

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 84  
(25 January 2008)**

**Jessieline C. Chang, Paulynn  
C. Chang, Michael C. Chang  
and Mark C. Chang**

**v.**

**Asian Development Bank**

**Florentino P. Feliciano, President  
Arnold M. Zack, Vice President  
Claude Wantiez**

1. The Applicants in this case allege failure by the Bank to meet the requisite standard of care in relation to its selection, management and supervision of the Bank's in-house medical facility operated by Associated Medical and Clinical Services Inc. ("AMCSI"). They seek US\$4,000,000 in actual and proximate damages, and request that the Bank take further steps to ensure rectification of systemic failures in the Bank's Medical Services Plan and that appropriate action be taken against AMCSI.

## **I. THE FACTS**

2. The initial Applicant in this case, Paul Chang, joined the Asian Development Bank (the "Bank" or "ADB") on 1 March 1990. The evidence shows that from 2001 to 2005 he underwent annual physical examinations at the Bank's in-house medical facility operated under contract by Associated Medical and Clinical Services Inc. ("AMCSI"). The chest x-rays taken during those five annual examinations reported "no significant chest findings", although on 20 January 2005 he was advised to see an ear,

nose and throat specialist for a persistent cough. On 3 March 2005 he consulted a cardio-pulmonary specialist at the Cardinal Santos Medical Center who detected no cancer. On 5 March 2005 he visited St. Luke's Medical Center where he underwent x-rays, lung perfusion scan and lung ventilation scans which procedures also failed to detect the lung cancer but which resulted in his symptoms being diagnosed as due to pneumonia in the left lower lobe and Kobe's infection in the right upper lobe of his lungs. Thereafter on 3 April 2005, he returned to Cardinal Santos Medical Center for further x-rays which again did not disclose the lung cancer. Rather it was only after a CT Scan that the specialist diagnosed the Applicant with Inoperable Stage III-B (IV) Lung Cancer, and he was then hospitalized for surgery to help his breathing. On 22 May 2005, he initiated a complaint with the Budget, Personnel and Management Systems Department (BPMSD) over what he claimed to have been the Bank's failure to have in place an adequate system to check the quality of the medical provider AMCSI, or to ensure that misdiagnosis was minimized, and over its failure to detect and correct AMCSI's consistent misreading of his annual x-rays which had failed to disclose his lung cancer over five consecutive years.

3. On 15 June 2005, he retired from his Bank position as a Principal Education Specialist. The Bank responded by asking how it could assist. Mr. Chang on 11 July 2005 asked the Bank to pay him US\$4,000,000 in compensation to cover medical costs, lost income due to his anticipated early demise, remuneration for pain and suffering, and the monetary value of accumulated sick leave to which he would have been entitled had he been correctly diagnosed, and for the imposition of punitive measures on AMCSI.

4. On 23 August 2005, the Bank declined his financial claim and after a failed conciliation effort, on 22 November 2005 adhered to its earlier position that under Administrative Order (“A.O.”) No. 3.10, and in particular, paragraph 5.1, it does not assume responsibility for the acts and/or omissions of its medical and dental retainers, and advised Mr. Chang to approach AMCSI with his claim.

5. On 28 December 2005, Mr. Chang appealed to the Appeals Committee protesting the “Bank’s systematic failure to manage and supervise medical services according to a reasonable standard and its failure to administer the AMCSI contract” which he faulted for the late discovery of his lung cancer. On 6 April 2006, the Appeals Committee denied his claim but proposed that the President consider making an *ex-gratia* payment. On 22 May 2006, Mr. Chang was advised that the President declined to make an *ex-gratia* payment inasmuch as the Appeals Committee findings did not attribute any responsibility to the ADB for Mr. Chang’s medical condition.

