

The Judicial Review Procedure Act, R.S.B.C. 1979, Chapter 209

and

IN THE MATTER OF AN APPLICATION BY FRANCES ELIZABETH KOVACH TO
QUASH THE DECISION OF THE APPEAL DIVISION OF THE WORKERS' COMPENSATION BOARD
RENDERED ON OCTOBER 6, 1993 PURSUANT TO SECTION 11 OF THE
WORKERS COMPENSATION ACT COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN: FRANCES ELIZABETH KOVACH Appellant (Petitioner)
AND: WORKERS' COMPENSATION BOARD

ATTORNEY GENERAL OF BRITISH COLUMBIA DR. G.S. SINGH
Respondents (respondents)

Before:

The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Madam Justice Proudfoot

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Dr. G. S. Singh

Place and Date of Hearing

Vancouver, British Columbia
October 23, 1996

Place and Date of Judgment

Vancouver, British Columbia
December 2, 1996

Written Reasons by: The Honourable Madam Justice Newbury
Concurred in by: The Honourable Mr. Justice Donald
The Honourable Madam Justice Proudfoot

Reasons for Judgment of the Honourable Madam Justice Newbury:

This case originates in 1987, when the petitioner Mrs. Kovach injured her back in the course of her job as a long-term care worker in Quesnel. At the time, she was a “worker” and her employer an “employer” for purposes of Part 1 of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 (the “Act”). She therefore applied for and was approved to receive benefits from the Workers’ Compensation Board.

[a]Mrs. Kovach consulted her family doctor about the back pain she experienced following her injury. He referred her to the respondent Dr. Singh, a neurosurgeon practicing in Kamloops. He first saw her on July 28, 1987 and recommended surgery, which he performed two weeks later. The surgery consisted of a lumbar laminectomy and bilateral removal of the L5–S1 disc featuring interbody fusion. When the surgery came to the attention of the Board’s medical advisers, they questioned the appropriateness of the procedure, leading Mrs. Kovach to seek other medical advice. Eventually, in 1989, she began an action in Supreme Court against Dr. Singh and the Royal Inland Hospital, where the surgery was performed. As I understand it, her writ (which we were not shown) alleged that the surgery ought not to have been performed, that her informed consent was not obtained, and that it has resulted in injury and damage to her.

There is no evidence to indicate that Mrs. Kovach was aware of the fact, but in 1986 Dr. Singh had incorporated his practice and registered his company, GMAS Holdings Inc. (“GMAS”), with the Board pursuant to Section 3(1) of the *Act*. In fact, three years before the incorporation, Dr. Singh had applied to have his own practice brought within Part 1 of the *Act*, which deals generally with “Compensation to Workers and Dependents”. By letter dated July 5, 1983 the Board advised him that his “Doctor’s Office operation” had been so registered. Then, in response to his application in 1986, the Board confirmed by letter to Dr. Singh that it had “changed the name of your registration to that of the new limited company” and that the “firm number” previously used by the doctor personally had been transferred to GMAS.

As a result, GMAS was at the time of Mrs. Kovach’s surgery an “employer” engaged in an industry covered by Part 1 and, since the Board considers directors, shareholders or other principals of registered companies to be “workers”, Dr. Singh was regarded as a “worker” for purposes of Part 1. There were some irregularities in Dr. Singh’s registration and in his dealings with the Board: the requirements of the College of Physicians and Surgeons with respect to the incorporation of GMAS had not been complied with; Dr. Singh rather than GMAS billed and was paid for the surgery by the Board; and Dr. Singh performed the operation without the Board’s prior authorization, as is required under its internal regulations.

The Board views these, however, as technicalities that do not affect Dr. Singh's status as a worker or the surgery as compensable, and Mr. Stewart on Mrs. Kovach's behalf did not pursue any of these matters before us.

In response to Mrs. Kovach's writ, Dr. Singh requested a determination under Section 11 of the *Act*. (We were not provided with a copy of his request.) On October 6, 1993, the Board's Appeal Division issued its determination that Mrs. Kovach had been a worker and that her injuries arose out of and in the course of her employment; and that correspondingly Dr. Singh had been a worker and that the conduct which constituted the alleged breach of duty of care on his part "arose out of and in the course of his employment". The certificate was duly filed in the Prince George Registry of the Supreme Court shortly thereafter.

That filing brought into play Section 10(1) of the *Act*, the text of which is appended to these Reasons. In general terms, it provides that the provisions of Part 1 are in lieu of any cause of action to which a worker is or may be entitled against her employer or against any employer within the scope of the Part or against any worker, "in respect of any personal injury, disablement or death arising out of and in the course of employment". Thus no action in respect thereof lies. Subsection 10(1) concludes:

This provision applies only when the action or conduct of the employer, his 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.

Despite the Appeal Division's comment in its reasons that "it is for the courts to determine the effect of the Section 11 certificate on the legal action", it appears to be accepted by all parties that the filing of the certificate effectively prohibited any further proceedings in Mrs. Kovach's action against Dr. Singh. This led Mrs. Kovach to file a petition in the Supreme Court pursuant to the *Judicial Review Procedure Act*, S. B.C. 1979, c. 209, seeking a declaration that the Appeal Division's decisions were patently unreasonable and could not be rationally supported by the *Act*. Three grounds were stated in the petition but evidently only two were pursued in the court below, namely that:

(a) The Board "erred when it failed to apply the applicable principles of law, including *novus actus interveniens*"; and

(b) Alternatively, "the Board fettered its discretion by adopting a fixed policy without considering the individual merits of the case and without a willingness or ability to depart from that policy in appropriate cases."

The Chambers Judge's Decision

The Chambers judge in the court below rejected both grounds, albeit reluctantly. She first stated the now well-settled rule that a decision lying within the jurisdiction of a tribunal such as the Board may not be overridden by a court unless that decision is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.": *C.U.P.E: Local 963 v. N.B. Liquor Corporation* [1979] 2 S.C.R. 227 at 237. After describing the compensation scheme provided by the *Act* for work-related injuries, as quoted ss. 10 and 11, she stated that the task before the Court was:

. . . not to look at [the]ultimate consequences [of the determination by the Board]and arrive at a policy decision that the Board is a spider-like creature that has pulled into its web one unwilling victim too many. Or read the other way, given succour to an undeserving bug. The court's task is simply to enquire whether a rational basis exists for the decision. "The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at. the result" . . . [C]ourts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of the tribunal cannot be sustained on any reasonable interpretation of the facts or of the law "*Nat'l Corn Growers v. Canadian Import Tribunal* (1990,) 74 D.L.R. (4th) 449 (S.C.C.) at 481.

Then, after reviewing the Board's reasoning and counsels' arguments, the Chambers judge continued:

The conclusion of the Board that the second injury allegedly caused by Dr. Singh to Mrs. Kovach was, at least in part, a direct consequence of the injury she suffered at work and thus compensable under section 5(1) as an injury arising out of her employment can be rationally supported by the legislation and the evidence. Once that conclusion was reached, the Board's determination under section 11 followed as the only possible rational outcome of Dr. Singh's request for a certificate.

Had Mrs. Kovach not suffered an injury at work, she would not have undergone the surgery. It was because of the injury that she went to Dr. Singh for treatment. That treatment included the surgery in question. So, it is not patently unreasonable to say that, whatever happened during that treatment, negligent or not, arose out of the course of her employment.

The phrase “arising out of and in the course of the employment” is not defined in the *Act*. However, section 5(4) creates a statutory presumption, if an injury arises out of the course of employment it is presumed to have arisen in the course of employment.

If this court were to impose its view of causation on the Board, it would be doing that which the legislature has clearly said it cannot do, to substitute its judgment for that of the body to which the legislature gave decision-making power.

In the result, the Chambers judge ruled that it was not open to the Court to overturn a decision of the Board about causation which might be wrong but which was not “irrational”. In short, the Board had the “right to be wrong”, and Mrs. Kovach was effectively barred from pursuing her action in the Supreme Court against Dr. Singh.

Arguments

Before us, Mr. Stewart’s argument on Mrs. Kovach’s behalf focussed not so much on the reasonableness of the result reached by the Board, as on the reasoning it used in reaching its decision. He pointed in particular to the following portion of the Board’s decision:

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*. [at 7.]

Implicit in this reasoning, Mr. Stewart argues, is what amounts to a finding that Dr. Singh had not been negligent, since if he had been, the surgery would have constituted a *novus actus interveniens* and thus “broken the chain of causation.” Yet there is no indication in the Board’s reasons that in finding Mrs. Kovach had not suffered a “new or different injury”, the Board examined any medical evidence of Mrs. Kovach’s condition before and after the surgery, the relationship between her injury and her back pain or between her injury and the surgery, the manner in which that surgery was performed, or the circumstances surrounding the giving of her consent thereto. In Mr. Stewart’s submission, such an inquiry would have lain outside the Board’s expertise and outside the Board’s jurisdiction, since the *Act* nowhere contemplates that the Board is to decide questions of medical malpractice arising between doctor and patient.

