Noteworthy Decision Summary

Decision: WCAT-2006-03078-RB **Panel**: Ralph McMillan **Decision Date:** August 2, 2006

Standing of dependant of deceased worker to pursue appeal – Standing of estate of deceased worker to pursue appeal – Section 241(1) of the Workers Compensation Act – Item #3.20 of the WCAT Manual of Rules of Practice and Procedure

This decision is noteworthy for its discussion of the circumstances in which a dependant of a deceased worker, as opposed to the deceased worker's estate, has standing to initiate and/or pursue an appeal at WCAT.

The worker tragically ended his life a month after appealing a February 24, 2000 decision of the Workers Compensation Board operating as WorkSafeBC (Board). Prior to his death, the worker had initiated an appeal from a February 24, 2000 Board decision denying reopening of his claim. On November 13, 2002 the Board concluded that the worker's death was not a compensable consequence of his compensable injury to the right knee. The worker's estate appealed this decision and also sought to continue the worker's appeal from the February 2000 decision.

After the appeals were filed, WCAT sent a letter to the worker's estate advising that the estate had standing to proceed with both appeals. However, after the appeal had been assigned to a panel, it was discovered that the estate's standing to pursue the appeal from the November 2002 decision had not been addressed.

The panel noted that section 241(1) of the *Workers Compensation Act* (Act) grants "a deceased worker's dependant" the right to appeal a decision of the Board. The definition of a dependant under the Act requires the individual to satisfy the Board that they had a reasonable expectation of pecuniary benefit. Under item #3.20 of the WCAT *Manual of Rules of Practice and Procedure*, an estate only has standing either to continue an appeal on behalf of a deceased worker or to initiate an appeal concerning a claim for arrears of compensation up to the date of the worker's death. The WCAT Registrar subsequently determined the estate did not have standing to pursue the appeal. However, a relative of the worker might have such standing and submissions were invited and received from the worker's mother and brother.

The panel then considered whether either the worker's mother or brother had standing to pursue the appeal from the November 2002 decision under section 241(1) of the Act. There was evidence of a strong bond between the worker and his mother and only brother, as well as a history of strong family support and cooperation. His mother was a single mother who worked to provide an education and family home for her two boys. There was evidence of strong extended family involvement in assisting the worker in the achievement of his life goals. The worker had done well in school and worked as an aircraft mechanic after obtaining certification in that field.

The panel reviewed the law and previous decisions of the Appeal Division. The panel noted there is no set formula for calculating the level of pecuniary benefit parents could reasonably expect to have derived from continuation of the life of a deceased son or daughter. Each case must be adjudicated on its particular facts and there must be something more than mere speculation

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

with respect to pecuniary gain. There must be something tangible in evidence that makes the expectation reasonable.

The panel agreed with the Registrar that the estate did not have standing to initiate an appeal from the November 2002 decision. However, the worker's mother had a reasonable expectation of pecuniary benefit had the worker survived and therefore had the necessary standing. The panel also concluded there was insufficient evidence the worker's brother had a reasonable expectation of pecuniary benefit from the worker. The panel then proceeded to consider and allow both appeals on the merits.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2006-03078-RB
WCAT Decision Date: August 02, 2006
Panel: Ralph D. McMillan, Vice Chair

Introduction

On March 28, 2000 the worker tragically ended his life. Prior to that event, the worker had appealed the February 24, 2000 decision of a case manager at the Workers' Compensation Board (Board). The worker's estate is pursuing that appeal, and in addition the estate filed an appeal with respect to a November 13, 2002 decision of a Board case manager. While there has been a question raised with respect to the estate's standing to pursue an appeal on the issue of the death of the worker as a compensable consequence of the worker's injury, these two letters form the basis of the appeals currently before this panel.

In the decision letter dated February 24, 2000 ("B" appeal) a Board case manager informed the worker his claim had been accepted for a torn medial meniscus, but had not been accepted for any problems relating to his anterior cruciate ligament (ACL). The case manager noted that a decision letter dated December 31, 1998 had informed the worker there was no further entitlement to temporary wage loss benefits, that his condition had plateaued, and that his file would be referred to the Board's Disability Awards Department.

The case manager noted the worker was scheduled to be examined for permanent functional impairment (PFI) purposes on March 1, 2000.

The case manager acknowledged that the worker had contacted the Board in February 2000, saying that he was having further problems with his right knee and could no longer work. Doctors' reports received had been sent to a Board medical advisor, who compared the "current" findings of the worker's attending physician with reports from 1998. The Board medical advisor could not establish any deterioration in the worker's compensable condition. The medical advisor indicated that current findings were consistent with a disrupted (perhaps torn) ACL. The Board medical advisor agreed with the worker's attending physician that the worker would likely need further surgery to his right knee, but as the ACL had not been accepted on this claim any surgery to fix further problems with the ACL was not a Board responsibility. On that basis the case manager determined the worker's claim would not be reopened.

On November 13, 2002 ("D" appeal) worker's counsel, on behalf of the worker's estate, was informed by a case manager in the Board's Sensitive Claims section that he believed the February 24, 2000 decision of the Board was correct. The case manager said the worker had an injury to his right medial meniscus that had been addressed surgically. He said the worker's attempt to reopen his claim in February 2000 was due

to problems with his ACL, and the February 24, 2000 decision that denied acceptance of the ACL was under appeal. The case manager's decision was to deny further benefits under the claim because he could not relate the worker having committed suicide to the compensable injury to the right knee.

The panel notes that subsequent to the February 24, 2000 decision, the worker had been examined at the Board for PFI purposes. After the worker's death, the Board issued a decision letter dated June 7, 2000 to the worker's estate, dealing with the worker's pension entitlement. An attempt by counsel for the worker's estate in 2002 to get an extension of time to appeal that letter was denied by the former Workers' Compensation Review Board (Review Board) in a letter dated May 28, 2002. Any issues contained within the June 7, 2000 decision letter are, therefore, not directly within the jurisdiction of this panel.

