of benefits for the surviving dependants of a deceased worker, the policies in Volume II apply where the worker's death occurred on or after June 30, 2002.
>
> Due to the fact that Volume I covers a finite group of injured workers and surviving dependants, its relevance to the workers' compensation system will gradually decrease over time. It is anticipated that there will be very

> few future amendments to the policies in Volume I. Any major amendments will be listed, for convenience, in the Addendum to Chapter 1 in Volume I.
>
> Volume II includes injuries and deaths occurring on or after June 30, 2002. Its relevance to the workers' compensation system will therefore continue over time. Volume II policies will be subject to amendment from time to time, in the same manner as policies in other policy manuals. Amendments to policies in Volume II will be archived in the Board's records and documented publicly.

This wording was approved by the board of directors on June 17, 2003 (*Resolution 20030617-03*, "Re: Amendments to Chapter 1, Volumes I and II, *Rehabilitation Services & Claims Manual*"), as a clarification of the policies previously approved effective June 30, 2002 and October 16, 2002.

The effect of the application statement in the January 20, 2004 resolution has been considered in three WCAT decisions. *WCAT Decision #2004-01325* dated March 16, 2004 concerned a worker who suffered a work injury in January 2000. She brought a legal action for alleged negligence with respect to the prescribing of a medication in July 2001. The WCAT panel reasoned:

> Any injury suffered by the plaintiff in July 2001 would not be subject to the policies in RSCM 2 revised by the recent resolution. Those revised policies would be applicable to injuries that occurred on or after June 30, 2002, but any July 2001 injury took place almost a year earlier. RSCM 1 would apply to any July 2001 injury.
>
> The resolution did not revise polices in RSCM 1. The versions of #22.00, #22.10, #22.11, #22.15 and #22.21 in that manual continue to be applicable to injuries that occurred before June 30, 2002. Notably, while those polices indicate that an injury arising out of treatment is compensable they do not indicate that the injury arises out of and in the course of employment. Thus the analysis in the recent Appeal Division and WCAT decisions continues to be applicable to the case before me.

Another case concerned an appeal by a worker regarding whether the prednisone administered to him in July 1989 activated his diabetes. *WCAT Decision #2004-02097* dated April 26, 2004 found the worker's diabetes was a compensable consequence of his compensable left wrist injury in 1988. The panel commented in that decision:

> I note that the policies dealing with treatment injuries have been amended recently but I do not consider that those amendments apply to this appeal. On this point I agree with the analysis contained in WCAT Decision #2004-01325-AD which is accessible on the WCAT website.

However, a different interpretation was applied in a third WCAT decision. *WCAT Decision #2004-02972* dated June 3, 2004 concerned a worker who suffered an injury to his tooth on December 27, 1998, while eating food provided by his employer at its "bunkhouse" at a remote mining camp. In an application for a certificate under section 11 of the Act, the WCAT panel found that the worker's initial tooth injury was a compensable work injury. The panel further determined that the worker's dental treatment in 1999 involved a compensable consequence of his work injury. With respect to the applicability of the new policy amendments, the WCAT panel noted:

> The policies concerning "compensable consequences of work injuries" are set out at item #22.00 and following in RSCM I and RSCM II. A note to item #22.00 in RSCM I, now provides as follows:
>
>> For all decisions, including appellate decisions, on or after February 1, 2004 refer to policy item #22.00 of Volume II of this *Manual* regardless of the date of the original work injury or the further injury.
>
> This note is repeated for items #22.10, #22.11, #22.15, and #22.21**. The note itself does not qualify as policy. The amendments to policy to which the note refers are policy.**
>
> [emphasis added]

With respect to the interpretation of the policy amendments, the WCAT panel concluded:

> I consider that I am required to apply the policies as amended effective February 1, 2004 and quoted at some length immediately above. The matter of which volume applies is a matter dictated by the policies themselves. I do not consider the fact that the amended policies appear in RSCM II to be of determinative significance. The resolution is clear that the amendments were intended to apply to all decisions including those of this body made after February 1, 2004.

By submission dated April 14, 2005, plaintiff's counsel objects both to the application of the reasoning in *WCAT Decision #2004-02972*, and to the application of the new policy, to this case (at paragraphs 25-26):

> ... the Plaintiff was **not** asked to vote upon, nor consent to, the revised RSCM #22.00. Nor were disabled workers, in general, as alleged "stakeholders", consulted or allowed voting privileges. Furthermore, that policy does not apply because it came into effect almost 3.5 years **after** the cause of injury arose and almost 3 years after the Writ was filed.
>
> ... the *Workers Compensation Act*, even the amended version, does **not** require nor authorize the retroactive or retrospective application of the statute nor of WCB policies; #22.00 does **not** state that it applies to medical treatment or surgery, conducted in 2000. And the Plaintiff was not a "party" to WCAT-2004-02972-AD. Furthermore, the *Act* explicitly provides that there is no system of legal precedent. Finally, the said "Appeal Tribunal" erred, in law, in general, and in **not** providing procedural due process notice to the Plaintiff, whose claim was already pending, on the Defendant's application, before the WCAT. WCAT knew, or ought to have known, that the Plaintiff's rights would be affected, prejudicially, by any adverse ruling in said case and notice should have been provided so that the Plaintiff could participate, as an intervenor or interested party, in WCAT-2004-02972-AD.
>
> [emphasis in original]