Instead the Board rejected out of hand the argument of a new or intervening cause and simply applied the logic that because Mrs. Kovach would not have been at the hospital “but for” her first injury, the second injury (if such there was, for that issue has not been tried) arose as a *direct consequence* of the first. The reasoning was this:

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. . . . That is, the direct consequences of a compensable injury also arise out of and in the course of employment. [at 7.]

Mr. Stewart also argues that the Board’s reasoning in Mrs. Kovach’s case was backwards: it said that *because* Mrs. Kovach’s second injury was treated as a “compensable consequence” of her first injury under the terms of the Board’s policy statement, the second injury “arose out of and in the course of” her employment. In rejecting arguments based on Dr. Singh’s failure to obtain prior authorization for the surgery, for example, the Board stated:

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. [at 8; emphasis added.]

The question before the Board, however, was the other way around — did the second injury in fact arise out of and in the course of her employment, so that it was therefore compensable by the Board and barred as a cause of action in the court? The contortion of this issue and the adoption of an erroneous approach to causation led, then, to a result that in Mr. Stewart’s analysis was patently unreasonable.

Not surprisingly, counsel for the Board and Dr. Singh relied on the many authorities decided in Canada over the last several years that mandate an extremely deferential approach on the part of courts towards decisions reached by administrative tribunals. This approach is perhaps best exemplified by the reasoning of the Supreme Court of Canada *per* Beetz, J. in *Syndicat des employés de production du Québec et de l’Acadie v. Canada Labour Relations Board* [1984] 2 S.C.R. 412, in which his Lordship said:

[Privative clauses] do not empower the court undertaking the review to make the decision which an administrative tribunal like the Board should have made, though they allow to indicate in some cases what it should have done and to refer the case back to it for action accordingly. They do not even empower the court to set aside the decision of an administrative tribunal because of a mere error of law. If the Board commits such an error, its decision remains unassailable.

A mere error of law is an error committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act, of another Act, or of an agreement or the document which it has to interpret and apply within the limits of its jurisdiction.

A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it. As Dickson J. (as he then was) described it, speaking for the whole Court in *Canadian Union of Public Employees local 963 v. New Brunswick Liquor Corporation*, [1979]2 S.C.R. 227 at p. 237, it is:

. . . so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review . . . [at 419–20.]

This reasoning was quoted by this Court in a recent case involving the Workers' Compensation Board, *Electrolux Corp. of Canada Inc. v. Workers' Compensation Board* (1993) 76 B.C.L.R. (2d) 239. In that case Seaton, J.A. for the majority also noted the following passage from the judgment of La Forest, J. in *CAIMAW local 14 v. Paccar of Canada Ltd.* [1989]2 S.C.R. 983:

This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. Privative clauses, such as those contained in ss. 31 to 34 of the Code are permissible exercises of legislative authority and, to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the Court should respect that limitation and defer to the Board. [at 244.]

In the case at bar, counsel for the Board and for Dr. Singh also emphasized the high degree of curial respect to which the Board is entitled, given its important policy and regulatory role and the well-developed expertise it provides to workers and employers in certain areas. As noted by Iacobucci, J. for the Court in *Pezim v. British Columbia*

Superintendent of Brokers (1994) 92 B.C.L.R. (2d) 145 (S.C.C.) at 166, “Courts have . . . enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a strong privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal.” (at 166.) In this case, there is also a strong privative clause – Section 96(1) of the *Act*, reproduced in the Appendix hereto – and no right of appeal exists beyond the Board’s Appeal Division. On the other hand, the presence of the phrase “within its competence” in Section 11 emphasizes the unquestionable principle that an administrative tribunal may not decide the limits of its own jurisdiction as it sees fit. As has been reiterated on numerous occasions by the Supreme Court of Canada, an error as to jurisdiction, “whether at the start of the hearing, during it, in the findings or in the order disposing of the matter” will result in the setting aside of the decision containing it, “even if committed in the best possible good faith”. *per Beetz, J. for the Court in Syndicat des employes, supra*, at 420. (See also *Service Employees’ Union v. Nipawin District Staff Nurses Association* [1975] 1 S.C.R. 382 at 388-89.)

Functional Analysis

The question of the jurisdiction of a tribunal in relation to the question before it involves a functional or “pragmatic” approach that considers not only the wording of the privative clause in question, but the broad purposes of the statute creating the tribunal, the broad functions of the tribunal itself, and the areas of expertise of its members. (See the judgment of La Forest, J. in *CAIMAW v. Paccar of Canada Ltd., supra Canada (Attorney General) v. PSAC* [1993] 1 S.C.R. 941 at 957; and *U.E.S., Local 298 v. Bibeault* [1988] 1 S.C.R. 1048 at 1088.) The present *Workers Compensation Act* does not contain any recitals describing the broad purpose or function of the workers’ compensation scheme, although I note that the predecessor statute in force between 1916 and 1948 stated its purpose was “to provide for compensation to workmen for injuries sustained and industrial diseases contracted in the course of their employment”. (See S.B.C. 1916, c. 77; S.B.C. 1924, c. 278; S.B.C. 1936, c. 312; S.B.C. 1948, c. 370.) It is a matter of historical fact that the scheme was originally devised in the United Kingdom and other European countries near the beginning of this century as a means of addressing accidents suffered by workers in the workplace. In particular, the English common law doctrine that an employee was deemed to assume the risks incidental to his employment, and the principle (later reversed by contributory negligence legislation) that if an employer could show the slightest degree of negligence on the part of an injured employee, he escaped liability completely, posed significant obstacles to injured workers and created “grave and distressing social and economic problems”. (See *Report of the Commissioner Relating to the Workmen’s Compensation Board* prepared by the Honourable Chief Justice Sloan (1942), at 12.)

Eventually, the idea of shifting the risk of such problems from the injured individuals to the respective industries in which they were employed gained acceptance, such that from the time the first workers' compensation legislation was introduced in British Columbia (S.B.C. 1902, c. 74,) employers were assessed according to the respective industries in which they operated and the accident record attributable thereto.

Those cases that have considered the nature and purpose of workers' compensation schemes in Canada have consistently emphasized the protection of employees against the risks of their employment, including risks incidental to the usual duties of employees. They have therefore given the phrase "arising out of and in the course of employment" a liberal interpretation not limited to the employer's actual work premises nor to the employee's actual work hours. As Rand, J. noted for the Court in *Workmen's Compensation Board v. C.P.R. and Noelle* [1952]2 S.C.R. 359:

It is obvious that the basic purpose of the statute was to protect employees against the risks to which by reason of their employment, in the sense of their job, they were exposed: injury so resulting was recognized as part of the wear, tear and breakage of the work being done which the business, as part of its expense, ought to bear. The legislation was instigated by the impact of the casualty product of modern industry on the individual employee. The solution, then, must, basically, have regard to those risks.

The employee has, of course, his own field of activity which at some points meets that of his employment; and it is now settled that the risks extend not only to those met while he is actually in the performance of the work of the employer, but also while he is entering upon that work and departing from it.

Ordinarily the place of the risks is the employer's premises, including means of approach and departure; but it may be elsewhere as in the case of a truck driver. On the other hand, while he is going or returning from work, on public streets, he is obviously moving in his own sphere and at his own risk. [at 369.]

(See also *Betts and Gallant v. The Workmen's Compensation Board* [1934]S.C.R. 107 at 115.)

The second major function of the Board, and one of increasing importance, is to minimize or prevent "injuries and occupational diseases in employments and places of employment": Section 71(1.) For this purpose, the Board makes extensive regulations relating to working conditions and regularly performs inspections of places of work or places of employment of workers within the scope of Part 1. In extreme cases, the Board has the power to close down "all or part of the employment or place of employment and the industry carried on there." (Section 74.)

The *Act* originally applied to virtually all industrial undertakings and permitted the Board to admit other industries or workers as being within the scope of Part 1. (See now Section 3.) Medical practitioners have been admitted for many years, and when they were permitted by the College of Physicians and Surgeons some years ago to incorporate their practices, doctors themselves were accorded the status of “workers” under the *Act* and could claim compensation if injured in the course of their duties. (It bears emphasizing that as a condition to incorporating one’s practice, a doctor is required by the College to acknowledge in writing that doing so will not in any way relieve him or her of observing the provisions of the *Medical Practitioners Act*. Personal liability is thereby, or also, maintained notwithstanding incorporation.) In 1993, the *Workers Compensation Act* was amended to *require* medical practitioners to become registered: see S.B.C. 1993, c. 34. Thus the *Act* allowed nurses and others employed by doctors to obtain coverage for work-related injuries in every instance. The record of debates in the Legislature suggests that the main purpose of this amendment was to provide coverage to a workforce that is “predominantly female”. (Hansard, June 25, 1993 at 7883, 7884; July 6, 1993, at 8266 et seq.)

