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NO. 69514-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RUDOLPH E. KNIGHT,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

Rudolph E. Knight, who traveled to the area of Houston, Texas for work, claims industrial insurance benefits for an injury occurring while he was drunk on a beach 25-30 miles from his hotel on a day off. Knight's intoxication at time of his injury is established as a matter of law. Only speculation refutes Knight's intoxication, and only medical *possibility* suggests his injury may have occurred before he was intoxicated. Traveling employees remain within the course of employment if they tend to normal creature comforts or reasonably comprehended necessities. As a matter of law, drinking to intoxication is not a normal creature comfort or a reasonably comprehended necessity for a traveling employee. The superior court properly granted the Department of Labor and Industries' motion for summary judgment, affirming an order of the Board of Industrial Insurance Appeals, which affirmed an order of the Department that rejected the claim.

II. STATEMENT OF THE ISSUES

1) Did Knight divert from tending to his normal creature comforts or reasonably comprehended necessities as a traveling employee when no genuine material issues of fact exist whether Knight was intoxicated at time of his injury and when his intoxication was not connected to his job?

2) Alternatively, did Knight depart from the course of employment as a matter of law when he traveled to the beach 25-30 miles from his hotel?

III. STATEMENT OF THE CASE

A. Knight Traveled 25-30 Miles South Of His Hotel To The Beach

Knight, a Washington resident, traveled to Texas for work processing insurance claims for State Farm Fire & Casualty Co. after 2008's Hurricane Ike. BR Knight 30, 33-35. On December 2, 2008, the day before he was scheduled to resume work following Thanksgiving break, he traveled 25-30 miles south from his Houston hotel to a beach in Galveston, on the Gulf of Mexico, where he sat and walked for an hour. BR Knight 43-44, 45, 59, 60-62. From there, he drove his company van to another beach in Galveston. BR Knight 62. By this time it was approaching 1:00 p.m. BR Knight 62. Knight stopped at this second beach because people driving a dune buggy fast into the surf caught his eye. BR Knight 51, 62; BR Ecklund 23. Knight recalls parking his van on the beach and getting out to watch the dune buggy riders. BR Knight 51. This had nothing to do with Knight's work. BR Knight 66.[1] According to

[1] Knight comments that his van had "a desk, all his files and paperwork, and a laptop computer with remote internet access," thereby seeming to imply Knight may have been working on his day off. App. Br. 8, 26. No evidence supports that Knight performed work on his day of injury. While Knight testified that he drove to the beach to survey the general damage to the area, he had already done this at earlier points. BR Knight 47, 73-74. Knight had been working in the Houston-Galveston area for roughly two months before his injury. BR Knight 35, 73. He did not learn anything new from this trip to Galveston. *See* BR Knight 74. Nor did he need to re-survey the area to do his work. *See* BR Mack 100. Knight went to the first beach to mentally prepare himself for returning to work after a break, which is not work. *See* BR Knight 77-78. Knight admitted that the stop at the second beach was to watch the dune buggy and not to work. BR Knight 66.

Knight, getting out of his van at the second beach is the last thing he remembers before he saw his wife in the hospital. BR Knight 52.

Knight's wife, Linda Ecklund, recalls details that start where Knight's memory ends. He called her around 1:00 p.m. on December 2, 2008. BR Ecklund 22-23. He told her he was watching the dune buggy splashing into the surf, leaving her with the impression he thought it looked fun. BR Ecklund 23. Ecklund recalled her husband saying that the people on the dune buggy (two men) were approaching to talk. BR Ecklund 14. She overheard their voices, with her husband explaining that the men liked his hat. BR Ecklund 14. Nothing was out of the ordinary about the exchange. BR Ecklund 23-24. Ecklund ended the call. BR Ecklund 14. That is the last she heard before the hospital called at night. BR Ecklund 16.

