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.

REPLY BRIEF OF APPELLANT

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I. Introduction

In accordance with the Industrial Insurance Act (Act) and the traveling workers' doctrine, Mr. Knight is entitled to workers compensation benefits to assist his recovery from a profound brain injury.

At his employer's request, Mr. Knight, a catastrophic insurance claims adjuster, traveled to Texas to assess claims for damage caused by Hurricane Ike. Hearing Transcript from June 20, 2011 (6/20/11 HT) at 35, ll. 14-26; 36, ll. 1-14. [1] In Texas, Mr. Knight was required to work six days per week, 12 hours per day; due to the volume of work, he regularly worked more than 12 hours and on his days off. 6/20/11 HT at 40, ll. 4-21. He was "immersed in the catastrophe" and never truly off the clock. 6/20/11 HT at 78, ll. 17-26.

On December 2, 2008, Mr. Knight suffered a traumatic brain injury, leaving him with permanent brain damage. Dr. Anita Shaffer Deposition, June 10, 2011 (Shaffer Dep.) at 8, ll. 10-13; 9, ll. 10-13.[2]

That morning, Mr. Knight had driven from his Houston hotel to Galveston Beach to survey hurricane damage.[3] 6/20/11 HT at 46, ll. 26;

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

[2] All depositions are contained in the CABR.

[3] December 2, 2008, was a day off for Mr. Knight; but, Mr. Knight received salary and per diem because he remained at the catastrophe site. 6/20/11 HT at 42, ll. 5-15. Also, State Farm acknowledged that time off benefited the company because it kept workers

47, ll. 1-7. While viewing the backside of Galveston Bay he stopped his mobile office/work van to call his wife and to watch dune buggy riders spray surf in the sand. 6/20/11 HT at 13, ll. 6-26; 14, ll. 12-26; 15, ll. 1-13; 50, ll. 24-26; 51, ll. 1-12. Pursuant to the Act and the traveling workers' doctrine, Mr. Knight remained in the course of employment during his damage surveillance and break.

Regrettably for Mr. Knight, parking his work van is his last memory of that day. 6/20/11 HT at 51, l. 26; 52, ll. 1-19. It is agreed that sometime after he stopped, Mr. Knight was injured by blunt force trauma to the head. It is also undisputed that his lack of memory is due to the traumatic injury and subsequent testing. Shaffer Dep. at 16, ll. 9-25; 17, ll. 1-12.

Mr. Knight's injury and ensuing amnesia leaves a hole in available evidence regarding the mechanism of injury. Yet, pursuant to the Act and the traveling workers' doctrine, Mr. Knight has demonstrated his entitlement to workers' compensation benefits; undisputedly, he is a traveling worker that was severely injured while traveling for his employer.

It is now up to the Department to demonstrate that *at the time of injury* Mr. Knight abandoned his employment and therefore should lose

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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.

his right to benefits. The Department necessarily fails because no evidence shows that *when he was injured* he had abandoned his employment through intoxication or otherwise.

Alternatively, even if this Court holds that Mr. Knight must demonstrate he did not abandon his employment, summary judgment was inappropriate. Mr. Knight presented tangible facts that, when taken in a light most favorable to him, establish he remained in the course of employment.

II. Argument

A. Under the Act, Mr. Knight is Entitled to Benefits Because He Suffered an Injury in the Course Employment

The act "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) (citations omitted); *see also* RCW 51.12.010.

As the appealing party, Mr. Knight has the burden of proceeding with the evidence to establish a prima facie case for the relief sought. RCW 51.52.050(2)(a); *see also* WAC 263-12-115(2)(a). Specifically, Mr. Knight must prove that he "suffered a compensable injury during the

course of his employment[.]" *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

Mr. Knight has done so. First, it is not contested that Mr. Knight suffered a traumatic brain injury while stationed in Texas. Second, to establish that he was in the course of employment, Mr. Knight draws from the applicable common law traveling workers' doctrine, which holds traveling workers are generally in the course of employment during their entire trip, unless a distinct departure from employment is shown; this is also referred to as the "continuous coverage rule." *See Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 142-143, 177 P.3d 692 (2008) (citations omitted); *see also Shelton v. Azar, Inc.*, 90 Wn. App. 923, 931-933, 937, 954 P.2d 352 (1998). Mr. Knight was in the course of employment because he falls within the traveling workers' continuous coverage rule and it has not been shown that at the time of injury Mr. Knight departed his employment.