As mentioned above, under the scheme employers’ assessments are based on the record of accidents or claims arising in their respective industries. From the correspondence between Dr. Singh and the Board in 1983 and 1986, and in the absence of evidence to the contrary, I infer that assessments of medical practitioners are based on their office payrolls rather than, for example, on their revenues from medical services provided to patients, whether in an office, clinic, hospital or elsewhere. It also appears that medical practitioners are placed in the same category as other “office operations” for assessment purposes and not according to the risks inherent in their respective specialties, for example.

If one takes the Board’s position in Mrs. Kovach’s case to its logical conclusion, however, the inspection and assessment features of the compensation scheme would require the Board to carry out inspections of the *professional* activities of doctors—in this case, surgery occurring in a hospital—and to base its assessments of doctors on the risks inherent in those activities, analogous to a professional liability insurer. There is no evidence before us that the Board has ever undertaken such inspections or risk assessments, or that the *Act* intended for them to do so.

The *Act* contemplates the establishment of medical review panels consisting of qualified specialists, which panels deal with grievances on the part of workers or *bona fide* medical disputes certified by physicians. A panel may among other things certify to the Board “if there is a disability, its cause and, if there is more than one cause, how much of the disability is related to one cause and how much to another”: Section 61(1)(d.) Such a certificate is conclusive as to the matter certified and is not open to question or review in any court: Section 65. No such certificate was brought to our attention as having been issued in Mrs. Kovach’s case.

We were not presented with any evidence as to the number and qualifications of the Board's members and staff, but obviously the Board employs medical professionals who provide health care for injured workers (see especially Section 21) and who determine the extent and duration of disabilities in respect of which claims are made under the *Act*. The Board itself consists of a chairman, five workers' representatives, five employers' representatives, and two representatives of the public interest, plus the president and chief appeal commissioner. Those governors appoint the chief appeal commissioner, who in turn appoints other appeal commissioners. No particular qualifications are imposed by the *Act* either for appeal commissioners or governors of the Board.

In addition to the privative clause in Section 96, Section 96.1 states that a decision of the Appeal Division is final and conclusive unless the chief appeal commissioner directs a reconsideration or directs an applicant to make a new claim. Section 99 states that the Board is not bound to follow legal precedent and that where there is doubt on an issue and the disputed possibilities are evenly balanced, "the issue shall be resolved in accordance with that possibility which is favourable to the worker."

The Jurisdiction Question

Counsel for the Board and Dr. Singh contend (and the judge below agreed) that the question of whether a claimant is a "worker" and whether her injuries may be said to arise "out of and in the course of" her employment, are questions lying at the heart of the Board's expertise and jurisdiction. They characterize these questions as matters of "status" under the *Act* that are completely divorced from questions of fault and causation that lie at the heart of tort law. Obviously, the whole purpose of the workers' compensation scheme is that it is "no-fault". As a "trade-off" for security of coverage, the worker loses her right to sue in the courts if she is injured by another worker or by her employer and the injury "arose out of and in the course of" employment.

But the phrase "arising out of and in the course of employment" implies that causation is highly relevant to the question of "status". Workers' injuries are covered regardless of fault but not regardless of *cause*. A "worker" who on her way to a weekend baseball game is injured then another "worker" drives into her car will not be compensated under the scheme. Some causal link must exist between her employment and her injuries for her injuries to be compensable. In his 1966 *Report of the Commission of Inquiry into the Workers Compensation Act*, Mr. Justice Tysoe was very specific on this point: at p. 178 he stated that "In truth the phrase 'arising out of and in the course of employment' means no more and no less than 'caused by the work which the man was employed to do and was doing'. In this context, employment must be regarded as covering and including the things necessarily and incidental to the employment. *The injury by accident must be work caused.*" (Emphasis mine.) The necessity for a causal link is also implicit in this passage from the Board's decision in Mrs. Kovach's case:

. . .the *direct consequences* of a compensable injury also arise out of the 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*. [at 7; emphasis added.]

It follows that an allegation of *novus actus interveniens* will be relevant to the issue of whether an injury “arises out of and in the course of” employment, since in the sphere of tort law at least, such an act severs the “chain of causation”, as Mr. Stewart says. This principle is best illustrated for purposes of this case by a 1949 decision of the House of Lords involving the interpretation of workers’ compensation legislation in the United Kingdom. *Hogan v. Bentinck West Hartely Collieries (Owner,) Ltd.* [1949] 1 All E. R. 588 involved a worker who had fractured his thumb at work and had it splinted. When the thumb continued to be painful, it was discovered that the fracture had not knit and his doctor advised an operation for the removal not only of a false thumb he had, but the top joint of his normal thumb. The worker was refused compensation for the resulting disability of his thumb on the basis that the surgery “appeared to have been ill advised” and the matter was eventually appealed to the House of Lords. Their Lordships dismissed the appeal and in their reasons dealt with the theory of causation advanced on the worker’s behalf and in the case at bar on behalf of the Board:

It was maintained that the learned arbitrator ought to have directed himself that, if the incapacity would not have existed if there had been no previous injury by accident, the incapacity must be attributed to the previous injury. It has often been said that Latin phrases cannot help to solve problems of causation, but they are sometimes so convenient a label that the careful avoidance of them becomes an inverted kind of pedantry. *I will, therefore, not apologize for observing that the workman’s argument is an attempt to set up the causa sine qua non as in law a sufficient basis for liability under the Workmen’s Compensation Act. I think it unnecessary to*

spend further time in refuting an argument which is so opposed to the reasonable man's conception of causation. [at 596; emphasis added.]

In his judgment, Lord Simonds also dealt with the theory of *novus actus interveniens* as follows:

Before I return to the all-important words in the Workmen's Compensation Act, 1925, which have given rise to this controversy, I would recall what is said to be the principle of the conflicting line of authority headed by *Dunham v. Clare*. In that case, Collins, M.R., said ([1902]2 K.B. 296):

"The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which give a fresh origin to the after-consequences."

It does not appear to me, my Lords, that in principle there is any conflict between the two lines of cases that I have cited. *The question whether a present state of incapacity is substantially the result of an original accident or of the later negligent act of a doctor is to ask, in other words, whether the present incapacity is due to the original accident or to the intervention of a novus actus which breaks "the chain of causation,"* and the question can only be answered on a consideration of all the circumstances and, in particular, of the quality of that later act or event. [at 593; emphasis added.]

It is true, of course, that an administrative tribunal such as the Board is entitled to make a "mere error of law" in interpreting or applying provision of its enabling statute: *Syndicat des employes*, supra, at 420. As already noted, however, there is a distinction, albeit difficult to draw, between such an error and an error as to jurisdiction. In the analysis of Beetz, J. the latter type of error:

. . . relates generally to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is "intended to circumscribe the authority" of that tribunal. . . . A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of a hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it been set aside. . . . [at 420-21.]

How, then, is the question of whether Mrs. Kovach's second (assumed) injury arose "out of and in the course of" her employment, to be characterized? Is the question one

that lies within the Board's jurisdiction and expertise or is it one that "describes" or delineates the Board's jurisdiction? In my view, the answer to this question becomes clearer if one frames the question before the Board more completely. If one asks whether Mrs. Kovach's second injury arose "out of and in the course of" her employment or whether it arose as a result of the professional negligence of her doctor, the limits of the Board's jurisdiction and expertise become apparent. The question in *this* case raised a whole other field of expertise—that of professional negligence—and a whole panoply of legal considerations—those inherent in the relationship between doctor and patient—that lie outside the scope of the *Act* and the Board's expertise. In fact, the Board itself seems to have acknowledged that its jurisdiction and expertise did not extend to such matters: at p. 11 of its reasons, it stated that "Any arguments that medical malpractice or professional negligence go beyond what is contemplated in Section 10(1) of the *Act* are arguments to be made to the Court, not to the Appeal Division."

More importantly, the functioning reality of the Board and the workers' compensation scheme generally, is that they exist to assess, provide coverage for, and minimize injuries and diseases suffered or contracted by workers *qua* workers — i.e., injuries or diseases they incur or suffer in their capacities as workers and because they are workers. The Board is not in a position to assess professional liability issues or to provide coverage for injuries that are other than "work-caused", and to describe these matters as indistinguishable from those raised by the "taxicab" and "parking lot" hypotheticals posited by respondents' counsel is to ignore the purpose and nature of the scheme and the manner in which it is carried out in this province.

A somewhat similar characterization issue came before the Saskatchewan Court of Appeal recently in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1995] 7 W.W.R. 1 (leave to appeal to S.C.C. granted, (1996) 134 D.L.R. (4th) (vii.)) a case on which we sought counsels' written submissions after the hearing of this appeal. *Pasiechnyk* concerned a determination made by the Workers' Compensation Board of Saskatchewan that certain workers injured by a falling crane on a construction site were barred from suing the Province for alleged negligence in safety inspections carried out under the *Occupational Health and Safety Act* of that province. The terms of the Saskatchewan workers' compensation legislation are very similar to those of British Columbia's. Applying a reasoning similar to that applied by the Board in Mrs. Kovach's case, the Saskatchewan Workers' Compensation Board had held that because the province had been an "employer" under the *Act*, and the action concerned defaults of employees "while engaged in, about or in connection with the industry or employment in which the employer or worker" was engaged, the plaintiffs' action was barred. The lower court upheld this result, concluding that whether the test for judicial review was one of patent unreasonableness or correctness, the Board had not exceeded its jurisdiction.

