69514-2

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No. 69514-2-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

RUDOLPH KNIGHT
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

BRIEF OF APPELLANT

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I. Introduction

Rudolph "Rudy" Knight seeks workers' compensation benefits under the Industrial Insurance Act (Act) with regard to a traumatic brain injury, which has left him permanently disabled.

At the time of injury, Mr. Knight worked for State Farm Insurance (State Farm) as a top level catastrophic claims adjuster. Mr. Knight's permanent residence is Washington State, but at the time of injury he was stationed in Galveston, Texas assessing home owners' claims in the aftermath of Hurricane Ike. On December 2, 2008, Mr. Knight was surveying beach damage in and around the Galveston Island area when, at about 1:00pm, he saw men on dune buggies spraying surf on the beach. He got out of his work van/mobile office to watch the riders. This is Mr. Knight's last memory of December 2, 2008. That same day, at about 5:30pm, paramedics found Mr. Knight not far from his van, lying on his back in the sand and water, calling for help, disoriented, and shivering uncontrollably.

It was later determined that sometime between 1:00pm and 5:30pm, Mr. Knight, by blunt force trauma, suffered a brain injury. Admittedly, no one knows when or how Mr. Knight was injured. No other witnesses have come forward, and amnesia is a common side effect to brain injuries.

Although the extent and severity of Mr. Knight's injury is not in question, the issue remains whether Mr. Knight was in the course of his employment at the time of injury and which party, Mr. Knight or the Department of Labor and Industries (Department), must show evidence that Mr. Knight was, or was not, in the course of employment at the time of injury.

At the trial court, in response to the Department's summary judgment motion, Mr. Knight argued, as a traveling worker, he is considered continually in the course of employment and covered by the Act. In order to refute coverage, the Department must show that he distinctly departed on a personal errand and therefore abandoned his employment at the time of injury. Mr. Knight asserts that the Department cannot show that he distinctly departed his employment at the time of injury because the record is blank as to when and how the injury occurred. Mr. Knight alternatively argued that genuine issues of material fact exist as to this issue, precluding summary judgment.

Conversely, the Department argued Mr. Knight has the burden to show he did not abandon his employment at the time of injury, and Mr. Knight could not meet this burden under two theories. First, it argued Mr. Knight abandoned his employment by pausing to watch dune buggies and Mr. Knight could not show that he reengaged in employment at the time of

injury. Second, two witnesses stated that Mr. Knight smelled of alcohol and Mr. Knight responded to a paramedic that he drank "a lot." Based on this evidence, the Department argued Mr. Knight abandoned his employment by drinking alcohol and must have been injured by falling onto the sand in a drunken state.

Mr. Knight argues that neither of the Department's theories demonstrates that he abandoned the course of his employment at the time of injury. First, resting on the beach fits within in the personal comfort doctrine and it is therefore contrary to law to find he abandoned his employment by pausing to watch dune buggies.

Second, dismissal on summary judgment was in error even if Mr. Knight must show that he did not abandon the course of his employment at the time of injury. Employee abandonment by way of intoxication is a question for the jury to determine. Additionally, material facts exist that suggest Mr. Knight was the victim of a crime. For example, Mr. Knight is a 61 year old insurance adjuster with no disciplinary history in his 23 years of employment; no alcohol bottles were found near him; he was found with significant bruising on his arms, chest, and face on a hurricane stricken beach inhabited by transient workers; and his wallet, necklace, and money clip were missing.

The trial court granted the Department's motion for summary judgment. It agreed with the Department that: 1) Mr. Knight abandoned his employment by watching dune buggies; 2) Mr. Knight did not have sufficient evidence to show that he reentered employment at the time of injury; and 3) Mr. Knight did not have sufficient evidence to show he had not been drinking at the time of injury. Mr. Knight Appeals.

II. Assignments of Error

A. Assignments of Error

1. The trial court erred in dismissing Mr. Knight's appeal seeking workers' compensations benefits. Order Granting Dismissal, Clerk's Paper (CP) at 96-97, Order Denying Reconsideration, CP at 110-111.

2. The trial court erred in misapplying the traveling workers' doctrine. Order Granting Dismissal, CP at 96-97, Order Denying Reconsideration, CP at 110-111.

3. The trial court erred in finding that there were no material facts in dispute. Finding of Fact and Conclusion of Law 3, CP at 97.

4. The trial court erred in finding that the material facts arguably in dispute were not supported by sufficient evidence to go to a jury. Finding of Fact and Conclusion of Law 3, CP at 97.

5. The trial court erred in finding that Mr. Knight abandoned the course of employment at the time of his injury, by virtue of alcohol intoxication. Finding of Fact and Conclusion of Law 4, CP at 97.

6. The trial court erred in finding that a jury could not reasonably find that any intoxication as well as Mr. Knight's injuries are fairly attributable to the increased risks of his employment travel. Finding of Fact and Conclusion of Law 4, CP at 97.

7. The trial court erred in finding that Mr. Knight was not injured in the course of his employment because he stopped to watch dune buggy riders. Finding of Fact and Conclusion of Law 5, CP at 97.

8. The trial court erred in finding that stopping to watch dune buggy riders was a personal amusement venture resulting in a distinct departure from employment. Finding of Fact and Conclusion of Law 5, CP at 97.