B. Under the Traveling Workers' Doctrine, Mr. Knight was Continuously within the Course of His Employment Throughout His Entire Trip to Galveston

A worker is "in the course of employment" when he or she is acting at his or her employer's direction or in furtherance of his or her employer's business. RCW 51.08.013. As a subgroup, "traveling employees are entitled to expanded coverage for travel related injuries."

Ball-Foster, 163 Wn.2d at 143. "The rationale for this extended coverage is that when travel is an essential part of employment, the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are an incident of the employment even though the employee is not actually working at the time of injury." *Id.* at 142 (citations omitted). Traveling employees further their employer's interests by virtue of their willingness to travel and are therefore continually covered. Thus, as element for entitlement to workers' compensation benefits, under the traveling workers' doctrine, when employees are required by their employers to travel to distant jobsites, they are within the course of their employment throughout the trip unless they are pursuing a distinctly personal activity. *Id.* at 142-143.

1. Mr. Knight was in the course of employment during his travel to Galveston Beach because he was stationed in Texas to benefit his employer and he was furthering his employer's business by surveying hurricane damage

The Department argues that the distance Mr. Knight traveled to Galveston Beach indicates a recreational departure. Brief of Respondents, filed Aug. 5, 2013 (Br. Resp'ts) at 45-47. This argument lacks support.

Galveston Beach was the epicenter of Hurricane Ike. 6/20/11 HT at 46, ll. 26; 47, ll. 1-7. The beach was five to eight miles away from the homes Mr. Knight was scheduled to evaluate the following morning.

6/20/11 HT at 65, ll. 15-17. Mr. Knight was stationed at a hotel 25-30 miles away only because the storm had damaged 50-75% of Galveston city. 6/20/11 HT at 36, ll. 23-26; 37, ll. 1-2; 38, ll. 17-24; Exhibit 1.

By surveying this beach Mr. Knight was able to witness the damage first hand, "[surveying] gave me a better understanding of what actually happened. I was handling flood claims and this way I could [have]... knowledge of the overall bigger picture[.]" 6/20/11 HT at 49, ll. 2-9. This knowledge better equipped him to evaluate claims for his employer. 6/20/11 HT at 47, ll. 1-7.

Mr. Knight considered surveying the area an important part of his job. 6/20/11 HT at 50, ll. 5-6. Mr. Knight's supervisor, Adrian Mack, also considers surveillance, "part of the job." 6/20/11 HT at 89, ll. 21-26; 90, l. 1. Although Mr. Mack stated that multiple trips to the storm site were not necessary, surveillance was part of Mr. Knight's job and additional research positively impacted Mr. Knight's ability to evaluate claims.

The cases cited to by the Department are not analogous. In *Silver*, the claimant and his coworkers drove to a remote river beach to swim and fish, the beach had no relation to their employment. Br. Resp'ts at 19, 45 (*citing Silver Eng'g Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973) *cited by Ball-Foster*, 163 Wn.2d at 143.) In *Young*, in order to seek

a pay raise, the employee left his worksite to inspect another section of the property. Br. Resp'ts at 21, 22, 45 (*citing Young v. Dep't of Labor & Indus.*, 200 Wash. 138, 93 P.2d 337 (1939) *cited by Ball-Foster*, 163 Wn.2d at 144.) In these cases, the employees' actions were entirely for their own personal benefit with no connection to their employers' work.

Mr. Knight did not choose to visit a beach fit for tourism. 6/20/11 HT at 88, ll. 10-17; 6/22/11 HT at 36, ll. 1-5; 47, ll. 2-5. He chose to work on his day off, which is not uncommon for claims adjusters. 6/20/11 HT at 95, ll. 20-24. He drove his mobile office to the beach where the storm hit so he could better understand how the storm affected his employer's policy holders. This was part of his job.

It is consistent with both the Act and the traveling workers' doctrine to hold that Mr. Knight, an insurance adjuster, was in the course of employment while he surveyed the catastrophic damage that resulted in the claims he assessed.

