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

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WCAT Decision Number: **WCAT-2006-03916**
WCAT Decision Date: **October 17, 2006**

Panel: Herb Morton, Vice Chair

WCAT Reference Numbers: 060994-A and 000464-B

Section 257 Determination and
Application for Reconsideration of *Appeal Division Decision #2001-1896*
In the Supreme Court of British Columbia
Vancouver Registry No. S016785
Erin Hamilton v. Victorian Order of Nurses of British Columbia, Nurse Karin Henderson and The Insurance Corporation of British Columbia

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Applicant (section 257): Erin Hamilton
(the "plaintiff")

Respondents: Victorian Order of Nurses of British Columbia and The Insurance Corporation of British Columbia
(the "defendants")

Representatives:

For Applicant:	Judy S. Voss MORRISON VOSS
For Respondents:	
Victorian Order of Nurses of British Columbia	Holly J. Harlow GUILD, YULE and COMPANY LLP
Insurance Corporation of British Columbia	Paul A. McDonnell SINGLETON URQUHART LLP

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Noteworthy Decision Summary

Decision: WCAT-2006-03916 **Panel**: Herb Morton **Decision Date:** October 17, 2006

Section 257 determination – Reconsideration – Duty to give notice – Duty to invite participation by third party defendants in a legal action – Sections 253.1(5) and 256(2) of the Workers Compensation Act

A preliminary issue was raised in this section 257 application regarding the duty on the Appeal Division of the Workers' Compensation Board, operating as WorkSafeBC, (Appeal Division) to invite participation by third parties who might be named as defendants in a legal action. Given the evidence before Appeal Division that the plaintiff was contemplating legal action and the prospect that this could lead to a section 11 (now section 257) application, the Appeal Division should have invited the third parties/defendants to participate as interested persons. On the facts of this case, although the third parties/defendants could have asserted their interest in participating in the proceeding, they did not have a duty to apply for interested party status until the worker brought her legal action.

The plaintiff, who received a Hepatitis B vaccination at her workplace, alleged damage to the nerves or muscles of her shoulder as a result of negligent placement of the needle. Her employer had contracted with a third party, V, for the provision of the Hepatitis B injections, and her injection was administered by a nurse employed by V. The plaintiff's claim for compensation was denied and she appealed. At the former Appeal Division the plaintiff argued that she felt compelled, on a subjective basis, to receive the vaccination based on her conversation with her supervisor. She withheld evidence in support of this position. Although there was information on file that she had consulted a lawyer earlier regarding the possibility of a legal action, neither V nor the nurse were invited to participate in the Appeal Division proceeding. Subsequent to the Appeal Division decision, the plaintiff commenced legal action and requested a determination under section 257 of the *Workers Compensation Act* (Act). A preliminary issue raised by the section 257 application was whether the Appeal Division's decision concerning the plaintiff's status was binding on the WCAT, notwithstanding the lack of notice to V and its nurse, or whether there was a basis for reconsidering that decision.

The panel viewed V's submissions as amounting to a "request of a party, to reopen an appeal in order to cure a jurisdictional defect" under section 253.1(5) of the Act, even though it was not a party to the initial Appeal Division appeal. Apart from this statutory provision, V had a right under common law to be heard prior to a final determination being made on the plaintiff's status in relation to the legal action. The Appeal Division's policies said it may give notice or allow intervention by other parties where the participation of these parties will assist inquiry into the merits of the issues. In proceeding to make a decision on an appeal, without notice to third parties which might be named as defendants in a legal action, the Appeal Division took the risk that its decision would be set aside as involving a breach of natural justice. Given the evidence before it that the worker was contemplating legal action and the prospect that this could lead to a section 11 (now section 257) application, it should have invited V and the nurse to participate as interested persons. Although V was aware of the ongoing proceeding before the Appeal Division and could have asserted its interest in participating, on the facts of this case it did not have a duty to apply for interested party status until the worker brought her legal action.

RE: Section 257 Determination
Hamilton v. Victorian Order of Nurses of British Columbia et al.
Application for Reconsideration: *Appeal Division Decision #2001-1896*

WCAT Decision Number: **WCAT-2006-03916**
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Introduction

The plaintiff was employed by the Insurance Corporation of British Columbia (ICBC) as a claims investigator. ICBC contracted with the Victorian Order of Nurses of British Columbia (VON) for the provision of Hepatitis B vaccine injections to employees considered at risk of contracting Hepatitis B, due to their work duties in dealing with recovered stolen vehicles. On December 2, 1999, the plaintiff received the second in a series of three Hepatitis B vaccinations at the workplace. The injection was given by the defendant, Nurse Karin Henderson (the nurse). In her legal action, the plaintiff claims negligence in the placement of the needle, causing damage to the nerves or muscle of her left shoulder.

By decision dated September 27, 2001 (*Appeal Division Decision #2001-1896*), a panel of the former Appeal Division of the Workers' Compensation Board (Board) denied the plaintiff's application for workers' compensation benefits in connection with the December 2, 1999 vaccination. The Appeal Division panel found that the plaintiff did not sustain a personal injury arising out of and in the course of her employment. The plaintiff subsequently commenced a legal action by a writ of summons filed on November 30, 2001. The plaintiff's statement of claim was filed on July 13, 2004. The VON filed a statement of defence on December 20, 2004, which pled section 10 of the *Workers Compensation Act* (Act) as a complete defence to the legal action (in paragraph 5). The defendant ICBC filed a statement of defence on July 30, 2004, which did not raise a defence under the Act.

Pursuant to section 257 of the Act, the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court concerning actions based on a disability caused by occupational disease, a personal injury or death. This application was initiated by counsel for the plaintiff on March 24, 2006. As a preliminary matter, plaintiff's counsel requested direction as to how to proceed given the "unusual circumstances of already possessing an Appeal Division Decision on the issue."

By memo dated April 7, 2006, I noted in part:

> The plaintiff (Erin Hamilton) is a claims investigator with the Insurance Corporation of British Columbia (ICBC). On December 2, 1999, she received a Hepatitis B vaccination at her workplace. *Appeal Division Decision #2001-1896* dated September 27, 2001 concluded that Erin Hamilton did not sustain a personal injury arising out of and in the course of her employment. The plaintiff (who had a union representative) and ICBC were parties to the Appeal Division decision, as the worker and employer. The Victorian Order of Nurses of British Columbia and Nurse Karin Henderson were not invited to participate in the appeal before the Appeal Division.
>
> ...
>
> *WCAT Decision #2004-04928*, 20 W.C.R. 303, found that WCAT also has jurisdiction to set aside an Appeal Division decision on the common law ground of an error of law going to jurisdiction (including a breach of natural justice).
>
> A preliminary question arises with respect to the effect of the Appeal Division decision, and WCAT's jurisdiction in this application. Is the Appeal Division decision concerning the plaintiff's status binding, so that in determining the status of the plaintiff, WCAT need only certify as to the conclusions reached by the Appeal Division? In that event, submissions on the merits need only be provided in relation to the status of the defendants.
>
> Alternatively, would it involve a breach of natural justice with respect to the defendants' (i.e. the Victorian Order of Nurses of British Columbia and Nurse Karin Henderson) right to be heard, to treat the Appeal Division decision as binding in connection with the determination of the plaintiff's status in the s. 257 application?
>
> I am not aware of a prior decision determining this jurisdictional issue. Current practice is that if there is an indication a legal action is pending, the potential defendants are invited to participate as interested persons in the appeal so as to avoid this situation. It may not always be possible to identify such situations in advance.
>
> To facilitate the submissions process, counsel may wish to provide submissions on both this preliminary issue, and on the merits in respect of the status of all parties to the legal action (regardless of the position taken on the preliminary jurisdictional issue).

Attached for convenient reference are two other Appeal Division decisions regarding vaccinations:

- *#99-0554*, March 30, 1999, *Workers' Compensation Reporter*, Volume 15, page 385;
- *#2001-1950*, October 3, 2001.

By submission dated June 14, 2006, counsel for the VON requests reconsideration of *Appeal Division Decision #2001-1896*. She submits that the VON has the right to be heard, and that there is substantial and material new evidence which did not previously exist.

Transcripts have been provided of the November 22, 2005 examinations for discovery of Harbans Singh Siddoo (a representative of ICBC) and of Karin Henderson (as a representative of the VON), and of the November 24, 2005 examination for discovery of the plaintiff.

The legal action is scheduled for trial on September 10, 2007. Counsel for the defendant ICBC advised that he had instructions not to participate in the WCAT process and would not be providing submissions. Written submissions have been provided by counsel for the plaintiff, and by counsel for the VON. The legal action has been discontinued against Karin Henderson, based on agreement between counsel. Plaintiff's counsel explains, in this regard:

> The basis for agreement was that Ms. Henderson was an employee of Victorian Order of Nurses of British Columbia and was acting within the course of her employment at all material times. Thus, for the purposes of the litigation, Ms. Henderson's employer was vicariously liable.

A preliminary issue arises as to whether I should proceed to issue a certificate in reliance on the Appeal Division decision. Alternatively, does natural justice require that the defendant VON have an opportunity to be heard, in connection with the determination of the plaintiff's status?

