Noteworthy Decision Summary

Decision: WCAT-2007-02935 Decision Date: September 26, 2007
Three Member Panel: Heather McDonald, Timothy Skagen, Sherryl Yeager

Application of the Presumption in Section 5(4) of the Workers Compensation Act – Speculation versus Evidence – Subpoena (Order) of Records

This decision is noteworthy as it illustrates the application of the presumption in section 5(4) of the *Workers Compensation Act* (Act) that is, where an injury or death is caused by an 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 vice versa. This decision evaluates what would be evidence to the contrary, and explains the difference between speculation and evidence. It also illustrates when a subpoena (order) to obtain records from the Workers' Compensation Board, operating as WorkSafeBC (Board), and the police will be issued.

The worker, a truck driver, died of multiple gun shot wounds while sitting in the driver's seat of his personal vehicle on the employer's premises. He was found with the truck trip log book on his lap. The worker had already started the engine of the truck he was going to operate that day to warm it up. Neither the worker's vehicle nor the truck were stolen. There was no evidence of a theft of money or personal property from the worker. There were no witnesses to the homicide and the assailant has not been identified.

The worker was unmarried and had no children. His father's claim for compensation was denied. The Board stated that it was unable to conclude that the reasons for the worker's homicide arose out of his employment. The Review Division of the Board found that the worker's death was not caused by his work.

The father's appeal was allowed. The panel found the worker's death was caused by an accident that occurred in the course of his employment, hence the presumption in section 5(4) of the Act applied. This meant the worker's death was presumed to have arisen out of his employment. There was insufficient evidence to rebut this presumption. Conjecture or speculation did not constitute evidence sufficient to rebut the presumption in section 5(4) of the Act. The panel stated that the evidence in this case did not point to any one motive as more likely than another. They emphasized that they were relying on the reasonable inferences which could be drawn from objective facts, not on assumptions, theories or speculation.

The panel was concerned about the amount of conjecture and speculation in this case. They were mindful of the statement in policy item #14.10[1] of the *Rehabilitation Services and Claims Manual, Volume II* that "all reasonable efforts must be made to obtain all available evidence" in the context of applying the section 5(4) presumption. Under section 247(1)(b) of the Act, the panel ordered the production of records from the Board's General Counsel and the staff sergeant of the investigating police force. The Board complied with the order but the panel found that the Board had not provided any new evidence that would assist them in deciding the appeal issues.

[1] Policy item #14.10 became policy item C3-14.20, effective July 1, 2010.

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The police provided a statutory declaration in response to the order. The panel decided that it would not be useful to pursue the order to require the police to provide documents related to the investigation of the worker's homicide, nor to convene an oral hearing to obtain oral testimony and documentary evidence from the police. They found that the sergeant's statutory declaration, provided with the same force and effect as if made under oath, revealed that the police were unable to provide evidence that would be useful to decide the issues in this appeal. They were satisfied that the earlier verbal statements made by the sergeant to the Board's field investigator regarding the beliefs of the police about the motive for the worker's homicide, and the sergeant's statement to WCAT that the police believed the worker's "murder" was not related to his place of employment, were not based on conjecture and speculation.

An amended decision has been issued for WCAT-2007-02935 and is attached to this document.

WCAT Decision Number: WCAT-2007-02935
WCAT Decision Date: September 26, 2007
Panel: Heather McDonald, Vice Chair
Timothy Skagen, Vice Chair,
Sherryl Yeager, Vice Chair

Introduction

On February 21, 2005 the worker died as a result of multiple gun shot wounds. He was a truck driver who had started his shift at approximately 6:30 in the morning. The worker was working for the employer trucking company and he was on the employer's premises at the time of the shooting. The worker had started the truck's engine to warm it up. He had returned to his personal vehicle parked on the employer's parking lot and was sitting in the driver's seat, checking the log book for the truck, when the homicide occurred. There were no witnesses and to date, the assailant has not been identified.

The worker was unmarried and had no children. His father applied to the Workers' Compensation Board, (Board) now operating as WorkSafeBC, for compensation. In a letter dated November 25, 2005, a Board case manager denied the father's claim. The case manager stated that he was unable to conclude that the reasons for the worker's homicide arose out of his employment. The father requested a review of the case manager's decision. In a decision dated July 17, 2006 (see *Reference #R0062391*, reported on the Board's website), a review officer confirmed the Board's decision to deny the claim, finding that the worker's death "was not caused by his work."

