THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2019-0605

APPEAL OF PELMAC INDUSTRIES, INC.

PETITIONER'S REPLY BRIEF

Submitted By:

Gary S. Harding, Esq.
(Bar Id. # 15335)
Bernard & Merrill, PLLC
814 Elm Street
Manchester, NH 03101
Phone: (603) 622-8454
Fax: (603) 626-8490

Counsel for Petitioner
Pelmac Industries, Inc. and
AmGuard Insurance Group

Date: August 10, 2020

Oral arguments by
Gary S. Harding, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. The Claimant was not a "traveling employee".

The Claimant cites the Appeal of Griffin, 140 N.H. 650 (1996) for the proposition that the Claimant was a "traveling employee." However, in Griffin, the employee was "in Warwick, Rhode Island, for approximately two weeks" and was hit on the head "with a two-by-four piece of wood, causing [the] injury." Griffin at 652. The Griffin Court was presented a "case of first impression" when the Court examined "the so-called 'travelling employee" **whose business requires that he be away from home**." Griffin at 654. (Emphasis added). The Court stated, "Because the petitioner was required by his employer 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.

The Claimant inadvertently misleads this Court when citing Griffin in defining a 'traveling employee." The Claimant fails to quote the entire definition when "citing Larson with approval." Brief of Respondent, pg. 7. The full definition continues with, "Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable." Griffin, at 655. An updated version of *Larson's Workers' Compensation Law* treatise indicates that "Traveling employees, whether or not on call, usually do receive protection **when the injury has its origin in a risk created by the necessity**

of sleeping and eating away from home." *Larson's Workers' Compensation Law,* §25, 25-1 (May 2000 Revised November 2007)

Simply put, a "traveling employee" must be away from his home for at least overnight to be considered a "traveling employee." Otherwise, all employees could be considered "traveling employees" because they need to commute to and from work. "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 v. Brooks Drugs, Inc., 148 N.H. 101, 106 (2002). Of course, any employee who sustains an injury while driving to and from job site to job site during the workday would be covered, but that is not the case here.

The facts of this case are substantially different then Griffin, as the Claimant was not required to be away from home overnight. Here, the Claimant was not on any special errand or special duty for the employer which required him to be away from home. He was just traveling home at the end of the day in a normal commuting situation. "Because a usual day of work would intervene between the morning journey and the trip home with the truck that evening, we conclude that the employee was not 'expeditiously proceeding to his special duties'", even if he was "on call." Donnelly v. Kearsarge Tel. Co., 121 N.H. 237, 243 (1981).

The Claimant relies on dicta in the Griffin decision to support the Claimant was a "traveling employee" by citing the Maine case of Boyce v. Potter, 642 A.2d 1342 (1994). However, the recited facts

in Boyce are inapposite to this case and are lacking in terms of whether the employees were staying overnight at the distant job site "in Knox County". Id. Boyce also involved a "personal injury action". Id. The Maine Supreme Court subsequently acknowledged that, "Although it is tempting to import precedent from workers' compensation cases into discussions of tort liability, that temptation must be resisted... As several courts have recognized, it is inappropriate to uncritically import the reasoning of workers' compensation cases into issues of vicarious tort liability." Spencer v. V.I.P., Inc., 2006 ME 120 (Me. 2006) n. 7. (citations omitted).

A Maine case that is directly on point is Westberry v. Town of Cape Elizabeth, 492 A.2d 888 (Me. 1985). In Westberry, the employee was a "patrolman with the Cape Elizabeth Police Department and he was injured in an automobile accident while driving home from work to his residence in South Portland, via Route 77 in the town of Cape Elizabeth. At the time of the accident, Westberry possessed an off-duty revolver and was in uniform with the exception of his hat and tie which remained in his locker at the police station. Although Westberry had concluded a shift, he was technically on call twenty-four hours per day." Id. at 889 -890. The Maine Court refused "to extend the scope of the section 51(1) requirement that injuries occur in the course of employment to encompass an employee injured while driving home from work, even though he is technically on call twenty-four hours a day. When Westberry concluded his formal shift with the police department, he departed from the course of employment. The fact that he was on

call twenty-four hours a day is not, without more, enough to bring him within the course of employment. We also find unpersuasive the argument that Westberry was injured on his employer's premises because he was injured on a highway within the jurisdiction of the Cape Elizabeth Police Department." Id. at 890.

Furthermore, the Claimant asserts that the "facts regarding Mr. Czaja's accident fit into the 'various exceptions' to the 'going and coming rule, envisioned by the Donnelly decision...." Brief of Respondent, pg. 8. However, the Claimant does not point to any exception which the accident would fall under, i.e. a special errand, a special duty imposed by employer, the journey itself being an important part of the service, a personal activity reasonably expected and not forbidden, or a mutual benefit on the employee and employer. See generally, Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 106 (2002) (citations omitted).