The Court of Appeal disagreed, ruling that the board's power did not extend to the "determination of the extent of jurisdiction." The Court carried out a lengthy analysis of recent administrative law cases, including many of those cited above, and reviewed counsels' arguments, which were remarkably similar to those made before us. Vancise, J.A. for the majority then continued:

. . . while it is clear that the legislature intended the Board to decide certain issues specified in s. 22(1) [the Saskatchewan counterpart of s. 11 of the British Columbia *Act*], such as, the question of entitlement to benefits under the Act, it is equally clear it did not intend to leave to the Board the power to decide the question of the applicability of the Act. For an employee to be eligible to receive the benefits provided for under the Act, the employee must have sustained the injury while in the employ of an employer. The Board has jurisdiction to determine, under ss. 22 and 44, whether a claimant is a worker, which includes who is and who is not an employer, *and whether the injury arose out of an act in or about the industry of the employer. Those sections do not however, include the power to determine the extent of jurisdiction.* Section. 22 (1) paras. (a) to (i) do not, for example, include the power to determine whether the Government, acting in its capacity as regulator, owes a statutory duty to the appellants for which it is liable in tort and whether it may be sued in its capacity as regulator under the Act. That question does not fall within a general category of "matters or questions arising under this Act" as that phrase is used in s. 22(1.) *It is a determination which concerns the extent of the jurisdiction and not a determination within jurisdiction. In the determination of the extent of jurisdiction the statutory tribunal must be correct. The standard of review is therefore correctness.* [at 17; emphasis added.]

Further, after reviewing the plaintiffs' pleadings and the fact that they had been "workers" at the time of the accident and the Province an "employer", Vancise J. A. added:

The question. . . reduces itself to whether an action by a worker for damages in a civil action based on the negligence of the Government in failing to carry out a duty owed to the worker is barred in every circumstance because the Government is an employer. In my opinion, *it would be illogical to conclude the Act was intended to protect persons from civil liability simply because of their status as "employer" regardless of the circumstances which gave rise to the injury sustained by the worker.* [at 20; emphasis added.]

In the result, the Court found that if the Province had breached a duty of care towards the plaintiffs, it had done so in its capacity as a regulator, not as an “employer”. The board had erred in ignoring the “fundamental distinction between the public and private sphere of operations of government.” This amounted to an error of law on the part of the board in determining the extent of its jurisdiction, and the Court was required to correct the error by lifting the bar to the plaintiffs’ damage action.

Similarly in the case at bar, it seems to me that the Board erred in ignoring the fundamental distinction between Mrs. Kovach’s status as a worker and her status as a patient, and the distinction between Dr. Singh’s status as a “worker” and his status as a doctor; and in failing to give proper consideration to the circumstances giving rise to Mrs. Kovach’s injury. Nothing in the legislation on the operation of the scheme itself supports the view that the *Act* was intended to extend to the sphere of professional negligence, as opposed to accidents suffered by medical workers in the course of their duties.

Counsel for the Board and Dr. Singh contended that *Pasiechnyk* is distinguishable on the basis of differences in the wording between the British Columbia *Act* and its Saskatchewan counterpart. In particular, Mr. Lepp submitted that there is a “fundamental difference” between the two:

In Saskatchewan, it is the Board, and not the courts, that determines whether an action is barred. In British Columbia, the Board may only certify that a person is an employer, or a worker, and that the injury arose out of the employment relationship. It is then for the courts to determine whether or not the certification is a bar to the action.

If the Saskatchewan legislation had been the same as that in British Columbia, then the Board would have issued a certification but could not have barred the action. That would have been for the court and presumably, it would have allowed the lawsuit to proceed. To that extent, the *Pasiechnyk* case may be an example of when courts in British Columbia will not bar an action following a certification. In other words, our courts may agree that the capacity in which a person is sued is paramount to the finding the person happens to be an employer.

With respect, the difference pointed out by Mr. Lepp seems to me more apparent than real. Taken together, the effect of ss. 10 and 11 of the British Columbia *Act* is that where a worker is injured by another worker or by her employer and the injury arose “out of and in the course of employment”, her cause of action is superseded or effectively barred. Thus once the Board issues a determination under Section 11 to that effect, any further determination by the court is on the face of the statute unnecessary. Consistent with this, it appears that once Dr. Singh obtained his certificate under Section 11 and

filed it in the Prince George Registry of the Supreme Court, no other order was sought or obtained from the Court. It rested with Mrs. Kovach to seek a judicial review of the Board's determination. This seems very similar, in substance, to the position under the Saskatchewan legislation.

It must also be noted that the argument quoted above from written submissions runs contrary to the position taken in oral argument by the respondents that once the Board has determined the "status" of a worker's injury as properly compensable, the same injury *cannot* form the basis for a legal action and the court *cannot* allow an action to proceed. In other words, the workers' compensation scheme and any court action are mutually exclusive—as Section 10 (1) states, the former is in lieu of the latter. 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."

Both Mr. Lepp and Mr. Powers also argued that the reasoning in *Pasiechnyk* is incorrect because it is inconsistent with the decision of the Supreme Court of Canada in *Alcyon Shipping Co. Ltd. v. O'Krane* [1961] S.C.R. 299. There, a longshoreman employed by a stevedoring company was injured while unloading a cargo of lumber from a Greek freighter at Tahsis, British Columbia. The worker claimed and was awarded compensation under the *Act* and the Board then brought an action in his name against the shipping company as it was permitted to do under the subrogation provision, then Section 11(3) of R.S.B.C. 1948, c. 413. (See now Section 10(6) of the present *Act*.) The shipping company sought to argue that the action was barred because it had been an "employer" for purposes of Part I; however, the Board ruled that it had not been an employer "in or about an industry within the scope of Part 1 of the *Workmen's Compensation Act*." The Supreme Court of Canada upheld the dismissal of the appeal on the basis that the determination was one on which the Board had exclusive jurisdiction, as provided in what was then Section 77. (See now Section 96 (1,) reproduced in the Appendix.)

Mr. Lepp submits that faced with the question before it in *Pasiechnyk*, the Saskatchewan Court of Appeal should also have found the decision "was that of the Board alone and that its decision could only be overturned if it were patently unreasonable." But as I hope I have made clear, *Pasiechnyk* and the case at bar raise much wider questions than that raised in *O'Krane*, where all that was at issue was the "status" of a company as an "employer". Clearly such an issue does lie at the heart of the Board's jurisdiction and expertise. Where on the other hand, an issue is raised that will take the Board far afield into matters the workers' compensation scheme was not designed to deal with, the determination must in my view be regarded as jurisdictional. Accordingly, I do not accede to the respondents' arguments seeking to distinguish *Pasiechnyk*. I conclude that the question in Mrs. Kovach's case was one on which the Board was required to be

correct, and that it was not correct in purporting to decide whether a “new or different injury” had been sustained by her as a result of Dr. Singh’s alleged negligence.

Patent Unreasonableness

The fact that the Board was acting outside its jurisdiction may explain the strained reasoning it employed in attempting to build a bridge between Mrs. Kovach’s original injury and her second injury (if such there was.) I note in particular the following passage from pp. 6–8 of the Board’s reasons:

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*. . . . That is, the direct consequences of a compensable injury also arise out of and in the course of employment. . . .

. . . 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 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. [at 26-28]

The whole question of *novus actus interveniens* was avoided by the logic that because Mrs. Kovach was seeking treatment for her original injury when she consulted Dr. Singh, any injury that he caused to her through negligence must be a direct result of

and arise out of her employment. As *Hogan v. Bentinck West Hartley Collieries* shows, that logic is severely flawed. If Dr. Singh was negligent, the injury caused by his surgery cannot as a matter of law be said to have been caused by her first injury, much less to be a “direct result” thereof.

Accordingly, if I were wrong in my conclusion regarding jurisdiction, I would also hold that the conclusion reached by the Board was patently unreasonable for two reasons—first because it cannot have been the Legislature’s intention to nullify Mrs. Kovach’s cause of action merely because Dr. Singh happens to be a “worker” for some purposes totally unconnected to the doctor-patient relationship; and second because the Board’s reasoning is inconsistent with any common sense view of causation.

For the guidance of the Board, I would suggest it should have refused the request for a certificate under Section 11 on the ground that the issue involved a determination for the courts, namely whether Dr. Singh was negligent in the performance of his professional duty. Mrs. Kovach’s compensation claim, as it relates to the second injury, will have to abide the result. If she fails in her suit it will be open to the Board to confirm its present position that there exists a sufficient causal link between her injury at work and the treatment-related injury for it to be said that the latter arose out of and in the course of her employment. This is because, on that outcome, it will have been determined by a court of competent jurisdiction that no intervening act of negligence broke the causal chain.

