



**WCAT**

**Workers' Compensation  
Appeal Tribunal**

150 – 4600 Jacombs Road  
Richmond, BC V6V 3B1  
Telephone: (604) 664-7800  
Toll Free: 1-800-663-2782  
Fax: (604) 664-7898

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**WCAT Decision Number:** **WCAT-2007-02502**  
**WCAT Decision Date:** **August 21, 2007**

**Panel:** Marguerite Mousseau, Vice Chair

**WCAT Reference Number:** **052781-A**

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Section 257 Determination  
In the Supreme Court of British Columbia  
Victoria Registry No. 02 1935  
James Gregory Servos v. Insurance Corporation of British Columbia

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**Applicant:** Insurance Corporation of British Columbia  
(the “defendant”)

**Respondent:** James Gregory Servos  
(the “plaintiff”)

**Representatives:**

For Applicant: Paul Dreyer  
INSURANCE CORPORATION OF  
BRITISH COLUMBIA

For Respondent: Lorenzo G. Oss-Cech  
HUTCHISON OSS-CECH MARLATT



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## Noteworthy Decision Summary

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**Decision:** WCAT-2007-02502 **Panel:** Marguerite Mousseau **Decision Date:** August 21, 2007

### ***Jurisdiction of WCAT in Section 257 of the Workers Compensation Act Determinations***

This decision is noteworthy because it explains the difference between the jurisdiction of WCAT and that of the court in section 257 of the *Workers Compensation Act* (Act) determinations.

The Insurance Corporation of British Columbia, the defendant in a civil action involving a motor vehicle accident, requested a certificate from WCAT pursuant to section 257 of the Act. The issue on this application was the status of the plaintiff.

The panel found that the plaintiff was a worker at the time of the accident. Since the plaintiff was transporting a load of fish to a processing plant when the accident occurred, any injuries he may have sustained in the accident arose out of and in the course of the employment.

Counsel for the plaintiff requested that WCAT make a further determination which related to the rights of the plaintiff. As the driver of the other vehicle had not been identified, it was not known whether he was a worker. Counsel argued, therefore, that the plaintiff was entitled to bring an action rather than claim compensation. He requested WCAT to certify that the plaintiff had the ability to elect, pursuant to section 10 of the Act, between claiming compensation under the Act or starting a legal action.

The panel stated that whether the plaintiff exercised his rights under section 10(2) of the Act was a matter for determination by the plaintiff not WCAT. Should the worker seek an extension of time from the Workers' Compensation Board, operating as WorkSafeBC (Board), in order to make an election, there would likely be a right of review and appeal if the Board denied the extension of time. Further, she found that WCAT did not have the jurisdiction under section 257 of the Act to issue a certificate addressing the plaintiff's entitlement to commence a legal action rather than claim compensation. It is the court and not WCAT who determines the effect of a section 257 certificate on a plaintiff's ability to pursue a legal action.

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## **Introduction**

The plaintiff, James Gregory Servos, was involved in a motor vehicle accident with an unidentified motorist on May 25, 2000. By letter dated October 6, 2005 counsel for the defendant, Insurance Corporation of British Columbia (ICBC), requested a certificate pursuant to section 257 of the *Workers Compensation Act (Act)*.

Notice of the application was provided to C-Force Marine Ltd. (C-Force), an interested party by virtue of being a possible employer of the plaintiff. C-Force indicated that it intended to participate; however, according to a letter from a Workers' Compensation Appeal Tribunal (WCAT) appeals coordination officer to C-Force, dated May 1, 2007, C-Force did not provide any submissions. WCAT also attempted to notify Bridgeman/Servos Productions Inc. (Bridgeman/Servos), a second putative employer of the plaintiff, but delivery of the notice documents was refused.

## **Issue(s)**

The issue on this application is the status of the plaintiff. Counsel have also requested that WCAT certify as to the plaintiff's right to seek compensation and the plaintiff's entitlement to compensation under the Act.