B. Knight Was Discovered On The Beach Intoxicated

Around 5:30 p.m. on December 2, 2008, someone alerted 911 that a man was on the beach, in need of aid. BR Garcia 8; BR Wunstel 7-8. A responding paramedic, Craig Wunstel, found Knight calling for help with waves splashing over him. BR Wunstel 12-13. Upon confirming it was safe to do so, Paramedic Wunstel and his partner moved Knight out of the surf and then into the aid car to begin treatment. BR Wunstel 6, 12-13. Galveston Police Officer Ernesto Garcia arrived to assist and noted that

Knight's breath filled the aid car with the odor of alcohol. BR Garcia 6, 12.

Paramedic Wunstel and Officer Garcia each noted that Knight was intoxicated. BR Wunstel 18, 22, 29-30, 42; BR Garcia 12-13. Paramedic Wunstel believed Knight was intoxicated based on his slurred speech, his response to treatment, and, most importantly, Knight's own words. BR Wunstel 23, 29-30. Knight, while initially minimally responsive, became increasingly alert while en route to Clear Lake Regional Medical Center southeast of Houston. BR Wunstel 19-20, 22-24. When he became verbal and "oriented to person, place, and time," he told Paramedic Wunstel that he had "a lot" of alcohol to drink. BR Wunstel 20, 22-24. Paramedic Wunstel had no reason to disbelieve this statement; it was consistent with his observations. BR Wunstel 23-24, 27, 30, 45. Knight told Paramedic Wunstel that the last thing he remembered was getting tired and passing out on the beach. BR Wunstel 24.

Knight notes that Paramedic Wunstel did not recall whether he smelled alcohol. App. Br. 11. However, Paramedic Wunstel explained why this is the case: "I don't smell real good. Being in EMS, you kind of learn not to smell, because of a lot of things. And I've always been told I have a poor sense of smell." BR Wunstel 42.

Clear Lake Regional Medical Center's intake nurse noted that Knight had a "strong smell of alcohol," and the physician who treated Knight, Dr. Blake Chamberlain, recalls the strong smell of alcohol on Knight's breath. BR Chamberlain 71, 108-09, 113-14. Knight does not recall anything he stated to the nurses or physician. BR Knight 68. Dr. Chamberlain recalls Knight telling him that he had "a lot" to drink. BR Chamberlain 74. This was consistent with Dr. Chamberlain's observations, including the strong odor of alcohol on Knight's breath, and Knight's slurred speech and sleepiness. BR Chamberlain 71-72, 79, 111-12. Knight also stated to Dr. Chamberlain that he was "riding in the dunes." BR Chamberlain 73.

Dr. Chamberlain and Paramedic Wunstel each examined Knight. Neither noticed visible signs of significant trauma. *See* BR Wunstel 18; BR Chamberlain 72. Paramedic Wunstel noted that Knight was cold and wet. BR Wunstel 13, 18.[2] He had small scrapes and scratches to his face, with no treatment necessary for the abrasions except antibacterial ointment and a bandage. BR Wunstel 14-15, 32. There was bruising, although

[2] While Paramedic Wunstel believed Knight was hypothermic, he did not take Knight's core body temperature and no physician diagnosed hypothermia. BR Wunstel 24, 34; BR Chamberlain 107. Dr. Chamberlain explained that core body temperature is the finding upon which a diagnosis of hypothermia is made, and Knight's core body temperature, as measured at Clear Lake Regional Medical Center, was not low enough to support a diagnosis of hypothermia. BR Chamberlain 107, 112. Before arriving at Clear Lake Regional Medical Center, Knight may have suffered mild hypothermic symptoms. BR Chamberlain 104. However, Dr. Chamberlain stated Knight's symptoms regarding his intoxication could not be explained by his exposure to cold. BR Chamberlain 116.

Dr. Chamberlain did not observe any large bruises. BR Chamberlain 72, 117; BR Wunstel 17. There was mention of a small cut above the left eyebrow in the nurse's notes. BR Chamberlain 76-77. Neither Dr. Chamberlain nor the physician at the Methodist Hospital who followed Knight's care in the subsequent hours and days recorded the cut in their notes, indicating to Dr. Chamberlain that it was a small and inconsequential cut. BR Chamberlain 77.

