THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2019-0605

APPEAL OF PELMAC INDUSTRIES, INC.

PETITIONER'S BRIEF

Submitted By:

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Date: June 1, 2020

Oral arguments to be presented by
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[1] Although not a formal opinion, the Carrier is citing to the Appeal of Estate of William Quinn as non-precedential value pursuant to NHSC Rule 20 (2).

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QUESTIONS PRESENTED FOR REVIEW

1) Did the Board err by shifting the burden of proof to the Carrier when it stated, "there was no testimony as to where in Manchester [the Claimant] was heading", even though the undisputed testimony was the Claimant "was heading home"?
2) Did the Board commit an error of law by not following the holding in Donnelly v. Kearsarge Tel. Co., 121 N.H. 237 (1981)(Travel is not a hazard of employment and there is no "portal-to-portal type" coverage for "on-call" employees) regarding the "going and coming rule"?
3) Did the Board commit an error of law by adding the concept of "travel time" between leaving a jobsite and traveling home into the well-established "going and coming rule"?

4) Did the Board commit an error of law by ruling that the Claimant's travel to his own home at the end of the workday is a "risk… directly associated with employment" i.e. an employment related risk based on In re Margeson, 162 N.H. 273 (2011)?
5) Did the Board misinterpret RSA 281-A: 2 XI, definition of "injury", which states "No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or injure another."?
6) Did the Board commit error by failing to properly analyze the Claimant's subsequent death by suicide in awarding death benefits to the widow pursuant to RSA 281-A:26 by failing to address whether the subsequent death by suicide was a "direct and natural result of the initial injury" or that the suicide was an "intervening event"?
7) Did the Board violate the Carrier's due process rights and guarantees of a fair and impartial hearing pursuant to the New Hampshire Constitution, Part 1 Article 35 when it determined, "it does not make sense to preclude recovery of widow's benefits in this situation"; omitting decisive facts in its decision, embellishing testimony and failing to provide any relevant analysis of facts to law or addressing the Carrier's arguments in any manner?

STATUTORY LANGUAGE

- RSA 281-A:2, XI Definitions -

  "Injury" or "personal injury" as used in and covered by this chapter means accidental injury or death arising out of and in the course of employment, or any occupational disease or resulting death arising out

of and in the course of employment, including disability due to radioactive properties or substances or exposure to ionizing radiation. "Injury" or "personal injury" shall not include diseases or death resulting from stress without physical manifestation. "Injury" or " personal injury" shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer. No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or injure another. Conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable only if contributed to or aggravated or accelerated by the injury. Notwithstanding any law to the contrary, "injury" or "personal injury" shall not mean accidental injury, disease, or death resulting from participation in athletic/recreational activities, on or off premises, unless the employee reasonably expected, based on the employer's instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation, or continued employment. (Emphasis added).

- 281-A:26 Compensation for Death. –
  If death results from an injury, weekly compensation shall be paid to the dependents of the deceased employee in an amount provided by the compensation schedule in RSA 281-A:28 as follows: (Emphasis added).
  I. In all cases in which compensation is payable to a widow or widower for the benefit of herself or himself and dependent children, the

commissioner shall have the power to determine from time to time, in the commissioner's discretion, what portion of the compensation shall be applied for the benefit of any such children and may order the same paid to a guardian.

II. In the case of the remarriage of a widow or widower without dependent children, compensation payments shall cease.

III. In the case of the remarriage of a widow or widower who has dependent children, the unpaid balance of compensation which would otherwise become due shall be payable to the mother, father, or guardian, or such other person as the commissioner may order, for the use and benefit of such children during dependency.

IV. The employer shall pay burial expenses not to exceed $10,000.

V. Any dependent, except a widow or a widower or children, who, at the time of the injury to the person covered under this chapter, is only partially dependent upon the injured person's earnings shall receive such proportion of the benefits provided for those wholly dependent as the amount of the wage contributed by the deceased to such partial dependent at the time of the injury bore to the total support of the dependent.

VI. Compensation for a dependent child shall continue until the child becomes 18 years of age, or until the child becomes 25 years of age if such child is enrolled as a full-time student in an accredited educational institution. However, if the commissioner determines that the child is self-supporting or if the child marries or is legally adopted, compensation shall cease. A dependent child who is physically or mentally incapacitated shall continue to receive compensation as long as

the incapacity continues. This paragraph shall have no effect on accidents or fatalities occurring prior to July 1, 1975, which shall be governed by the provisions of workers' compensation law prior to that date.

VII. Compensation payable to any dependent other than a widow, widower, or children shall cease when such dependent is married, is legally adopted, or is determined by the commissioner to be self-supporting.

- New Hampshire Constitution Part I Art. 35. [The Judiciary; Tenure of Office, etc.] It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the Judges of the Supreme Judicial Court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the Constitution of the State; and that they should have honorable salaries, ascertained and established by standing laws.
- *Wage and Hour Publication 1312, Title 29 Part 785 of the Code of Federal Regulations, United States Department of Labor* (See Appendix, Pgs. 46-58)
- Lab Rule 803.04 - Hours Worked. For the purpose of determining "all wages due" for hours worked in accordance with RSA 275:43, I, the department of labor, under the authority provided by RSA 275:54,

incorporates the "Wage and Hour Publication 1312, Title 29 Part 785 of the Code of Federal Regulations, United States Department of Labor "

STATEMENT OF THE CASE

There is no dispute that on June 5, 2018, the Claimant was involved in a single motor vehicle accident while traveling to his home from a jobsite in Berlin, NH at the end of his work day. Appendix, pgs. 6, 9, 10, 125, 165. The Claimant was an "on-call" employee and was driving in a company van at the time of the accident which, according to the Police report, occurred at 4:44 p.m. Appendix, pg. 185. There was no evidence adduced at either the Department of Labor ("Department") hearing or at the Compensation Appeals Board ("Board") hearing that the Claimant was traveling to anywhere else but to his home. He was not responding to an employment related call when the accident occurred. According to the medical records, the Claimant does not recall why the accident happened, although he recalls being "drowsy." Appendix, pg. 165. The Claimant sustained multiple physical injuries as a result of the motor vehicle accident.

There is no dispute that the Claimant sustained a significant left shoulder injury, a cervical fracture at the C1 level, multiple rib fractures, a head laceration and a concussion. There is no dispute concerning the medical treatment he received. The Claimant was in the hospital for five (5) days and underwent a series of objective testing. Upon his release, the Claimant received home nursing assistance until June 27, 2018. The Claimant wore a cervical collar for approximately 3 months. Appendix, pg. 168. The Claimant's physicians were waiting for the cervical fracture to

heal before proceeding with shoulder surgery. Id. at 169. Prior to shoulder surgery, the surgeon wanted medical clearance from various specialists in order to determine the cause of the motor vehicle accident. Id. at 165.

