STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2019 - 0605

APPEAL OF PELMAC INDUSTRIES, INC.

BRIEF OF RESPONDANT, ESTATE OF JOSEPH CZAJA

APPEAL BY PETITION FROM COMPENSATION APPEALS BOARD PURSUANT TO RSA 541 AND SUPREME COURT RULE 10

Submitted by:

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Oral arguments to be presented by
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STATEMENT OF THE FACTS

Joseph Czaja was employed by Pelmac Industries, Inc. as an installer and technician servicing alarm systems for 21 years. (Appendix page 101). Mr. Czaja primarily worked on jobsites remote from the Pelmac business location and would usually go directly to a worksite from his home in Manchester. (Appendix page 6,16). On June 5, 2018, Mr. Czaja was traveling from a Pelmac job in Berlin, New Hampshire to his home in Manchester, New Hampshire. (Appendix page 125). As he was traveling down route 93 in Northfield, his vehicle was involved in a single vehicle accident. Mr. Czaja was found unconscious and unresponsive. (Appendix page 171, 175). As a result of that accident, Mr. Czaja sustained a fractured neck, a concussion, a torn left rotator cuff, numerous rib fractures and a head laceration. (Appendix page 16). Mr. Czaja was also diagnosed with an unspecified intracranial injury. (Appendix page 171, 181).

Mr. Czaja's fractured neck injury was being treated by Dr. Neil Luther of New Hampshire NeuroSpine and Dr. Michael Groff of Brigham Women's Hospital in Boston. His rotator cuff injury was being overseen by Dr. Jon Warner of Massachusetts General Hospital. Dr. Warner would not perform a repair of Mr. Czaja's left rotator cuff until his cervical spine injury healed. On August 8, 2018 Mr. Czaja was seen by Dr. Luther who told him he needed to remain in his collar for another two months which delayed the scheduling of his shoulder surgery. (Appendix page 17). In an August 29, 2018 meeting with Dr. Groff, Mr. Czaja

was informed that he would be required to wear a cervical collar for approximately another month which would in turn delay his shoulder surgery. (Appendix page 16 & 17). The delay in his shoulder surgery was deeply disappointing to Mr. Czaja who was anxious to return to work. (Appendix page 16). He wrote in his diary, "I'm devastated, can't believe what I'm hearing and seeing. Does this mean my arm will never get fixed. Won't be able to raise it up, W.T.F. now what..." (Appendix page 176).

On September 2, 2018, Joseph Czaja committed suicide by slitting his throat and wrists. He left a suicide note in which he expressed despair for his present and future condition. (Appendix page 17).

Pelmac's workers' compensation carrier accepted the compensability of Mr. Czaja's injuries and paid him temporary disability benefits from the date of his accident until his death on September 2, 2018. (Appendix page 3).

As a result of her husband's death, Mrs. Czaja sought workers' compensation benefits pursuant to RSA 281-A:26. In the initial hearing before the Department of Labor, the hearing officer found that although Joseph Czaja's accident arose out of and during the course of his employment, his suicide did not result from his work related injuries. Both parties appealed that decision to the Compensation Appeals Board (CAB).

In addition to testimony from Mrs. Czaja and her family members, the CAB also received expert medical opinions from Dr. William Jamieson on behalf of the claimant and Dr. Albert Drukteinis on behalf of the employer. Dr. Jamieson's

opinion was that Mr. Czaja's suicide was the result of the injuries sustained by him in his June 5, 2018 motor vehicle accident. Dr. Jamison wrote:

> 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) (Appendix page 17, 171).

It was Dr. Drukteinis' opinion in part that:

> "it is likely that the injuries from the motor vehicle accident on 6/5/18 were a motivating factor and that he was struggling with a significant injury to his left shoulder which required surgery but also injury to his cervical spine which he was told needed to heal before the shoulder surgery could be performed. His own diary describes his anxiety and fear, first that the shoulder is not being operated on and might become intractably nonfunctional, which was not entirely impossible based on the size of the rotator cuff tear in that shoulder. Then he became acutely afraid that not only was the cervical fracture not healing but had gone from stable to displace." Appendix page 180.

The CAB found that Mr. Czaja was in the course of his employment when he was involved in his motor vehicle collision "because he worked ten 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 home in the company van.... We find that the aforementioned travel and responsibility would be included risk of his employment." (Appendix page 19). The CAB adopted the opinion of Dr. Jamieson and awarded Mrs. Czaja benefits finding that "the suicide was caused by Mr. Czaja's work related accident." (Appendix page 19).

