WORKERS' COMPENSATION
REPORTER

# Decision of the Appeal Division

**Number: 2002-1445**
**Date: November 9, 2001**
**Panel: Cassandra Kobayashi**
**Subject: Section 11 Determination (Timothy Edward Connell v. Medox Health Services Inc. and Stonehill Investment Ltd.)**

**APPEAL DIVISION (CERTIFICATION TO COURT) (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT)** — Plaintiff fractured his forearm while working as a painter and drywaller — While attending a Work Conditioning Program for the arm injury, the plaintiff allegedly fell from a piece of equipment at the defendant's property and injured his back — At issue was the status of the plaintiff and whether his injuries arose out of and in the course of employment — Both defendants were incorporated and registered with WCB as employers in good standing — Defendants sought declaration that a worker's injuries arose out of and in the course of employment by relying on Appeal Division decisions concerning injuries during surgery — Plaintiff was a worker for the original injury and he retains that status through the recovery period — The panel accepted that subsequent injuries are compensable if they are in direct consequence of treatment — The Appeal Division panel interpreted policy item #74.11 and Decision No. 152 and concluded: "The treatment injury results from the original workplace injury; therefore, the Board must pay compensation. However, the treatment injury does not arise in the coarse of employment. Therefore, the worker may elect to claim compensation, or bring an action" — The panel found that the presumption in subsection 5(4) of the *Workers Compensation Act* that an accident occurred in the course of employment can be rebutted if the treatment injuries are unrelated to the original injury.

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| **Law:** | *WCA* (1996): s. 5(4), s. 10(1), s. 10(8), s. 11, s. 82 |
| **Policy:** | *RSCM*: #14.10, #14.20, #17.11, #22.10, #22.11, #74.11, #84.54, #111.10; #115.30, Decision No. 152, 2 *Workers' Compensation Reporter 186*; Appeal Division Decision No. 00-0668, 16 *Workers' Compensation Reporter* 287; |
| **Decisions:** | *Kovach* v. *Royal Inland Hospital, et al.*, 10 *Workers' Compensation Reporter* 603; *Kovach* v. *Workers' Compensation Board, et al.*, (2000) 184 D.L.R. (4th) 415, [2000] 1 S.C.R. 55; *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.); *Frandle* v. *Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.); *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*, [1997] S.C.J. No. 75 |

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(1) In May 1997, the plaintiff fell off a ladder while working as a painter and drywaller. His claim for a right forearm fracture was accepted by the Workers' Compensation Board (WCB or Board). In August 1997, he attended a Work Conditioning Program, which is often part of the rehabilitation process. The Program was run by the defendant, Medox Health Services Inc., in a fitness centre operated by the other defendant, Stonehill Investments Ltd.

(2) While at the Work Conditioning Program, the plaintiff claims he fell from some equipment at the defendants' premises on August 28, 1997, resulting in a disc protrusion ("the accident"). The WCB gave permission for him to commence the civil action, noted above. He alleges the defendants were negligent, or are liable for their breach of duty under the *Occupiers Liability Act*.

(3) The defendant, Stonehill Investments Ltd., has requested a determination under section 11 of the *Workers Compensation Act* (the Act) regarding the status of the parties.

## Issue(s)

(4) At the time of the alleged injury at the defendants' premises, was the plaintiff a worker whose injuries arose out of and in the course of employment? What was the status of the defendants, and did their action or conduct, which caused the alleged breach of duty arise out of and in the course of employment?

## Section 11 Law and Policy

(5) Section 11 of the Act requires the Board to make determinations and provide a certificate to the court regarding certain matters relevant to the legal action, and within its competence under the Act. Governors' Decision 4, April 8, 1991, *Workers' Compensation Reporter* (W.C.R.) Vol. 7, p. 19, assigned to the chief appeal commissioner and Appeal Division, the Board's obligation for issuing section 11 certificates. That Decision also said the chief appeal commissioner may determine the practice and procedure for the conduct and disposition of these matters. In Decision 33, which sets the current practice and procedure, the chief appeal commissioner has said, "The Appeal Division will, in considering a section 11 application, consider all of the evidence and argument anew irrespective of a prior decision by a Board officer."

(6) The Appeal Division determines the status of the parties under the Act; the court determines the effect of the certificate on the legal action.

(7) Whether the plaintiff suffered a disabling injury at the defendants' premises, and the defendants' liability are issues in the legal action. For the purposes of this determination, I will assume that an injury did occur as alleged.