No oral hearing has been requested. The preliminary issue is a legal one. With respect to the merits, I do not consider that any significant issue of credibility arises in this application. The prior Workers' Compensation Review Board (Review Board) finding and Appeal Division decision did not involve any adverse finding of credibility with respect to the plaintiff's evidence. Rather, those decisions largely hinged on the fact that apart from the evidence contained in the claim file in relation to the initiation of the plaintiff's claim, no additional evidence was provided by the plaintiff (either orally or in writing) in support of her appeals. I find that the examination for discovery transcripts and the other written evidence and submissions provide a proper basis for making a decision without an oral hearing.

In this decision, I will refer to Erin Hamilton as the plaintiff or the worker.

Issue(s)

This section 257 application raises a preliminary issue regarding the effect of the prior Appeal Division decision concerning the plaintiff's claim for workers' compensation benefits. Is the Appeal Division decision binding, notwithstanding the lack of notice to the defendant? If there is a basis for reconsidering the Appeal Division decision, or addressing the issues afresh, did the plaintiff's injury on December 2, 1999 arise out of and in the course of her employment?

Jurisdiction

(a) Section 257 application

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.

(b) Application for reconsideration of Appeal Division decision

The workers' compensation appeal structures were changed effective March 3, 2003 by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The former Review Board, Appeal Division and Medical Review Panels were replaced by an internal review body (the Review Division) and an external appeal body (WCAT).

Section 96.1(1) of the former Act provided that Appeal Division decisions were final and conclusive, subject to reconsideration under section 96.1 or a Medical Review Panel (MRP) appeal. Section 96.1 defined the authority of the Appeal Division to reconsider a decision on the basis of new evidence. The Appeal Division also had authority to set aside one of its own decisions on the basis of the common law ground of an error of law going to jurisdiction. This authority was confirmed by the British Columbia Court of Appeal in the August 27, 2003 decision in *Powell Estate v. WCB (BC)*, 2003 BCCA 470, [2003] B.C.J. No. 1985, (2003) 186 B.C.A.C. 83, 19 W.C.R. 211.

Under section 256 of the current Act, WCAT has jurisdiction to reconsider both WCAT and Appeal Division decisions on the basis of new evidence:

> **256** (1) This section applies to a decision in
>
> (a) a completed appeal by the appeal tribunal under this Part or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*, and
>
> (b) a completed appeal by the appeal division under a former enactment or under Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*.
>
> (2) A party to a completed appeal may apply to the chair for reconsideration of the decision in that appeal if new evidence has become available or been discovered.
>
> (3) On receipt of an application under subsection (2), the chair may refer the decision to the appeal tribunal for reconsideration if the chair is satisfied that the evidence referred to in the application
>
> (a) is substantial and material to the decision, and
>
> (b) did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.
>
> (4) Each party to a completed appeal may apply for reconsideration of a decision under this section on one occasion only.

Item #15.24 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) further states:

> WCAT also has jurisdiction to consider an application to set aside an Appeal Division decision on common law grounds (see WCAT-2004-04928).

WCAT Decision #2004-04928, "Reconsideration Application — Whether WCAT Has Jurisdiction to Set Aside an Appeal Division Decision on the Basis of the Common Law Ground of an Error of Law Going to Jurisdiction", is published in the *Workers Compensation Reporter* at Volume 20(2), page 303.

The test for determining whether there has been an error of law going to jurisdiction generally requires application of the "patently unreasonable" standard of review. With respect to an alleged breach of natural justice, the common law test to be applied is whether the procedures followed by WCAT were fair (see *WCAT Decision #2004-03571*, "Reconsideration Application — Whether There Has Been a Breach of Natural Justice Almost Always Depends on All of the Circumstances", 20 W.C.R. 291).

Effective December 3, 2004, the provisions of the *Administrative Tribunals Act* (ATA) which affect WCAT were brought into force. Practice and procedure at item #15.24 of WCAT's MRPP provides that WCAT will apply the same standards of review to reconsiderations on the common law grounds as would be applied by the court on judicial review. These requirements are codified by section 58 of the ATA.

In paragraph 25 of *Decision of the Chair No. 8*, "Delegation by the Chair", March 3, 2006, the chair delegated the following authority to WCAT members (upon assignment of the application to the member by the chair):

> (a) under section 256, to refer a WCAT or Appeal Division decision to WCAT for reconsideration, and,
>
> (b) where such authority exists at common law, the authority to set aside a decision as void or to find that a decision is incomplete, and to return the matter to WCAT for completion of the decision,

These matters were assigned to me by the WCAT chair (in respect of both the section 257 determination and the application for reconsideration of the Appeal Division decision).

Background

The plaintiff filed an application for workers' compensation benefits dated December 21, 1999, in connection with her vaccination which she indicated occurred on December 3, 1999. I accept other evidence which indicates the actual date was December 2, 1999. On December 2, 1999, policy in the *Rehabilitation Services and Claims Manual* provided at item #19.41:

> *#19.41 Adverse Reactions to Inoculations or Injections*
>
> The following principles apply in claims arising from an adverse reaction to injections or inoculations:
>
> 1. Where the injection or inoculation is received voluntarily by the worker, either as part of a broad program put on by the employer or in any other circumstances, a claim should not be accepted.

2. Where the inoculation or injection is required, either as a condition of employment or as a condition of continued employment (such as where the claimant has suffered an injury or contracted a disease outside the work environment, but the employer insists on precautionary measures being taken before the worker returns to employment), the claim should be allowed.

3. Although each claim has to be decided on its merits, generally a subjective test should be applied to determine whether or not the worker was "compelled" to take the treatment. For example, in one claim submitted for consideration, the following factors were taken into account:

   (a) the employer had established a program whereby tetanus shots were given when metal cuts occurred;

   (b) although the first shot was with consent, the notice for the booster shot left the impression that it was required. In other words, no choice was specifically given. The worker was merely advised he was to attend at a specific time and place to receive the shot;

   (c) since no worker had ever refused a booster shot, there was further group or peer pressure and it was unlikely that a worker would feel free to refuse;

   (d) that unlikeliness was increased by the claimant's language difficulties.

   In general then, if the evidence is clear that the claimant was personally convinced that it was necessary to take the shot in spite of objective evidence from the employer that the process was not compulsory, the claim should be accepted.

By decision dated January 6, 2000, an entitlement officer denied the plaintiff's claim for compensation. The entitlement officer reasoned:

> You confirmed you were given the hepatitis B shot as a part of a preventative program by your employer. It was purely voluntary in nature. This program was put on by your employer for preventative purposes only. I have reviewed the information available and conclude that you have not sustained any personal injury nor were you exposed to or contracted an occupational disease.

A copy of the January 6, 2000 decision was sent to the plaintiff's employer (ICBC). The plaintiff appealed the January 6, 2000 decision to the Review Board by a notice of appeal – part 1 dated January 10, 2000, and a notice of appeal – part 2 dated May 16, 2000. The Review Board invited ICBC to participate, and ICBC completed a notice of participation. The plaintiff advised she was not requesting an oral hearing. The worker's union representative filed a written submission dated January 10, 2001, enclosing a medical-legal report dated May 4, 2000 from the worker's family physician. ICBC provided a written submission dated February 26, 2001, enclosing a copy of a memo dated August 25, 1999 which had been sent by ICBC to all managers and site supervisors regarding the Hepatitis B Vaccination Program (as well as other materials). A rebuttal submission dated March 7, 2001 was provided by the plaintiff's union representative. In that submission, the worker's union representative argued:

> [The employer] also attached Appendix A - D, which includes the bulletin to all Managers and Site Supervisors on August 25, 1999 and various literature on Hepatitis B and the risk factors associated. [The employer] also notes that Ms. Hamilton was employed in one of the eligible job classifications.
>
> It is the Union's contention that the Employer, in their submission, has missed the whole point of the appeal. Appendix A-D <u>was not</u> sent to all employees, they were sent to Managers. Also, Ms. Hamilton <u>only</u> received Appendix C from her manager, Harbans Siddoo.
>
> When Ms. Hamilton was given this one page info sheet she said, "I'm not sure about this". Mr. Siddoo replied to her, "It's important that you get it" and "If you don't take it, you won't be covered by WCB". It was this remark that compelled Ms. Hamilton to take the vaccination.
>
> [underlining in original]

By finding dated May 15, 2001, a three-member panel of the Review Board denied the plaintiff's appeal. The Review Board panel stated that it found "no reliable evidence of compulsion." The Review Board panel reasoned:

> The matter of a conversation between Ms. Hamilton and Mr. Siddoo had never been mentioned before, and we have no first hand or corroborating evidence that it occurred. There was no mention of it in the report to the employer, the reports to the Board, the claim log, or the initial submission. [the worker's union representative] does not identify the source of his information. We do not accept it as evidence.

Copies of the Review Board finding were provided the plaintiff and her union representative, and ICBC and its representative.

By notice of appeal dated May 22, 2001, the plaintiff appealed the Review Board finding to the Appeal Division. She indicated in her notice of appeal that she was not requesting an oral hearing. In a written submission dated May 22, 2001, the worker's representative explained:

> The Review Board also stated that I gave evidence without identifying the source of the information. As indicated the source was the claimant herself. If the Review Board was unclear of this, then we were more than willing to attend an oral hearing.

In response to an invitation from the Appeal Division, ICBC completed a notice of participation dated July 16, 2001. By letter dated July 5, 2001, an appeal officer of the Appeal Division invited the plaintiff's representative to provide a further submission. By telephone call of July 6, 2001, the plaintiff's union representative advised he would not be making a further submission. On July 24, 2001, an acting appeal officer invited a submission from ICBC. By letter dated August 10, 2001, the acting appeal officer forwarded to the worker's union representative a copy of the submission received from ICBC. By letter dated August 23, 2001, the appeal officer acknowledged receipt of the rebuttal submission received from the worker's union representative on August 15, 2001.

