BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
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WCAT Decision Number: **WCAT-2006-01747**
WCAT Decision Date: **April 20, 2006**

Panel: Herb Morton, Vice Chair

WCAT Reference Number: **051331-A**

Section 257 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 03 4816
Myra Simpson v. Dr. Stuart Silver, Dr. Stuart Silver Inc., Carmel Louie, Jaqueline Agate, Dr. Sam Stewart, Dr. Sam Stewart Inc., Dr. Robert Koopmans, Capital Health Region, carrying on the operation of hospital under the name of Victoria General Hospital, Victoria Hospital Society carrying on the operation of hospital under the name of Victoria General Hospital, Vancouver Island Health Authority carrying on the operation of hospital under the name of Victoria General Hospital and Victoria General Hospital

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Applicants:	Dr. Stuart Silver, Dr. Stuart Silver Inc., Dr. Sam Stewart, Dr. Sam Stewart Inc., and Dr. Robert Koopmans ("defendants") Vancouver Island Health Authority, Carmel Louie and Jaqueline Agate ("defendants")
Respondent:	Myra Simpson (the "plaintiff")
Interested Person:	Provincial Government of British Columbia, dba Oak Bay Lodge
Representatives:	
For Applicants: Dr. Stuart Silver, Dr. Stuart Silver Inc., Dr. Sam Stewart, Dr. Sam Stewart Inc., and Dr. Robert Koopmans	Alison W. Bruneau HARPER GREY LLP
Vancouver Island Health Authority, Carmel Louie and Jaqueline Agate	David J. Bell GUILD, YULE and COMPANY LLP
For Respondent:	Robert Isbister HORNE COUPAR
For Interested Person:	Marli F. Rusen HEENAN BLAIKIE LLP

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Noteworthy Decision Summary

Decision: WCAT-2006-01747 **Panel**: Herb Morton **Decision Date:** April 20, 2006

Determination under section 257 of Workers Compensation Act (Act) – Medical staff administering treatment to worker – Item #22.10 of the Rehabilitation Services and Claims Manual – Distinction between medical investigation and treatment – Status of parties at time of medical treatment – Responsible principal of an unregistered employer Whether unregistered employer an employer for purposes of section 10 of the Act – Item #20:30:30 of the Assessment Policy Manual – Decision No. 169

- For the purposes of item #22.10 of the *Rehabilitation Services and Claims Manual* (RSCM), entitled "Further Injury or Increased Disablement Resulting from Treatment", it is not appropriate to distinguish between medical investigation and medical treatment.

- Item #20:30:30 of the *Assessment Policy Manual* (APM) does not merely prevent the payment of a claim for compensation by the responsible principal of an unregistered company, but also concerns their status under the *Workers Compensation Act* (Act). As such, the policy applies equally to a plaintiff or a defendant.

The worker, a health care worker, injured her low back. The Workers Compensation Board operating as WorkSafeBC (Board) accepted her claim for compensation. A few years later the worker returned to work for the purposes of a "work assessment" and injured her back again. Subsequently, during a lumbar myelogram, the worker suffered a severe adverse reaction when an incorrect solution was injected into her lumbar spine. The worker brought a lawsuit against a number of doctors, medical staff and medical institutions for damages arising from the procedure. A number of the defendants requested from WCAT a determination under section 257 of the Act as to the status of the parties to the lawsuit as at the time of the treatment. The first issue was whether the plaintiff was a worker at the time of the treatment and whether the injury resulting from the treatment arose out of and in the course of the worker's employment. The second issue was whether certain doctors, medical staff, and other medical organizations were either workers or employers and if so whether their actions or conduct arose out of and in the course of their employment.

In relation to the first issue, the panel found that the plaintiff was a worker and that the injury resulting from the treatment arose out of and in the course of the worker's employment. The panel determined that the worker's work assessment injury was related to the original work injury and, as the myelogram related to treatment for the work assessment injury, the injury arising from the myelogram was a compensable consequence of the work injury. The panel rejected the applicants' argument that the worker chose to proceed with the myelogram recklessly or foolishly. In relation to the applicants' argument that the myelogram was an investigation procedure and not treatment, and thus not a compensable consequence pursuant to item #22.10 of the RSCM, the panel determined that while the distinction between medical investigation and medical treatment is accurate, it is not appropriate to distinguish between them for the purpose of considering the application of item #22.11 of the RSCM. Coverage for medical treatment would logically include medical investigations undertaken for the purpose of assessing treatment options.

In relation to the second issue, the panel determined that all but two defendants to the lawsuit were either a worker or an employer at the time of the treatment and that their actions or conduct arose out of and in the course of their employment. Of the two remaining defendants, one was an incorporated company and the other was a doctor and the active principal of the company. The company was not registered with the Board and the panel found that the defendant doctor was the one responsible for the company's failure to register.

In relation to the status of the doctor, the panel referred to item #20:30:30 of the APM and to a previous WCAT decision which determined that the principal of an unregistered company (who is responsible for the failure to register) is not a worker for the purposes of section 10 of the Act. The panel rejected the defendant doctor's argument that the effect of a failure to register with the Board should be limited to preventing an active principal of a company from receiving compensation under the Act. The panel found that the essential conclusion in the WCAT decision was that item #20:30:30 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. As such, the policy applies equally to a plaintiff or a defendant. The panel found that the doctor was the responsible principal of an unregistered company and that he was functioning in a fashion similar to that of an independent operator who had failed to obtain coverage for himself.

In relation to the status of the company, the panel noted that the company had no workers other than the doctor and given the panel's conclusion regarding the status of the doctor, the company had no workers and thus was not an employer. The panel noted that its conclusion in this respect is also supported by the policy contained in Decision No. 169, which was in effect at the time of the treatment. Decision No. 169 explained that it would not be consistent with the policy rationale of the legislation that someone who has not accepted the role of employer, not accepted the obligations of an employer, and not paid the assessments of an employer should then be allowed to claim the status of employer when it comes to immunity from suit on a tort claim. The panel noted *WCAT-2004-04112-AD* which determined, despite Decision No. 169, that an unregistered employer could still be an employer for the purposes of section 10 of the Act, but distinguished it on the basis that in this case there was no clear worker-employer relationship between the doctor and his company (whereas in *WCAT-2004-04112-AD* the defendant employer hired casual workers).

WCAT Decision Number: **WCAT-2006-01747**
WCAT Decision Date: **April 20, 2006**
Panel: Herb Morton, Vice Chair

Section 257 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 03 4816
MYRA SIMPSON v. DR. STUART SILVER, DR. STUART SILVER INC., CARMEL LOUIE, JAQUELINE AGATE, DR. SAM STEWART, DR. SAM STEWART INC., DR. ROBERT KOOPMANS, CAPITAL HEALTH REGION, carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, VICTORIA HOSPITAL SOCIETY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, VANCOUVER ISLAND HEALTH AUTHORITY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL and VICTORIA GENERAL HOSPITAL

Introduction

The plaintiff was a health care worker who suffered a back injury at work on September 3, 1998. Her claim for workers' compensation benefits was accepted by the Workers' Compensation Board (Board). She underwent surgery on November 1, 1999 for a fusion. By decision dated October 5, 2001, a Board case manager advised the worker that repeat surgery would likely have detrimental consequences, and that the Board would not accept responsibility for funding further surgery. On November 27, 2001, the plaintiff underwent a myelogram procedure. An incorrect solution was prepared for the contrast dye, and the plaintiff suffered a severe adverse reaction when this was injected in her lumbar spine.