## Submissions

(8) The defendants seek a finding that the plaintiff's claimed injuries arose out of and in the course of his employment. The defendants seek support in the prior Appeal Division decisions that found that workers undergoing treatment were in the course of their employment, while undergoing surgery (section 11 determination, *Kovach* v. *Royal Inland Hospital, et al.*, 10 *Workers' Compensation Reporter* 603 http://www.worksafebc.com/Publications/appeals/wc_reporter/assets/pdf/93_1399.pdf), using a staple gun at the WCB rehabilitation clinic (*Majer* v. *Karabilgin*, [1995] B.C.J. No. 20), driving their vehicle in the WCB parking lot after physiotherapy treatment (Appeal Division Decision 92-1899, 9 *Workers' Compensation Reporter* 653, http://www.worksafebc.com/Publications/appeals/wc_reporter/assets /pdf/92_1899.pdf), and being examined by a WCB physician (Appeal Division Decision 93-1185, 9 *Workers' Compensation Reporter* 745, http://www.worksafebc.com/Publications/appeals/ wc_reporter/assets/pdf/93_1185.pdf).

(9) The plaintiff advances that the reasoning in *Kovach* is of limited assistance because the Supreme Court of Canada only found the Appeal Division decision was not patently unreasonable: *Kovach* v. *Workers' Compensation Board, et al.,* (2000) 184 D.L.R. (4th) 415, [2000] 1 S.C.R. 55. Furthermore, the Appeal Division is not bound by prior decisions.

(10) The painting firm which employed the plaintiff when he fell and broke his arm was concerned that the disc protrusion allegedly sustained during treatment would adversely affect its experience rating for assessment purposes. It was participating in this section 11 matter until it was informed that the costs associated with the disc protrusion had in fact been removed from its claims costs pursuant to #115.31, *Rehabilitation Services and Claims Manual*.

### Status of the Defendants

(11) It is convenient to address the defendants' status first. Both are incorporated. On the day of the alleged accident, both were registered with the WCB Assessment Department as employers, and were in good standing. I find they were both employers under Part 1 of the Act.

### Action or Conduct of Defendants

(12) The last sentence in section 10(1) of the Act provides:

> This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

(13) Although the plaintiff has suggested in his submissions that the problem with the equipment may have been caused by a patron in the fitness facility, the question before me is whether any breach of duty by the defendants arose out of and in the course of employment. It is not necessary for me to consider whether another person caused the accident.

(14) Corporations can act only through their agents, servants and workers. I find that any action and conduct of the defendants, which caused the alleged breach of duty arose out of and in the course of employment.

### Was the Plaintiff a Worker?

(15) At the time of his original workplace injury, the plaintiff was a worker, employed by a painting firm that was registered with the WCB, according to the Board's Assessment Department.

(16) "Worker" is defined in section 1 of the Act as including:

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

(17) On the day of the workplace injury, the plaintiff was working under a contract of service, and was a "worker" within the meaning of Part 1 of the Act.

(18) On August 28, 1997, when the worker allegedly injured himself at the Work Conditioning Program, was he still a "worker" within the meaning of Part 1 of the Act? It has been said that for the purposes of the Act, a person need only be a "worker" at the time of the original injury. For example, the Act provides rights of appeal to workers under sections 90 and 91, and these rights are considered to apply to the person who was a worker, or claimed to be a worker at the time of the injury. It is not necessary that the person be a worker at the time of the appeal. Similarly, once compensation begins, if the worker becomes unemployed during the course of recovery, benefits continue. I accept that for the purposes of the Act, a person need be a worker only when initially entering the gateway provisions of section 5(1). Once through that gateway, the person retains their status as a "worker" under the Act.

(19) For the purposes of Part 1 of the *Workers Compensation Act*, I find the plaintiff was a "worker" on August 28, 1997, at the time of the alleged accident at the defendants' premises.

### Plaintiff's Injuries

(20) The statutory bar in section 10(1) applies to personal injury arising out of and in the course of employment. The original workplace injury occurred during work hours, at the place where the plaintiff was employed to work, and while doing an activity in furtherance of the job for which he was hired. It was accepted as compensable, and I find it arose out of and in the course of employment.

(21) However, the injury during rehabilitation ("the treatment injury") did not occur during hours of employment. The plaintiff was not receiving any "earnings," was not on the job site of his employer, and was not using equipment supplied by the employer. Can it be said that the treatment injury arose out of and in the course of employment?

#### Prior Appeal Division Decision: *Kovach*

(22) These questions have been previously considered by the Appeal Division in *Kovach*. The worker commenced an action against Dr. Singh for alleged injury caused by surgery and treatment of her compensable back injury. The Appeal Division determined that the plaintiff's injuries during surgery to treat a compensable injury arose out of and in the course of employment. Underlining in this quote and others in this decision is my own. The surgery was not treated as a *novus actus interveniens*, but as a "direct consequence" of the workplace injury (at p. 608):

> 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*.