Preliminary Matter

On March 2, 2000, the worker initiated an appeal from a February 24, 2000 decision of a Board case manager that advised the worker that his claim would not be reopened for a deterioration in his compensable condition. The case manager noted a Board medical advisor had indicated that the worker's clinical findings were consistent with a disrupted (perhaps torn) ACL; however, that problem was not considered to be related to the condition accepted under the worker's claim. This appeal, made to the then-existent Review Board, was designated as the "B" appeal.

Tragically, on March 28, 2000 the worker took his life. Subsequently, the worker's representative sent sufficient supporting documentation to establish standing of the estate to continue the "B" appeal. Further, as noted above, the estate initiated a new appeal with respect to the November 13, 2002 decision of the Board, which had found that the death of the worker was not a compensable consequence of his May 7, 1998 compensable injury. The new appeal with respect to the worker's death was given the designation of the "D" appeal.

Both the "B" and "D" appeals were assigned to this panel of the Workers' Compensation Appeal Tribunal (WCAT), and during the decision-making process it was discovered that the standing of the estate to pursue the "D" appeal had never been addressed. I note that in April 2005, a letter had been sent advising the estate had standing to proceed with both appeals.

Notwithstanding the above, section 241(1) of the *Workers Compensation Act* (Act) grants "a deceased worker's dependant" the right to appeal a decision of the Board. The definition of a dependant under the Act requires the individual to satisfy the Board that they had a reasonable expectation of pecuniary benefit. Under item #3.20 of the *WCAT Manual of Rules of Practice and Procedure* (MRPP), the rule for standing of an estate to appeal only applies to continuing the appeal on behalf of a deceased worker or

initiating an appeal concerning a claim for arrears of compensation up to the date of the worker's death.

On investigation it was determined by the WCAT Registry that the estate of the worker had no standing to pursue the "D" appeal. However, although the estate had no standing it was determined that a relative of the worker might have standing (as a dependant) to initiate and continue the "D" appeal, but submissions on the issue of whether they had an expectation of pecuniary benefit would need to be provided. Once the WCAT was in possession of those submissions, they would be provided to the vice chair of this panel to make the final determination.

I am now in receipt of a submission from worker's counsel dated May 4, 2006 with respect to the issue of whether the worker's mother (and brother) had an expectation of pecuniary benefit such that she/he would have standing to pursue the "D" appeal. I am now in a position to render a decision with respect to this preliminary issue.

In submission, worker's counsel said that as a preliminary matter he challenged the authority of the WCAT to raise the issue of standing to appeal the "D" appeal in 2006. He pointed out that file information confirmed that the "D" appeal had been properly registered in November 2002, and in 2005 the WCAT had confirmed both the "B" and "D" appeals would proceed and the submission process had been completed. Counsel said given that the appeal process had been completed in 2005 with only the decision left to follow, he challenged the ability of the WCAT to reopen the appeal process in 2006 and to raise the question of standing.

With respect to counsel's 'challenge' of the authority of the WCAT to address the issue of the standing of the estate to initiate and pursue the "D" appeal, as referred to in his submission of May 4, 2006, I note the following.

On January 18, 2006, the senior vice chair and registrar at the WCAT wrote to the worker's counsel. On pages two and three of that letter she informed counsel that she was unable to conclude that the estate had standing to pursue the "D" appeal. This was based on an analysis of section 90(1) of the former Act, which provided that a Board decision with respect to a worker could be appealed to the Review Board. She noted that as the estate is not directly awarded any compensation arising from the compensable death of a worker, the Board's November 13, 2002 decision was not with respect to the worker, but with respect to his dependants. As such, the estate has no standing to commence the "D" appeal.

On review of section 90(1) of the former Act and the explanation provided by the senior vice chair and registrar of the WCAT, I am led to the conclusion that to find that, as a result of an oversight on the part of the Review Board process, the estate should be allowed to proceed to initiate and pursue the "D" appeal would be a contravention of the legal provisions of the Act. On that basis, I do not consider that there is any merit in the challenge made by council, although I can fully appreciate his concerns.

With respect to counsel's submission that the worker's mother (or brother) should have standing to initiate and pursue the "D" appeal, I make the following finding.

In his May 4, 2006 submission, worker's counsel provided evidence of a strong bond between the worker and his mother and only brother, as well as a history of strong family support and cooperation. He noted that the worker's mother, following separation from the worker's father and later following another failed relationship, worked to provide an education and family home for her two boys. This was a process in which both boys assisted and contributed to the best of their ability. Further, counsel has provided evidence of a strong extended family involvement in assisting the worker in the achievement of his life goals.

Counsel provided evidence that the worker had done very well in his scholastic endeavours and had obtained and completed an aircraft mechanic's certification, following which he became employed in that industry and worked there until further problems in the area of his compensable injury caused him to go off work.

Counsel asserted that the chronology and personal history of the worker's young life in relation to his family substantiated a conclusion that had he lived he would have contributed to his mother's and brother's financial and physical well-being as they got older. In this respect, counsel referred to "*Cox v Fleming* (1995) 15 B.C.L.R. (3d) 201 (B.C.C.A.)", stating that the case at hand closely followed that example and therefore the criteria for a dependant as defined in the Act for the purposes of the appeal process had been substantiated.