None of the WCAT decisions cited above were by precedent panels appointed under section 238(6) of the Act. Accordingly, there is no WCAT precedent panel decision binding on my consideration pursuant to section 250(3) of the Act. The applicable provisions are subsections 250(1) and (2), which provide:

> **250** (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.
>
> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

As the various Appeal Division and WCAT decisions are publicly accessible, and the parties have had the opportunity to comment on them, I find no breach of procedural fairness in relation to the fact the plaintiff was not invited to participate in relation to the making of *WCAT Decision #2004-02972* dated June 3, 2004. In any event, there are competing interpretations expressed in the three prior WCAT decisions.

As stated in *WCAT Decision #2004-02972* , the notes inserted in RSCM I referring readers to RSCM II do not constitute policy. In board of directors' *Resolution No. 2003/02/11-04*, "Policies of the Board of Directors", February 11, 2003, published at

19 WCR 1 (accessible at: http://www.worksafebc.com/publications/wc_reporter/default.asp), the board of directors established the published policies of the board of directors effective February 11, 2003. The bylaw states, in part:

> 1.0 Policies of the Directors
>
> 1.1 As of February 11, 2003, the policies of the Directors consist of the following:
>
> (d) The *Rehabilitation Services & Claims Manual* Volume I and Volume II, except statements under the headings "Background" and "Practice" and explanatory material at the end of each Item appearing in the new manual format;

The comments included in the RSCM I and II regarding the "effective dates" of policy amendments, provided at the end of each item appearing in the new manual format, are not part of the policies approved by the board of directors. This explanatory material is inserted by the Board. Such notes may be viewed as flags regarding the existence of policy resolutions containing policy amendments, or as practice direction from the Board's administration concerning its interpretation of the effective dates provided in policy resolutions. In either case, such notes do not have the status of policy.

Thus, *WCAT Decision #2004-01325* gave meaning to the aspect of the board of directors' policy resolution which approved policy changes only to RSCM II. However, *WCAT Decision #2004-02972* took the plain wording of the policy regarding its effective date as determinative, rather than attaching significance to which volume of the RSCM contained the amendment. I consider that there is validity to both approaches. It is unfortunate that the policy resolution which was intended to provide clarity for the workers' compensation system regarding the status of treatment injuries itself contained an ambiguity regarding its effective date.

As a question of legal interpretation of the literal wording of the application statement, I would not disagree with the analysis set out in *WCAT Decision #2004-01325*. It is evident that the panel, in considering the effect of the policy amendment, sought to give meaning to each part of the wording of the policy. The fact that the policy amendment was limited to RSCM II was read as a limitation on the more general wording of the policy regarding its effective date. This approach was supported by the policy concerning the scope of the RSCM II. If it was intended that the policies in the RSCM II would also apply to cases in which the injury occurred prior to June 30, 2002, this would seem inconsistent with the policy concerning the scope of the RSCM II.

Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 provides:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The principles governing statutory interpretation may also be applied in relation to the interpretation of policy, subject to the provisions of the Act. It is evident that the status of treatment injuries was addressed as a policy issue by the board of directors for the purpose of providing clarity for the workers' compensation system, in connection with the two lines of analysis (i.e. as represented by the *Kovach* decision, and the different approach which was first expressed in *Appeal Division Decision #2002-1445* dated June 11, 2002). The approach set out in *Kovach* was one which was followed by the Appeal Division in decisions between 1992 and 2002. A similar approach had apparently been previously applied by the former commissioners. The new approach, expressed in decisions between June 2002 to August 2003, was implicitly rejected by the board of directors in their provision of policy direction for the workers' compensation system. By policy amendment, the board of directors confirmed the longstanding approach illustrated by the *Kovach* decision.

Even if the board of directors' resolution is subject to the limitation identified in *WCAT Decision #2004-01325*, this would make the new policies effective from June 30, 2002. The prior policies of the board of governors (and panel of administrators) were interpreted as having similar effect during the preceding decade. The new approach articulated in June 2002 was not adopted by the policy-makers when the question as to the status of treatment injuries came to them for direction.