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the appellant submits that his claim for compensation should be accepted on the basis that the worker's death arose out of and in the course of his employment. The appellant submits that the Board decisions are based on speculation and unreliable, unconfirmed statements from the police.

Issue(s)

Did the worker's death arise out of and in the course of his employment?

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act).

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This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Under section 251 of the Act, WCAT must apply a policy of the Board's board of directors unless the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Appeal Method

The appellant requested the appeal proceed by way of review of the file and written submissions. The appellant indicated a fast track process was acceptable and no further submissions would be provided.

WCAT notified the employer of the appeal. The employer did not respond and did not participate in the appeal proceedings.

We reviewed the information on the claim file. Applying the criteria in Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), we agree that the issues in this appeal can be fairly determined without an oral hearing. There are no significant credibility issues to be decided in this case. Although the circumstances of the worker's death raise important factual questions, the results of the Board's investigation documented on the claim file and our further inquiry to the police have led us to conclude that we would not obtain further helpful evidence by conducting an oral hearing. We find the documentary evidence, together with the relevant law and policy, sufficient to decide the appeal issues.

Law and Policy

Section 5(1) of the Act provides that a personal injury or death must arise "out of and in the course of the employment" before benefits can be paid.

Section 5(4) of the Act provides that where the injury is caused by an 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. Section 5(4) also provides that 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 Act's definition of "accident" includes a wilful and intentional act, not being the act of the worker, and also includes a fortuitous event occasioned by a physical or natural cause.

The relevant Board policy is found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Policy item #14.10 (*Presumption*) discusses the intent of section 5(4) of the Act. The policy provides that the term "out of employment" relates to the cause of the injury and the term "in the course of employment" relates to the time and place of the injury. Where an injury results from an accident, evidence is only needed to show either that the injury arose out of the employment or that it arose in the course of employment. The balance is presumed unless there is evidence to the contrary. This presumption only applies when the injury is caused by an accident. The presumption is not a conclusive one because it will be rebutted if opposing evidence shows that the contrary conclusion is more likely. The policy says therefore it follows that all reasonable efforts must be made to obtain all available evidence.

Regarding the point that the presumption applies only when the injury is caused by accident, the policy states as follows:

> This term is defined in section 2 to include a "wilful and intentional act, not being the act of the worker…" and a "fortuitous event occasioned by a physical or natural cause". This is not an exclusive definition of the term, but the word has been interpreted in its normal meaning of *a traumatic incident*. It has not, for example, been extended to cover injuries resulting from a routine work action or a series of such actions lasting over a period of time.
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> [italic emphasis added]

This statutory presumption is also referred to in policy item #97.20 regarding presumptions.

Policy item #16.30 *(Assaults)* states that there are two questions that must be addressed when considering assault claims. Policy item #16.30 states, in part:

> …the first question is whether the claimant was the aggressor and therefore the agent which caused the injuries. The answer to this question is not always clear cut and may involve an evaluation of the degree to which a claimant is an aggressor in a given situation. However, the fact that a worker is less than friendly with another employee and is at least equally responsible for ill feeling that may prevail between them is not, by itself, grounds for disallowing a claim for injury arising out of an assault by that other employee.
>
> The second question is whether there is a connection between the employment and the subject matter of the dispute which led to the assault or whether it was a purely personal matter. In the latter case, the claim is not acceptable.

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> Where an assault arises out of the worker's employment, no compensation is payable unless it also arises in the course of the employment.
>
> The same principles apply if the assault is by someone other than a fellow employee.

Policy item #97.00 (*Evidence*) outlines the approach the Board takes when dealing with evidence. After obtaining evidence relating to a claim, the evidence is weighed. Policy item #97.00 states, in part:

> The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker.

The policy goes on to provide that if after an investigation and weighing of evidence, there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the worker, it can be fairly said that the claim has not been established. The policy also states in part as follows:

> The Board, as a quasi-judicial body, must make its decisions according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence…If one speculates as to the cause of a condition of unknown origin, one might attribute it to the person's work or to any other cause, and one speculated cause is no doubt just as tenable as any other. However, the Board can only be concerned with possibilities for which there is evidential support…

Background and Evidence

The Review Division decision considered the following background and evidence:

- The worker commenced employment with the employer approximately one month prior to his death[2];

[2] The field investigator's notes state that the employer advised the worker had been working for the employer for approximately three months before his death. Other notes, however, indicate that the time period was only one month.