On July 20, 2018, the Claimant's neurologist and sleep disorder physician, George B. Neal, M.D., noted that the motor vehicle accident did not cause any brain injury. Appendix, Pg. 165. Dr. Neal recorded that the Claimant had not used his CPAP machine between May 31, 2018 and June 9, 2018. Dr. Neal stated that the Claimant does have sleep apnea and "the accident might have been related to sleep apnea." Appendix pgs. 165-167.

On August 29, 2018, the Claimant was evaluated by Michael W. Groff. M.D. for his cervical fracture and clearance for shoulder surgery. Dr. Groff recommended that the Claimant remain in the cervical collar for an additional 4 weeks and noted that "he requires surgery for his left shoulder and he will be cleared for that at his next appointment." Appendix pgs. 168-169.

On September 2, 2018, the Claimant committed suicide leaving a suicide note. Appendix pg. 178 (quoted verbatim in medical record). Thereafter, the Claimant's estate requested that the Carrier pay widow benefits pursuant to RSA 281-A: 26 which the Carrier denied.

An initial Department hearing was held on February 14, 2019. Appendix, pgs. 3-11. The two (2) issues before the Department were: (1) whether the Claimant's initial motor vehicle accident and injuries arose out of and in the course of his employment pursuant to RSA 281-A: 2 XI, XII and (2) whether the Claimant's widow was entitled to widow benefits pursuant to RSA 281-A: 26. Id.

On March 5, 2019, the Department issued its decision finding that the Claimant "sustained an injury that arose out of and in the course of employment on June 5, 2018." Appendix pg. 11. The Department, however, also found that "Mr. Czaja's suicide was not causally related to his motor vehicle accident of June 5, 2018 which forecloses the benefits of RSA 281-A:26 to the widow." Id.

Both parties filed a timely appeal with the Board regarding the two (2) issues. Appendix, pgs. 12, 13. On July 10, 2019, a *de novo* hearing was held by the Board. Id. at 14-20. The Board issued a decision on August 5, 2019, finding that the Claimant's travel to his home from a jobsite "would be an included risk of his employment... [and] the suicide was a substantial proximate cause of the September 2, 2018 suicide." Id. at 19. In analyzing whether the suicide was a "willful intent to injure himself" pursuant to RSA 281-A: 2 XI. the Board concluded that "Mr. Czaja's suicide was not a rational act...". Id. In addition, the Board stated, "it does not make sense to preclude recovery of widow's benefits in this situation." Id.

The Carrier filed a timely Motion for Rehearing. Appendix pg. 21. The Claimant responded. Id. at 88. On September 23, 2019, the Board issued an order denying the Carrier's Motion. The Board's denial reasoned that "There was no testimony as to where in Manchester [the Claimant] was heading." Id. at 95. The Board also remarked that "...several hours on the road each way is not the normal going-to-work situation." Id. The Board determined that "The 'injury' is the result of the van accident on June 5, 2018" in support of awarding widow benefits pursuant to RSA 281-A: 26. Id. This timely Appeal follows.

SUMMARY OF ARGUMENT

The Board committed legal error when it determined that the Claimant sustained a work-related injury as a result of the June 5, 2018 motor vehicle accident. The Claimant was driving home from work which falls directly under the "going and coming rule" and therefore, the injuries sustained are not compensable. There is no "portal to portal" coverage as determined by Donnelly v. Kearsarge Tel. Co., 121 N.H. 237 (1981). In addition, the cause of the motor vehicle accident was due to a personal risk, sleep apnea, which caused the Claimant to become drowsy and fall asleep at the wheel of his moving vehicle. All employees must drive home at the end of the day from their workplace, wherever their workplace happens to be, and traveling home is not an employment related risk.

This Court reaches the issue of whether the suicide is work-related, only if the Court determines the orthopedic injuries sustained in the motor vehicle accident are work-related. The Board committed legal error in direct contravention with the statutory definition of injury. The statue expressly states, "No compensation shall be allowed to an employee for injury proximately caused by the employee's **willful intention to injure himself** or injure another." RSA 281-A:2 XI. The Claimant's act of slicing his throat and his wrists, along with leaving a suicide note, conclusively proves that this was a willful intent to injure himself. The suicide was a nonindustrial intervening event which was not work-related which breaks the chain of causation. In addition, as expressed in Appeal of Estate of William Quinn, Case Number 2018-0310 (August 20, 2019),("Appeal of Quinn") suicide would not be the "direct and natural" result of the orthopedic injuries sustained in the motor vehicle accident.

Finally, the Board's statements contained in its decisions give rise to the question of whether the Board had already predetermined the outcome of the case.

The Board's decision must be reversed.

ARGUMENTS

I. THE COMPENSATION APPEALS BOARD FAILED TO PROPERLY ANALYZE THE "GOING AND COMING" RULE BY NOT FOLLOWING APPROPRIATE CASE LAW AND REGULATIONS

a) The Board committed an error of law by shifting the burden of proof to the Carrier when it stated, "there was no testimony as to where in Manchester [the Claimant] was heading", even though the undisputed testimony was the Claimant "was heading home".

The Board was basing its decision on the fact that "There was no testimony as to where in Manchester he was heading." Appendix pg. 95. The Board's failure to acknowledge this crucial fact that the Claimant was heading home is legal error and taints the reasoning of the Board's decision when analyzing the "going and coming" rule.

The medical evidence and testimony established that the Claimant was driving home which the Board ignores in its decisions. Dr. Neal recorded, "He was involved in an auto accident when driving home from work...." Appendix pg. 165.

The testimony at the hearing was:

> "Attorney Harding: Okay. And Dr. Neal asks some questions about what happened, and it sounds like he was involved in an auto when driving home from work on June 5th.

Mrs. Czaja: Correct.

Attorney Harding: So, he was driving home from Berlin and the car accident occurred somewhere in Northfield, right near Concord.

Mrs. Czaja: Exit 18." Appendix pg125.

Furthermore, the Department decision also found that the Claimant was on his way home from work. "Cross-questions of this witness supports Mr. Czaja was **on his way home** on Interstate 93 South at the time that the accident took place." Appendix pg. 6. (Emphasis added). The Department decision also records the Claimant's acquiescence to the fact the he was on his way home, by noting "the Estate asserts that Mr. Czaja, even if he was on route home at the time of the motor vehicle accident, he was performing an activity related to his employment given the transit agreement with the use of the company van." Appendix pg. 9.