6. The Application in the present case was filed with the Tribunal on 4 August 2006. On 6 October 2006, the Bank submitted its Answer with a request for an *in-camera* review of certain documents “without delivering them to the Applicant”. On 11 October 2006, the Applicant passed away leading to a request by his widow, Jessieline C. Chang, and his children, Paulynn C. Chang, Michael C. Chang, and Mark C. Chang, for an Order substituting them as Applicants. That request was granted on 12 December 2006.

7. On 1 February 2007, the current Applicants filed an objection to the Bank's request for confidentiality and *in-camera* inspection of any documents on 7 March 2007. The Tribunal declined the Bank's request for confidentiality and *in-camera* review. On April 4, 2007, the Bank submitted "Respondent's Submission Pursuant to the Tribunal's Order dated 7 March 2007", incorporating by reference, its 6 October 2006 Answer. It sought the Applicants' undertaking not to share the documentation originally submitted for *in-camera* review with anyone other than the Applicants and their designated legal representatives. That assurance was provided and the Tribunal received and considered Respondents documents as a revised Answer.

8. On 30 July 2007, the Applicants submitted "Comments" on the Respondent's revised Answer which comments the Tribunal considered as the Applicants Reply to that submission. On 17 September 2007, the Respondent submitted its Rejoinder completing the preliminary submissions for consideration by this Tribunal.

### **Principal Contentions of Applicant and Respondent**

#### *Applicants Principal Contention*

9. In his Application, the deceased asserts that he complied with the Bank's requirement that all staff undergo an annual physical examination including chest x-rays, that he used the services of AMCSI (the organization engaged, supervised and managed by the Bank and its Medical Director) to conduct such annual physical examinations including annual chest x-Rays at the Bank's in-house medical facility from 2001-2005 and that AMCSI reported "No

significant chest findings.” In April 2005, just three months after his last physical examination by AMCSI at the ADB's medical facility, he was diagnosed with inoperable Stage III B(IV) lung cancer by a team of physicians at the Cardinal Santos Medical Center. The medical team opined that the lung cancer had already existed for at least a year prior to the April 2005 diagnosis and told the deceased that without treatment he would have three to six months to live, which prognosis could be extended to nine months by chemotherapy and to 13 months by chemotherapy and radiotherapy.

10. On 9 May 2005, a review at the Makati Medical Center of the earlier AMCSI x-rays, reported that:

The x-ray plate of 2001 already showed “suspicious infiltrates at the right upper lung” while that of 2002 showed “fibro nodular infiltrates at the right upper lung” indicative of tuberculosis.

The x-ray of September 2003 reportedly showed “an ill-defined density in the left lower lung” while that of February 2004 showed “some increase in the density at the left lower lung” and “also some fullness of the left parahilar area”.

The January 2005 x-ray showed “indistinct borders of the lower lung mass, an “increase in the left parahilar fullness”, and “increased density now seen at the right Paratracheal area.

Following his April 2005 diagnosis, the deceased underwent chemotherapy, radiotherapy, oral chemotherapy, and immunotherapy, and on 22 May 2005, filed the grievance which is here appealed to this Tribunal.

11. The Applicants assert that the ADB has an implied contractual duty to its officers and employees to exercise the reasonable care of a prudent employer in the selection of a medical service provider as well as to maintain sufficiently close scrutiny to ensure that its medical service provider exercises reasonable care in the proper and adequate delivery of medical services to the Bank officers and employees. The Applicants cite the decision of this Tribunal in the case of *Bares*, Decision No. 5 [1995] I ADBAT Reports 53, in support of their position and assert that the Bank has breached this duty.

12. The Applicants further assert that the standard of care to which an ADB staff member is entitled is not reduced by the Bank's reliance on an independent contractor or by any contractual disclaimer language in the medical retainers plan seeking to free itself from responsibility for diagnoses made or treatment given by that provider. In the light of the Bank's stress on early detection, it was obligated to assure that annual x-rays are properly performed and professionally interpreted by its medical service provider to avoid misdiagnoses. Had the deceased's x-ray plates of September 2003 and February 2004 been read accurately, it is argued, his treatment could have started earlier, and if his January 2005 x-ray had been read competently, his condition could have been ascertained well before he began coughing up blood on 8 April 2005. Further, if his x-rays of March 2001 and July 2002 had been correctly read, the Applicants posit, subsequent x-rays would have been read more carefully and more thorough tests initiated earlier.