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. Requests for a certificate under section 257 were received from:

- counsel for the defendants, Dr. Stuart Silver and Dr. Stuart Silver Inc., on May 10, 2005;

- counsel for the defendants, Vancouver Island Health Authority, Carmel Louie and Jaqueline Agate, on July 11, 2005;

- counsel for the defendants, Dr. Sam Stewart and Dr. Sam Stewart Inc., on July 27, 2005; and

- counsel for the defendant, Dr. Robert Koopmans, on September 12, 2005.

The legal action has been discontinued against the defendants Capital Health Region, Victoria Hospital Society, and Victoria General Hospital. The action against Dr. Koopmans was dismissed by consent. Amended statements of defence were filed on March 27, 2006 on behalf of the defendant physicians. The legal action is scheduled for trial on June 12, 2006.

A transcript has been provided of the December 15, 2004 examination for discovery of the plaintiff. Affidavits have also been provided by Dr. Stuart Silver, Dr. Robert Koopmans and Dr. Samuel Stewart, all sworn on January 13, 2006.

Written submissions have been provided by the parties to the legal action. By memo dated January 19, 2006, I noted the following:

> To supplement the materials already provided by counsel, attached for reference are copies of the following:
>
> - *Decision No. 17*, "Re Disablement Following Unauthorized Surgery, 1 WCR 78;
> - *Decision No. 276*, "Re Compensation for Unauthorized Surgery", 4 WCR 28; (Note: decisions published in the *Workers' Compensation Reporter* were part of the published policy of the governors in November 2001);
> - Excerpt from *Rehabilitation Services and Claims Manual* #22.00 and following, dated August 1993 (policy in effect in November 2001);
> - January 20, 2004 Resolution of the Board of Directors, "Re: The Status of Treatment Injuries";
> - *WCAT Decision #2004-05552* dated October 26, 2004, Ellington v. Lim et al., re status of principal of unregistered company;
> - Records from Account #736778.
>
> On preliminary review, I would identify the following questions:
>
> 1. Although Board responsibility was denied for further surgery (October 5, 2001 decision by case manager), was it "clearly unreasonable" for the worker/plaintiff to pursue such treatment?

2. Was Dr. Stewart, in November 2001, a principal of an unregistered company, with responsibility for the failure to register, so that he should be found to not be a worker?

3. What was the status of the Vancouver Island Health Authority dba Victoria General Hospital in November 2001? The Assessment Department has indicated there was no registration under this name in November 2001. Further evidence or clarification regarding the status of the VIHA in November 2001 appears necessary.

[reproduced as written]

Additional written submissions were provided, which concluded on April 3, 2006.

An appeal was also filed to WCAT by Dr. Sam Stewart Inc. from *Review Decision #R0054138* dated December 15, 2005, concerning the firm's registration as an employer effective January 1, 2004. The review officer found that the Board officer had correctly applied policy by limiting the backdating of this registration to January 1, 2004 (on the basis that the failure to register was unintentional and did not involve misrepresentation). The employer filed an appeal to WCAT, but this has been withdrawn (as set out in Ms. Bruneau's letter of January 26, 2006).

I find that this application does not involve any significant issue of credibility and the questions of mixed fact, policy and law can be properly determined on the basis of written submissions without an oral hearing. For ease of reference, I will refer to the submissions of counsel as follows:

Robert Isbister	counsel for the plaintiff (Myra Simpson)
Alison Bruneau	counsel for the physicians (Dr. Stuart Silver, Dr. Stuart Silver Inc., Dr. Sam Stewart, Dr. Sam Stewart Inc., and Dr. Robert Koopmans)
David J. Bell	counsel for the other defendants (Vancouver Island Health Authority carrying on the operation of hospital under the name of Victoria General Hospital, Carmel Louie, and Jaqueline Agate)
Marli F. Rusen	counsel for the employer (Provincial Government of British Columbia, dba Oak Bay Lodge)

Issue(s)

Determinations are requested concerning the status of the parties to the legal action, at the time of the November 27, 2001 myelogram procedure.

Jurisdiction

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 that is applicable (section 250(2)). Section 254(c) provides that WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under Part 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.

Item #20.20 of WCAT's *Manual of Rules of Practice and Procedure* provides that in a section 257 application, WCAT will consider all of the evidence and argument afresh regardless of a prior decision by a Board officer. Accordingly, I may consider anew the matters addressed in prior decisions by Board officers (including a decision by a review officer of the Review Division).

Status of the Plaintiff

(i) Background and evidence

The plaintiff was a health care worker employed at the Oak Bay Lodge, a long-term care facility. She qualified as a licensed practical nurse in 1974, and commenced employment with the Oak Bay Lodge in February, 1989.

On September 3, 1998, the plaintiff and another staff member were transferring a resident (using a transfer belt) from a sitting position to her bed, when the plaintiff felt pain in her lower back. Her claim for workers' compensation benefits was accepted by the Board. In this decision, I will use the terms "worker" and "plaintiff" interchangeably.

The worker was examined at the Board on March 25, 1999 by Dr. K, orthopaedic surgeon. Dr. K referred her to the Visiting Specialists Clinic for an opinion on the advisability of a fusion, and she was seen by Dr. C. Fisher, orthopaedic surgeon. The worker underwent surgery on January 11, 1999, by Dr. Fisher, which included an L5-S1 intertransverse fusion.

As a result of an appeal by the worker from a decision dated January 8, 1999, by finding dated May 16, 2001 the Review Board concluded that the worker's gastrointestinal problems in December 1998 were a compensable consequence of her 1998 work injury (as being related to taking medication called Toradol under this claim). Wage loss benefits were paid for various periods (total of 965 days), ending on May 21, 2001. By letter dated May 23, 2001, the case manager advised the worker:

> Your file, including, medical evidence and the videotape evidence, was reviewed by both an orthopedic consultant and a Claims Medical Advisor of the Workers' Compensation Board and it was the consensus of opinion that you are no longer in need of home support services and that you are capable of a fair bit of activity. As well, it is quite evident that you do not require further surgery and Dr. Fischer has been advised of this.

The worker's file was referred to the Vocational Rehabilitation Department (to contact the worker to discuss vocational options), and to the Disability Awards Department (for assessment of any remaining permanent impairment).

In a report dated March 14, 2001, Dr. Fisher advised:

> Her radiographic changes certainly support a non-union at the L5-S1 level.
>
> ...
>
> Reviewing her imaging studies, there is loosening of the L5 screws.
>
> The concern with Ms. Simpson is that the surgery never seemed to significantly relieve her symptoms despite adequate decompression at the root.... She reports now that she is worse off than before the surgery. This must make her very reluctant or cautious to proceed with a second procedure which would involve a transperitoneal L5-S1 diskectomy with cage and bone graft following by revision instrumentation and fusion posteriorly.

At the request of the Board, the worker was assessed at the Visiting Specialists Clinic by Dr. Michael Boyd, neurosurgeon. By report dated July 6, 2001, Dr. Boyd advised:

> One of the intents of surgery was to obtain a lumbosacral fusion, this has not occurred. Therefore I think that her original back pain prior to surgery is still present and this is compounded by the fact that she has had surgery and non-union with an infection. There may in fact still be an underlying smoldering infection. She also has loose instrumentation.
>
> ...I do think that further surgical intervention suggested by Dr. Fisher is certainly appropriate to consider. She does I think require stabilization of a lumbosacral junction.... I think that she should have a repeat fusion.