SUMMARY OF THE ARGUMENT

The Compensation Appeal Board's decision that Joseph Czaja's injuries sustained in a motor vehicle accident as he was driving his company truck from a jobsite in Berlin to Manchester arose of and in the course of his employment is supported by the evidence and case law. Appeal of Griffin, 140 N.H. 650 (1996). Because Mr. Czaja travels from his home directly to remote jobsites, he was a "traveling employee" who is generally considered to be within the scope of his employment throughout his travels.

Joseph Czaja's injuries did not result from a personal risk. His treating physician's statement that his accident "might have been related to sleep apnea" is speculation and is not an adequate medical opinion. Even if the CAB were somehow to find that sleep apnea caused Mr. Czaja's accident, he still would be entitled to workers' compensation benefits because of the environment he found himself at the time of his accident – behind the wheel of a moving truck traveling on a major highway.

Joseph Czaja's suicide is a direct and natural result of the injuries he sustained in his accident, including a traumatic brain injury. The CAB decision that Mr. Czaja's suicide resulted from his accident is supported by expert medical opinion that "in view of all evidence, in my opinion the combination or injuries from his motor vehicle accident comprise the precipitating cause of his suicide."

This Court should analyze the facts and opinion regarding Mr. Czaja's suicide by applying the chain of causation analysis employed by the majority of states. Utilizing that analysis, a suicide which results from the despair or pain

resulting from a workplace injury is not considered intentional even though the act may be volitional.

The petitioner received a fair and impartial hearing from the CAB. There is no evidence that the CAB predetermined its opinion or that it was biased against the petitioner.

ARGUMENT

I. JOSEPH CZAJA'S ACCIDENT WHICH OCCURRED WHILE HE WAS TRAVELING FROM A JOBSITE IN BERLIN TO MANCHESTER IS COMPENSABLE

A. Legal Standards

Appeals from the Compensation Appeal Board (hereafter CAB) are governed by RSA 541. See RSA 281-A:43, I(c) (2010). The party seeking to set aside the CAB's order bears the burden of proof "to show that the (order) is clearly unreasonable or unlawful" and that all findings of the (CAB) upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable." RSA 541:13. "(T)he order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." Id. When reviewing the CAB's findings, "this Court's task is not to determine whether we would have found differently than did the (CAB), or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record." Appeal of Phillips, 165 N.H. 226, 235 (2013). The CAB's findings of fact will not be disturbed if they are supported by

competent evidence in the record, upon which the CAB's decision reasonably could have been made. Appeal of Dean Food, 158 N.H. 463, 464 (2009)

B. The Going And Coming Rule Is Not Applicable Because Joseph Czaja Was A Traveling Employee

The Compensation Appeals Board ruled that "as far as the 'going and coming rule', we find that his daily work stated when he left his house in the company van." (Appendix page 19). Even though Pelmac and its insurer accepted the compensability of Mr. Czaja's injuries as being work related and paid him weekly disability benefits from the date of his accident until his death, it now asserts that the "going and coming rule" precludes his widow from receiving death benefits pursuant to RSA 281-A:26.

This Court has stated on numerous occasions that "in this jurisdiction, we do not regard the going and coming rule as either necessary or particularly useful in deciding coverage under the workers' compensation law" Brousseau v. Blackstone Mills 100 NH 493, (1957); Henderson v. Sherwin Motor Hotel 105 NH 443, (1964). The rule as originally laid down was soon discovered to be an unjust one when applied in all cases of travel to and from the home of the employee and exceptions began to multiply in form and number. Brousseau at 494. In New Hampshire, the question is simply whether the cause of the injury can properly be considered a hazard of the employment. Brousseau at 495.

Joseph Czaja was a traveling employee. It was his norm to travel from his home in his company vehicle to jobsites throughout New Hampshire and Massachusetts. (Appendix page 128). On the day of his accident, Joseph Czaja

was traveling on Route 93 from Berlin to Manchester when his company van left the road and "crashed into the trees in the median." (Appendix page 187).

This Court in Appeal of Griffin, 140 NH 650 (1996) defined a traveling employee as a worker "generally considered to be within the scope of employment throughout his sojourn", and that an employee whose work entails travel away from the employee's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip. Griffin at page 655 citing Larson with approval.