2. Mr. Knight remained in the course of employment while he paused to watch dune buggy riders and call home because this break fits within the traveling workers' personal comfort doctrine

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." *Ball-Foster*, 163 Wn.2d at 150 at 152 (emphasis in original) (quoting *McDonald v. State Highway Dep't*, 127 Ga.App. 171, 176, 192 S.E.2d 919 (1972)).

As the *Ball-Foster* Court notes, an employee skiing 50 miles away from a worksite as well as an employee soaking in a hot tub several days before a work function and 150 miles away from the worksite would be considered substantial deviations. *Ball-Foster*, 163 Wn.2d at 143, (*citing E. Airlines v. Rigdon*, 543 So.2d 822 (Fla.Dist.Ct.App. 1989) and *Bucynski v. Indus. Comm'n*, 934 P.2d 1169 (Utah Ct.App.1997)).

Unlike those employees, Mr. Knight stepped out of his mobile office onto the beach to call his wife and take in scenery, much like the employee in *Ball-Foster* who took a walk on his day off. There, 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." *Ball-Foster*, 163 Wn.2d at 152. Likewise, Mr. Knight took a reasonable break and did not show any intent to abandon his employment.

When Mr. Knight surveyed beach damage, he was in the course of his employment; when he stopped to call his wife and watch dune buggy riders, he was in the course of his employment. Mr. Knight's last memory of the day was of himself working.

Sometime after he parked, Mr. Knight suffered a traumatic brain injury. Under the traveling workers' doctrine it should be presumed that he remained in the course of his employment at the time of this injury. As such, he has made his prime facie case, and met his burden proving his entitlement to benefits.

C. Mr. Knight's Injury is Attributable to the Increased Risks of Travel; the Department Has the Burden to Show that at the Time of Injury He Departed His Employment to Pursue an Entirely Independent and Personal Activity

To determine whether a worker has left the course of employment the court considers, "whether the injury relates to a risk incidental to employment or from an entirely independent act." *Ball-Foster*, 163 Wn.2d at 144. Traveling employees are entitled to expanded coverage; however, a traveling employee may depart on a personal errand and lose the right to benefits during that departure. *Id.* at 143. Here, there is no evidence that at the time of injury Mr. Knight departed his employment. Further, Mr. Knight's injury, a traumatic brain injury consistent with hitting his head hard onto sand, arises from a risk incidental to his work on and near beaches.

1. The Department bears the burden to prove that the injury was caused from an entirely independent act

Mr. Knight's memories nearest in time to the injury establish that he was still within the course of employment. Consistent with the

traveling workers' doctrine, it should be presumed that he remained in the course of his employment at the time of injury. As explained by the Department, the *Ball-Foster* Court reasoned that in general, persons on business trips tend to engage in reasonable and necessary activities. Br. Resp'ts at 27 (*citing to Ball-Foster*, 163 wn.2d at 145). As a trusted employee that has not been disciplined in his 23 years of service, Mr. Knight is entitled to this basic recognition.

The Department argues despite the continuous coverage rule, Mr. Knight must show he did not deviate from his employment. Br. Resp'ts at 25-32. To this end, the Department cites several general workers' compensation cases as well as a crime victims' compensation case. These cases, however, do not apply in a traveling workers context because the burden shifting required by the continuous coverage rule is absent from the analysis. Br. Resp'ts at 30-31 (*citing Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 442 P.2d 1000 (1968); *Stafford v. Dep't of Labor & Indus.*, 33 Wn. App. 231, 236, 653 P.2d 1350 (1982); *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 19 Wn. App. 800, 804, 578 P.2d 59 (1978)).

Instructive case law actually applying the traveling workers' doctrine is relatively sparse. *See Ball-Foster*, 163 Wn.2d at 142. However, the traveling workers' continuous coverage rule as recognized

and applied in *Shelton* and *Ball-Foster* confirms that the Department must show departure. *See Ball-Foster*, 163 Wn.2d at 142-144; 151-153; *see also Shelton*, 90 Wn. App. at 923.

The rule is simple - traveling employees are generally within the course of their employment throughout the trip, "*unless they are pursuing a distinctly personal activity.*" *Ball-Foster*, 163 Wn.2d at 142-143, (emphasis added) (citing *Shelton*, 90 Wn. App. at 933). The *Ball-Foster* Court also states that the employee would "los[e] the right to compensation benefits" during departure. *Id.* at 143. As expressed and as applied, the continuous coverage rule holds that the party without the benefit of continuous coverage has the burden to show departure.