Disposition

I would order that the certificate issued under Section 11 in Mrs. Kovach’s case be set aside pursuant to Section 7 of the *Judicial Review Procedure Act*, on the basis that it was not within the competence of the Board to determine the question of Dr. Singh’s alleged negligence. Alternatively, I would set the certificate aside on the ground that the result reached by the Board was patently unreasonable. It is unnecessary to consider as well whether the Board “blindly follow[ed] a policy laid down in advance” such that the Board disabled itself from lawfully exercising a discretion. (See *Testa v. Workers’ Compensation Board (British Columbia)* (1989) 36 B.C.L.R. (2d) 129 (B.C.C.A.) and the comments of Goldie, J.A. in *Electrolux*, *Supra*.)

It is not in my view appropriate to remit any question to the Board, given my finding on the question of jurisdiction.

The Honourable Madam Justice Newbury

I AGREE:

The Honourable Mr. Justice Donald

I AGREE:

The Honourable Madam Justice Proudfoot

Appendix

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

.

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

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

and shall certify its determination to the court.

.

96. (1) The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board on them is final and conclusive and is not open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, nor shall an action be maintained or brought against a governor, officer, appeal commissioner or employee of the board in respect of an act, omission or decision done or made in the belief that it was within the jurisdiction of the

board; and, without restricting the generality of the foregoing, the Board has exclusive jurisdiction to inquire into, hear and determine

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

.

96.1(1) Subject to this section and sections 58 to 65, a decision of the Appeal Division is final and conclusive.

- (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the Appeal Division on the grounds that new evidence has arisen

or has been discovered subsequent to the hearing of the matter decided by the Appeal Division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

(a) is substantial and material to the decision, and

(b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered.

he may direct that

(c) the Appeal Division reconsider the matter, or

(d) the applicant may make a new claim to the board with respect to the matter.

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In the Supreme Court of British Columbia

*IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,
R.S.B.C. 1979, c. 209, AS AMENDED*

AND

IN THE MATTER OF THE DECISION OF THE
APPEAL DIVISION OF THE WORKERS' COMPENSATION
BOARD OF BRITISH COLUMBIA DATED MARCH 2, 1996

BETWEEN: CANADA SAFEWAY LIMITED
PETITIONER

AND: WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA, WESTFAIR FOODS
LTD., OVERWAITEA FOODS GROUP, RETAIL MERCHANTS' ASSOCIATION OF
BRITISH COLUMBIA and SOUTHLAND CANADA INC.
RESPONDENTS

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE MACZKO (IN CHAMBERS)

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and Southland Canada Inc.:

P.M. Archibald, Q.C.
and S. Antle

Place and Dates of Hearing:

Vancouver, B.C.
April 7, 8, 9 and 10, 1997

I Introduction

This is a judicial review of a decision by the Appeal Division of the Workers' Compensation Board ("WCB"). The WCB and its activities are supported by levies on employers. Employers are divided into classes and subclasses and different levies or rates are paid by different groups depending on loss experience. One of the subclasses contained supermarkets, butchers, department stores and retailers as one group. Within this group, all were charged the same base rate. Over the years, the group accumulated a \$64 million under funded liability because the WCB did not exact levies high enough to pay for the losses of the group. In 1994, the retailers applied to the WCB for a reclassification on the grounds that the overwhelming majority of the losses were caused by the supermarkets and butchers. The WCB, in fact, reclassified and split the group into three subclasses:

- (1) supermarkets and butchers;
- (2) department stores; and
- (3) retailers.

The Board of Governors of the WCB (the "Board of Governors"), in addition to creating these subclasses, had to decide how the \$64 million unfunded liability would be paid and decided that it would be shared proportionately by the three groups. However, for the future, each of the three groups would be responsible for its own losses. To accomplish this, the Board of Governors decided to fix a base rate as follows:

Supermarkets and butchers	\$2.57 per \$100 of payroll
Department stores	\$1.36 per \$100 of payroll
Retailers	\$1.10 per \$100 of payroll

In addition, the Board of Governors levied 30 cents per \$100 of payroll on all the groups which was designated to pay off the \$64 million unfunded liability.

Pursuant to the decision of the Board of Governors, the assessment branch sent out the new assessments and the retailers appealed from those assessments to the Appeal Division. The Appeal Division reversed the decision of the Board of Governors holding that it was contrary to the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 (the "Act") and ordered the Board of Governors to make a new decision within the terms of the *Act*.

This judicial review of the Appeal Division is on the grounds that the Appeal Division went beyond its jurisdiction in reversing a policy decision of the Board of Governors and that the decision of the Appeal Division was patently unreasonable.

More specifically, the issues raised by the applicants are set out in the argument on behalf of Canada Safeway as follows:

- A. The Appeal Division committed a jurisdictional error by usurping the policy making role of the Governors contrary to the *Workers Compensation Act* of British Columbia (the “*Act*”).
- B. The Appeal Division committed a jurisdictional error in adopting a “substantial reasons” standard of review to review a policy decision of the Governors.
- C. The Appeal Division gave a patently unreasonable interpretation to sections 37 and 42 of the *Act* and its resultant finding that the Governors had committed an error of law in the exercise of their discretion under those provisions was a patently unreasonable finding.
- D. The Appeal Division’s interpretation of sections 37 and 42 to permit a retroactive reclassification of the supermarket employers was patently unreasonable as being inconsistent with the fundamental principles underlying the WCB system of modified collective liability and as being contrary to the presumption against the retroactive application of statutory provisions.

II Background

The WCB operates what has come to be called a modified collective liability scheme. All employers in the province are required to pay a levy or premium to insure workers who are injured in the course of their employment. The *Act* creates the scheme, creates classes of employers, and authorizes the Board of Governors to create subclasses. Each subclass is assessed a premium based on the risk or loss experience for a particular form of employment. For example, logging is riskier than working in a retail store and therefore logging companies pay a higher premium than retail stores.

In the 1980’s, the WCB classified supermarkets, butchers, department stores and retail stores in one subclass. Over a number of years the WCB failed to collect enough premiums to pay the losses accumulated by the group and a \$64 million unfunded liability accumulated.

In 1994, the retailers group applied to be reclassified on the basis that its premiums did not reflect its loss experience. The Board of Governors, in response to the application, conducted hearings and obtained staff reports. The Board of Governors concluded that the accumulated unfunded liability was caused almost entirely by the supermarkets and butchers and as a result decided to reclassify by breaking the subclass designated as 0621 into three separate subclasses, i.e. supermarkets and butchers, department stores, and retailers. Each new subclass was allocated a premium which presumably reflected their loss experience.

Once that was done, the Board of Governors embarked on an inquiry to determine how to collect the \$64 million to pay off the unfunded liability. The Board of Governors instructed the staff to prepare reports setting out the options and the staff presented four. After considerable debate, the Board of Governors selected the option that the \$64 million would be paid by the three groups on a pro rata basis. When the assessments were sent to the employers, the department stores and retailers appealed the decision to the Appeal Division. The Appeal Division reversed the decision of the Board of Governors ruling that it was not authorized by the *Act* and referred the matter back to the Board of Governors for reconsideration. The decision of the Appeal Division was written in such a way that if the Board of Governors followed it, the option initially chosen by the Board of Governors would not be open to it.

When the Board of Governors was making the decision on how to deal with the unfunded liability, it heard submissions from various groups and obtained reports from the staff of the WCB. The staff ultimately put before the Board of Governors four possible solutions which were:

1. *Direct attribution to employer groups in the subclass amortized over 5 years*
This would result in an additional surcharge of \$1.35 per \$100 of payroll to the supermarkets and a reduction of \$0.06 per \$100 for the general retail stores. The department stores would not receive any adjustment.
2. *Indirect attribution to all 3 employer groups*
All 3 new subclasses would receive a surcharge of \$0.30 per \$100 of payroll. This would result in supermarkets paying approximately 23% of the unfunded liability, department stores 13%, and general retail 64%.
3. *Attribution to all employers in the accident fund*
All employers would pay \$0.03 per \$100 of payroll.
4. *Distressed extended payment plan for the supermarkets*
This is a variation of option 1 but spreads the amortization over 15 years without

interest. Supermarkets would pay a base rate of approximately \$3.07 per \$100 of payroll with department stores remaining at \$1.36 and general retail at \$1.04.

The Board of Governors chose option 2.

The retailers and department stores claim that they have been subsidizing the supermarkets and butchers since 1988 and that to have them continue to share the unfunded liability would be to compel them to continue to subsidize the supermarkets and butchers.

The supermarkets and butchers agree that new subclasses should be created and agree with the subclasses decided upon by the Board of Governors. They have no complaint about the differential in the new rates allocated to each of the subclasses. However, they say that the accumulated unfunded liability occurred when all three groups were together and that it is now unfair to reallocate this unfunded liability to only one of the groups retroactively. To do so is contrary to the whole concept of modified collective liability.

