BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898

WCAT Decision Number: **WCAT-2007-00511-AD**
WCAT Decision Date: **February 13, 2007**

Panel: Marguerite Mousseau, Vice Chair

WCAT Reference Number: **031137-A**

Section 11 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 99 4139
Michael Warburton, Donovan Nott and Robert Sean McQuinn v. Charles Corthay, Prism Helicopters Ltd., Helifor Industries Limited, the Attorney General of Canada on behalf of Transport Canada , Boeing Co., and McDonnell Douglas Helicopter Company, Inc.

Applicant: Prism Helicopters Ltd.
(the "defendant")

Respondents: Michael Warburton and
Robert Sean McQuinn
(the "plaintiffs")

Helifor Industries Limited
(the "defendant")

Representatives:

For Applicant: Kim A. Wigmore
WHITELAW TWINING

For Respondents:

Warburton and McQuinn: Lorenzo G. Oss-Cech
HUTCHISON OSS-CECH MARLATT

Helifor Industries Limited: Callum G. Kelly
BORDEN LADNER GERVAIS LLP

BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898

Noteworthy Decision Summary

Decision: WCAT-2007-00511-AD **Panel**: M. Mousseau **Decision Date:** February 13, 2007

Horseplay – Item #16.20 of the Rehabilitation Services and Claims Manual—Decision No. 194 "Re Horseplay" retired as of February 24, 2004

This decision is noteworthy as it illustrates the factors to consider when applying the Workers' Compensation Board's, operating as WorkSafeBC, policy on horseplay to the facts of a particular case.

A defendant applied for a section 11 of the *Workers Compensation Act* (Act) determination (now section 257 of the Act). The panel found that the defendant, a pilot, was a worker at the time of a helicopter crash in 1997. The crash occurred while the defendant was flying three plaintiffs back to a logging base camp. The panel found that the defendant's job of flying employees between the base camp and the logging site were actions or conduct ordinarily arising out of and in the course of his employment. The plaintiffs argued that while flying the helicopter the defendant engaged in conduct that removed him from the course of his employment. The defendant argued that at no time did he engage in "horse play" or take the plaintiffs on a "joy ride".

The panel accepted that the defendant likely engaged once in a rapid descent manoeuvre during the flight which took the helicopter down to 75 feet, resulting in the need to get over a cable. The plaintiffs argued that this manoeuvre and the speed at which the defendant was flying the helicopter constituted horseplay or wilful misconduct. The panel concluded that, if the defendant's conduct did involve horseplay, there had to be an assessment of whether the horseplay was such as to constitute a substantial deviation from his employment – a deviation amounting to an abandonment of his employment.

The panel found that if the defendant's conduct was characterized as horseplay, it would appear to have been an unusual type of behaviour on his part. Even if there was horseplay, the flight path to the base camp the defendant chose was not a substantial deviation as contemplated by the policies regarding coverage of a worker who is employed to travel. The pilot had the discretion to choose the route and this choice could be influenced by a number of factors. There was no evidence that his conduct breached a specific regulation or rule, that he was cited for misconduct, or that his actions contributed to the engine failure that preceded the accident.

The panel found that the defendant's conduct was not such as to constitute abandonment of his employment even if it were characterized as horseplay. She found that the defendant's conduct or actions that allegedly caused a breach of duty arose out of and in the course of his employment.

RE: Section 11 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 99 4139
Michael Warburton, Donovan Nott and Robert Sean McQuinn v.
Charles Corthay, Prism Helicopters Ltd., Helifor Industries Limited,
the Attorney General of Canada on behalf of Transport Canada , Boeing Co.,
and McDonnell Douglas Helicopter Company, Inc.

WCAT Decision Number: **WCAT-2007-00511-AD**
WCAT Decision Date: **February 13, 2007**
Panel: Marguerite Mousseau, Vice Chair

Section 11 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 99 4139
Michael Warburton, Donovan Nott and Robert Sean McQuinn v. Charles Corthay, Prism Helicopters Ltd., Helifor Industries Limited, the Attorney General of Canada on behalf of Transport Canada , Boeing Co., and McDonnell Douglas Helicopter Company, Inc.

Introduction

On September 11, 1997 a helicopter piloted by the defendant, Charles Corthay, and owned by the defendant, Prism Helicopters Ltd. (Prism), crashed near Bute Inlet, British Columbia. The plaintiffs, Michael Warburton, Donovan Nott and Robert Sean McQuinn, were passengers in the helicopter at the time of the crash.

The plaintiffs submitted applications for compensation to the Workers' Compensation Board, now doing business as WorkSafeBC, (Board) and their claims were accepted. Subsequently, they initiated a subrogated action against the defendants with the authorization of the Board. Counsel for the defendant, Prism, requested determinations regarding the status of the three plaintiffs and the defendants, Charles Corthay and Prism, pursuant to what was then section 11 of the *Workers Compensation Act* (Act).

The actions against the defendants, Attorney General of Canada (AG), Boeing Co., and McDonnell Douglas Helicopter Company Inc., were discontinued by the plaintiffs, Michael Warburton and Robert Sean McQuinn as of October 10, 2002. As of December 15, 2004 the actions of the plaintiff, Donovan Nott, against the defendants, Boeing Co. and McDonnell Douglas Helicopter Company, Inc., were dismissed for want of prosecution; his action against Prism was dismissed as of May 5, 2005 and against the AG as of June 1, 2005. The status of the action of the plaintiff, Donovan Nott, against Charles Corthay is unclear. An appeal coordination officer attempted to notify Mr. Nott of this application but was unable to locate him.