This is a logical reading of the case law. The rule would not be phrased as a potential for the claimant to *lose his right to benefits* unless the claimant was presumed to have already established his right to benefits. Moreover, to read the rule otherwise requires the continually covered employee to continually prove that he was working. This would defeat the purpose of the traveling workers' expanded coverage and continuous coverage rule.

Traveling worker case law in other jurisdictions makes clear that the Department or employer, <u>not</u> the worker, must provide evidence of departure. In *Evans* a traveling employee who drowned while swimming

was not found to have abandoned his employment. *Evans v. W.C.A.B. (Hotwork, Inc.)*, 664 A.2d 216 (Pa.Cmwlth. 1995). The Pennsylvania appeals court found that the *"[e]mployer failed to carry its burden* to show that Mr. Evans was not acting in the scope of his employment." *Id.* at 221. (emphasis added.)

Under Washington law, analogous private insurance cases also establish that an insured need only present a prima facia case establishing coverage. The burden then falls to the carrier to prove that an exclusion or other defense to coverage applies. *See Brown v. Snohomish Cnty. Physicians Corp.*, 120 Wn.2d 747, 758-59, 845 P.2d 334 (1993) (holding when the insured makes the prima facie case that coverage is available, the burden is on the insurer to prove that the loss is not covered.); *see also Gould v. Mut. Life Ins. Co. of New York*, 95 Wn.2d 722, 725, 629 P.2d 1331(1981) (holding the plaintiff, to establish the prima facie case for death insurance benefits, must only prove the valid contract and the death of the insured; the insurance company must then prove the affirmative defense of suicide by a preponderance of the evidence.) In Washington, an insured covered under a private contract is entitled to a presumption of coverage. It reasons, a worker covered under workers' compensation - a liberally applied social insurance - is also entitled to such a presumption once a prima facia case is established.

The burden to prove departure would not be challenging in most cases, which usually have evidence surrounding the mechanism of injury. Here, evidence is lacking due to the injury itself. In this case, considering that the Act should be construed in favor of the worker, it is especially appropriate that the burden falls on the Department.

2. The Department has not provided evidence that Mr. Knight abandoned his employment, at the time of injury – it has provided no evidence as to when the injury occurred

The Department cannot meet its burden to show abandonment because none of the witnesses know how or when the injury occurred. Dr. Chamberlain testified, "I can't say when his injury happened." 6/22/11 HT at 119, ll. 19-22. 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; 29, ll. 1-2.

3. Mr. Knight's head injury was incident to the increased risk of his employment as a claims adjuster evaluating storm damage in a beach area

It is not necessary that a traveling worker show he was actually performing the duties for which he was hired at the time of the accident in order for an injury to be compensable. *Ball-Foster*, 163 Wn.2d at 141-142. Rather, "[i]t is sufficient if the injury arises out of the risk that is sufficiently incidental to the conditions and circumstances of the particular

employment. *In doubtful cases, the act is to be construed liberally in favor of compensation for the injured worker.*" *Id.* at 142, (emphasis added)(citations omitted). For example, the *Ball-Foster* Court 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.

Here, the injury is apparent, but the mechanism of injury is unknown; however, Mr. Knight's injury is consistent with hitting his head hard onto sand. 6/22/11 HT at 85, ll. 1-9. Mr. Knight's work carried him to a hurricane damaged beach. Hitting his head on sand is a sufficiently incidental risk of such employment.

D. Alternatively, and Regardless of Burden, Summary Judgment was Granted in Error; Mr. Knight Presented Sufficient Evidence that He Did Not Purposefully Abandon His Employment at the Time of Injury

1. Mr. Knight is not required to put forth medical evidence to show he was in the course of employment at the time of injury

The Department argues that "[a]ll medical evidence (i.e., that which rises to the level of *probability*), establishes that Knight was intoxicated at the time of his fall onto the sand. . . . [and] the only medical testimony suggesting the potentiality that Knight was not intoxicated when he was injured is incompetent to defeat summary judgment because it rises only to the level of possibility." Br. Resp'ts at 33, 35. This argument, that

Mr. Knight is required to present medical testimony that he was not intoxicated at the time of injury, is misplaced and confuses the issues. Br. Resp'ts at 33-36.

