

DECISION OF THE APPEAL DIVISION

2002-0607

March 7, 2002

RE: Section 11 Determination
In the Supreme Court of British Columbia
Kelowna Registry Action No. 30825
Frederick Joseph Thomas Nelson v. Dr. Peter Huang,
carrying on business under the firm name and style of
P. Huang Neurosurgery Inc., and the said Dr. Peter Huang,
Kelowna General Hospital, Nurse Jane Doe #1, Nurse Jane
Doe #2, and each party's agents, employees and servants

Panel Appointed:
Herb Morton

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- (1) The defendants, Dr. Peter Huang and P. Huang Neurosurgery Inc., request a determination under section 11 of the *Workers Compensation Act* (the *Act*) in this legal action. The defendants plead the provisions of section 10 of the *Act* in paragraph 9 of the statement of defence filed October 8, 1996.
 - (2) Section 11 of the *Act* obliges the Workers' Compensation Board (WCB or Board) to make determinations and provide a certificate to the court in certain matters which are relevant to the legal action. The governors of the Board assigned this function to the chief appeal commissioner and the Appeal Division. The role of the Appeal Division is to determine the status of the parties under the *Act*. It is for the court to determine the effect of the certificate on the legal action. Section 85.2(6) of the *Act* provides that a decision of the Appeal Division or of a panel shall be deemed to be a decision of the Board.
 - (3) By Consent Order dated May 27, 1997, the action was dismissed against the defendants Kelowna General Hospital, Nurse Jane Doe #1, Nurse Jane Doe #2, and its agents, employees and servants.

Background

- (4) The plaintiff's claim for a back injury at work on February 9, 1994 was accepted by the WCB. An L4-5 disc herniation was diagnosed. The plaintiff underwent surgery on September 13, 1994 by Dr. Huang. At surgery, Dr. Huang had difficulty locating the L4-5 disc, and apparently approached the L3-4 disc. The surgery was terminated with a view to rescheduling the surgery at the correct level some two weeks later. The plaintiff's action alleges medical malpractice in respect of the surgery performed on his back on September 13, 1994.

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Issue(s)

- (5) Determinations are requested as to the status of the parties to the action, in relation to the plaintiff's surgery on September 13, 1994 for treatment of his prior work injury.

Status of the plaintiff

- (6) The plaintiff, Frederick Joseph Thomas Nelson, was employed as a plumber for Sun Mechanical (B.C.) Ltd. He was working at an apartment complex in Kelowna, B. C. On February 9, 1994, during a coffee break, he slipped on a snowy or icy concrete path and fell flat on his back. The plaintiff's claim for workers' compensation benefits was accepted by the Board.
- (7) Under the plaintiff's WCB claim, he received wage loss benefits from February 10, 1994 until May 19, 1996, followed by rehabilitation assistance. A pension award of 7.5% of total disability was made.
- (8) I have reviewed the medical evidence in a general way, to establish the context of the plaintiff's action. I make no findings concerning the medical evidence.
- (9) In July, 1994, the worker was referred for assessment by Dr. Peter Huang. At that time, the worker weighed 340 pounds, and was 6 feet in height. A CT scan revealed an L4-5 disc herniation. Dr. Huang's consultation report of July 17, 1994 concluded as follows:

I have reviewed his CT on June 23, 94 and despite is [sic] weight he has rather good CT detail. It was quite clearly demonstrated that he has a moderate large herniated L4-5 disc on the left side and this correlates to his clinical condition. I do wish to prolong his further conservative management and assess him in a month to decide if he really has unremitting radicular pain. If this persists to be the case and despite the situation with his weight which is not ideal for surgical treatment, there remains no alternative but to perform a microdiscectomy on him. He promises to be very strict in his diet and I wish him to keep a very strict weight record. Prior to my seeing him the WCB will have time to give consideration of his surgical treatment if there is really no alternative. . . .

- (10) By letter dated July 22, 1994, a WCB medical advisor wrote to Dr. Huang stating:

I agree completely with your approach and opinion regarding the treatment of this patient. As you are aware, he has a weight of 340 lbs., so if he can be managed non-surgically then this obviously would be

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preferable. If, on the other hand, radicular symptoms become severe enough to warrant surgery, then the suggested discectomy as per your letter of July 17, 1994 will be accepted as a W.C.B. responsibility.

(11) By letter dated August 19, 1994, Dr. Huang wrote to the WCB medical advisor stating:

. . . it is now clear that further conservative management will not work out. I should therefore proceed with performing on him an L4-5 microdiscectomy and hoping to get this done in about 3 weeks. To avoid intraabdominal pressure for his operative procedure, the operation will be performed with Mr. Nelson in a lateral position.

(12) By report dated September 27, 1994, Dr. Huang advised the WCB:

. . . on September 13, 94 Mr. Nelson underwent an intended L4-5 microdiscectomy on the left side. You are aware of his weight in excess of 300 lbs and it was necessary to perform his surgery in a lateral position and in fact utilizing a two operating tables, and intraoperative x-rays localization was not permissible. I went to anatomical landmarks and it turned out that he had an approach to the L3-4 level which could only be confirmed by a post-operative x-rays. There was thus no finding of a herniated disc at this level and discectomy was not carried out for L3-4. The most sensible approach at the time of surgery was to obtain this post-operative x-ray and for which he could easily have a repeat procedure when localization will then be accurate.

Mr. Nelson was discharged from hospital from September 18, 94. . . .
[reproduced as written]

(13) A CT of the plaintiff's lumbar spine on October 19, 1994 showed a "probable partial laminectomy defect on the left at L3-L4."

(14) By report dated March 30, 1995, Dr. Orest Porayko, neurosurgeon, advised:

I reviewed the post-operative MRI Scan with the patient taken December 12th, 1994. . . . Again review of the scan suggests by the location of the paraspinal scar tissue which does extend to some degree within the spinal canal that the likely exploration was at L4 rather than L3. The Scan does not show any evidence of residual disc herniation.

(15) Dr. Porayko advised that further surgery would not improve the plaintiff's usability or functional capacity with his back.

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- (16) By report of July 11, 1995, Dr. Majid Faridi, neurosurgeon, similarly expressed the view that the surgery had in fact been performed at the correct level. A post-myelogram CT scan on August 30, 1995 was reported as follows:

Due to patient's obesity with limit of tube reached, all images grainy, with limited resolution.

No evidence of herniation or stenosis. Early facet joint degenerative changes at L4-5 on the left.

- (17) In a report dated April 18, 1996, Dr. Smit, WCB medical advisor, noted that the plaintiff was apparently being considered for a possible fusion by Dr. Andrew D. Porter, orthopaedic surgeon. Dr. Smit expressed the view that the worker's poor physical overall shape, together with his weight, was a very strong contraindication to such surgery.
- (18) An affidavit has been provided by the plaintiff, sworn on July 21, 2001. The plaintiff states in paragraph 7, in connection with his conversation with Dr. Huang prior to his September 13, 1994 surgery:

During the conversation outside the operating room, I was only 3-4 feet away from him and noticed that Huang's eyes were sore looking and weeping, so much so, that he had to remove a handkerchief from his pocket to wipe the tears from both of his eyes repeatedly. I notice that that even before he wiped his eyes, they were blood red and irritated, especially the flesh of the eyelids. This certainly aroused my curiosity and raised some apprehensions.

- (19) An affidavit has been provided by the defendant, Dr. Huang, sworn on October 26, 2001, in answer to the plaintiff's interrogatories. Dr. Huang confirmed that he suffered from an eye condition commonly known as a sty, for which he sought medical attention in 1996 and in 1999. He advised that "there were possibly two other occasions of which a sty was not reported to my family physician." He advised he had employed hot compresses for this condition, although he could not recall whether this condition existed before or after the plaintiff's operation. The plaintiff's interrogatories referred to a letter dated March 30, 1999 from Dr. Yap to Dr. Enns. Dr. Huang stated that "My visit to Dr. Yap was the first occasion on which it was determined that I had 'hemorrhagic posterior vitreous detachment,' and that Dr. Yap advised that retinal (not vitreous) detachment is serious."
- (20) Submissions dated November 20, 1996 were provided by counsel for the defendants Dr. Huang and P. Huang Neurosurgery Inc. Determinations were requested on five

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issues, including whether the plaintiff was, at the time the cause of action arose, a worker within the meaning of Part 1 of the *Act*, and whether the plaintiff's injuries arose out of and in the course of his employment.