9. The trial court erred in finding that any departure from employment had not concluded when Mr. Knight sustained his injury. Finding of Fact and Conclusion of Law 5, CP at 97.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it misapplied the traveling workers' doctrine by failing to hold that Mr. Knight is a traveling worker continuously in the course of employment and eligible for benefits

under the Act, unless the Department shows he distinctly departed the course of his employment at the time of injury? (Assignments of error 1 and 2.)

2. Whether the trial court erred by holding that Mr. Knight distinctly departed his employment when he stopped to watch dune buggy riders; this stop fits within the personal comfort doctrine because it was not unreasonable or unusual and it took place while Mr. Knight was surveying the beach? (Assignments of error 1, 7, 8, and 9.)

3. Whether the trial court erred by holding that no material facts are in dispute and that all reasonable fact finders must find that Mr. Knight abandoned his employment at the time of injury when witnesses do not know when or how Mr. Knight was injured, abandonment by intoxication is a jury question, and evidence suggests that Mr. Knight was a crime victim? (Assignments of error 1, 3, 4, 5, and 6.)

III. Statement of the Case

A. In September 2008, State Farm sent Mr. Knight, a Top Level Catastrophic Claims Adjuster, to Galveston, Texas to Assess Damage Claims in the Aftermath of Hurricane Ike

For over 23 years, Mr. Knight worked for State Farm Insurance (State Farm) which is based out of Bloomington, Illinois. Hearing Transcript from June 20, 2011 (6/20/11 HT) at 31, ll. 7, 23-26.[i] By the early 2000's, he had become a top level claims adjuster who could be

[i] All hearing transcripts are contained in the Certified Appeal Board Record (CABR).

trusted to work the most difficult assignments. 6/20/11 HT at 86, ll. 4-26; & at 87, ll. 1. As such, he became a catastrophic claims adjuster. 6/20/11 HT at 31, ll. 21-26; & at 32, ll. 1-22.

Mr. Knight kept his permanent residence in Seattle. 6/20/11 HT at 34, ll. 2-26; & at 35, ll.71-13. However, State Farm sent Mr. Knight all over the country after catastrophic events to adjust damage claims. 6/20/11 HT at 33, ll. 3-26; & at 34, ll. 1. Depending on the severity of the catastrophe, Mr. Knight could be away from home for months working six days a week, twelve hours a day or more. 6/20/11 HT at 40, ll. 9-21; & at 87, ll. 2-13. One of these catastrophes, Hurricane Ike, struck Galveston, Texas, in September 2008. 6/20/11 HT at 35, ll. 14-26; & at 36, ll. 1-22. Hurricane Ike devastated Galveston, and State Farm sent Mr. Knight there to adjust damage claims. *Id.*

Because so much of the city and surrounding area had been damaged, State Farm put Mr. Knight in a hotel about 30 minutes north of Galveston. 6/20/11 HT at 36, ll. 23-26; at 37, ll. 1-2; *See* Exhibit 1 to 6/20/11 Hearing; & at 38, ll. 17-24. State Farm provided Mr. Knight a per diem in addition to his annual salary on all days he was at the catastrophe site. 6/20/11 HT at 42, ll. 5-15.

State Farm allowed its workers to earn extra days off to rest at the catastrophe site or to travel because its adjusters worked long hours and

had extended stays away from home. 6/20/11 HT at 90, ll. 24-26; & at 91, ll. 1-19. State Farm referred to this time off as "provisional days." *Id.* However, an employee's per diem was paid whenever the employee was staying at the catastrophe site, even if it was a provisional day. 6/20/11 HT at 42, ll. 5-15. State Farm specifically acknowledged that provisional days benefited the company because time off kept its workers fresh and rejuvenated for the long weeks and months of work away from home. 6/20/11 HT at 90, ll. 24-26; & at 91, ll. 1-19. However, many employees, like Mr. Knight, used their days off to catch up on work, due to the sheer volume of claims at catastrophe sites. 6/20/11 HT at 40, ll. 17-21.

While in Texas working at the catastrophe site, Mr. Knight would primarily work out of his State Farm van. 6/20/11 HT at 45, ll. 19-26 & at 46, ll. 1-25. The van had a desk, all his files and paperwork, and a laptop computer with remote internet access. *Id.* The van was also Mr. Knight's means of transportation. *Id.*

B. On December 2, 2008, Mr. Knight Surveyed Damage in and around Galveston Island

During the Thanksgiving weekend of 2008, Mr. Knight traveled from Galveston to spend the holiday with family. 6/20/11 HT at 44, ll. 11-26 & at 45, ll. 1-4. Mr. Knight returned to the catastrophe site on Monday, December 1, 2008. *Id.* Mr. Knight had a provisional day on December 2,

2008, and was set to audit claims beginning December 3, 2008. *Id.* On December 2, 2008, Mr. Knight decided to drive from his hotel down to Galveston Island to survey damage. 6/20/11 HT at 46, ll. 26; at 47, ll. 1-7; at 49, ll. 2-26; & at 50, ll. 1-16.

As Mr. Knight's supervisor testified, surveying the damage to an area as a whole is part of an adjuster's job and is helpful with adjusting specific damage claims at a particular home. 6/20/11 HT at 89, ll. 11-26; & at 90 ll. 1. Or as Mr. Knight explained, "I'd be a lot less likely to deny something once you've been on Galveston Island and you've seen the devastation . . . handling the claims becomes more personal . . . you can't go out there and not feel compassion for the people you're handling." 6/20/11 HT at 50, ll. 10-16. In addition, Mr. Knight testified this trip to Galveston was a way for him to adjust back to his intense work routine and to mentally prepare himself for surveying individuals' homes the next day. 6/20/11 HT at 77, ll. 17-26; & at 78, ll. 1-26.