- At the time of the homicide, the worker had reported to work, started the engine of the truck he was going to drive that day, and then returned to his own vehicle on the employer's premises to complete paperwork related to his employment;

- An unknown assailant shot the worker while he was sitting in his vehicle completing paperwork. The worker died of multiple gunshot wounds;

- There were no witnesses to the incident. The company's owner arrived for work a little while later that morning and found the deceased worker slumped over in his vehicle. The truck trip log was in the worker's hands;

- Neither the worker's vehicle nor the truck was stolen. There was no evidence of a theft of money or personal property from the worker;

- In a report dated July 15, 2005, a Board field investigator referred to sworn evidence from a representative of the employer who identified two other companies with whom the worker was previously employed. The employer described the worker as a good employee. The employer had no problems with the worker. The employer was unaware of any problems the worker may have had with anyone;

- In a memorandum dated November 25, 2005, another Board field investigator referred to verbal advice from a staff sergeant of the investigating police force. The review officer said the field investigator indicated the police investigation did not reveal any evidence that the worker's employer or any employee of the employer was the intended target, but the police did not eliminate this possibility. The sergeant said there was no evidence the employer was involved in any illegal activity. The sergeant said there was no evidence to indicate the worker or the employer was the intended victim of a robbery. The sergeant described the worker's death as an "execution style killing" with the worker "the intended target." The field investigator advised that the police investigation of the homicide was ongoing and therefore the police were not releasing any further information about the investigation;

- The Board field investigator conducted an Internet search of the worker and found a newsletter article dated July 2, 2005, on www.voiceonline.com, which stated that the worker had previously been employed by another company that had links to another "murdered" driver. The newsletter article attributed the deaths to truck drivers involved in the drug trade;

- The appellant provided a copy of a February 25, 2005 newspaper article which described an evening incident at the employer's premises the Thursday before the worker's death. In this incident, another trucker observed a man running towards him in the employer's parking lot in the dark. When the trucker opened his truck door and turned on the interior lights, the approaching man then fled. The trucker

saw another man waiting in a nearby car. The appellant submitted this as evidence that his son, the worker, was mistakenly killed because the other trucker was the obvious target, not his son;

- The February 25, 2005 newspaper article stated that one of the worker's previous employers was linked to at least one "murder" and two other shootings;

- The appellant said that the employer advised there is no security, fencing, guard gates, proper lighting or camera coverage of the employer's parking lot. The appellant said the employer indicated that in the past there had been thefts of company trucks and recently a company truck had been stolen. The appellant's position was that the worker's homicide was due to the absence of proper security, fencing, lighting, etc. and that the worker was mistakenly killed as a part of an attempted robbery that occurred as another vehicle was entering the parking lot.

- The worker did not have a criminal record at the time of his death although the February 25, 2005 newspaper article stated that he was facing criminal charges. The article did not describe the nature of the charges.

In the case manager's November 25, 2005 decision, he referred to the Board field investigator's conversation with the staff sergeant of the investigating police force. The case manager said that in order for the Board to accept the appellant's claim for compensation, it must be demonstrated that the worker's death arose out of and in the course of his employment. The case manager said that while it was clear that the worker was at his place of employment warming up a company truck at the time of his death, "there is no evidence to suggest that the reason he was killed was related to his work on or before the date of his death." Therefore the case manager denied the claim, stating that he was unable to conclude that the reasons for the worker's death arose out of his employment with the employer.

In confirming the case manager's decision, the review officer found that the worker's death arose in the course of his employment, but she decided that the worker's death did not arise out of his employment. The review officer referred to the following evidence as suggesting that the worker's death was "likely related to associations or activities of the worker outside of his employment" – although she also expressly recognized that "this has not been proven:"

- The employer had no known association with criminal activity and its trucking business was legitimate;

- The Internet newsletter article indicated the worker was previously employed by another trucking company linked to a "murder" and to two other shooting incidents; the Board investigator's Internet search revealed that these events "were thought to be related to the drug trade";

- The worker was facing criminal charges at the time of his death.