As the parties understood the Claimant was on his way home from work, the lack of further questioning as to "where in Manchester he was heading" was not relevant because it was established that he was going home. Appendix, pg. 95. The Carrier brought this issue to the attention of the Board in its Motion for Rehearing. The Carrier stated, "The Board neglects to clearly state in its decision that the Claimant was simply on his way home from work when the accident occurred." Appendix, pg. 22. The Claimant never disputed this statement in his response. Id. at 88-94. The Board refused to address it and instead ignored this fact and shifted the burden to the Carrier, even though it was the Claimant's burden to establish where "he was heading."

In addition, the Claimant admits that "On June 5, 2018, Mr. Czaja was traveling from a Pelmac job in Berlin, New Hampshire **to his home** in Manchester New Hampshire." Motion for Summary Affirmance, pg. 2. (Emphasis added). "To recover under the Workers' Compensation Law, an employee must show that his injuries arose out of and in the course of employment. RSA 281-A:2, XI." Appeal of Kelly, 167 N.H. 489, 492 (2015). The Board's manufactured comment about where the Claimant was heading inappropriately shifted the burden to the Carrier to prove he was heading home. It was the Claimant's burden to establish he was responding to a call or engaging in some other employment related activity.

In the Claimant's closing statements, there was no argument that the Claimant was heading anywhere else but home. The Claimant's concern was, "it's got to be understood that he was –not only was he on the clock, but he was on-call. He was in a company vehicle. He **could be** called from the house to another job from route, on route to another job, so there was definite mutual benefit there for both parties." Appendix pg. 161. (Emphasis added). There was no evidence or testimony the Claimant was going to another job, even if he was on-call.

It is clear from the evidence, testimony, and the Claimant's own admission, he was driving home after his workday ended. There was no contradictory evidence. As a result, the "going and coming rule" applies and the Board inappropriately shifted the burden to the Carrier to conclusively establish the Claimant was heading home.

b) The Board commit an error of law by not following the holding in Donnelly v. Kearsarge Tel. Co., 121 N.H. 237 (1981)(Travel is not a

hazard of employment and there is no "portal-to-portal type" coverage for "on-call" employees) regarding the "going and coming rule".

The Board failed to follow the long standing holding in Donnelly v. Kearsarge Tel. Co., 121 N.H. 237 (1981). The Donnelly Court "recognized that the ordinary perils of travel between home and the workplace are not risks of the employment and injuries arising therefrom are not ordinarily compensable." Donnelly, at 240. The Board disregarded any attempt to distinguish this case with the Court's rationale in Donnelly regarding the "going and coming rule." The teachings of Donnelly establish that there is no "portal-to-portal" coverage in New Hampshire for "on-call" employees.

Even though the Claimant was deemed to be an "on-call" employee, he was not responding to any work-related call when the accident occurred. He was going home. The "going and coming rule" and his travel, which was not associated with employment, forecloses the Claimant's right to workers' compensation benefits. For an activity to be an employment related risk it must be substantially "viewed as an integral part of the service itself." Heinz v. Concord Union School Dist., 117 N.H. 214, 219 (1977). See also, Murphy v. Town of Atkinson, 128 N.H. 641, 646 (1986) ("Although employment may occur at any time, it does not occur without a call or a requirement to some activity integrally related to the object of the employment relationship.") Traveling home is not an activity related to employment.

Under the "going and coming" rule, there are various exceptions that do not apply in this case. One exception is "when a peril which arises out of the employment overtakes the employee when he is returning home after

employment beyond the usual working hours, as the result of special duties which thus subject him to special travel risks." Heinz v. Concord Union School Dist., at 218. The Claimant recognizes that the Heinz decision was based on a special duty and therefore the holding in Heinz in inapplicable. In this case, the Claimant was simply heading home after work and not responding to any call from his "on call" status.

A second exception exists for personal activities that are "reasonably to be expected" and "not forbidden" or that confer a "mutual benefit on the employee and employer." See, Harrington v. Brooks Drugs, *148 N.H. 101,* (2002) (citing Cook v. Wickson Trucking Co., 135 N.H. 150, 154 (1991) (quotations omitted). In this case, with the Claimant going home after ending his workday, this trip home "was being accomplished solely for his own benefit." Donnelly, at 243. Neither exception applies to this case.

The Donnelly case is on point. The Donnelly court detailed that "whether the journey itself was an important part of the service; and since it was nothing but the usual trip Donnelly always had to take, there is no real distinction from the going and coming of an ordinary employee." Donnelly, at 241-242. The Court indicated, "the mere fact that an employee is generally on call should not make a special errand of a normal going and coming trip that is not in response to a special call." Id. at 242. The Donnelly Court stated, "While we recognize that a number of courts have liberalized the 'going and coming rule,' ... we believe that overruling past precedent in this case would open a veritable Pandora's box that would inevitably lead to the 'portal-to-portal' type of rule of compensation .... That is a journey upon which we are not prepared to embark." Donnelly at 242.

In this case, the Board improperly extended the "going and coming" rule to "portal-to-portal" coverage for this Claimant.

The Claimant's reliance on Appeal of Griffin, 140 N.H. 650 (1996) is unavailing. The facts in Griffin are distinct, in that the injured worker was traveling and living out of state for a short period. The Griffin Court noted that "because the petitioner was required by his employment to live away from home, the risk of injury to him during travel necessary to take his meals was created by his employment." Id. at 655. When addressing the Griffin decision, the Claimant indicates, "An employee whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, **except when a distinct departure on a personal errand is shown**." Motion for Summary Affirmance, pg. 7. (Emphasis added). Here in this case, the Claimant was on a personal errand, going home for the day, a distinct departure from his employment.

The Claimant's reliance on Whittemore v. Sullivan Cty. Homemaker's Aid Serv., 129 N.H. 432 (1987) is also futile. The facts in Whittemore were that the injured worker was returning to work after a lunch break when she slipped and fell. In this case, the Claimant was not heading back to work, but simply going home. The Claimant and the Board conveniently overlooked the holdings in Donnelly v. Kearsarge Tel. Co., 121 N.H. 237 (1981) and Cook v. Wickson Trucking Co., 135 N.H. 150 (1991) in which the court has "repeatedly recognized that the ordinary perils of travel between home and work are not considered hazards of employment and, therefore, that injuries arising from such travel are noncompensable under our Workers' Compensation Law." Harrington v.

Brooks Drugs, *148 N.H. 101,* 106 (2002). Had the Claimant been driving from job site to job site during the work day and was involved in a motor vehicle accident, then his injuries would be compensable.

The Board committed legal error by not following the holding in Donnelly v. Kearsarge Tel. Co., 121 N.H. 237 (1981).

c) The Board commit an error of law by adding the concept of "travel time" between leaving a jobsite and traveling home into the well-established "going and coming rule".

Keeping in line with the Court's decrees as noted above, traveling within the State and being "on the clock" while traveling home is not part of hours worked pursuant to Department of Labor regulations. The Board simply disregards this important concept and provides no discussion at all in its decision.