## **Jurisdiction**

Section 257 of the Act provides that WCAT may be asked by a party or the court to make determinations and certify to the court with respect to actions based on a disability caused by occupational disease, a personal injury or death.

Subsection 257(3) of the Act provides that Part 4 applies to proceedings under section 257 save for subsection 253(4) which imposes a statutory due date for decisions.

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Under Part 4 of the Act, WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law or discretion arising or required to be determined under that part (section 254). WCAT is not bound by legal precedent (subsection 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2)).

### **Status of the Plaintiff, James Gregory Servos**

Counsel for the plaintiff originally submitted that the plaintiff, Mr. Servos, was an independent firm and, since he had not purchased Personal Optional Protection, he was not covered under the Act. In a submission dated March 8, 2007, counsel for the defendant submitted that the plaintiff was a worker at the time of the accident and any injuries allegedly sustained in the accident arose out of and in the course of employment. In a second submission, dated May 23, 2007, counsel for the plaintiff conceded that the plaintiff was a worker and any injuries sustained in the accident arose out of and in the course of employment. Despite the agreement which now exists between counsel regarding the status of the plaintiff, WCAT is required to make its determination based on the application of law and policy to the evidence.

The plaintiff gave evidence regarding his status at an examination for discovery on June 17, 2004. At that time, he stated that he had moved to Port Alice, British Columbia in January 2000 and started driving truck for C-Force in April 2000. Prior to that time, from October 1999 to January 2000, he had been a truck driver for Trans Freight McNamara operating out of Cambridge, Ontario. (Q 77 to 86 and Q 148) In addition to his employment as a truck driver, the plaintiff was also a writer. He and a co-writer, Troy Bridgeman, incorporated Bridgeman/Servos specifically for the purposes of a writing contract. In 1998/99, Mr. Servos purchased Mr. Bridgeman's share of the company for one dollar. (Q 144 to 145)

At the time of the accident, Mr. Servos was employed transporting fish for C-Force, in trucks provided by C-Force. His shift started at midnight and his usual route was to pick up fish at Coal Harbour and take them to either Englewood Packing, a processing plant south of Port McNeill on Beaver Cove Road, or Brown's Bay, a processing plant in Campbell River. He carried out two runs a shift and C-Force told the plaintiff where to take each load of fish. (Q 150, 164, 171, 186 and 187)

On the day of the accident, the plaintiff arrived at the C-Force yard at 11:00 p.m. and performed the safety inspection on the truck he was going to drive on that shift. He then drove to Coal Harbour and loaded the truck with fish. He finished loading at approximately 3:00 a.m. and then drove to the Englewood processing plant, arriving at approximately 4:00 a.m. He slept in the cab of the truck until sometime between 6:00 a.m. and 7:00 a.m., when the processing plant staff was ready to unload the truck.

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He unloaded the truck with them then returned to Coal Harbour to pick up another load of fish. On the way to Coal Harbour he stopped at the C-Force truck yard to see if there were any messages and to do another inspection of the truck. He arrived at Coal Harbour between 9:00 a.m. and 10:00 a.m. and loaded the truck with fish again. He drove to Englewood but was told when he arrived at the processing plant that he had to go to Brown's Bay. He contacted C-Force by telephone to verify that they wanted the shipment to go to Brown's Bay. He stated that he did not take directions from a third party (the Englewood processing plant). He was driving along Beaver Cove Road on his way to Brown's Bay, with the trailer fully loaded with fish, when the accident occurred. (Q 173 to 201 and Q 517)