The plaintiff began a "work assessment" at the Oak Bay Lodge on July 9, 2001. She received rehabilitation benefits from the Board while participating in this work assessment. These benefits were concluded on August 12, 2001.

On August 7, 2001 (during her "work assessment" at the Oak Bay Lodge), the plaintiff bent over to pick up a crib board peg from the floor and felt a sharp pain in her left upper leg and buttock. A log entry dated August 23, 2001 by the vocational rehabilitation consultant noted that the following information had been received from the human resources representative with the employer:

> ...on August 7 Myra was cleaning in the 3rd Dogwood Skyview room. She picked up a peg which had fallen on the floor from a crib board – she felt a sharp pain in her left upper leg and in her left buttock. We provided time for her to apply an ice pack. Myra contacted [name] of the Housekeeping and Laundry area at 2:45 p.m. to advise that she had a difficult time driving home using the clutch in her vehicle.

The plaintiff stopped the work assessment. By decision dated September 12, 2001, the case manager advised the worker:

> Your file was referred to the Claims Medical Advisor for an opinion. He has reviewed the medical evidence submitted and finds that there is no objective medical evidence that your condition has significantly deteriorated beyond what would normally be expected for your permanent condition. He also went on to advise that the mechanism of injury described on August 7, 2001 was extremely minor and one would not expect any new pathology.
>
> Given the above, it is my decision that your recent symptoms are in keeping with the normal range of fluctuations expected from the condition for which you may be entitled to a pension.

In a report dated September 21, 2001 addressed to the Board medical advisor, Dr. Boyd confirmed that he still felt that surgical intervention was reasonable as the worker's original problem had not been fully addressed. Dr. Boyd advised that he had asked to worker to return to Dr. Fisher for discussions regarding further surgery.

By decision dated October 5, 2001, the case manager responded to the September 21, 2001 consultation report by Dr. Boyd. The case manager noted that a failed fusion at the lumbar sacral junction may result in no disability to significant disability. In the plaintiff's case, it was considered, having regard to videotape evidence, that she had already achieved as much function and mobility as could be expected with her condition and further surgery would not improve her mobility. The case manager noted that the Board medical advisor had advised that it was more than likely that repeat surgery would have detrimental consequences for the worker's function, and that there was no indication for further repeat fusion. The case manager concluded:

> Therefore, it is my conclusion that the Workers' Compensation Board cannot be responsible for funding surgery. Clearly the referral to Dr. Fisher is solely for this reason and I am also unable to fund a referral to Dr. Fisher.

The worker appealed the decisions dated May 23, September 12, and October 5, 2001 to the former Workers' Compensation Review Board. Those appeals were transferred to WCAT on March 3, 2003, and were subsequently withdrawn in June, 2003.

By report dated November 7, 2001, Dr. Fisher advised:

> At this point, I think she requires a CT myelogram to document any new pathology that might be affecting her nerve roots. Her clinical presentation, however, is far more indicative of a hamstring problem. I have also asked her to see one of the general surgeons here with respect to a trans-peritoneal approach for the revision of her L5-S1 fusion. I will see her back when she has had that consultation and her CT myelogram.

On November 27, 2001, the plaintiff underwent a lumbar myelogram and CT scan at Victoria General Hospital. Counsel for the other defendants advises that the plaintiff was supposed to be injected with a non-ionic agent called Isovue. Instead, she was injected with an ionic contrast agent, Renograffin 60, and suffered a severe adverse reaction. By report dated December 2, 2001, Dr. G. Wood advised that the plaintiff developed an "ascending tonic/clonic seizure syndrome" secondary to receiving ionic contrast dye in a myelogram.

By decision dated May 21, 2002, a disability awards officer advised the plaintiff that the assessment of her permanent functional impairment resulting from her 1998 injury would be deferred until she had recovered from her "non-compensable condition" resulting from the November 27, 2001 myelogram procedure.

In a recent report dated November 28, 2005, Dr. Fisher noted that the worker wishes to proceed with surgery for her pseudoarthrosis.

(ii) August 7, 2001 incident

Plaintiff's counsel submits that the August 7, 2001 incident involved a new injury, which was unrelated to the plaintiff's September 1998 work injury and November 1999 fusion. He submits the August 7, 2001 incident was not a compensable injury, in terms of the plaintiff's entitlement to workers' compensation benefits. Counsel for the other defendants submits that the fact the Board thought the injury was a minor aggravation of a previously sustained work injury does not change the fact that it is work-related.

At the time of the August 7, 2001 incident, the plaintiff was receiving rehabilitation benefits while participating in a work assessment under her 1998 claim, on the premises of her employer. Accordingly, any new injury she suffered at work would have been compensable. On August 7, 2001, policy at item #88.12 of the *Rehabilitation Services and Claims Manual* (RSCM) provided:

> *#88.12 Expenditures*
>
> 1. The Board provides financial assistance to workers who are participating in work assessment programs, either through a continuation of wage-loss benefits under Section 29 or 30 of the Act, or payment of rehabilitation allowances under Section 16 when wage-loss benefits are no longer payable.
>
> 2. Costs arising from injuries or aggravations that occur during the course of Board-sponsored work assessments with an employer are not charged to the participating employer.

If the worker suffered a new injury at work on August 7, 2001, this would be a compensable injury. It makes no difference whether this would have involved the establishment of a new claim file, or whether this would have been considered part of the plaintiff's 1998 claim as it occurred during a work assessment program. In either event, the worker would have been entitled to workers' compensation benefits, but the costs associated with this would not have been charged to the employer.

In this case, the Board officer found that the worker's problems involved a fluctuation in her permanent disability resulting from her 1998 injury (which has not yet been assessed). Policy at RSCM item #34.12 provided:

> *#34.12 Claimant in Receipt of Permanent Disability Pension*
>
> Wage-loss benefits are terminated when the claimant's condition becomes permanent and prior to the assessment of any pension. However, they may again become payable because a further work injury or a natural relapse in the condition for which the pension is being paid causes a further period of temporary disability.
>
> With regard to the latter situation, it is recognized that no condition is ever absolutely stable or permanent; there will commonly be some degree of fluctuation. Nevertheless, a pension will be awarded when, though there may be some changes, the condition will, in the reasonably foreseeable future, remain essentially the same. The fluctuations in the condition of a worker receiving a pension may be such as to require the worker to stay off work from time to time. The question then arises whether wage-loss benefits should be paid for these periods. **If the fluctuations causing the**

> **disability are within the range normally to be expected from the condition for which the worker has been awarded a pension, no wage loss is payable. The pension is intended to cover such fluctuations**. Wage loss is only payable in cases where there is medical evidence of a significant deterioration in the worker's condition which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is a permanent one, the worker's pension will simply be reassessed.
>
> [emphasis added]

It is evident, therefore, that the compensability of the worker's problems related to the August 7, 2001 event was not in question. Rather, these problems were characterized as a fluctuation in the worker's permanent condition which was accepted under her 1998 claim.

The worker was participating in a Board-sponsored work assessment at that time, and the incident or event involved a work-required motion of bending to pick up a cribbage peg while the worker was cleaning a room. I find that any problems suffered by the worker in relation to the August 7, 2001 incident or event were compensable under her 1998 claim, whether viewed as a minor fluctuation in her permanent disability or as a new injury. Accordingly, I do not accept the submission by plaintiff's counsel that the further medical investigations pursued by the plaintiff were related to a non-compensable injury on August 7, 2001.