The Department of Labor, pursuant to Lab Rule 803.04, has adopted the "Wage and Hour Publication 1312, Title 29 Part 785 of the Code of Federal Regulations, United States Department of Labor". Appendix pgs. 46-59.

Title 29 § 785.34 states, in part:

"...**the use of an employer's vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered principal activities** when the use of such vehicle is within the normal commuting area for the employer's business or establishment and is subject to an agreement on the part of the employer and the employee or the representative of such employee...**ordinary travel from home to work** (see §785.35) **need not be counted as hours worked**

even if the employer agrees to pay for it." Appendix pg. 55. (Emphasis added).

In addition, Title 29 § 785.35 specifically states:

"An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. **This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.**" Appendix pg. 55. (Emphasis added).

The Claimant's travel home is not worktime. The Board embellishes the "travel time" by stating the travel time between Manchester and Berlin "requires several hours on the road each way". Appendix pg. 95. The Board's comment is in stark contrast to its initial finding that the travel time was "approximately 5 hours per day of travel" or a 2.5 hour commute each way. Id. at 16. In any event, prevailing case law and Lab Rules do not incorporate this concept of "travel time" into the "going and coming" rule analysis.

For an activity to be an employment related risk it must be substantially "viewed as an integral part of the service itself." Heinz, at 219. See also, Murphy v. Town of Atkinson, 128 N.H. 641 646 (1986) ("Although employment may occur at any time, it does not occur without a call or a requirement to some activity integrally related to the object of the employment relationship.") Also, "an employee's commute is a requirement for most jobs and, therefore, cannot realistically be deemed of mutual benefit to both employee and employer. To find otherwise would allow the exception to swallow the rule." Harrington, at 106. As argued at

the hearing, but never discussed in the Board's decision, travel, in general, is not integrally related or a principle activity of employment.

Based on the above argument, the Boards decision must be reversed.

II. THE BOARD COMMITTED ERRORS OF LAW WHEN IT DETERMINED THAT THE CLAIMANT'S MOTOR VEHICLE ACCIDENT AND INJURIES AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT PURSUANT TO RSA 281-A: 2 XI, XII

a) The Board commit an error of law by ruling that the Claimant's travel to his own home at the end of the workday is a "risk… directly associated with employment" i.e. an employment related risk, based on In re Margeson, 162 N.H. 273 (2011).

The Board committed an error of law when it failed to properly analyze the causal relationship of the Claimant's June 5, 2018 injury to his employment in accordance with relevant case law. As noted above, "normal travel from home to work is not worktime" and therefore cannot be a work-related activity.

The Board ignored applicable law by not properly applying the test formulated by the Court in In re Margeson, 162 N.H. 273 (2011). The Board "should first make a finding regarding the cause of the claimant's injury." Margeson, at 284-285. The medical evidence supported that the motor vehicle accident was caused by the Claimant's sleep apnea which is a "personal risk". Personal risks "are, so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." Margeson, at 277. The Board fails to

mention the Claimant had sleep apnea which might have caused the accident which led to his injuries. See, Appendix, pg. 165.

The medical evidence clearly established that the Claimant had sleep apnea and that he had not used his CPAP machine for at least 6 days prior to the motor vehicle accident on June 5, 2018. Appendix, pg. 166. The words of the Claimant's treating physician debunks the Board's finding that "there was no explanation of why the van left the road". Appendix, pg. 16. The Claimant's physician stated, "The accident might have been related to sleep apnea." Appendix, pg. 167. There is clear medical evidence that the motor vehicle accident was due to a personal risk and the Claimant did not dispute that the cause of the motor vehicle accident was due to a "personal risk." Injuries resulting from a personal risk "are never compensable." Margeson, at 277.

There was no other testimony or evidence to suggest that the accident was caused by some other reason other than the Claimant's sleep apnea. The burden was on the Claimant to establish that his injuries were causally related to his employment which he failed to prove. The accident was a direct result of his "personal risk" of sleep apnea which the Board never addressed. This is legal error.

The cases relied on by the Claimant can be easily distinguished. With regards to the Appeal of Kelly, 167 N.H. 489, 492 (2015)," Neither party challenges the CAB determination that the case involves a mixed risk." In this case, the cause of the injury was due to a "personal risk", sleep apnea. The Board found the injuries were the result of an "employment related risk", even though the Claimant was not performing any work-related task.

The Claimant was not "in the course of his employment" when the motor vehicle accident happened. "Although employment may occur anywhere and anytime, it does not occur without a call or a requirement to perform some activity integrally related to the object of the employment relationship." Murphy v. Town of Atkinson, 128 N.H. 641, 646 (1986). And with the Claimant commuting home from the end of his workday, "the ordinary perils of travel between home and work are not considered hazards of employment...." Harrington, at 106.

In addition, in Kelly, "the petitioner departed for the company shop in Hudson where he intended to unload the truck." Id. at 491. In this case, the Claimant was heading home. As a result, there was no employment related activity which was integral to the service of the Claimant's employment.

Furthermore, the Claimant's assertion that "his injuries suffered in his motor vehicle collision would still be compensable because of the environment in which he found himself at the time of the accident – behind the wheel of a moving truck" is a positional risk type argument. Motion for Summary Affirmance, pg. 5. "[U]nder the positional risk test, an injury arises out of employment so long as the obligations of employment place the employee in the particular place at the particular time that he suffers an injury." Margeson, at 279. The Margeson Court went on to state, "our case law and the workers' compensation statute do not support further extension of *Steinberg I* or the adoption of the actual or positional risk theories." Id. at 282. As such, the Claimant's positional risk type argument has no merit.

The Board's decision must be reversed with a ruling, based on the record, that the Claimant did not sustain a compensable work-related injury.

III. THE BOARD COMMITTED ERRORS OF LAW, EXCEEDED ITS AUTHORITY AND/OR RENDERED AN UNJUST OR UNREASONABLE DECISION WHEN IT DETERMINED THAT THE CLAIMANT'S WIDOW WAS ENTITLED TO WIDOW BENEFITS PURSUANT TO RSA 281-A: 26

a) The Board misinterpreted RSA 281-A: 2 XI, definition of "injury", which states "No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or injure another."

The questions concerning the Claimant's death by suicide pursuant to RSA 281-A: 26 only arise if the original injury is found compensable. The foregoing arguments address the Board's decision for completeness. The Carrier does not waive any preceding arguments above regarding the compensability of the original injury. The Board failed to properly analyze and plainly misinterprets the definition of "injury" under the statute.

Whether death by suicide is a compensable work-related injury requires this Court to engage in statutory interpretation of the definition of "injury" as contained in RSA 281-A: 2 XI and 26. The Board claims that the definition of "injury" only relates to the original injury which is wrong.