III Structure of the WCB

The WCB has a number of components and there is no need to describe all of them. However, it is important to describe two.

A. The Board of Governors

The Board of Governors is appointed by the Lieutenant Governor in Council pursuant to Section 81 of the *Act*, which provides as follows:

81. (1) The governors of the board shall consist of
 - (a) 13 voting governors appointed by the Lieutenant Governor in Council on the recommendation of the minister as follows:
 - (i) one governor who shall be chairman;
 - (ii) 5 governors representative of workers;
 - (iii) 5 governors representative of employers;
 - (iv) 2 governors representative of the public interest, and
 - (b) the president and the chief appeal commissioner who are non-voting governors by virtue of their office.

- (2) The minister shall
 - (a) consult with the governors appointed under subsection (1)(a)(ii) and (iii) before making a recommendation to the Lieutenant Governor in Council with respect to the appointment of the chairman, and
 - (b) consult with the governors appointed under subsection (1)(a)(ii) and (iii) and the chairman before making a recommendation to the Lieutenant Governor in Council with respect to the appointment of the governors referred to in subsection (1)(a)(iv).
- (3) A voting governor shall be appointed for a term of up to 6 years and is eligible for reappointment or extension of his appointment.
- (4) The chairman may designate a governor appointed under subsection (1)(a)(iv) to act in the chairman's place during the chairman's temporary absence, and while so acting the designated governor has the power and authority of the chairman.
- (5) The voting governors shall be paid out of the accident fund
 - (a) remuneration in an amount determined by the Lieutenant Governor in Council, and
 - (b) reasonable and actual travelling and out of pocket expenses necessarily incurred by them in discharging their duties.

The powers of the Board of Governors are set out in Section 82:

82. The governors shall approve and superintend the policies and direction of the board, including policies respecting compensation, assessment, rehabilitation and occupational safety and health and
 - (a) shall
 - (i) select and define the functions of the president and the chief appeal commissioner,
 - (ii) review and approve operating policies of the board,
 - (iii) approve operating and capital budgets of the board,
 - (vi) develop policies to ensure adequate funding of the accident fund,

- (v) approve major programs and expenditures,
 - (vi) plan for the future of the board, and
 - (vii) enact bylaws and pass resolutions for the conduct of the business and functions of the governors, including, without limitation, bylaws with respect to
 - (A) the quorum for a meeting or class of meetings of the governors, and
 - (B) the manner in which their policies shall be published, and
- (b) may
- (i) establish and give direction to committees,
 - (ii) authorize the board to acquire and dispose of land and buildings, and
 - (iii) delegate in writing any of the powers and duties of the governors to the president, chief appeal commissioner or an officer of the board, subject to any terms and conditions set out in the delegation.

B. The Appeal Division

The Appeal Division is appointed pursuant to Section 85 which provides as follows:

85. (1) There shall be an appeal division of the board consisting of
- (a) a chief appeal commissioner appointed by the governors, and
 - (b) one or more appeal commissioners, appointed by the chief appeal commissioner, who are selected in accordance with the policies established by the governors.
- (2) Subject to the approval of the governors, the chief appeal commissioner may appoint part time or temporary appeal commissioners.
- (3) The chief appeal commissioner shall be appointed for a fixed term agreed on between the chief appeal commissioner and the governors and is eligible for reappointment or for extension of his appointment, but may be removed by the governors at any time for just cause.

- (4) An appeal commissioner other than the chief appeal commissioner shall be appointed for a term agreed on between the appeal commissioner and the chief appeal commissioner and is eligible for reappointment or for extension of his appointment, but may be removed by the governors at any time for just cause.
- (5) For the purposes of subsections (3) and (4), just cause does not arise in a case where an appeal commissioner makes a decision with which the governors do not agree with respect to an appeal.
- (6) Where an appeal commissioner resigns or his appointment terminates, he may carry out and complete his duties and responsibilities and continue to exercise his powers as an appeal commissioner, in relation to a proceeding in which he participated, until the proceeding is completed.
- (7) The chief appeal commissioner is responsible to the governors for the general operation of the appeal division and shall
 - (a) attend and participate as a non-voting member at meetings of the governors,
 - (b) implement the policies of the governors with respect to the administration of the appeal division, and
 - (c) preside at hearings or meetings of the appeal division.
- (8) The chief appeal commissioner may delegate in writing any of his powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

The powers of the Appeal Division are set out in Section 96 and Section 96.1. The relevant provisions, for the purposes of this appeal, are set out in Section 96 (6.1) and Section 96.1 which provide as follows:

96. (6.1) An employer who has received a notice relating to
- (a) an assessment
 - (b) a clarification
 - (c) a monetary penalty, or
 - (d) an apportionment or shifting of cost between classes
- under this *Act* not referred to in subsection (6) but designated in the policies of the governors, may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the

assessment, classification, monetary penalty or apportionment or shifting of cost between classes to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

96.1 (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

- (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
- (3) Where the chief appeal commissioner considers that the evidence referred to in subsection
(2) (a) is substantial and material to the decision, and
 - (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered, he may direct that
 - (c) the appeal division reconsider the matter, or
 - (d) the applicant may make a new claim to the board with respect to the matter.

There is no provision in the *Act* for an appeal directly from the Board of Governors to the Appeal Division. Any employer who receives a notice of assessment from the assessment branch may appeal to the Appeal Division any assessment, classification, monetary penalty, or an apportionment or shifting of cost between classes. The appeal may be allowed on grounds of error of law or fact or contravention of a published policy of the Board of Governors. The only basis for quashing a decision of the Board of Governors is where the decision is contrary to the *Act*. There is no provision in the *Act* for the Appeal Division to review policy decisions of the Board of Governors except to ensure that the decision is not contrary to the *Act*.

The Board of Governors is composed of representatives of employers, workers, and the public. It carries out investigations by obtaining reports and hearing submissions. It considers broad policy questions that affect the parties and the public interest. It is composed of 13 people representing various interests. This is the body best qualified to make policy decisions. The Appeal Division sits in banks of three and acts as a court of

appeal ensuring that the various sections of the WCB act within the law. The chair of the Appeal Division is a legally qualified person.

I find that the Appeal Division has no power to directly reverse a policy decision of the Board of Governors unless the policy decision is contrary to the *Act*.

IV Judicial Review of Administrative Decisions

Decisions of the Appeal Division are protected by a true privative clause. Section 96 provides:

96. (1) The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board on them is final and conclusive and is not open to question or review in any court, and no proceedings by or before the board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, nor shall an action be maintained or brought against a governor, officer, appeal commissioner or employee of the board in respect of an act, omission or decision done or made in the belief that it was within the jurisdiction of the board; and, without restricting the generality of the foregoing, the board has exclusive jurisdiction to inquire into, hear and determine. . .

The court has jurisdiction to review a decision of the Appeal Division where it acts beyond its jurisdiction or where the decision of the Appeal Division is patently unreasonable.

If the Appeal Division was reversing a policy decision made by the Board of Governors and substituting its own opinion, then it would be acting beyond its jurisdiction and this court will intervene to set aside any decision that is wrong on jurisdiction. If, however, the Appeal Division is making a legal decision and decides that the Board of Governors was wrong in law, this court will only intervene if the decision of the Appeal Division is patently unreasonable.

V Did the Majority of the Appeal Division Exceed Its Jurisdiction?

The applicants argue that the Appeal Division exceeded its jurisdiction by substituting its opinion for the opinion of the Board of Governors on a matter of policy. They argue that the Board of Governors has a responsibility to make policy. Although the Appeal Division said that it does not have the power to substitute its opinion on a matter of policy for that of the Board of Governors, the decision in effect does just that. They

argued that the Board of Governors had four policy options open to it and that in deciding that one of these policy options was not open, the Appeal Division exceeded its jurisdiction by invading the Board of Governors' jurisdiction to make policy.

I reject the jurisdictional argument. The Appeal Division recognized that the Board of Governors has jurisdiction to make policy and agreed that it has no right to substitute its opinion for the opinion of the Board of Governors on a matter of policy. The Appeal Division does have a responsibility to ensure that any decision of the Board of Governors does not conflict with the *Act*, whether it is a policy decision or not. In this matter, the Appeal Division held that the Board of Governors' decision conflicted with Section 42. I have no basis for looking behind the words of the Appeal Division to conclude that their real intent was to make a policy decision under the guise of making a legal decision.

It is my view that the decision of the Board of Governors was either contrary to the *Act* or it was not, and it does not matter whether it is considered to be policy or not. I conclude that the Appeal Division was deciding a legal question when it decided that the option that the Board of Governors chose in dealing with the unfunded liability was contrary to the *Act*. In other words, I find the Appeal Division was acting within its jurisdiction when it reviewed the decision of the Board of Governors. Therefore, the only basis for me to quash the decision of the Appeal Division is if the decision was patently unreasonable.