Counsel referred to a Board Appeal Division decision *(#96-1421*), which had adopted the reasoning in *Cox v Fleming*. Counsel stated, in part:

> In *Cox v Fleming* and as adopted by the Appeal Division panel in 96-1421, the BC Court of Appeal confirmed there is no set formula for determining whether a child might have bestowed a pecuniary benefit on a parent or to determine the level of pecuniary benefit that a parent might have received. Instead, each case is to be adjudicated on its particular facts and providing there is "…something tangible in the evidence that makes the expectation reasonable", the criteria of a dependent is substantiated (Appeal Division 96-1421, p. 329).
>
> To assist in reaching this determination, both the BC Court of Appeal and the Appeal Division panel identified a number of relevant factors. We submit that a review of these factors in conjunction with the personal circumstances of [the worker] confirms [the worker's mother] and [the worker's brother], would clearly have benefited from [the worker's] continued existence. In particular, [the worker] had achieved his academic pursuit and was gainfully employed with a company and in an

> industry where [the worker] could have continued to aspire and grow in both his qualifications and earnings level. Other than the WCB injury, [the worker] had no health problems and because his past history identifies a person who is an achiever, the likelihood of [the worker] failing to achieve his goals was minimal. [The worker's] confirmed close family ties with his mother, brother and extended family further confirms [the worker] had the family support needed to succeed and [the worker] would surely have responded in kind. [The worker's mother] devoted her life to her children, providing them with all she could and because her abilities in this regard slow with age, [the worker] would have ensured to make up the shortfall for his mother to ensure she maintained the same quality of life which he enjoyed growing up.
>
> [reproduced as written except for the removal of identifiers]

The panel of the Board Appeal Division that produced *Decision #96-1421*, dated September 12, 1996, consisted of a three-person panel that was charged with the responsibility of addressing the appeal of a mother in search of compensation benefits arising from the death of her son. The fact pattern before the Appeal Division panel on that appeal was similar to the one before me. The Appeal Division panel, in considering section 17(3)(i) of the Act, noted that the task before them was to interpret the meaning of the phrase "Reasonable expectation of pecuniary benefit". That panel noted that item #61.00 of the *Rehabilitation Services and Claims Manual* merely reproduced section 17(3)(i) of the Act and provided no relevant elaboration. The Appeal Division panel therefore considered and analyzed several common law decisions of the courts to determine how the courts had interpreted this phrase. That panel then set out several court decisions with respect to the issues and outcomes.

The Appeal Division panel noted that B.C. and Ontario common law decisions, in awarding damages to parents under the *Family Compensation Act*, use a test basically identical to that contained in section 17(3)(i) of the Act. That panel noted these cases make it clear that there is no set formula for calculating the level of pecuniary benefit that parents could reasonably have expected to derive from continuation of the life of their deceased son or daughter. Each case must be adjudicated on its particular facts. There must be something more than mere speculation with respect to pecuniary gain. There must be something tangible in evidence that makes the expectation reasonable. The Appeal Division panel stated, in part:

> The panel observes, from the above cases, that the courts seem to be interested in a number of factors in making their awards. Some of these factors are: evidence of the deceased's aspirations, and the likelihood they would have been realized; the health of the deceased; evidence of the deceased's capability and willingness to get involved in things, such as grades and extracurricular activities; the likelihood that the deceased would have obtained a post-secondary education, married, had children,

> become sick or unemployed, etc.; the chance that there might have been a reduction in the level of contributions to the parents during the time that the deceased was in university, or was only working part-time during a pregnancy, etc.; the relationship that the deceased had with his or her family; whether the deceased demonstrated a commitment to helping the family, either through past financial contributions or by helping with various tasks; cultural beliefs and values that might have made future contributions by the deceased a legitimate expectation; the size of the surviving parent(s)' income, and the chance they might obtain higher-paying work in the future; the health of the surviving parent(s), pension benefits and income from RRSPs accruing to the parents in the future.
>
> However, as stated by Mr. Justice Finch for the B.C. Court of Appeal in *Cox v Fleming*, these cases are highly fact specific and the awards depend on a number of factors, as well as predictions as to what all of these factors may lead to in the future.
>
> [reproduced as written except for the removal of identifiers]

On review of counsel's submission and file evidence, I conclude the fact pattern in the appeal before me meets sufficient of the factors identified by the panel of the Board Appeal Division in *Decision #96-1421*, dated September 12, 1996, the reasoning of which I agree and accept, to justify a conclusion that the worker's mother in the case before me had a reasonable expectation of pecuniary benefit had her son survived. I find, therefore, that the worker's mother has the standing required to initiate and pursue the "D" appeal.

While counsel in his submission of May 4, 2006 alluded to the worker's brother also having expectation of pecuniary benefit, no evidence has been provided in this respect. While I have found that counsel's submission has provided sufficient evidence to establish that the worker's mother has standing to pursue the "D" appeal, I find there is insufficient evidence to determine that the worker's brother should be accorded the same standing.

Having found that the worker's mother has standing to initiate and pursue the "D" appeal, I will now proceed to deal with both the "B" and "D" appeals.

Issue(s)

The issue arising from the February 24, 2000 decision letter ("B" appeal) is whether the worker's claim should be reopened to include a problem in the worker's knee, for which he sought treatment in February 2000, as a sequela of his May 7, 1998 compensable injury.

The issue arising from the November 13, 2002 decision letter ("D" appeal) is whether the May 7, 1998 compensable injury is responsible for the worker having taken his own life.

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Review Board and the Appeal Division of the Board were replaced by the WCAT. As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it (section 254 of the Act).

WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which relates to the former (pre-Bill 49) provisions of the Act.

Law and Policy

The law and policy applicable to this appeal is the law and policy as it existed prior to changes in the legislation resulting from Bills 49 and 63.

Policy applicable to this appeal is found in the RSCM as it existed prior to the above-noted legislative changes.

One exception applicable to the defined policy is set out in policy item #22.00 in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) which is applicable to all decisions, including appellate decisions, made on or after February 1, 2004, regardless of the date of the original work injury or the further injury. That policy states:

> Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other.
>
> Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a "common sense" point of view, it should be considered whether the work injury was a significant cause of the later injury. If the work injury was a significant cause of the further injury, then the further injury is sufficiently connected to the work injury so that it forms an inseparable part of the work injury. The further injury is therefore considered to arise out of and in the course of employment and is compensable.

In arriving at a decision on these appeals the panel has also considered policy items #22.11 and #22.22 in the RSCM.

Policy item #22.11 sets out the procedure to be followed in a case where disablement is caused by surgery.

Item #22.22 in the RSCM provides that: "In a case of suicide, death benefits are payable if it is established that the suicide resulted from a compensable injury." The policy goes on to set out that the test to be applied is whether the suicide was an event that would have been unlikely to have occurred in the absence of a work-related injury.