13. The Applicants argue that if the Bank were not held liable for that requisite standard of care, the Bank would be able to shirk responsibility for the medical services. This would make the Bank's duty of reasonable care of a prudent employer in selecting and supervising its medical service provider illusory and mere lip service. The deceased in his Application noted that employees have no choice or control over the Bank in its selection and supervision of the medical service provider, and that only the Bank can supervise AMCSI to make sure it delivers the required levels of services. Its power and control over AMCSI is demonstrated by its directive to dismiss the radiologist who had examined Mr. Chang's x-rays from 2001 to 2005. Since the medical services were made available for his benefit as an employee, Mr. Chang argued that he had the legal right to demand close supervision to ensure the provider exercised reasonable care in conducting examinations.

14. The Applicants argues that the conclusion of the Appeals Committee finding no evidence of abuse of discretion, arbitrariness, discrimination, improper motivation or violation of fair and reasonable procedures in the selection and award of the AMCSI contract does not detract from the need for the exercise of more than perfunctory adherence to formal procedures in the selection of the medical provider. The Applicants cite the Appeals Committee findings of failure of the Bank to exercise the standard of care required of a prudent employer including inadequate monitoring and evaluation of performance through its once a year Performance Evaluation Reviews, its inadequate assessment of complaints, the questionable ethical standards in the selection of the wife of the ADB's Medical Director as a public relations consultant; the absence of redundancies in tests to overcome human error and frailties, the absence of checks and balances to verify diagnoses, its tardy response to notification of errors in misreading x-ray films,

its failure to implement the recommendations of other specialists for a lateral view in the deceased's x-ray examinations, and its other inactions including failure to impose punitive measures on physicians who had misread Mr. Chang's x-ray plates.

15. The Applicants challenge the Bank's claim that it exercised reasonable care in its selection of the medical service provider, asserting that it placed excessive weight on the technical aspects of the bid without obtaining the highest quality medical services for its staff members and families. They assert that choosing between only two companies as prequalified falls short of the required competitiveness, that both bidders garnered low scores in critical areas of their bid proposals, that the successful bidder was only the better of the two rather than the best of many, that it should have procured additional bidders including hospitals rather than only clinics, that there is no evidence of AMCSI's being an accredited member of industrial, medical and occupational safety and health associations or of its staff having undergone requisite training in those areas, and that there is no proof that AMCSI's personnel had undergone the necessary training in the use and operation of equipment in the ADB medical facility.

16. The Applicants further challenge the adequacy of the annual Performance Evaluation Reports arguing that four evaluations over 46 months are insufficient to constitute "a careful consideration" of services rendered, that there is no showing of the ADB Medical Director actually having the close involvement with, or supervision of, AMCSI's medical personnel, that such Reports are superficial and inadequate, that the ADB Medical Director's close connection with AMCSI through his wife (who was a public relations consultant to AMCSI) constitutes a conflict of interest, and that the cited "minor issues" are in fact indicative



of serious problems of communication, job performance, attendance and punctuality. The Applicants assert that the minimal number of responses by staff to the Retainer Clinical Survey is hardly evidence of satisfaction, noting that such issues should be responded to by expert peer physicians rather than laymen, and that the survey covered too short a period with too few respondents to constitute a representative sample. The Applicants also challenge the position that AMSCI has always taken remedial action in cases of complaints, arguing that that view only underscores their failure to take adequate preventative and precautionary measures to avoid injury to patients particularly in relation to double reading of chest x-ray films by a radiologist and by a patient's attending physician as well, emphasizing that from 2001 to 2005 there has been no showing of any supervision in the examination, diagnosis and treatment of Chang.