- (21) By letter dated December 23, 1996, the assistant to the chief appeal commissioner wrote to counsel, enclosing a copy of the December 2, 1996 decision by the British Columbia Court of Appeal decision in the case of *Kovach v. Singh*. He invited submissions as to how the Appeal Division should proceed. All counsel agreed that this application should be held in abeyance pending the final outcome of the *Kovach v. Singh* case before the Supreme Court of Canada. On June 5, 2000, the appeal officer invited submissions from counsel, following the January 20, 2000 decision by the Supreme Court of Canada.
- (22) In considering this application, I have reviewed prior Appeal Division decisions published in the *Workers' Compensation Reporter* (the WCR), or accessible on the internet at www.worksafebc.com, together with relevant Court decisions. The Appeal Division has established its *Hallmarks of Quality Decisions*, published at 15 WCR 111. These were confirmed in *Decision No. 33* of the chief appeal commissioner (*Appeal Division Practice and Procedure*, effective September 1, 2001, published in Volume 17 of the *Workers Compensation Reporter*), at item 15.0, page 26. *Decision No. 33* states, in confirmation of these *Hallmarks*:

Though conflicts may occur during periods of development, over the long term a good decision supports established positions on law, medicine, science, and the interpretation of legislation, regulations, and policy.

A good decision is consistent with previous published Appeal Division decisions unless the conflict is identified and the reasons for the departure are articulated in a coherent manner.

The Hallmarks were established before the publication of all Appeal Division decisions since January 1, 2000 on the Board's internet web site. The reference to "previous published Appeal Division decisions" was intended to mean, and continues to mean, Appeal Division decisions published in the *Workers' Compensation Reporter* series.

- (23) An earlier published Appeal Division decision (#92-1899, *Compensable Consequences of Work Injuries*, 9 WCR 653) concerned a fitter/welder who suffered a shoulder injury at work. During his period of disablement, he attended the WCB for physiotherapy treatment. On December 5, 1990, he had finished his physiotherapy treatment and was

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involved in a motor vehicle accident while leaving the visitors' parking lot (but still on the WCB's premises). The panel found that the plaintiff was, at the time of the December 5, 1990 accident, a worker within the meaning of Part 1 of the *Act*, and that his injuries arose out of and in the course of his employment. The panel reasoned:

The issue is whether, at the time of the accident on December 5, 1990, the Plaintiff was a "worker" and was within the course of his employment.

Items #22.00 to #22.34 set out the policy of the Governors on "Compensable Consequences Of Work Injuries". Item #22.00 states, in part:

Not all consequences of work injuries are compensable. ...Looking at the matter broadly and from a "common sense" point of view, it should be considered whether the previous injury was a significant cause of the later injury.

Item #22.10 provides that - "Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable." Item #22.11 covers disablement caused by surgery.

These policy items make it clear that, for workers' compensation purposes, an injured worker is considered to be a "worker" within the course of his or her employment for activities related to treatment for a compensable injury.

- (24) Similar issues were addressed in connection with a medical malpractice action, in Appeal Division decision #93-1399, *Frances Elizabeth Kovach v. Royal Inland Hospital, G. S. Singh, Jane Doe, Sue Doe and Janet Doe*, 10 WCR 603. In that case, the worker suffered a back injury at work in 1987. She alleged negligence in relation to her subsequent medical treatment and surgery. The Appeal Division panel found that any injury caused by the surgery and related treatment arose out of and in the course of her employment. The Appeal Division panel reasoned:

We have given considerable thought to whether any real distinction can be drawn between an "injury arising out of and in the course of employment" and a "compensable consequence" of an original injury. We can see no basis for differentiating between the two concepts. If the statute restricted compensability to injuries *occurring* in the course of a worker's employment, injuries in the course of treatment might well be subject to a different consideration. A much broader concept is expressed, however,

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by the term "*arising out of*" and in the course of employment. The breadth of that terminology is reflected in the manuals containing the Governors' published policies.

As noted by counsel and seen in such cases as *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.), the Board apparently has routinely determined in the past that, when an injured worker's condition was made worse during treatment for a compensable injury, the worker was still a worker and the subsequent injury arose out of and in the course of employment. The Court in *Frandle v. Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.) noted that the Board had made those determinations in that case with regard to the Plaintiff and the hospital in which his subsequent injuries occurred.

That approach appears to fit more closely the intent of the *Act* than the interpretation suggested by the Plaintiff. It may be difficult to say that an injured worker who is undergoing an operation miles from her place of employment is still in the course of her employment. It is less difficult, however, to characterize the operation as *arising out of* such employment.

The important issue in workers' compensation is whether the injured worker should be covered for any subsequent injury arising from the treatment. The Board has decided, properly in our view, that these subsequent injuries are compensable if they are a direct consequence of treatment for a compensable injury. An original injury which arose out of and in the course of employment is both compensable under section 5(1) and gives rise to a certificate under section 11 which can result in a legal action being barred. It follows that the same must be said for the direct consequences of that injury which gave rise to further entitlement to compensation. The worker is undergoing treatment because of a work injury. Exposure to the risk of further injury during that treatment is due to having suffered the work injury. Otherwise, the worker would not be undergoing the medical treatment. There is a direct causal link between the two injuries. The risk in treatment is part of the original compensable injury for the purposes of compensation under section 5(1) of the *Act*. We find that it is also part of the compensable injury for the purposes of section 11. That is, the direct consequences of a compensable injury also arise out of and in the course of employment. The broad definition given to that phrase for the purposes of section 5(1) must carry through into section 11. There is no reason to assume that the legislature intended them to be interpreted differently.

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However, under both sections 5(1) and 11, this is limited to situations where there is a sufficient causal link between the original injury and any subsequent injury. An injured worker could be further injured by an unrelated cause or by a cause that is only remotely connected to her work injury or subsequent treatment. In such a case, the subsequent injury would not be a compensable consequence of the original injury. It would not arise out of and in the course of employment, either for section 5(1) or section 11 of the Act.

In this case, the Plaintiff's complaint is that her injured back was made worse by the Defendant's surgery and treatment. Some subsequent injuries could be "new" injuries, in the sense that they are separate and distinct from the original injury and/or there is an insufficient causal link between the original and subsequent injuries. However, based on the evidence submitted, we find any subsequent injury to the Plaintiff's back due to the Defendant's surgery and related treatment was a direct consequence of her original injury and not a new or different injury.

The Plaintiff argued that the surgery was a separate cause of action, distinct from the original injury, as it was not authorized by the Workers' Compensation Board. The Workers' Compensation Board did not formally approve the surgery, however, nothing was done at the Board to stop payment to the Defendant for the surgery or deny the Plaintiff further compensation for the consequences of the surgery. The surgery was questioned by the Claims Adjudicator and a Board Medical Advisor. The Defendant's account was paid as a routine administrative act - that is, it was paid by the Payment Clerk as the claim had been accepted and no one indicated that the surgery was not compensable. The Board did accept that the Plaintiff was entitled to further compensation following the surgery. We consider that to be a proper decision. While the surgery might have been questionable, it arose as a direct result of a compensable injury and was performed by an established surgeon on a referral from the Plaintiff's family doctor.

Therefore, we find that it is not determinative that the Board did not formally authorize the surgery. The surgery arose directly as a result of the compensable injury. It was part of the treatment for that injury. The Board accepted responsibility for the consequences of the surgery. Therefore, any injury caused by the surgery and related treatment *arose out of* and in the course of employment.

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It is not significant that the Plaintiff was not working at the time of the subsequent injury. For each claim, and the compensable consequences arising as part of the claim, the worker must meet the requirement of being a "worker" under the Act only once. That is, the person must be a "worker" for the claim to be accepted initially, but it is not necessary to show that the person is still a "worker" each time further compensation is claimed. The worker still is an injured worker with the Board while undergoing treatment for a compensable injury. The Board does not stop compensation because the worker becomes unemployed. The worker is receiving compensation from the Board and the compensation paid has relevance to the assessments paid by the worker's original accident employer.