(iii) Policy concerning compensable consequences

In November, 2001, policy at RSCM item #22.11 provided:

> *#22.11 Disablement Caused by Surgery*
>
> Compensation is not limited to the direct consequences of work accidents. Ordinarily, when a claimant undertakes surgery for the injuries sustained, the consequences of the surgery are accepted as consequences of the accident, and any disablement resulting from the surgery is treated as compensable. No doubt an exception could be made if a claimant recklessly undertook surgery, knowing that it was likely to do more harm than good. In that case, a claimant might be viewed as having introduced a new cause of disablement. There may be other grounds for making an exception, but there is no rational ground on which an exception can be made simply because the surgery was not authorized by the Board.
>
> In a Board decision, the claimant had suffered a compensable injury at work, but had then become disabled following surgery carried out without the Board's authorization. The question was whether the disablement should be compensated as resulting from the injury or disallowed because

> it resulted from unauthorized surgery. Once it was determined that the claimant's conduct in undertaking the unauthorized surgery was not unreasonable, the surgery was treated as having resulted from the work injury, and pursuant to the general rule, the consequences of the surgery were accepted as the consequences of the work accident.
>
> Virtually all patients place complete faith in their physicians and, if a physician merely suggests the remote possibility of improvement in a patient's condition through surgery, it cannot be said to be "clearly unreasonable" for the patient to go along with that suggestion. **It is irrelevant whether unauthorized surgery was successful or unsuccessful, whether or not the claimant and/or the physician knew the Board was not prepared to authorize the surgery, nor that the surgery was purely exploratory in nature.** The only situation where it is foreseeable that the Board could reasonably refuse payment of benefits for unauthorized surgery is where a claimant, in desperation and against the advise [*sic*] of every other physician consulted, deliberately seeks out surgery. Unless the claimant can be shown to have acted foolishly, the claimant should not be deprived of compensation because there happens to be a persuasive surgeon involved who has convinced the claimant that, on balance, surgery is the best course of action. (9)
>
> The above rules only apply where the surgery resulted from the injury. The Board accepts no responsibility for the cost of surgery or any resulting disability where the surgery was not a consequence of the injury.
>
> [emphasis added]

Similar policy was contained in *Decisions #17* and *#276* of the *Workers' Compensation Reporter*.

(iv) Analysis concerning compensable consequences

In November, 2004, the plaintiff filed a provisional application for workers' compensation benefits in relation to the November 27, 2001 myelogram incident. This has no bearing on the determination of her status in relation to the November 27, 2001 myelogram. (In any event, a separate application for compensation is not required in order to claim compensation for the adverse consequences of medical treatment for a compensable work injury.)

Plaintiff's counsel submits that the myelogram was not treatment to investigate the plaintiff's ongoing back problems, but rather, was an investigation of new problems she was experiencing after the August 2001 incident. This is supported by Dr. Fisher's medical-legal opinion of February 28, 2006, in which he advises that the CT myelogram was an investigation for nerve root compression, rather than investigation for a non-union. However, for the reasons set out in the previous section, I find no basis for

treating any problems suffered by the plaintiff as a result of the August 7, 2001 bending event (while participating in a Board-sponsored work assessment), as unrelated to her 1998 claim.

Counsel for the employer submits that the plaintiff was aware that the Board's medical advisor had reviewed her situation and advised that further surgery could be detrimental. Counsel for the employer submits that the plaintiff's decision to undergo further treatment was unreasonable in the circumstances. She submits the plaintiff knew, or should have known, that the treatment would likely do more harm than good. Plaintiff's counsel submits that the recommendations and advice from Dr. Boyd and Dr. Fisher were ambivalent as to the likelihood of a successful recovery and given the constellation of that advice, it was not reasonable for the plaintiff, in retrospect, to undergo the myelogram procedure.

In a medical-legal report dated February 28, 2006, Dr. Fisher advised that the November 2001 myelogram was an investigation rather than a treatment. While I accept this distinction as accurate, I do not consider it appropriate to distinguish between medical investigation and medical treatment for the purpose of considering the application of the policy at RSCM item #22.11. Coverage for medical treatment would logically include medical investigations undertaken for the purpose of assessing treatment options. Indeed, the undertaking of such further medical investigations prior to making a decision on further surgery lends support to the "reasonableness" of the course of action which was taken.

I find it significant, in connection with the arguments outlined above, that the policy at RSCM item #22.11 provides that it is irrelevant whether "the claimant and/or the physician knew the Board was not prepared to authorize the surgery, nor that the surgery was purely exploratory in nature."

This was not a case where the plaintiff engaged in "doctor-shopping", for the purpose of finding a doctor who might offer a solution to her problems. It does not appear that the plaintiff was seen by any physicians other than those recommended by the Board or her treating physicians. The fact that the Board had denied authorization for further medical investigations or surgery does not, by itself, suffice to establish that the plaintiff was reckless in pursuing further medical investigations. Dr. Boyd and Dr. Fisher (a neurosurgeon and an orthopaedic surgeon) both provided opinions in support of such further investigations and surgery. Both of these specialists were associated with the Board's Visiting Specialists Clinic. I find that this was very clearly not a case where the plaintiff "in desperation and against the [advice] of every other physician consulted, deliberately [sought] out surgery".

The plaintiff has not undergone the further surgery. The November 27, 2001 myelogram was undertaken as an investigative measure, before a decision was made concerning the proposed surgery. While an invasive procedure, this additional

investigation would have provided additional information to assist in making an informed decision regarding the proposed further surgery.

I find that the plaintiff did not act foolishly or recklessly in undergoing a myelogram and CT scan on November 27, 2001. Having regard to the guidance provided by policy at RSCM item #22.11, I find that the problems experienced by the plaintiff as a result of the November 27, 2001 myelogram were a compensable consequence of her 1998 work injury.

(vi) Status of the plaintiff

A further issue to be determined concerns the status of the plaintiff, at the time she underwent the myelogram on November 27, 2001.

Plaintiff's counsel submits that the plaintiff's status should be determined on the basis of the policy contained in *Volume I* of the RSCM (RSCM I). The plaintiff's 1998 work injury, 1999 fusion, August 2001 incident, and November 2001 myelogram all occurred prior to the 2004 policy amendments concerning the status of treatment injuries. Plaintiff's counsel cites *WCAT Decision #2004-01325*, which 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 [Rehabilitation Services and Claims Manual, Volume II (RSCM II)] 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.

The interpretation of the January 20, 2004 resolution of the board of directors regarding the status of treatment injuries (*Resolution No. 2004/01/20-01*, "Re: The Status of Treatment Injuries", 20 WCR 1), was considered at length in *WCAT Decision #2005-04416* dated August 23, 2005. That decision reasoned:

…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.
>
> ...
> 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….

Upon consideration of the arguments presented by counsel in this case, I adopt the reasoning set out in *WCAT Decision #2005-04416*. I find that at the time of the myelogram on November 27, 2001 and ensuing medical treatment, 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 her medical investigation and treatment on or around November 27, 2001, arose out of and in the course of her employment.