VI Summary of the Majority Decision of the Appeal Division

The majority decision of the Appeal Division turns on its interpretation of Section 37 and 42 of the *Act*. Section 37 provides as follows:

37. (1) The board may
 - (a) create new classes in addition to those mentioned in section 36;
 - (b) consolidate or rearrange any existing class; and
 - (c) withdraw from a class an industry or a part of a class or subclass included in it and transfer it wholly or in part to another class, or form it into a separate class.
- (2) In case of a rearrangement of the classes, or the withdrawal of an industry from a class, the board may make the adjustment and disposition of the funds, reserves and accounts of the classes affected that is considered just and expedient.

Section 42 provides as follows:

42. The board shall establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and where the board thinks a particular industry or plant is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry or plant is assigned, the board shall confer or impose on that industry or plant a special rate, differential or assessment to correspond with the relative hazard or cost of compensation of that industry or plant, and for that purpose may also adopt a system of experience rating.

I think the majority decision of the Appeal Division can be fairly summarized as follows:

- (1) Section 37 does not permit the Board of Governors to make a special assessment. It refers to the "adjustment and disposition" of the "funds, reserves and accounts." It appears to relate to the accounting function of allocating the subclass accounts when a rearrangement of the class takes place.
- (2) The statutory support for the imposition of the special assessment is found in Section 42.
- (3) The Board of Governors did not address its responsibility under Section 42 to impose a special rate where it thinks that a particular industry or plant is shown to be so circumscribed or conducted that the cost of compensation differs from the average of the subclass to which the industry is assigned.
- (4) Because the supermarkets' losses were significantly higher than the average of the subclass, the Board of Governors was obligated by Section 42 to set a rate which reflected that.

The essence of the Appeal Division's decision is that the Board of Governors was obligated to allocate the entire unfunded liability to the supermarkets and butchers by way of a special rate. The Appeal Division found that the Board of Governors did not do that and was therefore acting contrary to the *Act*.

VII Is The Majority Decision of the Appeal Division Patently Unreasonable?

All counsel agreed that to set aside the decision of the majority would require me to make a finding that the decision was patently unreasonable. That concept is not easy to apply. However, Iacobucci J. provided some guidance for understanding the concept in *Canada (Director of Investigation and Research) v. Southam Inc.* (1997), 144 D.L.R. (4th) 1 (S.C.C.), as follows:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at 963, [i]n the Shorter Oxford English Dictionary “patently”, an adverb, is defined as “openly, evidently, clearly”. This is not to say, of course, that judges reviewing a decision on the standard of patently unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1370, 74 D.L.R., (4th) 449, per Gonthier J.; see also *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1 S.C.C. No. 24724, February 27, 1997 [summarized 69 A.C.W.S. (3d) 221], at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

At the appeal all parties were fully represented by competent, intelligent and experienced counsel. A full hearing was heard. I was informed by counsel that no one argued or even thought of the possibility that Section 42 prohibited or limited the Board of Governors in the options that it could choose until it was raised by the Chair of the Appeal Division.

A plain reading of Section 37(2) and Section 42 makes it clear to me that Section 37(2) was intended to deal with a situation such as unfunded liability, and Section 42 was designed for the purpose of setting differential rates. Section 37(2) reads as follows:

(2) In case of a rearrangement of the classes, or the withdrawal of an industry from a class, the board may make the adjustment and disposition

of the funds, reserves and accounts of the classes affected that is considered just and expedient.

The Appeal Division's interpretation would deprive the Board of Governors of its discretion and is in direct conflict with Section 37(2) which allows the Board of Governors a discretion to allocate unfunded liability on rearrangement of the classes as it considers just and expedient. On the face of the record, the Board of Governors did precisely what the *Act* permits it to do. The resolution of the Board of Governors even tracked the words of Section 37(2). Pursuant to Section 37(2) it adjusted the accounts of the classes by allocating the unfunded liability pro rata among the three new subclasses. Then, pursuant to Section 42, the Board of Governors set rates which reflected the loss experience of each of the groups, i.e.

supermarkets and butchers	\$2.57 per \$100 of payroll
department stores	\$1.36 per \$100 of payroll
retailers	\$1.10 per \$100 of payroll

Section 42 says nothing about allocating unfunded liability or adjusting accounts. It speaks only to setting rates.

If the Appeal Division's decision were allowed to stand, the Board of Governors would no longer have the discretion provided in Section 37(2).

Each section of a statute must be given meaning and it is improbable that the legislature would have intended that a discretion would be given in one section and entirely taken away in another section. The *Act* should be interpreted in such a way as to give a logical and purposeful meaning to each section.

In my view, the only logical interpretation of these two sections is that Section 37(2) allows the Board of Governors to allocate past losses or reserves or unfunded liability as it considers just and expedient, and Section 42 was designed to set rates for the future based on loss experience. This is exactly what the Board of Governors did.

The Appeal Division decided that the second part of Section 42 requires the Board of Governors to allocate all unfunded liability to the group that created it.

The effect of this interpretation is that any time there is a re-classification and a plant or industry has a loss experience that is greater than the average of the class or subclass, the Board of Governors, as a matter of law, would be obligated to collect those losses from that plant or industry. If a particular plant had a very large loss, the Board of Governors would be compelled by Section 42, without discretion, to collect that loss from that particular plant.

In my view, this interpretation flies in the face of the *Act* and attacks the whole notion of modified collective liability which is at the heart of the *Act*.

I conclude that the majority decision of the Appeal Division is patently unreasonable and should be set aside.

The decision of the Appeal Division is quashed.

F. Maczko J.

In the Supreme Court of British Columbia

The Judicial Review Procedure Act, R.S.B.C. 1979, Chapter 205

and

In the matter of an application by Frances Elizabeth Kovach to quash the decision of the Appeal Division of the Workers' Compensation Board rendered on October 6, 1993 pursuant to Section 11 of the *Workers' Compensation Act*

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUDDART

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Heard at Vancouver

February 15, 1995

The question underlying this petition is whether a claim for medical malpractice in the treatment of a work-related injury may be barred by section 10(1) of the *Workers Compensation Act*. Dr. Singh says that a decision of the Appeal Division of the Workers' Compensation Board has that effect. Mrs. Kovach says that decision was patently unreasonable and asks that the certificate of the Board be set aside or remitted to the Board with directions as to the proper interpretation of the relevant sections of the *Act*.

The facts are not in dispute.

Mrs. Kovach injured her back on June 15, 1987, in the course of her employment as a long-term care worker at Dunrovin Park Lodge in Quesnel, B.C. She applied for and received compensation under the *Act*.

In late July, 1987, her family doctor referred Mrs. Kovach to Dr. G.S. Singh, a neurosurgeon in Kamloops, B.C., because of continuing complaints of back pain. He saw her on July 28, 1987. An August 6, 1987 CT scan showed a central and right sided

disc protrusion at L5-S1. On August 12, 1987, Dr. Singh performed a lumbar laminectomy and bilateral removal of the L5-S1 disc with interbody fusion at Royal Inland Hospital. He did so without prior approval from the Board. However, when Dr. Singh billed the Board for Mrs. Kovach's surgery, the Board paid his account. He paid the money to GMAS Holdings Inc. of which he was a shareholder and employee. GMAS is registered with the Board.

Several medical practitioners formed the opinion that the treatment provided by Dr. Singh was substandard, that the surgery was performed without Mrs. Kovach's informed consent, and that the type and timing of the surgery were inappropriate. Mrs. Kovach started an action against Dr. Singh and Royal Inland Hospital on July 31, 1989, alleging negligence in the performance of the surgery and the associated treatment. Dr. Singh applied for a certificate under section 11 of the *Act*.

On October 6, 1993 the Appeal Division of the Board concluded that "The Plaintiff . . . was, at the time the cause of action arose, on or about the first week of August, 1987, a worker within the meaning of Part 1 of the *Act*." and that "[t]he injuries suffered by the Plaintiff, . . . arose out of and in the course of her employment." They also concluded that Dr. Singh was a worker and that his conduct which "allegedly caused the breach of duty of care" arose out of and in the course of his employment.

Mrs. Kovach says that the decision of the Board is patently unreasonable insofar as the Board decided that the injuries she suffered by the alleged negligence of Dr. Singh in August, 1987, arose out of and in the course of her employment. Her petition sets out two grounds:

1. The Board failed to apply the principle of *novus actus interveniens*.
2. The Board fettered its discretion by adopting a fixed policy without considering the individual merits of the case and without a willingness or ability to depart from that policy in appropriate cases.

Discussion

Counsel agree that the law applicable to the review of a decision of the Board is well-settled. For this court to override the privative clause contained in the *Act*, its decision must be ". . . so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review." (*CUPE local 963 v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227 at 237.) Curial deference is at its highest level with the Board.