The Board misconstrues the definition of the term "injury" as defined in RSA 281-A: 2 XI. The term "injury" does not only apply to the original injury, but to the subsequent death by suicide. The Board simply disregards the term "injury" as defined in the statute. The argument that the definition of "injury" only applies to the original injury is illogical.

RSA 281-A:2 XI states, "Injury" or "personal injury" as used in and **covered by this chapter means** accidental injury or **death**...[and] No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself...." (Emphasis added). If the term "injury" only relates to the original injury, then widow benefits cannot be awarded because RSA 281-A: 26 specifically states, "If death results from an **injury**...." Therefore, the statutory definition of "injury" must apply to death benefits under Section 26 of the statute and the definition must be applied in its entirety. The Board cannot pick and choose what portion of the statute it wants to apply. In this case, the death resulted from the Claimant's suicide which is the ultimate willful and intentional injury.

The medical opinions support the conclusion that the Claimant's suicide was a "willful intention to injure himself." The Carrier's medical expert, Albert Drukteinis, MD, declared that "nothing in the records establishes that [the suicide] was not his willful choice." Appendix pg. 181. The Claimant's psychologist, William Jamieson, Ph.D., specifically agreed with Dr. Drukteinis and stated, "it is not possible retrospectively to fully understand his motivation for suicide." Id. at 183. Dr. Jamieson goes on to say, "I'm not altogether clear on the issue of prevention of forming the willful intention to commit suicide." Id. at 184. Based on this statement alone by Dr. Jamieson, the Board could not have relied on Dr. Jamieson's opinion to address "willful intention." But Dr. Jamieson completes his thought and says, "It seems to me that most mental and/or cognitive disorders, apart from psychoses and dementia, **do not in fact prevent forming the willful intention to commit suicide**." Id. (Emphasis

added). The Board disregarded the medical evidence concerning the Claimant's willful intent to injure himself.

Both physicians agreed that it was "not possible to retrospectively to fully understand his motivation for suicide." Appendix, pg. 183. Dr. Jamieson also stated, "it is not possible to fully understand his thinking and emotions at the time of the suicide." Id. Dr. Jamieson interviewed the Claimant's wife and close family friend who felt the Claimant "was the last person that they thought would ever kill himself." Id. at 171. Neither physician was able to interview the Claimant and neither physician treated the Claimant. With the Claimant not exhibiting any behavior that would lead one to believe he was suicidal and no medical evidence to support his orthopedic injuries was a cause of the suicide, there would be no way other than to speculate how the Claimant reached a point of committing suicide.

Since Dr. Jamieson's opinions are equivocal and he is unable to "fully understand [the Claimant's] thinking and emotions at the time of the suicide", his opinion is speculative at best and the Board's reliance on his opinion is faulty. Dr. Jamieson's opinions do not rise to the level of "competent medical evidence." For expert medical evidence to be "competent," the opinion must be "based upon sufficient facts or data; ... is the product of reliable principles and methods; and ... that the witness has applied the principles and methods reliably to the facts of the case." Goudreault v. Kleeman, 158 N.H. 236, 247 (2009). Dr. Jamieson's conclusions are not based on any sound reliable principles or methods and appears to be based on speculation. Here, the Claimant failed to produce any competent medical opinion supporting the contention that the Claimant's death was other than his willful intent to injure himself.

There was no medical evidence to support a mental or cognitive disorder that prevented the Claimant from forming his willful intention to commit suicide. The suicide note left by the Claimant *ipso facto* establishes a "willful intention to injure himself." As a result, the only legal rationale would be to find the Claimant's suicide was a "willful intention to injure himself."

There was no legal basis for the Board's finding that the Claimant's death by suicide stems from a work-related injury. The Board's decision is based on clear errors of law and is unreasonable, unjust and must be reversed.

b) The Board committed an error of law by failing to properly analyze the Claimant's subsequent death by suicide in awarding death benefits to the widow pursuant to RSA 281-A:26 by failing to address whether the subsequent death by suicide was a "direct and natural result of the initial injury" or that the suicide was an "intervening event"?

This Court needs to determine whether it should follow the majority of other jurisdictions concerning whether death by suicide is related to the initial work injury or continue and develop its rationale as announced in Appeal of Quinn. See, Appendix, pgs. 188-193. It should be noted that that the Board's original decision is dated August 5, 2019. On September 3, 2019, the Carrier brought the Appeal of Quinn decision to the attention of the Board and requested that the Board review its decision considering the Quinn case. Appendix, pg. 29. The Board failed to address the rationale in Quinn.

The Quinn case informs the bar that in order for a subsequent death of a claimant to be compensable, the death must be "the direct and natural

result of the initial compensable injury." Appendix, pg. 190. The Board's factual finding was that the suicide "was not a rational act." Appendix pg. 19. "The [board's] factual findings are prima facie lawful and reasonable." Appeal of Dean Foods, 158 N.H. 467, 471 (2009). It was therefore impossible for the Board to conclude that the death was a "direct and natural result of the initial injury" under Quinn. The death was not a "direct and natural result of the initial injury", but that of an "irrational act" as the Board found.

Furthermore, in Bruzga v. PMR Architects, P.C., 141 N.H. 756, 757 (1997), the Court stated, "the act of suicide is considered to be a deliberate, intentional and **intervening act**...." (Emphasis added). Undoubtedly, the Claimant's suicide was "deliberate, intentional and intervening act" and therefore, cannot be considered a work-related injury. Even if the original orthopedic injuries were work-related, "the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause." Town of Hudson v. Wynott, 128 N.H. 478, 481 (N.H. 1986) (Citations omitted). Here, there was no worsening of the orthopedic condition and the subsequent injury was the result of a nonindustrial cause and intervening act, i.e. suicide. The Board failed to address whether the suicide was an intervening act and/or a direct and natural result of the initial injury.

The Board takes liberty and misconstrues the suicide note when it says the note was "expressing deep dissatisfaction with his present and future condition." Appendix at pg. 17. The suicide note neither references his dissatisfaction of anything, nor mentions his present or future condition, nor indicates he was committing suicide because of his orthopedic injuries.

The note, in pertinent part, states: "I don't want what('s) coming for me, and you deserve so much more." Appendix, pg. 178. It was the Claimant's burden to show by a preponderance of the evidence that the suicide was directly related to his orthopedic injuries.

The Board is merely guessing as to what the suicide note means, other than expressing his love for his wife and family. Could it be that that Claimant was concerned about other non-injury related issues? The Board's decision fails to address how the suicide was the "natural and direct result" of the injuries sustained in the motor vehicle accident. The Board's only conclusion was the suicide "was not a rational act" and awarded benefits anyway. Id. at 19.