Status of the Defendants Dr. Stuart Silver and Dr. Stuart Silver Inc., Dr. Sam Stewart, Dr. Sam Stewart Inc. and Dr. Robert Koopmans

(i) Dr. Stuart Silver Inc. and Dr. Stuart Silver

By memo dated December 14, 2005, the policy manager, Assessment Department, advised:

> Dr. Stuart Silver Inc. – Account No. 607421 was registered during the period of time between September 3, 1998 and November 27, 2001 inclusive, and is an active account to date.

By affidavit of January 13, 2006, Dr. Stuart Silver advises that he was and is an employee of Dr. Stuart Silver Inc., a company which was registered with the Board.

Dr. Silver advises that he practiced as a diagnostic radiologist in the Capital Health Region, in Victoria, B.C. He was on shift at the Victoria General Hospital when the plaintiff was admitted as an outpatient for a lumbar myelogram and CT scan. Dr. Silver instructed the radiology technician who was assisting with the myelogram study, to draw up a solution but that, unfortunately, an incorrect solution was drawn up. Dr. Silver performed an L2-3 lumbar puncture and injected the contrast dye. The plaintiff proceeded to the CT department and underwent a post-myelogram CT scan as scheduled, and was then brought back to the x-ray department with worsening symptoms. Dr. Silver transferred the plaintiff to the care of Dr. Sam Stewart in the Emergency Department.

Dr. Silver further advises that he, through Dr. Stuart Silver Inc., is also a member of and contracts with the organization called Victoria Radiology Consulting Inc. (VRCI), which in turn contracts with the Vancouver Island Health Authority to provide radiology services. The services that Dr. Silver provided to the plaintiff on November 27, 2001 were billed to the Medical Services Plan (MSP).

On November 27, 2001, policy at No. 20:30:30 of the *Assessment Policy Manual* provided:

> ...an incorporated company is usually considered an independent firm by the Board, and therefore registration with the Board is mandatory. As the incorporated entity is considered the employer, a director, shareholders or other principal of the company who is active in the operation of the company is considered to be a worker under the Act.

I find that on November 27, 2001, the defendant, Dr. Stuart Silver Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act, and that any action or conduct of the defendant, Dr. Stuart Silver Inc., or its servant or agent, 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. I further find that the defendant, Dr. Stuart Silver, was a worker 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 his employment within the scope of Part 1 of the Act.

(ii) Dr. Robert Koopmans

By memo dated December 14, 2005, the policy manager, Assessment Department, advised:

> Dr. Robert A. Koopmans – Account No. 591311 was registered during the period of time between September 3, 1998 and November 27, 2001 inclusive, and is an active account to date.

In a further memo dated January 18, 2006, the policy manager advised:

> Dr. Robert A. Koopmans Inc. – Account No. 591311 was registered during the period of time between September 3, 1998 and November 27, 2001 inclusive, and is an active account to date.

The legal action against Dr. Koopmans was dismissed by consent. It is not evident whether a determination of his status is still required. I will proceed to address the request for a determination of his status, in case this remains relevant to the legal action.

By affidavit of January 13, 2006, Dr. Robert Koopmans advised that he was an employee of Dr. Robert Koopmans Inc., a company which was registered with the Board. Dr. Koopmans advises that he practiced as a diagnostic radiologist in the Capital Health Region, in Victoria, B.C. He was on shift at the Victoria General Hospital when the plaintiff was admitted as an outpatient for a lumbar myelogram and CT scan. Dr. Koopmans was responsible for reviewing and interpreting the CT scan results on November 27, 2001.

Dr. Koopmans further advises that he, through Dr. Robert Koopmans Inc., is also a member of and contracts with the organization called Victoria Radiology Consulting Inc. (VRCI), which in turn contracts with the Vancouver Island Health Authority to provide radiology services. The services that Dr. Koopmans provided to the plaintiff on November 27, 2001 were billed to the MSP.

I find that on November 27, 2001, Dr. Robert Koopmans Inc. was an employer engaged in an industry within the meaning of Part 1 of the Act, and that any action or conduct of Dr. Robert Koopmans Inc., or its servant or agent, 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. I further find that the defendant, Dr. Robert Koopmans, was a worker 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 his employment within the scope of Part 1 of the Act.

(iii) Dr. Sam Stewart Inc. and Dr. Sam Stewart

By memo dated December 14, 2005, the policy manager, Assessment Department, advised:

> Dr. Sam Stewart Inc. – Account No. 736778 was not registered during the period of time between September 3, 198 and November 27, 2001 inclusive.

By affidavit of January 13, 2006, Dr. Sam Stewart advised that he was an employee of Dr. Sam Stewart Inc. This company was not registered with the Board on November 27, 2001. Dr. Stewart advised that he practiced as an emergency room physician in the Capital Health Region, in Victoria, B.C. He was on shift at the Victoria General Hospital on November 27, 2001. The plaintiff was transferred to his care in the Emergency Department of the Hospital following her myelogram and CT scan on November 27, 2001.

Dr. Stewart further advised that he was also an associate member of the Victoria Emergency Physicians Association (VEPA), which has a management company called Victoria Emergency Physician Management (VEPM). VEPM has an employee who prepares the books for the organization and that employee is covered by the Board as an employee of VEPM. VEPA has a contract with the Vancouver Island Health Authority. The services that Dr. Stewart provided to the plaintiff on November 27, 2001 were billed to the MSP.

In November 2001, policy at No. 20:30:30 of the *Assessment Policy Manual* further provided:

> ...in the event of an injury to an active principal of a private company that is not registered with the Board, that active principal is not entitled to compensation benefits. This is based on two principles established in WCB Reporter Decision No. 335:
>
> 1. All active principals of a company should be aware of the obligations of the company and should bear the responsibility for registration as an employer under the Act.
>
> 2. Except under unusual circumstances, a person who in essence is both a “worker” and an “employer” cannot be given the benefits due to a “worker” unless that person’s obligations have been met under the Act as an “employer”.

In the policy contained in *Decision #335*, “Re Principals of Limited Companies”, 5 WCR 101, the former commissioners found as follows:

> The general rule followed by the Board is that a worker’s claim is not prejudiced by the fact that his employer has not complied with his obligation to register. However, since a company can only act through its principal, it was felt that the claimant in the situation in question, unlike most claimants, had to accept some personal responsibility for the failure

> to register. If the corporate form of the business were ignored, the claimant was really an independent operator who had failed to obtain coverage for himself. It would be unfair for him to receive the benefits of the Act without meeting his obligations. The Board, therefore, concluded that, except in unusual circumstances, claims from principals of small unregistered companies or their dependants should be denied.

Counsel for the physicians submits that the policy at No. 20:30:30 precludes Dr. Stewart from claiming compensation as a worker for injuries he sustains while working for his own company but should not preclude the plaintiff from receiving compensation under the Act. I agree that Dr. Stewart's failure to register with the Board has no relevance to the determination of the plaintiff's eligibility for workers' compensation benefits.

WCAT Decision #2004-05552 (the *Ellington* case) agreed with the reasoning in two published Appeal Division decisions:

- *Appeal Division Decision #2000-0684*, "Status of Principals of Unregistered Companies (No. 1)", 17 WCR 475; and,

- *Appeal Division Decision #2001-1217,* "Status of Principals of Unregistered Companies (No. 2)", 17 WCR 559.