Upon initial physical examination, Dr. Chamberlain diagnosed Knight with alcohol intoxication only. BR Chamberlain 79. Dr. Chamberlain diagnosed alcohol intoxication nearly two hours after Paramedic Wunstel first located Knight. *See* BR Chamberlain 79, 93; BR Wunstel 10. Dr. Chamberlain ordered a blood alcohol test to confirm Knight's level of intoxication, but he mis-keyed the entry into the computer, so no test was administered because the order was instead placed on hold. BR Chamberlain 74-75. While blood alcohol tests may confirm a person's level of intoxication, doctors make clinical diagnoses of alcohol intoxication in the absence of such tests. BR Chamberlain 95-97.

While Dr. Chamberlain saw no visible sign of significant trauma, he ordered CT scans of the head and neck to rule out fracture and brain injuries. *See* BR Chamberlain 72, 79. The head CT revealed a

subarachnoid hemorrhage. BR Chamberlain 79. Dr. Chamberlain added the diagnosis of subarachnoid hemorrhage to his diagnosis of alcohol intoxication. BR Chamberlain 79, 89-90, 111.

Dr. Chamberlain then ordered Knight's transfer to the Methodist Hospital in Houston. BR Chamberlain 81. Testing performed there confirmed that Knight did not suffer an aneurysm and that the subarachnoid hemorrhage was accompanied by a subdural component, each supporting some form of trauma. BR Chamberlain 81-82. During the one hour to hour-and-a-half time that Dr. Chamberlain observed Knight, he noticed improvement in Knight's slurred speech and that he became more easily arousable, confirming the diagnosis of alcohol intoxication and contra-indicating head trauma alone. BR Chamberlain 90, 111. Knight suffered from both head trauma *and* alcohol intoxication. BR Chamberlain 89-90, 100, 111.

While Dr. Chamberlain noted that Knight's slurred speech had initially improved in the hours after his injury, after a brain angiogram done at the Methodist Hospital the next day, Knight's condition worsened, including worsening speech and a wandering eye. BR Chamberlain 86-88, 90, 111. Dr. Chamberlain explained that worsening could be a complication of the brain angiogram or could be from the brain trauma. *See* BR Chamberlain 87-88, 101-02.

C. Knight's Head Injury Is Consistent With A Fall Onto Sand

Knight does not know what happened to him. BR Knight 56-57, 81. He has his speculations that he created in order to ease his mind. *See* BR Knight 81. Among the potentialities, according to Knight, is that he may have fallen off a dune buggy or that he was assaulted and robbed. BR Knight 54-57, 76, 79-81. Knight later realized that he was missing certain items he believed were on his person at the time of injury: a wallet, money clip, and necklace. BR Knight 54-55. While his wallet was at first missing and then later mailed to him full of sand with some items gone, no money was stolen from his accounts and he was not an identity theft victim. BR Knight 54-55, 74-76. Also, certain valuables remained on Knight's person at time of his injury: namely, his gold chain bracelet, watch, and cell phone. BR Knight 75. Knight acknowledges that he can only guess as to how he was injured: "Because for weeks and weeks and weeks I had nothing, no memory, but with months and months, over a period of time, I speculated on what had happened and I developed my own – my own ideas of what happened." BR Knight 54. Knight does not deny stating to Paramedic Wunstel and/or Dr. Chamberlain that he drank "a lot" of alcohol that day. *See* BR Knight 68.

Dr. Chamberlain explained that Knight's head injury is consistent with a fall onto sand. BR Chamberlain 85. This is supported by the

absence of swelling of any area of the face or head, meaning that Knight's head suffered blunt trauma that evenly distributed force. BR Chamberlain 83-84. This is also supported by the CT findings, in that Dr. Chamberlain described a pillow effect (a "coutrecoup injury"), where one's head hits a blunt surface such as a pillow or sand and then the brain moves in the opposite direction and is injured by the inner skull. BR Chamberlain 83. If Knight were hit with a fist or object, Dr. Chamberlain would expect to see swelling. BR Chamberlain 84. Dr. Chamberlain did not see any signs of swelling on Knight's head. BR Chamberlain 84.