C. Mr. Knight Drove along Seawall Boulevard in Order to get a Different Perspective of the Bay, Along this Route, at about 1:00pm, he Noticed Dune Buggies and Paused to Watch

After Mr. Knight spent time surveying the damage on Galveston Beach, he decided to take Seawall Boulevard, "to give [him] a different perspective" of the damage as he made his way back to his hotel. 6/20/11 HT at 50, ll. 17-26; & at 51, ll. 1-6.

Although he does not remember doing so, Mr. Knight had a conversation with his wife, Linda Ecklund. She testified that she and Mr. Knight spoke at about 1:00pm when he had stopped his company van because he noticed some people on the beach driving dune buggies in the sand. 6/20/11 HT at 13, ll. 16-26; at 14, ll. 12-26; at 15, ll. 1-13; & at 51, ll. 7-19. While on the phone with Mr. Knight, Ms. Ecklund heard a group of men approach Mr. Knight and say that they liked his hat. 6/20/11 HT at 14, ll. 12-26; & at 15, ll. 1-13. Ms. Ecklund then had to end the phone call to go to work. *Id.* Mr. Knight has no memory of the events that took place after he stepped out of his van. 6/20/11 HT at 52, ll. 1-9.

D. At about 5:30pm, Mr. Knight Was Found on the Beach, Treated by Paramedics, and Transported to the Nearest Available Emergency Room

At approximately 5:30pm, an unidentified caller placed a 9-1-1 call to report an unconscious man on the beach. Hearing Transcript from June 22, 2011 (6/22/11 HT) at 7, ll. 19-26; at 8, ll. 1-5; & at 10, ll. 10-26. Paramedics arrived to find Mr. Knight about 200 yards from several homeless workers that inhabited the beach, but otherwise alone. 6/22/11 HT at 40, ll. 18-26; at 41, ll. 1-4. Mr. Knight was lying on his back in the surf mumbling "help me, help me," but otherwise unresponsive. 6/22/11 HT at 8, ll. 6-10. Water was washing over him. 6/22/11 HT at 12, ll. 1-10.

While performing a head to toe exam of Mr. Knight, the paramedics noted that he was "pretty beat up." 6/22/11 HT at 32, ll. 4-12. He had bruising on both arms and bruising all over his chest. 6/22/11 HT at 17, ll. 1-7, 19-20. He also had several lacerations on his face. 6/22/11 HT at 32, ll. 9-12. The following day bruising appeared across the right side of his face as well. 6/22/11 HT at 82, ll. 14-17.

Mr. Knight's color was poor and his face was "very, very blue, very cold to the touch." 6/22/11 HT at 8, ll. 17-20. His nose, ears, and lips, were blue and clear mucus was coming from his mouth. 6/22/11 HT at 15, ll. 13-14. He was shivering uncontrollably. 6/22/11 HT at 13, ll. 14-16. He had slow blood flow and was taking only short shallow breaths. 6/22/11 HT at 17, ll. 9-18 & at 21, ll. 2-10.

Based on the symptoms they observed, the paramedics diagnosed Mr. Knight as suffering from hypothermia. 6/22/11 HT at 7, ll. 15-16; & at 24, ll. 19-22. In addition, the paramedic believed Mr. Knight had been drinking. 6/22/11 HT at 24, ll. 20-22. The paramedic did not remember smelling any alcohol; however a police officer responding to the scene stated that he smelled alcohol on Mr. Knight. 6/22/11 HT at 42, ll. 24-26; & at Hearing Transcript from June 28, 2011 (6/28/11 HT) at 12, ll. 4-8. Also, while on route to the hospital Mr. Knight responded that he had a lot to drink. 6/22/11 HT at 23, ll. 11-18. At this time Mr. Knight was

oriented to person, time, and place, but was still verbally confused. 6/22/11 HT at 20, ll. 20-26; & at 33, ll. 17-23. The paramedics were unaware that Mr. Knight was suffering from a traumatic brain injury at this time. 6/22/11 HT at 31, ll. 9-12.

The paramedics treated Mr. Knight for only hypothermia and intoxication; hypothermia and intoxication have nearly identical symptoms (disorientation, slurred speech, memory difficulties, and altered mental status) and require the same treatment. 6/22/11 HT at 29, ll. 18-26; at 30, ll. 1-26; & at 31, ll. 1-22. The paramedics warmed him with IV fluids and hot packs. 6 /22/11 HT at 18, ll. 3-14. Mr. Knight's condition improved; however, his improved condition related as much to the treatment of hypothermia as for any intoxication. 6/22/11 HT at 31, ll. 3-6.

Admittedly, this overlap in symptoms and recovery cannot account for the alcohol smell or Mr. Knight's statements. However, the medical providers failed to conduct a blood alcohol test, so the amount or type of substance in Mr. Knight's system is unknown. 6/22/11 HT at 74, ll. 21-26; at 75, ll. 1-9. Neither the responding officer nor the paramedics found any alcohol on or near Mr. Knight. 6/22/11 HT at 29, ll. 3-4; 6/28/11 at 18, ll. 9-16. Moreover, Mr. Knight's statements from this time in question are doubtful because a person's statements are not reliable while suffering from hypothermia and a brain hemorrhage. 6/22/11 HT at 38, ll. 1-10; &

at 109, ll. 20-26. Mr. Knight has no memory of being found or treated by paramedics. 6/20/11 HT at 52, ll. 1-9.