*(23)* The Court of Appeal majority criticized the logic of the sentence beginning, "It follows . . . ." The court suggested that whether the injury during treatment arises out of and in the course of employment need not follow the determination regarding the original workplace injury.

*(24)* The Appeal Division did not say that *all* injuries during treatment will be considered a direct consequence of the workplace injury. The Decision suggested some treatment injuries will be outside the scope of the Act, due to being "separate and distinct," or causally remote (at page 609):

> 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.

*(25)* In *Kovach*, the surgery was on the same part of the worker's body as was injured in the original workplace injury, and the surgery was occasioned by the work injury. The reasons seem to leave open the possibility that with different facts, the injury during treatment would not be considered to have arisen out of and in the course of employment.

*(26)* That could be seen as a potential for departure from what was described as the Board's past practice, to certify that the worker's injuries during treatment arose out of and in the course of employment. Reference was made to *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.), and *Frandle* v. *Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.). Prior to June 1991, the Board

did not issue reasons to accompany the section 11 certificates, so it is not clear on what basis the Board previously certified that injuries during treatment arose out of and in the course of employment.

*(27)* Having withstood judicial review to the Supreme Court of Canada, the Appeal Division reasons in *Kovach* are one viable interpretation of the Act. That analysis of "arising out of and in the course of employment" relies on the strength of the causative relationship between the original workplace injury and the treatment injury, with a very weak "in the course" element. In contrast, a literal approach would suggest this gateway test involves two separate requirements: first, the injury must "arise out of" employment; meaning causal connection with the employment; second, the injury must arise "in the course" of employment, meaning time and place.

*(28)* These terms are defined in #14.10, *R.S.C.M.*, in the context of the presumption in section 5(4) of the Act, which applies to injuries caused by accident:

> Generally speaking, "out of the employment" concerns the cause of injury and "in the course of the employment" its time and place.

*(29)* While the presumption requires the Board to consider separately "cause" and "course," section 5(1) and the policy in general does not favour the two-pronged test. The policy sometimes refers to both cause and course, as in #14.20, "Occurrence or Non-Occurrence of a Specific Incident," which states that where the presumption does not apply, "the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it arose in the course of the employment." However, that policy does not proceed to explain how to determine if both cause and course have been satisfied. Instead, the policy tends to analyze various situations without precise reference to both cause and course.

*(30)* For example, #14.00 lists a number of factors to consider, some of which relate to the course of employment (e.g., on the employer's premises, being paid at the time of injury); and others, to the causal connection with the employment (e.g., acting in response to employer's instructions; using equipment or materials supplied by the employer; whether the risk was the same as in the course of production). There is no requirement that there be both "cause" and "course" factors for a claim to be accepted. Thus, a worker may be in the course of employment, on the journey to report to work after dispatch from a union hall (Decision 26, 2 *Workers' Compensation Reporter* 109), after the worker quit work and was awaiting a flight from the remote logging camp, was drunk, and in the company dump (Decision 49, 1 *Workers' Compensation Reporter* 210), or is at work, but engaging in horseplay (#16.20, *R.S.C.M.*).

*(31)* Such a unitary approach is favoured by *Larson's Worker's Compensation Law*, Lexis Publishing, New York, 2000. After reviewing the interpretation of this phrase in the early chapters, Chapter 29, Vol. 2, concludes that the tests are not and should not be applied entirely independently:

> In practice, the "course of employment" and "arising out of employment" tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.

(32) Larson gives examples of borderline cases that are weak in the "course" factor, but strong in the "arising" factor, such as injury to a travelling worker when the hotel burns down while he is sleeping in it. Although not engaged in any productive activity, the worker's employment put him in the position of risk. Taken as a whole, the connection between the accident and the employment is strong. The B.C. Board also accepts such injuries (see #18.41, *R.S.C.M.*).

(33) Conversely, when the "course" factor is strong, but the "arising" factor is weak, compensation is again paid. Examples in the *R.S.C.M.*, include the personal comfort cases, such as an injury caused by some aspect of the work environment during a meal break (see #21.10, *R.S.C.M.*). Overall, the published policy of the governors generally accepts a unitary test. However, where a policy addresses particular situations, I consider they take precedence over a general approach. In such cases, the policy-makers have given specific direction to decision-makers, which will generally be applied to such fact situations. Therefore, I have considered whether the relevant published policies provide specific guidance in this situation. Two such policies were not mentioned in the *Kovach* decision.

