BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
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WCAT Decision Number: **WCAT-2007-02604**
WCAT Decision Date: **August 29, 2007**

Panel: Marguerite Mousseau, Vice Chair

WCAT Reference Number: **051737-A**

Section 257 Determination
In the Supreme Court of British Columbia
New Westminster Registry No. M 87167
Richard Dean Johnston v. Michael George Lemky

Applicant: Michael George Lemky
(the "defendant")

Respondent: Richard Dean Johnston
(the "plaintiff")

Interested Party: J & J Oilfield Ltd.

Representatives:

For Applicant: Gary Higson
HIGSON APPS

For Respondent: Peter Buxton
FRIZ LAIL SHIRREFF VICKERS

For Interested Party: Joe Ollenberger

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Noteworthy Decision Summary

Decision: WCAT-2007-02604 **Decision Date:** August 29, 2007 **Panel:** Marguerite Mousseau

Item #16.50[1] of the Rehabilitation Services and Claims Manual, Volume II – Emergency Actions – Environment Which by its Very Nature May Become Site of Emergency Situation – Status of the Parties – Section 257 determination

This decision is noteworthy because it examines the exception in policy item #16.50 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) "Emergency Actions" whereby claims may be accepted from workers who, in the ordinary course of their work, are situated in an environment which, by its very nature, may become the site of an emergency situation.

The plaintiff and the defendant were involved in a motor vehicle accident on March 18, 2004. They were travelling on Highway 97 (Alaska Highway) at approximately Mile 122, in British Columbia, when the plaintiff stopped his car to provide assistance to individuals whose car had gone into the ditch. The defendant's vehicle collided with the plaintiff's truck. Counsel for the defendant requested a certificate from WCAT pursuant to section 257 of the *Workers Compensation Act* (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. In determining whether the accident arose out of and in the course of the employment, the panel referred to policy item #18.31 of the RSCM II, "Worker on Call," which provides that workers who have to make a special journey from their home to respond to a call to perform work are covered for compensation from the time they leave home until they return home, provided that they do not deviate from the route. The question in this case was whether the plaintiff removed himself from his employment when he stopped to assist the individuals whose car had gone into the ditch. This involved consideration of item #16.50 of the RSCM II "Emergency Actions".

The panel noted that item #16.50 states that claims may be accepted "from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation." The policy goes on to state, "Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation."

The panel found that this was "an environment which by its very nature may become the site of an emergency situation." Therefore, the plaintiff's circumstances came within that limited field of coverage for workers who undertake to provide emergency assistance as described in item #16.50. Accordingly, the accident arose in the course of the employment.

The panel also found that the defendant was a worker within the meaning of Part 1 of the Act, and any action or conduct of the defendant which caused the alleged breach of duty of care arose out of and in the course of his employment within the scope of Part 1 of the Act.

[1] Policy item #16.50 was merged into policy item C3-17.00, effective July 1, 2010.

RE: Section 257 Determination
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Section 257 Determination
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Introduction

The plaintiff, Richard Dean Johnston, and the defendant, Michael George Lemky, were involved in a motor vehicle accident on March 18, 2004. They were travelling on Highway 97 (Alaska Highway) at approximately Mile 122, in British Columbia, when the accident occurred.

By letter dated June 27, 2005, counsel for the defendant requested a certificate pursuant to section 257 of the *Workers Compensation Act* (Act). Section 257 of the Act provides that the Workers' Compensation Appeal Tribunal (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.

Issue(s)

The issue on this application is the status of the parties.

Jurisdiction

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.

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 Workers' Compensation Board, operating as WorkSafe BC (Board), that is applicable in the case (subsection 250(2)).

Status of the Plaintiff, Richard Dean Johnston

The first issue with regard to the plaintiff's status is whether he was a worker at the time of the accident. Mr. Johnston gave evidence relevant to this issue in a signed statement provided to the Insurance Corporation of British Columbia (ICBC) on March 19, 2004 and in his examination for discovery on April 3, 2006. In addition, there are a number of other documents on the file that are relevant to a determination of Mr. Johnston's status, including several documents provided by the Assessment Department of the Board.