The Plaintiff was a "worker" at the time of her original injury. She met that requirement in section 5(1) for compensation and she did not have to satisfy it again under this claim. She remained a "worker" for the purposes of the claim. Therefore, we find that, at the time the cause of action arose, the Plaintiff was a worker within Part 1 of the *Act*.

[emphasis added]

(25) In that case, the Appeal Division panel certified that the plaintiff was, at the time the cause of action arose, a worker, and her injuries arose out of and in the course of her employment. The plaintiff brought a petition for judicial review, which was dismissed in the British Columbia Supreme Court on March 6, 1995 (1995) 5 B.C.L.R. (3d) 142. An appeal was allowed by the British Columbia Court of Appeal on December 2, 1996, which set aside the certificate issued under section 11 of the *Act*. The respondents sought leave to appeal to the Supreme Court of Canada. On October 16, 1997, the Supreme Court of Canada remanded the matter to the British Columbia Court of Appeal to be reconsidered and dealt with in accordance with the Supreme Court of Canada judgment in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, released August 28, 1997 [1997] 2 S.C.R. 890. The matter was considered again by the same three member panel of the British Columbia Court of Appeal, and their judgment was provided on May 28, 1998. The appeal was allowed by a majority decision of the British Columbia Court of Appeal, with Mr. Justice Donald dissenting [1999] 1 W.W.R. 498, 52 B.C.L.R. (3d) 98. Mr. Justice Donald reasoned:

27 Was the result illogical? If the plaintiff had not been injured at work she would not have been treated by Dr. Singh. That fact forms a causal link connecting the employment related injury to the negligence alleged against Dr. Singh. In my view, the causation finding would only be illogical if there were no connection. Whether

the law should treat the connection as remote or proximate is a separate issue.

- 28 The Board was not bound to apply common law principles of causation, such as *novus actus interveniens*, in deciding the matter. No single theory of causation can be said to be infallible or universally applicable. What works for a tort-based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system. The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries, it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection.
- 29 Different considerations arise when, instead of a collective fund, the purse of an individual defendant is put at risk. There it is important to determine whether an intervening act has broken the chain of causation. That is not an exercise of pure logic but a matter of justice in allocating responsibility between initial and subsequent tortfeasors.
- 30 The onus of proof in each system is different. Under the WCB scheme if the probabilities are evenly balanced the claimant succeeds in obtaining compensation. In tort law, the defendant wins.
- 31 Requiring the Board to apply the doctrine of *novus actus interveniens* creates the potential of confusion and delay for the injured worker. This is the consequence of mixing incompatible systems of compensation. For example, assume that the WCB ruled that the chain of causation was broken by medical negligence and a court later found that all or most of the worker's problems were caused by the industrial injury. Neither the Board nor the court is bound by the findings of the other. The worker falls between two systems.
- 32 What if the worker lacks the resources to pursue a medical malpractice claim or is unwilling to take the financial risk of losing? Even if he or she proceeds with an action, the time required in bringing the litigation to a conclusion and the uncertainties involved are potential deterrents.

- 33 These difficulties are inconsistent with the principles of the model WCB scheme identified by Mr. Justice Sopinka in *Pasiechnyk*, supra, at 909:

Montgomery J. also commented on the purposes of workers' compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.J.). He stated at p. 279 that the scheme is based on four fundamental principles:

- (a) compensation paid to injured workers without regard to fault;
- (b) injured workers should enjoy security of payment
- (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- (d) compensation to injured workers provided quickly without court proceedings.

I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an Injury Fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number of issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide them with any insurance.

- 34 The truly vexing aspect of this case is that a doctor secures immunity from action through participation in the scheme as an employer or worker. We are not accustomed to such a result. But as anomalous as it may seem, the choice of including professionals in the scheme was made by the legislature, and the structure of the scheme must not be altered to defeat the immunity. The plaintiff must forgo the prospect of a large tort judgment for the prompt and

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certain payment of compensation without having to prove fault. The trade-off may seem disadvantageous in the circumstances involving a doctor but it is highly advantageous in the vast majority of claims.

35 For these reasons I would dismiss the appeal.

(26) By decision dated January 20, 2000 in the *Kovach* case (2000) 184 D.L.R. (4th) 415, [2000] 1 S.C.R. 55, the Supreme Court of Canada allowed the appeal. The Court stated:

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

(27) In another decision which was also issued on January 20, 2000, in *Lindsay v. Workers' Compensation Board of Saskatchewan*, (2000) 184 D.L.R. (4th) 431, [2000] 1 S.C.R. 59, the Supreme Court of Canada similarly reasoned:

We are all of the view, substantially for the reasons of MacPherson C.J. in the Saskatchewan Court of Queen's Bench, to dismiss the appeal, affirm the judgment of the Court of Appeal and the decision of the Court of Queen's Bench with costs to the respondents.

(28) In the *Lindsay* case, the worker suffered an injury to his lungs in a mining accident at work. He was referred for a lung biopsy. He suffered further injury during the biopsy, when the physician accidentally severed one or more of the worker's nerves. The worker sought to pursue a legal action against the Health Board and two doctors. The Saskatchewan Workers' Compensation Board found the plaintiff's legal action was barred by the *Workers' Compensation Act* of Saskatchewan. On an application for judicial review, MacPherson C.J. in the Saskatchewan Court of Queen's Bench, reasoned:

. . . it is quite plain that since the plaintiff was first injured at the mine site in Northern Saskatchewan, he has not actually performed any labour, manual or otherwise, for any employer. But that does not necessarily mean that the plaintiff is not barred from commencing action against the two doctors.

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Section 29 reads in part: "Where an injury to a worker arises out of his employment, it is presumed that it occurred in the course of his employment". This in turn raises the question of the meaning of the phrase "out of". I could find no judicial interpretation of this phrase, but in the Shorter Oxford Dictionary (3rd ed., 1990 reprint) there are a number of meanings given, each seeming to depend on the manner in which the phrase is used. The meaning which I think most closely reflects what is intended by the section is: "taken or derived from". If this is a correct meaning, then the first portion of s. 29 would be interpreted to read: "an injury to a worker is derived from his employment", and I think it is correct to say that the biopsy injury is derived from the first injury.

Further, as mentioned above, in Pasiachnyk, Sopinka J., in paragraph 45, approved of question number 4 posed by the Compensation Board in that case, and here I emphasize the use of the word "connection" in that paragraph 4. Certainly, there was a connection between the two injuries -- that is, the biopsy was intended to supply information as to what further could be done to improve the lung damage caused by the first injury. It is, therefore, my view that under s. 29, the plaintiff's injury caused by the biopsy arose "out of his employment".

- (29) The appeal of this judgment was dismissed by the Saskatchewan Court of Appeal, and a further appeal was dismissed by the Supreme Court of Canada.
- (30) By letter dated February 20, 2001, the appeal officer provided counsel with a copy of a more recent Appeal Division decision dated October 10, 2000 (#00-1587). That case concerned a worker who was attending the WCB's rehabilitation centre for treatment of a hand injury he had suffered at work. While attending the centre, he tripped on a pipe which was on the sidewalk outside the entrance to the centre, and fell and broke a rib. The Appeal Division panel found the injury suffered by the worker in this fall arose out of and in the course of his employment. While acknowledging the criticisms expressed of the reasoning provided in the two published Appeal Division decisions (#92-1899 and #93-1399), the panel also noted the importance of consistency and predictability in decision-making. The panel found no compelling reason to depart from the analysis expressed in decisions #92-1899 and #93-1399. That approach was also followed in a more recent Appeal Division decision, #2002-0003, January 2, 2002.
- (31) The fact that a petition for judicial review of a prior Appeal Division decision has been denied does not mean that the analysis in the decision was necessarily correct, or the only interpretation which might reasonably be applied. Where a petition for judicial review is denied on the standard of review of patent unreasonableness, it means the decision was viable in the sense of not being patently unreasonable. It does not

preclude the Appeal Division from considering whether some different analysis might be preferable, as better reflecting the intention of the legislature. Notwithstanding the publication of the Appeal Division decision in the *Kovach* case in the *Workers' Compensation Reporter*, and the fact that a Court challenge to that decision was unsuccessful, it is open to me to apply a new analysis were I to find such persuasive. I refer, in this regard, to the September 13, 2001 decision of the Ontario Court of Appeal in *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association*, (2001) 205 DLR (4th) 700. Even though the judgment of the British Columbia Court of Appeal in the *Kovach* case was overturned by the Supreme Court of Canada, on an application of the standard of review of patent unreasonableness, it would be open to the Board to adopt the analysis expressed by the Court of Appeal were this considered persuasive.