**Published Policies**

(34) Section 82 of the Act provides the governors of the Board must approve and superintend the policies and direction of the Board. The governors' duties are now performed by a Panel of Administrators. Governors' Decision 86, *Workers' Compensation Reporter*, Vol. 10, p. 781, and Panel of Administrators' Decision 1, *Workers' Compensation Reporter*, Vol. 11, p. 465, provide the published policies include the *Assessment Policy Manual* (*A.P.M.*), *Rehabilitation Services and Claims Manual* (*R.S.C.M.*), and *Workers' Compensation Reporter*, Decisions 1–423, with the exceptions of the Decisions which have been "retired" by resolution of the Panel of Administrators (see http://www.worksafebc.com/policy/panelpolicy/mtgs2000/000428b.asp, April 28, 2000 resolution of the Panel of Administrators).

(35) Most of the published policies are primarily concerned with the payment of compensation benefits, which is the principal task of claims adjudication (see Preface to *R.S.C.M.*, for example). The policies clearly and consistently provide that compensation will be paid for injuries during treatment for a compensable injury. For example, item #22.10, *R.S.C.M.*, provides:

> **22.10 Further Injury or Increased Disablement Resulting From Treatment**
>
> Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable.
>
> Where a worker is undergoing treatment for a compensable injury, the *place of treatment is analogous to a place of employment*, and *a further injury arising out of the place of treatment would also be compensable*. For example, if a worker is undergoing treatment at a hospital for a compensable injury and sustains a further injury by stumbling down the stairs in the hospital, that is also compensable.
>
> [emphasis added]

*(36)* The policy to pay compensation for injuries during treatment is repeated in Decision 17, 1 *Workers' Compensation Reporter* 78, and Item #22.11, *R.S.C.M.*, which is taken from Decision 17. Item #17.11 also provides, "If a worker acted reasonably in undergoing unauthorized treatment, compensation will be paid to him or her for the consequences of that treatment."

*(37)* While the *compensability* of injuries during treatment seems to be consistently articulated, the published policies are more ambiguous on questions of status for the purposes of sections 10 and 11. According to the policy in *Workers' Compensation Reporter* Decision 152, injuries during treatment are compensable, but they do not arise out of and in the course of employment: "Re: Injuries Arising Out of Treatment and Other Appointments," (1975) 2 *Workers' Compensation Reporter* 186. Most of Decision 152 is now found in the *R.S.C.M.*, but that decision concluded with a statement that is not found in the Manual:

> Where a subsequent injury within the scope of this directive is accepted as compensable, it is *not accepted on the ground that the injury is one arising out of and in the course of the employment*. It is accepted on the ground that the subsequent injury is a compensable consequence of the original injury. *Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.*
>
> [emphasis added]

*(38)* That policy clearly distinguishes between compensability of treatment injuries and the gateway criteria for compensation. It is the only policy where the "cause" and "course" concepts are defined in terms of both compensation entitlement, and status for section 11 purposes.

*(39)* A contrary view of that issue is provided in another policy item, #111.10, *R.S.C.M.*, in Chapter 16, on Third Party and Out-of-Province Claims. The policy quotes section 10(1), explains the application of the bar, and ends:

> Where an action is barred under Section 10(1) in respect of a work injury, the same applies to any subsequent injury occurring in the course of treatment or rehabilitation which is accepted as a compensable consequence of that injury.

*(40)* If the statutory bar for a compensable workplace injury automatically applies to a subsequent treatment injury, then:

a) the treatment injury must have arisen out of and in the course of employment, and

b) the potential defendant was a worker or employer, whose action or conduct, which caused the breach of duty arose out of and in the course of employment.

*(41)* That contradicts Decision 152, which states that the injury during treatment is accepted as compensable, but *not* on the grounds that it arose out of and in the course of employment.

(42) Further confusion is added by the policy in #74.11, in Chapter 10, "Medical Assistance," *R.S.C.M.* It sets out a procedure for the Board staff to consider initiating legal action for medical malpractice:

> **#74.11 Medical Negligence or Malpractice**
>
> During the progress of a claimant's file, information may come to the attention of Board employees that would lead them to conclude that there was prima facie evidence of medical malpractice or negligence. This may come from the perusal of a single file or the perusal of a series of files where claimants have been treated by the same physician. The following action should be taken in these cases:
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> 1. Where this is brought to the attention of a Board employee or a Board physician, it shall be reported to the Vice-President, Medical Services Division.
>
> 2. The Vice-President, Medical Services Division will review the case, together with a committee composed of the following members:
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>    (a) The Board's General Counsel, or nominee;
>
>    (b) The Director, Medical Services Department;
>
>    (c) The Director, Rehabilitation Centre.
>
> 3. The committee will forward to the President a recommendation for action in cases where it is felt that medical malpractice or negligence may have occurred. The President will determine whether to proceed with an action. The claimant will be advised of the President's decision with reasons.

(43) While this policy appears to be outdated (the position, vice-president, Medical Services Division, has not existed for many years), it appears to contemplate at least some situations where an injury in the course of treatment will be actionable. That would be inconsistent with the statement in #111.10, which states actions for treatment injuries are barred if the workplace injury was compensable.