Per Dr. Chamberlain, Knight's injury is inconsistent with being struck in the head with a fist, and thus Knight's injury is inconsistent with Knight's assault theory. *See* BR Chamberlain 83-84. An abrasion that later turned into a bruise on Knight's face was, according to Dr. Chamberlain, consistent with a fall onto the sand. BR Chamberlain 84-85. Officer Garcia did not think a crime had taken place and he saw no signs of visible injuries or swelling. BR Garcia 11, 13 ("Q: Did you believe . . . that any crime had taken place? A: No, sir. Just thought the intoxication."). Similarly, Paramedic Wunstel saw no signs of trauma. BR Wunstel 18, 37.

Knight's attending physician in Seattle, Dr. Anita Shaffer, saw him starting two-and-a-half months after his injury. BR Shaffer 8. Dr.

Shaffer's first chart note states that Knight fell off an all-terrain vehicle in Texas. BR Shaffer 20.[3] She does not know this to be the cause of injury. *See* BR Shaffer 11. Dr. Shaffer does not contradict Dr. Chamberlain's testimony that Knight's injury is consistent with falling onto sand but not with being hit by a fist or object. *See* BR Shaffer 12. Dr. Shaffer states only that the injury mechanism is "unknown," coming from "some sort of trauma." BR Shaffer 11.

Dr. Shaffer never asked Knight whether he consumed alcohol on December 2, 2008, because he never brought it up, and she did not review records of Knight's treatment in Texas until her testimony approached. BR Shaffer 27-28. Dr. Shaffer calls the discussions of alcohol consumption a "fact" that did not surprise her given her patient's history. BR Shaffer 28. She explained that the "only way to know" whether Knight ingested alcohol would be to test his blood alcohol content, as that is the only test "that is completely accurate." BR Shaffer 33, 36. She did not state Knight was not intoxicated. BR Shaffer 4-37.

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[3] Dr. Shaffer believes this report of the mechanism of injury did not come from Knight (but instead came by way of Knight's wife to Dr. Shaffer's nurse, who has since passed away), but Knight believes he told Dr. Shaffer he fell off an all-terrain vehicle. BR Shaffer 21; BR Knight 76-77. Knight never stated to Dr. Shaffer or other physicians his belief that he was robbed. BR Shaffer 30; BR Knight 83.

D. State Farm Had Zero Tolerance For Alcohol While Driving

State Farm had a policy of zero tolerance for alcohol when driving company vehicles. BR Mack 94-95. Knight had driven his company van onto the beach. BR Knight 51. Knight knew his employer's zero tolerance policy for alcohol. BR Knight 67. Given this policy and the presence of the company van on the beach, Knight's supervisor would not have expected Knight to have something to drink. *See* BR Mack 101-02.

E. The Department Rejected Knight's Workers' Compensation Claim And the Board And Superior Court Affirmed

Knight applied for workers' compensation benefits in April 2009. BR 2. The Department issued an order in September 2010, rejecting the claim. BR 2. Knight appealed the order to the Board. BR 2. The Board upheld the Department's order, finding as fact: "On December 2, 2008, Knight drank a lot of alcohol, became intoxicated, and as a result collapsed on the beach. His head struck the sand and he sustained a head injury." BR 2. The Board furthermore found:

> On December 2, 2008, before he sustained the head injury, Knight distinctly departed from his course of employment with State Farm when he consumed alcohol, became intoxicated, and/or rode an all terrain vehicle or dune buggy (ATV). Consuming a large amount of alcohol, intoxication, and/or riding an ATV vehicle on beach dunes are not fairly attributable risks of travel, and are not reasonably needed activities to maintain one's health while traveling for work.

BR 2. Based on these findings, the Board concluded as a matter of law that Knight was not acting in the course of employment at the time of his injury. BR 3.