17. In closing, the Applicants protest the repeated misdiagnosis of Mr. Chang's grave condition being treated as a mere contingency that may be met by the simple expedience of a benefit package and the Bank's requiring litigation to compel it to live up to its contractual duties.

*Respondent's Principal Contentions*

18. The Bank notes that staff are encouraged but not required to take annual physicals, that such physicals are paid for by the Bank and that staff members have the option of having such examinations done at the AMSCI-operated Medical center or at another local medical retainer facility. It acknowledges that upon re-evaluation of the x-ray films taken in September 2003, February 2004, and January 2005, there appeared to be a density at the lower

left lung level which, because of its sudden growth between July 2002 and September 2003, had not been recorded in the earlier reports noting that it thereafter remained relatively stable in the last three x-ray films. The Bank further acknowledges that it introduced a new practice of double x-ray readings after re-reading Mr. Chang's x-ray plates, and that it replaced the radiologist involved.

19. The Respondent contends that the Applicants' claim falls outside the jurisdiction of the Tribunal, that Article II of the Statute, limits proceedings to claims in contract between the Respondent and staff members and that for the Tribunal to have jurisdiction, the Applicants must allege a violation of a right embodied in the terms of appointment. It cites Section 5 of A.O. 3.10 which specifies that

... responsibility for rendering the services in accordance with the medical and dental retainer plans lies within the medical retainer and Asian Development Bank assumes no responsibility for the diagnosis made or for the treatment given by the medical retainer.

Although the Applicants assert that their claim is based on the Respondent's failure to properly manage and supervise the medical services offered to staff members and does not pertain to AMCSI's diagnoses, the Applicants rely on the Tribunal's finding of an implied duty of reasonable care by the Respondent in the *Bares* case. The Respondent argues that the core of the Applicants' claim is that AMCSI was negligent in its failed diagnosis at the earlier stages of his condition, and that here, unlike in the *Bares* case, there is an explicit provision precluding the Applicants' claim of misdiagnosis and thus the implied contractual obligation theory in *Bares* was not available to the Applicants. Their claim can not therefore be based on, or implied from,

the terms of Mr. Chang's contract of employment. According to the Bank the proper course of action would have been to bring a claim directly against AMCSI as the service provider who was allegedly negligent, a course of action that was not pursued by the Applicant.

20. The Respondent further contends that the express terms of Mr. Chang's appointment bar his claim for financial compensation since under Section 5.1 of A.O. 3.10, governing the Medical retainer plan, the Bank is merely providing an extra service to facilitate staff member's access to basic medical services. It notes that staff members have a choice of using the services provided under the medical retainer plan at ADB's medical facility, or using the services of another medical retainer facility elsewhere, which use would also be covered by the Respondent's Group Medical Insurance Plan (GMIP). This circumstance distinguishes this case from the *Bares* decision which involved the provision of security services which were a component of physical security of those working for the Bank. It argues that the standard of reasonable care of an employer in engaging a contractor to protect staff is distinguishable from the duty of care in hiring a contractor to provide complimentary medical services to Bank staff. Section 5.1 of A.O. 3.10 specifically excludes liability of the Bank for the retainers' diagnosis and treatment, with claims of liability to be directed to the retainer, not the ADB. Specifically, the Respondent argues that a monetary claim of US\$4,000,000 against the ADB as the party with deeper pockets is inappropriate when the alleged wrong doing lies at the feet of a provider with lesser means. According to the Bank the citation of U.S. law to support the claim is likewise inappropriate, irrelevant, and properly excluded from the law of international agencies.