In an industrial injury case, like this one, Mr. Knight does not need to provide medical evidence to prove course of employment. Rather, medical testimony, on a more probable than not basis, is only required for a claimant to prove that "the industrial injury caused the subsequent disability."[4] *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431(1995) (citations omitted). Here, Mr. Knight has met his medical burden - it is undisputed that Mr. Knight suffered a traumatic brain injury and that the injury has caused subsequent disabilities.

The question of intoxication goes towards whether Mr. Knight was in the course of employment at the time of injury. Whether he abandoned his employment, via intoxication or otherwise, remains a factual determination requiring no medical expertise. *See Flavorland Indus., Inc. v. Schumacker*, 32 Wn. App. 428, 434, 647 P.2d 1062 (1982).

2. Mr. Knight has presented evidence that he remained in the course of employment at the time of injury competent to defeat summary judgment

[4] *Dennis* states that medical testimony is needed to establish that an occupational disease arose "proximately" out of employment. *Dennis*, 109 Wn.2d at 477 (cited in Br. Resp'ts at 38). This is not an occupational disease case. Thus, Mr. Knight does not need to prove that his injury arose out of employment.

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). Whether an employee "depart[s] from the course of his employment to the extent necessary to constitute an abandonment of that employment [is] a factual determination for the jury." *Flavorland*, 32 Wn. App. at 434.

When taken in the light most favorable to Mr. Knight, a jury could reasonably believe Mr. Knight's statements that he would not become intoxicated in these circumstances, a jury could attribute his intoxication type symptoms to his brain injury and hypothermia, a jury could agree that Mr. Knight was the victim of a crime and did not purposefully abandon his employment, or a jury could reasonably find that Mr. Knight was injured while he was in the course of employment and before drinking.

a. Evidence shows Mr. Knight does not remember drinking, does not believe he would drink, and has never been disciplined in 23 years of service to his employer

Mr. Knight's affirmation that he would not drink or get drunk and his impeccable service record are entitled to deference. Mr. Knight is a 61 year old insurance adjuster with no disciplinary history in his 23 years of employment. 6/20/11 HT at 31, ll. 7; 86, l. 26; 87, l. 1. Mr. Knight does

not remember drinking that day. 6/20/11 HT at 52, ll. 20-22. His boss "wouldn't think he would drink" in this situation. 6/20/11 HT at 101, ll. 20-25. While at work and when scheduled to evaluate people's homes the next morning, Mr. Knight does not believe that he would drink at all, let alone drink to the point of intoxication. 6/20/11 HT at 71, ll. 16-26; 72, ll. 1-13. 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. Likewise, no alcohol paraphernalia was found in or near his van.[5] 6/28/2011 HT at 18, ll. 9-11.

b. Evidence shows Dr. Chamberlain's clinical diagnosis is speculative; Mr. Knight's symptoms of and recovery from hypothermia are nearly indistinguishable from intoxication

The validity and strength of Dr. Chamberlain's clinical diagnosis of intoxication is challenged and a jury may reject the doctor's opinion. A jury is "entitled to accept or reject the various experts' opinions." *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 43, 931 P.2d 911 (1997) (citations omitted). That is because "[i]t is the function of the jury . . . to evaluate the credibility of witnesses." *Id.* at 42. As with all evidence, "the

[5] The Department argues that Mr. Knight took himself out of employment because he knew that there was a zero tolerance policy for drinking and driving the company van. However, there is no evidence suggesting that Mr. Knight drank and drove. No alcohol was found near or in his van. 6/28/2011 HT at 18, ll. 9-11. When found, Mr. Knight was 100-200 yards away from his van. 6/22/11 HT at 9, ll. 17-25; 40, ll. 24-26; 41, ll. 1-4. State Farm has not investigated the incident and has seen no reason to. 6/20/11 HT at 103, ll.4-7, 16-18.

trier of fact is not required to accept an expert's opinions; rather, it decides an issue based on its own fair judgment, assisted by experts' testimony." *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 169, 231 P.3d 1241 (2010) (citations omitted).

Here, the jury could reasonably find substantial weakness in the doctor's diagnosis and determine it not credible. No blood alcohol test was administered that would show how much or what substance was in Mr. Knight's system. 6/22/11 HT at 74, ll. 21-26; at 75, ll. 1-9. Dr. Chamberlain also agreed he was speculating with regard to how much Mr. Knight drank:

> Q: Without a blood alcohol content test, you're speculating on how much somebody's drank?
>
> A: On how much; I agree with that.