The review officer noted the evidence about the evening incident the Thursday before the worker's death. The review officer stated her reluctance to conclude from that evidence that an attempted robbery or theft was necessarily the motive for the worker's death, or that the other trucker was the intended target of the shooting. The review officer found the appellant's position to be speculative on that point.

With respect to the appellant's submission that the worker was the victim of a mistaken identity, the review officer stated that in order to complete his paperwork the worker "would have presumably required lighting." Thus the assailant did not flee at the sight of the worker "but presumably saw the worker, who was sitting in his own vehicle." The review officer concluded that:

> Since the worker was sitting in his own vehicle at the time of the murder the assailant might have been able to identify him on that basis alone. I find that these factors suggest that the worker was likely the intended target. I therefore place little weight on the [appellant's] position that the worker was the victim of mistaken identity.

The review officer also found it unlikely that robbery was a motive in the worker's death because nothing was stolen and the evidence did not corroborate the appellant's position that a vehicle was just entering the parking lot at the time of the worker's death. The evidence was that the employer's owner arrived at about 7 a.m. and the shooting incident occurred shortly after the worker reported to work at 6:30 a.m. The review officer also observed that a robbery could have occurred in the absence of a shooting and the shooting in that type of case "would not likely have been one that resembled an execution."

The review officer found that the worker's death amounted to an assault. Considering RSCM II policy item #16.30, the review officer stated on the first question to be addressed in the policy, there was no evidence that the worker was the aggressor in this case. The second question referred to in the policy is whether there is a connection between the worker's employment and the subject matter of the dispute. On that question, the review officer said as follows:

> There is no evidence of a verbal exchange or a physical altercation and the subject matter of any such exchange in any event, is not known. What arises, however, is whether there is any evidence that the worker was killed as a result of his employment. Given my discussion above, I find little evidence beyond the speculation of the [appellant], that the worker was the intended victim of a robbery associated with his place of employment. I find it more likely that factors outside of the worker's employment were responsible for his death.

The review officer did not specifically discuss or apply the presumption in section 5(4) of the Act in the context of the evidence in the review proceedings. The review officer did mention RSCM II policy item #14.10 in stating:

> The time and place of the worker's death establishes that he was working when he was killed and the requirement of section 5 with respect to "in the course of employment" has therefore been met. I find that the weight of evidence does not support the conclusion that the cause of the worker's death was related to his employment and therefore conclude that the worker's death did not arise out of his employment as required by section 5 of the Act and policy item #14.10.

The review officer expressly acknowledged that many pertinent details relating to the worker's death have not and may never be confirmed, but stated she was required to rely on the available evidence. She stated that the arguments put forward by the appellant were far more speculative than the police evidence and the assumptions that were made on the basis of the police evidence. Therefore, as a result, the review officer concluded that the Board case manager was correct in concluding that the worker's death did not arise out of and in the course of his employment because the worker's death was not caused by his work.

WCAT Inquiry

We were concerned about the amount of conjecture and speculation in this case. We were mindful of the statement in RSCM II policy item #14.10 that "all reasonable efforts must be made to obtain all available evidence" in the context of applying the section 5(4) presumption. We decided it appropriate to conduct a further inquiry to obtain reliable evidence surrounding the worker's death, particularly regarding motivation and the issue under section 5 of the Act regarding whether the worker's death arose out of his employment. Under section 247(1)(b) of the Act, we arranged for service of a formal order to the Board's General Counsel, requiring production of:

> All records (including documents, reports, interview records, memoranda, drawings, pictures, videos and/or audiotapes, hand-written notes, field investigation department records) in the custody or control of [the Board] relating to the death of [the worker]….

We arranged for service of a similar order to the staff sergeant of the investigating police force.

The Board's General Counsel responded to the WCAT order by providing relevant documents. Most of those documents, however, were already on the claim file and we were satisfied that the information in the remainder of the material was also recorded

on the claim file. Thus we did not obtain any new evidence that would assist us in deciding the appeal issues.

The police sergeant responded to the WCAT order with a letter dated January 8, 2007 advising that the police investigation was active and ongoing. He said that as a result the police were unable to release detailed information regarding the worker's death. The sergeant went on to state in part as follows:

> The investigation is ongoing and will remain open until the person(s) responsible are charged and prosecuted. The investigation, to this date, has led police to believe that the murder of [the worker] is not related to his place of employment.