In his statement to ICBC, Mr. Johnston stated that he had a leased vehicle which he used for work. He subcontracted to J&J Oilfield Ltd. under his company name, Richard Johnston Contracting. According to a letter from Mr. Ollenberger, owner of J&J Oilfield Ltd., Mr. Johnston was employed as a contract operator and was paid $45 per hour "for himself and a truck." He regularly worked a ten-hour day. A memorandum from the Assessment Department dated July 30, 2007 states that Richard Dean Johnston @ Lumby, BC dba MBK Energy Limited was registered at the time of the accident and had coverage for workers and also Personal Optional Protection (POP). Subsequent correspondence with the Assessment Department, which was disclosed to the parties, revealed that Mr. Johnston had incorporated MBK Energy Ltd. on September 8, 2004, after the date of the accident. At the time of the accident, he had been registered with the Board as a sole proprietor.

Defendant's counsel submitted that Mr. Johnston was a worker in that he was an employee of J&J Oilfield Ltd. This was disputed by the company, which provided documentation to show that Mr. Johnston had his own compensation coverage.

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).

Section 2(2) of the Act provides that the Board may direct that Part 1 of the Act applies "to an independent operator who is neither an employer nor a worker as though the independent operator was a worker."

The term “independent operator” is not defined in the Act. However, policy at item AP1-1-1 of the *Assessment Manual* provides the following definition of an independent operator:

> Independent Operator - "Independent operator" is not defined in the Act. The term is referred to in section 2(2) of the Act as being an individual "who is neither an employer nor a worker" and to whom the Board may direct that Part 1 applies as though the independent operator was a worker. An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an "independent firm".

Policy item #AP1-1-7 of the *Assessment Manual* states that labour contractors include proprietors “who contract a service including one piece of major revenue-producing equipment to a firm or individual.” The policy states that labour contractors may voluntarily choose to register as an employer (proprietorship or partnership) if they have workers or obtain POP as an independent operator if they do not have workers. Labour contractors who do not register with the Board are considered workers of the main contractor.

In this case, Mr. Johnston was a labour contractor at the time of the accident, as he was contracting his labour and the use of his truck, which is a major revenue-producing piece of equipment. Since he had chosen to register with the Board and had POP, he was covered under the Act as an independent operator and, therefore, he was a worker.

The next question is whether the accident arose out of and in the course of the employment. I note, as a preliminary matter, that a Board officer issued a decision letter dated April 7, 2004 informing Mr. Johnston that his actions at the time of the accident did not arise out of and in the course of employment. Item #20.20 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) provides that, in a section 257 application, WCAT will consider all of the evidence and argument afresh and make its determination regardless of a prior decision by a Board officer.

Turning to Mr. Johnston’s evidence, in his examination for discovery he stated that, on the day of the accident, he had worked from about 7:00 in the morning until 2:00 in the afternoon. (Q 132) He was “on call,” however, and was paid for ten hours a day to operate a facility regardless of how long he worked. (Q 65, 67 and 69) He was called by an answering service at about 8:30 p.m. or 9:00 p.m. that day because a compressor station had shut down at about mile 131. He was required to go to the compressor station to restart it. (Q122 – 128)

He left immediately after receiving the call and started driving north from his home in Fort St. John towards the compressor station at mile 131. (Q 130) He stated that it was snowing and the road conditions were slippery. There was ice and there was a moderate snow fall; the temperature was about 20 degrees below zero. (Q 145 to 148)

As he was driving, he saw a "young fellow" waving on the side of the road. (Q 183) He was standing next to the spot where a vehicle had gone into the snow on the shoulder of the road. Another person was shovelling snow. (Q 186 to 189). It was clear that they wanted his assistance so he drove past them as it was very slippery and then made a 180 degree turn and parked on the shoulder so that his lights pointed at them. (Q 190 to 197)