- (32) Submissions were provided by plaintiff's counsel on November 30, 2001, concerning the status of the defendant, Dr. Huang. Plaintiff's counsel does not comment on or address the status of the plaintiff.
- (33) I have looked at materials from other jurisdictions, with a view to identifying alternative analyses for consideration. In a judgment dated May 9, 2001, in *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2001] N.S.J. No. 166, the Nova Scotia Court of Appeal addressed similar circumstances. A worker was injured in the course of employment and was treated by medical personnel at the hospital. He wished to sue the hospital and medical personnel for negligence. The Court reasoned:

[5] The bar of civil actions in s. 28 of the Act applies to rights of action to which a "worker" may be entitled "... as a result of any personal injury by accident... arising out of and in the course the worker's employment..." against any "...employer subject to this Part...": see s. 28(1)(b) and (d). There was no dispute that Mr Erl was a worker within the meaning of the Act. There were two other questions raised. The first was whether the right of action advanced in the civil suit resulted from a "personal injury by accident arising out of and in the course of [Mr. Erl's] employment". The second, for the purposes of this appeal, was whether the QE II was an employer subject to the Act.

[6] On the first issue, Mr. Erl's submission to WCAT was that the medical negligence represented a new cause of injury and, therefore, his right of action did not result from an injury by accident which arose out of and in the course of his employment. If this were so, the medical negligence action would not be barred.

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[7] WCAT rejected this submission, relying on two recent decisions from the Supreme Court of Canada, *Kovach v. British Columbia (Workers' Compensation Board)*, [2000] 1 S.C.R. 55 and *Lindsay v. Saskatchewan (Workers' Compensation Board)*, [2000] 1 S.C.R. 59.. Mr. Erl's work place accident continued, in WCAT's view, to be the operative cause of his injury and his claim relating to negligent medical treatment resulted from the original work place injury.

[8] The second issue was whether the hospital is an employer subject to the Act within the meaning of s. 28(1)(b). As noted, s. 28 bars action, not only against an injured worker's own employer but also against "... any other employer subject to this Part [i.e., Part I] ...": see s. 28(1)(b). The question, then, is whether the hospital is such an employer.

- (34) Under the Nova Scotia *Workers' Compensation Act* and Regulations, the "operation of hospitals" was subject to the Act but the "surgical medical" industry was expressly excluded from the coverage of the Act. WCAT resolved the apparent conflict by deciding that while the hospital was generally included within the coverage of the Act, it was not subject to the Act for the purposes of this civil action. It reasoned that the particular actions of the hospital's servants and agents which gave rise to the civil claim related to "...those activities upon which surgical or medical competence and professionalism touch" and that such activities were excluded from the "operation of hospitals".
- (35) The Nova Scotia Court of Appeal found that the WCAT decision was patently unreasonable. The Court of Appeal found in part:

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

[43] This interpretation is also unreasonable when the relevant provisions are examined in isolation from the rest of the Act. The Regulations deal with included and excluded "employers ... engaged in, about or in connection with the ... industries" set out in Appendix A and section 2 thereof. The structure of s. 3 of the Act and of ss. 2 and 3 of the

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Regulations makes it clear, in my view, that an employer is either included or excluded and cannot be both. These provisions define included and excluded employers for all purposes under the Act. This requires a characterization of the employer as one or the other for all purposes. WCAT, instead, attempted to fit the employer into both categories by examining the particular activity giving rise to the particular cause of action and "carving out" an aspect of the employer's activity on a case by case basis. With respect, this approach, as well as its result, appear to me to be unreasonable.

- (36) Decisions from Ontario are of interest, as they reveal an alternative approach. Decision No. 24/91 of the Ontario Workers' Compensation Appeal Tribunal, [1991] O.W.C.A.T.D. No. 805, October 2, 1991, concerned the situation of a worker who suffered an injury at work, for which he claimed workers' compensation benefits. He subsequently brought a legal action against a hospital and a doctor alleging negligence in the treatment of his work injury. The WCAT panel found that workers' compensation benefits continued to be payable to the worker, on the basis the worker's disability resulted from his initial injury at work. The panel found that the bar to a legal action did not apply, however, on the basis that the worker was not in the course of his employment at the time of the second injury (involving the alleged medical malpractice). The panel stated, in paragraph 41:

[41] We note that s. 8(9) requires that "the workers of both employers be in the course of their employment at the time of the happening of the injury". In the Panel's view, while the workers of the Hospital may have been in the course of their employment at the time of the happening of the injury, it cannot be said that the worker who brings this action was in the course of his employment at the time of the happening of the injury.

[42] In our opinion, the "injury" in question, i.e. the injury for which a lawsuit is brought, was the injury resulting from the misreading of the x-ray by the physicians who treated the worker following his compensable accident. As we have concluded above, the worker is entitled to compensation benefits for any disability resulting from his compensable accident. This, as we determined above, includes disability that could be attributed to the negligence of the Applicants. However, subsequent third party negligence may, in certain circumstances, constitute a distinct injury, giving rise to a right of action, which in turn triggers the application of the election provisions with the results outlined above. In our view, that is what occurred here.

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[43] Where a distinct subsequent injury does occur, giving rise to a right of action, the right to bring that action may be subject to s. 8(9). However, if that right of action is to be taken away by s. 8(9) all the conditions of s. 8(9) would have to be met. Among those conditions is that, when that subsequent injury occurs, both the injured worker and the workers of the third party be in the course of their employment. In the present case, at the time of the happening of the subsequent injury, the injured worker was not in the course of his employment. He was receiving medical treatment. Consequently, he has a right of action against the Hospital. But, as we determined above, that right of action is subject to the provisions of ss. 8(1) and (4). The effect of those subsections is that the worker's right of action against the Hospital can only be maintained by the Board.

[emphasis added]

- (37) In a more recent decision by the Ontario Workplace Safety and Insurance Appeals Tribunal, *No. 1434/97*, [1999] O.W.S.I.A.T.D. No. 328, February 23, 1999, the panel considered a similar situation involving a compensable work injury, followed by alleged medical malpractice. In this case, however, the physician was not covered as a worker or employer under the *Act*. The panel expressed agreement with the analysis of *Decision No. 24/91*. The panel found:

[73] In the view of this Panel, the worker's right of action against Dr. Singh is subrogated to the Board. In our view, the analysis of the *Decision No. 24/91* [1991] O.W.C.A.T.D. No. 805 Panel is correct. Once a worker suffers a work-related accident, and claims benefits from the Board, the Board is required to pay compensation for disability which results from the original work-related injury, provided that the original injury is a significant contributing factor to the subsequent disability. This applies to injuries which occur or are alleged to occur as a result of medical treatment for the work-related injury, provided that the medical treatment is a reasonably foreseeable consequence of the original injury. In this case, the worker is entitled to benefits for the consequences of his original injury. This includes any injuries which may have arisen from medical treatment.

[74] Pursuant to subsection 10(4), once the worker elects to claim benefits for the work-related injury, the worker's right of action against a third party in respect of any matter related to the work-related injury is subrogated to the Board, provided that the right of action is not taken away because of the status of the third party. Unless the right of action is extinguished, the right of action remains, but, pursuant to subsection 10(5), it is for the Board to decide how or whether to proceed. In

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exercising its discretion, the Board must act reasonably, but is permitted to consider the interests of the workers' compensation (or workplace safety and insurance) system, in addition to the interests of the worker.