When asked whether he carried workers' compensation insurance, the plaintiff stated that it was provided through C-Force. (Q 576) Counsel for the defendant stated that he had been informed by C-Force that the plaintiff was paid an additional \$5 per hour because he paid for his own workers' compensation coverage. Invoices shown to the plaintiff indicated that he was paid \$20 per hour by C-Force. Mr. Servos professed not to be aware that he was receiving an additional \$5 per hour to pay for his compensation coverage and he did not recall his gross hourly rate. (Q 578 to 584) The plaintiff stated that he had been subcontracting with C-Force and that the compensation coverage had to be paid by the owner of the truck. He stated that he had contacted the Board to verify this. (Q 602) He stated that he had been paid the additional \$5 per hour because C-Force did not want to pay holiday pay and take care of all of the "payroll stuff and EI". (Q 602)

Copies of three invoices addressed to C-Force from Bridgeman/Servos were also submitted. Other than the first three entries in the first invoice, most of the entries are for a specific number of hours payable at the rate of \$20 per hour. The first three entries in the first invoice, which has a billing date of April 30, 2000, indicate an amount payable by C-Force for "training". A half-day of training is billed at \$50 and two full days of training are each billed at \$100.

In addition, a number of daily work reports on C-Force letterhead were submitted. Each of these shows "Greg Servos" as "driver". These reports indicate the date, the location of a load, the name of the customer and the destination. Some of the reports indicate the amount of time that was spent waiting at each location and the amount of time spent sleeping. Most also specify a starting time and a finishing time. Each form indicates the total billable time, which is obtained by deducting the time spent sleeping and the time spent waiting from the total number of hours between the starting and finishing times.

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A number of trip inspection reports, signed by “Greg Servos”, were also submitted. In addition, there are job sheets indicating a job number and providing information regarding destinations and mileage. These are also on C-Force letterhead and describe “Greg Servos” as “Driver”.

A C-Force document provides the dates and amounts of invoices and payments made in relation to Bridgeman/Servos and copies of two cheques indicate that payments were made to Bridgeman/Servos.

There are also a number of invoices on Bridgeman/Servos letterhead for painting services provided to Vancouver Island Painters and Jeff Craig Painting. When asked about these invoices at his examination for discovery, the plaintiff agreed that it was just him providing the painting services to these two companies. He stated that he was an employee of Bridgeman/Servos. (Q 144 to 146)

## **Law and Policy**

A “worker” is defined in Section 1 of the Act to include:

- a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

...

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

Policy item #AP1-1-1 of the *Assessment Manual* sets out a number of definitions used in the policies. It describes an independent firm as follows:

*Independent Firm* – The Board has created the term “independent firm” to identify those persons who are either required by the *Act* to register with the Board as employers of workers, or from whom, as unincorporated employers or independent operators, the Board will accept a registration through the purchase of Personal Optional Protection for themselves. An independent firm performs work under a contract, but has a business existence under the contract independent of the person or entity for whom that work is performed. An independent firm may be an individual, a corporation or another type of legal entity. A worker cannot be an “independent firm”. For more formation about “independent firms”, see Item AP1-1-3.

Policy item #AP1-1-3 of the *Assessment Manual* provides guidelines for determining whether a contract creates an employment relation or a relationship between independent parties. It enumerates general principles which are followed by specific guidelines. The policy states that no single test may be consistently applied and sets out a non-exclusive list of factors to consider. These are:

- whether the services to be performed are essentially services of labour;
- the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;
- whether the individual doing the work might make a profit or loss;
- whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;
- if the business enterprise is subject to regulatory licensing, who is the licensee;
- whether the terms of the contract are normal or expected for a contract between independent contractors;
- who is best able to fulfill the prevention and other obligations of an employer under the *Act*;
- whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and
- whether the individual doing the work is able or required to hire other persons.

The policy states that the major test, which encompasses these factors, is whether the individual performing the work exists as a business enterprise independent of the person or entity for whom the work is performed. It goes on to state:

No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they

are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.