By the time he had turned around, they had made it out of the snow bank with the help of another truck that had pulled them out. (Q 199 to 202) The vehicle did not start once it was out of the snow bank so the plaintiff backed up his truck and waited because he thought he was going to drive the occupants to town and he intended to call a tow truck. (Q 224, 239 to 240) He thought that he would take them with him while he started the compressor, which was about three miles from the accident site, and then take them to town. (Q 242 to 243) The defendant's vehicle collided with his truck while he was waiting for the occupants of the vehicle and looking for the telephone number for a tow truck in his personal phone book. (Q 305 and 307) The accident occurred sometime around 10:00 p.m. (Q 57)

There does not appear to be any dispute that Mr. Johnston was in the course of employment until he stopped to provide assistance. In that regard, policy #18.31 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), "Worker on Call," provides that workers who have to make a special journey from their home to respond to a call to perform work are covered for compensation from the time they leave home until they return home, provided that they do not deviate from the route. Accordingly, the question is whether Mr. Johnston removed himself from his employment when he stopped to assist the individuals whose car had gone into the ditch. This involves consideration of the policy at item #16.50 of the RSCM ll.

Section 5(1) of the Act provides that compensation is payable when an injury arises out of and in the course of employment. Section 5(4) of the Act establishes a presumption where a worker sustains injuries as a result of an accident. If the accident arose out of the employment, it is presumed to have arisen in the course of employment and *vice versa*.

Item #16.50 of the RSCM II, "Emergency Actions," provides, in part:

> Where an emergency occurs at a time when a worker is in the course of employment, the worker is considered to be covered if injured when acting to protect a fellow worker or protect the employer's property. If, however, the action is that of a public spirited citizen, she or he would be doing no more than anyone would do, whether or not working for an employer at the time. This cannot be considered to be related to the employment.
>
> However, there is an exception to this general proposition, notably where the injury occurs through the presence of a hazard on the premises of the employer.
>
> The situation can perhaps best be illustrated by an example. Suppose a worker receives a telephone call at work indicating that there is a fire in a portion of the employer's premises. The worker races from the office and, due only to haste, trips over his or her own feet, falls and injures an arm. There is no doubt that in light of the relationship of the emergency to the employment this injury would be compensable. In other words, it would be found to have arisen out of the employment.
>
> Suppose, then, that the same worker receives a telephone call to the effect that a family member has been seriously injured in an accident. Once again the worker races from the office and, due only to haste, falls and injures an arm. In these circumstances there is no relationship to the employment. The reason for the worker's departure is totally unrelated to the employment and nothing about the employment contributed to the injury. However, if the worker were to race from the office and trip over a poorly laid carpet, a relationship to the employment would be present. In other words, the injury would not have occurred had it not been for a hazardous condition on the employment premises.
>
> Therefore, while it is incorrect to say that compensation will be payable when a worker is injured while leaving the premises of the employer for whatever reason, it is correct to say that any injury will be compensable which was suffered in any emergency and which also arose out of a hazard on the employment premises.
>
> *Even if the injury does not arise from a hazard of the employment premises, and the emergency does not concern a fellow worker or the employer's property, claims may still be accepted from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation.* An excellent

> example of this "positional risk" would be all employees in the various aspects of the operation of an airport. The Board is of the understanding that, for example, at Vancouver International Airport groups or "teams" are formed to act in cases of emergency. The members of these groups will be drawn from various aspects of the operation and the nature of their specific employment may be totally unrelated to emergency rescue. Baggage handlers or concession operators could not be considered to have as part of their employment the need to react in the event of a crash of an aircraft. Nevertheless, their very presence as employees at the airport places them in the position of being the logical choices to become members of such teams. Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation.
>
> If a worker's injury is the result of an emergency action to prevent a crime, there may be entitlement to benefits under the *Criminal Injury Compensation Act*. (4)
>
> [emphasis added]

Policy at item #14.00 of the RSCM II, "Arising Out Of and in the Course of Employment," states that the notion of employment in section 5 of the Act is to be interpreted more broadly than the term 'work,' and that it includes activities "which would not normally be considered as work or in any way productive."