E. While at the Emergency Room the On Call Doctor Discovered Mr. Knight had a Brain Injury, Mr. Knight was then Transferred to a Larger Hospital

After the paramedics transported Mr. Knight to the nearest available hospital, the treating emergency room physician, Dr. Blake Chamberlain, examined Mr. Knight. Dr. Chamberlain agreed with most of the paramedics assessments. He found Mr. Knight was likely mildly hypothermic at the time he arrived. 6/22/11 HT at 104, ll. 12-18. He also believed that Mr. Knight had been drinking. Although he did not record so in his notes, during his deposition two years later, he allegedly remembered Mr. Knight smelling of alcohol. 6/22/11 HT at 108, ll. 8-26; & at 109, ll. 1-4. As part of his examination, Dr. Chamberlain ordered CT scans of Mr. Knight and discovered that Mr. Knight had suffered a brain injury. 6/22/11 HT at 79, ll. 10-22. Being so, Mr. Knight was transferred to Methodist Hospital because it was better equipped to handle his needs. 6/22/11 HT at 80, ll. 21-26; & at 81, ll. 1.

While at Methodist Hospital, CT angiogram studies were conducted to determine the type of brain injury suffered. 6/22/11 HT at 81, ll. 7-26; & at 82, ll. 1-7. The CT results showed a subdural hematoma,

meaning that head trauma, rather than an aneurysm, caused the injury. 6/22/11 HT at 82, ll. 4-8.

Although no one disputes the necessity of the angiogram studies; in Mr. Knight's case, the studies caused a spasm in his brain that led to a stroke and a worsening of his cognitive impairments, a known, but uncommon result of angiograms. Deposition of Dr. Anita Shaffer, M.D. from June 10, 2011 (Shaffer Dep.) at 12, ll. 22-25; at 13, ll. 1-18; at 15, ll. 15-24; & at 16, ll. 1-2.

F. Mr. Knight was Injured by a Blunt Force Trauma to the Head between 1:00pm and 5:30pm on December 2, 2008; No One Knows Exactly When or How the Injury Occurred

The medical evidence shows that Mr. Knight's injury was from a blunt force trauma to the head. It is further agreed that the injury must have occurred between 1:00pm and 5:30pm. 6/28/11 HT at 23, ll. 24-26; at 24, ll. 23-26; & at 25, ll. 1-5. However, none of the medical providers can say what circumstances led to the injury. Mr. Knight's primary physician, Dr. Shaffer, testified, "I understand [the mechanism of Mr. Knight's injury] to be unknown." Shaffer Dep. at 11, ll. 10-23. The emergency room physician, Dr. Chamberlain, testified "I can't say when his injury happened." 6/22/11 HT at 119, ll. 19-22. Dr. Chamberlain also agreed that he did not know where the trauma came from and that he did not know at all exactly what happened to Mr. Knight. 6/22/11 HT at 101,

ll. 2-5; & at 110, ll. 22-24. Finally, the paramedic also agreed that he did not have any firsthand knowledge as to what happened to Mr. Knight. 6/22/11 HT at 28, ll. 24-26; & at 29, ll. 1-2.

Mr. Knight's statements regarding the circumstances are also unhelpful because not only are statements from brain injury victims unreliable, it is common that people who suffer from memory loss "confabulate" or fill in blanks with guesses. Shaffer Dep. at 30, ll. 19-25; & at 31, ll. 1-8. Additionally, no witnesses came forward. There were many people about 200 yards from Mr. Knight when he was found, but as the paramedic explained, a lot of people stayed on the beach because they were homeless at the time. 6/22/11 HT at 40, ll. 18-26; & at 41, ll. 1-4. The men on the dune buggies were not found.[1]

Although he could not say how the injury was caused, Dr. Chamberlain stated that the injuries were consistent with Mr. Knight hitting his head fairly hard on sand. 6/22/11 HT at 85, ll. 4-9. However, Dr. Chamberlain agreed it would be difficult to establish any time line of events because when brain trauma effects an individual's ability to function is "[h]ard to predict . . . [i]t could be immediate with some patients. And it could be delayed . . . just depending on how fast the

[1] The Department has speculated that Mr. Knight may have ridden a dune buggy during this time frame, but the Department agrees that for purposes of summary judgment the court should assume that Mr. Knight did not fall from a dune buggy. CP at 37.

bleeding happened, or the increase in pressure, or the increase in swelling of the brain[.]" 6/22/11 HT at 91, ll. 12-21.

Being that no one can determine when or how Mr. Knight was injured, theories as to what happened between 1:00pm and 5:30pm have evolved on both sides. The Department argues that pausing to watch the dune buggies equated to abandonment and nothing shows that Mr. Knight reentered employment at the time of injury. CP at 27-28; & at 37-38. Alternatively, because witnesses smelled alcohol on Mr. Knight and because he stated he drank, the Department theorizes that Mr. Knight must have been intoxicated and fell onto the sand, which caused the injury. CP at 27; & at 32-37.

On the other hand, Mr. Knight strongly believes he must have been the victim of a crime, "I think I was mugged by the people that were driving the dune buggy." 6/20/11 HT at 57, ll. 2-3. He was found without any alcohol on or near him, he was covered in bruises and he was alone on a beach inhabited by transients. His wallet, necklace, and money clip were missing. 6/20/11 HT at 54, ll. 16-26; & at 55, ll. 3-9. He does not believe that he would drink at all, let alone drink to the point of intoxication, while at work and when scheduled to evaluate people's homes the next morning. 6/20/11 HT at 71, ll. 18-26; & at ll. 1-13.