[75] For these reasons, the Panel concludes that the action against Dr. Singh can only proceed if the Board decides to pursue that action, or gives the worker permission to pursue the action.

[emphasis added]

(38) Larson's *Workers' Compensation Law* summarizes the American jurisprudence as follows:

[1] Compensability of Aggravation by Treatment

It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. Examples include exacerbation of the claimant's condition, or death, resulting from antibiotics, antitoxins, sedatives, pain-killers, anesthesia, electrical treatments & hardments, or corrective or exploratory surgery.

[2] Irrelevance of Fault or Malpractice of Doctor

Fault on the part of the physician, such as faulty diagnosis, improper administration of anesthesia, excessive surgery, or a slip of the surgeon's knife, even if it might amount to actionable tortiousness, does not break the chain of causation. Indeed, in some of the cases in the present category, the compensability of the aggravation due to treatment is adduced to support holdings that the employer or physician cannot be sued in tort because of the exclusiveness of the compensation remedy.

[3] Irrelevance of Fault of Others Involved in Treatment

Similarly, injuries due to the negligence of persons other than physicians, connected with the process of treatment or convalescence, such as orderlies, first-aid personnel, physical therapists, or even cleaners in a hospital, are within the compensable range of consequences.

(39) A decision of the High Court of Australia, *Mahoney v. J. Kruschich (Demolitions) Pty. Ltd.*, (1985) 156 CLR 522, concerned the situation where a worker sued his employer for damages suffered in a work injury. The employer sought contribution from the worker's doctor, arguing that his negligent treatment had caused or contributed to the worker's disability. The court reasoned in part:

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[7] In particular circumstances, minds may differ as to whether a subsequent injury was foreseeable or whether it is too remote to be regarded as a consequence for which an earlier tortfeasor may be held liable. When an injury is exacerbated by medical treatment, however, the exacerbation may easily be regarded as a foreseeable consequence for which the first tortfeasor is liable. Provided the plaintiff acts reasonably in seeking or accepting the treatment, negligence in the administration of the treatment need not be regarded as a *novus actus interveniens* which relieves the first tortfeasor of liability for the plaintiff's subsequent condition. The original injury can be regarded as carrying some risk that medical treatment might be negligently given: see *Beavis v. Apthorpe* (1962) 80 WN(NSW)852, at p 858; *Moore v. A.G.C. (Insurances) Ltd.* (1968) SASR 389, at p 394; *Lawrie v. Meggitt* (1974) 11 SASR 5, at p 8; *Price v. Milawski* (1977) 82 DLR(3d) 130, at pp 141-142; *Katzman v. Yaeck* (1982) 136 DLR(3d) 536. It may be the very kind of thing which is likely to happen as a result of the first tortfeasor's negligence (cf. per Lord Reid in *Dorset Yacht Co. v. Home Office* (1970) AC 1004, at p 1030). That approach is consistent with the view taken in workers' compensation cases that the total condition of a worker whose compensable injury is exacerbated by medical treatment, reasonably undertaken to alleviate that injury, is to be attributed to the accident: see *Lindeman Ltd. v. Colvin* (1946) 74 CLR 313, per Dixon J. at p 321; *Migge v. Wormald Bros. Industries Ltd.* (1972) 2 NSWLR 29, per Mason J.A. at p 48; on appeal (1973) 47 ALJR 236, although medical negligence or inefficiency can be held to amount to a new cause of incapacity in some circumstances: *Rothwell v. Caverswall Stone Co.* (1944) 2 All ER 350, at p 365; *Hogan v. Bentinck Collieries* (1949) 1 All ER 588, at p 592. In the last-mentioned case Lord Reid, in dissent, expressed the opinion that there is a break in the chain of causation when a doctor is guilty of such negligence as would make him liable in damages. We think, with respect, that that test is too rigid. Some degree of medical negligence in the treatment of an injury may well be a reasonably foreseeable result of the act or omission by which that injury was inflicted, and then no clear line can be drawn to limit the original tortfeasor's liability to exclude the consequences of medical negligence.

[8] However, in the ordinary case where efficient medical services are available to an injured plaintiff, the original injury does not carry the risk of medical treatment or advice that is "inexcusably bad" (*Martin v. Isbard* (1946) 48 WALR 52, at p 56), or "completely outside the bounds of what any reputable medical practitioner might prescribe" (*Lawrie v. Meggitt*, at p 8) or "so obviously unnecessary or improper that it is in the nature of a

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gratuitous aggravation of the injury" (South Australian Stevedoring Company Limited v. Holbertson (1939) SASR 257, at p 264) or "extravagant from the point of view of medical practice or hospital routine" (Hart and Honore Causation in the Law, (1959), p.169). In such a case, it is proper to regard the exacerbation of a plaintiff's condition as resulting solely from the grossly negligent medical treatment or advice, and the fact that the plaintiff acted reasonably in seeking and accepting the treatment or in following the advice will not make the original tortfeasor liable for that exacerbation.

- (40) In considering the foregoing, I find some appeal to the analysis set out in Decision No. 24/91 of the former Ontario WCAT. Namely, workers' compensation benefits continue to be payable to a worker notwithstanding negligence in the medical treatment for a work injury, on the basis that this involves disability resulting from the initial work injury. Under sections 22, 23, 29 and 30 of the British Columbia *Workers Compensation Act*, compensation is payable for temporary or permanent disability which "results from the injury". At the same time, however, the statutory bar to a legal action does not arise, as it cannot be said that the worker was in the course of his employment at the time of the happening of the medical treatment. Under section 5(1) and (4) of the British Columbia *Workers Compensation Act*, the dual requirements are similarly stated, that an injury arise out of and in the course of the employment. There is some appeal to the notion that medical malpractice in the treatment for a work injury is not a sufficient intervening cause to break the chain of causation for the purposes of considering entitlement to workers' compensation benefits, but that the medical malpractice will be considered a sufficient intervening cause to give rise to a right of legal action.
- (41) This approach seems to involve an element of inconsistency, however. For the first purpose the medical malpractice is seen as a foreseeable consequence of the work injury, but for the second purpose the medical malpractice is seen as an intervening event which breaks the chain of causation. To that extent, therefore, the analysis is strained.
- (42) However, the analysis of the Appeal Division in the *Kovach* case is also strained in concluding, in relation to any further injury suffered due to medical malpractice, that so long as the further injury is a direct consequence of the initial work injury it is an injury arising out of and in the course of the employment. In Appeal Division decision #93-1399, the panel acknowledged the difficulty in saying that an injured worker who is undergoing an operation miles from her place of employment is still in the course of her employment. The Appeal Division panel found, however, that any subsequent injury due to medical treatment was a direct consequence of the original work injury and not a new or different injury. The Appeal Division decision was, therefore, internally

consistent in terms of not according significance to the negligent medical treatment for either workers' compensation or tort purposes.

(43) I note with interest certain provisions in the *Act Respecting Industrial Accidents and Occupational Diseases*, Chapter A-3.001, of Quebec. The Quebec Act provides.

31. An injury or a disease is considered to be an employment injury if it arises out of or in the course of

- (1) the care received by a worker for an employment injury or the lack of such care;
- (2) an activity prescribed to the worker as part of the medical treatment he receives for an employment injury or as part of his personal rehabilitation program.

The first paragraph does not apply if the injury or disease gives rise to compensation under the Automobile Insurance Act (chapter A-25), the Act to promote good citizenship (chapter C-20) or the Crime Victims Compensation Act (chapter I-6).

1985, c. 6, s. 31.;1999, c. 40, s. 4.

442. No beneficiary may bring a civil liability action, by reason of an employment injury, against a worker or a mandatary of an employer governed by this Act for a fault committed in the performance of his duties, except in the case of a health professional responsible for an employment injury contemplated in section 31.

Where the employer is a legal person, the administrator of the legal person is deemed to be a mandatary of the employer.

1985, c. 6, s. 442.;1999, c. 40, s. 4.