Issue(s)

RE: Section 11 Determination
In the Supreme Court of British Columbia
Victoria Registry No. 99 4139
Michael Warburton, Donovan Nott and Robert Sean McQuinn v.
Charles Corthay, Prism Helicopters Ltd., Helifor Industries Limited,
the Attorney General of Canada on behalf of Transport Canada , Boeing Co.,
and McDonnell Douglas Helicopter Company, Inc.

The issue on this application is the status of the parties, primarily, the status of the defendant, Charles Corthay.

Jurisdiction

This application for a determination under section 11 of the Act was filed with the Appeal Division before March 3, 2003. Effective March 3, 2003, section 11 of the Act was repealed, and the Review Board and Appeal Division were replaced by the Workers' Compensation Appeal Tribunal (WCAT). These changes were contained in Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*.

WCAT has jurisdiction to provide a certificate to the court under section 257 of the amended Act but, section 39(1)(c) of the transitional provisions in Bill 63 provide that section 11 proceedings pending before the Appeal Division on March 3, 2003 must be completed as proceedings before WCAT. Accordingly, WCAT will consider this application under the former section 11. In doing so, WCAT must apply the policies of the board of directors pursuant to sections 250(2) and 251 of the amended Act. The applicable policies are those which were in place at the time that the accident occurred.

Section 11 of the Act obliged the Board to make determinations and provide a certificate to the court regarding certain matters relevant to a legal action. The court determines the effect of the certificate on the legal action.

Status of the Defendant, Charles Corthay

The first question is whether Mr. Corthay was a worker at the time of the accident. In an affidavit sworn on November 1, 2005, David Michael Zall, chief operating officer of Prism, stated that the pilots who fly for Prism are salaried employees. In an affidavit sworn on May 31, 2004, Mr. Corthay stated that he was employed as a pilot by Prism from February 25, 1995 to December 5, 1998. Mr. Corthay was, therefore, a worker at the time of the accident.

The next question is whether the action or conduct of Mr. Corthay that allegedly caused a breach of duty arose out of and in the course of his employment. Mr. Corthay deposed that in 1997 he was working near Bute Inlet. He lived at a base camp with a number of workers and his job was to transport fallers from the base camp to the logging site and then to return them to the base camp when they had finished working. On the morning of the accident, he flew the plaintiffs from the base camp to the logging site and then returned to base camp. Later that day, he was requested to pick them up from the logging site and return them to camp. The accident occurred as he was flying the three plaintiffs back to the base camp.

Since Mr. Corthay's job was to fly employees between the base camp and the logging site, actions or conduct involved in performing that duty would ordinarily be accepted as arising out of and in the course of his employment. It is submitted by the plaintiffs, however, that Mr. Corthay engaged in conduct that removed him from the course of his employment while flying the plaintiffs back to the base camp. Two main arguments have been put forward in support of this position. The first argument is that Mr. Corthay chose a flight route that constituted a substantial deviation from the usual route, thereby taking himself out of his employment. The second argument is that Mr. Corthay engaged in conduct while flying the helicopter that removed him from the course of employment - based on policies regarding horseplay and serious and wilful misconduct.

Law and Policy

The law applicable to this application is the Act as it read prior to the amendments made by the *Workers Compensation Amendment Act, 2002* (Bill 49). The applicable policies are set out in the *Rehabilitation Services and Claims Manual, Volume I (RSCM I).*

Section 5 of the Act provides, in part:

> 5(1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part must be paid by the Board out of the accident fund.
>
> …
>
> (4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

The policies regarding compensation coverage while an employee is travelling are found at items #18.00 to #18.42 of the RSCM I. These provide the guidelines for determining whether a worker's injuries or conduct arose out of and in the course of employment. Generally, when a worker is employed to travel, as was Mr. Corthay, accidents occurring in the course of travel are covered. An exception to this rule occurs when an accident occurs while the employee has deviated from the work-related travel

route. This is expressed in policy #18.33, "Deviations from Route," as follows: "Where a worker is covered while travelling to a place of work, that worker must proceed with reasonable expedition and without substantial deviation from the most convenient route. Otherwise the worker may be regarded as no longer in the course of employment." The same principle is also set out in policy #18.41, "Personal Activities During Business Trips," which states that there is compensation coverage except where there has been "a distinct departure on a personal errand."

The notion of a "substantial deviation" may also be applied to the employment duties themselves and not just to the route chosen by a travelling employee. An employee may take himself out of the course of employment by engaging in unauthorized activities. The policies at item #16.00 to #16.60 describe the types of conduct which may serve to remove a worker from the course of his employment. Item #16.00, "Unauthorized Activities," states:

> The mere fact that a worker's action which leads to an injury was in breach of a regulation or order of the employer or for some other reason unauthorized by the employer does not mean that the injury did not arise out of and in the course of the employment. On the other hand, there will be situations where the unauthorized nature of the worker's conduct is sufficient to take the worker out of the course of employment or to prevent an injury from arising out of the employment.

In some cases, horseplay may be of such a nature that it constitutes a substantial deviation from the course of employment. The policy at #16.20, "Horseplay," states:

> A worker who is injured through participation in horseplay is not for that reason alone denied compensation. The conduct of the claimant which caused the injury must be examined to determine whether it constituted a substantial deviation from the course of the employment. An insubstantial deviation does not prevent an injury from being held to have arisen in the course of employment.
>
> No definite rules can be laid down as to what constitutes a substantial deviation. One factor to be considered is the degree of participation of the claimant. For instance, a claimant who instigates or provokes horseplay, or who has been involved in previous episodes of horseplay, will more likely be considered to have made a substantial deviation than one who simply reacts to actions commenced or provoked by someone else.