Copies of these latter two submissions were not contained in the claim file records provided to WCAT by the Board. By memo dated September 6, 2006, I requested that copies of these submissions be provided by the parties. The August 7, 2001 submission by ICBC, and the August 14, 2001 submission by the worker's union representative, were subsequently provided to WCAT. These were disclosed to the parties on September 19, 2006, with a further opportunity for submissions.

In its submission of August 7, 2001, ICBC argued:

> It is our view that the evidence supports our submission that this inoculation program was voluntary. We submit that in order for an individual to have their claim accepted they must provide evidence that they felt "compelled" to participate in the vaccination program. This must include clear evidence that the claimant was personally convinced that they were required to have the vaccination. We submit that this evidence has not been provided.

By response dated August 14, 2001, the worker's union representative argued:

> [ICBC's representative] throughout her submission talks about evidence or lack of evidence, voluntarily, as she attacked my submission. She indicates that I stated incorrect terms were used when quoting the Employer.
>
> The term "WCB requires employers to offer Hepatitis B vaccinations to all at risk employee's" would be a concern to any employee in itself. In addition, [ICBC's representative] states that the August 25th, 1999 Work Safe memo was sent to all managers and site supervisors, including the attached Appendix's [*sic*].
>
> There is no evidence that the same package was duplicated and distributed to all at risk employees. Both supervisors and some co-workers gave the compelling information verbally.

A panel of the Appeal Division issued its decision on September 27, 2001. The Appeal Division cited, in paragraph 18, the August 7, 2001 submission from the employer's representative. The Appeal Division panel found that the employer offered the Hepatitis B program to its employees on a voluntary basis. The Appeal Division panel reasoned in part:

> (28) There are two submissions by the worker's representative that are provided as a basis for the worker's compulsion to take the vaccination. They are contained in the March 7, 2001 submission made to the Review Board and the May 22, 2001 submission made to the Appeal Division. The first submission deals with an alleged conversation between the worker and her manager, referenced earlier in this decision, in which a remark was said to have been made by the manager to the worker to the effect that if she didn't take the vaccination, then she would not have been covered by WCB. The second submission refers to a fact that the worker was at the time of the injury in training as a bodily injury claims adjuster, and was at the time overwhelmed with training issues. **The Review Board dealt with the March 7, 2001 response as having no evidentiary basis. I accept the reasons of the Review Board, and find that the Review Board properly and reasonably dealt with this submission.** Furthermore, there is nothing informative in the May 22, 2001 submission, to substantiate a claim of compulsion arising out of a voluntary inoculation program. The fact that the worker was overwhelmed with training issues, or even that she did not receive all of the information regarding side effects of the Hepatitis B vaccination, are not clear indicators that she was

> convinced it was necessary to take the shot. Such feelings could be consistent with feelings of confusion and uncertainty.
>
> (29) I find that the particular facts of this case do not warrant a departure from the general policy guideline in item #19.41 against compensating an injury arising from a voluntary inoculation program. A departure from the general policy requires a clear articulation of the factors at play or substantive reasons why the worker was convinced it was necessary to take the vaccine despite objective evidence that the process was not compulsory.
>
> [emphasis added]

The Appeal Division decision was not limited to determining whether the worker was eligible for compensation. The panel's decision concerning the worker's appeal concerned whether the plaintiff's injury arose out of her employment. In paragraph 25, the Appeal Division panel reasoned:

> Having found the injury was caused by an accident which occurred in the course of employment, a presumption arises under Section 5(4) of the *Act* that the accident arose out of the employment. This presumption can be rebutted under *Manual* policy #19.41 only if the evidence shows that the injection was received voluntarily by the worker (*Manual* policy #19.41(1)), and, the injection is not required as a condition of employment (*Manual* policy #19.41(2)). The evidence is clear that the vaccination program was not required as a condition of employment. The general guideline in the policy provides that a subjective test should be applied to determine if the worker was personally convinced to take the treatment.

In paragraph 31, the Appeal Division panel concluded:

> In conclusion, the worker's appeal is denied. The worker did not sustain a personal injury arising out of and in the course of employment pursuant to Section 5(1) of the *Act* that would entitle her to compensation. The evidence rebuts the presumption under Section 5(4) of the *Act*.

Following the Appeal Division decision, the plaintiff initiated her legal action.

Reasons and Findings

A. Application for Reconsideration – Appeal Division Decision

The plaintiff submits that *Appeal Division Decision #2001-1896* is binding. Plaintiff's counsel argues:

> 3. If the VON had made submissions at the time of the Review and or the Appeal it is doubtful that they could have in their possession any information that would have effected [*sic*] the outcome, given the basis for the Appeal decision being the exclusion from being in the course of employment due to the program being voluntary and Ms Hamilton's subjective beliefs.

Plaintiff's counsel advises that the VON were served with the Writ of Summons and acknowledged receipt on November 20, 2002. Plaintiff's counsel further submits:

> 12. Ms Hamilton however has relied on and followed all of the WCB provisions and exhausted all levels of appeal prior to entering into the litigation process.
>
> 13. The VON has had knowledge of the litigation process since 2002 and has done nothing to seek redress before this Board. This process has been used for litigation advantage.
>
> 14. Ms Hamilton is now exposed to further damage as she has spent time, energy, and monies in financing the law suit which may not be recoverable if the VON is at this late date successful.
>
> 15. The interest of Natural Justice brings with it the principles of equity. The VON has by its actions been very dilatory in seeking any redress available from the WCB. The principles of Laches must be applicable.

A concern which arises in this case is that the decisions made by the Review Board and Appeal Division concerning the plaintiff's claim for compensation were based in part on a lack of evidence. The plaintiff's union representative sought to argue, in his rebuttal submission, that the plaintiff felt compelled to take the vaccination based on a conversation with her manager. The Review Board rejected that argument on the basis that no evidence had been provided to support this argument. The Review Board panel was not prepared to accept the hearsay description by the worker's representative regarding the worker's evidence, when the plaintiff had not furnished this evidence either orally or in writing. The Review Board finding made clear the nature of this deficiency, by explaining that "The matter of a conversation between Ms. Hamilton and Mr. Siddoo had never been mentioned before, and we have no first hand or corroborating evidence that it occurred." However, in appealing the Review Board finding to the Appeal Division, the appellant did not request an oral hearing. Nor did she submit any first hand or corroborating evidence that the conversation had occurred as described. The plaintiff's union representative simply explained that he was relaying information provided by the plaintiff, in response to the statement by the Review Board that the union representative had not identified the source of his information.

The Appeal Division panel had several options. It could have convened an oral hearing, despite the lack of a request for this. Alternatively, the Appeal Division panel could have pointed out to the plaintiff's union representative that it was not sufficient that he identify the plaintiff as the source of his information, and that he would have to furnish evidence from the plaintiff and/or her supervisor (such as a letter, statement, or affidavit) in order for this argument to be considered. The Appeal Division panel elected to proceed to make a decision on the basis of the materials provided in support of the appeal. In denying the plaintiff's appeal, the Appeal Division panel agreed with the Review Board panel that the "alleged conversation" had "no evidentiary basis."

There are two possible interpretations of the foregoing. One is that the plaintiff's union representative did not appreciate that it was insufficient for him to describe the worker's evidence, and that direct evidence from the worker and/or her supervisor (either orally or in writing) were required in order to establish the contents of the conversation. A second possibility is that the plaintiff was going through the motions of exhausting the avenues of appeal under the Act, without actually furnishing the appeal bodies with the evidence to support her appeal.

The failure to provide an evidentiary basis for the argument put forward on the plaintiff's behalf by her union representative meant that neither the Review Board nor the Appeal Division addressed his submission on the merits (as to whether the plaintiff felt compelled, on a subjective basis, to receive the vaccination based on the contents of a conversation with her supervisor). Given that the basis for the plaintiff's appeal concerned her subjective beliefs (pursuant to the policy at RSCM item #19.41), it is strange that no additional evidence was provided by the plaintiff, either orally or in writing, to either the Review Board or the Appeal Division regarding her subjective beliefs. While legal argument was presented regarding the plaintiff's subjective beliefs, the plaintiff's union representative failed, for reasons unknown, to submit the plaintiff's evidence for consideration. It is possible that the outcome of the Appeal Division decision was affected by either an intentional or negligent withholding of evidence. (While not necessary to my decision, I would note that I consider the latter possibility more likely.)

In these circumstances, it would not seem possible for the plaintiff or ICBC to request reconsideration of the Appeal Division decision on the basis of new evidence. The former section 96.1(3) required that an application for reconsideration be supported by substantial and material new evidence which "did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered." The current section 256(3) requires that there be substantial and material new evidence which "did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered." The exercise of reasonable or due diligence would have required the plaintiff to provide her evidence to the Appeal Division, either orally or in writing, in light of the finding by the Review Board that

it was not prepared to accept a hearsay account of that evidence from her representative in his submission.

Under section 256 of the Act, a "party to a completed appeal" may ask that WCAT reconsider a WCAT or Appeal Division decision on the basis of new evidence. At the time of the Appeal Division decision, the only parties to the appeal were the plaintiff and ICBC. As the VON is not a "party to a completed appeal", it cannot seek reconsideration under section 256 of the Act.