The policy goes on to say that no single criterion is conclusive in deciding whether an injury should be classified as one arising out of and in the course of employment. While control by an employer may be an indicator that a situation is covered under the Act, the absence of control by the employer does not preclude the acceptance of a claim where other factors demonstrate an employment connection. The policy lists a number of indicators which are commonly used for guidance:

> (a) whether the injury occurred on the premises of the employer;
>
> (b) whether it occurred in the process of doing something for the benefit of the employer;
>
> (c) whether it occurred in the course of action taken in response to instructions from the employer;
>
> (d) whether it occurred in the course of using equipment or materials supplied by the employer;

(e) whether it occurred in the course of receiving payment or other consideration from the employer;

(f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;

(g) whether the injury occurred during a time period for which the employee was being paid;

(h) whether the injury was caused by some activity of the employer or of a fellow employee.

Counsel for the defendant submitted that, in stopping to provide assistance in a treacherous situation, the plaintiff was assisting other workers by removing a potential hazard from the road. He referred to several WCAT decisions which involve the application of the policy at item #16.50. In each case, it was found that the worker had not removed himself from his employment by assisting in the emergency situations. In this regard, he cited *WCAT Decisions #2003-00438-RB*, *#2005-01453*, *#2004-01349-AD*, *#2005-05306*, *#2004-06331* and *#2006-00119-AD.*

Counsel for the plaintiff submitted that "rendering assistance to stranded motorists on an unpopulated stretch of the Alaska Highway, on a cold and snowy night" was the action of a public spirited person. There was no employment aspect to bring the incident within the course of employment. The plaintiff stopped to assist some non-workers stranded on the highway. This was not required by his employment and any assistance that may have been rendered to individuals passing by who may have been workers was purely incidental. The plaintiff departed from his employment in order to provide the assistance and he was still providing the assistance when his vehicle was struck. He deviated from his work journey when he stopped to provide assistance and he had not resumed his employment when the accident occurred. Counsel went on to distinguish the cases cited by counsel for the defendant.

I have considered the cases cited by counsel and have also considered a case that was cited in one of the decisions cited by counsel. I note that decisions of the Appeal Division and WCAT are not policy and, with the exception of WCAT decisions issued by a panel constituted under section 238(6), WCAT is not bound to follow legal precedent (section 250(1)). However, the MRPP provides that WCAT will strive for consistency in decision making. (See items #14.10 and #20.44 of the MRPP.) Accordingly, it is useful to consider the reasoning in appropriate prior decisions.

WCAT Decision #2006-00119-AD involved an appeal by a truck driver who was driving along a road that followed the Fraser River when he saw a car sinking in the river. The truck driver parked his car and attempted, unsuccessfully, to rescue the driver of the sinking vehicle. The truck driver developed post-traumatic stress disorder following this incident. The panel referred to the reasoning in *Appeal Division Decision #97-1051* at some length and ultimately concluded that the driver had not removed himself from the scope of his employment when he attempted to rescue the driver of the vehicle.

Counsel for the plaintiff acknowledged that the facts in this decision quite closely resembled the present case but were distinguishable in that the truck driver's distress and psychological symptoms were due to his having to drive repeatedly past the place of the drowning and it had been the trauma of reliving this event night after night that had caused the psychological injury to the driver.