G. Based on His Injury, Mr. Knight Applied for Benefits, but was Denied Coverage; He Sought Review in Superior Court, where the Department Successfully Moved for Summary Judgment; Mr. Knight Now Seeks Appellate Review

In accordance with the Act, Mr. Knight sought judicial review of a Board of Industrial Insurance Appeals (Board) decision that denied him workers' compensation benefits. At the trial court, the Department moved for summary judgment. CP at 18-38. The trial court granted the Department's motion, agreeing with the Department that Mr. Knight was ineligible for benefits because he could not affirmatively prove that he had not abandoned his employment at the time of injury and because his rest stop to watch the dune buggies demonstrated abandonment. CP at 115-116. Mr. Knight now seeks appellate review of the trial court's summary dismissal.

V. Standard of Review

This case presents three issues, all of which should be reviewed de novo. The court reviews questions of law de novo. *Federal Way School Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 765, 261 P.3d 231 (1980). The court uses the same de novo standard when it reviews mixed questions of law and fact. *Devine v. Employment Security Dep't*, 26 Wn. App. 778, 781, 614 P.2d 231 (1981). Under that standard, the court exercises its

inherent and statutory authority to make a de novo review of the record independent of agency actions. *Id.* (citations omitted).

Additionally, the court reviews summary judgment de novo and engages in the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (citations omitted). Summary judgment is appropriate if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The Court considers all facts and reasonable inferences in the light most favorable to the nonmoving party. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (citations omitted). Summary judgment is appropriate only if from all the evidence, reasonable persons could reach but one conclusion. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citations omitted). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (citations omitted). The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (citations omitted).

V. Summary of the Argument

First, as a matter of law, the trial court misapplied the traveling workers' doctrine to the facts of this case when it required Mr. Knight to affirmatively prove he did not abandon his employment at the time of injury, rather than require the Department to show that Mr. Knight intentionally departed on a personal errand at the time of injury.

Second, as a matter of law, as accepted by the Supreme Court in *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 177, P.3d 692 (2008), a worker does not abandon his or her employment when his activities fit within the personal comfort doctrine. The facts of this case, viewed in the light most favorable to Mr. Knight, establish that Mr. Knight did not abandon his employment when he temporarily broke from surveying damage to rest on the beach and watch dune buggy riders. Rather, Mr. Knight's stop fits squarely within the personal comfort doctrine.

Finally, even if Mr. Knight bears the burden surrounding the issue of abandonment, summary judgment was inappropriate because he presented multiple issues of material fact regarding the series of events that took place between 1:00pm and 5:30pm. Viewing the evidence in the light most favorable to Mr. Knight, a reasonable fact-finder could find either that the Department did not establish Mr. Knight abandoned his

course of employment or that Mr. Knight established that he did not abandon the course of his employment at the time of injury.

VI. Argument

A. Mr. Knight is a Traveling Worker Considered in the Course of Employment Continuously and Eligible for Benefits under the Act Because the Department Did Not Establish that he Distinctly Departed the Course of his Employment at the Time of Injury

1. The purpose of the Industrial Insurance Act is to provide compensation to employees injured in the course of their employment

The background and starting point of this case, like all workers' compensation cases, is the Industrial Insurance Act. The Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572 - 573, 141 P.3d 1 (2006) (citations omitted). As such, "the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *see also* RCW

51.12.010. Additionally, "where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker[.]" *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). Further, under the Act there is no requirement that an injury arise out of employment, only that the worker was within "the course of employment" when injured. *Ball-Foster Glass Container Co.*, 163 Wn.2d at 141; *See also* RCW 51.32.010.

2. A traveling employee is considered to be in the course of employment during the entire trip, except during a distinct departure

Generally speaking, employees who claim rights under the Act are held to strict proof of their right to receive benefits provided by the Act. *See Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955). However, the courts in *Ball-Foster* and *Shelton* reasoned that under the Act's liberal construction framework, a traveling worker is considered continuously in the course of employment during the entire trip except when a distinct departure on a personal errand is shown. *See Ball-Foster Glass Container Co.*, 163 Wn.2d at 142-143, *see also Shelton v. Azar*, 90 Wn. App. 923, 933, 954 P.2d 352 (1998).

Read together, general workers' compensation case law and traveling workers' doctrine case law requires a two part process to

determine if a traveling worker is entitled to benefits. First, Mr. Knight must prove that he was a traveling worker at the time of his injury.[2] Once done, the law presumes that he was acting within the course of his employment at the time of injury. To preclude benefits the Department must then prove, by a preponderance of the evidence, that at the time of injury Mr. Knight abandoned the course of his employment by departure on a personal errand.

The Court in *Ball-Foster* applied this same two part inquiry when it held that the traveling worker there was entitled to benefits with regard to injuries he sustained when he was struck by a car as he crossed the street from his hotel to attend a concert in a park. *Ball-Foster Glass Container Co.*, 163 Wn.2d at 139.

First, the Court determined that the employee fell within the category of traveling worker, it then applied the traveling workers' doctrine's continuous coverage rule and reviewed the employer's evidence to determine whether the employee distinctly departed from the course of employment at the time of his injury: "[the employer] contends that [the employee] was engaging in an 'inherently dangerous' activity at the time of his injury by crossing a multilane thoroughfare without first assuring himself that he had the right of way." *Ball-Foster Glass Container Co.*,

[2] That Mr. Knight was a travelling worker, injured while on assignment, is not disputed in this case.