The Claimant in this case was not a "traveling employee" and the accident that occurred did not arise out of and in the course of his employment. He did not sustain a compensable work injury. The Court should reverse the decision of the Compensation Appeals Board.

II. The Motor Vehicle Accident Arose Out Of A Personal Risk.

It is well established that "the claimant bears the burden of proof on the issue of causation." Town of Hudson v. Wynott, 128 N.H. 478, 483 (1986). To meet the prima facie burden of proving causation, the Claimant "must produce evidence to prove it is more

likely than not that [his] injury was work-related." Tzimas v. Coiffures by Michael, 135 N.H. 498, 501 (1992).

In this case, the Claimant did not produce any evidence that the cause of the accident was work-related. The accident was the result of a medical condition, a personal risk, of sleep apnea. The Claimant did not produce any evidence to refute his own physician's statement that "the accident might have been related to sleep apnea." Appendix[1], pg. 167. His physician acknowledged as much by stating, "He does have sleep apnea and was not using his CPAP around that time." Id. Had the Claimant utilized his CPAP machine, the accident might have been avoided.

The Claimant's reliance on the Appeal of Kelly, 167 N.H. 4889 (2015) is unavailing. Kelly was decided based on a "mixed risk" type of analysis and not a personal risk as argued here which the Board neglected to address. The Kelly Court noted, "there is no contention that the petitioner suffered from a disease or internal weakness that caused him to fall asleep...." Kelly at 494. The Court went on to state, "this is not a case involving an employee's disease or internal weakness." Id. at 496. The Court left open the question of "whether being tired and then falling asleep on the job constitutes a mixed risk." Id. at 494. This case is not a mixed risk or an employment related risk, it is a personal risk.

The Claimant also contends that the injuries sustained in the motor vehicle accident "would still be compensable because of the

[1] Appendix refers to Appendix to Petitioner's Brief.

environment in which he found himself at the time of the accident – behind the wheel of a moving truck." Brief of Respondent, pg. 9. This is a positional risk type argument. "[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." In re Margeson, 162 N.H. 273, 279 (2011). 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. (Emphasis added). As such, the Claimant's positional risk type argument has no merit.

Given the above arguments, the Boards decision must be reversed and that this Court find that the Claimant failed to establish a compensable work-related injury on the record before it.

III. The Claimant's suicide is not a work-related injury.

There is a two-step analysis that needs to be undertaken in determining whether the Claimant's suicide is a work-related injury. The first step is to determine if the injury fits within the statutory definition. RSA 281-A:2 XI specifically 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." (Emphasis added). The Claimant's suicide does not allow for compensation.

The only physician to provide competent medical evidence on the issue of "willful intention" was Albert M. Drukteinis, M.D. He

opined that the Claimant "was not compelled because of [his] injuries...and nothing in the records establishes that it was not his willful choice" to commit suicide. Appendix, pg. 181. The Claimant's opinion offered by William J. Jamieson, Ph.D. stated, "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 he willful intention to commit suicide." Appendix, pg. 184. Neither Psychologist Jamieson nor any other physician diagnose the Claimant with a psychoses or dementia or any other mental derangement to override the Claimant's willful intent to commit suicide.

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). Although Psychologist Jamieson mentions "a significant body of literature" of risk for suicide, he never cites to any study or compares the study findings to the Claimant. Appendix, pg. 171.

The Board was "required to base its findings on this issue upon the medical evidence rather than solely upon its own lay opinion", which it failed to do. Appeal of Kehoe, 141 N.H. 412, 417 (1996). Since both physicians agreed that it was "not possible to retrospectively to fully understand his motivation for suicide", the Board relied on its own lay opinion for this complex

medical/psychiatric issue. Appendix, pg. 183 and 180. As a result, the Boards decision must be reversed.

Assuming arguendo, that the suicide fits within the statutory definition, the Claimant fails to show the suicide satisfies the second step in the analysis, which is the "chain of causation analysis followed by a majority of states" as proffered by the Claimant. Brief of Respondent, pg. 10. Larson's treatise states, "Suicide under the majority rule is compensable if the injury produces mental derangement and the mental derangement produces suicide." *Larson's Workers' Compensation Law,* §38, 38-1 (May 2000 Revised November 2007). There was no evidence to suggest that the Claimant suffered from a "mental derangement."