I have found *Appeal Division Decision #97-1051* particularly helpful in considering the application of the policy to the facts in the present case. That case involved an application for a certificate under what was then section 11 of the Act. The defendant had been driving a loaded logging truck when he stopped to render assistance to a motorist whose vehicle had gone off the road into the snow. He was struck by the plaintiff who was travelling from Takla Landing to either Fort St. James or Vanderhoof; he had not yet determined his final destination. The accident occurred at approximately 4:30 p.m. on the Leo Creek Forest Service Road, which was a radio controlled forestry road used by logging trucks.

The defendant's evidence was that he had been driving loads of logs on the Leo Creek Road five days a week for the last four years. He had stopped to render assistance to the vehicle in the ditch as a "good deed." The question was whether the actions of the defendant were merely those of a public spirited citizen such that he had removed himself from his employment by stopping to give assistance.

The panel, in considering the application of the policy on emergency actions, quoted at some length from *Decision No. 252* (Re Scope of Employment, 3 W.C.R. 147) which is the basis for the policy on emergency actions. This is a decision of the former commissioners which was "retired" on October 21, 2003. Although it is no longer applicable policy, it provides a useful context for the policy on emergency actions since much of the language in that policy is taken directly from that decision.

Decision No. 252 dealt with a situation in which a worker, who was working in an office at a marine supply company, saw a light plane crash into the Fraser River. He decided to attempt to rescue the occupants of the plane and injured himself while exiting the office building. The Board had denied compensation to the office worker but this decision had been appealed to the Board of Review which had overturned the decision. The commissioners concluded that the Board of Review decision should be

implemented although they had reservations about the basis for extending compensation coverage to the office worker in this circumstance. In this regard, they stated "The fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation." The commissioners set out some principles which should be applied in future when considering actions of a similar nature. These principles are now set out in the policy at item #16.50.

In *Appeal Division Decision #97-1051*, *supra*, the panel considered the factors enumerated in policy #14.00 which are used to assist in deciding whether an injury arose out of and in the course of employment. The panel found that there was some basis for considering the situation in the case before him came within the terms of item (b), (d), (f) and (g) of the list of factors described in that policy.

I am not satisfied in the present case that the circumstances satisfy that many of the criteria. The accident did, however, occur during a time period for which the defendant was being paid, in that he was paid on the basis of a flat rate equivalent to what he would earn for ten hours of work per day. In addition, the risk to which the plaintiff was exposed when the accident occurred was the same as the risk to which he was exposed in the normal course of employment in that there could be any number of reasons for the plaintiff to stop on the side of the road while driving - although there is no evidence that it happened outside of the circumstances of this case. In addition, the employer was paying the plaintiff for the use of the vehicle that he was driving that evening. I do not find, however, that these criteria lead definitively to one conclusion or another.

Returning to policy item #16.50, I find that one aspect or principle appears particularly relevant to the situation in this case. The policy states that claims may be accepted "from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation." The policy goes on to state, "Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation." Accordingly, this appears to provide quite a narrow scope for compensation coverage when a worker takes emergency actions. The example provided is of employees in an airport who would become part of a rescue team in an emergency, even though emergency response is not part of their work. In such a case, there appears to be a fairly strong employment connection in any event since an emergency would likely involve risk to clients of the employer and/or other employees and/or the employer's premises. However, the policy states that claims may be accepted in this circumstance "[e]ven if the injury does not arise from a hazard of the employment premises, and the emergency does not concern a fellow worker or the employer's property." Accordingly, it does not appear that it is the risk to clients,

employees or property which provides for coverage of workers who take emergency actions in an employment situation which, inherently, holds risks for emergencies.