The panel also reviewed the policy set out in item #96.21 of the RSCM, which provides guidance to adjudicators with respect to making an interim decision on a worker's claim.

The last three policies referred to above form a part of counsel's submission to the panel in support of the appeal(s).

Background and Evidence

Although the worker's mother requested an oral hearing be held to discuss the appeals, the WCAT registry determined the appeals would proceed on the basis of a 'read and review' of file evidence and submissions. On review of the available evidence and submissions I did not identify any issues that would require an oral hearing to address.

I conclude, therefore, that the appeals before me can be fairly decided by use of the read and review process.

On May 7, 1998, the worker was employed on a part-time basis by a large supermarket chain, while attending school. During the course of his work activities he twisted his right knee. The Board accepted the worker's claim for compensation and he was placed on wage-loss benefits.

Based largely on a statement from the worker that he had sustained a non-compensable injury to his right knee approximately six months prior to the May 7, 1998 compensable injury, and on a Board medical advisor's opinion that the mechanism of injury described as occurring May 7, 1998 was not of sufficient magnitude to cause an ACL tear, the case manager decided:

1. The worker had a torn ACL that pre-existed the May 7, 1998 compensable injury; and,

2. Any injury to the ACL would not be accepted as a Board responsibility.

The Board medical advisor appears to have accepted without reservation the worker's statement that he had injured his ACL six months prior to the May 7, 1998 compensable injury, but ignored (or did not believe) the worker when he said:

1. The prior injury had resulted in a stretched ACL; and,

2. The prior injury, following treatment, had resolved to the point that by May 7, 1998, he was able to function at a 100% level.

Further, the Board does not appear to have made any attempt to obtain medical evidence with respect to the severity of the non-compensable injury.

In a decision letter dated August 7, 1998 the worker was informed that his claim had been accepted for a medial meniscus tear but based on file information, while the medial meniscus surgery and a recovery period would be accepted, any surgery to the ACL and recovery time (in excess of the time needed to recover from the accepted meniscus injury following the resulting surgery) would not be accepted as a Board responsibility. The worker did not appeal that decision.

In a decision letter dated December 31, 1998, the worker was informed that wage loss benefits would be paid based on the maximum predicted recovery time for a medial meniscus surgery (six weeks) to December 31, 1998. Because it was considered that as of December 31, 1998 the worker had reached a medical plateau in his recovery from the compensable component of his injury, his file would be referred to the Board's Disability Awards Department. The worker did not appeal that decision.

The worker's failure to appeal the decision letters of August 7, 1998 and December 31, 1998 has the consequence (for the purposes of this appeal) of establishing that:

(1) The worker had a torn ACL as a result of a non-compensable injury occurring prior to the May 7, 1998 compensable injury; and, (2) Any problems/treatment directed at the worker's ACL is not a Board responsibility.

On February 4, 2000 the worker called the Board and advised that he was having further problems with his knee and, as a result, was having difficulties working because his knee tended to lock.

On February 11, 2002 the worker contacted the Board, stating he had seen his doctor that day and had been advised not to return to work. The worker requested that the Board contact him when a decision had been made as to the reopening of his May 7, 1998 compensable injury claim.

On February 14, 2000, the case manager requested an opinion from a Board medical advisor, noting that the only medical report received since 1998 had been a physician's progress report of January 20, 2000 which indicated the worker was having ongoing knee pain while climbing stairs and ladders. She said that from a lay point of view it did not appear that the findings provided in the doctor's report supported a deterioration in the worker's condition which could be deemed other than a normal fluctuation. The case manager requested the medical advisor provide a medical opinion on this issue.

On February 14, 2000, a Board medical advisor reviewed the worker's file and said that pain from time to time was not unexpected following a surgical repair of the right knee. In the absence of a new application for compensation, the Board medical advisor said he could not determine the specifics of what had caused the worker's pain to flare up. He noted the case manager's log entry had mentioned pain with climbing and, if this was the case, the worker's problem might be patello-femoral pain. If the case manager were to decide the worker was entitled to Board assistance with this, then physiotherapy would be appropriate.

On February 15, 2000, the case manager replied to the medical advisor, indicating her question had not been answered. She noted that the claimant had not sustained any new injury and that she required an opinion from the medical advisor as to whether the worker's condition had deteriorated when compared to the medical reports of December 1998.

On February 15, 2000, the medical advisor replied:

> The December 1998 medical report from Dr. Ackermann documents clinical data as:
>
> 5 degrees short of full extension
> Flexion to 110 degrees
> An effusion is present
> These are all expected findings at 6 weeks post-op.
>
> The January 20, 2000 medical report from [Dr. H] states documents clinical data as:
>
> Ligaments are intact
> There is no local pain with palpation
> There is good function
> There is a surgical scar
>
> Since there are no objective data listed by [Dr. H] it is not possible to directly compare the two reports. However, it appears that:
>
> - [The worker] has pain only with activity,
> - There is no significant effusion present (at least not one documented by [Dr. H]), and
> - There is no obvious or significant restriction in range of motion in the knee (none was documented by [Dr. H]).
>
> Other considerations (that I think are important) are as documented in my log entry yesterday.
>
> So, the report of 20 Jan 00 does not document a medical deterioration. However, perhaps if [Dr. H] had been aware a comparison with the 1998 findings would have been helpful, he could have documented this.
>
> I note in his latest F11, [Dr. H] documents clinical findings that are consistent with a disrupted (perhaps torn) anterior cruciate ligament (ACL). As noted in documents in his file from 1998, the worker evidently had the ACL disruption as a result of a non-compensable incident some six months before the 1998 work injury. Also, the ACL was repaired in the OR 12 Nov 98. So, while it is possible that [Dr. H] is correct that there is another ACL tear, it is also possible that there is just laxity in the ACL. In any case I think that [Dr. H] needs to be aware of any administrative decisions about acceptability of this claim and about our referral to an Orthopedic Surgeon (or not), since I agree that the patient needs to be assessed by a surgeon (if not through the Board, then through the MSP).