The Claimant correctly points out that the mental derangement necessary must be "of such severity as to override **normal rational judgment**." Brief of Respondent, pg. 11. (Emphasis added). All cases cited by the Claimant in its brief from other jurisdictions are distinguishable. All cases cited involve complex medical conditions resulting from compensable work injuries with years of medical treatment, surgical procedures, multiple medications and psychiatric diagnoses.

For example, in Kahle v. Plochman, 85 N.J. 539 (N.J. 1981), the employee was seriously injured "which over the course of the next several years required hospitalization surgical removal of a lumbar disc and spinal fusion, and the prescription of medication for pain and depression." Id. at 540. "Her medications included anti-depressants, pain relievers and sleeping pills." Id. "She was

diagnosed as suffering…from a convulsive disorder caused by drug withdrawal, severe compressive lumbar and dorsal arachnoiditis (inflammation of the membrane of the spinal cord), a neurogenic bladder, anemia, iron deficiency and chronic cystitis… and was reduced to using crutches." Id. at 541. She left suicide "notes mak[ing] it abundantly clear that Mrs. Kahle was no longer able to bear her pain, anxiety and depression." Id.

In Vredenburg v. Sedgwick CMS, 124 Nev. 553 (Nev. 2008), after multiple surgical interventions, the employee was ultimately diagnosed with "failed back syndrome." Id. at 555. "Pursuing a more aggressive approach, Dr. Kim recommended an anti-inflammatory agent, stronger pain medication, and an antidepressant to counteract Danny's paradoxical reaction to his muscle relaxants, which kept him awake." Id. "Later, when the pain did not subside, Danny elected to surgically implant a morphine infusion pump in his spine and undergo a round of epidural steroid injections." Id. However, "because of the chronic nature of this pain, in Dr. Kim's view, Danny had become 'psychologically de-stabilized.'" Id.

In this case, the Claimant's injury was about 3 months old (June 5, 2018 until September 2, 2018) when he committed suicide. He had not undergone any surgical procedures and there was no diagnosis of any psychiatric condition. He was not taking any medications for any health or injury related condition. Appendix, pg. 166. The suicide note left was ambiguous as to why he killed himself. Appendix, pg. 178. The Claimant did not exhibit any "mental derangement" to satisfy the "chain of causation" test.

Here, the Claimant's wife testified concerning the Claimant's mental state as follows:

Attorney Harding: "So, he wasn't having any problems with…depression or anxiety at this point. Correct?"

Mrs. Czaja: "I assume not." Appendix, pg. 122.

Attorney Harding: "…tests all came back normal concerning his cognitive functioning. Correct?"

Mrs.Czaja: "Correct." Appendix, pgs. 128-129.

Attorney Harding: "So, he was acting normally in regards to following up and finding out what's going on?

Mrs. Czaja: "Right." Appendix, pg. 132.

Attorney Harding: "And now the day that he did unfortunately take his life, in the morning, how was he doing that day?"

Mrs. Czaja: "**Completely normal**….I didn't recognize anything out of the ordinary that day… **it was just what I thought was normal Joe**." Id. at 132, 133. (Emphasis added).

The fact that on the day of his suicide the Claimant was "completely normal" does not support the Claimant had any "mental derangement" of such severity as to "override normal rational judgment." There was no medical evidence to even support a brain injury. Dr. Drukteinis, after review of the medical records, explains and supports his conclusion by stating, "Therefore, attributing Mr. Czaja's suicidal behavior to TBI is not supported by the records or opinions of any of his treatment providers." Appendix, pg. 182.

The Board's decision must be reversed based on numerous errors of law with regards to the Claimant's suicide.

CONCLUSION

This Court should reverse the Board and find that the Claimant did not sustain a compensable work injury on June 5, 2018. The Court should also reverse the Board's decision and find that his subsequent suicide on September 2, 2018 was not a compensable work-related injury.

STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this reply brief is in compliance with the 3,000-word limitation as set forth in Supreme Court Rule 16 (11). This reply brief contains 2,945 words.

Respectfully submitted,

AmGUARD Insurance Group, insurer of
Pelmac Industries, Inc.

By its Attorneys,
BERNARD & MERRILL, PLLC

August 10, 2020 By: ____/s/ Gary S. Harding_____

Gary S. Harding, Esq. (Bar #15335)
814 Elm St., Suite 407
Manchester, NH 03101
Telephone: (603) 622-8454
Fax: (603) 626-8490

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being timely provided through the electronic filing system's electronic service to Terrance J. Daley, Esq., tdaley@moquindaley.com and to the Solicitor General at Solicitor.General@doj.nh.gov for the Attorney General Office.

Date: August 10, 2020 /s/ Gary S. Harding

Gary S. Harding, Esq.