The specific guidelines enumerated in the policy describe a number of situations in which the parties would be considered independent firms. Item #(4)(i) is of particular relevance in this application. It provides:

- (4) Incorporated companies unless there are circumstances indicating that the principals of the corporation are workers rather than independent firms. If such circumstances exist, a full investigation will be made and the applicant's position determined in accordance with the policies in this *Manual*. Two common situations where corporations will not be considered independent firms are where:
  - (i) the corporation is a personal service corporation, (A personal service corporation for this purpose is one where no worker other than a principal active shareholder is employed, and if the firm was not incorporated, the principal active shareholder would clearly be a worker. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.);

Policy item #AP1-1-4 of the *Assessment Manual* states that an incorporated entity is considered the employer and a director or other principal of the company who is active in the operation of the company is generally considered to be a worker under the Act.

Counsel for the defendant submits that the application of the criteria in policy item #AP1-1-3 to the circumstances of Mr. Servos results in a conclusion that he was a worker. He submits that the plaintiff's own labour was the only service he provided to C-Force. In addition, C-Force exercised complete control over the work done by the plaintiff. There was no arrangement with C-Force that would permit the plaintiff to make a profit or loss; he could do nothing, outside of providing his own labour, that could make a profit for either C-Force or Bridgeman/Servos. In addition, the plaintiff provided no major equipment; the trucks driven by the plaintiff were provided by C-Force and licensed by C-Force.

Any agreement or arrangement between the plaintiff, or his company, and C-Force had the hallmarks of an employment contract. The plaintiff was completely subservient to C-Force. Counsel also submitted that, other than the performance of routine



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pre-trip inspections on trucks assigned to him by C-Force, the plaintiff did not have the ability to fulfill the prevention and other obligations of an employer, owner or supplier under sections 114, 119 and 120 of the Act. The plaintiff performed the same work continually and indefinitely for C-Force and reported to the same persons. Finally, the plaintiff had no capacity to hire others to perform his work for C-Force. Essentially, the plaintiff was entirely dependent on C-Force for work and had no separate business identity. Accordingly, the plaintiff was a worker at the time of the accident.

Counsel also submitted that the plaintiff was in the course of his employment when the accident occurred and any injuries allegedly sustained in the accident arose out of and in the course of his employment.

As I have previously noted, plaintiff's counsel subsequently conceded that the plaintiff was a worker and that his injuries arose out of and in the course of the employment.

Turning to the policies, policy item #AP1-1-3 of the *Assessment Manual* provides that incorporated companies are independent firms unless there are circumstances which indicate that the principal of the corporation is a worker rather than an independent firm. It goes on to state that a common situation in which a corporation will not be considered an independent firm occurs when the corporation is a personal service corporation. The policy defines a personal service corporation as one where no worker other than a principal active shareholder is employed and, if the firm was not incorporated, the principal active shareholder would clearly be a worker. I consider that to be the situation in this case. As counsel for the defendant has submitted, the application of all the criteria in policy item #AP1-1-3 clearly leads to the conclusion that the plaintiff was a worker at the time of the accident, despite providing his services under the name of Bridgeman/Servos. Accordingly, I find that the plaintiff was a worker at the time of the accident.

Since the plaintiff was transporting a load of fish to a processing plant when the accident occurred, any injuries he may have sustained in the accident arose out of and in the course of the employment.

### **Election under section 10(2) of the Act**

Counsel for the plaintiff requests WCAT to make a further determination, which relates to the rights of the plaintiff. In his submission of May 23, 2007 counsel submits that, as the driver of the other vehicle has not been identified, it is not known whether he was a worker. He submits, therefore, that the plaintiff is entitled to bring an action rather than claim compensation. He requests WCAT to certify that "[t]he Plaintiff has the ability to elect, pursuant to section 10 of the *Workers' [sic] Compensation Act*, whether he wishes to claim compensation under the Act or start an action."

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Section 10 of the Act provides, in part:

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

(2) Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows.