[reproduced as written except for the removal of identifiers]

The panel interprets this report to mean that while the worker may have had yet another tear of his ACL or laxity in his ACL, (if he did it would not have been a Board responsibility) and more investigation was required to establish just what was going on in the worker's knee.

On February 23, 2000, a Board medical secretary recorded that a PFI examination had been confirmed for the worker on March 1, 2000 with Dr. G in the Board offices. On February 24, 2000, the case manager issued the first of the two letters currently under appeal.

On March 1, 2000 the worker was examined for PFI purposes by Dr. G, a Board disability awards medical advisor. Dr. G's report provided a medical summary of the worker's claim, and noted that unfortunately the worker had sustained further injuries to the right knee over the past two to three months. The worker noticed the problem mostly going up and down ladders in the course of his employment as an aircraft mechanic. Dr. G noted the worker had reported becoming gradually aware of more pain and discomfort in the right knee. He noted the worker was faithfully wearing a Generation II knee brace, but had become aware of periodic snapping in the knee joint at various degrees of flexion and extension. The worker could not recall any specific incident in which he might have re-injured his right knee.

Dr. G recorded a history, apparently provided by the worker, noting that prior to the May 7, 1998 injury to his knee the worker had enjoyed excellent health and was very active in outdoor activities, including downhill skiing, snowboarding, soccer and volleyball. He noted the worker's history of multiple incidents resulting in injuries to various parts of his body, but in spite of those injuries the worker had been able to continue in employment classified as heavy work. Dr. G noted the worker had no previous claims with the Board. Further, the worker reported that up to the May 7, 1998 injury he had no significant problems with his knees while performing his work activities.

On clinical examination the worker presented in a pleasant and straightforward manner with no evidence of symptom magnification or inappropriate behaviour.

Following clinical examination, Dr. G summarized his report as follows:

> Although there is some laxity of the right ACL, this, in all probability, had been present since the operative procedure and hence Dr. Ackermann's prescription for a Generation II knee brace.
>
> Although there has been no specific incident, [the worker] today is showing symptoms as well as signs of some derangement of the medial compartment, this time of an indeterminate nature which will most

> probably become more evident either with an MRI examination or during a diagnostic arthroscopy.
>
> [reproduced as written except for the removal of identifiers]

A subsequent claim log entry from Dr. G dated March 8, 2000 indicated that based on examination, review of the facts and a discussion, he felt the worker should be seen by an orthopaedic surgeon.

On March 13, 2000, a disability awards officer noted the PFI examination performed by Dr. G on March 1, 2000, and his advice that the worker had not plateaued and should be referred to see an orthopaedic surgeon. He requested an appointment be made, noting the worker might require further treatment or possibly surgery and that it was therefore too soon to assess the worker for PFI purposes. Prior to any further arrangements for examination being made, however, tragically the worker took his own life.

On December 10, 2000, a "**JUDGEMENT OF INQUIRY**" report from the BC Coroners Service was completed. The report of the investigation by the coroner, based on her investigation, noted that a handwritten note indicative of the worker's intention to take his own life had been recovered. Further:

> …He was experiencing significant turmoil and disillusionment in his life as a result of a knee injury which left him unable to continue working as a helicopter mechanic for a Vancouver based heli-logging operation. He was involved in an unresolved disability claim with the Workers Compensation Board regarding his injury. He was on unemployment insurance and was receiving insurance benefits from his former employer. Family and friends stated his inability to work at a job he enjoyed, his inactivity and distinct probability he would have to change careers were very distressing to him.
>
> [reproduced as written]

The coroner, in her report, set out a historical synopsis of the worker's right knee problems. On page five of her report she stated in part:

> Following his examination at the WCB, [the worker] remained uncertain about his ability to work at a job he enjoyed and his financial security. On advice of family members, he retained a lawyer on March 3, 2000 to assist him in understanding options available to him with the Workers Compensation Board. He also applied for, and received, unemployment insurance benefits, which were supplemented by an insurance company payment through the heli-logging company for whom he had been employed.

In the weeks following his initial visit to his general practitioner on February 1, 2000 [the worker] became increasingly depressed. Although he outwardly appeared to understand the procedures and formalities of the lengthy adjudication process undertaken by the WCB, the situation was very distressing to him. He desperately wanted to return to work repairing helicopters but had come to the realization that this may not be possible because of his knee injury. He had inquired at a local community college about classes and a possible career change but, with the uncertainty of his WCB claim, did not enroll in any classes.

POST MORTEM RESULTS:

An external post mortem examination revealed no evidence of acute traumatic injury.

Toxicological analysis confirmed a lethal carboxyhemoglobin level of 98%. A blood ethanol level of 0.02% was evident. No other substances were detected.

CONCLUSION:

…Although he had not expressed thoughts of suicide, [the worker] had related to others his feelings of sadness at being unable to work at a job he enjoyed because of the pain in his knee. The symptoms he experienced in January and February of 1999, subsequent reassessment by the Workers Compensation Board as to its responsibility to him, and the distinct possibility he would not be able to return to his previous job were distressing to him.

Investigation revealed that, at the time of the original work related injury in May of 1998, [the worker] informed the Workers Compensation Board that he had a previous sports related injury to the same knee. No background medical information was sought by the Workers Compensation Board as to the status of the right knee in relation to the previous injury. His employer at the time of the claim did not dispute the fact that he had been injured on the job. No background information was sought or deemed necessary for the WCB to proceed with his claim. It may have been advantageous for the WCB to know from a medical standpoint the status of the right knee prior to the work-related injury.

In January and February of 1999 [the worker] began experiencing pain and discomfort in his right knee. After seeking medical attention on February 4th, documentation was forwarded to the Workers Compensation Board by his general practitioner. The decision to disallow the re-opening

> of the May 1998 claim was made by the adjudicator dealing with [the worker] in consultation with a WCB medical advisor. That decision was made based on the documentation provided by the general practitioner and a file review by the adjudicator and medical advisor. No diagnostic studies were performed to confirm that the symptoms currently being experienced by [the worker] were sports related and therefore not compensatable.
>
> [reproduced as written except for the removal of identifiers]

The coroner went on to find that the worker had died as a result of suicide.