> The duration and seriousness of a claimant's horseplay is also of relevance in considering whether there has been a substantial deviation from the course of employment. For example, if a worker walks over to a co-employee to engage in a friendly word, and accompanies this with a playful jab in the ribs, this is a trivial incident which would probably be considered an insubstantial deviation. As Larson notes,
>
> > "At the other extreme, there are cases in which the prankster undertakes a practical joke which necessitate the complete abandonment of the employment and the concentration of all his energies for a substantial part of his working time on the horseplay enterprise." (3)
>
> When this abandonment is sufficiently complete and extensive, it must be considered a substantial deviation from the course of employment. It is also relevant to consider whether the "horseplay" involved the dropping of active duties calling for the claimant's attention as distinguished from the mere killing of time while the claimant had nothing to do. The duration and seriousness of a deviation from the course of employment which will be called substantial will be somewhat smaller when the deviation necessitates the dropping of active duties than when it does not.
>
> Notes
> (3) Law of Workmen's Compensation, A. Larson, 1972, Vol. I, para. 23.61

This policy was initially set out in a decision of the former commissioners, *Decision No. 194* "Re Horseplay," 2 W.C.R. 309 (Decision 194), which illustrates the application of the policy in a particular fact situation. In that decision, the worker was employed as a concrete mixer-truck driver. His duties included checking and maintaining the quality and flow of the concrete and keeping his vehicle clean. A high pressure water hose was attached to the rear of the truck for cleaning the truck. Decision 194 stated:

> On the day of the injury there were frequent interruptions in the flow of concrete. This was due either to deficiencies in the pump-truck or to delays caused by the carpenters working on the site. During these interruptions the claimant engaged in conversation with the pump-truck driver and "horsed around" with him. On one such occasion the claimant attempted to grab some food from the pump-truck driver's lunch box, but moved into the roadway when the pump-truck driver appeared to be reaching for the water hose on the claimant's truck. The claimant

> apparently feared that the pump-truck operator was going to spray him in retaliation, but this did not occur. The claimant was struck by a car travelling west, his view of which was blocked by another mixer-truck of his employer parked behind the pump-truck....
>
> Although the time period involved was quite small, it is felt that the conduct of the claimant which resulted in his injury was sufficient to constitute an abandonment of his employment.... In no way could "horsing" around with the pump-truck operator be considered part of his employment.

This decision was "retired" as of February 24, 2004 but it was still part of the applicable policy on the date of the accident.

The policies describe other conduct which may also result in a worker being denied compensation for injuries sustained as a result of those activities. As an example, policy item #16.10, "Intoxication or Other Substance Impairment," describes situations where intoxication of the worker is implicated as a cause of injuries at work. It states that intoxication is not, in itself, sufficient to exclude coverage. If "something in the employment relationship had causative significance in producing the injury, it is still one arising out of and in the course of employment notwithstanding the impairment."

Item #16.60, "Serious and Wilful Misconduct," provides:

> Section 5(3) provides that "Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation shall not be payable unless the injury results in death or serious or permanent disablement."
>
> By the terms of Section 5(3), the injury must be attributable "solely" to the worker's misconduct. Thus, for example, where the worker was impaired by reason of alcohol or other substances, investigation will have to be carried out to evaluate the extent of the impairment and its degree of responsibility in producing the injury in order to establish whether this requirement is met. See #16.10 for further details.
>
> The section only applies where the misconduct was serious and "wilful". In determining whether misconduct is wilful it must be considered whether the claimant had pre-knowledge or voluntarily elected to break a rule. In other words, the claimant must be aware of a rule and knowingly elect to break it.

Evidence

In his affidavit of May 31, 2004, Mr. Corthay gave his version of the events that preceded the accident. He stated that there were numerous routes that could be taken from the logging site to the base camp. He stated that, on the day of the accident, he "offered to take a less direct and more scenic route to the base camp and follow the river." This route "was approximately 300 feet off the most direct route to base camp." He stated his main reason for flying that route was "because the battery in the Helicopter was weak and the Helicopter needed to be engaged for a period of time to re-charge the battery. The extended trip would help re-charge the Helicopter's battery." He stated that "The risks of flying the route chosen were not significantly different than any other route I could have taken."

He described the events leading to the crash as follows:

> 14. I recall climbing and flying beside the hillside with the nose of the Helicopter in a slight pitch, aiming to join the river valley. As I arrived at the riverbank the wind picked up and I decided to climb higher.
>
> 15. I was aware of a suspension cable suspended across the river valley approximately 75 feet above the water, further down the river. I believe I was flying at approximately 75 feet above ground because as I approached the suspension cable I was required to pull up above it.
>
> 16. Shortly after I passed above the suspension cable, I experienced a total loss of power and recall that the engine horn of the aircraft sounded indicating the engine quit. I rapidly checked my instruments and flew the Helicopter towards the shore. I autorotated the Helicopter successfully and the Helicopter landed on the shoreline in the trees.
>
> 17. At all material times, I flew the Helicopter within its allowable limits.
>
> 18. At no time were abrupt movements undertaken other than the ordinary movements of the Helicopter in the course of transporting workers from the logging site to the base camp.
>
> 19. At no time did I engage in "horse play" or take the Plaintiffs on a "joy ride". I did take them on a less direct route to base camp. However,

---

this was within the scope of my ordinary duties at this job site and done for the purpose of increasing the battery's charge.