(44) Section 2 defines "beneficiary" as meaning a person entitled to a benefit under the Act. It would seem that under section 31 of the Quebec Act, workers' compensation coverage for injuries resulting from the health care provided for a work injury is expressly provided in the Act (rather than simply in policy). However, such workers' compensation coverage is excluded in cases where compensation is payable under the *Automobile Insurance Act*. Furthermore, the Quebec Act expressly authorizes a legal action against a health professional responsible for a further employment injury resulting from the provision of health care for a work injury.

(45) It is evident, therefore, that to the extent the law or policy concerning injuries in the course of treatment for a work injury in British Columbia may be viewed as unclear or problematic, that is something which is capable of being addressed by means of

statutory amendment. The British Columbia WCB has taken a consistent approach to these issues in the past, as evidenced by the decisions in *Smith v. Vancouver General Hospital* (1981) 31 B.C.L.R. 358, and in the more recent *Kovach* case. A Court challenge to that approach was ultimately unsuccessful, pursuant to the Supreme Court of Canada decision dated January 20, 2000 in the *Kovach* case. In her judgment of March 6, 1995 in the *Kovach* case, Madam Justice Huddart of the British Columbia Supreme Court noted in paragraph 13 (in connection with the court's role in reviewing the Appeal Division decision on judicial review):

If an unpalatable result flows from the Board's reasoned interpretation of its governing legislation and the facts of a case, that is a matter for the legislature.

- (46) A new approach could conceivably be introduced by legislative or perhaps policy amendment. Issues concerning the scope of the bar to legal actions (as to whether this should apply in situations involving medical malpractice, or, given the existence of compulsory automobile insurance, motor vehicle accidents between workers) have broad ramifications. Whether or not any change in approach is warranted obviously raises broad issues involving competing interests.
- (47) Upon consideration of all of the foregoing, I consider it appropriate to follow the analysis expressed in Appeal Division decisions #92-1899, #93-1399 and #00-1587. Pursuant to section 99, the Board is not bound to follow legal precedent. As stated in the reasons of Mr. Justice Donald of the British Columbia Court of Appeal in the *Kovach* case, the Board is not bound to apply common law principles of causation such as *novus actus interveniens*. Once it is concluded that a broadly inclusive policy of worker protection should apply, and that negligence in medical treatment for a work injury does not break the chain of causation, the contention that this reasoning should hold for all purposes in decision-making under Part 1 of the *Act* has considerable force. While the approach taken in the Ontario WCAT decision *No. 24/91* also has merit, I am not persuaded that analysis should be viewed as "more correct" than the analysis expressed in Appeal Division decision #93-1399 so as to warrant a change in approach.
- (48) Accordingly, I find that at the time the cause of action arose, September 13, 1994, the plaintiff was a worker within the meaning of Part 1 of the *Act*, and his injuries arose out of and in the course of his employment.

Status of the Defendant

- (49) Bill 63, the *Workers Compensation Amendment Act, 1993*, expanded the scope of Part 1 of the *Act*. Effective January 1, 1994, section 2(1) of the *Act* provides:

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

(50) Registration of medical and dental offices with the WCB was made compulsory effective January 1, 1994.

(51) By memo dated August 24, 1998, the acting policy manager, assessment department, WCB, advised:

P. Huang Neurosurgery, Inc., Registration No. 507048, was registered on February 25, 1994 to cover workers from January 1, 1994 and, therefore, registered at the time of the action between February 9, 1994 and September 18, 1994. This firm is an active registration to date.

(52) Policy at No. 20:10:30 of the *Assessment Policy Manual* provides:

In a situation where the employer is a limited company, a director, shareholder or other principal of the company who is active in the operation of the company is considered a worker.

(53) The September 15, 1994 account submitted to the WCB for the surgery on September 13, 1994 was in the name of Dr. Peter Huang. However, defence counsel advises that all payments for services provided by Dr. Huang are paid into the account of P. Huang Neurosurgery Inc., and Dr. Huang is paid a salary by P. Huang Neurosurgery Inc. P. Huang Neurosurgery Inc. pays assessments to the Board on the salary of, *inter alia*, Dr. Huang.

(54) A published Appeal Division decision (#95-0320, 11 WCR 327) concerned the status of a lawyer operating through an incorporated company. The WCB assessment director found the lawyer was a worker of the company. In considering objections by the lawyer to that decision, the Appeal Division panel reasoned:

The director applied the policies of the governors which provide that the active shareholders or principals of a corporation are "workers" of the corporation for the purposes of workers' compensation.

There are many businesses which operate through an incorporated company. Many of those are small businesses, where the proprietors become the shareholders on incorporation and continue to be active in the business of the corporation. Often in small corporations which deal with the public, there may appear to be little distinction in practice between the active principal and the business. However, the Workers' Compensation

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Board does not examine these companies to determine if the principal operates more like an owner than a worker. Rather, once a business incorporates, the former proprietors are now "workers" of the company for the purposes of workers' compensation. At that point, the principal becomes a "worker" and loses the option of whether or not to apply for personal coverage as an "independent operator". The corporation is required to register with the Board as an employer and must pay assessments on the wages of all of its workers, including its principal. The Board can investigate and disregard the distinction between the corporation and its principal if the incorporation is being used to avoid the provisions of the *Act*.

It is difficult to see why these policies should not apply to law corporations, once it is determined there is some distinction between a law corporation and its active shareholders. The fact that the policy predates the mandatory inclusion of law firms in the coverage of the *Act* is not particularly relevant. The *Assessment Policy Manual* was amended in 1994 in response to the amendments to the *Act*, and no changes were made to the policies under consideration here. Thus, the only question is whether the policy produces an untenable result when applied to the facts.

We find the policy does provide a tenable result. Lawyers choose to incorporate and carry on the practice of law through a law corporation. Undoubtedly, they do this for certain advantages, perhaps relating to succession or tax planning. They do not gain all the advantages of other incorporated businesses, but there must still be some advantages or there would be no reason to incorporate. This is no different than other business people who incorporate. They do it for certain advantages. However, incorporation also gives rise to certain obligations. In workers' compensation, one of the obligations is that the corporation must pay assessments on the wages or remuneration of its active principals. Thus, the principals lose the ability to opt out of personal coverage under the *Act*, but they receive entitlement to no-fault compensation coverage and the protection of the bar against legal action in section 10(1) of the *Act* in appropriate circumstances.

We find nothing untenable with the decision to treat active principals of law corporations the same as active principals of other corporations. They have voluntarily opted for incorporation and the advantages and obligations which go with incorporation. Therefore, we find the director did not contravene the published policies of the governors when he applied

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the policies to law corporations and determined that active principals of a law corporation are "workers" under the *Act*.

- (55) Another published Appeal Division decision (#93-1399, *Kovach v. Singh et al.*, cited above) concerned an application for a section 11 determination in relation to an action for alleged medical malpractice. In that case, the surgeon was similarly registered with the WCB as an incorporation. The Appeal Division panel expressed the following reasoning, at pages 612-613:

Since the sections of the *Act* which set out who is covered by the *Act* make no specific reference to doctors, there is no reason to conclude that they cannot be "workers" under the *Act* - whether as employees of a hospital or as part of a medical practice. Therefore, if a doctor applies for registration under section 3(1) of the *Act* and is accepted, either as an independent operator or as part of an incorporated medical practice, and pays assessments on his wages, then he will be a "worker" within Part 1 of the *Act*. Further, any service he performs as part of that medical practice will come within his employment. Thus, if a doctor is injured while providing medical services, he will be entitled to compensation benefits. If he is sued or sues someone else as a result of an injury that arises in the course of that employment, he will be a "worker" under section 11 of the *Act* and, whether he is a Plaintiff or Defendant, his injuries and conduct will have arisen out of and in the course of his employment.

We appreciate the Plaintiff's argument that this appears to allow a doctor to hide behind the *Act*. That is, by registering with the Board, a doctor is protected from legal actions, such as this one, from injured workers. However, the doctor's position is no different than any other worker or employer under the *Act*. Anyone who is registered with the Board or who works for a firm registered with the Board is entitled to the protection of section 10(1) of the *Act*, in the appropriate circumstances. Of course, in certain situations this will not be seen as a protection but as a negative consequence. In this case, it appears as if the Defendant is hiding behind the *Act*. However, that is only because he is the Defendant and not the Plaintiff in this legal action. If the Defendant here had been injured in a motor vehicle accident while driving to the hospital to perform this surgery, and had brought a legal action against the other driver, that legal action could have been barred if the other driver was also a worker engaged in the course of their employment. In that situation, the Defendant here would be limited to his entitlement under the *Act* and not be allowed to sue the other driver for his injuries.