On September 13, 2000, a client service representative recorded a call from the coroner requesting a return call from the case manager to clarify some details prior to the submission of her report. On September 18, 2000 the case manager recorded that she had left a message at the coroner's office that she had returned the coroner's call.

Approximately nine months later, an interoffice memo dated June 6, 2001 from the case manager noted the remote request from the coroner for a meeting to discuss the claim. The case manager said that after speaking with the coroner she had felt there was no need to involve the Board's Legal Department, because the impression she had received was that the coroner wished to discuss a few issues that in no way implicated the Board in the worker's death. She went on to state:

> I met with [the coroner] on May 10, 2000. We spent several hours discussing general issues: TTD, TPD, Disability Awards, the different levels of adjudication, significance of prior problems (and why prior problems were not more fully investigated at the onset of [the worker's] claim, etc. It was a very amicable conversation.
>
> During the course of our meeting, [the coroner] advised that on the day that (or the day before) [the worker] committed suicide he had received a call from either EI or Revenue Canada advising that he owed them a substantial amount of money and he was quite disturbed about having to repay this (I seem to recall that [the coroner] had gotten this information from [the worker's] girlfriend, who at the time was living in Vancouver).
>
> [The coroner] mentioned that she thought the family might be trying to blame the Board because we are a large "faceless" organization and it would be easier than accepting one's own responsibility, in this case, referring to the pressure the father had put on his son to "follow in his footsteps" in regard to [the worker's] career. Apparently, [the worker] was under considerable stress about this, given that his knee problems may have prevented him from doing so.

> [The coroner] expressed that these two factors probably had a large influence in [the worker's] decision to commit suicide and I was very surprised to see that none of it was mentioned in the coroner's report.
>
> [reproduced as written except for the removal of identifiers]

On June 7, 2001, the same claims adjudicator provided a second internal memo stating in part:

> …There was another thing that I remembered about this claim, and that is that the worker left a suicide note. It was in the note that he talked about the pressure he was feeling from his father.
>
> …
>
> Another thing I remembered about my discussion with [the coroner] is that she did not understand why the claim would not have been disallowed if the worker had previous non-compensable problems or at the very least why these would not have been investigated at the onset of the claim. The claim was accepted for a right medial meniscus tear, but not for a pre-existing anterior cruciate ligament problem. I tried to explain Section 5(1) as opposed to Section 39(1)e, but I'm still not convinced that she understood.
>
> [reproduced as written except for the removal of identifiers]

The panel notes that the two internal memos quoted above contain information that is not verified by evidence anywhere in the claim file. Further, the meeting with the coroner is stated to have been on May 10, 2000, the case manager's memo was not placed on file until September 30, and the coroner's report was finalized on December 20, 2000. The coroner's report makes absolutely no mention of any problems being experienced by the worker in addition to his right knee. The coroner's report does discuss the worker being upset by not being able to work in his chosen field due to his knee problems, and his concern that he would have to change his job. In other words it was not just the knee problem that was bothering him, it was the resulting impact on his employability. In the circumstances, the panel places absolutely no weight whatsoever on the two internal memos provided by the case manager.

The panel notes that the coroner, following her report, did recommend to the Minister of Labour that a review of the handling of the worker's claim be undertaken with a view to determining how service delivery might have been improved.

On March 6, 2000, worker's counsel wrote to the Board, noting the worker's assessment by Dr. G. Because Dr. G appeared to be unable to distinguish or specifically identify the area of the knee which had been "again injured", counsel

requested the worker's benefits be reinstated while he remained totally temporarily disabled awaiting an appointment with a specialist. Counsel also questioned whether the worker should not be entitled to 'Code R' benefits while simply awaiting pension entitlement.

On March 7, 2000 the case manager replied to counsel, stating in part:

> I must explain that [Dr. G] examined [the worker] for the sole purpose of determining the degree of residual permanent impairment of [the worker's] knee, as it pertains to the area accepted under this claim. The only reason he was unable to complete this assessment is that [the worker] is experiencing acute symptoms and, therefore, he was unable to establish the level of permanent impairment. [Dr. G] was not examining the knee to determine which area of the knee is aggravated. His assessment, therefore, has no bearing on any decision that I have previously rendered.
>
> My decision to deny reopening of this claim is based on the medical information provided by [the worker's] physician which indicates that his current problems relate to his anterior cruciate ligament, an injury which pre-dates this claim. It is on this basis that I will not be reopening this claim for the payment of wage loss benefits.
>
> While [Dr. G] has suggested that [the worker] be seen by the Visiting Specialist Clinic, he does not have entitlement under this claim. Given that any further investigation will be directed to a non-compensable condition, it will have to be carried out on a private-patient basis.
>
> [reproduced as written except for the removal of identifiers]

On February 4, 2000, the worker's attending physician provided a progress report which noted the worker had pain in his right knee while climbing stairs and ladders. The doctor noted the worker's prior surgery, and questioned a meniscectomy of his right knee, identified as WCB. On examination, the doctor found the worker to have a painful right knee.

On February 11, 2000, the attending physician noted the worker had been provided with physiotherapy and the physiotherapist had called, indicating they felt the worker had a possible torn cruciate ligament. On examination the doctor noted the worker's tibia had slid forward on the femur. He diagnosed a torn cruciate ligament. The attending physician commented that the worker needed to see an orthopaedic surgeon. He said he suspected this injury had occurred in 1998. He requested the Board arrange for the worker to see an orthopaedic specialist.