6/22/11 HT at 96, ll. 13-15. Further, nowhere in Dr. Chamberlain's chart notes did he record that Mr. Knight smelled of alcohol. Rather, at his deposition, two years later, he remembers smelling alcohol on him.[6] 6/22/11 HT at 108, ll. 8-26; 109, l. 1.

It cannot be understated that Mr. Knight was also suffering from a brain injury and hypothermia at the time he was diagnosed with intoxication. Hypothermia and intoxication have nearly identical

[6] A responding officer also smelled alcohol but gave no testimony with regard to when or of what substance Mr. Knight might have ingested. Hearing Transcript from June 28, 2011 (6/28/11 HT) at 12, ll. 5-22.

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; 31, ll. 1-22. 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.

Although the paramedic testified that Mr. Knight stated he drank a lot, it is unclear what Mr. Knight was referring to or what he meant by a lot. Further, according to the paramedic, Mr. Knight's statements, while suffering from a traumatic brain injury and hypothermia are unreliable. 6/22/11 HT at 38, ll. 1-10; & at 109, ll. 20-26.

Summary judgment is not appropriate because whether an employee has abandoned his employment via intoxication is also a question of fact for the jury.[7] *Orris v. Lingley*, 172 Wn. App. 61, 67-68, 288 P.3d 1159 (2012); *see also Flavorland*, 32 Wn. at 434-435. In this case, Mr. Knight was suffering from hypothermia and brain trauma, a jury could reasonably conclude that Mr. Knight's symptoms were due to these ailments not that he abandoned his employment via intoxication.

c. Evidence shows Mr. Knight was likely the victim of a crime

[7] The Department argues that *Flavorland* and *Orris* are inapplicable. Br. Resp'ts at 41-42. Under the traveling workers' doctrine, coverage is broader and (as the Department concedes) drinking some amount of alcohol would not remove a worker from employment. Br. Resp'ts at 42-43. It reasons then that a jury must determine whether the amount of alcohol ingested, if any, equates to abandonment.

Mr. Knight, was "pretty beat up" when found by the paramedics. 6/22/11 HT at 32, ll. 4-12. He had bruising across his face, on both arms and bruising all over his chest and lacerations on his face. 6/22/11 HT at 17, ll. 1-7, 19-20; 32, ll. 9-12; 82, ll. 14-17. Mr. Knight states, "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 alone on a beach inhabited by transients. 6/22/11 HT at 40, ll. 18-23. His wallet, necklace, and money clip were missing. 6/20/11 HT at 54, ll. 16-26; 55, ll. 3-9. Viewing the facts in the light most favorable to Mr. Knight a jury could reasonably infer that the injury was due to an assault.

d. Evidence shows Mr. Knight's injury could have occurred at any time

While arguing that Mr. Knight must prove that he was in the course of employment via medical testimony, the Department urges the Court to ignore Dr. Chamberlain's statements that the head injury could have occurred at any time. The Court should decline this invitation.

Nowhere in Dr. Chamberlain's testimony does he conclude or even suggest that Mr. Knight's brain trauma was a result of falling in the sand while intoxicated. Br. Resp'ts at 33. Dr. Chamberlain states that the injury is consistent with someone "who had hit his head fairly hard on

sand" but does not discuss intoxication as a potential cause. 6/22/11 HT at 83, ll. 17-21; 85, ll. 1-9.

Dr. Chamberlain repeatedly states he does not know what happened to Mr. Knight or when Mr. Knight's injury occurred. First in response to Industrial Insurance Judge Caner:

Judge Caner:	Let's say someone falls, or they get hit in the head somehow, and it causes this level of brain trauma. How soon would that affect their ability to function?
Dr. Chamberlain:	I think that's variable on individual cases. I don't think it's predictable. Hard to predict.
Judge Caner:	Could it be immediate with some patients?
Dr. Chamberlain:	It could be immediate with some patients. . . . [I]t could be delayed.