This background raises a concern as to the fairness of the VON being bound by the Appeal Division decision, when it did not have the opportunity to participate in that appeal and when the appellant did not exercise reasonable or due diligence in the presentation of her appeal to the Appeal Division. While the Appeal Division decision was reasonable in the context of the evidence which was before the panel, the Appeal Division panel did not consider what the result would have been had an evidentiary basis been provided for the argument made by the worker's union representative.

Counsel for the VON points out that the VON was not invited to participate in any of the prior proceedings before the case manager, Review Board and Appeal Division. I accept this as correct. Counsel candidly acknowledges, however, that the VON had some indirect general knowledge of these ongoing proceedings. By submission dated June 14, 2006, counsel for the VON advises:

> 7. A representative of ICBC called Diane Hicks of the VON sometime in late December 1999 or early January 2000, and advised that Hamilton had submitted a WCB claim, that it had been denied, and that it was under appeal.
>
> 8. On or about January 27, 2000, Bob Brownlee of ICBC confirmed to the Adjuster retained on behalf of the VON (the "Adjuster") that Hamilton's claim for WCB compensation was rejected and that the decision was being appealed.
>
> 9. On or about April 11, 2000, Bob Brownlee confirmed to the Adjuster that the appeal against WCB had been filed but he did not believe that a hearing date had been established. Mr. Brownlee agreed to follow-up regarding the WCB appeal and that he would advise the Adjuster further.
>
> 10. On or about September 12, 2000, Hamilton spoke to the Adjuster and stated that her WCB appeal had not been heard, but that she would keep the Adjuster informed in this regard.

In paragraph 50, counsel for the VON further submits:

> Hamilton argues that the VON has been dilatory in seeking relief and that the fact that they did not make submissions at any of the Previous Proceedings should determine the outcome of this proceeding. The VON only knew about the Previous Proceedings, though, because the parties to those proceedings were keeping it informed of the outcome at each stage. The VON were not invited to make submissions at those Previous Proceedings. WCB did not notify the VON that they had a right to be heard, assuming that they had such a right at the Previous Proceedings.

Counsel for the VON cites *WCAT Decision #2005-01289*, regarding the requirements of natural justice and the right to be heard. In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: Butterworths, 2006) Sara Blake states at page 11:

> Essentially, the courts require that decisions that affect the rights of individual persons be made following procedures that are fair to the affected parties. This requirement is called the "doctrine of fairness" or the "duty to act fairly".
>
> At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond. The purpose is twofold. First, the person to be affected is given an opportunity to influence the decision. Second, the information received from that person, should assist the decision maker to make a rational and informed decision. A person is more willing to accept an adverse decision if the process has been fair.
>
> A right to be heard is not a right to have one's views accepted nor is it a right to be granted the order sought. It is only a right to have one's views heard and considered by the decision maker.
>
> [reproduced as written]

Under the heading "Status: Who May be a Party?", Blake further comments at page 29:

> Questions of standing should be decided at the outset prior to the commencement of the hearing on the merits. A hearing cannot proceed fairly while a person's right to participate remains uncertain. Persons requesting to participate in a proceeding should describe their interest and state the purpose of their intervention to the tribunal with sufficient particularity so as to enable other parties to make representations, and to enable the tribunal to decide whether to grant status and to define the scope of participation. They may be expected to prove their interest with

> evidence. One cannot expect to be granted status on a vague request to intervene and on an assurance that one's position will be fully disclosed at the hearing.

In this case, the writ of summons was filed on November 30, 2001. At that time, 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….

The bringing of a legal action was a prerequisite to the making of an application for a determination under section 11 of the Act (by the former Appeal Division). Accordingly, it would not have been open to the VON to request a determination under section 11 of the Act prior to November 30, 2001. (WCAT's authority under section 257, pursuant to the March 3, 2003 changes contained the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), similarly requires that a legal action have been brought.)

Decision of the Governors No. 1, "Appeal Division Administration, Practice and Procedure", April 8, 1991, 7(1) W.C.R. 7, provided at item #2.0:

> **2.0 Representation Before the Appeal Division**
>
> The procedure of the Appeal Division shall recognize and facilitate the appearance and participation by workers and employers acting for themselves or lay advocates acting on their behalf.
>
> **Where the participation of other parties in the procedure will assist inquiry into the merits of the issues, the Appeal Division may give notice to or allow intervention by these other parties**. For example, where an employer is no longer registered with the Board, the Appeal Division may give notice of an appeal commenced by a worker to the relevant industry association and the Employers' Advisor. Or in appeals commenced under Sections 96(6) and 96(6.1), the Appeal Division may give notice of the appeal to the workers or trade union representative of the workers employed by the employer who may have an interest in the appeal.
>
> [reproduced as written, emphasis added]

In *Decision of the Appeal Division No. 1*, "Practice and Procedure", 7 W.C.R. 33, the chief appeal commissioner provided as follows (at pages 41-42):

> **3.4 Representation Before the Appeal Division**
>
> The Appeal Division will recognize and facilitate the appearance and participation by workers and employers acting for themselves or lay advocates acting on their behalf.
>
> **The Appeal Division operates on an inquiry basis and may obtain information from sources other than a party to an appeal. Where the participation of other persons or groups in the procedure will assist inquiry into the merits of the issues, the Chief Appeal Commissioner may give notice to or allow intervention by them. Their participation will be invited to assist the Appeal Division in the consideration of the appeal, through the provision of further evidence or submissions.** For example, where an employer is no longer registered with the Board, the Chief Appeal Commissioner may give notice of an appeal commenced by a worker to the relevant industry association and the Employers' Advisers. Such notification may be given by the Chief Appeal Commissioner prior to the matter being assigned to a panel of the Appeal Division, or at a later date upon request to the Chief Appeal Commissioner by the panel considering the matter. On an appeal from a Review Board finding, notice will normally be sent to any organized group of employers which participated in the appeal to the Review Board under Section 90(2).
>
> All matters raised in the decision letter which was appealed to the Review Board, and in the Review Board finding, may be considered issues in the appeal. The Appeal Division will ensure that the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond.
>
> [reproduced as written, emphasis added]

Decision of the Governors No. 75, "Appeal Division Administration, Practice and Procedure", December 1, 1994, 10(5) W.C.R. 753, provided at item #2.0:

> **2.0 Representation Before the Appeal Division**
>
> The procedure of the Appeal Division shall recognize and facilitate the appearance and participation by workers and employers acting for themselves or lay advocates acting on their behalf.

> **Where the participation of other parties in the procedure will assist inquiry into the merits of the issues, the Appeal Division may give notice to or allow intervention by these other parties**. For example, where an employer is no longer registered with the Board, the Appeal Division may give notice of an appeal commenced by a worker to the relevant industry association and the employers' advisor. Or in appeals commenced under Sections 96(6) and 96(6.1), the Appeal Division may give notice of the appeal to the workers or trade union representative of the workers employed by the employer who may have an interest in the appeal.
>
> [reproduced as written, emphasis added]

Appeal Division practice and procedure was revised and consolidated in *Appeal Division Practice and Procedure Decision No. 33*, effective September 1, 2001, published in Volume 17 of the *Workers' Compensation Reporter*. This provided, at page 11:

> **6.0 REPRESENTATION ISSUES**
>
> As the Appeal Division conducts its hearings on an inquiry basis, it may seek to obtain information from sources other than those offered by a party to the proceedings. Where the participation of other persons or groups will assist an inquiry into the merits of the issues, these persons or groups will be given notice and invited to participate in the matter.

Given the fact that the VON was aware of the possibility that the worker might wish to pursue a legal action against the nurse and the VON, and given that the practice and procedure of the Appeal Division contained provision for participation by third parties where this would assist the Appeal Division panel in making a decision, it would have been open to the VON to apply for standing to be heard by the Appeal Division. Accordingly, the VON may be characterized as having sat on its hands until the worker exhausted her avenues of appeal under the Act and commenced a legal action. It is only at this late date that the VON submits that it had a right to be heard, and that it would be a breach of natural justice to treat the Appeal Division decision as binding on it.

A preliminary issue is whether, in addressing this section 257 application, I can simply proceed to address the merits as involving a new matter (i.e. without regard to the prior Appeal Division decision). At the time the Appeal Division decision was issued, section 96.1(1) of the Act provided:

> Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

Section 35 of the *Interpretation Act* provides:

> 35 (1) If all or part of an enactment is repealed, the repeal does not
>
> (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect,
> (b) affect the previous operation of the enactment so repealed or anything done or suffered under it,
> (c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed,
>
> ...

This provision makes section 96.1(1) applicable, notwithstanding its repeal, in relation to the final and conclusive effect of the Appeal Division decision (subject to a reconsideration of the Appeal Division decision). Accordingly, the Appeal Division decision was final and conclusive, subject to a Medical Review Panel appeal or an application for reconsideration under section 96.1. The statute did not contain an additional exception, in connection with an application for a certificate to the court under section 11 of the Act. However, this was dependent on there being a valid Appeal Division decision. The requirements of the common law applied to the determination as to whether a valid decision had been provided. As found by the British Columbia Court of Appeal in the *Powell Estate* case, *supra*, the statutory provision permitting reconsideration on the basis of new evidence added to, but did not supplant, the Appeal Division's authority to reconsider its decisions on the common law grounds.