Appeal Division Decision #2000-0684 concluded

> ...in our view, the decisions of the former commissioners provide policy guidance in a general sense. Although the issue before the former commissioners was related to claims from principals of unregistered companies, we are satisfied that Decision No. 335 also provides guidance in relation to the status of such principals under subsection 10(1). We interpret Decision No. 335 as meaning that the principal of an unregistered company (who is responsible for the failure to register) is not a worker for the purposes of sections 10 and 11.

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

Counsel for the physicians further submits that in the alternative, Dr. Stewart should be considered a worker on the basis that he was carrying out his work as an emergency room physician pursuant to a contract between the VIHA and the VEPA. The medical services provided to the plaintiff were billed to the MSP. Funds received on behalf of Dr. Stewart by the VEPM, the management company for VEPA, were paid out to him by the VEPM. VEPM is registered with the Board and paid assessments over the relevant period.

By memo dated January 18, 2006, the policy manager, Assessment Department, advised:

> Victoria Emergency Physicians Management Ltd. – Account No. 497364 was registered during the period of time between September 3, 1998 and November 27, 2001, inclusive, and is an active account to date.

Dr. Stewart's evidence is that VEPM has one employee who prepares books for the organization. As noted above, Dr. Stewart was an associate member of the VEPA, which has a management company called VEPM.

On the evidence provided, I am not persuaded that Dr. Stewart was either a worker or an employer on November 27, 2001. I find that he was working as a principal of Dr. Sam Stewart Inc. This company was not registered with the Board, and I find that Dr. Stewart had responsibility for this failure to register.

Prior to January 1, 1994, industries for which workers' compensation coverage was compulsory were listed in Schedule A to the Act. The insurance industry, banking and other financial institutions, medical/dental/law offices and real estate sales were not included in Schedule A. Legislative changes contained in the *Workers Compensation Amendment Act, 1993* expanded the scope of Part 1 of the Act. Effective January 1, 1994, section 2(1) of the Act provided:

> This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board.

Accordingly, workers' compensation coverage became compulsory for all industries on January 1, 1994 (i.e. where there is a relationship of employment).

In a submission to the Review Division dated October 19, 2005, counsel for Dr. Stewart advised that Dr. Stewart became incorporated on February 5, 1993. At that time, it was not necessary that the company register with the Board. Dr. Stewart did not become aware of this obligation until shortly before he applied for registration in May of 2005. By letter of November 4, 2005, counsel for Dr. Stewart advised that his son and ex-wife were shareholders of the company until 2002 and 2004, respectively, and that his ex-wife received employee wages from the company in 1996 and 1997. *Review Decision #R0054138* dated December 15, 2005 denied Dr. Stewart's request to

have his registration backdated to 1994. The review officer cited policy at *Assessment Manual* AP1-38-1, which provided:

> The effective date of registration is the date from which the employer will be assessed by the Board. Except where stated otherwise in this manual, this is the date the employer first employed workers. If the firm was employing workers, so that the registration with the Board would have been required in a previous year, the effective date will only go back as far as January 1st of the preceding year. However, if there is evidence that the employer deliberately avoided registration by such means as misrepresentation, false statements or ignoring registration requests, a prior date may be used.

The review officer found that as the failure to register was unintentional, the Board officer correctly limited the backdating of the employer's registration to January 1, 2004.

Upon consideration of the foregoing, I find that Dr. Stewart was the responsible principal of an unregistered company and that he was functioning in a fashion similar to that of an independent operator who had failed to obtain coverage for himself. I find that on November 27, 2001 Dr. Sam Stewart was not a worker within the meaning of Part 1 of the Act.

With respect to the status of Dr. Sam Stewart Inc., no evidence has been provided to show that on November 27, 2001 this company had any workers other than Dr. Stewart. In view of my conclusion that Dr. Stewart was functioning in similar fashion to an independent operator, this means, in effect, that Dr. Stewart was not a worker and Dr. Sam Stewart Inc. was not an employer. Accordingly, I find that Dr. Sam Stewart Inc. was not an employer engaged in an industry within the meaning of Part 1 of the Act. I further find that any action or conduct of the defendant, Dr. Sam Stewart Inc., 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.

While not necessary to my decision, I note that this conclusion is also supported by the policy contained in *Decision No. 169* ("*Re an Employer or an Independent Operator,"* 2 WCR 262). On November 27, 2001, the published policies included decisions published in Volumes 1 to 6 of the *Workers' Compensation Reporter*. *Decision No. 169* stated (at page 264):

> The Defendant might, under Part I of the *Workmen's Compensation Act, 1968*, have been in the position of an employer or in the position of an independent operator, not being an employer. But he cannot claim to be an independent operator (and not an employer) when the obligations of an employer under the Act are being considered, and then claim to be an employer in respect of the same time period when there subsequently

appears to be some advantage in that position. To use an old Scottish maxim, he cannot approbate and reprobate.

Decision No. 169 further stated, at pages 264-265:

> It was not the intention of the *Workmen's Compensation Acts* of this Province that any category of businessmen should be immune from liability fro the consequences of an injury or death to a workman arising out of business activity. The essence of the Acts was that there should be two kinds of liability, and each businessman would fall under one or the other. He may be an employer, in which case he would pay assessments under the *Workmen's Compensation Acts*, but would be immune from suit on a tort claim by any workman. Alternatively, if he was an independent operator, he could be liable under the general law of tort for injuries to workmen, but he would pay no assessments under the *Workmen's Compensation Act* in respect of workmen. But the same businessman could not have it both ways. He could not, when his responsibilities under the *Workmen's Compensation Act* are being determined, claim that he is not an employer and therefore not liable for assessments in respect of workers, and obtain a decision of the Board to that effect, and then subsequently, when being sued under the law of tort, claim immunity from suit on the ground that he was an employer under the *Workmen's Compensation Act*.
>
> When workmen's compensation was first introduced into this Province, it was something in the nature of a bargain. Workers obtained a right to compensation for injuries arising out of and in the course of employment without enquiry into fault. The new obligation imposed upon employers was to pay assessments to the Board, and in return for that obligation, employers were granted an immunity from suit by workers for injuries arising out of and in the course of employment. It would not be consistent with that policy rationale of the legislation that someone who has not accepted the role of employer, not accepted the obligations of an employer, and not paid the assessments of an employer should then be allowed to claim the status of employer when it comes to immunity from suit on a tort claim.
>
> ...
>
> It was suggested in argument that the Defendant could, even at this late stage, pay assessments in respect of casual workers engaged during 1973, and in that way, obtain retroactive recognition of the status of employer in respect of that year. That argument cannot be accepted. To accede to it would be analogous to allowing a person who has failed to

> obtain insurance against a loss to be provided with that insurance coverage after the loss has been incurred.