(44) The policies in Decision 152, #111.10 and #74.11 all pre-dated the expansion of the Act in January 1994, which provided that all workers and employers in the province are covered by Part 1. Prior to the expansion, the status of the plaintiff was less of an issue because many physicians and treatment providers were not covered, so an action against them would not be barred. Therefore, actions for injuries during treatment were more likely to proceed.

**Policy on Conflict Between Policies**

(45) Can the policies in Decision 152, #111.10 and #74.11 be reconciled with each other and the Act? According to Governors' Bylaw 4, all are part of the published policy. That Bylaw provides a number of interpretive rules:

> 1.1 As of June 3, 1991, the published policies of the governors consist of the following:
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> (a) the *Assessment Policy Manual*,
>
> (b) the *Occupational Safety and Health Division Policy and Procedure Manual*,
>
> (c) the *Rehabilitation Services and Claims Manual*, and
>
> (d) *Workers' Compensation Reporter* Decisions No. 1–423. . . .
>
> **2.0 Section 2 — Application of Published Policy of the Governors**
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> 2.1 In the event of a conflict between the Act or Regulations and the published policies of the governors, the Act and Regulations are paramount.
>
> 2.2 In the event of a conflict between published policy in a Manual identified in Section 1.1 (a), (b), or (c) of this Bylaw, and published policy in *Workers' Compensation Reporter* Decisions No.1–423 identified in Section 1.1(d), published policy in the *Manual* is paramount.
>
> 2.3 In the event of any other conflict between published policies of the governors:
>
> (a) if the policies were approved by the governors on the same date, the policy most consistent with the Act or Regulations is paramount.
>
> (b) if the policies were approved by the governors on different dates, the most recently approved policy is paramount.

**Is Policy #111.10 Viable Under the Act?**

(46) The policy purports to say when an action is barred. To review, the policy states:

> Where an action is barred under Section 10(1) in respect of a work injury, the same applies to any subsequent injury occurring in the course of treatment or rehabilitation which is accepted as a compensable consequence of that injury.

(47) The Board has not had the authority to determine whether the action was barred since 1968. Rather, the Board makes determinations about the status of the parties, and the court decides how that affects the legal action: see *Smith* v. *Vancouver General Hospital*. On this basis, the policy in #111.10 oversteps the Board's authority.

(48) The history of the legislation indicates the legislature's intent that employers no longer have the benefit of the statutory bar simply because they are employers. Initially, the Act did not require that the employer's action or conduct arise out of and in the course of employment for the action to be barred. A worker whose injuries arose out of and in the course of employment could not maintain an action against his or her employer regardless of whether the employer's conduct was related to the employment. Section 11 of the *Workmen's Compensation Act*, S.B.C. 1916, c. 77, stated:

> 11 (1) The provisions of this Part shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law, or by any Statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the employer shall lie in respect of such accident.

(49) Similarly, the injured worker was barred from suing another employer covered by Part 1 of the Act, again, without that employer's conduct having to relate to employment. Section 10(4) provided:

> 10 (4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part; . . .

(50) Section 10(1) now affords the defendant the protection of the statutory bar only if its action or conduct arose out of and in the course of employment. This indicates the legislature's intent to allow suits to proceed against employers or workers whose action or conduct was outside the scope of the Act.

(51) If the policy in #111.10 is not intended to set out the Board's jurisdiction to rule on whether the action is barred, but only refers to the result, it is probably viable. The outcome in the Appeal Division decision in *Kovach* was consistent with that result, although the reasoning allowed for more flexibility in deciding if the treatment injury was causally connected to the workplace injury. However, the Appeal Division analysis in *Kovach* did not apply the policy in #111.10, *R.S.C.M.* In fact, it did not mention that policy. I have considered whether this policy should be "read down" so that the offending elements regarding the effect on the action are eliminated, in an attempt to "save" the policy. If that were possible, this policy might be paramount over that in Decision 152. However, several reasons lead to me to conclude that is not the proper approach to resolving this conflict.

(52) First, Bylaw 4 does not list reading down as a method of resolving conflicts between the Act and Regulations, and the policy. It simply states that in such a conflict, the Act and Regulations are paramount.

(53) Second, it is not clear how one would interpret the intent of #111.10 if the reference to the statutory bar was removed. For example, the policy could be read down to mean that any injury during treatment is a continuation of the original injury. That would be a way to ensure that the parties' status for the treatment injury is the same as for the workplace injury. Another possibility is that this policy is intended to address only the status of the plaintiff. If that were the case, then the plaintiff's treatment injury arises out of and in the course of employment if the original workplace injury did. These approaches lead to very different results for the purposes of section 11.