163 Wn.2d at 151. The Court went on to state that the employer's allegation could not stand because "[t]he record here does not support [the employer's] assertion that [the employee] walked against the light[.]" *Id.*

The *Ball-Foster* Court reviewed the *employer's* assertions; it did not require or suggest that the employee needed to prove that he crossed with the light, acted reasonably, or had otherwise not abandoned his employment. In short, the Court examined whether the *employer* established that the employee distinctly departed from his employment at the time of injury.

Here, rather than require the *employer* or the *Department* to establish a distinct departure on a personal errand as in the *Ball-Foster* case, the court below mistakenly required *Mr. Knight* to show that "he had not abandoned the course of employment" at the time of injury. CP at 91.[3] The distinction may be subtle, but it is also undoubtedly important in this case due to the lack of direct evidence surrounding the time of injury. Requiring Mr. Knight to prove that he had not abandoned his employment at the time of injury would force Mr. Knight to continually reassert that he had not left his employment status in order to seek coverage under the Act for any kind of injury over his multiple month assignment. Such a

[3] Mr. Knight's actual employer, State Farm, has not participated in any of the proceedings in this case. The Department, as the party defending against Mr. Knight's claim, stands in the same position as the employer in *Ball-Foster*.

requirement negates the intent of the traveling workers' doctrine, "[a] traveling employee is generally considered to be in the course of employment continuously during the entire trip[.]" *Ball-Foster Glass Container Co.*, 163 Wn.2d at 142.

Mr. Knight has shown, and the Department agrees, that he is a traveling worker. He has further shown, and the Department agrees, that he was injured while on assignment in Texas. Under the traveling workers' doctrine he is continuously covered under the Act and eligible for benefits. Thus, he has established his right to coverage, unless the Department shows that he distinctly departed on a personal errand at the time of injury. The Department has not shown such a departure at the time of injury by a preponderance of the evidence rendering summary judgment inappropriate.

B. Mr. Knight's Rest Stop on the Beach to Watch Dune Buggies was a Reasonable Activity Fitting within the Personal Comfort Doctrine and the Injury Later Suffered was Incidental to the Increased Risks of Travel

Below, the Department argued that by merely pausing on the beach Mr. Knight abandoned the course of his employment as a matter of law. Not so.

Under the personal comfort doctrine, a worker who engages in acts that minister to personal comfort does not thereby leave the course of

employment unless the extent of the deviation is so substantial that an intent to abandon the job temporarily may be inferred or the method chosen is so unusual and unreasonable that the act cannot be considered incidental to the course of employment. *Ball-Foster Glass Container Co.*, 163 Wn.2d at 150 (citations omitted). To hold that a traveling employee "is not covered except when either actually, directly conducting his employer's business or engaged in some activity which is strictly a *necessity* of life, would unduly limit the intended beneficial purpose of this remedial social insurance, which is to be liberally construed." *Id.* at 152 (emphasis in original) (quoting *McDonald v. State Highway Dep't*, 127 Ga. App. 171, 176, 192 S.E.2d 919 (1972).) As such, "[s]eeking personal comfort should fall outside the course of employment only if the method chosen is unusual or unreasonable." *Id.* at 151 (citations and internal quotation marks omitted).

For example, in *Ball-Foster* the traveling employee was struck by a car as he crossed the street from his hotel to attend a concert in a park, and the Court determined that the employee's injuries were covered under the Act because he was injured while satisfying personal comforts. *Id.* at 152-153. The Court reasoned that "[g]oing for a Sunday stroll on [an employee's] single day off was a reasonable activity that falls well within the personal comfort doctrine." *Id.* at 152. An employee attending to his

or her personal comforts remains within the course of employment because "attending to one's personal health and comfort furthers the employer's interest by ensuring that an employee is healthy, well-rested, and comfortable, and thus able to perform his or her job functions more efficiently." *Id.*

Here, Mr. Knight drove to Galveston Island to survey damage in order to better assess insurance claims. He drove back to his hotel in his mobile office/work van taking Seawall Boulevard in order to view the scene from a different perspective.[4] While driving, Mr. Knight noticed men riding dune buggies splashing in the surf. He pulled over and got out of his work van to watch the riders.

This stop fits well within the personal comfort doctrine as described by the Court in *Ball-Foster*. Mr. Knight exiting his work van to watch dune buggy riders is analogous to *Ball-Foster's* employee crossing the street to attend a concert in a park. Neither the nature of the activity nor the manner in which Mr. Knight engaged in the activity was

[4] The fact that Mr. Knight was returning to his hotel should not impact the analysis. First, even on his way back to his hotel he was still surveying damage – he specifically took Seawall Boulevard to get a different perspective of the bay. Second, even if he were just returning to the hotel, Mr. Knight is covered under the Act while commuting to and from jobsites or work activities under the traveling worker exception to the "coming and going" rule. *See Shelton*, 90 Wn. App. at 935 (employees temporarily stationed in Washington were injured in an auto accident as they drove from the airport to their hotel in a rental car, the Court held that the employees were covered under the Act because they had traveled to Washington at the direction of their employer, were in a rental car paid for by the employer, and were going to a hotel because they were far from home, thus they were in the course of employment at the time of injury).

unreasonable or unusual. Mr. Knight's supervisor agreed that it would not be unreasonable for Mr. Knight to even ride a dune buggy; rather it would be part of rejuvenating and getting a break so that he could better perform his job duties. 6/20/11 HT at 93, ll. 26; & at 94, ll. 1-9.