This Court in Griffin also cited with approval the Maine case of Boyce v. Potter, 642A 2nd, 1342 (1994). In the Boyce case, the worker was a painter who was required to travel to various remote jobsites. While traveling to a jobsite, he was involved in a motor vehicle accident. This Court cited with approval the holding in Boyce that the "employers control in assigning employees to different worksites and travel requirement that increases normal risks renders any injury during travel compensable." See Griffin at page 655.

Pelmac's reliance on Donnelly v. Kearsarge 121 N.H. 237, 240 (1981) for the proposition "that the ordinary perils of travel between home and the workplace are not risks of the employment and injuries arising from them are not ordinarily compensable," is not applicable to the facts of the case at bar. In Donnelly, the employee was traveling from his home directly to his employers set place of business to begin his usual workday when he was injured. The facts in Donnelly set forth the classic "going and coming rule" scenario where the employee is simply injured while driving to his employers' place of business.

Unlike Mr. Donnelly, Mr. Czaja was traveling from a distant worksite to his home when he was injured. The uncontested facts regarding Mr. Czaja's accident fit into the "various exceptions" to the "going and coming rule" envisioned by the Donnelly decision which states "an employee's injury is compensable if the cause of the injury can properly be considered a hazard of the employment." Id. 239.

Joseph Czaja was traveling 2 ½ hours from the jobsite in Berlin to Manchester when his vehicle crashed in Northfield. Clearly, he is the type of traveling employee described by this Court in Griffin and as a result his injuries occurred during the course of his employment and are compensable.

C. Mr. Czaja's Injuries Resulting From His Motor Vehicle Accident Did Not Arise Out of A Personal Risk

Pelmac alleges that Mr. Czaja's motor vehicle accident arose as a result of his sleep apnea and that a claim for benefits should be denied because his accident arose out of a personal risk. Appeal of Margeson, 162 NH 273 (2011). The only basis of Pelmac's argument was a statement by Mr. Czaja's treating physician that "the accident might have been related to sleep apnea." (emphasis added) (Appendix page 167).

In the Appeal of Brandon Kelley, 167 NH 489 (2015), Brandon Kelley fell asleep at the wheel of a company truck as he was returning to his employer's shop in Hudson. This Court found that Mr. Kelley's injuries were compensable because "There can be no question that the injurious effects of falling asleep were increased by the environment in which the petitioner found himself at the

time he fell asleep – behind the wheel of a moving truck. We have no difficulty concluding on this record, as a matter of law, that the petitioner's employment was a substantial contributing factor to the injury". Kelley at 496. In the case at bar, even if the Court were to accept that Mr. Czaja's accident was somehow related to his sleep apnea, 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.

D. The CAB Did Not Shift The Burden Of Proof To The Carrier When It Found That There Was No Testimony As To Where In Manchester Joseph Czaja Was Traveling When His Vehicle Crashed In Northfield.

In it's decision, the CAB clearly considered the issue raised by Pelmac as to the "going and coming rule." The CAB analyzed Mr. Czaja's work routine as traveling "throughout New Hampshire in his company van. His work, as in the instant case, often involved traveling long distances, working on the site and returning to Manchester." (Appendix page 19).

The CAB considered the "going and coming rule" and held that because his work began when he left his home to travel to a jobsite "that the aforementioned travel and responsibility would be an included risk of his employment." (Appendix page 19). As a result, Mr. Czaja's accident in Northfield would result in a compensable injury whether he was traveling to his home or to his employer's place of employment which the CAB believed to be in Manchester. (Appendix page 95).

II. JOSEPH CZAJA'S SUICIDE IS A DIRECT AND NATURAL RESULT OF THE INJURIES HE SUSTAINED IN HIS WORK-RELATED MOTOR VEHICLE ACCIDENT AND UNDER THE CHAIN OF CAUSATION ANALYSIS FOLLOWED BY A MAJORITY OF THE STATES, HIS WIDOW IS ENTITLED TO BENEFITS PURUSANT TO RSA281-A:26

At the scene of his June 5, 2018 accident, Joseph Czaja was found unresponsive and was unconscious for 30 minutes. (Appendix page 171, 175). He was noted to have suffered significant head and facial injuries in addition to left shoulder and rib injuries (Appendix page 171) and received a diagnosis of an unspecified intracranial injury. (Appendix page 171, 181).