Mr. Stewart did not pursue seriously the argument contained in his written brief that Mrs. Kovach was no longer a “worker” when Dr. Singh caused injury to her back. Mrs. Kovach says she was simply a patient, two months after the injury. But were she benefitting from non-negligent treatment, Mrs. Kovach would be seeking compensation from the Board, as indeed she did, at least before she became aware of the deficiencies in her treatment, on the basis that such treatment was a compensable consequence of a work-related injury. Clearly Mrs. Kovach is a “worker” for the purpose of sections 5(1) and 11 of the *Act*.

The real issue facing this court is whether to set aside the impugned decision, that the injury giving rise to the cause of action against Dr. Singh (the second injury) “arose out of and in the course of her employment” because, it cannot be rationally supported by the relevant legislation and facts.

The *Act* provides a comprehensive scheme of compensation for work-related injuries as is apparent from these key provisions:

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

. . .

- (4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall 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 shall be presumed that it arose out of the employment.

. . .

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

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

...

- (5) If after trial, or after settlement out of court with the written approval of the board, less is recovered and collected than the amount of the compensation to which the worker . . . would be entitled under this Part, the worker . . . is entitled to compensation under this Part to the extent of the amount of the difference.

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

- (7) If, in an action brought by a worker . . . or by the board, it is found that the injury, . . . was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss or damage caused by that negligence shall be determined although the employer or worker is not a party to the action.

...

11. Where an action based on . . . personal injury. . . is brought, the board shall, on request by the court or by any party to the action, *determine any matter that is relevant to the action and within its competence under this Act*, and, without limiting the generality of the foregoing, may determine whether

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

- (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of this Part, and shall certify its determination to the court.

(emphasis added)

To Mrs. Kovach and undoubtedly to many residents of this province, the combined effect of section 10(1) and the Board's determination under section 11 will seem clearly wrong. They ask why a surgeon or other professional person should be protected by legislation clearly designed to ensure compensation in the workplace for injuries suffered in accidents or as the result of the negligence of an employer or co-worker, why employers should pay for such negligence rather than the professional person who can insure himself from the substantial fees he is paid for his services?

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. It seems clear that the court's task on judicial review of a determination is not to look at its ultimate consequences and arrive at a policy decision that the Board is a spider-like creature that has pulled into its web one unwilling victim too many. Or read the other way, given succour to an undeserving bug. The court's task is simply to enquire whether a rational basis exists for the decision. "The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at the result." *Paccar of Canada Ltd. v. CAIMAW*, [1989] 2 S.C.R. 983 at 1004. ". . . [C]ourts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of the tribunal cannot be sustained on any reasonable interpretation of the facts or of the law." *Nat'l Corn Growers Canadian Import Tribunal* (1990), 74 D.L.R. (4th) 449 (S.C.C.) 481. See also *Canada (A.G.) v. Public Service Alliance of Canada* [1993] 1 S.C.R. 941.

The Board's Determination

The Board first concluded that any injury caused to Mrs. Kovach's back during treatment or surgery for her compensable back injury was also compensable. That decision under section 5(1) is not disputed. Nor is the decision that the words "arose out of, and in the course of, his employment" in section 11(b) must be interpreted to the same effect as the words "arising out of and in the course of the employment" in section 5(1). Mrs. Kovach says, however, that the "injury" Dr. Singh caused did not arise out of and in the course of her employment." It was simply a "compensable consequence" of the original injury.

This distinction was recognized in Decision No. 152 of the Board (1975) (*Workers' Compensation Reporter*, Vol. 2: p. 186.) That decision was a directive dated November 6,

1975 written “to clarify the position with regard to the circumstances in which the subsequent injury will also be compensable.” That directive included these two relevant provisions:

1. FURTHER INJURY ARISING DIRECTLY FROM TREATMENT

Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable. For example, if a worker is undergoing surgery for a compensable injury and some mishap in the process of surgery causes further injury, that is also compensable.

2. FURTHER INJURY AT THE PLACE OF TREATMENT

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.

After setting out other policies regarding travel injuries, the directive concluded:

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.

The concluding paragraph of Decision 152 was not included in the Claims Manual. The two quoted provisions are included as Item #22.10.

In reaching its determination in this matter, the Board considered the view expressed in that paragraph in the light of policy items contained in the Claims Manual concerning other activities that might not be considered to be related to work or productive activity, that are not within the control of the employer, but are considered to be in the course of employment or arising out of it and it looked at a variety of potential consequences to the compensable work injury found under this general item.

Item #22.00 “Compensable Consequences of Work Injuries”

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.

Then the Board concluded (at page 6):

“A review of the referenced policy indicates that the requirement of ‘arising out of and in the course of employment’ has been given a broad interpretation by the Board. While Decision No. 152 raised a possible distinction between original and subsequent injuries, the Claims Manual, which is a more recent statement of the published policy of the Governors, does not refer to any such distinction. Nor can we find support for the distinction in any other material.

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.”

The Board found support for this conclusion in the decisions of the Court of Appeal in *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.) and of this court in *Frandle v. Mackenzie* (1988), 47 C.C.L.T. 30 (B.C.S.C.). Both of these cases involved injuries during treatment of a compensable injury in a hospital that worsened the worker’s condition. It concluded its discussion with its view of the sound policy considerations behind its decision saying (at page 6-7):

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 Arguments

Counsel for Mrs. Kovach says that the Appeal Division fell into error when it failed to appreciate that their role was to determine if Mrs. Kovach's new injury arose out of her employment as a worker, or if they did appreciate that role, then they erred in ignoring the alleged negligence. At the root of their error, he says, is their failure to appreciate that Mrs. Kovach is complaining about a second injury caused by Dr. Singh's negligence, not about an aggravation of an existing condition caused by medical treatment and not about a direct consequence of a compensable injury.

The distinction Mrs. Kovach sought to have considered was recognized in *Mercer v. Gray*, [1941] O.R. 127 (C.A.). In dealing with an intervening medical error, Mr. Justice McTague said (at 130-131) ". . . if reasonable care is used to employ a competent physician or surgeon to treat personal injuries wrongfully inflicted, the results of the treatment, even though by an error of treatment the treatment is unsuccessful, will be a proper head of damages," but if the treatment is "so negligent as to be actionable" it becomes an actionable mistake or a "*novus actus interveniens* and the Plaintiff would have his remedy against the physician or surgeon".

The Board says that, right or wrong, it is entitled to curial deference for a decision made at the heart of its specialized jurisdiction because its determination is rational and can be supported by the facts and the relevant legislation. The fact that Mrs. Kovach's position may be equally or more tenable does not give this court the right to impose it on the Board.

Discussion

It is difficult to imagine a question more central to the administration of the legislative scheme or more at the heart of the Board's jurisdiction than the question of whether a person is a worker under Part 1 of the *Act* entitled to compensation for an injury. In any event the matter is well-settled by the Court of Appeal. See *Smith, supra, Bradshaw v. Herman (B.C.)*, [1985]1 W.W.R. 279 (B.C.C.A.), and *Murphy v. Dowhaniuk* (1986), 7 B.C.L.R. (2d) 335 (C.A.).

The conclusion of the Board that the second injury allegedly caused by Dr. Singh to Mrs. Kovach was, at least in part, a direct consequence of the injury she suffered at work and thus compensable under section 5(1) as an injury arising out of her employment can be rationally supported by the legislation and the evidence. Once that conclusion was reached, the Board's determination under section 11 followed as the only possible rational outcome of Dr. Singh's request for a certificate.

Had Mrs. Kovach not suffered an injury at work, she would not have undergone the surgery. It was because of the injury that she went to Dr. Singh for treatment. That treatment included the surgery in question. So, it is not patently unreasonable to say that, whatever happened during that treatment, negligent or not, arose out of the course of her employment.

The phrase "arising out of and in the course of the employment" is not defined in the *Act*. However, section 5(4) creates a statutory presumption, if an injury arises out of the course of employment it is presumed to have arisen in the course employment.

If this court were to impose its view of causation on the Board, it would be doing that which the legislature has clearly said it cannot do, to substitute its judgment for that of the body to which the legislature gave decision-making power.

In arriving at that conclusion I have not failed to have careful regard for the comments of the Court of Appeal in *Smith, supra*. That decision left open the question raised on this judicial review. Who may decide whether a loss arising from a "second injury" (from alleged negligent treatment) rather than the "first injury" (from the workplace accident) can be compensated as an "injury arising out of and in the course of employment"? The legislation permits the conclusion that the Board may determine

that issue in the course of reaching a determination under section 5(1) or under section 11.

If the Board, as it did here, concludes that the loss arising from the second injury is compensable as a direct consequence of the first injury, it is making a finding that the first injury contributed to the loss arising from the second injury. It may be that decision about causation is wrong, but it is not irrational. The Board does not agree with the Ontario courts that have considered a subsequent act of negligence as a *novus actus interveniens*. It considers the "single link" to which Mr. Justice Carrothers referred in *Smith*, the injured back, a sufficient link to put Mrs. Kovach in the course of her employment when she sat in Dr. Singh's office and lay on the operating table. The Board is entitled to take that view.

Conclusion

With regret the petition is dismissed

March 6, 1995
Vancouver, B.C.