The Appeal Division and WCAT decisions issued prior to the policy amendments concerning the status of treatment injuries were provided in the context of ambiguous policies. Both interpretations were legally viable. Even if I treat the February 1, 2004 policy amendments as not binding on my consideration, the fact remains that the policy makers have resolved the ambiguity in the policies in a direction which restored the approach set out in *Kovach*. The alternative analysis expressed in *Appeal Division Decision #2002-1445* has not been adopted by the policy-makers. Given the knowledge that this alternative approach was rejected in its infancy, it seems to me that the interests of consistency in decision-making favour an application of the same interpretation of the former policies as was expressed in *Kovach*. Viewing the matter broadly, and from a purposive perspective, I consider that I should apply the same interpretation to the former policies as was applied in Appeal Division decisions up to June 2002 (and which was expressly adopted as policy of the board of directors from at least June 30, 2002).

Accordingly, I consider that my decision should be the same whether I apply the *Kovach* approach in making my decision under the former policies, or apply the new policies as

was done in *WCAT Decision #2004-02972*. This has the benefit of giving effect to the apparent intent of the policy-makers that the new policy would apply to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury.

It is not evident to me as to why the policy changes were limited to RSCM II. It may be that it was perceived that this would be sufficient, as this reached back almost to the date the first Appeal Division decision took a different approach. Alternatively, it may be that it was not recognized that there would still be cases awaiting consideration involving treatment injuries prior to June 30, 2002. It may also be that there was an intention to try to restrict policy changes to RSCM II, to minimize the complexity created by amendments to RSCM I. Whatever the reason, this created an ambiguity which could have been avoided by making the policy change to RSCM I and II, or by some other means to avoid the logical inference created by the related policy concerning the scope of RSCM II. That said, I am inclined to consider that if the policy-makers had intended to limit the new policy to cases in which either the work injury, or treatment injury, occurred on or after June 30, 2002, they would likely have said so directly in the application statement rather than leaving this to be inferred from amending RSCM II alone.

Assuming that the new policy was intended to be applied on a fully "retroactive" basis, the question may be posed as to whether the board of directors has authority to approve retroactive policies. I find, however, that this situation is analogous to the one addressed by the Alberta Court of Queen's Bench decision in *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, [2001] 10 W.W.R. 651, (2001) 34 Admin. L.R. (3d) 289, July 23, 2001. In the context of both the common law and statutory provisions in Alberta, the court reasoned:

> 67 Based on the general presumption against the retroactivity of subordinate legislation, and based on the distinction that the statute appears to draw between various types of decision-making mechanisms, I am not satisfied that s. 149.2 authorizes the Board to pass policies retroactively. Parties such as the Applicant are entitled to know the law in force at the time that they make decisions about their business. Generally, they should be entitled to assume that the effect of decisions made by them will not be reversed retroactively by legislation, unless that is expressly authorized by the statute. This is particularly so with respect to the Board's assessment policies. While the assessments are not a true tax, they are a compulsory statutory levy, and assessment policies should not be applied retroactively. It is unlikely that the Lieutenant Governor in Council has a general power to make retroactive regulations under s. 147, and it is unlikely that it was intended that for Board to have a wider power.

> I am accordingly not satisfied that the Board has any general authority to make retroactive policies. The question is therefore whether the Board or the Appeals Commission did in fact apply the policy retroactively, or whether there is any specific power to enact the labour pooling policy retroactively.
>
> [reproduced as written]

Following a review of the background materials, the Court found as follows:

> 70 This memorandum and the accompanying resolution make it clear that the Board did not regard the "pooling of labour" policy as it was defined in 1997 to be a new policy. The added provisions were intended merely to clarify a policy that the Board believed had been in force since 1982. The added provisions were merely to clarify some uncertainty that had arisen about the application of the policy. This decision about the scope of an existing policy is clearly one that is within the core jurisdiction of the Board, and it would be entitled to significant curial deference. The underlying assumption that the policy had been in place since 1981 can be rationally supported by the material before the Board, and is not patently unreasonable.

I find that the January 20, 2004 policy amendments by the board of directors regarding the status of treatment injuries were of similar effect, in clarifying an uncertainty that had arisen about the application of the former policy. The board of directors in effect confirmed the longstanding approach illustrated by the *Kovach* decision, as the approach to be applied in future decision-making effective February 1, 2004. The Alberta Court of Queen's Bench concluded that policy amendments aimed at clarifying and confirming the effect of a prior policy as it had been previously understood, did not offend the presumption against retroactivity. I find that the January 20, 2004 policy amendments were within the authority of the board of directors.

In making my decision, I have taken into account section 42 of the transitional provisions contained in Part 2 of Bill 63. As this application to the Appeal Division for a certificate under the former section 11 is being completed by WCAT under section 39 of the transitional provisions, section 42 provides that as may be necessary for the purposes of applying sections 250(2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38(1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors. I do not consider that this transitional provision has the effect of making the February 1, 2004 policy amendments inapplicable. While for the most part the policies to be applied in this determination are the policies which were in effect at the time the cause of action

arose (see *WCAT Decision No. 2005-02939*), I find that it was open to the board of directors to clarify the policies on a retroactive basis.