On receipt of this letter, we requested WCAT's Tribunal Counsel Office to act on our behalf in pursuing evidence from the police. WCAT legal counsel wrote to the police solicitor on February 28, 2007, describing the appellant's claim for compensation and the appeal issues, and providing sections 5(1) and 5(4) of the Act. The letter went on to state in part as follows:

> The correspondence from [the sergeant] has indicated that the investigation has led police to believe the murder of [the worker] is not related to his place of employment. WCAT does not know whether that is simply a suspicion based on years of experience or a reflection of some evidence in the file which fairly tends to show that the murder was not related to his place of employment.
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> …
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> It would be helpful if you could review the file and make an assessment as to whether the material in the file can be disclosed or whether there is nothing in the file that would assist WCAT at all. Further, if there is material that may be relevant and of assistance to the tribunal, but disclosure of which may jeopardize the administration of justice, it is certainly open to [the police] to apply to WCAT to ask the WCAT panel to exercise its discretion under section 42 of the ATA to receive the evidence in confidence and not disclose it to any third parties. [The police] could request that such evidence ought not to be retained on the file or made part of the claim file for the future. The panel may be prepared to consider an application from [the police] that the evidence be maintained confidential in advance of the release of that evidence.
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> Please advise your position. Thank you for your cooperation.

In response, we received a statutory declaration dated June 26, 2007 by the police sergeant who declared as follows:

> 1. I am a police officer with [the investigating police force] and am involved with the investigation of the death of the Deceased.
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> 2. Based on the investigation to date, I am not aware of any evidence to indicate that the Deceased's death was not related to his work.
>
> AND I make this solemn Declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

We decided that it would not be useful to pursue the WCAT order to require the police to provide documents related to the investigation of the worker's homicide, nor to convene an oral hearing to obtain oral testimony and documentary evidence from the police. Our finding was that the sergeant's statutory declaration, provided with the same force and effect as if made under oath, revealed that the police were unable to provide evidence that would be useful to decide the issues in this appeal. We were satisfied that the earlier verbal statements made by the sergeant to the Board's field investigator regarding the beliefs of the police about the motive for the worker's homicide, and the sergeant's statement in his January 8, 2007 letter to WCAT that the police believed the worker's "murder" was not related to his place of employment, were not based on evidence but rather on conjecture and speculation.

We also requested WCAT's Tribunal Counsel Office to contact the Provincial Court Registry to obtain information about any outstanding criminal charges against the worker at the time of his death. WCAT received a written facsimile transmission dated September 7, 2007 advising that the worker had been facing criminal charges at the time of his death. (These charges were subsequently abated because of his death). There was no record of criminal convictions. It is unnecessary in this decision to reveal the nature of the criminal charges except to say that the evidence does not indicate in any way they were related to drug offences.

Reasons and Findings

We have decided that the worker's death constituted an accident within the Act's definition of the term. The worker's death was caused by the wilful and intentional act of a person other than the worker. The death also falls within the interpretation of an accident as a traumatic incident set out in policy #14.10. We refer to *Appeal Division Decision #96-0797* (reported at 12 WCR 747) and *WCAT Decision #2003-03671-AD* (November 21, 2003), wherein the Act's definition of accident is interpreted as requiring some external traumatic incident in order for the section 5(4) presumption to come into play.

The evidence supports a finding that the worker had commenced his work shift and was in the course of checking the truck log book when the shooting occurred. As set out in policy item #14.10, "in the course of employment" relates to the time and place of injury, and we find it clear that the worker was in the course of his employment at the time of his death.

Given that the worker's death was caused by an accident that occurred in the course of his employment, the presumption in section 5(4) of the Act comes into play. Board policy item #14.10 provides that this presumption is rebutted if opposing evidence shows that the contrary conclusion is more likely. This leads us to the question of what, if any, evidence supports a contrary conclusion is likely in this case.

Policy item #97.00 emphasizes that the Board must make its decision according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence. The policy gives the example that if one speculates as to causes of unknown origin, one might attribute it to the person's work or any other cause, and "one speculated cause is no doubt just as tenable as any other." The policy states that the Board can only be concerned with "possibilities for which there is evidential support." We have found these policy statements to be particularly apt in this case.