In his submission dated August 16, 2005, on behalf of the worker's estate, counsel referred to a November 1, 2002 decision letter obtained through disclosure, which had

accepted the worker's suicide as arising from the injuries sustained under the May 7, 1998 compensable injury claim. This letter, apparently, had never been sent to the worker and instead the November 13, 2002 decision of the case manager had been provided. In his submission counsel said he had followed up with the case manager to learn why the November 1, 2002 decision had not been issued. He said the case manager had advised that in his twenty plus years of experience, that problem had never occurred and he could not offer an explanation other than that he had difficulty reaching a decision. Unfortunately, counsel did not provide the panel with any documentation to substantiate the conversation with the case manager. It may be that conversation took place over the telephone and no record of it was ever made. The panel had the WCAT registry contact the case manager in regards to this question on November 22, 2005. The case manager informed the WCAT that the November 1, 2002 letter had been sent in error. The case manager said he would ensure that a copy of the decision letter marked as a "duplicate", as well as a record of the conversation with the WCAT registry, was placed on the e-file. He noted that a subsequent decision letter (November 13, 2002) had been issued and was currently under appeal.

Based on the above, the panel is satisfied that due to the misplacement of file information, it is unlikely anyone will ever know either the initial reasoning behind the unsent November 1, 2002 decision letter or the reasoning which led the case manager to change that decision and issue the November 13, 2002 letter in its place.

The panel recognizes a June 23, 2005 submission from the worker's mother in which she provides a history of the worker's work experience and eventual acquisition of an aircraft maintenance engineer apprenticeship. In the submission the worker's mother sets out her reasoning in arriving at a conclusion that the worker took his own life as a result of the compensable May 7, 1998 work injury. In this respect, she quoted the letter found with the worker when he was discovered after his death. A photocopy of the note was provided with the submission. The letter stated:

Mom and Mark
I love you
But my knee
Is to much

[reproduced as written]

The worker's mother has requested a finding that all funeral costs be paid, all legal costs be paid, a pension disability award of 100% from January 1999, and finally, compensation for trauma, stress and untimely death due to the worker's right knee injury under his WCB claim in the amount of $100,000.

In his August 16, 2005 submission to the panel, the worker's estate counsel submits that the case manager erred in her decision to deny a reopening of the worker's claim. He stated in part:

> First, the Board Medical Advisor's opinion as relied upon by the CM to deny the reopening was neither fairly nor properly interpreted by the CM. In particular, while the Board Medical Advisor indicates that the recording of the worker's symptoms for reopening purposes is lacking, there was no follow up with the Medical Advisor's recommendation that the GP should be made aware of the 1998 medical findings and the Board's policy regarding reopening requests in order to assist the GP in providing the medical information required by the Board.
>
> Second, the Board Medical Advisor confirms that the GP's opinion regarding a basis for the worker's current symptoms may be in error and that a referral to an orthopedic surgeon is needed to definitively answer this question. Despite this recommendation, there is no evidence that the Board acted on arranging an expedited referral for this purpose.
>
> [reproduced as written]

Counsel went on to make a third point, which was that item #22.11 of the RSCM I provides that disablement caused by surgery is seen to be a compensable consequence of that surgery and is accepted as such. He went on to note that the surgery performed in 1998, in addition to addressing the worker's torn medial meniscus, also was, without the Board's authorization, extended to repair the torn ACL. He argued that since the surgery performed in November 1998 simultaneously repaired both the medial meniscus and the ACL in the worker's right knee, the subsequent reopening request in February 2000 was substantiated regardless of the exact nature of the need for reopening. Counsel said that even though initial medical evidence at the time of the reopening request in February 2000 was not conclusive, the medical evidence

sufficiently established that the worker had right knee pain which required treatment, time off work, and possibly further surgery.

Counsel went on to state:

> We further submit that additional confirmation as to the lack of understanding of the true extent of the worker's right knee impairment resulting in the reopening request in 2000 is the medical assessment undertaken by [Dr. G] on March 1, 2000. Leaving aside the question as to why the Board would schedule a PFI examination for pension purposes when they are fully aware of the worker's on going problems with his right knee and yet fail to arrange an expedited orthopedic specialist examination of the right knee, [Dr. G] confirmed that "it is obvious that we will not be able to perform an adequate PFI examination today, due to the recent injury and the fact that [the worker] may well require further surgical intervention in the near future". In addition, [Dr. G's] clinical examination also supported the worker's reopening request in his finding that "although there is some laxity of the right ACL, this, in all probability, had been present since the operative procedure and hence Dr. Ackermann's prescription for a Generation 2 knee brace." Furthermore, "although there has been no specific incident [the worker] today is showing symptoms as well as signs of some derangement of the medial compartment, this time of an indeterminate nature which will most probably become more evident either with an MRI examination or during a diagnostic arthroscopy".
>
> Accordingly, it is for these reasons that we submit the CM erred in her February 24, 2000 decision to deny a reopening of the worker's 1998 claim file.
>
> [reproduced as written except for the removal of identifiers]

With respect to the decision of November 13, 2002 which provided that the worker's death was not reasonably related to his 1998 right knee injury claim, counsel referred to the argument with respect to the reasons why he felt the appeal of the February 24, 2000 decision letter should succeed. Secondly, he referred to policy item #22.22 in the RSCM I, which provides that death benefits are payable if it is established that the suicide resulted from a compensable injury. Counsel noted the test was that the suicide was something that would not have been likely to occur in the absence of a work accident.

Counsel further argues that pursuant to his request to the Board dated March 6, 2000 the worker's benefits should have been reinstated. In this regard the panel notes the March 7, 2000 reply of the case manager to counsel's request was not appealed and the issue of reinstatement of the worker's benefits on the basis of counsel's March 6, 2000 letter is not an issue that can be directly addressed by this panel.

Counsel concluded his submission by expressing concern with respect to the unsubstantiated June 6, 2001 and June 7, 2001 internal memos from the case manager that provided her recollection of the coroner's comments during meetings that took place May 10, 2000. Counsel said that great issue was taken with the case manager's comments which suggested there were other reasons for the worker's tragic death other than the Board's handling of the claim file, especially given the hearsay nature and basis of the comments.