For the reasons set out above, I find that the plaintiff was a worker within the meaning of Part 1 of the Act, and any further injury suffered by the plaintiff as a result of negligence in his medical treatment and surgery for his left knee in or around October, 2000, arose out of and in the course of his employment. My decision is the same whether I treat the February 1, 2004 policy amendments as applicable, or whether I make my decision under the former policies. In the latter case, I consider it appropriate to take into account the fact that the alternate analysis expressed in *Appeal Division Decision #2002-1445* and following, was ultimately not adopted by the policy makers. In the interest of consistency, I follow the interpretation applied in various Appeal Division decisions prior to June 2002, which has been expressly adopted as policy from at least June 30, 2002.

Status of the Defendant

The defendant, Dr. James C. Rose, has provided an affidavit sworn on February 16, 2005. He is an orthopaedic surgeon, licensed to practice in British Columbia. He provided treatment to the plaintiff between December 9, 1999 and February 21, 2001. Dr. Rose's office was at the Gateway Medical Building. He saw the plaintiff at his office at Gateway Medical Building, except on October 19, 2000 when he performed the total knee replacement surgery on the plaintiff. This surgery was performed at the Abbotsford MSA Hospital. Dr. Rose had one employee (not his spouse), who was his medical office assistant. Dr. Rose was registered with the Board as a private medical practice under registration number 575168 and paid assessments to the Board.

By memos of July 7, 2004 and October 15, 2004 (incorrectly dated as 2003), the Assessment Department confirmed Dr. Rose's registration as an employer effective September 23, 1996, under account #575168. The policy manager, Assessment Department, advised this was an active account to the date of his July 7, 2004 memo. I accept this evidence as correct. I find that Dr. Rose's affidavit, and the Assessment Department memos, provide sufficient evidence to establish that Dr. Rose was an employer at the time the cause of action arose.

Dr. Rose did not purchase Personal Optional Protection coverage for himself. If Dr. Rose had suffered an injury at work, he would not have been eligible to claim workers' compensation benefits.

Prior to January 1, 1994, the practice of medicine was not a compulsory industry listed in Schedule A to Part 1 of the Act. Effective January 1, 1994, pursuant to Bill 63, the *Workers Compensation Amendment Act, 1993*, section 2(1) of the Act was amended to

apply "to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the Board."

Section 2(2) further provided that the board may direct that Part 1 of the Act applied on the terms specified in the board's direction:

> (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or
>
> (b) to an employer as though the employer was a worker.

Section 10(9) of the Act provided:

> For the purpose of this section, "worker" includes an employer admitted under section 2(2).

Section 1 of the Act included within the definition of the term "worker":

> an independent operator admitted by the board under section 2(2).

Pursuant to sections 1 and 10(9) of the Act, an independent operator or an employer who registered with the Board and obtained Personal Optional Protection coverage under section 2(2) was considered a worker within the meaning of Part 1 of the Act.

Governors' policy at No. 20:30:20 of the *Assessment Policy Manual* provided:

> Where an independent firm is an employer, registration with the Board is <u>mandatory</u>. Partners or proprietors are not automatically covered unless Personal Optional Protection is in effect.
>
> [emphasis in original]

Governors' policy at 20:50:10 of the *Assessment Policy Manual* further provided:

> Personal Optional Protection coverage allows those individuals not automatically covered under the Act to obtain compensation coverage if desired. The following individuals must apply for Personal Optional Protection to be covered for compensation:
>
> 1. A proprietor of a business where it is not a limited company. . . .
>
> 2. Partners of a business where it is not a limited company.

Under the policies at *No. 20:30:20* and *No. 20:50:10*, a proprietor or partner was not eligible for workers' compensation coverage for any injury or disease he might suffer as a result of his work activities unless he had personal optional protection coverage. While Dr. Rose was registered with the Board as an employer, he did not elect to purchase Personal Optional Protection coverage. Thus, his status under the Act was only that of an employer, rather than that of a worker.

Two lines of analysis have developed in regard to such situations. *Appeal Division Decision #93-0670*, "Medical Malpractice Action (No. 1)", 9 WCR 731 (*Cesari*) concerned a doctor who had voluntarily registered with the workers' compensation board as an employer, but did not obtain personal optional protection. An action was brought for medical malpractice in relation to surgery performed on August 12, 1988. The panel reasoned in that decision (at pp. 732-733):