[reproduced as written]

There is also a handwritten statement written by Mr. Corthay immediately after the accident in which he describes the events leading up to the accident. This does not refer to a need to recharge the battery.

David Michael Zall, president of Prism, gave evidence regarding the operations of Prism in an affidavit sworn on November 1, 2005 and an examination for discovery conducted on February 9, 2006. This is relevant to the status of Mr. Corthay in that he described the discretion that a pilot has in choosing a flight path and his view of Mr. Corthay's general demeanour as a pilot.

In his affidavit, Mr. Zall deposed that the route taken by a pilot between a base camp and logging sites is not pre-determined by Prism or by the client. There were no set routes since "each day presents a unique set of challenges for the pilot who has to operate the helicopter." The choice of route was within the discretion of the pilot based on specific circumstances which included weather conditions, the precise location and elevation of the landing pads, and the number of crew to be picked up and dropped off. Variations in route were commonplace.

Mr. Zall stated that he was not aware of any complaints made with respect to Mr. Corthay's competence as a pilot and he considered that if there had been any concerns regarding his flying skill or the way he performed his job, that these would been brought to the immediate attention of Mr. Zall. Mr. Corthay had resigned from Prism in 1998 in order to return to Switzerland and his departure from Prism was unrelated to the accident on September 11, 1997.

Mr. Zall was questioned about his affidavit evidence at his examination for discovery and he reiterated a number of times that there were a number of factors that a pilot would take into account in choosing a route and that one would need to know the circumstances in order to know whether decisions made by a pilot were reasonable. (Q 166 – 207) He stated that he had not been aware at the date of the accident that Mr. Corthay was using a pick-up truck to jump-start the helicopter battery from time to time but he said that it was not unusual to jump-start a helicopter. (Q148 – 152) Elsewhere he stated that it would not be usual to fly a helicopter longer in order to charge a battery. (Q 157 – 159)

Mr. Warburton and Mr. McQuinn also gave evidence regarding the journey back from the logging site on the day of the accident. Mr. McQuinn was examined for discovery on November 7, 2005. He stated that about 50% of his employment in the ten years prior to the accident involved heli-logging. (Q 46) He had flown regularly with Mr. Corthay for two weeks prior to the accident. (Q 139) The trip between the base camp and the logging site was approximately one and a half minutes. He thought that going along the river would have doubled the time required to make the trip. (Q 329 - 330) He had no concerns regarding Mr. Corthay's flying abilities prior to the accident. (Q158) He did have some concern that the helicopter did not start every morning and the battery had to be jump-started using a pick-up. He had expressed his concern to Mr. Corthay who said that it was not a problem. (Q 171 – 178)

He stated that all of the previous flights with Mr. Corthay had been straight from the base camp to the logging site. Mr. Corthay had not taken other routes while Mr. McQuinn was in the helicopter but he did not know whether Mr. Corthay had taken other routes when carrying other fallers. (Q 216 – 219) Mr. McQuinn thought it would be unusual for a pilot to make trips off the direct route without a reason because of the cost involved in flying a helicopter. (Q 235 – 237)

Mr. McQuinn thought that there had been no conversation in the helicopter on the flight in which the accident occurred. (Q 268) Counsel referred Mr. McQuinn to a memorandum from his claim file which was based on an interview with Mr. McQuinn on October 9, 1997, after he had been discharged from the burn unit. In this memorandum, the Board officer states:

> The service helicopter picked up two other fallers and then picked him [Mr. McQuinn] up and when heading down the pilot said that he had a low battery and they had to fly for awhile to recharge the battery. Sean [Mr. McQuinn] had suggested flying up to look at the Hemathoco glacier but the pilot apparently said that he did not have enough fuel. According to Sean the pilot then started doing "loops" and "screwing around" in a fairly rapid manner. He then dove down to the river level and flew at about 30 ft off of the river going quite fast flying in what Sean described as an "aggressive" manner going fast and low to the ground. I said something like a sightseeing trip and he said no it was much more aggressive. Then warning signals went off in the helicopter and the pilot said something to the effect of "engine out or engine failure", called two Maydays and then crashed.

Mr. McQuinn thought this was likely an accurate record of what had transpired, although his current memory was that there had been no conversation on the helicopter. He noted a number of times during the examination for discovery that the flight and accident had occurred eight years earlier. He went on the state that, within seconds of starting the flight from the logging site, the pilot had "just headed straight up as high – as high as he could and then hammer-headed straight down." He had done that a few times and then "zoomed down to the valley bottom, the river, Homathko River, and flew wide open down there back to camp, or headed back to camp." (Q 269) The base camp was on the river. (Q 332)

Mr. McQuinn described a hammer-head as follows: "I understand a hammer-head to be you zoom straight up and then just turn over the top and head straight down as fast as you can." (Q 270) He stated that he knew this was called hammer-heading because he had been told after the accident that this manoeuvre was called hammer-heading when he had described it to other pilots, although he could not recall the names of any pilots with whom he had discussed this matter. He had never before been in a helicopter where this had been done. (Q 278 – 292)

Mr. Warburton's discovery evidence was that pilots did take different routes from time to time due to weather patterns. Also, on the last trip of the day there could be a deviation for other reasons such as going to look at the glacier. He also recalled that, over the years, pilots had taken loggers fishing, or grocery shopping but he did not recall Mr. Corthay undertaking any such trips. Mr. Warburton said that he would not be surprised to take something other than the most direct route if it had been discussed beforehand. (Q 114 to 130)