A majority of other jurisdictions follow a chain of causation analysis which suggests that in order for the suicide to be related to a compensable work-related injury, the initial work injury must have caused a "brain derangement" or an "unsound mind." See, Appendix pgs. 60-87 (case law from other jurisdictions). The Board failed to provide any reasoning in its decisions under any theory.

The Claimant speculates that his suicide was as a result of a traumatic brain injury. However, this notion that the Claimant sustained a "traumatic brain injury" is dispelled by the medical opinion of his treating physician. Dr. Neal states the Claimant "was evaluated at Concord Hospital and had lacerations of the head, **but no brain injury.**" Appendix, pg. 165. (Emphasis added). In order for the Claimant to prevail with this type of argument, then the initial work injury must have caused a "brain derangement" or an "unsound mind" as held in other jurisdictions. The

Claimant was never diagnosed with a brain injury to cause a brain derangement or unsound mind.

In fact, on the day of the suicide, the Claimant was acting "Completely normal." Appendix, pg. 132. The Claimant's wife, "didn't recognize anything out of the ordinary that day." Id. at 133. The Claimant and his wife were "joking around about breakfast." Id. The Claimant's wife admitted that "nobody saw this coming." Id. When the Claimant's wife asked him to shower with her, "he goes, no I'll just go after you. It wasn't like ho-hum - - **it was just what I thought was normal Joe**." Id. (Emphasis added). This conversation between the Claimant and his wife on the day he committed suicide supports the fact that the Claimant was not of "unsound mind" or had any "brain derangement". Becoming "discouraged, depressed and despondent" is insufficient to establish the original work injury caused a "mental disease which, in turn, caused the suicide." In the Matter of Vernum v. State Univ. of New York, Coll. Of Forestry, 4 A.D. 2d 722 (1957). See, Appendix, pg. 66.

The Board's conclusion that the Claimant's death by suicide was work-related is legally erroneous, unjust and unreasonable given the prevailing caselaw. It is clear the Claimant's suicide was not a direct and natural result of the orthopedic injuries sustained in the motor vehicle accident and was simply an intervening act which breaks the chain of causation. As a result, widow benefits cannot be awarded, and the Board's decision must be reversed.

IV. THE BOARD COMMITTED ERRORS OF LAW, EXCEEDED ITS AUTHORITY, RENDERED AN UNJUST OR UNREASONABLE DECISION AND VIOLATED THE

CARRIER'S DUE PROCESS RIGHTS AND GUARANTEES OF A FAIR AND IMPARTIAL HEARING PURSUANT TO THE NEW HAMPSHIRE CONSTITUTION, PART 1 ARTICLE 35 BY PREDETERMINING OR PREJUDGING THIS CASE

a) The Board violated the Carrier's due process rights and guarantees of a fair and impartial hearing pursuant to the New Hampshire Constitution, Part 1 Article 35 when it determined, "it does not make sense to preclude recovery of widow's benefits in this situation"; omitting decisive facts in its decision, embellishing testimony and failing to provide any relevant analysis of facts to law or addressing the Carrier's arguments in any manner

The Board abrogated the Carrier's rights under Part I, Article 35 of New Hampshire's Constitution, which states, in part, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." "It is well established that due process guarantees also apply to administrative agencies." Appeal of Lathrop, 122 N.H. 262, 265 (1982). The Board's decision violated the Carrier's due process right to a fair and "impartial interpretation of the laws".

The Board's decision shows a "predetermined purpose to reach a determined end." Lathrop, at 265 (citations omitted). The Board's motivation for awarding death benefits to the widow was because "it does not make sense to preclude recovery of widow benefits in this situation." Appendix pg. 19. The Board's statement establishes its prejudgment of this case.

The Board showed its unwillingness to address the Carrier's arguments by not addressing any argument in its decision and by making gratuitous comments. The Board's decision is purely result orientated jurisprudence. The Board decided what the outcome of the case it wanted and then worked backward to determine the reasoning that reached the desired conclusion. This is evidenced by the lack of any legal analysis of the facts to the law.

Essentially what the Board is saying is that "we feel bad for the widow so we will order payment no matter what." When a decision shows "prejudgment concerning issues of fact in a particular case … there is no doubt that [ ] would constitute a ground for disqualification." Lathrop, at 265. It appears that the Board let emotions rule its decision-making process instead of applying the facts to the law. This is evidenced by the fact that the Board would not even mention that the Claimant was on his way home when it performed the short shrift analysis concerning the "going and coming rule."

The Board's decision was a predetermined outcome in violation of our State's Constitution depriving the Carrier's procedural due process rights. The Board's misguided comments and lack of analysis of the facts to the law shows a predetermined mindset that the Board was willing to award benefits to the widow at any cost.

The inexorable mindset of the Board is also evidenced by the overall tone of its decisions, by embellishing or inserting facts not in evidence, such as travel time, omitting facts and commenting "the extent of his depression like mental state was not fully recognized by his family…" Appendix pg. 16. There was no medical evidence to establish the Claimant

was depressed or had a "depression like mental state." The medical evidence was clear that the Claimant did not have depression. Appendix pg. 120, 122, 178.

The witness testified that the medical providers did not diagnose the Claimant with depression. See, Appendix, pg. 120. Even the Claimant admitted to his doctors that he was not depressed. Appendix, pg. 122. There was no medical evidence that the Claimant was depressed, yet the Board inserts its own lay opinion that the Claimant had a "depression like mental state." The Board is conveniently adding this pseudo medical diagnosis as if it were reality in order to support its decision.

The Board appears to insert a medical condition that is non-existent. The issue of medical conditions is "a matter properly within the province of medical experts, and the board [is] required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion." Appeal of Kehoe, 141 N.H. 412, 417 (1996). This Court should reverse the Boards decision to correct this unjust result. This Court needs to reinforce to all administrative agencies of its obligations to provide fair and impartial hearings.

When the fact that the Claimant was heading home after his day had ended was brought to the attention of the Board in the Carriers' Motion for Reconsideration, the Board inexplicably replied that "There was no testimony as to where in Manchester he was heading." Appendix pg. 95. The Claimant, however, stated in his Response to Carrier's Motion for Rehearing indicated that "Mr. Czaja had driven to Gorham from his Manchester home and at this point was driving back after a day's work...." Appendix. Pg. 89. The Board's failure to acknowledge this crucial fact, to

which the parties agreed, and comes up with some manufactured question is extremely troublesome and shows the Board's true intent of finding for the widow at any cost.

The Claimant appears to have taken no position regarding the Carrier's constitutional due process arguments under Part I, Article 35 of New Hampshire's Constitution. This Court must address the Constitutional safeguards that are required in all administrative proceedings and reinforce the edict that predetermined outcomes are a violation of our State's Constitution.