> The practice of medicine, on its own, is not a compulsory industry within Part 1 of the *Act*. It is included only on application. When an unincorporated private doctor's office is brought within Part 1 of the *Act* on application, no assessments are paid on the doctor's wages. That would be done only if the doctor took out Personal Optional Protection.
>
> The employment activities of the office staff of a doctor's office would not include attending at operations at the hospital. The office staff would be concerned with the management of the office, the booking of appointments, accounting matters, etc. Those workers would be covered for compensation benefits for any injuries arising out of and in the course of that employment and their employer would be protected under Section 10(1) from any legal action based on those employment activities. Those activities define the employment relationship and "employment" for the purposes of Part 1 of the *Act* for the doctor's office.
>
> Here, none of the workers of Dr. Ellis's medical office were engaged in attending to Mr. Cesari at the hospital. Dr. Ellis was not attending there as a worker, as he was not a worker under Part 1 of the *Act*. Assessments were not paid on his earnings for attending to Mr. Cesari. He would not have been covered for compensation benefits if he had been injured while attending to Mr. Cesari. I cannot see how this comes within the employment relationship or "employment" within Part 1 of the *Act*. Dr. Ellis declined to bring his activities into "employment" under Part 1 of the *Act* by not taking out Personal Optional Protection.

> As he did not take out Personal Optional Protection to cover himself while engaged in those activities, I find that Dr. Ellis was not in the course of employment within the scope of Part 1 of the *Act* while attending to Mr. Cesari at the hospital.

Plaintiff's counsel similarly argues (paragraph 37, April 14, 2005) that the defendant's assessments paid only for the risks incurred by employing his medical office assistant "(and himself) – in an office, for office work – not for the risks incurred by operating on any patients."

That reasoning was followed in *Appeal Division Decision #98-0728* dated May 12, 1998. However, this approach not followed in *Appeal Division Decision #2001-2240* dated November 9, 2001, "Section 11 Determination (Craig Sidney Parker v. Ravinderjit Singh Kandola and Yellow Cab Company Ltd.)", 18 WCR 71. The *Kandola* decision concerned a taxi owner, who registered with the Board as an employer for his workers, but did not have Personal Optional Protection at the time of a motor vehicle accident. Kandola was driving the cab at the time of the accident. In *Kandola*, the panel critiqued the reasoning in *Cesari*, reasoning in part (at paragraphs 41-43):

> On its face, the definition of "employment" in Section 1 does not distinguish "employment" for workers or employers. For compensation purposes, the published policy is that coverage extends beyond the "work" for which the person is being paid. Item #14.00, R.S.C.M., provides:
>
> > Confusion often occurs between the term "work" and the term "employment". Whereas the statutory requirement is that the injury arise out of and in the course of employment, it is often urged that a claim should be disallowed because the injury is not work related or did not occur in the course of productive activity. There are, however, activities within the employment relationship which would not normally be considered as work or in any way productive. For example, there is the worker's drawing of pay. An injury in the course of such activity is compensable in the same way as an injury in the course of productive work.
>
> The *Cesari* decision would not apply the broad definition of "employment" articulated in the policy to employers seeking protection from suit. To the contrary, the person who is at the centre of the business activity, perhaps the only one whose effort generates the revenue and makes possible the jobs of the support staff, is not acting in the course of employment when doing the productive work at the core of the business plan.

> The fact that the employer fully funds the assessments on its workers' earnings is not mentioned in the *Cesari* decision, even though payment of assessments could be seen as the cost to employers for protection from suit.

The Appeal Division panel concluded that Kandola's action or conduct (in driving the taxi), alleged to have caused the breach of duty, arose out of and in the course of employment within the scope of this Part. He was an employer, meeting his obligations as an employer by paying assessments on his workers' earnings to the Board. His not having Personal Optional Protection did not affect his status as an employer.

Similar issues were recently addressed in *WCAT Decision #2005-01937* dated April 18, 2005 (*Siefred*). That decision was disclosed to the parties for comment on April 19, 2005. In *Seifred*, the panel considered the status of a dump truck driver, who registered with the Board and paid assessments for his casual employees. He did not have personal optional protection coverage, and did not have any employees on the date of the accident. The panel reasoned:

> The approach in Kandola requires a determination of whether the employer was conducting business activities as opposed to personal or other non-business activities when the impugned conduct occurred, whereas the approach in Cesari requires consideration of whether the employer was engaged in conduct related to the activities of the workers upon which assessments have been paid.
>
> On the whole, I find the reasoning of the panel in Kandola more persuasive than that in Cesari. I do not consider that the failure to purchase POP [Personal Optional Protection] is a significant factor when considering questions related to status as an employer. The consequence of failing to purchase POP is that an employer is not entitled to compensation if injured while working. I have found no policy, however, to support a conclusion that the failure to purchase POP has an impact on a party's status as employer.
>
> I also find that the facts in this case reveal some of the practical difficulties associated with the application of the reasoning in the Cesari case. In that case, the panel said that the registration of any firm concerns the employment activities of its workers and therefore the scope of employment activities for the surgeon *qua* employer was confined to the activities he performed in his role as an employer. Accordingly, the surgeon was only protected under section 10 for activities related to the management of his office staff. Since the conduct that formed the basis of

the legal action against him was his conduct as a surgeon he was not protected from legal action.