Knight appealed to King County Superior Court. CP 1. The Department moved for summary judgment, which the superior court granted. CP 18-38, 96-97. The superior court ruled that Knight abandoned the course of employment by virtue of his alcohol intoxication. CP 97. It ruled that a "jury could not reasonably find that the intoxication and injury are fairly attributed to the increased risks of travel." CP 97. The superior court also alternatively ruled that Knight was not in the course of employment because "the travel to the beach, 25-30 miles from his hotel, where he stopped to watch dune buggy riders, amounts to a personal amusement venture . . . ." CP 97.

Knight moved for reconsideration. CP 98-105. The superior court denied reconsideration, clarifying that Knight's evidentiary objections about Dr. Chamberlain were overruled. CP 110-11. Knight now appeals. CP 112.

IV. STANDARD OF REVIEW

The first step in seeking review of the Department's decision to deny benefits is an appeal to the Board. RCW 51.52.060. As the appealing party, Knight bore the burden of proof to prove by a

preponderance of the evidence that the Department's order was incorrect. *See* RCW 51.52.050; *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942). One seeking benefits under the Industrial Insurance Act "must prove his claim by competent evidence." *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

Decisions of the Board may be appealed to superior court. RCW 51.52.110. The superior court reviews the Board's decisions de novo but without any evidence or testimony other than that included in the Board's record. RCW 51.52.115; *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560-61, 897 P.2d 431 (1995). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary civil standard of review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). Knight has not assigned error to the Board's findings of fact and they are verities on appeal. *See Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390, 394 (2012), *review denied*, 177 Wn.2d 1006 (2013) (in appeal from summary

judgment order, court held that findings of Board are verities unless a party assigns error).

On review of a summary judgment order, the appellate court's inquiry is the same as that of the superior court's. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate only if the pleadings, affidavits, admissions, and depositions demonstrate the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56; *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 398, 135 P.3d 941 (2006). The moving party bears an initial burden of demonstrating that no genuine issue of material fact exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* at 226. Once a party seeking summary judgment has made an initial showing that no genuine issues of material fact exist, the nonmoving party must set forth specific facts that, if proved, would establish his or her right to prevail on the merits. *Id.* at 225; CR 56(e). The moving party is entitled to a summary judgment if the opposing party fails to provide proof concerning an essential element of the opposing party's claim. *Young*, 112 Wn.2d at 225. Mere speculation is not sufficient to support the

existence of a material issue of fact. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009); CR 56(e).

V. SUMMARY OF ARGUMENT

Knight's intoxication at time of injury is established as a matter of law. Knight, a traveling employee on a day off work, was found on a beach 25-30 miles from his hotel. He had an internal head injury that was not visibly apparent. He does not know what happened. He smelled strongly of alcohol, had slurred speech, and admitted to drinking "a lot." A paramedic, police officer, and emergency room physician concluded he was intoxicated. No evidence disproves Knight's intoxication. No competent evidence disproves that his injury resulted from a fall onto sand while intoxicated. In this context, the superior court properly granted the Department's motion for summary judgment.

Traveling employees remain within the course of employment (and hence covered for purposes of industrial insurance), even in hours and days off work, if they tend to "normal creature comforts" or "reasonably comprehended necessities." *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 143, 177 P.3d 692 (2008). Injuries from activities outside this description are not "fairly attributable to the risks of travel" or "incidental to employment," and hence not covered. *Ball-*

Foster, 163 Wn.2d at 145. "[S]trictly personal amusement ventures" are not covered. *Id.* at 143.

As a matter of law, drinking to intoxication is not a normal creature comfort or a reasonably comprehended necessity for a traveling employee. Because drinking to the point of intoxication is not a travel or job-related risk, Knight's intoxication alone shows he was not in the course of employment. No evidence refutes that Knight was intoxicated, as opposed to having had a drink or two, at time of injury, or supports that Knight's injury occurred at a time when he was not intoxicated.