Granted, *Ball-Foster's* employee was crossing the street in front of his hotel, whereas Mr. Knight was on a beach about 30 miles from his hotel. However, State Farm provided Mr. Knight a more distant hotel because so much of Galveston was damaged. More importantly, Mr. Knight was on Galveston Island and driving on Seawall Boulevard because he was "surveying the area." 6/20/11 HT at 66, ll. 4-7. When Mr. Knight paused to watch the dune buggies he was attending to reasonable creature comforts- getting fresh air, exercise, and enjoying the scenery. At the point in time he stopped, he did not show any intent to abandon his employment.

No matter how reasonable the activity, in order to be covered under the Act, the injury suffered must also connect in some way to the employee's work, the injury must relate back to a risk incidental to the employment related travel. *Ball-Foster Glass Container Co.*, 163 Wn.2d at 144. In *Ball-Foster*, the Court determined that the risk of getting injured while crossing the street during a walk to the park was a risk of employment. *Id.* at 151-153. It reasoned that "[i]f the employment

occasions the worker's use of the street, the risks of the street become part of the risks of employment." *Id.* at 152.

Similarly here, Mr. Knight was in Galveston at the beach because of his employment. It is common practice for catastrophic claims adjusters like Mr. Knight to survey beach damage and to be on beaches in general when assessing hurricane damage claims. Mr. Knight's employment occasioned his use of the beach, and the risks of the beach- such as tripping and falling into sand, or being mugged by transients living on the beach following the hurricane- become part of the risks of his employment. Here, no one knows the exact circumstances surrounding Mr. Knight's injury, but the weight of the evidence on both sides establishes that the injury occurred on the beach.

C. The Department Did Not Establish that, as a Matter of Law, Mr. Knight Abandoned the Course of his Employment at the Time of Injury, and Genuine Issues of Material Fact Exist as to Whether Mr. Knight Abandoned his Employment

1. The Department has not established that, as a matter of law, Mr. Knight abandoned the course of his employment at the time of injury

As explained above, under the Act and the traveling workers' doctrine, Mr. Knight is entitled to coverage unless the Department establishes that he abandoned his employment at the time of injury. Under the facts presented, the Department has failed to establish abandonment.

First, it argued that Mr. Knight abandoned his employment when he paused on the beach to view the dune buggy riders. As explained, Mr. Knight's stop fits within the personal comfort doctrine and therefore he did not abandon his employment.

Second, the Department argued that Mr. Knight became intoxicated and any injury was due to intoxication. However, the Department cannot establish that Mr. Knight was injured due to intoxication because the record is blank with regard to the time and manner of the injury. Also, this theory fails as summary judgment because abandonment due to intoxication is a material question of fact for the jury to determine.

a. The Department has provided no direct evidence that Mr. Knight was intoxicated before or at the time of his injury

None of the medical witnesses could testify regarding when or how the injury occurred. The responding paramedic stated he did not have any firsthand knowledge as to what happened to Mr. Knight. 6/22/11 HT at 28, ll. 24-26; & at 29, ll. 1-2. The emergency room physician, testified "I can't say when his injury happened" and further agreed that he did not know where the trauma came from. 6/22/11 HT at 119, ll. 19-22. 6/22/11 HT at 101, ll. 2-5; & at 110, ll. 22-24. He further explained that brain injuries can have delayed symptoms and a person's ability to function will

be affected "immediate[ly] with some patients. And . . . it could be delayed[.]" 6/22/11 HT at 91, ll.10-21. Being so, the physician agreed that even if Mr. Knight drank, he could have suffered his head injury before he drank.

b. Abandonment via intoxication is a material question of fact for the jury

Intoxication removes an employee from the course of employment if the employee becomes so intoxicated that he has abandoned his employment. *Orris v. Lingley*, 172 Wn. App. 61, 67-68, 288 P.3d 1159 (2012); *See also Flavorland Indus., Inc. v. Schumaker*, 32 Wn. App. 428, 434, 647 P.2d 1062 (1982). Whether an employee is so intoxicated that he or she abandoned her employment is a genuine issue of material fact for the jury. *Orris*, 172 Wn. App. at 68, *See also Flavorland Indus., Inc.*, 32 Wn. App. at 434.

For example in *Orris* two employees were involved in a car accident which resulted in the death of the driver and severe injuries to the passenger. *Orris*, 172 Wn. App. at 64. An issue before the court was whether the driver was acting within the course of his employment at the time of the accident. *Id.* at 66. An uncertified death investigation toxicology report showed the presence of THC (tetrahydrocannabinol) in the driver's blood and cannabinoids in the driver's urine. *Id.* at 64. The

presence of these substances was not conclusive evidence of abandonment by intoxication instead, the presence of these substances in the driver's body created a material issue of fact as to whether the driver had abandoned the course of employment by becoming intoxicated before the crash occurred. *Id.* at 67.

In this case it was error for the trial court to determine that Mr. Knight abandoned the course of employment at the time of his injury, by virtue of alcohol intoxication. This question should have been given to the jury.