21. The Respondent contends that it exercised reasonable care in its selection and supervision of the medical retainer, and that the *Bares* Decision rejected the concept of “absolute liability in contract for injury suffered by a staff member” and held only that “the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety while on the Bank’s premises. The Bank asserts that the burden of substantiating the claim of failure to exercise reasonable care and diligence in selecting and supervising AMCSI is on the Applicants who have failed to meet that burden. It emphasizes that it fully examined the six companies which submitted prequalification documents on time out of the twelve companies expressing interest in providing medical and dental services, and finally narrowed the choices to two. The Bank states that it gave exceptionally high weighting to the technical bid which it considered far more important than the cost thereof, that the final bidding being limited to two, demonstrates that there were only two of the original contenders who could meet ADB's very demanding minimum requirements, that AMCSI rather than garnering low scores in that final competition had maximum scores on experience in in-house medical clinic management, numbers of full time physicians and specializations, number of back-up doctors, years of experience for nurses, technicians and doctors and that AMCSI was clearly more technically qualified to provide the requisite services. The Bank emphasizes that staff members have a wide range of choices of medical providers with direct billing arrangements with major Metro Manila hospitals at an 80% reimbursement rate, as well as other clinics, and that AMCSI personnel have the appropriate training for a facility serving as a private practice servicing the public rather than providing industrial medicine or occupational safety and health services. The Bank discounts the Applicants’ challenge to the ADB Medical Doctor as merely an armchair doctor by pointing out that he regularly and diligently supervises AMCSI staff interacting 20 or 30 times per day with

doctors and nurses, that he dedicates 30% to 40% of his working hours to such supervision, that he frequently discusses difficult diagnoses with AMCSI physicians referring to outside specialists as necessary, that he properly responds to problems as they arise, that he evaluates the performance of AMCSI staff as appropriate and that ADB staff recently participating in a poll have indicated their satisfaction with AMCSI diagnosis (84%), prescribed treatment (84%) and quality of service (87%).

22. The Respondent states that reading of x-rays is not an exact science, that precisely diagnosing lung tumors from x-rays alone is frequently impossible and that even if, as the Applicants allege, doctors in April 2005 informed Mr. Chang that the malignant tumor had been there for at least a year, that does not establish that it would have been there in February 2004, let alone September 2003. It adds that even when he was examined for his chronic cough in March 2005, and given a further chest x-ray and a lung perfusion scan and a lung ventilation scan, he was only prescribed antibiotics and anti-tuberculosis drugs, without any diagnosis of a malignant tumor or ordering of further tests, even at that stage. The three different Metro Manila medical service providers to which he went after the 2005 AMCSI x-Ray, including two hospitals, all failed to detect Mr. Chang's lung cancer, which was only discovered even later as a result of a CT Scan. There is thus no persuasive evidence, that the failure of early diagnosis was the proximate cause of the Applicant's cancerous condition.

23. The supervision of AMCSI by the Respondent has been based upon annual performance reviews against the Work Performance Standard set forth in Article VI of the

Bank's AMCSI contract, including immediate re-evaluation of issues when shortcomings or incompetence in personnel or procedures were reported as in this case. The Respondent discounts the specific charges regarding its supervision noting that the wife of the ADB's medical Director did not become a Public Relations Consultant for AMCSI until long after AMCSI was selected and even subsequent to the first extension of its contract and certainly subsequent to the alleged problems in diagnosing the earlier x-rays. It also notes further that the initial double reading of chest x-rays is not common in comparable hospitals, that lateral x-rays or CT Scans while helpful are not common practice since the additional benefits therefrom may not outweigh the high cost and additional health risks associated with considerable exposure to radiation that they entail. It discounts the idea of punishing the radiologist involved in reading the Applicant's x-rays on the grounds that no formal finding of negligence or fault has been made in the appropriate forum and claiming that the removal of the radiologist in this case did have a punitive and educational impact. It asserts that it responded positively to the divergence between its x-ray readings and those of the Cardinal Santos Medical Center radiologist by instituting the current system of double reading of x-rays thus exceeding the standards for x-ray reading at many leading Asian hospitals.