Conjecture or speculation does not constitute evidence. In *Jacques v. British Columbia Council of Human Rights* [1988] B.C.J. No. 990 (QL), (May 5, 1998), the B.C. Court of Appeal applied the following analysis of the distinction between conjecture and inference from *Caswell v. Powell Duffryn Associated Colleries Ltd.*, [1940] A.C. 152 (H.L.):

> …the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The court therefore is left to inference or circumstantial evidence. *Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish*. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. *But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture*.
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> [at pgs. 169-170, italic emphasis added]

We agree with the review officer's finding that the appellant's explanations for the reasons for the worker's homicide (robbery, mistaken identity) are speculative theories. But our finding is that the evidence in this case does not point to any one motive as

more likely than another. We emphasize that we are relying on the objective facts, not on assumptions, theories or speculation.

The review officer relied on three matters as evidence suggesting that the worker's death was likely related to his associations or activities outside his employment.

One matter was the Internet newsletter article located by the Board field investigator indicating that the worker's previous employer was linked to a "murder" and two other shootings thought to be related to the drug trade. In our view, the unreliability of the sources of such information is obvious. The original sources are not identified and the information is provided in an informal manner more akin to gossip than a formal declaration or sworn testimony. We find that an assumption made from that information, that the worker was engaged in unlawful activity that caused his death, amounts to speculation and conjecture. It is not a reasonable inference based on reliable evidence.

The second matter was the fact that the worker was facing criminal charges at the time of his death. We have confirmed that matter as objective fact. However, the evidence does not support a finding that the criminal charges were related to drug offences. Further, it takes a leap of conjecture to assume from the existence of those outstanding charges that the worker's death was somehow related to those charges or his activities outside his employment. Thousands of people face criminal charges but are not victims of homicide.

Third, the review officer referred to the fact that the employer had no known association with criminal activity. We are unable, however, to extrapolate from this fact to a finding that the worker's death was therefore likely caused by his activities outside his employment.

Even considering all three of these matters together, we find that they do not constitute evidence from which we can infer that the worker's death was likely related to his associations or activities outside his employment. To do so, in our view, amounts not to reasonable inference based on objective facts but rather to speculation or conjecture. This is not sufficient to rebut the presumption in section 5(4) of the Act that as the worker's death occurred in the course of his employment, the worker's death also arose out of his employment. The speculation does not establish, as stated in RSCM II policy item #14.10, that the contrary conclusion is more likely.

The review officer indicated that the assumptions made on the police evidence (namely, that the worker died because he was the intended target of an execution-style killing) were less speculative than the theories put forth by the appellant. We refer, however, to the statement in Board policy item #97.00 that "one speculated cause is no doubt just as tenable as any other" and that the Board "can only be concerned with possibilities for which there is evidential support." The field investigator's notes indicate the police view

that the worker was the assailant's intended target. This is an opinion, but is not supported by any objective facts (that is, reliable evidence) to substantiate the reason for the police holding that opinion.

We observe that the police opinion is also arguably consistent with another possible motive for the worker's homicide. The worker could have been resisting attempts to persuade him to misuse the truck and his job as a trucker with the employer to engage in the illegal trafficking of drugs, and was shot as both punishment and an intended message to others who similarly tried to resist. We are not making a finding that this was the reason for the worker's homicide, but we are pointing out, in light with Board policy item #97.00, that one speculated cause is just as tenable as another. The fact is that no one knows why the worker was killed in the course of his employment. There is a dearth of reliable evidence in the form of objective facts, to support one cause as more likely than another.

In serving the police sergeant with an order for the production of documents related to the investigation of the worker's death, we were seeking objective facts, evidence, on which to make a finding as to the likely reason for the worker's homicide. We first received the January 8, 2007 letter from the police sergeant advising that the police believed the worker's "murder" was not related to his place of employment. That statement was again providing us with an opinion or a belief, but not the objective facts or evidence upon which the opinion or belief was based. When we pursued the matter by inquiring as to whether the police belief was only suspicion or based on evidence, we received the formal statutory declaration from the police sergeant. That statutory declaration again does not provide any evidence. In the absence of confirmatory evidence, we are left with police conjecture and speculation. Conjecture or speculation does not constitute evidence sufficient to rebut the presumption in section 5(4) of the Act.