That analysis seems appropriate and reasonable in relation to those facts because of the clear separation between the surgeon's role in relation to the office staff and his activities as a surgeon. It seems reasonable to treat his activities in relation to his office staff as employment activities and his activities in surgery as a realm of activity unrelated to his functions as an employer of office staff. On the other hand, there would be no reason to have office staff other than to support his activities as a surgeon and his activities as a surgeon financed the operation of the office and paid the wages of his staff. So, if the surgical practice is viewed as a whole with very different but interdependent parts, it is more difficult to carve out those activities which would attract the benefit of the bar as an employer's employment activities and those that would not.

The line of reasoning in Cesari becomes even more problematic when applied to a case where the employer performs the same work as his employees. On what basis does one delineate those activities which are his employment activities as an employer? Would the employer only have the benefit of the bar when completing paperwork? Or, perhaps he would have coverage while negotiating a bank loan or purchasing new equipment. If it extended to purchasing new equipment would that be limited to situations where his employees would be using the equipment? Would he have coverage if he purchased equipment that only he would be using? Would he have coverage when taking equipment in for servicing? Would it make a difference if it was equipment used only by him?

No principles have been articulated to assist in characterizing a particular activity for this purpose. There are numerous policies to assist in defining the parameters of employment activities for workers but these are not relevant to determining the employment activities of an employer. In the absence of any principles or guidelines, I do not consider it viable to embark on a task of carving out a set of duties or tasks that constitute an employer's employment activities for the purpose of obtaining the benefit of the bar.

In view of all of the above, I consider that the term "employment activities" in section 10(1) is intended to include an employer's activities in relation to his business as a whole as distinct from his personal activities. Since the defendant was driving a dump truck used by his business when the accident occurred and he was on his way to have the dump truck

> serviced, I find that his conduct at the time of the accident arose out of and in the course of his employment.

Although dealing with somewhat different aspects of this issue, various Court decisions have upheld tribunal decisions which found that an employer's action or conduct could not be divided into different roles, or overturned tribunal decisions which recognized such distinctions.

(a) *Pasiechnyk v. Saskatchewan* (W.C.B.), [1997] 2 S.C.R. 890, (1997) 149 D.L.R. (4th) 577, [1997] 8 W.W.R. 517.

This case arose out of a crane collapse at a construction site, killing two workers and injuring four others. A legal action was brought alleging, among other things, negligence by the government of Saskatchewan for breach of its duties under the *Occupational Health and Safety Act*. With respect to the status of the provincial government, the Saskatchewan Workers' Compensation Board considered two questions: is the defendant an employer within the meaning of the Act; and, if so, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged. The Board found that both questions should be answered in the affirmative, and concluded that the legal action was barred. The Board gave three reasons for rejecting the "dual capacity" theory advanced by the respondents: first, it did not recognize that the government, Procrane and SaskPower were corporations and could therefore only act through their employees. Thus, they were really being sued in their capacity as employers. Second, the statute bars "all" rights of action in which workers are injured in the course of employment, with no exception for actions based solely on non-employment grounds. Third, this doctrine would allow injured workers to bring actions against their employers on some other ground of liability, thereby defeating the intention of workers' compensation legislation.

Upon judicial review, the Saskatchewan Court of Appeal allowed an appeal on the basis of the "dual capacity" theory, which divided the role of the government in accordance with its public and private duties [1995] 7 W.W.R. 1. The Court of Appeal held that the government was only protected from claims in liability in its capacity as employer and not as regulator. The Court of Appeal found that the Board erred in failing to find that the government was acting in its capacity as regulator at the time of the accident.

The majority of the Supreme Court of Canada allowed an appeal by the Saskatchewan government, finding that the Board's decision (that the legal action was barred) was not patently unreasonable.

(b) *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (WCAT)*, (2001) 200 D.L.R. (4th) 504

A worker was injured in a workplace accident for which he received workers' compensation benefits. His injury required treatment by a number of doctors at the Queen Elizabeth II Health Sciences Centre as well as by other medical personnel. The worker thought that they had treated him negligently and wished to sue. Under the Nova Scotia *Workers Compensation Act* and *Regulations*, the operation of hospitals was included in the workers' compensation scheme, but the following industries were expressly excluded from the operation of the Act: "educational institutions, surgical medical, veterinary work and dental surgery." The Nova Scotia WCAT panel found that the term "surgical medical" referred to the provision of medical treatment by medical professionals to patients generally, and not solely to "surgery." It found the worker's legal action was not barred.