Mr. Warburton thought there had been some discussion with the pilot but he could not recall the details. He thought there had been some discussion about a power check and about seeing a glacier, but he did not know whether they had actually seen a glacier. He recalled being in a fjord with ice like formations hanging over it. The pilot wanted to do a power check, which involved going straight up fast. He was able to do this because the next pick-up was not for another hour or so. Then the pilot had done a hammer-head, which involved heading straight up and then nosing down immediately. He recalled one of these manoeuvres and then the pilot had continued at a high rate of speed, maybe a hundred feet above the river. He saw a thick cable across the river and at the very last second, the pilot had gone upwards and cleared the cable and then gone back down on the other side. He thought the pilot had wanted to "create a skip;" that was the only reason he could think of for the pilot to have done something that risky. As soon as the pilot had cleared the cable, the lights came on but they were flying too low to autorotate. (Q 135 – 136)

He stated that the river was adjacent to the usual flight path, approximately 300 feet off the direct path between the logging site and the base camp. (Q 160 – 163) In the year prior to the accident, Mr. Warburton's work had involved heli-logging about 80% to 90% of the time. (Q 205)

He stated that he did not know what could have been going on in Mr. Corthay's head to have made such a high risk manoeuvre over the cable and at such high speed. He stated that Mr. Corthay was "a good guy" and "a good pilot." But, he thought Mr. Corthay had made a bad decision at the end – that he had given himself a very short time to do a very high speed, high risk manoeuvre over the cable, which was at a very low altitude. He stated that he had been on a lot of helicopters and on what some would call "joy rides" but "never that blatant of a hot dog manoeuvre." (Q 234) He was aware that there had been investigations into the accident, including a Transportation Safety Board of Canada (TSB), investigation and that the cause of the accident remained unknown. (Q 235) He would not have sought legal counsel though, if he had not thought that there was recklessness involved. (Q 248) He also recalled that there had been an ongoing problem with the helicopter keeping its charge. (Q 290)

The TSB conducted an investigation into the cause of the helicopter engine failure. The Engineering Report (TSB Report), which is dated April 1, 1998, indicates that the cause of the engine failure could not be determined.

Submissions

Counsel for Prism submits that the route chosen by Mr. Corthay did not constitute a substantial deviation from the usual route, given that there were numerous routes that could have been taken from the logging site back to the base camp. The route taken by Mr. Corthay back to the camp constituted an approximately 300 foot deviation from the path of the most direct route. The main reason for choosing this route was that the battery required recharging and a longer flight would help to charge the battery. The route chosen was not a deviation at all, in the circumstances. But if it was, it was not a "substantial deviation," as contemplated by policy. On this point, counsel referred to *Appeal Division Decision #2001-1857*. It was submitted that the route chosen may have been longer than other possible routes but it was a "usual route" and the primary reason for taking it was to recharge the battery.

Regarding the issue of Mr. Corthay's conduct in flying the helicopter, counsel for Prism submitted that there was no "wilful misconduct" or "horseplay" that would serve to take him out of the course of his employment. Counsel submitted that the seeming

contradictions in the evidence regarding Mr. Corthay's actions could be viewed as merely alternate characterizations of the same actions, noting that neither Mr. Warburton nor Mr. McQuinn were trained as pilots or mechanical engineers.

Mr. Corthay's evidence was that he had not flown the helicopter beyond its limits. In addition, no complaints had been filed, no disciplinary action taken and no determinations made regarding the cause of the accident despite the investigation by the TSB. Even if it could be said that Mr. Corthay's conduct was in some way unauthorized or involved an element of inappropriate conduct, the policies established a high threshold for exclusion from the course of employment on these grounds. In that regard, counsel relied on the interpretations of these policies in several decisions of the Appeal Division: *Appeal Division Decisions #00-1943, #00-1360 and #96-0805*.

Counsel for the plaintiffs submits that Mr. Corthay was not in the course of his employment. He submits that the flight path chosen by Mr. Corthay constituted a substantial deviation. Whether a deviation is substantial or not is determined in the context of the journey. A deviation of two blocks could be minor or substantial depending on the length of the journey. Counsel referred to the reasoning in *Appeal Division Decision #96-0966*. The travel time between the logging site and the base camp was approximately two minutes. Travelling along the Homathko River doubled the flight time.

Council also noted that Mr. Corthay's first handwritten statement does not refer to a low battery as the reason for using the alternate route. The second statement includes additional notations referring to a battery. Counsel suggests the first statement is more reliable. He also notes the evidence of Mr. Zall that charging a helicopter battery by flying longer would not be the usual thing to do and he submits that flying the helicopter an extra two minutes would likely make little or no difference to the battery charge. Furthermore, he submitted that, if the intent was to recharge the battery, Mr. Corthay could easily have extended the flight in a much more leisurely and safe manner.

He submitted that the degree of risk or change in the exposure to risk caused by the deviation was also a factor to consider in determining whether the defendant had removed himself from the course of employment. He referred to reasons given in *Appeal Division Decisions #98-0675*, *#93-0520* and *#2003-0296* on this point.

In addition, he submits that the better view of the evidence is that Mr. Corthay indulged in a high risk joy ride, as opposed to undertaking some necessary manoeuvres as he states in his affidavit. The final action of skipping over a cable further pointed to the route chosen by Mr. Corthay being a higher risk route than the usual route. The low

altitude at which he was flying reduced his options after the engines quit and did not allow him to autorotate to a safe landing area.