A question arises as to whether, in response to an application for a section 257 certificate involving a third party who was not notified of a prior appeal to the Appeal Division or to WCAT concerning a worker's claim for compensation, WCAT should proceed to set aside the prior decision as void based on a breach of natural justice (i.e. where it concerned an issue as to whether the plaintiff was a worker, or whether the worker's injury arose out of his or her employment). Alternatively, is it open to WCAT to disregard the Appeal Division decision, and make a new decision on the section 257 application, on the basis that to do otherwise would involve a new breach of natural justice?

While the Appeal Division might have pointed out to the worker's representative the need to furnish evidence in support of the worker's appeal, the Appeal Division panel may reasonably have viewed the Review Board finding as having already done that. Accordingly, I do not consider that the Appeal Division decision involved a breach of natural justice in relation to the worker's right to be heard.

In *Campbell v. Poole Construction Ltd*., [1978] 5 W.W.R. 712, the Saskatchewan Court of Queen's Bench found that the Alberta Workers' Compensation Board had breached the requirements of natural justice by issuing a certificate to the effect that a legal action was barred without notice to the plaintiff. However, that decision does not have direct application to the circumstances of this case, as the VON was not a party to the worker's appeal.

It is evident that the worker turned her mind to the possibility of pursuing a legal action at an early date in her claim (prior to the Review Board finding and Appeal Division decision). An entry by an entitlement officer in the claim log dated October 16, 2000, states:

> Voice mail message received on Oct 10 2000 from [name] - lawyer - [telephone number] inquiry regarding the status of the worker's claim . Can she seek an action against the Nurse who provided the shot? Worker is still having problems with her arm.
>
> Called back - not available - lmtcb [left message to call back]
> [reproduced as written except for changes noted]

This inquiry in October 2000 followed the initial decision by the Board entitlement officer on January 6, 2000 to deny the plaintiff's claim, but was prior to the May 15, 2001 Review Board finding and the September 27, 2001 Appeal Division decision.

Given the prospect of a legal action, the Appeal Division panel could have followed some different procedure to take that possibility into account. For example, *WCAT Decision #2006-02800/2006-02801* dated July 7, 2006 began as an appeal to WCAT concerning a Review Division decision which found that the injured person was a worker rather than a volunteer. In that case, a legal action had already been commenced. At an early stage in the appeal to WCAT, the parties were advised:

> Any party to the legal action may request a section 257 determination. In that event, the section 257 application would be addressed at the same time as the appeal, and all parties or interested persons would have the opportunity to participate. This would likely concern a number of issues relevant to the legal action, as contemplated by section 257.
>
> Alternatively, WCAT can proceed to decide the appeal alone, but invite all parties to the legal action, or other persons who may be affected by the WCAT decision, to participate as interested persons in relation to the appeal. Subject to a section 257 application being received, I will proceed with consideration of the appeal on this latter basis. This will likely preclude any subsequent consideration by WCAT on the merits of any issue addressed in the appeal, in the event an application is subsequently made for a certificate

> under section 257 of the Act. (In other words, the section 257 application could involve decisions on the merits, and certification, regarding any new issues not addressed in the appeal, but would likely be restricted to bare certification on any issue determined in the WCAT appeal decision).

Similarly, *WCAT Decision #2005-01597* dated March 31, 2005, which concerned an appeal regarding a worker's claim for compensation, noted as follows:

> **Preliminary**
>
> Section 246(2)(i) of the Act provides that WCAT may request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal.
>
> The worker was seriously injured in a motor vehicle accident on November 30, 2003. Having regard to the possibility that a legal action might be brought by one of the persons involved in the motor vehicle accident, and to the possibility that this could result in a request for certification regarding the status of the parties to the action under section 257 of the *Workers Compensation Act* (Act), notice of this appeal was given to the third party (and ICBC), with the opportunity to participate. The third party (and ICBC) declined to participate. The Legal Services Division of the Board was also notified of the appeal. By letter of February 8, 2005, the associate general counsel, Legal Services Division, advised that while the authority of the Board to subrogate is dependent on the outcome of the appeal, it would await the outcome without taking any position.

That type of process would serve to assist in preventing situations such as those raised in the present case from occurring, where the existence of a legal action or possibility of a legal action is identified before the making of a decision on an appeal.

The VON acknowledges that it was kept informed (by ICBC or the plaintiff) regarding the status of the proceedings before the Board. It may reasonably be inferred that the VON would have been cognizant of the possibility of a legal action against the nurse and the VON. The VON took no action to request the opportunity to participate in the appeal before the Appeal Division, notwithstanding the fact that the published practice and procedure of the Appeal Division made provision for permitting third persons to participate in an appeal to assist a panel in its inquiry.

If the VON was content to leave the worker's application for compensation to be resolved by her appeals to the Review Board and the Appeal Division, without seeking the opportunity to participate, it may be questioned as to why it would be unfair for the VON to then be bound by the Appeal Division decision. Given the VON's awareness of the ongoing proceedings before the Review Board and the Appeal Division, the VON could have acted to assert its interest in participating. Arguably, the VON may be viewed as having taken the chance that the position of the appellant or respondent would not be properly presented to the Appeal Division. This lessens the sense of unfairness which arises from the prospect of applying the Appeal Division decision to this application (despite the fact they were not invited to participate in the appeal to the Appeal Division).

On the other hand, it may be expecting too much of a potential defendant to expect that they would apply for standing to be heard on a claim for workers' compensation benefits, when no action had been brought against them. Not every person who suffers an iatrogenic injury elects to bring a legal action against the person who provided the medical treatment. In this context, it is understandable that a potential defendant may not wish to take any action to assert its position, until such time as the injured person actually initiates a legal action.

The Appeal Division decision was clearly based on the evidence which was before the panel. However, the worker's central argument was not heard by the Review Board or the Appeal Division, due to the failure of her representative to put the evidence on which it was based before those appellate bodies. The evidentiary basis for that argument was subsequently provided in the examinations for discovery of the plaintiff and her supervisor. The plaintiff's evidence accorded with the description of her evidence previously put forward by her union representative. No decision has been made based on that evidence. Accordingly, there is a strong basis for considering that there would be an unfairness in refusing to address the merits afresh, having regard to all the evidence which is now available.

To reiterate, the background to this application includes the following:

- the defendants (VON and the nurse) were not invited to participate in any of the proceedings before the Board, the Review Board, or the Appeal Division;
- the plaintiff contemplated the possibility of a legal action at an early date (prior to the Review Board finding and the Appeal Division decision), apparently seeking legal advice from a lawyer regarding the possibility of such an action;
- the Appeal Division panel failed to invite participation by a potentially affected party (the nurse/VON), notwithstanding the indication on file that the plaintiff was considering the possibility of a legal action;
- a central point in the plaintiff's appeal to the Review Board and the Appeal Division was presented as a legal argument, but the supporting evidence for this position was withheld (whether intentionally or negligently);

- the plaintiff was alerted by the Review Board finding to the need to provide an evidentiary basis for her position but failed to provide this to the Appeal Division, with the result that no decision has been made which addresses this evidence;
- prior to the Appeal Division decision being issued, the plaintiff had not initiated a legal action;
- the plaintiff did not exercise her rights to initiate a legal action and to request a binding determination of her status in the form of a certificate under section 11 of the Act, until after the Appeal Division decision was issued.

Section 58(2)(b) of the ATA provides that questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly. Upon careful consideration, and having regard to all of the circumstances of this particular case, I find that the Appeal Division decision involved an inadvertent breach of procedural fairness. There was evidence on the claim file to show that the worker had consulted a lawyer regarding the possibility of pursuing a legal action. The Appeal Division panel proceeded to render a final decision, concerning whether the worker's injury arose out of and in the course of her employment, without inviting the potential defendant(s) to the legal action to participate. The Appeal Division had the opportunity to apply a process, by inviting interested persons to participate, which would have made its decision final and binding. Inasmuch as the Appeal Division failed to follow such a process, I find it would be a breach of natural justice for me to now apply that decision as binding in relation to the VON (given the fact it was not invited to participate before the Appeal Division).

The legislature has provided a separate process for determining the status of parties to a legal action. This authority was previously that of the Board under section 11 of the Act (and assigned to the Appeal Division by policy). Since March 3, 2003, this authority was given to WCAT under section 257 of the Act. That is the avenue available to the parties to a legal action, who wish to obtain a conclusive ruling regarding their status. All parties to the legal action, and interested persons (i.e. such as a plaintiff's employer which is not a party to the legal action) are invited to participate in that certificate process. It was open to the plaintiff to commence a legal action and obtain such a determination for the purposes of a legal action. Given that the plaintiff did not follow the statutory process for obtaining a conclusive determination of status for the purposes of a legal action, the argument that it would now be unfair to revisit the issues addressed in the Appeal Division decision loses some of its force.

Had the plaintiff made an application under section 11, it would not have been necessary to await the outcome of the appeals to the Review Board and the Appeal Division. All affected parties would have had the opportunity to participate, and she would have obtained a conclusive determination of her status for the purposes of the legal action. There would be an unfairness to third parties, were the decision

provided in the appeal context to be binding on them, when the third party did not have an opportunity to participate.