(54) I consider that the best approach is to apply the published policy at face value. Bylaw 4 has given guidance on resolving such conflicts, and I have chosen to apply the provisions of Bylaw 4 as stated. Particularly where it is not clear how to read down the policy, the offending policy cannot stand.

(55) I conclude that #111.10 is not consistent with the Act, in that the policy purports to determine the action is barred, rather than determining the status of the parties. The findings on status that would lead to that result are probably viable, but that is not how the policy is stated.

**Is Policy #74.11 Viable?**

(56) This policy contemplates the Board taking legal action for medical malpractice, but does not set out the basis for that practice. The policy implies that if the Board had a subrogated interest then the plaintiff had a choice to sue or obtain compensation. That does not necessarily mean that the treatment injury is simply a continuation of the original workplace injury.

(57) Section 10(6) of the Act gives the Board a right to maintain an action on behalf of the worker for an injury for which compensation is paid:

> (6) If the worker or dependant *applies to the board claiming compensation* under this Part, neither the making of the application nor the payment of compensation under it restricts or impairs any right of action against the party liable, but *as to every such claim the board is subrogated to the rights of the worker* or dependant and may maintain an action in the name of the worker or dependant or in the name of the board; and if more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the amount of the excess, less costs and administration charges, must be paid to the worker or dependant. The board has exclusive jurisdiction to determine whether to maintain an action or compromise the right of action, and its decision is final and conclusive.

(58) One possibility that provides for the Board having a subrogated right of action, and for the worker to receive compensation for the injury during treatment is characterizing the treatment injury as a continuation of the compensable workplace injury, but the defendant is not covered by Part 1 of the Act, then an action is not barred.

(59) This approach resembles the Appeal Division's analysis in *Kovach* with respect to the plaintiff's injuries. Any injuries during treatment are considered to be causally related to the original compensable injury.

(60) Another possibility was discussed by the Court of Appeal majority in *Kovach*. It contemplated that paying compensation and allowing a suit to proceed need not be mutually exclusive. Madam Justice Newberry did not look favourably on the defendants' position in oral argument that once the worker's injury is properly compensable, the same injury cannot form the basis for a legal action (at paragraph 33):

> If counsel for Dr. Singh now wishes to modify his position to acknowledge that the "capacity in which a person is sued" may in some circumstances be regarded as "paramount" to his capacity as an "employer" or "worker" for purposes of the **Act**, then as is already apparent, I would agree with that concession. I would analyze it, however, in terms of jurisdiction rather than "paramountcy".

(61) While the Court of Appeal findings were overturned by the Supreme Court of Canada, that seems to have rested on the strength of the WCB's privative clause, rather than the correctness of the reasoning. In other words, the WCB's privative clause allows it to make decisions within its exclusive jurisdiction, which are not the best interpretation of the legislation, or even a correct interpretation. Even where the decision is wrong, the courts will not interfere with the Board's jurisdiction, unless the result is patently unreasonable.

(62) I recognize there is a tension between finding an injury does not arise in the course of employment, but is compensable, and that the Board has a subrogated interest. In the first approach above, the treatment injury arises out of and in the course of the plaintiff's employment, even though the plaintiff is not being paid a salary, is not at the employer's premises, and is not engaged in any of the normal activities associated with employment. Indeed, the panel in *Kovach* noted, "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."

(63) The second approach also involves some tension, but of a different sort. The worker's treatment injury "results" from the original workplace injury, and is therefore compensable, but that same treatment injury has an identity separate from the original workplace injury capable of giving rise to a cause of action. This will be discussed in more detail.

(64) Neither of these interpretations is entirely satisfactory. Clearly, the policy intends that compensation be paid for certain consequences of a workplace injury, including injuries that occur while the worker is being treated. Such a determination would appear to fall squarely within the Board's authority in section 96(1) to determine whether an injury arises out of or in the course of employment, or the existence and degree of disability by reason of an injury. In the context of the conflicting policies, and the difficulties in reconciling the policies with the Act, I consider that the best route is to simply apply the policies as they are written, and leave it to those responsible for policy to provide direction or clarification if necessary.

(65) That said, I have considered that Item #74.11 has been part of the policies for many years prior to the expansion of the Act to cover all workers and employers in the province. Possibly it is no longer of wide application. It is, however, still viable and even with the expansion of the Act, there are very likely some potential defendants who are neither workers nor employers under Part 1.

(66) Because #74.11 does not explain on what basis the Board will consider proceeding with a legal action, it is not clear which of the two analyses, or possibly another, underlies the policy. I consider that this policy is viable under the Act.