24. Finally, the Respondent challenges the relief sought by the Applicants pointing out that the demand for US\$4,000,000 for medical expenses, for loss of future income, for pain and suffering, and for accumulated sick leave exceeds the statutory relief permitted under Article X which limits financial relief to three years basic salary of an applicant. Regarding the claim for medical expenses, the Bank cites the limits set forth in the Post Retirement Group Medical Insurance Plan as precluding any award of compensation for medical expenses even assuming

that the Respondent may be somehow responsible to the Applicants. Any entitlement to compensation for loss of future income is also governed by the Post Retirement Group Life Insurance Policy, while, according to the Bank, any claim for pain and suffering is based on tort rather than contract, and is thus outside the authority of this Tribunal. It argues that any claim for monetary value of accumulated sick leave is also speculative and without merit in the absence of any evidence to indicate that an earlier diagnosis would necessarily have led to Mr. Chang's taking early or extended sick leave. It notes that the deceased, as a participant in the GMIP had all medical costs resulting from his lung cancer (beyond the stop loss of \$3,000) covered for a total cost of over \$80,000, that he was entitled to an annual pension of \$57,586.40 despite having only 15 years of service, that the commuting of his Staff Retirement Plan (SRP) pension meant a payment of \$778,983.08 in Discretionary Benefits to his designated beneficiaries, and that under ADB procedures he was able to apply for maximum post retirement coverage even after his lung cancer had been discovered.

25. As to the President's decision to deny an *ex-gratia* payment, the Respondent asserts that the legal relationship between the Bank and the original Applicant as expressed in his terms of appointment does not give rise to any such responsibility on the part of the Respondent. Further it would raise implications of unequal treatment of staff and threaten the feasibility and sustainability of the medical retainer plan in the longer term. The claim is in the Bank's view without legal basis and should be denied.

## **II. FINDINGS**

26. The Authority of this Tribunal is established under Article II of the ADBAT Statute as follows:

The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges non observance of the contract of employment or terms of appointment of such staff member. The expressions “contract of employment” and “terms of employment” include all pertinent regulations and rules in force at the time of alleged non observance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.

Included among the benefit plans provided to the Applicant is access to the Medical and Dental Retainer Plans established by A.O. 3.10.

27. A.O. 3.10, Section 3 Coverage, in describing the nature and extent of services provided under the Retainer Plans notes that

In general, it seeks to provide staff members basic and routine services such as annual physical examinations, periodic check ups and x rays, routine medical consultations, diagnosis and other treatments, referral to specialists, laboratory tests, inoculations and routine dental care.

In this case, the Applicants seek relief from the ADB for the alleged failure of those responsible for administering the Medical Retainer Plan to discover in a timely fashion irregularities in chest x-rays, which the Applicants contend resulted in late detection of the deceased’s lung cancer.



A.O. 3.10, Section 5.1 however is explicit in excluding the Respondent from responsibility for the acts of those providing services under the Plan. It specifies that

The responsibility for rendering the services in accordance with the Medical and Dental Retainer Plans lies with the Medical Retainer and ADB assumes no responsibility for the diagnosis made and for the treatment given by the Medical Retainer.

28. The Applicants in this case, instead of proceeding against the Medical Retainer, undertake to pursue their action against the ADB on the basis of an alleged failure to properly manage and supervise the medical services provided under the deceased's contract of employment invoking an implied breach of that contract of employment, thus presumably creating a liability of the principal for the acts of an entity which is contracted to provide a particular service. When the Bank undertakes to provide a service or benefit to its staff, it can not simply immunize itself from the responsibility to exercise all necessary and proper care in providing that service or benefit by simply outsourcing the supply thereof or by designating an independent contractor to render that service and direct the staff member to that contractor for any relief, wiping its hands of all responsibility for any errors or omissions. Since the provision of access to medical and dental services to staff members is an undertaking of the Bank, A.O. 3.10 para. 5.1 does not shield the Bank from liability for errors and omissions proximately due to its failure to exercise all necessary and proper care in selecting and supervising the activities of the providers of those services