Section 256(2) permits an application for reconsideration on the basis of new evidence by "a party to a completed appeal." Section 253.1(5) states, in connection with its provisions dealing with amendments to a WCAT decision:

> This section must not be construed as limiting the appeal tribunal's ability, on request of a party, to reopen an appeal in order to cure a jurisdictional defect.

The phrase "party to a completed appeal" is contained in section 256, but not in section 253.1(5) of the Act. I view the VON's submissions, in this application, as amounting to a "request of a party, to reopen an appeal in order to cure a jurisdictional defect", even though they were not a party to the initial appeal. Even apart from this statutory provision, I find that the VON has the right, at common law, to be heard, prior to a final determination being made regarding the plaintiff's status in relation to the legal action. As set out above, I consider that the VON should have been invited to participate before the Appeal Division, if the Appeal Division decision was intended to provide a final and binding determination of the worker's status for the purposes of both the appeal and the possible legal action.

The Appeal Division (and now WCAT) controlled its own procedures. In proceeding to make a decision on an appeal, without notice to a third party which might be named as a defendant in a legal action, it may reasonably be considered that the Appeal Division took the risk that its decision would be set aside as involving a breach of natural justice. In order to ensure the decision would be final and binding, it was open to the Appeal Division to follow a procedure which would avoid this risk (by inviting the potential defendants to participate as interested persons). Accordingly, I find that fairness to the VON requires that the Appeal Division decision be set aside.

In coming to this conclusion, I appreciate that the Appeal Division panel may have overlooked the information indicating that the worker was investigating the possibility of a legal action. To the extent there was any breach of procedural fairness on the part of the Appeal Division panel, I would characterize it as inadvertent. I also recognize the apparent anomaly in my reasoning, in that I have found that the Appeal Division panel had a duty to notify the third party while not finding that the third party had a duty to apply for interested party status. I view the Appeal Division panel as having ultimate responsibility regarding the procedures to be followed, to ensure the legal validity of its decision. To the extent my reasoning is strained, I consider that this is required so as to prevent a breach of natural justice.

I considered the argument by plaintiff's counsel regarding laches, as to whether there was such delay by the VON in asserting its right to be heard that I should not exercise my discretion in favour of granting a remedy to them. Section 11 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, ch. 241, provides:

> **11** An application for judicial review is not barred by passage of time unless
>
> (a) an enactment otherwise provides, and
>
> (b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

In oral reasons for judgment in *Burlington Northern Railroad v. W.C.B.*, Vancouver Registry No. A920288, April 30, 1993, Mr. Justice Low dismissed an application for judicial review of a 1975 decision of the Board. He reasoned, at pages 3-4:

> On rehearing, the Board would have to review the circumstances of an accident which occurred in August, 1973, some twenty years ago. The 1975 decision was made, without objection as I understand it, solely on the basis of witness statements and other documents. No viva voce evidence has been preserved. It would be almost impossible for the various concerned parties to attempt to reconstruct, through evidence, either the scene of the accident or how it physically occurred. The Board would be severely hampered in an attempt to properly adjudicate the matter, a result brought about solely by the delay of Burlington in seeking a quashing of the 1975 decision and a rehearing of the issue.... Although section 11 of the Judicial Review Procedure Act specifically says that judicial review is not barred by effluxion of time, at some point there must be finality to the decisions of the Board. The point of finality in this case, if not in all cases, should be seen to be reached substantially prior to eighteen years after the decision. Permitting a review in the circumstances of this case, would invite reviews in other cases many years down the road and would tend to inject undesirable uncertainty into the conduct of the Board's business, contrary to the interests of both workers and employers covered by the legislation.
>
> [emphasis in original]

In that case, Mr. Justice Low found that the petitioner's delay was both unreasonable and inadequately explained, and that the arguments were compelling that the court should not exercise its discretion in favour of the petitioner.

Section 57 of the *Administrative Tribunals Act* (ATA) applies to WCAT decisions, pursuant to section 245.1 of the Act. Section 57 provides:

> **57** (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.
>
> (2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

MRPP item #15.24 indicates that WCAT will apply the same standards of review to reconsiderations on common law grounds as will be applied by the court on judicial review. This is stated to be in reference to MRPP item #15.32 regarding the standards of review, rather than item #15.31 regarding the time frames for seeking judicial review. For the purposes of my decision, I will assume that delay is a ground on which I may refuse to grant a remedy to the VON. I will further assume, however, that the time limit for initiating a petition for judicial review contained in section 57 of the ATA does not constrain my consideration of this application, on the basis that this time limit was not intended to have retroactive application.

Section 115.1 of the *Labour Relations Code*, R.S.B.C. 1996, ch. 244, stipulates that sections 57 and 58(1) and (2) of the ATA apply to the Labour Relations Board (LRB). The LRB became subject to the provisions of the ATA effective October 15, 2004. In *James v. BC (LRB)*, [2006] B.C.J. No. 1146, the British Columbia Supreme Court considered a petition of judicial review in connection with a decision of the LRB dated October 3, 2003. The petition for judicial review was filed on November 19, 2005. In that case, the British Columbia Supreme Court found that the ATA, and in particular section 58, applied as the petition for judicial review was filed after the ATA was in force (see paragraphs 36 to 42). That decision contained no reference to the time limitation requirements of section 57 of the ATA. Accordingly, that decision appears to implicitly confirm that the time limit for filing a petition for judicial review does not apply in connection with a decision made before the relevant provisions of the ATA came into force.

In *Andrews v. BC (LRB)*, [2005] B.C.J. No. 1139, the British Columbia Supreme Court denied a lay litigant's application for an extension of time to file a petition for judicial review. The petitioner was four days late in filing his petition, in relation to a decision of the LRB dated November 2, 2004. However, the provisions of the ATA concerning the LRB came into effect on October 15, 2004. As the LRB's decision was issued after that date, the 60-day time limit in section 57 of the ATA applied.

MRPP item #15.24 provides that WCAT will apply the same standards of review to reconsiderations on common law grounds as will be applied by the court on judicial review. This item is silent, however, regarding any time limitation for requesting reconsideration. The "Applications for Reconsideration -- WCAT Information Sheet" states:

> **4. Time limit**
>
> There is no time limit for applying for reconsideration.

I will, therefore, not address the grounds set out in section 57(2) of the ATA in my decision.

In the circumstances of this case, I am not persuaded that there was delay by the VON in this case which was unreasonable and inadequately explained. I do not consider that the VON was under an obligation to act until the plaintiff brought her legal action. The plaintiff's statement of claim was filed on July 13, 2004, and the VON's statement of defence (which raised a defence under section 10 of the Act), was filed on December 10, 2004. Nearly three years elapsed between the date the plaintiff filed her writ on November 30, 2001, until her statement of claim was filed. While five months elapsed between the filing of the statement of claim and the filing of the statement of defence, this is not so excessive as to justify a refusal to give relief to the defendant. The plaintiff could have initiated an application for a certificate under section 11 (now section 257), any time after the writ was filed. As well, it was not until the plaintiff provided sworn evidence in an examination for discovery on November 24, 2005, that the VON would have been able to furnish evidence regarding the plaintiff's subjective beliefs. The unfortunate course of events in this case is, in large measure, attributable to the fact that the plaintiff pursued her appeals under her workers' compensation claim, putting forth an argument regarding the state of her subjective beliefs while not furnishing her evidence to the Review Board or Appeal Division. Accordingly, the extensive delay in this case stems from that ill-advised course of action by the plaintiff. WCAT is now in a position to provide a reasoned decision based on consideration of the plaintiff's evidence.

I also considered the fact that the March 3, 2003 amendments to the Act contained many changes aimed at promoting finality. On the other hand, the legislative changes aimed at promoting finality were themselves tempered to some extent. For example, the chief review officer and WCAT chair were given authority to extend the time for review or appeal, respectively (although the general discretion to grant such an extension was constrained by the grounds set out in sections 96.2(4) and 243(3) of the Act). Section 256 authorizes WCAT to reconsider both WCAT and Appeal Division decisions on the basis of new evidence. The provisions concerning the final and binding effect of a decision are predicated on the provision of a valid decision (which is

subject to challenge on the common law grounds, as contemplated by section 253.1(5) of the Act). As well, section 96(7) provides that

> ...the Board may at any time set aside any decision or order made by it or by an officer or employee of the Board under this Part if that decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based.

