

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

	)	State File No. G-20950
	)	
Merrill Austin	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Central Vermont Home Health and Hospice	)	Opinion No 32-02WC

**PERMISSION TO TAKE INTERLOCUTORY APPEAL**

This action arises out of the suicide of the late Jill Austin, which her surviving spouse, Merrill Austin, alleges is work-related. Defendant has denied the claim on several grounds, including that it is barred as a matter of law under *McKane v. Capital Hill Quarry Company*, 100 Vt. 45 (1926).

The parties agree that this Department may certify an interlocutory appeal on the question of the appropriate legal standard to be applied to a workers' compensation case where the claimant has committed suicide. The claimant's agreement to this appeal was conveyed through his attorney's telephone message to the hearing officer.

The defense argues that the standard to be applied is one enunciated in *McKane*, 100 Vt. 45, that the claimant must prove that Jill Austin's death was due to an uncontrollable impulse or delirium of frenzy. In a pretrial ruling, this Department held that: 1) the language in *McKane* on which the defense relies is not controlling on the present case; and 2) the burden is on the defendant under 21 V.S.A. § 649 to prove that Ms. Austin's death was due to an intentional act.

Upon motion of either party, an appeal from an interlocutory order or ruling shall be permitted if the judge or administrative agency "finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation." V.R.A.P. 5(b)(1).

"Interlocutory appeals are an exception to the normal restriction of appellate jurisdiction to the review of final judgments." *In re Pyramid Co.*, 141 Vt. 294, 300 (1982). Therefore, three criteria must be satisfied before permission for such an appeal will be granted: 1) the order at issue must involve a controlling issue of law; 2) there must be a substantial ground for difference of opinion as to the correctness of the order; and 3) an interlocutory appeal should materially advance the termination of the litigation. *Id.* at 301. These criteria are considered in turn.

First, the issue at hand involves a controlling issue of law on the appropriate legal standard and assignment of the burden of proof. Is it the claimant's burden to prove a causal connection between the work-related injury and the suicide, with the burden on the defendant under § 649 to prove an intentional act that would bar the claim? Or must the claimant prove not only that the suicide was work-related, but also that it was due to "an uncontrollable impulse or delirium of frenzy"? Answers to these questions will have a substantial impact on the litigation by saving time, Department resources and, at minimum, narrowing the issues for hearing. *See id.* at 303.

Second, there is substantial ground for difference of opinion as to the correctness of the order and reasoning. Is *McKane* distinguishable from this case because of the differing postures of the two cases, legislative history and changing societal attitudes toward mental illness? Or is the language that claimant must prove "uncontrollable impulse or delirium of frenzy" controlling? A reasonable appellate justice could reject this Department's determination that *McKane* does not control this case. *See id.* at 307.

Third, this appeal will materially advance the termination of this litigation. If the "uncontrollable impulse or delirium of frenzy" standard applies and claimant is unable to meet it, the matter is entirely and finally decided.

Therefore, the defense motion for an interlocutory appeal is granted on the issue of the legal standard applicable to a workers' compensation claim based on an employee's suicide.

Dated at Montpelier, Vermont this 25<sup>th</sup> day of July 2002.

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R. Tasha Wallis  
Commissioner