Reasons and Decision

I am satisfied that the flight path along the river was not a substantial deviation as contemplated by the policies regarding coverage of a worker who is employed to travel. In arriving at this conclusion, I have taken into account that the pilot had the discretion to choose the route and that this choice could be influenced by a number of factors. I have also taken into account the possible reasons for the pilot having chosen that route and the nature of the route itself.

The evidence as to why he chose the route is not entirely clear. His affidavit evidence is that he chose the route because the battery was weak and needed re-charging, although the notes he wrote immediately after the accident do not refer to the battery. Mr. McQuinn's initial statement to the Board officer on October 9, 1997 was that the pilot said he needed to recharge the battery. And, although Mr. Zall said this was not a usual procedure, there is no dispute that the battery was not holding a charge and that it had to be jump-started several times. Accordingly, it is possible that one of the reasons for the choice of route was to recharge the battery.

The alternative explanation provided for that choice of route is that it was a scenic tour. In the handwritten notes prepared by Mr. Corthay the day after the accident, he states that he followed the river for a scenic flight on the way back. Mr. McQuinn's initial statement to the Board officer, however, was that he had suggested to Mr. Corthay that they go to look at the glacier and Mr. Corthay had declined because he did not have sufficient fuel. Accordingly, even if the path along the river was chosen solely on the basis that it was more scenic, this was still a fairly direct route back to the base camp as opposed to an excursion to see the glacier. If it is accepted that the reason that flight path was chosen was because it was more scenic, the question remains as to whether it was sufficiently far off the most direct route that it constituted a substantial deviation.

The flight path he chose, although not the most direct route, was only approximately 300 feet from the most direct flight path. Accordingly, it did not involve a significant deviation with respect to the distances involved. In addition, the base camp was on the river along which Mr. Corthay flew the helicopter. The flight path was an alternate route, not a flight in the opposite direction or some other unrelated direction. Of particular significance, there was no alternative or intermediate destination involved, such as fishing or viewing the glacier or other destination entirely unrelated to the employment or the journey home from the logging site. The destination, for the duration of the trip,

was the base camp. As a result, even if Mr. Corthay chose that flight path solely because it was more scenic, I consider that it was a relatively minor deviation from the most direct route. I find that he did not take himself out of his employment merely by flying the route that he chose.

The next question is whether Mr. Corthay removed himself from his employment by engaging in horseplay. In this regard, there are some differences in the descriptions of what transpired during the flight. In his affidavit, Mr. Corthay describes climbing higher when he arrived at the river bank because the wind picked up. He then states that he must have been flying at about 75 feet when he approached the cable because he had to pull up to go over it. Presumably Mr. Corthay had not been flying so low that he had to climb up to 75 feet when the wind picked up. So, there appears to be a gap in his information as to what happened between his climbing because of the wind and then finding himself at 75 feet so that he had to go over the cable.

The evidence of Mr. McQuinn and Mr. Warburton is that Mr. Corthay used a hammer-head manoeuvre to get down to 75 feet. On this point, Mr. McQuinn states that there were several such manoeuvres but Mr. Warburton states that there was only one. I accept that Mr. Corthay more than likely undertook a manoeuvre that involved a rapid descent, as described by Mr. Warburton and Mr. McQuinn. It is most unlikely that they fabricated this occurrence and Mr. Corthay's affidavit is notably silent on this point. Given the limited period of time involved, I consider that this manoeuvre likely only occurred once and it appears to have taken the helicopter down to 75 feet, resulting in the need to get over the cable.

It is argued that undertaking this manoeuvre, the speed at which Mr. Corthay was flying and his manoeuvre to get over the cable constituted horseplay or wilful misconduct. There are a number of alternative explanations, however, for Mr. Corthay’s conduct. These include the possibility that he made an error in judgement at some point which resulted in his having to undertake manoeuvres that were unusual or that the plaintiffs saw as unusual. Alternatively, he may have been conducting a power check or in some other way assessing the helicopter’s function and he made no error. When considering his conduct, it is important to bear in mind that no relationship has been found between the way in which he was flying the helicopter and the subsequent engine failure.

If Mr. Corthay’s conduct did involve horseplay, there must be an assessment of whether the horseplay was such as to constitute a substantial deviation from his employment - a deviation amounting to an abandonment of his employment.

In applying the policies regarding unauthorized activities, of which horseplay is one such activity, I am mindful that the workers' compensation system is a "no fault" system which is based on the "historic compromise." The principle elements of this system are that workers relinquished the right to sue a negligent employer in tort in exchange for a system of no-fault compensation and the employer was protected from civil liability in exchange for assuming the cost of the no-fault system. Section 10(1) of the Act is based on this historic compromise.

This notion is expressed in *Decision #10,* 1 WCR 46, which was also retired on February 24, 2004. This case involved the death of a fisherman who became intoxicated and apparently attempted to board his ship in order to sleep there in preparation for sailing the next day. He attempted to jump onto the boat instead of using the ladder provided for that purpose and fell into the water, where he drowned.

In discussing the effect of the intoxication with respect to the worker's entitlement to coverage under the Act, the former commissioners stated:

> A distinguishing feature of drunkenness is that it is generally regarded as culpable behaviour. The deceased was not taking reasonable care of himself. But one of the basic purposes for which workers' compensation was introduced was to get away from the common law doctrine of contributory negligence as a bar to a claim.

In that case, the commissioners concluded that the fisherman had not removed himself from the course of his employment.