Section 96(7) only concerns the Board's authority to reconsider its own decisions on the basis of fraud or misrepresentation, and does not relate to decisions of the Appeal Division or WCAT. However, similar authority is contained in the common law. The Appeal Division's authority to reconsider its own decisions on the common law grounds was first set out in a published decision of the chief appeal commissioner (*Appeal Division Decision #93-0740*, "Right to Reconsider Appeal Division Decisions", (1993), 10 WCR 127). In that decision, the chief appeal commissioner identified fraud as being one of the common law grounds on which a decision could be set aside:

> Strictly speaking, the question of whether an administrative tribunal has reconsideration powers cannot arise when a prior act is void or a nullity. As one academic commentator put it, if a first attempted determination is void or a nullity, any subsequent decision is "legally only the original exercise of an agency's power" (in R.A. MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corp. and Bukwa*" (1979), 17 Osgoode Hall Law Journal 207 at 210). This reasoning underlies the majority decision in *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848 (see p. 862–3) but was rejected by L'Heureux Dubé J. in her dissent (see p. 869).
>
> An administrative act is a nullity either because it is tainted by fraud or because it is *ultra vires*. The term of *ultra vires* applies to situations when an administrative agency has no power whatever to do an act, or when it has this power but exercises it irregularly. These situations include breaches of mandatory procedural requirements and the improper exercise of discretion. They also include breaches of the rules of natural justice (see *Chandler*, p. 862). *Ultra vires* acts can be characterized as acts tainted by errors "going to jurisdiction."
>
> ...
>
> In light of the jurisprudence, the *Act* and the history behind some of its provisions, I have come to the conclusion that the grounds on which I may direct the reconsideration of Appeal Division decisions are: new evidence in accordance with the terms of Section 96.1, clerical mistakes

> or omissions, **fraud** and an error of law "going to jurisdiction," including breaches of the rules of natural justice.
>
> [emphasis added]

The worker's union representative asserted to the Appeal Division panel that the worker was told that she would not be eligible for workers' compensation benefits if she did not receive the inoculations and later contracted Hepatitis B in her work. However, the evidence to support such an allegation was withheld. No oral hearing was requested, and no supporting written statement by the worker was provided. However, the plaintiff subsequently provided such evidence, under oath in her examination for discovery. I consider it unlikely that the plaintiff's union representative had any intent to mislead the Appeal Division panel. However, his failure to submit any evidence in support of his argument in effect negated the submission which he was making.

The parties to the Appeal Division decision are precluded by the wording of section 256 from seeking reconsideration on the basis of new evidence which previously existed and which should have been provided to the Appeal Division. It is arguable that it could involve fraud or misrepresentation for the Appeal Division decision to stand when it was based on a withholding of directly relevant evidence (i.e. even if the union representative did not appreciate that was the effect of his actions in representing the worker). However, given my conclusion that there was a breach of procedural fairness involving the failure to invite the VON to participate in the appeal before the Appeal Division, this reasoning is not necessary to my decision.

WCAT generally addresses reconsideration applications in a two stage process. In this case, full submissions were provided concerning whether WCAT is bound by the Appeal Division decision, whether there were grounds for reconsidering the Appeal Division decision as being based on a breach of natural justice, and regarding the plaintiff's status in the event WCAT is not bound by the Appeal Division decision. As I have found that grounds for reconsideration are established, I have proceeded to address the plaintiff's status based on all the evidence and argument which is now available.

B. Status of the Plaintiff

The background facts are largely undisputed. The plaintiff was employed by ICBC. The Board suggested that ICBC offer a Hepatis B vaccination program for at risk employees. ICBC designed the program and identified the "at risk" categories of employees. ICBC entered into a contract with the VON to administer the injections to the employees who signed up for this. A series of three injections was required. This program was explained to the plaintiff by her manager or supervisor, Siddoo. At the time of the December 2, 1999 vaccination, the plaintiff was 26 years of age. That injection was the second in the series undertaken by the plaintiff.

In a claim log entry dated December 22, 2000, the Board entitlement officer recorded the following notes regarding a conversation with the plaintiff:

> She confirms she was given a Hep B shot as part of program put on by her employer for preventative measures. It is voluntary in nature.
>
> She indicates the nurse who gave her the shot put it in the wrong part of her arm and she suffered an injury from it. She indicates she has nerve damage from it.
>
> She missed 7 days from work because of it.
>
> I advised her of the requirements of the WCB Act needed before a claim could be accepted. The need of the Hepatitis shot was a requirement of her job. It is a voluntary program put on for possible preventative measures. This is not covered under the Act. There has to be a personal injury that requires the vaccination's use or exposure to an individual with the condition before the claim can be reviewed by the WCB Act.
>
> She understands but disagrees with the decision. She thinks her employer should be responsible since they put on the program.

Counsel for the VON points to the reference in this memo to the Hepatitis shot being "a requirement of her job". She submits that if nothing else, these notes create an ambiguity in the evidence which should have been resolved in the plaintiff's favour. A difficulty I have with this argument, however, is that it is unclear from the placement of this phrase in the quotation above whether it was referring to the circumstances of the plaintiff's vaccination, or was part of the entitlement officer's explanation as to the law and policy requirements which applied in determining whether such a claim would be acceptable under the Act. Accordingly, I prefer the more detailed evidence provided by the examination for discovery transcripts.

The plaintiff's supervisor, Harbans Singh Sidoo, gave evidence at an examination for discovery on November 22, 2005. He advised that every employee in his group except one (who was pregnant) signed up for the vaccination (Q 81-82). He denied telling the plaintiff that she would not be eligible for WCB coverage should she not go into the vaccination program and later get Hepatitis B (Q 100).

In her examination for discovery on November 24, 2005, the plaintiff stated at question 246:

> Q Okay. Did you ever discuss the injection program with Harbans Sidhu or anyone else at ICBC?

A Yes. At the time my co-worker when she asked her question to him he had said, and I recall him saying, that it's important for a [*sic*] claims adjusters to take the program because we are exposed to recovered vehicles that have been stolen where there could be blood and semen and other things in the vehicle and that it was important to take it because if we didn't take it and we received Hepatitis B from our work that WCB would not cover us.

At questions 254 to 255, the plaintiff further stated:

A And then I remember him saying to me specifically that statement that I just told you.
Q So at that time he said if you don't get the shot and get Hepatitis you won't be covered for WCB?
A That's correct.

At questions 291 to 293, the plaintiff further explained:

Q Okay. Did you ask anyone at ICBC any questions or for any information apart from that information you related to me with Harbans Sidhu?
A Not that I recall, no.
Q Was his remark to you that you wouldn't be eligible for WCB if you got Hepatitis and didn't take the shot a factor in your agreeing to take the shot?
A Yes.
Q Okay. And how so?
A Well, because at that time I was a new adjuster and I was quite gung-ho at looking at cars and digging through things, and although that's part of my job I was quite keen to do that and so because I knew that and that had been pointed out by others, I felt it was important to protect myself.

In the plaintiff's appeal to the Appeal Division, her union representative attached a copy of a Review Board finding dated May 16, 2001 concerning a male worker who participated in the same series of vaccinations. In that decision, the Review Board panel reasoned:

> In a submission faxed to the Review Board on December 30, 1999 [Mr. X] said he had had no reaction from the first shot in the series, but the second was placed too high, and he developed shoulder and arm pain. He said:

> …The Hepatitis B shot was highly recommended by my employer. I was advised we should get this shot if our normal duties include daily exposure to the virus. I have daily interaction with customers so I did concede to have the shots done. **Workers** [*sic*] **compensation required employers to have their workers vaccinated if they are exposed as part of their normal working duties**. I have continual exposure to the Hepatitis B virus working daily with the public. I am always in danger of contracting Hepatitis B on any working day….

...

The panel would first point out that [Mr. X] is mistaken in his statement that the Board "requires employers to have their workers vaccinated…". What the Board requires is that employers <u>offer</u> the vaccination, to be provided on a voluntary basis, to workers who may be exposed to the virus at work. The pamphlet provided by [Mr. X] with his letter clearly explains the voluntary nature of the participation. The panel is also concerned that there is no evidence to support [Mr. X's] perception that he is at risk of contracting the virus, from contact with the public, to any greater extent than any other member of the public.

#19.41 of the <u>Manual</u> provides, under Item 1 that if an injection program is voluntary, an associated claim should not be accepted. This program was clearly voluntary, and [Mr. X] confirmed this to the Entitlement Officer. However, the policy goes on to say that:

> …if the evidence is clear that the claimant was personally convinced that it was necessary to take the shot…the claim should be accepted.

[Mr. X's] letter to the Review Board of December 30, 1999 satisfies the panel of his genuine, though mistaken, belief that the vaccination was a requirement by the Board. In these circumstances, we find that he is entitled to have his claim accepted, on the basis that he was convinced that it was necessary to take the shot.

[underlining in original, emphasis added]

An unpublished Appeal Division decision (*Appeal Division Decision #2001-1950*, October 3, 2001) was disclosed to the parties for comment. That decision also concerned a worker who worked for a large insurance company and received an inoculation on the same day as the plaintiff. The evidence concerning the worker's

subjective belief as to whether or not the vaccination was required was summarized by the Appeal Division panel as follows:

> (13) The worker appealed the Review Board findings. Her representative submitted that the worker suffered a personal injury arising out of and in the course of her employment because she felt compelled to take the vaccination. He suggested that the reference in the August 25, 1999 memo to the Board's requirement that employers offer hepatitis B vaccinations to all 'at risk' employees would cause any employee concern. He wrote that supervisors and some co-workers "gave the compelling information verbally".
>
> (14) Her representative submitted that there was no evidence that the worker or other 'at risk' employees received all the necessary educational material regarding side-effects or risks associated with the vaccination. **He queried whether employees were advised that the Board would not cover any wage loss or medical costs if they had an adverse reaction to the vaccination**.
>
> [emphasis added]

In that case, the Appeal Division panel concluded:

> (25) There is no convincing evidence before me which would support a conclusion that the worker believed the inoculation program was compulsory or required as a condition of continued employment. Nor is there any persuasive evidence before me that the worker felt compelled to take the vaccination, or was personally convinced that it was necessary to have the inoculation because of the reference in the August 25, 1999 memo to the Board's requirement that employers offer hepatitis B vaccinations to all at risk employees. I also find there is insufficient evidence to support the assertion by the worker's representative that supervisors and some co-workers gave "compelling information" verbally. There is no reference to the worker feeling compelled to have the inoculation in her application for compensation, or in the entitlement officer's notes of her January 5, 1999 discussion with the worker.
>
> (26) Although there may be specific circumstances which warrant a departure from the general policy guideline in *Manual* item #19.41 against compensating an injury arising from a voluntary inoculation program (see for example Appeal Division decision #99-0554, published at 15 WCR 385), the combination of factors in this case do not warrant a departure from the general policy. The worker has not offered substantive or persuasive reasons why she was

> convinced it was necessary to take the vaccine despite objective evidence that the process was not compulsory.