29. In the present case the Bank states that the provision of access to medical and dental services to staff is not a stipulation of the employment contract or of the appointment of a

staff member. The Tribunal does not believe it is necessary for present purposes to determine whether or not the Bank has a contractual obligation to provide access to medical and dental services to its staff. In point of fact, the Bank does provide access to such services for its staff, through its retainer with AMCSI. Having undertaken to do so, the Tribunal believes that the Bank is properly regarded as having voluntarily assumed the accompanying duty to exercise all necessary and appropriate care in selecting the service provider and supervising its operations. The level of care appropriate in the situation here involved is not reduced by the fact that the costs of such service to staff members is subsidized by the Bank

### **The Selection of AMCSI**

30. We are not persuaded by the Applicants' claim that there was breach of duty of care in the selection of AMCSI. The evidence shows the bids were properly advertised, that the offering elicited 12 responses, and that number was appropriately winnowed to those providing documentation as to experience, scope of operations, qualification of personnel, and financial standing. The evidence shows that the applicants were evaluated, subjected to unannounced visits, with appropriate emphasis on technical competence and financial strengths, before reducing the number of providers under examination to 2, bypassing the lower financial bid to secure a higher level of medical and dental competence. It notes that the decision to continue the services of AMCSI in 2006 was made by a different institutional Procurement Committee and a different Compensation and Benefits Division Evaluation Team underscoring the reasonableness of its initial selection. We are mindful of the caveat contained in the *Bares* decision that

... the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment. (par 26)

### **Supervision of AMCSI**

31. We are not persuaded either that there was a breach of duty of care in the supervision of AMCSI. The fact that the evaluation of the bidders focused on 80% for their technical competence and 20% for their financial competence, with AMCSI scoring 55 points out of a possible score of 80, demonstrates the care with which the Bank examined the medical competence of the service provider.

32. The evidence shows periodic monitoring as to performance standards and effective response to problems. Each time a problem occurred according to the record, the Bank took appropriate action. Thus in February 2003 it purchased a colposcope after a complaint of a missed polyp diagnosis, in November 2003 it removed a physician following provision of wrong information on treatment equivalence, and in May 2006 it removed the radiologist who examined the Applicant and implemented a new system of double x-ray reading by two different radiologists and accompanying recall and rereading of the prior years x-rays.

33. The evidence also shows ongoing involvement of the ADB Medical Doctor in observing and discussing issues at AMCSI, the provision of periodic staff solicitation for input

and comment, and even its system for reading x-rays all constituted normal and reasonable practice. We note that the contract between AMCSI and the Bank allowed ADB's medical doctor to screen the CVs of medical personnel assigned to the ADB Medical Center and that it had screened the CV of the radiologist who reviewed the Applicants x-rays, a senior and respected medical practitioner connected not only with AMCSI but also with the Makati Medical Center.

34. There has been no persuasive showing by the Applicants that any deficiencies in selection or supervision caused the missed diagnosis. Indeed as the Respondent points out, even after the deceased sought further examination of his condition at multiple alternative facilities, the subsequent x-rays were still no more effective than those administered at AMCSI in detecting the cancerous condition. In March and April 2005 the Applicant underwent three medical evaluations, in two Medical Centers (Cardinal Santos and St. Luke's Medical Center) none of which detected the lung cancer.

35. Additionally we are not persuaded that there was a demonstrable breach of duty of care in the spouse of the ADB Medical Doctor having worked as AMCSI's public relations consultant. Any role she played at AMCSI from 31 March 2005 to May 2006, occurred well after the earlier x-rays that the Applicants allege were the precipitating factors for the alleged misdiagnosis, and could not have impacted on discovery of the tumor.

36. In the light of the foregoing we must conclude that the Applicants have failed to meet their burden of showing that the Respondents violated any obligation to provide the reasonable standard of care for which they might be held responsible.

**DECISION**

For these reasons, the Tribunal unanimously dismisses the Application.