**Is Decision 152 Viable Under the Act?**

(67) Decision 152 states:

> Where a subsequent injury within the scope of this directive is accepted as compensable, *it is not accepted on the ground that the injury is one arising out of and in the course of the employment*. It is accepted on the ground that the subsequent injury is a compensable consequence of the original injury. Thus the provisions of Section 10 might not apply to any tort claim arising out of the subsequent injury.

(68) The Appeal Division Decision in *Kovach* considered this policy raised a possible distinction between injuries that arise out of and in the course of employment and injuries that arise as a consequence of a compensable injury, but concluded there was no real distinction between them. The panel applied a broad interpretation of "arising out of and in the course of employment," that would include treatment injuries. Such an approach was consistent with interpretation of the other policies to pay compensation for injuries sustained during treatment of a compensable workplace injury. Their interpretation, they said, "appears to fit more closely the intent of the Act." In deciding not to apply the policy in Decision 152 to the facts before them, the panel appears to have used a "best fit" or "better fit" test. Little deference was given to the role of the governors in setting the policy in Decision 152.

(69) Since 1993, when *Kovach* was written, decisions of the Appeal Division have more clearly articulated the standard of review concerning published policy. Some Decisions have favoured a best fit approach (as in *Kovach)*, but the recent trend is to uphold and apply the policy if it is a viable interpretation of the Act (#00-0668, 16 *Workers' Compensation Reporter* 287). As stated in the Appeal Division Decision in *Kovach*, the treatment injury results from the original workplace injury; therefore, the Board must pay compensation. However, I consider that Decision 152 means the treatment injury does not arise in the course of employment. Therefore, the worker may elect to claim compensation, or bring an action. If the worker claims compensation, the Board has a subrogated right of action.

(70) Decision 152 is the clearest statement in the published policy on the status of the injured worker for the purposes of section 11 purposes. That unique place in policy is to be respected. It is not necessary for me to precisely define the standard of review which is applicable in this case, except to say that I would be prepared to give considerably more deference to the policy than did the panel in *Kovach*. Applying a more deferential standard of review to the published policy leads to a different conclusion with respect to Decision 152.

**Compensation Issues**

(71) Although it does not directly concern the disposition of the issue before me, any interpretation of the law and policy concerning treatment injuries may also affect compensation entitlement. The Supreme Court of Canada described the workers' compensation system as having three main aspects, compensation and rehabilitation of injured workers, the statutory bar, and the injury fund: per Sopinka, J., in *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*, [1997] S.C.J. No. 74.

(72) While I consider this is an aside to my reasoning above, some consideration will be given to the long-standing and numerous policies to compensate workers for injuries during treatment. Within the context of workers' compensation, such policies encourage workers to undergo appropriate treatment, knowing that an adverse outcome of surgery will not be at their own risk. Having a uniform policy also reduces costs and delay in adjudicating claims.

(73) Finding a legal underpinning for paying compensation for consequential injuries has involved some contortion. Larson acknowledges that consequential injuries do not strictly occur in the course of employment, but are related to the employment because they are necessary or reasonable activities that would not have been undertaken *but for* the compensable injury: §10.05. Larson calls this "quasi-course of employment."

(74) However, the published policy in British Columbia states that it is not sufficient that the consequential injury would not have occurred "but for" the workplace injury. Item #22.00 suggests the previous injury must be a "significant cause" of the later injury, but the test is not one of foreseeability.

(75) For example, after cutting his hand at work, it is foreseeable that a worker will need to see his doctor, and go to the drug store. However, compensation is not payable for injuries arising out of ordinary travel to see a doctor including a specialist, travel to a drug store, or doing maintenance exercises at home after the return to work (see #22.15, *R.S.C.M.*). On the other hand, injuries while travelling to an appointment at the WCB, Review Board, or Medical Review Panel are compensable: #22.21, *R.S.C.M.*

(76) On what basis can the Board pay compensation for certain consequences of the workplace injury? The Act describes only the original injury in terms of "arising out of and in the course of the employment." Section 5(1) provides:

> 5 (1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the board out of the accident fund.

(77) This gateway triggers the payment of compensation as set out in Part 1. Section 5(1) does not specify that the Board may pay compensation only for injuries arising out of and in the course of employment. Compensation is not paid for that *injury per se*, but for certain compensable *consequences* that result from the injury. For example, section 22(1) provides for full benefits in the case of permanent total disability:

> 22 (1) Where *permanent total disability results from the injury*, the compensation must be a periodic payment to the injured worker equal in amount to 75% of the worker's average earnings, and must be payable during the lifetime of the worker.

*(78)* Whether disability *results* from an injury is for the WCB to decide.

*(79)* If the injury results in permanent *partial* disability, compensation is again paid for disability that "results from the injury":

> 23 (1) Where *permanent partial disability results from the injury*, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.