The evidence in the present case, regarding the plaintiff's subjective beliefs as to whether or not a vaccination was required, is different from the evidence considered by the Review Board and the Appeal Division in those two other cases. In the case of the male worker, the Review Board panel accepted the worker's evidence, and found that he had a genuine, though mistaken, belief that the vaccination was a requirement of the Board. In the Appeal Division case involving a female worker, the representative is described as having queried whether employees were advised that the Board would not cover any wage loss or medical costs if they had an adverse reaction to the vaccination. In this case, it is the plaintiff's sworn evidence (as given in her examination for discovery on November 24, 2005) that she was told by her supervisor that "if we didn't take it and we received Hepatitis B from our work that WCB would not cover us." To my mind, this statement, while expressed in different wording, is very similar in effect to the evidence of the male worker, in respect of his belief that the vaccination was a requirement by the Board. As well, in this worker's case, all the members of the plaintiff's work group received the vaccination, apart from one worker who was pregnant.

The plaintiff further explained, at question 309 to 315:

> Q Were you ever advised by anyone at ICBC whether or not the injections were voluntary or mandatory?
> A I knew at the time that they were voluntary but that it was strongly recommended and that a large percentage of my co-workers were taking the program.
> Q Okay. Did you in any way feel pressured to take the vaccine, and if so why?
> A No, I didn't feel pressured.
> Q Okay. You just state – you just were concerned that if you did get Hepatitis B you wouldn't be covered if you didn't have it?
> A Well, that was a factor.
> Q Mm-hm.
> A But also that I was new in the job, that other adjusters were taking it, that there was discussions about being safe and…
> Q Did you talk to anyone about whether or not you should take the vaccination apart from Harbans Sidhu?
> A I remember asking co-workers if they were taking it, if they thought it was a good idea.
> Q Mm-hm.
> A That's all I recall, yeah.

Q Okay. Do you recall what anyone told you?
A Well, that the majority of my co-workers were taking it and so I thought it's probably a good idea.

The example provided in the policy at item #19.41 concerned a situation in which an employer had established a program whereby tetanus shots were given when metal cuts occurred. Although the worker's first shot was with consent, the notice for the booster shot left the impression that it was required. In other words, no choice was specifically given. The worker was merely advised he was to attend at a specific time and place to receive the shot. As well, since no worker had ever refused a booster shot, there was further group or peer pressure and it was unlikely that a worker would feel free to refuse. That unlikeliness was increased by the claimant's language difficulties.

Regardless of what was actually said to the worker by her supervisor, her understanding as to what he had said was that if she did not receive the vaccination but later contracted Hepatitis B due to her work, she would not be covered for workers' compensation purposes. I find that such an understanding would have a coercive or compelling effect. While the plaintiff's understanding was that she had the right to refuse the vaccination, her belief was that by doing so she would be waiving the right to claim compensation if she subsequently contracted Hepatitis B as a result of her employment. Every member of her team except a member who was pregnant signed up for the shots. It is evident from the plaintiff's discovery evidence that she was a young worker, who was keen to advance in her employment. In consideration of these various factors, I find the plaintiff's circumstances to be as equally compelling as those summarized in the example provided in policy at item #19.41, in terms of establishing a lack of voluntariness on the part of the worker.

Accordingly, I find that the worker's injury on December 2, 1999 arose out of and in the course of her employment.

C. Status of the Defendants

By submission dated September 11, 2006, counsel for the VON confirmed that she was requesting determinations as to the status of the defendants VON and ICBC.

By memo dated April 11, 2006, the policy manager, Assessment Department, advised that the VON, account number 033358, was registered with the Board at the time of the incident on December 2, 1999. He further advised that ICBC, account number 181833, was registered with the Board at the time of this incident.

ICBC was the employer of the plaintiff, and of the plaintiff's supervisor. In her statement of claim, the plaintiff states in paragraph 15:

> The Plaintiff was further advised by her supervising Claims Manager that if the Plaintiff did not take participate [*sic*] in the Program and contracted Hepatitis B through work, she would be ineligible for WCB coverage for treatment of Hepatitis B.

ICBC contracted with the VON for the provision of Hepatitis B vaccine injections to employees considered "at risk" of contracting Hepatitis B, due to their work duties in dealing with recovered stolen vehicles. The plaintiff's December 2, 1999 injection was administered by nurse Karin Henderson, an employee of the VON. In her examination for discovery evidence, nurse Karin Henderson advised that she was a registered nurse, and had been working for the VON as a casual employee since 1998.

No dispute has been identified regarding the status of the defendants. I find that the defendant ICBC was an employer engaged in an industry within the meaning of Part 1 of the Act, and that any action or conduct of this defendant, 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 VON was an employer engaged in an industry within the meaning of Part 1 of the Act, and that any action or conduct of this defendant, 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.

Conclusion

I find that the Appeal Division decision involved an inadvertent breach of procedural fairness, in connection with the failure to invite participation by the VON as an interested person. There was information before the Appeal Division panel to indicate that the worker was contemplating bringing a legal action. Given the prospect that this could lead to a section 11 (now section 257) application, I consider that the Appeal Division panel should have invited the VON (and the nurse) to participate as interested persons. Accordingly, the Appeal Division decision is set aside as void.

With respect to the determination of the plaintiff's status, I find that the position previously advanced by her union representative in her appeals (without evidentiary support) was in fact correct. The plaintiff's sworn evidence in her examination for discovery provides the necessary evidentiary basis which was lacking in the prior appeals, in support of her previous claim that her injury arose out of and in the course of her employment.

It is regrettable and unfortunate that the plaintiff's claim has taken nearly seven years to come to this point, with the commensurate expenditure of time and resources in connection with both the appeals on her claim and the pursuit of a legal action. I find, however, that the requirements of natural justice, and the evidence provided in this case, lead me to the conclusions set out above.

I find that at the time of the needle injection on December 2, 1999, and other times material to the legal action:

(a) the plaintiff, Erin Hamilton, was a worker within the meaning of Part 1 of the Act;

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

(c) the defendant, Victorian Order of Nurses of British Columbia, was an employer engaged in an industry within the meaning of Part 1 of the Act;

(d) any action or conduct of the defendant, Victorian Order of Nurses of British Columbia, 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, The Insurance Corporation of British Columbia, was an employer engaged in an industry within the meaning of Part 1 of the Act; and,

(f) any action or conduct of the defendant, The Insurance Corporation of British Columbia, 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.

This decision concerns both the section 257 application, and a reconsideration with respect to the Appeal Division decision on the plaintiff's appeal. With respect to the reconsideration of the Appeal Division decision, I consider it appropriate to proceed to address the question of expenses. By submission dated January 10, 2001 to the Review Board, the plaintiff's union representative forwarded a report dated January 10, 2001 by Dr. J. R. Sogryn, family physician, in support of her appeal. The representative requested reimbursement of Dr. Sogryn's fee in the amount of $461.00. The worker's appeal concerned the January 6, 2000 decision by the entitlement officer. That decision denied the worker's claim for several reasons: that the vaccination was provided for preventative purposes only, that the program was purely voluntary in nature, and that the worker did not sustain any personal injury or occupational disease. Dr. Sogryn's report was directed to establishing that the plaintiff suffered a personal injury. I consider that this report was helpful and reasonably obtained, in relation to this third issue. I direct the Board to provide reimbursement of the expense of this report (based on the lesser of the actual amount billed, or the Board's tariff which was in effect in 2001). No other expenses are apparent. Section 7(2) of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/02 provides:

> The appeal tribunal may not order the Board to reimburse a party's expenses arising from a person representing the party or the attendance of a representative of the party at a hearing or other proceeding related to the appeal.

Apart from my consideration of expenses in relation to the appeal, the issue of costs is left to be addressed in the legal action (see *WCAT Decision #2006-03368*).

Herb Morton
Vice Chair

HM:gw

NO. S016785
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:

ERIN HAMILTON

PLAINTIFF

AND:

VICTORIAN ORDER OF NURSES OF BRITISH COLUMBIA,
NURSE KARIN HENDERSON and
THE INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the Plaintiff, ERIN HAMILTON, 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, December 2, 1999:

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

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

3. The Defendant, VICTORIAN ORDER OF NURSES OF BRITISH COLUMBIA, 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, VICTORIAN ORDER OF NURSES OF BRITISH COLUMBIA, 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, THE INSURANCE CORPORATION OF BRITISH COLUMBIA, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

6. Any action or conduct of the Defendant, THE INSURANCE CORPORATION OF BRITISH COLUMBIA, 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 October, 2006.

_____

Herb Morton
VICE CHAIR

NO. S016785
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:

ERIN HAMILTON

PLAINTIFF

AND:

VICTORIAN ORDER OF NURSES OF BRITISH COLUMBIA, NURSE KARIN HENDERSON
and THE INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANTS

SECTION 257 CERTIFICATE

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