Section 256(1) of the Nova Scotia *Workers Compensation Act*, provided for a right of appeal to the Nova Scotia Court of Appeal on any question as to WCAT's jurisdiction or on any question of law. On appeal, the Court of Appeal reversed the WCAT decision, reasoning as follows:

> 38 In the present case, WCAT's decision is that an employer may be subject to the Act in general terms and, at the same time, not subject to the Act on a case by case basis for the purposes of the bar of civil actions. Whether the employer is subject to the Act in particular cases will depend, in the Tribunal's view, on the nature of the activities of the employer's servant and agents which give rise to a cause of action. As the Tribunal put it, "... the term "surgical medical" ... applies to the activities [i.e. of the medical professionals] which gave rise to the applicant's cause of action" and thereby "... carve[s] out an aspect of the operation of hospitals that is not covered by the Act ... on the facts of this case."
>
> 39 In my respectful view, this is an interpretation of the relevant legislation that is not reasonably attributable to the words. Three reasons compel this conclusion. First, WCAT's interpretation makes the Act unworkable. Second, it unreasonably confuses the questions of whether an employee is a worker within the meaning of the Act with the question of whether an employer is subject to the Act. Third, it is fundamentally at odds with a core principle - the historic trade-off - of the workers' compensation scheme. I will address each of these points in turn.
>
> 40 The bar to a civil action established by s. 28(1)(b) applies to workers' actions against employers who are "subject to this Part". However, whether an employer is "subject to this Part" is not

defined by the legislation uniquely for the purposes of the bar of civil actions; it is defined in the same way for all of the many purposes under the Act for which this is a relevant consideration. The question of whether an employer is subject to the Act is fundamental, not only to the bar of actions, but to the operation of the Act in general. It is a determination made on the basis of a single set of provisions, that relates not only to whether a particular civil action is barred, but to a host of other determinations under the Act.

41 Whether or not an employer is subject to the Act relates to whether an employer has a duty to report an accident (s. 86(1) and s. 2(n) of the Act) as well as to the many other duties of such employers set out in ss. 88, 90 to 92, 97 and 98. It determines whether an employer is liable to contribute to the accident fund (s. 115) and has the duties associated therewith (see, e.g. s. 129).

42 It follows that the question of whether an employer is "subject to this Part" cannot depend, as WCAT concluded that it does, on a case by case analysis of the actions of an employer's servants or agents on a particular occasion which gave rise to a cause of action. It is not possible for the many other provisions in the Act whose operation depends on whether an employer is subject to the Act, to have any sensible operation if, as WCAT decided, an employer may, at the same time, be both subject and not subject to the Act. In other words, WCAT's interpretation is patently unreasonable viewed in the context of the Act as a whole.

43 This interpretation is also unreasonable when the relevant provisions are examined in isolation from the rest of the Act. The Regulations deal with included and excluded "employers ... engaged in, about or in connection with the ... industries" set out in Appendix A and section 2 thereof. The structure of s. 3 of the Act and of ss. 2 and 3 of the Regulations makes it clear, in my view, that an employer is either included or excluded and cannot be both. These provisions define included and excluded employers for all purposes under the Act. This requires a characterization of the employer as one or the other for all purposes. WCAT, instead, attempted to fit the employer into both categories by examining the particular activity giving rise to the particular cause of action and "carving out" an aspect of the employer's activity on a case by case basis. With respect, this approach, as well as its result, appear to me to be unreasonable.

> 44 Again with respect, WCAT unreasonably confused the question of whether a servant or agent is covered by the Act with the question of whether an employer is subject to the Act. The provisions deal with both issues. But the inclusion or exclusion of an employer does not depend on whether its servants or agents, whose activities gave rise to a particular cause of action, are workers (and therefore covered) within the meaning of the Act. The statute clearly distinguishes between workers (who are covered by the Act) and the broader class of servants and agents (who may not be). An employer may have servants and agents who are not workers covered by the Act but that does not mean that their employer is not subject to the Act.
>
> 45 WCAT confused these two issues. It noted that, in Nova Scotia, medical professionals have never been included in the workers' compensation scheme (With this no issue is taken on appeal). WCAT then reasoned that if the hospital has servants or agents who are medical professionals and, therefore, who are not workers under the Act, there must be an "aspect of the operation of hospitals" that is not covered by the Act. This is an unreasonable interpretation. The fact that certain servants and agents of an employer may not be workers subject to the Act because they are engaged in surgical medical activities does not affect the classification of the employer as being subject to the Act if it is covered precisely by the legislation's list of inclusions. It is hard to imagine how a hospital could be more precisely included than by the words "operation of hospitals" used in the governing provision.
>
> [reproduced as written]

(c) *Fry v. Kelly* [1994] N. J. 373, (1994) 127 Nfld. & P.E.I.R. 260

Both the *Kandola* decision, and *WCAT Decision #2005-01937*, cited the decision of the Newfoundland Supreme Court – Trial Division, in *Fry v. Kelly*. Fry's business involved the delivery of mail under contract with Canada Post. He had one employee, and applied to the Workers' Compensation Commission of Newfoundland and Labrador for coverage for this employee. His operation as an employer was assessed on a payroll that included only the income of this employee. Fry did not apply for personal coverage as he might have. Fry was involved in a motor vehicle accident. The Commission ruled that Fry was not immune from suit, for reasons similar to those expressed in *Cesari*.