The Board's August 5, 2019 decision contains numerous errors of law, numerous errors of fact, is contrary to applicable law and deprived the Carrier of a fair and impartial hearing. This Court should reverse the Board's decision.

CONCLUSION

WHEREFORE, for the reasons contained herein, AmGUARD Insurance Group and Pelmac Industries, Inc. respectfully requests that this Court reverse the decision of the Compensation Appeals Board on the presented issues.

REQUEST FOR ORAL ARGUMENT

The Petitioner, AmGUARD Insurance Group, insurer of Pelmac Industries, Inc. respectfully request that this Court schedule oral arguments to hear Attorney Gary S. Harding in this matter.

SERVICE

The undersigned hereby certifies that a copy of this brief is being forwarded to:

For the Claimant, Estate of Joseph Czaja:

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Manchester, NH 03102

For the Agency:

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The undersigned also certify, pursuant to New Hampshire Supreme Court Rule 16 (3)(i), that the appealed decisions are in writing and are appended to this Brief.

Respectfully submitted,

AmGUARD Insurance Group, insurer of Pelmac Industries, Inc.

By its Attorneys,
BERNARD & MERRILL, PLLC

June 1, 2020

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August 5, 2019

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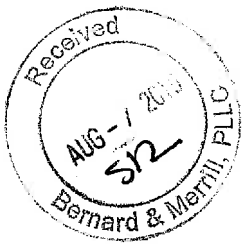

Re: Estate of Joseph Czaja V Pelmac Industries, Inc.
Docket # 2019-B-0297

Dear Attorneys Moquin & Harding:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - ***Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.***

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of $20.00.

Respectfully submitted,

Hamilton R. Krans, Jr., Esq., Panel Chair
Compensation Appeals Board

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August 5, 2019

DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD

Docket # 2019-B-0297

ESTATE OF JOSEPH CZAJA

v.

PELMAC INDUSTRIES, INC.

APPEARANCES: The Estate of Joseph Czaja was represented by Attorney Edward Moquin. Attorney Gary Harding represented the carrier, Guard Insurance Group.

ISSUES: RSA 281-A: 2 XI, XIII – Causal Relationship of Injury to Employment.
RSA 281-A: 26 – Compensation for Death Benefits.

DOI: June 5, 2018

WITNESSES: Kathleen Czaja, wife to Joseph Czaja
David Czaja
Nicole Rosario

HEARING: A de novo hearing was held at the New Hampshire Department of Labor, Concord, New Hampshire on July 10, 2019.

PANEL: The Panel was comprised of:

Attorney/Chair:	Hamilton R. Krans, Jr.
Panelist:	Robert Norton
Panelist:	Leo Kelly

FINDINGS OF FACT

The late Joseph Czaja, age 59, lived in Manchester, New Hampshire with his wife of 31 years. The couple had two grown children, Nicole and David, who live in the Manchester area. The Claimant worked as an installer and technician for Pelmac Industries, an alarm system company, also located in Manchester, for the past 21 years. Mr. Czaja was issued a company van and usually went to the work sites directly from home. Mrs. Czaja testified that he was always on call and would be sent to problem situations after hours anywhere in the State of New Hampshire. He worked a regular 40 hours a week of four ten-hour days.

On June 5, 2018 Mr. Czaja had just finished a two-day job in the Berlin, New Hampshire area. He had traveled to Berlin and back each of the two days (approximately 5 hours per day of travel). On Route 93 in Northfield, New Hampshire at 4:45 pm, he crossed the road going into the median and flipped the van, seriously injuring Mr. Czaja. There was no explanation of why the van left the road, although there was a thought that perhaps he fell asleep. The accident report is located in Tab 19 (p. 570). He was taken to Concord Hospital for emergency care. He had multiple lacerations to his head (Exhibit 1), a fractured neck (C1), a serious rotator cuff tear in his left shoulder, multiple rib fractures and a concussion. He remained in the hospital for five days. He was released after an extensive series of diagnostic tests were completed.

Thus, began the summer of Mr. Czaja's increasing discontent. Mr. Czaja's mental well-being seemingly deteriorated over the summer. Where he had been a cheerful, busy and active person around the house, he became increasingly inactive. Where he had been happy and confident, he became emotional, often crying, and morose. He could not drive a car or fully care for himself due to his neck collar and rotator cuff injury. The extent of his depression-like mental state was not fully recognized by his family, but they knew that things were getting worse over the course of the summer. Mr. Czaja desperately wanted the rotator cuff surgery so he could get back to work and be the person he once was. The holdup was that the surgeon (Dr. Luther) would not perform the rotator cuff surgery until Mr. Czaja's fractured neck (C1 & 2) healed.

The Claimant met with Dr. Groff, a neurologist at Brigham and Women's Hospital, on August 29, 2018. He expected the neck collar to be removed so surgery on his shoulder could be scheduled. However, Dr. Groff indicated that another four weeks with the cervical collar would

be necessary before surgery could be scheduled. This news was devastating to Mr. Czaja and apparently was the last straw. His downward spiral had reached a new depth.

On September 2, 2018 Mrs. Czaja was preparing to take a shower. When the Claimant came into the bathroom, she asked if he would like to shower with her so she could wash the parts of his body he could not reach due to his injuries. Mr. Czaja declined and left the bathroom saying he would shower after she was done. When she had dressed, she went looking for her husband inside the house and subsequently in the neighborhood. Eventually, the family broke into the locked garage finding Mr. Czaja dead on the floor. He had slashed his throat from ear to ear as well as his wrists. There was blood everywhere. The Claimant had left a suicide note thanking his wife and expressing deep dissatisfaction with his present and future situation.

There were two medical reports addressing the factors contributing to the suicide of the Claimant. There is a December 3, 2018 report from Dr. William Jameson, a licensed psychologist (p.11). Dr. Jameson reviewed the medical records and consulted with Mrs. Czaja. Dr. Jameson based his medical conclusions on the interview and medical records:

> There is nothing in his past history to suggest previous vulnerability to depression, despair, or suicidal ideation, or, in fact, to suggest any significant prior psychiatric issues.
>
> There is a significant body of literature indicating a notably increased risk of suicidal ideation after traumatic brain injury. Available records indicate that Mr. Czaja did sustain a traumatic brain injury in brain areas involved with emotional control, reasoning, and judgment, as well as other physical injuries significantly affecting his functional capacity. In view of all available evidence, in my opinion the combination of injuries from his MVA comprise the precipitating cause of his suicide. (p.12-13)

Dr. Albert Drukteinis, an IME psychiatrist, reviewed the medical records and issued his medical opinion on January 5, 2019. Dr. Drukteinis found that the medical records do not fully explain why Mr. Czaja committed suicide (p.13H). However, Dr. Drukteinis found that even if the automobile accident and resulting injuries were a motivating factor in the subsequent suicide, they did not result in a mental disorder which prevented him from forming the willful intention to commit suicide.