6/22/11 HT at 91, ll. 12-21. Second, during cross examination, Dr. Chamberlain agreed, he did not "know at all exactly what happened to Mr. Knight[.]" 6/22/11 HT at 101, ll. 3-5. Third, Dr. Chamberlain, in his medical chart notes, described the source of trauma as unknown. 6/22/11 HT at 110, ll. 12-23. Fourth, during re-cross, Dr. Chamberlain agrees again that he did not know how Mr. Knight sustained his head trauma. 6/22/11 HT at 119, 9-11. Finally, at only one point does Dr. Chamberlain use the term "possible" when after being asked, "earlier you testified that someone could have a head trauma, and then the symptoms could come on a little later; isn't that right? . . . So that is a possibility in this case?"

6/22/11 HT at 119, ll. 13-17. To which, Dr. Chamberlain states, "It's possible. Yes." 6/22/11 HT at 119, l. 18. However, immediately following, Dr. Chamberlain is asked "So, *in fact*, Mr. Knight could have suffered a head injury before he drank(?)" 6/22/11 HT at 119, ll. 19-21. Dr. Chamberlain agrees, "Yeah. I can't say when his injury happened." 6/22/11 HT at 119, l. 22. The Department provided no evidence that Mr. Knight was intoxicated at the time he sustained his injury.

Given all of the above evidence, it is reasonable for a jury to believe that Mr. Knight did not depart his employment to attend a four hour drinking binge on a hurricane struck beach and became so intoxicated that he fell like a cut tree - striking his head hard enough to cause brain damage. Instead, a jury could find he did not drink, did not drink to the point of abandonment, or a jury could find that any drinking that did occur, occurred after Mr. Knight suffered a head injury that impacted his behavior.

E. Mr. Knight has contested the Board and superior court's misapplication of the traveling workers' doctrine and all findings of departure

The Department argues that Mr. Knight failed to dispute the board's finding of intoxication at the time of injury and thus it claims that Mr. Knight's intoxication at time of injury is established as a matter of law. Br. Resp'ts at 13, 15, and 31.

This argument is an incorrect representation of this case's procedural posture. In accordance with the Act at every level of judicial review, Mr. Knight has challenged all findings of deviation and the conclusion that the traveling workers' doctrine does not afford him a presumption of coverage.

To support their argument, the Department cites to *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012) . In *Shirley*, neither party challenged the Board's factual findings to the superior court and neither party assigned error to those findings on appeal. *Id.* at 394. Accordingly, the unchallenged findings of fact were verities on appeal. *Id.* (citations omitted). *Shirley* is not applicable.

Here, Mr. Knight appealed the Department's initial coverage denial to the Board of Industrial Insurance Appeals (Board), in accordance with RCW 51.52.060. CABR at 1, 11, 30, 42. Mr. Knight then appealed the Board's coverage denial to superior court under RCW 51.52.110. Clerk's Papers (CP) at 1. Mr. Knight "appeal[ed] . . . from *each and every part* of the Board['s] . . . Order[.]" *Id.* (emphasis added.)

In opposition to Mr. Knight's superior court appeal, the Department moved for summary judgment. CP at 18. The Department's summary judgment motion interrupted Mr. Knight's appeal from the

Board order, but it did not negate Mr. Knight's challenges to the Board's findings and conclusions.

In response to the Department's summary judgment motion Mr. Knight argued, "alcohol consumption, let alone intoxication, is highly disputed" and argued "as a traveling employee, Mr. Knight is entitled to a presumption that he is in the course of employment." CP at 44, 51. The superior court, however, granted the Department's motion.

Mr. Knight appealed to this Court in accordance with the rules of civil procedure and pursuant to RCW 51.52.140. Here again, Mr. Knight argued that the trial court "misapplied the traveling workers' doctrine" and that the trial court erred in holding that "Mr. Knight abandoned his employment." Brief of Appellant, filed May 3, 2013 (Br. App'ts) at 5-6.

Shirely holds that *unchallenged* findings become verities on appeal. Here, the Board's order as well as the lower court's summary judgment order have been and remain appropriately challenged.

III. 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.

DATED this 4th day of September 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 Reply Brief upon the individuals listed by the following means:

Original to: Richard D. Johnson Court Administrator/Clerk Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101-1176	[ ] U.S. Postal Service (First Class) [ ] Facsimile [ ] E-Service (by agreement) [ ] Hand Delivery [X] Via Legal Messenger
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DATED this 4th day of September, 2013.

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