While Knight's intoxication is the primary basis for the superior court's ruling, the superior court ruled in the alternative that Knight's travel to a beach distant from his hotel was a personal amusement venture taking him outside the course of employment at time of his injury. Knight errs in appearing to characterize this as the superior court's chief ruling. *See* App. Br. 4. In any event, the superior court's alternative basis for its ruling also supports the result reached, as the Court in *Ball-Foster* limited coverage for traveling employee injuries.

While Knight contends the superior court's ruling is based on its determination that Knight bore the burden of proving he had not abandoned the course of employment, the superior court did not necessarily determine this burden was on Knight. *See* App. Br. 23; CP 97.

In any event, under longstanding statutory and case law, Knight *does* bear the burden of proving entitlement to benefits, which here requires showing he tended to "normal creature comforts" or "reasonably comprehended necessities" and was not engaged in a "strictly personal amusement venture[]." RCW 51.52.115; *Ball-Foster*, 163 Wn.2d at 143, 145; *Lightle*, 68 Wn.2d at 510.

VI. ARGUMENT

A. The *Ball-Foster* Court Limited Coverage For Injuries Sustained By Traveling Employees To Those Reasonably Incidental To Risks Of Travel Or the Job

A claimant seeking workers' compensation benefits must prove that at the time of an injury, he or she acted within the course of employment. *See* RCW 51.32.010; RCW 51.52.050(2); WAC 263-12-115(2). "Acting in the course of employment" in turn means "acting at his or her employer's direction or in the furtherance of his or her employer's business . . . ." RCW 51.08.013(1).

Injuries occurring off an employer's premises while an employee is not working are generally not covered by the Industrial Insurance Act. *Ball-Foster*, 163 Wn.2d at 145. However, coverage is broader for employees who travel for work under the traveling employee doctrine. *Id.* at 142-43. When employees are required by their employers to travel to distant jobsites, courts generally hold that they are within the course of employment

throughout the trip, unless they are pursuing a distinctively personal activity. *Ball-Foster*, 163 Wn. 2d at 142-43 (quoting *Shelton v. Azar, Inc.*, 90 Wn. App. 923, 933, 954 P.2d 352 (1998)).

In *Ball-Foster*, the Supreme Court provided guidance concerning the limits of coverage for injuries sustained by a traveling employee: "Of course, the traveling employee doctrine does not require coverage for every injury. A traveling employee may depart on a personal errand just like any other type of employee, thus losing the right to compensation benefits during such departures." *Ball-Foster*, 163 Wn.2d at 143. The Court explained that for a traveling employee to remain in the course of employment, "[b]oth the nature of the activity and the manner in which the employee performs it must be reasonable." *Id.* Moreover, the Court specifically declined to adopt a generalized reasonableness standard, as this "would go too far in covering social and recreational activities of traveling employees." *Id.* at 144. Instead, "[t]he injury must have its origin in a travel related risk." *Id.* The inquiry is whether the injury is "fairly attributable to the risks of travel." *Id.* Traveling employees lose industrial insurance coverage when they depart on "strictly personal amusement ventures." *Id.* at 143. Like under the personal comfort doctrine, to depart on a personal amusement venture, there must be a substantial deviation. *Id.* at 150.

The *Ball-Foster* Court cited to *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973), a case in which the court reversed an award of benefits to a traveling employee who, over Easter weekend, drove over a difficult road with co-workers to swim and fish at a remote beach, drowning in the river outlet; the court held the worker "had indeed stepped aside from his employment and was attending to a matter of personal recreation, which was beyond that necessary to the normal ministration to needs of an employee on a business trip." *Silver Eng'g Works*, 180 Colo. at 311-13, *cited at Ball-Foster*, 163 Wn.2d at 143.