After Mr. Czaja's death, Wiliam J. Jamieson, P.H.D., a Neuropsychologist, reviewed his medical records and interviewed Mrs. Czaja in regard to Joseph Czaja's suicide. It was Dr. Jamieson's opinion that:

> There is nothing in his past history seek (sic) to suggest previous vulnerability to depression, despair or suicidal ideation, or, in fact, to suggest any significant prior psychotic 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, reason, and judgement as well as other physical injuries affecting his emotional capacity. In my opinion, the combination of injuries from his motor vehicle accident comprise the precipitation cause of his suicide. (Appendix page 171, 172).

Albert M. Drukteinis, M.D., a psychiatrist retained by Pelmac's attorney, was of the opinion that "it is likely that the injuries from the motor vehicle accident of 06/05/18 were a motivating factor in that he was struggling with a significant injury to his left shoulder which required surgery, but also an injury to his cervical spine which he was told needed to heal before the shoulder surgery could be performed." (Appendix page 180).

In general, an injured employee is entitled to workers' compensation benefits for subsequent injuries or conditions that are a "direct and natural result" of the initial injury. Appeal of Bergeron, 144 N. H. 681, 684-85 (2000). A subsequent injury is not compensable if there was an independent intervening cause of the injury. Bergeron at 685.

Whether a suicide caused by a compensable workplace injury must constitute an independent intervening cause precluding the payment of workers' compensation benefits to the injured employees' spouse pursuant to RSA 281-A:26 appears to be an issue of first impression before this Court.

The majority of states employ a chain of causation analysis where there is an allegation that a suicide results from a work related injury. Kealhoa v. Director of Workers' Compensation Program, 713F.3d, 521, 527 (2013). The chain of causation test provides that an employee's death by suicide is compensable where the original work-connected injuries result in the employee's becoming dominated by a disturbance of mind directly caused by his or her injury and its consequences, such as extreme pain or despair, of such severity as to override normal rational judgement. A suicide committed by an employee from such a disturbance of mind is not considered intentional even though the act itself may be volitional. . Kahle v. Plochman, 85 N.J. 539 (N.J. 1981). See also McCoy v. W.C.A.B., 518A 2^{d}, 883 (Penn 1986); Burnight v. Industrial Assoc. Commission, 181 Cal. App. 2d 816, 825 (1960); Advance Aluminum Co. v. Leslie, 869 S.W. 2d 39 (KY 1994).

In Vredenburg v. Sedgwick CMS, 188 P3d, 1084 (Nev 2008) Mr. Vredenburg was injured when he slipped on a flight of stairs severely injuring his back. The injured employee's workers' compensation claim was accepted and he underwent a spinal fusion which did not alleviate the employee's pain. Prior to his workplace injury, the employee was sociable and extroverted but after his injury, he became a "different person" Vredenburg at 1087. The employee committed suicide after his treating physician recommended that he apply for permanent disability status. Id 1087. Like New Hampshire, Nevada's workers' compensation law contained a willful self-injury exclusion. In adopting the chain of causation test, the Nevada Supreme Court reasoned that "Since an industrial injury and its consequences may surpress an employee's will to resist the impulse to commit suicide, a claimant may recover under this test even if the employee's choice to commit suicide was deliberate." Vredenburg at 1090.

Similar to New Hampshire, the Nevada Supreme Court considers the "remedial purpose of the Nevada workers' compensation scheme" in construing it's workers compensation statute. As a result, the Nevada Supreme Court adopted the chain-of-causation test which furthered the remedial purpose of the statute which is to "deliver economic assistance to persons who suffer disability or death as a result of their employment." Vredenburg at 1090.

In Kahle, supra, the employee suffered a compensable back injury, and committed suicide after experiencing chronic pain and disability because of her injury. The only expert medical opinion presented at the hearing was that the injured worker's suicide was a direct consequence of the workplace injury. Like

New Hampshire, New Jersey workers' compensation precludes compensation "when the injury or death is intentionally self-inflicted." Even though it was uncontested that the suicide was a direct consequence of the work connected injury, the employer's spouse was denied survivor benefits by the workers' compensation board because the death was "intentionally self-inflicted."

The New Jersey Supreme Court, in adopting the chain of causation analysis, held that "an act of suicide committed under circumstance in which the decedent was devoid of normal judgement is not to be considered to be willfully, purposely or intentionally self-inflicted within the meaning of the various statutory exclusions, regardless whether the act was committed with conscious volition or knowledge of its consequences." Kahle at page 546.