Any arguments that medical malpractice or professional negligence go beyond what is contemplated in section 10(1) of the *Act* are arguments to be made to the Court, not to the Appeal Division. As set out above, the Appeal Division only determines the status of the parties under section 11 of the *Act*. The Court determines what effect that has on the legal action. Thus, any issue as to the interpretation and application of section 10(1) of the *Act* in this matter is not within the jurisdiction of the Appeal Division.

We find the Defendant was a worker within Part 1 of the *Act*. Further, we find no distinction between the work he did at his office and his operations at the hospital. His medical practice was incorporated and his billings were paid into GMAS and he was paid by GMAS. The fact that his hospital privileges were in his name personally and his account was paid by the Workers' Compensation Board to him personally are mere technicalities in this determination. Hospital privileges can only be held in a doctor's name and the fees he received were paid into GMAS. The Board is not restricted by technicalities in determining who is a worker under the *Act*. The Plaintiff argued that since the surgery was not authorized by the Workers' Compensation Board, the Defendant was outside of his employment in performing the surgery. The Defendant was not employed by the Workers' Compensation Board and, thus, the Workers' Compensation Board did not define the scope of his employment. Section 56 of the *Act* regulates doctors' relationships with the Board as service providers and recipients of payments from the Board. However, that does not define doctors' employment relationships with their employers. If the Workers' Compensation Board had not paid for the surgery, the Defendant still would have been within his employment with GMAS. Therefore, we find the Defendant's conduct in treating the Plaintiff was part of his employment relationship with GMAS, and any negligence in that treatment arose out of and in the course of that employment.

- (56) The decision of the Supreme Court of Canada in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890, rejected arguments which sought to distinguish between the dual capacities of a provincial government as an employer and as a regulator. Similarly, the Nova Scotia Court of Appeal, in the *Queen Elizabeth II Health Sciences Centre* case cited above, found that it would be patently unreasonable to address the question of whether an employer is "subject to this Part" on a case by case analysis of the actions of an employer's servants or agents on a particular occasion which gave rise to a cause of action.
- (57) Plaintiff's counsel argues that Dr. Huang's actions in proceeding with surgery on the plaintiff, on September 13, 1994, were outside the scope of his employment with

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P. Huang Neurosurgery Inc. Plaintiff's counsel submits that at the time the cause of action arose, Dr. Huang was not a worker within the meaning of the *Act*, P. Huang Neurosurgery Inc. was not an employer within the meaning of the *Act*, and the conduct of Dr. Huang, which caused the alleged breach of duty to the plaintiff, did not arise within the course of his employment. Plaintiff counsel submits that Dr. Huang's vision at the time of the operation was marginal at best, that he should not have been operating, and that to do so with his vision so impaired amounted to gross negligence. Counsel submits:

With Dr. Huang proceeding with the operation with his vision allegedly so impaired he committed a breach of his employment agreement with P. Huang Neurosurgery Inc. that went to the root of that contract. Thus his actions subsequent to his meeting with Mr. Nelson in the hallway outside the operating room were committed outside the scope of his contract with his employer and thus he operated outside of that contract as an individual.

It is submitted that Dr. Huang's decision to proceed with the operation amounted to gross negligence and possibly even assault on Mr. Nelson during the procedure.

- (58) Plaintiff's counsel cites the policy at #22.11 of the *Rehabilitation Services and Claims Manual* (the *Manual*), which states in part:

Compensation is not limited to the direct consequences of work accidents. *Ordinarily*, when a claimant undertakes surgery for the injuries sustained, the consequences of the surgery are accepted as consequences of the accident, and any disablement resulting from the surgery is treated as compensable. No doubt an exception could be made if a claimant recklessly undertook surgery, knowing that it was likely to do more harm than good. In that case, a claimant might be viewed as having introduced a new cause of disablement. There may be other grounds for making an exception, but there is no rational ground on which an exception can be made simply because the surgery was not authorized by the Board.

[emphasis added]

- (59) In the present case, the plaintiff's surgery had been authorized by the WCB. Plaintiff's counsel highlights the use of the term "ordinarily" in the policy, arguing that it was never in the plaintiff's contemplation that Dr. Huang would operate when his vision was impaired. Plaintiff's counsel concludes by arguing that:

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Failure by Dr. Huang to disclose his eye condition on the day of the operation goes to his ability to step into the operating theatre to begin with and thus the employment contract that he had with his professional corporation is breached to the root of that contract before the Nelson operation even commences.

- (60) By letter of December 3, 2001, plaintiff's counsel also forwarded a copy of the contract between P. Huang Neurosurgery Inc. and Dr. Peter Huang, dated June 1, 1990. Under the terms of that agreement, the employer had the right to cancel the agreement without notice, if the employee "conducts himself in a manner detrimental to the interest of the Company". Plaintiff's counsel argues that when Dr. Huang proceeded with the surgery while his vision was impaired, the employment contract was fundamentally breached in relation to three terms of the contract, so that Dr. Huang was conducting the surgery well outside of the scope of the employment contract.
- (61) While the terms of an employment contract may be a relevant consideration, they cannot be treated as determinative. For example, a contract may expressly provide that an individual is to be considered as an independent contractor rather than a worker. The WCB is not bound to follow the terms of the contract, as the parties cannot by contract exclude the operation of the Act. I do not view the terms of the employment contract as providing any useful guidance in this case, apart from confirming Dr. Huang's status as a worker of the company.
- (62) I consider it useful to refer to general principles concerning workers' compensation coverage. Workers' compensation is often described as a "no-fault" system. In claiming compensation, the worker need not establish fault on the part of the employer, and fault (contributory negligence) on the part of the worker is generally not relevant. Section 5(3) of the Act provides:

Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.

- (63) To state this another way, fault on the part of the worker is only relevant where this involves serious and wilful misconduct, where this is the sole cause of the injury, and where the injury does not involve death or serious or permanent disablement. A published Appeal Division decision (#92-0025, *Captive Road (No. 1) and Misconduct by Worker*, 9 WCR 543) explained the effect of this section as follows:

The wording "compensation shall not be payable" in section 5(3) is significant. The section is phrased in terms of the payment of compensation, rather than in terms of the scope of the employment.

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It would be logically inconsistent to define the scope of the employment as being contingent on the consequences of the injury.

The Governors' policy stated in #16.60 of the Rehabilitation Services and Claims Manual provides that if a disability is prolonged, it may be regarded as serious even though the initial injury appears minor. It would indeed be strange if it were necessary to ascertain the length of the period of disability, in order to determine whether the worker's injury arose out of and in the course of their employment. Section 5(3) merely constitutes a bar to the payment of compensation in some cases, rather than altering the worker's status at the time of their injury. Serious and wilful misconduct within the meaning of section 5(3) may preclude the payment of compensation where it is the sole cause of the injury, but it does not take a worker outside the scope of their employment.

- (64) A judicial review of Appeal Division decision #92-0025 was dismissed (*James Bourgeois v. Workers' Compensation Board*, (1994) 10 C.C.E.L. (2d) 61).
- (65) The policies concerning the scope of workers' compensation coverage are primarily directed to determining whether a worker's claim for compensation will be accepted by the Board. However, these policies are equally applicable in determining whether the action or conduct of a defendant, which caused the breach of duty, arose out of and in the course of employment within the scope of Part 1 of the *Act*.
- (66) There are a number of policies governing the scope of a worker's employment. While the workers' compensation system is not based on fault, under certain circumstances workers may be found to be outside the scope of their employment. These policies assist in determining the boundaries of the coverage provided under Part 1 of the *Act*. For example, policy at #18.00 of the *Manual* provides:

The general position is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. But where a worker is employed to travel, accidents occurring in the course of travel are covered. This is so whether the travel is a normal part of the job or is exceptional.