In view of the fact that Dr. Stewart was functioning in similar fashion to an independent operator (as the principal with responsibility for the failure to register the company with the Board), and the fact that Dr. Sam Stewart Inc. had no other workers, this is not a situation is which any clear worker-employer relationship continued to exist on November 27, 2001. I find, therefore, that the facts of this case are distinguishable from those addressed in *WCAT Decision #2004-04112-ad*, July 30, 2004 (flagged as a "noteworthy" decision on WCAT's internet site). In that case, the defendant had hired two casual workers, who were travelling with her at the time of the accident giving rise to the legal action. That decision reasoned:

> Subsequent to *Decision #93-0336*, the Board amended RSCM I policy #111.40, "Certification to Court", to add the following two paragraphs in late 1994. These paragraphs lent support to the plaintiff's argument that a party's status as an employer is contingent on it having assumed the responsibilities commensurate with the status it seeks:
>
> > The Board has determined that a party to a Section 11 determination cannot claim to be an independent operator (and not an employer) when the obligations of an employer under the Act are being considered, and then claim to be an employer in respect of the same time period when there subsequently appears to be some advantage in that position.
> >
> > There are several examples in our legal system of the principle being applied that a person cannot disclaim or fail to meet her or his obligations under a statute and at the same time claim its benefits. That principle has no application where a statute otherwise provides. Nor is it in any event a principle of universal application. But where a statute does not otherwise provide, it is a principle that is sometimes applied where the adjudicating tribunal finds it consistent with the policy objectives of the Act, and in other respects appropriate.
>
> Policy #111.40, however, was deleted effective March 3, 2003, as a result of Resolution 2003/01/21-01 of the board of directors of the Board. Because the resolution specifically states that this policy change applies to all decisions made on or after March 3, 2003, I conclude that policy #111.40 does not apply to my decision.

The first quoted paragraph of policy #111.40 is drawn from Decision 169, a 1975 commissioners' decision published at 2 *WCR* 262. Although Decision 169 has now been retired, it had the status of a policy of the predecessor of the board of directors of the Board at the time of the MVA [motor vehicle accident]. In Decision 169, a defendant sought a section 11 determination that he was an employer within the scope of Part I of the Act at the time of a fatal MVA. The defendant proprietor did not have anyone in his service at the time of the MVA. He had in the past, however, hired temporary, short-term workers from time to time for small jobs. Based on the zero payroll return which he had submitted to the Board indicating he had no workers that year, the Board's assessment department had not levied any assessments against him for workers for the year of the MVA. In effect, based on the defendant's representations, the Board had concluded he was not an employer during that year.

When he was later sued as a defendant related to the MVA, he claimed to have been an employer, and sought to submit a revised payroll report to the Board. The commissioners concluded that the defendant could not now change his position and claim to have been an employer under Part 1 of the Act when there subsequently appeared to be some advantage in that status. They stated that it would be contrary to the policy and purposes of the Act to consider the evidence recently adduced by the defendant relating to his engagement of casual help. They determined that the Board should not reopen its earlier decision that the defendant was not an employer during the year in question.

Appeal Division Decision #99-1912 concluded that Decision 169 did not stand for the proposition that employer status was unavailable in a section 11 determination when an employer was not registered with the Board. The panel limited the application of Decision 169 to its particular facts, i.e. the party seeking a determination that it was an employer had previously made an express representation to the Board denying employer status, on which the Board had relied, and it was unclear whether or not the proprietor was in fact an employer at the time of injury.

Other decisions (e.g. *Appeal Division Decisions #2000-1740* and *#2001-2255*) have suggested that Decision 169 may stand for the broader proposition that even if a defendant were in fact an employer at the time of injury, if the defendant failed to meet his obligations to register in that period, the Board will not make a determination of his status that will give him the benefit of immunity from a civil suit.

After considering the alternative interpretations of Decision 169, I adopt the restricted interpretation set out in *Decision #99-1912*, which limits Decision 169 to its unique facts. I do so because the definition of employer

> in section 1 of the Act is very broad, and makes no reference to registration as a prerequisite to employer status, and section 2(1) states in absolute terms that Part I of the Act applies to all employers, as employers, except where exempted by order of the Board. I note that the current form of section 2(1), creating a scheme of universal coverage (subject to exemption by Board order for exceptional industries or occupations), was enacted in 1993, eighteen years after Decision 169.
>
> I conclude that Decision 169 does not apply on the facts of this case. **I find that the clear language of sections 1 and 2 regarding the application of Part 1 of the Act to an employer is not displaced by Decision 169 in a case such as this where the party clearly meets the section 1 definition of an employer, and has made no active representation to the Board regarding its employer status which would estop it from now asserting a change in its status in the context of a section 11 determination.**
>
> I therefore conclude that the fact that Ms. Case had not registered with the Board as an employer at the time of the MVA does not affect her legal status as an employer under Part 1 of the Act. I find that the defendant Ms. Case was an employer engaged in an industry within the meaning of Part 1 of the Act on February 24, 2000.
>
> [underlining in original, bolding added, footnotes removed]

In the present case, there is no clear relationship of employment which would displace the application of the policy in *Decision No. 169*. I find that the policy in *Decision No. 169* is applicable within this limited context.

Accordingly, I find that on November 27, 2001, Dr. Sam Stewart Inc. was not an employer. I further find that any action or conduct of the Defendant, Dr. Sam Stewart Inc., 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*.

Status of the Defendant Carmel Louie

In paragraph 7 of her statement of claim, the plaintiff alleges that the defendant, Carmel Louie, is a radiology technician working at the Victoria General Hospital. The plaintiff alleges that at all material times, Carmel Louie was employed as a radiology technician at Victoria General Hospital by the Defendant Victoria Hospital Society, alternatively, Capital Health Region, or alternatively Vancouver Island Health Authority and Victoria General Hospital. She was present and assisted in the myelogram procedure that the plaintiff underwent on November 27, 2001, at the Victoria General Hospital.

Dr. Silver states, in paragraph 4 of his affidavit:

> I instructed the Radiology Technician who was assisting me with the myelogram study, Carmel Louie, to draw up a solution for use in Ms. Simpson's treatment. Unfortunately, Ms. Louie drew up an incorrect solution.

Counsel for the other defendants submits that Carmel Louie was, at all material times, a worker employed by the Victoria General Hospital.

I find that the defendant, Carmel Louie, was a worker within the meaning of Part 1 of the Act, and that any action or conduct of this defendant, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Act.

Status of the Defendant Jaqueline Agate

In paragraph 11 of her statement of claim, the plaintiff alleges that the defendant, Jaqueline Agate, is a registered nurse who at all material times was employed by the defendant Victoria Hospital Society, alternatively, Capital Health Region, or alternatively Vancouver Island Health Authority and Victoria General Hospital as an Emergency Room Nurse.

Counsel for the other defendants submits that Jaqueline Agate was, at all material times, a worker employed by the Victoria General Hospital.

I find that the defendant, Jaqueline Agate, was a worker within the meaning of Part 1 of the Act, and that any action or conduct of this defendant, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Act.

Status of the Defendant Vancouver Island Health Authority

By memo dated December 14, 2005, the policy manager, Assessment Department, advised:

> Capital Health Region dba Greater Victoria Hospital Society – cancelled account No. 355094 was registered during the period of time between September 3, 1998 and November 27, 2001 inclusive.
>
> Capital Health Region dba Victoria General Hospital – cancelled account No. 355094 was registered during the period of time between September 3, 1998 and November 27, 2001 inclusive.

> Victoria Hospital Society dba Victoria General Hospital – cancelled account No. 355094 was registered during the period of time between September 3, 1998 and November 27, 2001 inclusive.
>
> Vancouver Island Health Authority dba Victoria General Hospital – Account No. 687517 was not registered during the period of time between September 3, 1998 and November 27, 2001 inclusive.

By memo dated January 25, 2006, the policy manager, Assessment Department, further advised:

> "Vancouver Island Health Authority" account 687517 was the successor to "Capital Health Region" account No. 355094; effective January 1, 2003.