Reasons and Findings

Reopening of the worker's claim was denied on the basis that his problems, manifesting in February 2000, were a result of an injury to his right ACL, which had occurred approximately six months prior to the May 7, 1998 compensable injury. Once the Board had made a determination that the problems in February 2000 were related to the non-compensable condition, the worker had no entitlement to further benefits. This determination is reflected in the letter from the case manager to worker's counsel dated March 7, 2000, in which she explains that the examination by Dr. G was with respect to any PFI resulting from the torn medial meniscus and resulting surgery which was a direct result of the May 7, 1998 compensable injury accepted under the claim. In the March 7, 2000 letter the case manager said that Dr. G's assessment would therefore have no bearing on any decision that she had previously made. While that statement by the case manager is true, Dr. G's PFI report provides key medical evidence that has a direct effect on the panel's decision with respect to the appeal of the February 24, 2000 decision letter. That decision was based on the premise that the worker's problems in February 2000 were originating from the original injury to his ACL. In his PFI report Dr. G, following examination, provided the following:

> Although there is some laxity of the right ACL, this, in all probability, had been present since the operative procedure…
>
> [reproduced as written]

The panel interprets this comment to mean that the torn ACL identified at surgery in 1998 had been repaired and any residual ACL laxity was simply a "left over" once the worker had recovered from the repair. Dr. G went on to state:

> Although there has been no specific incident, [the worker] today is showing symptoms as well as signs of some derangement of the medial

> compartment, this time of an indeterminate nature which will most probably become more evident either with an MRI examination or during a diagnostic arthroscopy.
>
> [reproduced as written except for the removal of identifiers]

The panel interprets this comment as providing medical evidence that the problems in February 2000 originated in the medial area of the worker's right knee, which is the area that has been accepted as compensable by the Board. This interpretation is further borne out by the Board's having eventually awarded the worker an award of 5% of a totally disabled person with respect to his right knee. The panel notes that in the pension decision the Board decided not to apply proportionate entitlement with respect to the worker's pre-existing ACL injury on the basis that there was no evidence of any pre-existing disability which might limit entitlement under the claim.

Based on the above the panel finds, on the basis of a balance of probabilities (greater than 50%), that the problems experienced in the worker's knee in February 2000 were a direct sequela of his May 7, 1998 compensable injury and he was entitled to have had his claim reopened on that basis. The appeal from the decision letter of February 24, 2000 ("B" appeal) is allowed.

With respect to the relationship between the worker's compensable right knee problems and his unfortunate decision to commit suicide, the panel notes that on review of the file information, a memorandum to the case manager who made the November 13, 2002 decision was found. That memo was in sequential order on the file just prior to the issuance of the November 13, 2002 decision letter. The memo is undated and unsigned, and states:

> I recall discussing this case with Shelley a few weeks ago, and expressing some concerns at that time.
>
> In this case, I think the key issue that has not been adequately addressed is the fact that the worker's ongoing symptomatology relating to his right knee was deemed to be non-compensable. That being the case, the worker's ongoing pain in the knee, which appears to be the captioned reason in his suicide note, would not be compensable. The reasons for denying the ACL tear are noted on file, along with documentation noting that ongoing problems would not be accepted (and therefore, the claim would not be reopened) because of these problems. While Dr. Alvaro may correctly correlate that client's suicide to knee problems (notwithstanding that there were some other documented stressors), these problems have not been accepted by the Board.
>
> I asked James to have a look at this one prior to offering my opinion, and he came to the same conclusion independent of any discussion with me.

[reproduced as written]

The panel assumes that the "other documented stressors" referred to in this undated, unsigned memo are the same stressors that were identified by the case manager in her two memos dated June 6, 2001 and June 7, 2001, which reflected the year old recollection of a conversation with the coroner and for which there is a complete lack of documented evidence. As noted previously, the panel puts absolutely no evidentiary weight on those memos. Further the panel, on review of the file in total, can find no reference anywhere (other than in the "recollection" of the case manager) to any other "stressors" that may have been responsible for the worker's tragic decision to take his own life.

Notwithstanding the case manager's reference to a suicide note which allegedly provided alternate reasons for the worker's suicide, unless there is a second note which has been misplaced along with the other information missing from this file, the panel notes the copy of the suicide note attached to the Coroner's report is the most compelling piece of evidence with respect to the worker's reason for taking his own life. That note specifically identifies the knee problem as being the reason. The panel has found that the worker's claim should have been reopened on the basis that the problems in the worker's right knee in February 2000 were a Board responsibility. On that basis, and on the explicit wording of the worker's suicide note, I find that the worker's decision to take his own life results directly from the effect of the compensable injury to his right knee. The appeal from the November 13, 2002 decision ("D" appeal) of the Board is allowed.

With respect to the remedies requested by the worker's mother, the issues that can be addressed by this panel are limited to whether the worker's right knee symptoms in February 2000, were a direct result of his compensable injury and whether the worker's decision to take his own life resulted from the compensable injury. Benefit entitlement resulting from the panel's decision(s) will have to be determined by the Board following investigation and taking into consideration, but not limited to, all of the various factors set out in Appeal Division *Decision #96-1421*.

The panel notes that on review, there is no copy of the suicide note on the 'e-file'. The coroner's report is there, but no suicide note. The panel therefore directs the Board to be sure a copy of the note is scanned to the e-file to ensure the record is complete.

Conclusion

The decision of the case manager dated February 24, 2000 ("B" appeal) is varied. The panel finds that the problem in the worker's right knee for which he sought treatment in February 2000 is a direct sequela of his May 7, 1998 compensable injury, and the claim should have been reopened.

The decision of the case manager dated November 13, 2002 ("D" appeal) is varied. The panel finds the worker's tragic suicide is directly related to his May 7, 1998 right knee injury.

The file will be returned to the Board to determine what benefits flow from this decision. The estate of the deceased worker is entitled to recover any expenses, that can be established, that may have been incurred in mounting the appeals to the extent permitted by section 7 of the *Workers Compensation Act Appeal Regulation*.

Ralph D. McMillan
Vice Chair

RDM/jkw