- (67) It is easier to view the limits to the employment relationship, where this relates to activities such as commuting which occurs before or after the day's work, or personal activities during a lunch hour away from the employer's premises. A worker who is continuing to perform a work function will generally be found to be within the course of employment, even where the activity is being performed in a negligent or even dangerous fashion. For example, the policy at #16.10 provides:

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If the injury arose in the course of the employment, and something in the employment relationship had causative significance in producing the injury, it is still one arising out of and in the course of employment notwithstanding the impairment. Examples are where an intoxicated sailor fell into the water while attempting to board a vessel, and where a forest industry worker was run over by a logging truck. In these kind of cases, if the injury results in death or serious or permanent disablement, it is compensable.

Once it is apparent that an injury is one arising out of and in the course of employment, it does not cease to be so merely because some other factor, extrinsic to the employment, also has causative significance. An industrial injury is often caused, for example, by inattentiveness due to nausea, depression, lack of sleep, or a variety of other factors. But it is still compensable.

- (68) There are, however, policies to assist in determining when the worker may be found to have departed from the employment. Policy at #16.00 concerning unauthorized activities provides:

The mere fact that a worker's action which leads to an injury was in breach of a regulation or order of the employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of the employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take the worker out of the course of employment or to prevent an injury from arising out of the employment.

- (69) An example of a decision in which a worker was found to have abandoned his employment due to horseplay, based on the policy at #16.20 of the *Manual*, is #98-0666, *Horseplay — Section 11 Determination*, 15 WCR 77).

- (70) #16.30 of the *Manual* concerns *Assaults*:

In considering cases of assault, the first question is whether the claimant was the aggressor and therefore the agent which caused the injuries. The answer to this question is not always clear cut and may involve an evaluation of the degree to which a claimant is an aggressor in a given situation. However, the fact that a claimant is less than friendly with another employee and is at least equally responsible for ill feeling that may prevail between them is not, by itself, grounds for disallowing a claim for injury arising out of an assault by that other employee.

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The second question is whether there is a connection between the employment and the subject matter of the dispute which led to the assault or whether it was a purely personal matter. In the latter case, the claim is not acceptable.

Where an assault arises out of the worker's employment, no compensation is payable unless it also arises in the course of the employment.

- (71) Policy at #16.40, concerns *Injury While Doing Another Person's Job*. This provides, in part:

On the other hand, there is a clear need to place some limit on the activities which form part of a worker's employment. Thus, for example, if an act is specifically prohibited by an employer or is known, or should reasonably have been known, to the worker to be unauthorized, or, if the worker has been previously warned against doing other persons' jobs, the worker would not usually be covered merely because of a bona fide action for the benefit of the employer. On the other hand, it might be different if, for example, the employer had previously condoned a prohibited practice carried out by employees or some emergency forced a worker to act.

- (72) Pursuant to these policies, in some circumstances a worker's conduct may be such as to support a conclusion that the worker had, even if only temporarily, removed himself or herself from the course of the employment. For example, Appeal Division decision #2001-0626 (March 20, 2001) found that a sales representative who drove his car in an aggressive fashion, and squealed his tires to scare away a ferry worker who was attempting to detain him, had engaged in an aggressive act outside his employment which was of a personal nature. The defendant's action and conduct were held to be outside his employment.

- (73) Bearing in mind these policy guidelines, I find that in the present case no basis is established for finding that the defendant's action or conduct at the time of the September 13, 1994 surgery was outside his employment. For workers' compensation purposes, negligence in the performance of a work function, even if established, is not relevant. While I note the authorities cited by plaintiff's counsel concerning the standard of care required of a professional, and concerning the duties of a physician to fully advise a patient of the risks to be undertaken and to obtain informed consent, I consider those more relevant to a determination of tort liability rather than to the determination of the defendant's status under the *Act*. My decision is not based on contract or tort law.

- (74) Having regard to the analysis expressed by the Supreme Court of Canada in *Pasiechnyk*, I see no valid reason for treating a surgeon in a different fashion than any other worker performing work functions, in terms of characterizing the physician's status under the *Act*. I agree with the reasoning expressed in Appeal Division decision #93-1399, in considering that the medical services performed by a doctor as part of an incorporated practice comes within his or her employment. The determination of the doctor's status is the same whether the doctor is claiming compensation for an injury incurred during surgery (i.e. such as a needlestick injury), or seeking certification of his or her status under section 10 and 11 of the *Act*.
- (75) In performing surgery on the plaintiff in September, 1994, Dr. Huang was engaged in the regular performance of his work. While I note the submissions of plaintiff's counsel to the contrary, I do not consider that this is a case to which the policies concerning assault, horseplay, or unauthorized activity, have application. Dr. Huang's intent was to perform the surgery to which the plaintiff had consented, and which had been approved by the Board. If there was an error in the performance of that surgery, even a negligent one, that does not support a finding that Dr. Huang had removed himself from the course of his employment.
- (76) I find that the defendant, P. Huang Neurosurgery Inc. was, at the time the cause of action arose, September 13, 1994, an employer engaged in an industry within the meaning of Part 1 of the *Act*. I find that in performing surgery on the plaintiff on September 13, 1994, Dr. Peter Huang was a worker within the meaning of Part 1 of the *Act*. Any action or conduct of the defendant, Dr. Peter Huang, at the time the cause of action arose, September 13, 1994, 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

- (77) I find that at the time of the plaintiff's surgery on September 13, 1994, for treatment of his February 9, 1994 work injury:
- (a) the plaintiff, Frederick Joseph Thomas Nelson, was a worker within the meaning of Part 1 of the *Workers Compensation Act*,
 - (b) the injuries suffered by the plaintiff arose out of and in the course of his employment within the scope of Part 1 of the *Act*,
 - (c) the defendant, P. Huang Neurosurgery Inc., was an employer engaged in an industry within the meaning of Part 1 of the *Act*,

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- (d) the defendant, Dr. Peter Huang, was a worker within the meaning of Part 1 of the *Act*; and,
- (e) any action or conduct of the defendant, Dr. Peter Huang, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Act*.

Herb Morton
Appeal Commissioner

HM/dc

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

BETWEEN:

FREDERICK JOSEPH THOMAS NELSON

PLAINTIFF

AND:

DR. PETER HUANG, carrying on business
under the firm name and style of
P. HUANG NEUROSURGERY INC., and the said
DR. PETER HUANG, KELOWNA GENERAL HOSPITAL,
NURSE JANE DOE #1, NURSE JANE DOE #2,
and each party's agents, employees and servants

DEFENDANTS

CERTIFICATE

UPON APPLICATION of the Defendants, DR. PETER HUANG and P. HUANG NEUROSURGERY INC., in this action for a determination pursuant to Section 11 of the *Workers Compensation Act*,

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the competence of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE APPEAL DIVISION DETERMINES THAT AT THE TIME THE CAUSE OF ACTION AROSE, SEPTEMBER 13, 1994:

1. The Plaintiff, FREDERICK JOSEPH THOMAS NELSON, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
2. The injuries suffered by the Plaintiff, FREDERICK JOSEPH THOMAS NELSON, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.
3. The Defendant, P. HUANG NEUROSURGERY INC., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
4. The Defendant, DR. PETER HUANG, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
5. Any action or conduct of the Defendant, DR. PETER HUANG, 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 March, 2002.

HERB MORTON
APPEAL COMMISSIONER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FREDERICK JOSEPH THOMAS NELSON

PLAINTIFF

AND:

DR. PETER HUANG, carrying on business under the
firm name and style of P. HUANG NEUROSURGERY INC.,
and the said DR. PETER HUANG, KELOWNA GENERAL HOSPITAL,
NURSE JANE DOE #1, NURSE JANE DOE #2, and each
party's agents, employees and servants

DEFENDANTS

SECTION 11 CERTIFICATE

APPEAL DIVISION
Workers' Compensation Board
6951 Westminster Highway
Richmond, B.C. V7C 1C6
FAX (604) 276-3349
TELEPHONE (604) 279-7510