*(80)* Thus, the acceptance of a claim for personal injury under section 5(1) requires both the "causal" and "course" factors to be satisfied, but after that, the payment of benefits requires only a causal relationship with the original injury. The same is true for benefits paid under section 16(1):

> **Vocational rehabilitation**
>
> 16 (1) *To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap*, the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

*(81)* The title of section 16 suggests that the purpose of these expenditures is vocational, and subsection (2) and (3) concern training and placement services for dependants of a worker whose death is compensable. However, subsection (1) does not limit the Board to paying only for vocational assistance. Indeed, section 16 has been used to pay continuity of income benefits in some situations where a worker is no longer temporarily disabled (and therefore not eligible for temporary total disability benefits). Due to administrative delays, the worker's pension assessment cannot be started immediately after the temporary benefits end, so bridging payments are made (see #89.11, *R.S.C.M.*).

*(82)* Injuries during rehabilitation at a training school or work site are considered to be a continuation of the original injury: #88.54, *R.S.C.M.* In such cases, the costs of the second injury will normally be excluded from the original injury employer's experience rating (#115.30), but appears to be included in the original injury employer's sector or rate group. There is provision in section 10(8) of the Act to transfer costs for assessment purposes where "a serious breach of duty of care" has resulted in injury or death, and the payment of a substantial amount of compensation. Transfer of claims costs under section 10(8) might also have some application to injuries resulting from treatment. Instead of costs being carried by the employer at the time

of the workplace injury (or its sector), applying section 10(8) would result in costs being transferred to the treatment facility or health care provider, where there has been a serious breach of duty of care.

*(83)* The provision of health care is somewhat different, in that benefits can be paid "to cure and relieve from the *effects* of the injury or alleviate those effects," but again rests on there being a causal connection between the original injury and the resulting "effects":

> 21 (1) In addition to the other compensation provided by this Part, the board may furnish or provide for the injured worker any medical, surgical, hospital, nursing and other care or treatment, transportation, medicines, crutches and apparatus, including artificial members, that it may consider reasonably necessary at the time of the injury, and thereafter during the disability *to cure and relieve from the effects of the injury or alleviate those effects*, and the board may adopt rules and regulations with respect to furnishing health care to injured workers entitled to it and for the payment of it. . . .

*(84)* According to my interpretation of the law and policies, the original injury must arise out of and in the course of employment, but compensation will be paid for resulting disability, including disability caused by injury during treatment, where that treatment resulted from the original injury.

*(85)* It is sufficient that there is a causal connection between the original workplace injury and the injury during treatment, rather than having to re-enter through the section 5(1) gateway requirements regarding "course" and "cause" for compensation to be paid for treatment injuries.

**Analysis of the Viable Policies**

*(86)* Having determined that the policies in #74.11 and Decision 152 are viable, they can be interpreted together in a coherent manner, as follows. The treatment injury results from the original workplace injury; therefore, the Board must pay compensation. However, the treatment injury does not arise in the course of employment. Therefore, the worker may elect to claim compensation, or bring an action. If the worker claims compensation, the Board has a subrogated right of action.

*(87)* The reasoning of the majority in the Court of Appeal in *Kovach* suggests that such an approach is viable, even preferable.

**Application to the Facts**

*(88)* The plaintiff was a worker at the time of the workplace accident, and remained a worker at the time of the alleged accident on the defendants' premises. Having found that Decision 152 is a viable interpretation of the Act, the plaintiff's injuries during treatment did not arise out of and in the course of employment.

(89) A further factor in this case is that the alleged injury during treatment was to the worker's back, whereas the original workplace injury was to the right forearm. This is not a case of a further injury to the same part of the body, which distinguishes this case from *Kovach*.

(90) I have also considered the presumption in section 5(4) of the Act:

> (4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

(91) If the plaintiff's treatment injury occurred as claimed, it was an "accident" as defined in section 1 of the Act:

> "accident" includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause.

(92) The treatment injury could be seen to have arisen out of the employment, in that had he not broken his arm at work, he would not have been using the allegedly faulty equipment at the defendants' premises. Thus, it is presumed that the injury also occurred in the course of employment, "unless the contrary is shown." On the basis of my findings above, the contrary is shown.

(93) The plaintiff's injuries on August 28, 1997 did not arise out of and in the course of employment.

## Conclusion

(94) At the time of the alleged accident on August 28, 1997:

1. The defendants were employers under Part 1 of the Act.

2. Any action or conduct by the defendants, which caused the alleged breach of duty arose out of and in the course of employment.

3. The plaintiff was a worker under Part 1 of the Act.

4. The plaintiff's injuries did not arise out of and in the course of employment.

Editors' Note: *The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.*