It is clear from the policies regarding unauthorized activities that the alleged unauthorized conduct must be of a fairly significant nature in order to exclude the worker from compensation coverage. That the threshold for exclusion from coverage is high is illustrated in a number of decisions, including *Appeal Division Decision #00-1360,* one of the decisions noted by counsel. This case also involved a determination under section 11 of the Act. There had been a motor vehicle accident in which the intoxication of the defendant driver played a role. The defendant truck driver was driving a tractor and towing two trailers loaded with lumber. His tractor-trailer overturned and some of the lumber that spilled out struck a bus, injuring the driver and 33 passengers. The truck driver was convicted of criminal negligence causing bodily harm and sentenced to five years imprisonment.

It was argued in that case that the driver had used his tractor-trailer as a weapon and in so doing had removed himself from his employment. In supporting this argument,

counsel cited *Appeal Division Decision #94-1122*, in which a truck driver assaulted another driver with a baseball bat and submitted that the situations were much alike. The panel distinguished the facts in that case on the basis that the defendant truck driver in the latter case had introduced a non-work object (the baseball bat) into the work environment.

Plaintiff's counsel in *Appeal Division Decision #00-1360* had also argued that the degree of negligence was such that the worker was no longer in the course of his employment. It was noted that the driver had demonstrated a sustained disregard for the safety of others on the road. Minutes before the accident occurred, the defendant had been stopped by police and ticketed for speeding (127 km/hr in a 90 km/hr zone), passing on a double line and following too closely. Witnesses had testified in court that he had passed on blind curves and followed cars so closely that they could see only part of his truck grill. In the minutes before the accident, the trailers were swaying with the wheels occasionally lifting off the ground. The trial judge had stated that an accident was "virtually inevitable" unless the defendant truck driver changed his manner of driving.

The panel, after considering this evidence, stated:

> Where the court found the truck driver's sustained driving was likely to result in a virtually inevitable accident, it is arguable that he was no longer engaged in delivering the load of lumber as required by his work. However, there are many cases where workers use bad judgement that results in serious injury to themselves or others. Trying to adjudicate using such criteria is unlikely to improve fairness and consistency between cases.

The panel found "reluctantly" that, in the light of the law and policy, the truck driver's conduct arose out of and in the course of his employment.

In the present case, Mr. Corthay was considered a competent pilot by his employer and both Mr. Warburton and Mr. McQuinn considered him a good pilot and they did not have concerns with his ability as a pilot prior to the accident. In addition, there was no evidence of a history of Mr. Corthay engaging in horseplay or taking employees on trips unrelated to the employment. Accordingly, if Mr. Corthay's conduct in flying the plane just prior to the accident is characterized as horseplay, it would appear to have been an unusual type of behaviour on his part.

Even accepting that there was horseplay involved, the evidence is that he continued to transport the plaintiffs to the base camp while executing these manoeuvres. He did not

depart from a flight path to the base camp, albeit he was not using the most direct path. In addition, there has been no evidence submitted that Mr. Corthay's conduct was in breach of a specific regulation or rule and there is no evidence that he was cited for misconduct or that his actions contributed to the engine failure that preceded the accident. In view of all of these factors, I find that his conduct was not such as to constitute abandonment of his employment even if it is characterized as horseplay. Accordingly, I find that Mr. Corthay's conduct or actions that allegedly caused a breach of duty arose out of and in the course of employment.

Status of the Defendant, Prism Helicopters Ltd.

According to a memorandum from the Board Assessment Department dated March 23, 2005, Prism was registered with the Board at the time of the accident. Prism also clearly had employees. Accordingly, it was an employer engaged in an industry within the meaning of Part 1 of the Act and any action or conduct by Prism which allegedly caused the breach of duty arose out of and in the course of employment within the scope of this Part of the Act.

Since a corporation may only act through its agents or employees any action or conduct of an employee or agent which allegedly caused a breach also arose out of and in the course of employment – unless the employee has removed himself or herself from the employment by their conduct.

Status of the Defendant, Helifor Industries Limited

In a submission dated August 31, 2006, counsel for the defendant Helifor Industries Ltd. (Helifor) made submissions to much the same effect as those made by Prism. Counsel also submits that Helifor had employees but none of the plaintiffs were employed by Helifor. Counsel requested a determination that Helifor was an employer at the time of the accident.

In an affidavit sworn on August 28, 2006, Gary McDermid, president of Helifor, deposed that Helifor is a large helicopter logging company which maintains its own fleet of helicopters for use in logging operations. When those helicopters are in use, Helifor contracts with other suppliers, such as Prism, for the use of helicopters. According to a memorandum from the Board Assessment Department dated March 23, 2005, Helifor was registered with the Board at the time of the accident.

Given the above, I find that Helifor was an employer engaged in an industry within the meaning of Part 1 of the Act and any action or conduct of the employer, or the employer's servant or agent, which caused the breach of duty arose out of and in the course of employment within the scope of this Part of the Act.

Status of the Plaintiff, Michael Warburton

There is no dispute regarding the status of Mr. Warburton; however, a determination has been requested regarding his status and any determination made under section 11 must be supported by evidence.

According to his evidence at his examination for discovery, Michael Warburton was an employee of Possession Point Holdings Ltd. at the time of the accident. (Q 222) According to the memorandum from the Board Assessment Department dated March 23, 2005, Possession Point Holdings was registered with the Board at the time of the accident. Accordingly, Mr. Warburton was a worker at the relevant time.

The next question is whether Mr. Warburton's injuries arose out of and in the course of employment. Item #18.20, "Provision of Transportation by Employer" states:

> An employer may directly or indirectly provide transportation for its employees' journeys to and from work. In situations where this involves providing a specific vehicle such as, for example, a crew bus, in which the journeys are made, compensation coverage is generally extended to injuries occurring while travelling in this employer-owned vehicle.