In the statutory declaration, the police sergeant expressly stated that he was not aware of any evidence to indicate that the worker's death was not related to his work. The police have not provided evidence to support a finding that the worker's death was not related to his employment. The police have not provided evidence that rebuts the presumption in section 5(4) of the Act that the worker's death, arising in the course of his employment, also arose out of his employment.

In reviewing all the evidence and background in this case, we find that this is a classic case for the application of the presumption in section 5(4) of the Act. Given our finding that the worker's death occurred because of an accident that arose in the course of his employment with the employer, it must be presumed that the worker's death arose out of his employment unless opposing evidence shows that the contrary conclusion is more likely. In this case we find that there is not opposing evidence showing that the contrary conclusion is more likely.

We do not find Board policy item #16.30 (*Assaults*) to be helpful in deciding the issues on appeal. We agree with the review officer that there is no evidence that the worker was the aggressor in this case. On the issue of whether there is a connection between the worker's employment or whether it was a purely personal matter, we are led back to the matter of evidence and the application of the statutory presumption in section 5(4) of the Act. This we have already dealt with.

Conclusion

For the foregoing reasons, we allow the appeal. We find that the worker's death occurred in the course of his employment as a truck driver with the employer. Applying section 5(4) of the Act, we find that the worker's death also arose out of his employment as a truck driver with the employer. Accordingly, we vary the Review Division decision of July 17, 2006. This has the effect of varying the Board case manager's decision dated November 25, 2005 to accept the appellant's claim for compensation. It is now for the Board to determine the appellant's entitlement to compensation benefits, if any, under the claim.

The appellant did not request reimbursement of any appeal expenses and therefore we make no order in that regard.

Heather McDonald
Vice Chair

Timothy Skagen
Vice Chair

Sherryl Yeager
Vice Chair

HMc/dw

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WCAT Addendum to Decision Number: WCAT-2007-02935a

WCAT Addendum Decision Date: **December 12, 2007**

Panel: Heather McDonald, Vice Chair
Timothy Skagen, Vice Chair,
Sherryl Yeager, Vice Chair

This Addendum is issued pursuant to item #15.25 of the WCAT MRPP.

By letter dated December 7, 2007, the appellant requested reimbursement of the following expenses:

(a) payment of $565.00 in legal fees associated with the appellant's pursuit of the appeal of the WorkSafeBC decisions;

(b) estimated cost of $300.00 related to "Drafting, Printing, Photocopying, mailing; Faxing; Telephones to WCB and WCAT offices and contacting contacts and Delta Police officials by phones and mails [sic] during the course of the appeal" – no receipts available.

There was no oral hearing in these appeal proceedings. Section 7(2) of the *Workers Compensation Act Appeal Regulation* (Regulation) states that WCAT may not order the Board to reimburse a party's expenses arising from a person representing the party. Thus we are unable to award the appellant reimbursement for the $565.00 legal fees associated with obtaining legal advice related to the appeal.

Under section 7(1)(b) of the Regulation, WCAT has a discretion to order the Board to reimburse a party to an appeal "the expenses associated with obtaining or producing evidence submitted" to WCAT. We have reviewed the claim file, including the review and appeal sections. The appellant sent written submissions to both the Review Division and WCAT, relating his position and view of the available evidence which had been obtained by the Board and WCAT. Those written submissions, however, did not provide new and helpful evidence to WCAT. Any helpful evidence referred to in the appellant's submissions was already in existence on the claim file as a result of efforts from both the Board and WCAT in seeking relevant evidence.

The expenses referred to by the appellant (printing, photocopying, mailing, faxing etc.) were not incurred in providing new evidence helpful to deciding the issues on appeal. Rather, those expenses are in the nature of incidental expenses that any party may incur while participating in an appeal process. We are satisfied that section 7 of the Regulation does not provide us with the authority to order the Board to reimburse a

party for the expenses involved in preparing a written appeal submission that does not include new evidence that is relevant and helpful in the appeal proceedings.
Even if we had such a discretion, we would not exercise it in this case to make a reimbursement Order. This is because the appellant has not provided us with receipts; further and in any event, the approximate amount would be minimal, much lower than the administrative cost involved in providing reimbursement.

For the foregoing reasons, we deny the appellant's request for reimbursement of the expenses referred to in his letter dated December 7, 2007.

Heather McDonald
Vice Chair

Timothy Skagen
Vice Chair

Sherryl Yeager
Vice Chair

HMc/dw