Applying the chain of causation analysis, Mr. Czaja's death by suicide is compensable. Both Drs. Jamieson and Drukteinis share the opinion that the injuries suffered in the motor vehicle collision were a "motivating factor" (Drukteinis) or "precipitating cause" (Jamieson) of his suicide.

As in Kahle, in which the New Jersey Supreme Court adopts the chain of causation rule, Mr. Czaja's death is compensable because it occurred because of "...a disturbance of the mind directly caused by his or her injury and its consequence such as extreme pain and despair, of such severity as to override normal rational judgement. A suicide committed by an employee suffering from such a disturbance of mind is not to be considered "intentional" within the means of (the statute)" Kahle at page 546.

This Court has long held that it will construe the workers' compensation statute liberally resolving all reasonable doubts in statutory constriction in favor of the injured employee in order to give the broadest reasonable effect to it's remedial purpose. Appeal of Belair, 158 N.H. 273, 276 (2009). New Hampshire jurisprudence supports this Court's adopting the chain-of-causation test because as the Nevada Supreme Court noted, it closely aligns with the remedial purpose of the workers' compensation law. Vredenburg at 1090.

The adoption of the chain-of-causation analysis is particularly appropriate in the Czaja's case. Prior to his accident, Mr. Czaja did not experience depression, despair or suicidal ideations. (Appendix page 17). Dr. Jamieson's opinion that the traumatic brain injury sustained by Mr. Czaja in his accident, along with the severe level of ongoing distress from the accident led to his suicide. (Appendix page 18). The remedial nature of New Hampshire workers' compensation statute supports a finding of compensability and an award of benefits pursuant to RSA 281-A:26 to Mrs. Czaja.

Pelmac's reliance on the recent case of Appeal of Estate of William Quinn, (case no. 2018-0310, August 20, 2019) for its argument that Joseph Czaja's suicide was not a direct an natural result of the initial injury is misplaced.

In Quinn, the injured worker died as a result of an overdose of heroin and his prescribed oxycodone. The CAB rejected the opinions of Quinn's medical expert who was a friend of Quinn's family. As a result, there was no credible medical opinion to establish that Quinn's death was causally related to his work place injury.

III. PELMAC RECEIVED A FAIR AND IMPARTIAL HEARING BEFORE THE COMPENSATION APPEALS BOARD.

Pelmac complains that it did not receive a fair hearing before the CAB because "The Board's decision shows a predetermined purpose to reach a determined end." Nothing in the transcript of the CAB hearing or in its decision supports Pelmac's claim of partiality.

Pelmac relies exclusively on Appeal of Lathrop, 122 N.H. 262 (1982) to support its claim that it wasn't treated fairly. In Lathrop, the administrative agency charged with approving dam reconstruction passed a resolution in March 1980 urging the Governor and Council to negotiate a lease so that a dam reconstruction project could go forward. In November 1980, the same administrative agency received a petition to permit the reconstruction of the dam the agency had advocated for in March. The agency held a hearing on the petition and approved the dam reconstruction project. The parties opposing the project appealed the agency's decision because of its prior position advocating for the project. This Court found that because the agency announced its position on the project before it conducted a hearing, the due process rights of the opposing parties were violated.

In the case presently before this Court, there is no evidence that the CAB had any information about or any preconceived opinions about Joseph Czaja's accident or Mrs. Czaja's claim for workers' compensation benefits as a result of her husband's suicide. The transcript reveals no bias on the part of the CAB toward either party. The CAB Findings of Fact in its decision are thorough and it is clear that the panel's decision analyzed the parties' arguments. The CAB's

comment that "Additionally, it does not make sense to preclude recovery of widow's benefits in this situation" (Appendix page 16) does not indicate a predetermination of the issues presented to it. Rather, that statement appears after the panel has found that Mr. Czaja's accident arose during the course of his employment when his truck went off the road and that his death was as a result of the injuries he suffered in his work related accident. The CAB statement which Pelmac claims discloses a bias is simply a statement by the panel that the facts and law support a decision that Mrs. Czaja is entitled to "widow benefits" because her husband's death resulted from his work related accident.

CONCLUSION

For the reasons set forth above, the Estate of Joseph Czaja requests that the Compensation Appeal Board's decision be upheld.

REQUEST FOR ORAL ARGUMENT

The Respondent, the Estate of Joseph Czaja, requests that this Court schedule oral argument. Oral argument will be presented by Terrence J. Daley. Mr. Daley requests 15 minutes of argument before the full Court.

CERTIFICATE OF SERVICE

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

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