I have difficulty discerning how the worker's rights under section 10(2) of the Act are a matter for determination by WCAT. Section 10(2) of the Act establishes that a worker has a right of election, with certain limitations. The primary limitation is that the worker must make the election within three months of the occurrence of the injury "or any longer period that the Board allows." I have found that the plaintiff is a worker; however, whether the plaintiff exercises his rights under section 10(2) of the Act is a matter for determination by the plaintiff. It is a decision that the plaintiff must make, not a matter to be determined by WCAT. Should the worker seek an extension of time from the Board in order to make an election, there would likely be a right of review and appeal if the Board denied the extension of time.

In the alternative, I have also addressed the question of whether WCAT has the jurisdiction to determine whether the plaintiff is entitled to pursue a legal action in any event. In that regard, counsel submits that WCAT has the jurisdiction "to make a certification regarding the worker's ability to elect to commence an action, rather than to claim compensation, pursuant to section 10 of the Act."

In support of this proposition he sets out section 257(2) of the Act and submits that WCAT is able to determine "any matter that is relevant to the action" and, since the list

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of matters enumerated in section 257 of the Act is not exclusive, he submits that WCAT has the jurisdiction to determine the plaintiff's entitlement to initiate a legal action rather than claim compensation.

Section 257 of the Act provides:

257 (1) Where an action is commenced based on

- (a) a disability caused by occupational disease,
- (b) a personal injury, or
- (c) death,

the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.

(2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether

- (a) a person was, at the time the cause of action arose, a worker,
- (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
- (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
- (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

(3) This Part, except section 253 (4), applies to proceedings under this section as if the proceedings were an appeal under this Part.

The Board's jurisdiction is set out in section 96(1) of the Act, which provides:

96 (1) Subject to sections 239 and 240, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court, and proceedings by or before the Board must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, and an action may not be maintained or brought against the Board or a director, an officer, or an employee of the Board in respect of any act, omission or

decision that was within the jurisdiction of the Board or that the Board, director, officer or employee believed was within the jurisdiction of the Board; and, without restricting the generality of the foregoing, the Board has exclusive jurisdiction to inquire into, hear and determine

- (a) the question whether an injury has arisen out of or in the course of an employment within the scope of this Part;
- (b) the existence and degree of disability by reason of an injury;
- (c) the permanence of disability by reason of an injury;
- (d) the degree of diminution of earning capacity by reason of an injury;
- (e) the amount of average earnings of a worker, whether paid in cash or board or lodging or other form of remuneration, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation;
- (f) the existence, for the purpose of this Part, of the relationship of a member of the family of a worker as defined by this Act;
- (g) the existence of dependency;
- (h) whether an industry or a part, branch or department of an industry is within the scope of this Part, and the class to which an industry or a part, branch or department of an industry within the scope of this Part should be assigned;
- (i) whether a worker in an industry within the scope of this Part is within the scope of this Part and entitled to compensation under it; and
- (j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of this Part.

Neither section 96(2) nor section 257 of the Act empower either the Board or WCAT to determine whether a worker is entitled to pursue a legal action; although, historically, the Board was empowered to make such a determination. Prior to 1996, the Act authorized the Board to determine whether a party was entitled to initiate a

legal action. This matter was specifically addressed by Mr. Justice Tysoe in his report on the inquiry into the workers' compensation system which was issued in 1966<sup>1</sup>. The relevant provisions of the Act at that time<sup>2</sup> were as follows:

11. (1) Where an accident arising out of and in the course of his employment happens to a workman in such circumstances as entitle him or his dependent to an action against some person other than his employer and other than an employer in an industry within the scope of this Part or against the Crown, the workman or his dependent, if entitled to compensation under this Part, may claim such compensation or may bring such action; but if the workman or dependent elects to claim compensation, he shall do so within three months after the happening of the accident or, in case it results in death, within three months after the death.

...

(4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part when the accident arises out of and in the course of the business of the employer; ...