As noted above, the legal action has been discontinued against the defendants Capital Health Region, Victoria Hospital Society, and Victoria General Hospital. In certifying as to the status of the Vancouver Island Health Authority on November 27, 2001, I will do so on the basis of its role as the successor to the Capital Health Region, dba the Victoria General Hospital. Registration with the Board has been continuous. As the successor to the Capital Health Region, the VIHA inherited the rights and obligations of the Capital Health Region. On this basis, I find that on November 27, 2001, the defendant, Vancouver Island Health Authority, was an employer engaged in an industry within the meaning of Part 1 of the Act, and that any action or conduct of the defendant, Vancouver Island Health Authority, or its servant or agent, 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.

Expenses

Counsel for the plaintiff requests a ruling that the plaintiff be compensated for expenses she incurred in preparing the March 13, 2006 submission. The plaintiff requests leave to provide further details of those expenses when requested by WCAT.

WCAT's general practice to date has not been to address issues of expenses in relation to section 257 applications, leaving these to be determined in the legal action. In *WCAT Decision #2006-00401 / #2006-00402* dated January 26, 2006, it was found that the particular circumstances of the case required consideration under section 7 of the *Workers Compensation Act Appeal Regulation*, B.C. Regulation 321/02 (Appeal Regulation). That decision directed that the Board provide reimbursement to the plaintiff in respect of the expenses related to obtaining disclosure of his records from the Board. Section 7(2) of the Appeal Regulation stipulates that WCAT may not order the Board to reimburse a party's expenses arising from a person representing the party.

I will not address the plaintiff's request for compensation for expenses in this decision. If counsel wishes to pursue this request, he may provide further submissions to explain

the basis for this request, with reference to the Appeal Regulation, and that issue will then be addressed in a supplemental decision.

By letter dated April 18, 2006, plaintiff's counsel forwarded a copy of Dr. Fisher's account of $535.00. WCAT's *Manual of Rules of Practice and Procedure* provides guidance at item #13.23 concerning the reimbursement of such expenses by the Board. In view of the pending trial date, and the fact that there has not been an opportunity for other counsel to respond to this letter, I will defer consideration of that request for a supplemental decision.

Conclusion

I find that on and around the time of the November 27, 2001 myelogram procedure and related medical investigation and treatment:

(a) the plaintiff, Myra Simpson, was a worker within the meaning of Part 1 of the Act;

(b) the injuries suffered by the plaintiff, Myra Simpson, arose out of and in the course of her employment within the scope of Part 1 of the Act;

(c) the defendant, Dr. Stuart Silver Inc., was an employer engaged in an industry within the meaning of Part 1 of the Act;

(d) any action or conduct of the defendant, Dr. Stuart Silver Inc., or its servant or agent, 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;

(e) the defendant, Dr. Stuart Silver, was a worker within the meaning of Part 1 of the Act;

(f) any action or conduct of the defendant, Dr. Stuart Silver, 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;

(g) Dr. Robert Koopmans Inc. was an employer engaged in an industry within the meaning of Part 1 of the Act;

(h) any action or conduct of Dr. Robert Koopmans Inc., or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act;

(i) the defendant, Dr. Robert Koopmans, was a worker within the meaning of Part 1 of the Act;

(j) any action or conduct of the defendant, Dr. Robert Koopmans, 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;

(k) the defendant, Dr. Sam Stewart, was not a worker within the meaning of Part 1 of the Act;

(l) the action or conduct of the defendant, Dr. Sam Stewart, 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;

(m) the defendant, Dr. Sam Stewart Inc., was not an employer engaged in an industry within the meaning of Part 1 of the Act;

(n) any action or conduct of the defendant, Dr. Sam Stewart Inc., 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;

(o) the defendant, Carmel Louie, was a worker within the meaning of Part 1 of the Act;

(p) any action or conduct of the defendant, Carmel Louie, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Act;

(q) the defendant, Jaqueline Agate, was a worker within the meaning of Part 1 of the Act;

(r) any action or conduct of the defendant, Jaqueline Agate, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the Act;

(s) the defendant, Vancouver Island Health Authority, was an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(t) any action or conduct of the defendant, Vancouver Island Health Authority, or its servant or agent, 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. 03 4816
VICTORIA 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:

MYRA SIMPSON

PLAINTIFF

AND:

DR. STUART SILVER, DR. STUART SILVER INC.,
CARMEL LOUIE, JAQUELINE AGATE, DR. SAM STEWART,
DR. SAM STEWART INC., DR. ROBERT KOOPMANS, CAPITAL HEALTH REGION,
carrying on the operation of hospital under the name of VICTORIA GENERAL
HOSPITAL, VICTORIA HOSPITAL SOCIETY carrying on the operation of hospital
under the name of VICTORIA GENERAL HOSPITAL, VANCOUVER ISLAND HEALTH
AUTHORITY carrying on the operation of hospital under the name of
VICTORIA GENERAL HOSPITAL and VICTORIA GENERAL HOSPITAL

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Defendants, DR. STUART SILVER, DR. STUART SILVER INC., DR. SAM STEWART, DR. SAM STEWART INC., VANCOUVER ISLAND HEALTH AUTHORITY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, CARMEL LOUIE, JAQUELINE AGATE, and DR. ROBERT KOOPMANS, 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 the action arose, on or about November 27, 2001:

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

2. The injuries suffered by the Plaintiff, MYRA SIMPSON, arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, DR. STUART SILVER INC., 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. STUART SILVER INC., or its servant or agent, 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*.

5. The Defendant, DR. STUART SILVER, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

6. Any action or conduct of the Defendant, DR. STUART SILVER, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

7. DR. ROBERT KOOPMANS INC. was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

8. Any action or conduct of DR. ROBERT KOOPMANS INC., or its servant or agent, 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*.

9. The Defendant, DR. ROBERT KOOPMANS, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

10. Any action or conduct of the Defendant, DR. ROBERT KOOPMANS, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

11. The Defendant, DR. SAM STEWART, was not a worker within the meaning of Part 1 of the *Workers Compensation Act*.

12. Any action or conduct of the Defendant, DR. SAM STEWART, 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.*

13. The Defendant, DR. SAM STEWART INC., was not an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

14. Any action or conduct of the Defendant, DR. SAM STEWART INC., 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.*

15. The Defendant, CARMEL LOUIE, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

16. Any action or conduct of the Defendant, CARMEL LOUIE, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act.*

17. The Defendant, JAQUELINE AGATE, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

18. Any action or conduct of the Defendant, JAQUELINE AGATE, which caused the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act.*

19. The Defendant, VANCOUVER ISLAND HEALTH AUTHORITY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

20. Any action or conduct of the Defendant, VANCOUVER ISLAND HEALTH AUTHORITY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, or its servant or agent, 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 April, 2006.

_____

Herb Morton
VICE CHAIR

NO. 03 4816
VICTORIA 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:

MYRA SIMPSON

PLAINTIFF

AND:

DR. STUART SILVER, DR. STUART SILVER INC., CARMEL LOUIE, JAQUELINE AGATE, DR. SAM STEWART, DR. SAM STEWART INC., DR. ROBERT KOOPMANS, CAPITAL HEALTH REGION, carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, VICTORIA HOSPITAL SOCIETY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL, VANCOUVER ISLAND HEALTH AUTHORITY carrying on the operation of hospital under the name of VICTORIA GENERAL HOSPITAL and VICTORIA GENERAL HOSPITAL

DEFENDANTS

SECTION 257 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
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