2. Viewing the facts in the light most favorable to Mr. Knight, a jury could reasonably find that Mr. Knight did not purposefully abandon his employment

Even if Mr. Knight is not entitled to a presumption of coverage, summary judgment was inappropriate. Summary judgment is appropriate only if there is no genuine issue as to any material fact and from all the evidence, reasonable persons could reach but one conclusion. As explained above, the series of material facts that occurred between 1:00pm and 5:30pm are strongly disputed. In this case, viewing the facts in the light most favorable to Mr. Knight, a jury could reasonably find that Mr. Knight was the victim of a crime or accident; that he did not purposefully drink at all or at the very least did not drink to the point of abandonment; and that when the injury occurred Mr. Knight was not intoxicated.

To start, no blood alcohol test was administered that would show how much or what substance was in Mr. Knight's system; and Mr. Knight's statements while suffering from hypothermia and a brain injury are unreliable. Also, symptoms of and recovery from intoxication, hypothermia, and a brain injury overlap significantly and cannot be easily distinguished.

Moreover, Mr. Knight was found alone. If he had drank socially to the point of stumbling intoxication with the men on dune buggies, as the Department suggests, it would stand to reason that those men would not leave him so vulnerable in an unknown area. Further, no bottles, cans, or other paraphernalia was found around Mr. Knight or his company van. Mr. Knight was also near his van when he was found. A drinking binge to the magnitude implied would likely have taken place further away, in an area better suited for tourism. Instead, Mr. Knight was found bruised and alone on a beach severely damaged by the hurricane and inhabited by transient workers. Also, when found, Mr. Knight was missing his wallet, money clip, and necklace, although his phone and bracelet remained on him.

Even more at odds with an intoxication theory is Mr. Knight's own history and position. Mr. Knight is a 61 year old top level insurance adjuster. He has worked for State Farm for over 23 years. In this time he

has not received any disciplinary actions. Even now, State Farm is not pursuing any violations of company policies.[5] 6/20/11 HT at 94, ll. 12-26; and at 95, ll. 1-12. Mr. Knight should be given the reasonable inference that he did not drink himself silly in four and a half hours on an unknown beach in the middle of the afternoon with people he just met.

As the nonmoving party, all reasonable inferences should have been found in favor of Mr. Knight. There is evidence to support Mr. Knight's theory that he did not intend to abandon his employment at the time of injury, rather he was likely the victim of a crime- he was found alone, covered in bruises, and suffering from a traumatic brain injury. As such, summary judgment for the Department was granted in error. Mr. Knight should be given the opportunity to argue his case before a jury.

VIII. Fees and Costs

Mr. Knight requests a remand for a trial on the merits because 1) the Department must establish that he distinctly departed the course of his employment; 2) the Department has not, as a matter of law, established abandonment; and 3) Mr. Knight has presented material issues of fact that

[5] In its argument below, the Department makes note that State Farm has a zero tolerance policy against drinking and using the company van. Based on this policy the Department reasoned that any amount of alcohol consumption shows intent to abandon employment. CP at 25. However, State Farm has not pursued any form of disciplinary action against Mr. Knight. 6/20/11 HT at 94, ll. 12-26; and at 95, ll. 1-12. It is unreasonable to use an employment policy that Mr. Knight has not violated as evidence against his eligibility for employment benefits.

suggest he did not become intoxicated to the point of abandonment and was injured as a victim of a crime rather than injured due to intoxication.

However, the trial court below appeared to reason that because there is no direct evidence regarding when and how the injury occurred, there are no material facts in dispute, and the party that has the burden to prove or disprove abandonment necessarily fails. In the event that this Court agrees with the trial court that the lack of direct evidence surrounding the injury equates to a lack of material facts in dispute but agrees with Mr. Knight that the Department must establish abandonment, then it would be reasonable for this Court to grant summary judgment to Mr. Knight as the nonmoving party. *See* CR 56(d); *see also Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (citations omitted) (it is proper to grant the nonmoving party summary judgment when the material facts are undisputed).

Under this analysis, this Court could hold that a traveling worker is considered to be in the course of employment during his or her entire trip; Mr. Knight was injured while on assignment as a traveling worker; and Mr. Knight is entitled to coverage under the Act because, as a matter of law, the Department lacks evidence to show he abandoned his employment at the time of injury.

Being so, Mr. Knight must request reasonable fees and costs pursuant RAP 18.1 and RCW 51.52.130. The award of attorney fees in workers' compensation cases is controlled by RCW 51.52.130. RCW 51.52.130, *see also* RAP 18.1. Attorney fees are awarded to the worker or beneficiary where his or her appeal to the superior or appellate court results in a reversal or modification of the Board decision and additional relief is granted to the worker or beneficiary. RCW 51.52.130. The statute encompasses fees in both the superior and appellate courts when both courts review the matter. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1037 (2005) (citations omitted).

IX. Conclusion

Appellant respectfully requests that the Court reverse the trial court's summary dismissal and remand this case for trial on the merits.

Alternatively, should the Court find that Mr. Knight is entitled to benefits and that, as a matter of law, the Department cannot establish Mr. Knight abandoned the course of his employment at the time of his injury, Mr. Knight respectfully requests that this Court reverse the trial court's decision, award Mr. Knight costs and attorney's fees, and remand the case with instructions to grant him benefits under the Act.

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DATED this 2 day of May 2013.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RUDOLPH KNIGHT, Appellant, vs. DEPARTMENT OF LABOR AND INDUSTRIES Respondents.	**PROOF OF SERVICE**

I, hereby certify under the penalty of perjury under the laws of the State of Washington that I have served a true and correct copy of the Appellant's Brief upon the individuals listed by the following means:

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DATED this 3 day of May, 2013.

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PROOF OF OF SERVICE
Regarding: Appellant's Brief