Section 12(1) and (4) read as follows:

(1) The provisions of this Part are in lieu of all rights and rights of action, statutory or otherwise, to which a workman or the members of his family are or may be entitled against the employer of such workman for or by reason of any accident happening to him or any industrial disease contracted by him on or after the first day of January, 1917, while in the employment of such employer, and no action in respect thereof lies.

...

(4) Where an action in respect of an injury is brought against an employer by a workman or a dependent, the Board has jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and

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<sup>1</sup> *Commission of Inquiry into the Workmen's Compensation Act*, Report of the Commissioner, The Honourable Mr. Charles W. Tysoe, at page 419 (Victoria: A. Sutton, Printer to the Queen, 1966), reported on the Board's website at [www.worksafebc.com](http://www.worksafebc.com)

<sup>2</sup> *Workmen's Compensation Act*, R.S. 1948, c.370

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such adjudication and determination is final and conclusive; and if the Board determines that the action is one the right to bring which is taken away by this Part the action is for ever stayed.

Submissions had been made to the Commission of Inquiry regarding the extent of the powers granted to the Board under section 12(4) of the Act. Mr. Justice Tysoe acknowledged that he himself had some difficulty discerning precisely what causes of action were barred under sections 11(4) and 12(1) of the Act. In addition, under section 12(4) of the Act, the Board was in a position of adjudicating upon a matter in which it had a financial interest in that its ability to reimburse itself for compensation paid out by it could depend on whether a worker's right of action was barred. He concluded that, "in justice to the Board and to all others concerned, the jurisdiction conferred upon the Board by subsection (4) of section 12 should be taken away from it and left with the Courts". The Board should continue to certify its findings to the court pursuant to its powers under section 77 of the Act (now section 96(2)) "as are material to the question which is before the Court - namely, whether the action is barred by Part I of the Act."

Subsequent to this report, amendments were made to the Act which incorporated this recommendation by Mr. Justice Tysoe. The recommendation regarding the powers of the Board in relation to court actions were addressed by the repeal of section 12(4). The following provision was enacted in its place:

11. Where an action for personal injury or death is brought against an employer, the Board, upon request of any party to the action, shall determine whether at the time of injury or death

- (a) the plaintiff was a workman within the scope of this Part;
- (b) the person whose death is the subject of the action was a workman within the scope of this Part;
- (c) the injury, disablement, or death arose out of and in the course of employment;
- (d) the defendant employer, servant or agent, was in the course of employment;
- (e) the defendant employer was engaged in an industry within the scope of this Part;

and shall certify its determinations to the Court or Judge seized with the action. The Board may also, at the request of the Court or Judge, certify its determination as to any other matter within its jurisdiction.

1968, c. 59, s. 11.

Returning to counsel's submission that the plaintiff is entitled to elect to bring an action, in view of this history I do not consider that WCAT has the jurisdiction to certify on that matter. This issue was also addressed in *Appeal Division Decision #97-1701*, which is

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accessible at the Board's website. The panel in that case addressed the jurisdiction of the Appeal Division in relation to what was then section 11 of the Act and section 10 of the Act. In 2002 section 11 was repealed and replaced by section 257 of the Act<sup>3</sup>. The panel dealt with jurisdiction as a preliminary matter as follows:

Section 11 of the Workers Compensation Act currently provides as follows:

Where an action based on a disability caused by occupational disease, personal injury or death is brought, the board must, on request by the court or by any party to the action, determine any matter that is relevant to the action and within its competence under this Act and, without limiting the generality of the foregoing, may determine whether

- (a) a person was, at the time the cause of action arose, a worker within the meaning of this Part;
- (b) injury, disability or death of a worker arose out of, and in the course of, the worker's employment;
- (c) an employer or his servant or agent was, at the time the cause of action arose, employed by another employer; and
- (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part,

and must certify its determination to the court.

Defence counsel submits that it is not the role of the appeal division to determine the meaning of section 10. The appeal division's role pursuant to section 11 is to determine the status of the parties involved in this action. The effect of this determination is the domain of the courts.