I find that the plaintiff's situation falls between that of employees in an airport who may be required to act in an emergency because of the risks inherent in their employment environment and that of an employee whose employment situation merely puts him in a position to observe an emergency. It is in a gray area but I find that it is closer to the situation of the employees in the airport in that the plaintiff's employment required him to drive late in the evening, through a snow storm, under icy road conditions, on a remote stretch of the Alaska Highway. In my view, this is "an environment which by its very nature may become the site of an emergency situation." Therefore, I find that the plaintiff's circumstances come within that limited field of coverage for workers who undertake to provide emergency assistance as described in policy item #16.50. Because the defendant was driving in quite hazardous conditions which could reasonably become the site of an emergency situation and did become such a site, he was covered under the Act while providing emergency assistance. Accordingly, I find that the accident arose in the course of the employment and I do not find sufficient evidence to rebut the presumption under section 5(4) of the Act.

Status of the Defendant, Michael George Lemky

The defendant gave evidence relevant to his status in a statement made to an ICBC adjuster on March 19, 2004 and signed on March 30, 2007, at the request of his representative. In addition, he was examined for discovery on April 3, 2006. There does not appear to be any disagreement between counsel regarding the status of Mr. Lemky. Counsel for the defendant submits that Mr. Lemky was a worker in the course of his employment and counsel for the plaintiff has made no submission on this point, noting that the only issue of contention is whether Mr. Johnston's injuries arose out of and in the course of the employment.

At the relevant time, Mr. Lemky was the owner/operator of a truck used for hauling logs and he had a contract to haul logs from November 2003 to March 2004. (Q 24, 25 and 30) According to a memorandum from the Board Assessment Department, dated February 7, 2007, he was registered with the Board at the time of the accident and he had coverage for workers, as well as POP. Accordingly, under the law and policies cited with regard to the plaintiff's status, Mr. Lemky was also a labour contractor who was covered under the Act as an independent operator and was therefore a worker.

At the time of the accident, Mr. Lemky lived at Kaleden, British Columbia but he was staying at the Roost Motel, near Fort St. John, for the duration of his contract. (Q 11, 12 and 31) His job was to haul logs from 126 Jedney to the mill in Fort St. John. He was paid by the load. (Q 33 to 36) At that time of the year, he would start working around 9:00 or 10:00 p.m. (Q 55) On the night of the accident, he had to be in Jedney

to pick up logs between midnight and 1:00 a.m. (Q 73) When the accident occurred, he was driving north, on the Alaska Highway, on his way to pick up logs. (Q 46)

The policies at item #18.00, "Travelling to and From Work," and item #18.40, "Travelling Employees," state that when a worker is employed to travel, accidents occurring in the course of travel are compensable. This is true whether the job involves travelling on a particular occasion or generally. In this case, Mr. Lemky was employed to haul logs and was therefore employed to travel. Since he was on his way to pick up a load of logs when the accident occurred, any action or conduct that caused a breach of duty of care arose out of and in the course of his employment.

Conclusion

I find that at the time of the March 18, 2004 motor vehicle accident:

(a) the plaintiff, Richard Dean Johnston, was a worker within the meaning of Part 1 of the Act;

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

(c) the defendant, Michael George Lemky, was a worker within the meaning of Part 1 of the Act; and,

(d) any action or conduct of the defendant, Michael George Lemky, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the Act.

Marguerite Mousseau
Vice Chair

MM:gw

NO. M 87167
NEW WESTMINSTER 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:

RICHARD DEAN JOHNSTON

PLAINTIFF

AND:

MICHAEL GEORGE LEMKY

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the defendant, MICHAEL GEORGE LEMKY, 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, March 18, 2004:

1. The Plaintiff, RICHARD DEAN JOHNSTON, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, RICHARD DEAN JOHNSTON, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, MICHAEL GEORGE LEMKY, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

4. Any action or conduct of the Defendant, MICHAEL GEORGE LEMKY, which caused any alleged breach of duty of care arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act.*

CERTIFIED this day of August, 2007.

_____

Marguerite Mousseau
VICE CHAIR

NO. M 87167
NEW WESMINSTER 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:

RICHARD DEAN JOHNSTON

PLAINTIFF

AND:

MICHAEL GEORGE LEMKY

DEFENDANT

SECTION 257 CERTIFICATE

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

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