The helicopter used for transporting the fallers to and from the logging site was equivalent to a crew bus. Accordingly, Mr. Warburton's injuries arose out of and in the course of employment.

Status of the Plaintiff, Robert Sean Quinn

According to his application for compensation, Mr. McQuinn was an active principal of McQuinn Contracting at the time of the accident. The memorandum from the Board Assessment Department, dated March 23, 2005, states that McQuinn Contracting was registered with the Board at the time of the accident. Accordingly, Mr. Quinn was a worker at the time of the accident. Under the policy at item #18.20, his injuries arose out of and in the course of his employment.

Status of the Plaintiff, Donovan Nott

According to memoranda of several telephone conversations with the Board Assessment Department and the accountant of Mountain Heli-Logging Ltd., Mr. Nott had his own compensation coverage. According to this information, at the time of the accident, Mr. Nott was a principal of Powerhead Falling Ltd. A memorandum from the Board Assessment Department, dated March 29, 2005, states that Powerhead Falling Ltd. was registered with the Board at the time of the accident. This corrected the information previously provided in the memorandum dated March 23, 2005. Accordingly, Mr. Nott was a worker at the time of the accident. Under the policy at item #18.20, his injuries arose out of and in the course of his employment.

Conclusion

I find that at the time of the September 11, 1997 accident:

1. the plaintiff, Michael Warburton, was a worker within the meaning of Part 1 of the Act and any injuries he sustained in the accident arose out of and in the course of his employment;

2. the plaintiff, Robert Sean McQuinn, was a worker within the meaning of Part 1 of the Act and any injuries he sustained in the accident arose out of and in the course of his employment;

3. the plaintiff, Donovan Nott, was a worker within the meaning of Part 1 of the Act and any injuries he sustained in the accident arose out of and in the course of his employment;

4. the defendant, Charles Corthay, was a worker within the meaning of Part 1 of the Act and any action or conduct which allegedly caused a breach of duty arose out of and in the course of his employment;

---

5. the defendant, Prism Helicopters Ltd., was an employer engaged in an industry within the meaning of Part 1 of the Act and any action or conduct of the employer, or the employer's servant or agent, which caused the breach of duty arose out of and in the course of employment within the scope of this Part of the Act;

6. the defendant, Helifor Industries Limited, was an employer engaged in an industry within the meaning of Part 1 of the Act and any action or conduct of the employer, or the employer's servant or agent, which caused the breach of duty arose out of and in the course of employment within the scope of this Part of the Act.

Marguerite Mousseau
Vice Chair

MM:gw

NO. 99 4139
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

MICHAEL WARBURTON, DONOVAN NOTT and
ROBERT SEAN MCQUINN

PLAINTIFFS

AND:

CHARLES CORTHAY, PRISM HELICOPTERS LTD.,
HELIFOR INDUSTRIES LIMITED,
the ATTORNEY GENERAL OF CANADA on behalf of TRANSPORT CANADA,
BOEING CO., and MCDONNELL DOUGLAS HELICOPTER COMPANY, INC.

DEFENDANTS

C E R T I F I C A T E

UPON APPLICATION of the defendants, Prism Helicopters Ltd., in this action for a determination pursuant to section 11 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Board;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, September 11, 1997:

1. The Plaintiff, MICHAEL WARBURTON, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The injuries suffered by the Plaintiff, MICHAEL WARBURTON, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Plaintiff, ROBERT SEAN MCQUINN, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

4. The injuries suffered by the Plaintiff, ROBERT SEAN MCQUINN, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

5. The Plaintiff, DONOVAN NOTT, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

6. The injuries suffered by the Plaintiff, DONOVAN NOTT, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

7. The Defendant, CHARLES CORTHAY, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

8. The alleged action or conduct of the Defendant, CHARLES CORTHAY, that allegedly caused a breach of duty, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

9. The Defendant, PRISM HELICOPTERS LTD., was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

10. Any action or conduct of the defendant, PRISM HELICOPTERS LTD., or its servant or agent which allegedly caused a breach of duty, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

11. The Defendant, HELIFOR INDUSTRIES LIMITED, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

12. Any action or conduct of the defendant, HELIFOR INDUSTRIES LIMITED, or its servant or agent which allegedly caused a breach of duty, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of February, 2007.

_____

Marguerite Mousseau
VICE CHAIR

NO. 99 4139
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

MICHAEL WARBURTON, DONOVAN NOTT and
ROBERT SEAN MCQUINN

PLAINTIFFS

AND:

CHARLES CORTHAY, PRISM HELICOPTERS LTD.,
HELIFOR INDUSTRIES LIMITED,
the ATTORNEY GENERAL OF CANADA on behalf of TRANSPORT CANADA,
BOEING CO., and MCDONNELL DOUGLAS HELICOPTER COMPANY, INC.

DEFENDANTS

SECTION 11 CERTIFICATE

WORKERS' COMPENSATION APPEAL TRIBUNAL
150-4600 Jacombs Road
Richmond, BC V6V 3B1
FAX (604) 664-7898
TELEPHONE (604) 664-7800

031137-A

BRITISH COLUMBIA **WCAT** ***Workers' Compensation Appeal Tribunal***

150 – 4600 Jacombs Road
Richmond, BC V6V 3B1
Telephone: (604) 664-7800
Toll Free: 1-800-663-2782
Fax: (604) 664-7898