In rebuttal of December 16, 1997, plaintiff's counsel indicates that the British Columbia Court of Appeal decision in Kovach v. WCB, "would seem to be law that could defeat the WBC's jurisdiction"

I agree, first of all, with the submission of defence counsel that the role of the appeal division in a section 11 determination is to determine the status of the parties to the legal action under the Act. It is for the court to determine the effect of the certificate on the legal action. I note, in this

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<sup>3</sup> *Workers Compensation Amendment Act, 2002* (Bill 49)

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regard, the preliminary comments of Mr. Justice Thackray in the case George Ernest Hunt v. T & N et al. (1994) 96 B.C.L.R. (2d) 300, at page 303, concerning the submissions in that case:

The defendants contend that the statutory bar question is not one which "arises" under Pt. 1 of the Act for decision by the Board. Therefore, it is left to the court. This submission was supported by a review of the history of the Act. Prior to 1968 the Act contained a provision the statutory bar was to be decided by the Board. In 1968, following the recommendations of Mr. Justice Tysoe in his *Commission of Inquiry into the Workmen's Compensation Act*, this provision was deleted from the Act.

This is the basis for the concession by the Board that the court has the jurisdiction to determine the ultimate issue as to whether or not a claim is statute barred.

In his judgment, Mr. Justice Thackray reasoned (at page 304):

The foundation upon which the statutory bar determination rests is within the exclusive jurisdiction of the Board. Section 96 provides that it is within the exclusive jurisdiction of the Board to determine whether persons are workers or employers within Pt. 1 of the Act.

He further quoted from the decision of the B. C. Court of Appeal in the case Smith V. Vancouver General Hospital (1981), 31 B.C.L.R. 358, which stated at page 362:

This submission fails to combine the reading of the binding determination clause, s. 11, and the privative clause, s. 96, with limitation or extinguishment of actions provisions of s. 10, all of the Workers Compensation Act. The effect of s. 10 is to take away the cause of action, not to adjudicate upon the cause of action.

I cannot read s. 11 independently of s. 10 and do not agree that a determination by the board under s. 11 is interference in the decision in the action, but a determination whether the action is to take place at all. Under s. 11 the board is not concerned with the tort, merely the compensation. Section 11 is not concerned with the wrongdoing, but merely



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with the status of the parties under the scheme. Section 11 is part of the scheme of the statute, and part of the function of the board in carrying out that scheme.

Mr. Justice Thackray found:

There may be cases where the court's function of answering the ultimate issue of a statute bar will require findings beyond those matters over which the Board has exclusive jurisdiction. . . . However, where the issue, as here, is based solely on a determination of the employer/employee relationship, this court's function will be limited to pronouncing the legal result of the Board's determination.

I find that the board's obligation under section 11 is mandatory. A section 11 certificate has been requested in the legal action — a determination must be provided as to the status of the parties under the Workers Compensation Act at the time the cause of action arose. In determining the status of the parties, it is not for the appeal division to address the effect of its findings for the legal action. That is a matter for the court to determine. I have, therefore, proceeded to consider the status of the parties.

[reproduced as written]

I agree with the reasoning in that decision. WCAT has the jurisdiction to make determinations with respect to those matters that are within the Board's jurisdiction under section 96(2) of the Act and relevant to the court action. It is the court, however, which determines the effects of the WCAT findings with respect to the legal action. Accordingly, it is not within the jurisdiction of WCAT to make a determination regarding the plaintiff's ability to pursue a legal action.

I note that this conclusion has also been confirmed quite recently by the British Columbia Supreme Court in *Clapp v. Macro Industries Inc.*, 2007 BCSC 840. That case addressed the effect of a certificate issued under section 257 of the Act. At page 5, Mr. Justice Parrett set out the statement of the WCAT panel regarding its jurisdiction as follows:

[35] Mr. Morton, the vice Chair of the Workers Compensation Appeal Tribunal, and the author of the decision in the present case recognizes that distinction clearly at p. 2 of his reasons when he writes:

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. . . 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.