> The motivation to commit suicide may have stemmed from injuries sustained in the motor vehicle accident of 06/05/18, but he was not compelled because of those injuries to do so and nothing in the records establishes that it was not his willful choice. (p.13I)

Dr. Jameson responded to the Drukteinis report on March 11, 2019.

> I agree with Dr. Druckteinis' opinion that the records do not fully explain the suicide and that it is likely that injuries from the accident on 6/5/18 were a motivating factor, but that it is not possible retrospectively to fully understand his motivation for suicide.
> However, his analyses of the lack of discrete MRI findings to indicate brain injury, and the lack of psychiatric evidence to support a mental health diagnosis that would prevent forming a willful intention to commit suicide do not seem to me fully persuasive in view of the incomplete ability of MRI imaging to predict actual cognition and behavior, and a prior history that does not apparently involve any pre-injury propensity toward suicide.
> Since it is not possible to fully understand his thinking and emotions at the time of his suicide, his history is important in indicating a man without prior psychiatric or cognitive disturbance who was apparently, from both his own comments and his wife's, undergoing a severe level of ongoing distress stemming from his accident. If not for the accident and its documented consequences, is it likely that he would have killed himself? I think it is extremely unlikely. It is from his perspective that I concluded that the accident and injuries were causal.
> I'm not altogether clear on the issue of prevention of forming the willful intention to commit suicide. It seems to me that most mental and/or cognitive disorders, apart from psychoses and dementia, do not in fact prevent forming the willful intention to commit suicide. (p.10A-10B)

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Since it is not possible to fully understand his thinking and emotions at the time of his suicide, his history is important in indicating a man without prior psychiatric or cognitive disturbance who was apparently, from both his own comments and his wife's, undergoing a severe level of ongoing distress stemming from his accident. If not for the accident and its documented consequences, is it likely that he would have killed himself? I think it is extremely unlikely. It is from his perspective that I concluded that the accident and injuries were causal.

I'm not altogether clear on the issue of prevention of forming the willful intention to commit suicide. It seems to me that most mental and/or cognitive disorders, apart from psychoses and dementia, do not in fact prevent forming the willful intention to commit suicide. (p.10A-10B)

DECISION

In both issues, the causal relationship of the injury to employment (RSA 281-A: 2 XI and XIII) and compensation for death benefits (RSA 281-A:26) the Claimant has the burden of proof to prove their case by a preponderance of the evidence. We unanimously find that the Claimant has met that burden. Pursuant to Appeal of Margeson the Panel finds that the risk involved is directly associated with employment. Mr. Czaja traveled throughout the State of New Hampshire in the company van. His work, as in the instant case, often involved traveling long distances, working on site, and returning to Manchester. He worked 10-hour days and was on the clock at 4:45 p.m. on June 5, 2018 when the accident occurred in Northfield, New Hampshire on Route 93. As far as the "going and coming rule," we find that his daily work started when he left his house in the company van. Mr. Czaja was on call to travel to any problem area in the State regardless of whether it was after and before normal work hours. We find that the aforementioned travel and responsibility would be an included risk of his employment.

As far as the suicide is concerned, there is an obvious difference between the medical opinions of Dr. Drukteinis and Dr. Jameson. We find the medical opinion of Dr. Jameson to be the more persuasive and logical. He finds that the suicide was a substantial proximate cause of the September 2, 2018 suicide. There are two reasons why we make that decision. The first is that Dr. Jameson had the benefit of interviewing Mrs. Czaja, who was able to explain how Mr. Czaja's spirits had deteriorated over the summer of 2018. She could compare and contrast the actions and moods of her husband of 31 years. This undoubtedly gave Dr. Jameson additional insight. Secondly, the opinion of Dr. Jameson simply made more sense. There was an obvious cause and effect between the work accident and injuries resulting the increasing despair of Mr. Czaja and the suicide of September 2, 2018. The Board considered RSA 281-A:2, XI:

> No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself....

The Panel finds that Mr. Czaja's suicide was not a rational act based upon his deteriorating mental health and the gruesome manner of cutting his own throat, leaving a terrible scene for his wife to discover. Additionally, it does not make sense to preclude recovery of widow's benefits in this situation.

On both issues, the Board unanimously finds decedent's injuries are compensable and Mrs. Czaja is entitled to widow's benefits under RSA 281-A:26.

Payment of compensation by the insurance carrier to comply with this decision shall begin and/or continue as soon as possible after this decision's effective date, but no later than five workdays thereafter, and shall not be terminated except in accordance with the terms of this decision. A Memo of Payment shall be issued simultaneously.

Upon failure to comply with the decision, the Commissioner shall assess a penalty not to exceed one hundred dollars ($100.00) for each day of non-compliance. This letter will serve as notification of this assessment commencing on the seventh day following the date of this decision.

In order to avoid application of this penalty, the Memo of Payment shall be mailed to the Department of Labor no later than the seventh day following the date of this decision, indicating payments have been made in accordance with this decision. If payments are continuing, a Memo must be filed to indicate this.

Legal counsel for claimant shall, within sixty (60) days of the date of this decision, submit for approval all fees charged for professional legal services rendered in connection with this appeal pursuant to RSA 281-A:44 and Lab 207.02.

Hamilton R. Krans, Jr., Esq., Panel Chair
Compensation Appeals Board

HRK/tb

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September 23, 2019

Gary S. Harding, Esq.
Bernard & Merrill, PLLC
814 Elm Street
Manchester, NH 03101

Re: Joseph S. Czaja v. Pelmac Industries – Docket #2019-B-0297
DOI: 06/05/2018

Dear Attorney Harding:

We have reviewed the Motion for Reconsideration/Rehearing and Attorney Moquin's Objection thereto. The Employer/Insurer made the same argument concerning the "coming and going" legal argument at the hearing. The testimony was that Mr. Czaja was working in Berlin, New Hampshire on a two-day assignment. Both the Employer's location and the Claimant's home was in Manchester. Mr. Czaja's company van went off the road in Northfield, which is north of Concord. There was no testimony as to where in Manchester he was heading. The Board also found that Mr. Czaja would often go directly from his home to the work site. Traveling from Mr. Czaja's home or business in Manchester to Berlin, which requires several hours on the road each way, is not the normal going-to-work situation.

In the second argument, The Board finds the legal analysis of the Claimant is correct. The "injury" is the result of the van accident on June 5, 2018. The Board is not insulted by the Employer/Insurer claim that it was biased in this matter. However, it assures the parties and attorneys that it holds no bias or prejudice toward either side.

The Motion for Reconsideration/Rehearing is denied.

H R Krans

Hamilton R. Krans, Jr., Panel Chair

HRK/klp
cc: Edward H. Moquin, Esq.