The Newfoundland *Workers Compensation Act* provided for an appeal to the Court from a decision of the Commission involving any question of law or of mixed fact and law (section 38(1)). On appeal, the Court reversed the Commission's decision, reasoning:

> 21 In this case the Commission was unwilling to apply Section 12 in respect of torts committed by an employer in the course of his business. Does Section 12 support this view. [*sic*] Section 12(1) provided:
>
> > .... neither the workman, his personal representative, his dependents nor the employer of the workman has any right of action in respect of the accident against an employer in any industry within the scope of this Part or against any workman of that employer unless the accident occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer;
>
> 22 The plain language of the Section prohibits action against an employer unless the accident occurred outside the normal course of his business. In this case the accident occurred within the normal course of his business.
>
> 23 I do not consider this interpretation to lead to an absurd result. Immunity is granted as part of an overall no-fault insurance scheme funded by employers to cover accidents occurring in the course of business. (Lee v. Spence; and see Reference re Sections 32 and 34 of The Workers' Compensation Act (Nfld) (1987) 67 Nfld. & P.E.I.R. 67 (Nfld. C.A.)). The Decision would carve out an exception to this statutory scheme for unincorporated employers.
>
> Conclusion
>
> 24 Accordingly I will grant the requested Order reversing the Decision and substituting therefore an Order that the Respondents "are precluded from bringing the within action against the Appellant by virtue of Section 12(1) of the Act.

(d) *Lindsay v. Saskatchewan (Workers' Compensation Board)* [1998] 4 W.W.R. 436

The plaintiff received workers' compensation benefits for an injury to his lungs due to a mining accident. One doctor recommended a biopsy and this was performed by a second doctor. The plaintiff suffered further injury when the physician, while performing a biopsy of the plaintiff's lungs, accidentally severed one or more nerves.

The Saskatchewan Board ruled that the plaintiff's claim for medical malpractice was barred. The plaintiff brought an application to quash the Board's decision. With respect to the status of the doctors, the Saskatchewan Court of Queen's Bench reasoned:

> 19 The remaining question is whether the doctors are employers. Reference must again be made to Dr. Patel's M.W.W. Agreement, and Dr. Ofiesh's CVT Agreement. The Compensation Board pointed out at paragraphs 7 and 8 of its decision that both these management companies pay assessments to the Board on behalf of their members. I think that each of these agreements can be fairly interpreted to mean that each doctor is the employer of the staff in the doctor's office, and that the company in each case is simply an agent of each doctor. While the agents pay the Compensation Board assessments in respect of the staff of each office, the doctors must reimburse the agents for such payments. In my view, both doctors, as well as the management companies with which they are associated, are engaged in the medical services industry.
>
> 20 At paragraph 6 of Pasiechnyk, Sopinka J. stated:
>
> > . . . if the question of law at issue is within the tribunal's jurisdiction it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review.
>
> In deciding that the doctors are employers and thus barring the plaintiff's action against them, I cannot find that the Compensation Board erred in a patently unreasonable manner, especially when the Compensation Board is competent to answer a question and in doing so may make errors without being subject to judicial review. As pointed out in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at 778-9, there are many things that are clearly wrong but not patently unreasonable. However, I consider the Compensation Board's decision to be correct.
>
> [emphasis in original]

An appeal from this decision was denied by the Supreme Court of Canada on January 20, 2000 [2001] 1 S.C.R. 59, (2000) 184 D.L.R. (4th) 431.

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.

Conclusion

I find that at the time of the plaintiff's medical treatment and surgery on or about October 19, 2000:

(a) the plaintiff, John Welch, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, John Welch, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(c) the defendant, Dr. James C. Rose, was an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(d) any action or conduct of the defendant, Dr. James C. Rose, 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.

Herb Morton
Vice Chair

HM:gw

NO. S011323
VANCOUVER REGISTRY

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:

JOHN WELCH

PLAINTIFF

AND:

DR. JAMES C. ROSE

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, JOHN WELCH, in this action for a determination pursuant to Section 11 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 Board;

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;

- 1 -

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, on or about October 19, 2000:

1. The Plaintiff, JOHN WELCH, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, JOHN WELCH, 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. JAMES C. ROSE, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

4. Any action or conduct of the Defendant, DR. JAMES C. ROSE, 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 August, 2005.

____

Herb Morton
VICE CHAIR

NO. S011323
VANCOUVER REGISTRY

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:

JOHN WELCH

PLAINTIFF

AND:

DR. JAMES C. ROSE

DEFENDANT

SECTION 11 CERTIFICATE

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