[reproduced as written]

Mr. Justice Parrett went on to state:

[36] This specifically recognizes the fact that it is for the court to control its process and to determine the effect of the certificate, once it is issued and filed, on the legal proceedings in this court. It is, with respect, not a part of WCAT's jurisdiction under the **Act** to determine if an action commenced in this court is statute barred although that may be the end result of the findings they are empowered to make.

[37] The process in this court encompasses, in my view, not simply a determination of costs in the proceedings which have taken place, but also the possibility that the WCAT findings and certificate does not dispose of the whole of the issues raised in the action brought in this court. These issues, and others, are properly within the jurisdiction of this court to be determined.

[38] In my view, even actions determined by the findings under s. 257 are subject to a final decision of the court as to the effect of the certificate....

I did not consider this decision in making my finding on jurisdiction as it was issued after the final submission had been made by counsel, and it was not disclosed to counsel as it merely confirmed existing law.

### **Plaintiff's Entitlement to Benefits**

In a letter to WCAT dated June 14, 2007, counsel for the defendant stated that, if WCAT found that the plaintiff was a worker at the time of the accident and that any injuries allegedly sustained in the accident arose out of and in the course of employment, counsel "would require confirmation from WCAT that Mr. Servos, had he

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applied for benefits from WCB in the specified time period, would have in fact received benefits.” Neither counsel have made submissions respecting WCAT’s jurisdiction to address such a request.

I am very doubtful that WCAT has the capacity to certify as to the outcome of a hypothetical situation. Even if WCAT has such a capacity, there is no sound evidentiary basis from which the necessary findings of fact may be made. Under section 5(1) of the Act, a worker is entitled to compensation for personal injury arising out of and in the course of employment. A determination as to whether a worker has suffered personal injury is based on consideration of medical and other evidence which provides a basis for making findings that a personal injury has occurred and that there was a causal relationship between the personal injury and the employment activities. Medical and other evidence of pre-existing conditions and evidence of the worker’s activities outside of his or her employment at the time of injury, as well as evidence of subsequent activities, may all be relevant to determining the causative significance of work activities. In some cases, witness evidence is required. Very little such evidence has been submitted to WCAT in the course of this application. Accordingly, I make no finding as to the possible entitlement of the plaintiff to compensation under the Act had he made an application for compensation within the requisite time periods.

### **Conclusion**

I find that at the time of the May 25, 2000 accident, the plaintiff, James Gregory Servos, was a worker within the meaning of Part 1 of the Act and any injuries he sustained in the accident arose out of and in the course of his employment.

I find that WCAT does not have the jurisdiction to determine the plaintiff’s entitlement to pursue a legal action.

I make no finding regarding the likelihood that the plaintiff would have received compensation benefits had he submitted an application for compensation.

Marguerite Mousseau  
Vice Chair

MM: jy

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:

JAMES GREGORY SERVOS

PLAINTIFF

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Applicant, Insurance Corporation of British Columbia, 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, May 25, 2000:

1. The Plaintiff, James Gregory Servos, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. Any injuries suffered by the Plaintiff, James Gregory Servos, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this      day of August, 2007.

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Marguerite Mousseau  
VICE CHAIR

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

BETWEEN:

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PLAINTIFF

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

DEFENDANT

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SECTION 257 CERTIFICATE

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WORKERS' COMPENSATION APPEAL TRIBUNAL  
150-4600 Jacombs Road  
Richmond, BC V6V 3B1  
FAX (604) 664-7898  
TELEPHONE (604) 664-7800

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**WCAT**

***Workers' Compensation  
Appeal Tribunal***

150 – 4600 Jacombs Road  
Richmond, BC V6V 3B1  
Telephone: (604) 664-7800  
Toll Free: 1-800-663-2782  
Fax: (604) 664-7898

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