

Decision of the Appeal Division**Number: 2002-0607****Date: March 7, 2002****Panel: Herb Morton****Subject: Medical Malpractice in Treatment of Compensable Injury —
Section 11 Determination**

SECTION 11 DETERMINATION (NEGLIGENCE, MEDICAL) (CAUSATION) – Plaintiff's back injury claim accepted by Board – Plaintiff commenced action alleging medical negligence in relation to treatment for compensable injury – Whether plaintiff was a worker at the time of the surgery and whether the injury caused by the surgery arose out of and in the course of employment – Consideration of Appeal Division approach in light of *Kovach* decision and approaches taken in other jurisdictions – Ultimately, the panel found it appropriate to follow the analysis in prior Appeal Division decisions – Any subsequent injury due to medical treatment is a direct consequence of the original work injury and therefore arises out of and in the course of employment – No break in the chain of causation – Plaintiff was a worker under the Act and his injuries arose out of and in the course of his employment.

Law: WCA (1996): s. 10, s. 11

Decisions: Appeal Division Decision No. 92-1899, 9 *Workers' Compensation Reporter* 653; Appeal Division Decision No. 93-1399, 10 *Workers' Compensation Reporter* 603; Appeal Division Decision No. 2000-1587; Appeal Division Decision No. 2002-0003; *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (B.C.C.A.); *Kovach v. Singh* (1995), 5 B.C.L.R. (3d) 142 (B.C.S.C.), (1999), 52 B.C.L.R. (3d) 98 (B.C.C.A.), [2000] 1 S.C.R. 55; *Lindsay v. Workers' Compensation Board of Saskatchewan*, [2000] 1 S.C.R. 59; *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association* (2001), 205 D.L.R. (4th) 700 (Ont. C.A.); *Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2001] N.S.J. No. 166 (N.S.C.A.) (Q.L.); Decision No. 24/91, [1991] O.W.C.A.T.D. No. 805 (Ont. W.C.A.T.) (Q.L.); Decision No. 1434/97, [1999] O.W.S.I.A.T.D. No. 328 (Ont. W.S.I.A.T.) (Q.L.); *Mahoney v. J. Kruschich (Demolitions) Pty. Ltd.*, (1985) 156 C.L.R. 522 (Aus. H.C.).

Medical Malpractice in Treatment of Compensable Injury [s. 11 determination]
Appeal Division Decision No. 2002-0607

18 *Workers' Compensation Reporter* p. 185

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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.

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- (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.

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 C.T. scan revealed an L4-5 disc herniation. Dr. Huang's consultation report of July 17, 1994 concluded as follows:

I have reviewed his C.T. on June 23, 94 and despite is [sic] weight he has rather good C.T. 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 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 C.T. 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 M.R.I. Scan with the patient taken December 12th, 1994. . . . Again review of the scan suggests by the location of

the paraspinous 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.
- (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 C.T. 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."

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- (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 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*, 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 *Workers' Compensation Reporter* 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 *Workers' Compensation Reporter* 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 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 *Workers’ Compensation Reporter* 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, 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.

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.

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 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.

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 *Pasiechnyk*, 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 D.L.R. (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 Q.E. II was an employer subject to the Act.

[6] On the first issue, Mr. Erl’s submission to W.C.A.T. 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.

[7] W.C.A.T. 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 W.C.A.T.’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. W.C.A.T. 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 W.C.A.T. 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 W.C.A.T. 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 W.C.A.T. decided, an employer may, at the same time, be both subject and not subject to the Act. In other words, W.C.A.T.'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 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. W.C.A.T., 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 W.C.A.T. 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.

[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 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 C.L.R. 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:

[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 W.N.(N.S.W.)852, at p 858; *Moore v. A.G.C. (Insurances) Ltd.* (1968) S.A.S.R. 389, at p 394; *Lawrie v. Meggitt* (1974) 11 S.A.S.R. 5, at p 8; *Price v. Milawski* (1977) 82 D.L.R. (3d) 130, at pp 141-142; *Katzman v. Yaeck*

(1982) 136 D.L.R. (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) A.C. 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 C.L.R. 313, per Dixon J. at p 321; *Migge v. Wormald Bros. Industries Ltd.* (1972) 2 N.S.W.L.R. 29, per Mason J.A. at p 48; on appeal (1973) 47 A.L.J.R. 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 E.R. 350, at p 365; *Hogan v. Bentinck Collieries* (1949) 1 All E.R. 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 W.A.L.R. 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 gratuitous aggravation of the injury" (*South Australian Stevedoring Company Limited v. Holbertson* (1939) S.A.S.R. 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 W.C.A.T. 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 W.C.A.T. 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

[Paragraphs 49–76 have been omitted for publication. For full text of the decision, please refer to the on-line version which may be found at: http://www.worksafebc.com/appeals/search_appeal_decisions/default.asp]

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;
 - (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.

NO. 30825
KELOWNA REGISTRY

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

NO. 30825
KELOWNA REGISTRY

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

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