The *Ball-Foster* Court, to specifically provide guidance to Washington courts for distinguishing between reasonable personal ministrations and purely personal amusement ventures, pointed to Texas as a model. 163 Wn.2d at 143 (citing *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290 (Tex. 1965); *North River Ins. Co. v. Purdy*, 733 S.W.2d 630, 632-33 (Tex. Ct. App. 1987)). The test derived from these cases is whether the injury had "its origin in the risk associated by the necessity of sleeping or eating away from home." *Ball-Foster*, 163 Wn.2d at 144 (quoting *North River Ins. Co.*, 733 S.W.2d at 632-33 (quoting *Shelton*, 389 S.W.2d at 293) (quotation marks omitted)). And the court's inquiry is focused "upon whether the injury relates to a risk incidental to employment or from an entirely independent act." *Ball-Foster*, 163 Wn.2d at 144.

The two Texas cases cited as a model suggest that coverage for traveling employees' injuries is relatively narrow, as the injuries there appear obviously covered. In *Shelton*, the claimant, who aided the employer in moving its business to a different state, checked in to a motel while in transit, took a shower, changed clothes, and then was struck by an automobile crossing the street to go to a cafe, suffering a compensable injury. *Shelton*, 389 S.W.2d at 291-92, 294. The court noted: "Although a number of eating establishments were available to petitioner, he chose a cafe only a short distance from his motel. Neither personal pleasure nor recreation played any part in the choice." *Shelton*, 389 S.W.2d at 294. The court held: "In these circumstances we are unable to say as a matter of law that his crossing the street to obtain food was not an incident of the employment, or that the injuries he received did not have to do with and originate in the employer's business." *Id.* at 294. In *North River Insurance Co.*, an employee was sent to work in a distant location, and he injured himself on broken glass when attempting to push an intruder back from entering his motel room in the middle of the night. 733 S.W.2d at 631. The employee "was in the motel room and subject to this danger due to the conditions of his employment." *Id.* at 633.

Knight argues going to a beach 25-30 miles from his hotel and watching dune buggies falls within the traveling employee doctrine under

Ball-Foster. *See* App. Br. 19. The facts of *Ball-Foster* do not lead to such a broad interpretation of covered injuries for a traveling employee. The worker, walking with his supervisor on a "Sunday stroll," merely attempted to cross the street from his hotel to go to a park when he was struck by a car. 163 Wn.2d at 139. The worker was not far from his hotel, nor was he engaging in an unexpected activity for a traveling employee on a day off.

The *Ball-Foster* Court furthermore pointed to Washington case law concerning injuries on the jobsite during rest or lunch breaks as a model, stating the standard for personal errands of traveling employees should be consistent with the standard for non-coverage of lunchtime or rest period injuries on the jobsite. 163 Wn.2d at 144 (citing *In re: Alfred Morrill, Dec'd*, BIIA Dec., 29,704, 1970 WL 104554 (1970) (worker who died from bee sting was not stung while working or eating or resting, but while he independently sought honey for himself; reaching for honey was non-compensable because it had no connection with work or meal and it increased risk of injury)).

Ball-Foster also favorably cited *Young v. Department of Labor & Industries* for analyzing an employee's independent acts. 163 Wn.2d at 144 (citing *Young*, 200 Wash. 138, 93 P.2d 337 (1939)). *Young* held that harm

sustained by an independent act having no connection with the worker's meal or work is not covered, emphasizing that:

> harm sustained during a meal period may not be compensable as arising out of and in the course of employment when the harm results from an independent act of the employee having no connection with his work or his meal, or from the independent act of a third person, or when the harm is sustained by reason of the employee's placing himself in a more dangerous position than was required of him during the meal period . . . .

Young, 200 Wash. at 145. Young was denied compensation for his lunchtime injury sustained on the jobsite from falling down a hole because he finished eating and left his work area but acquainted himself with another section of the project in order to increase his knowledge and seek a pay raise. *Id.* at 141-42, 146. This took him outside the course of employment because he was not required to expose himself to possible dangers and the information he sought was for his own benefit and did not contribute to the work he was engaged to perform. *Id.* at 146-47.

Ball-Foster also cited to the Florida case, *N. & L. Auto Parts Co. v. Doman*, 111 So. 2d 270 (Fla. 1959). *Ball-Foster*, 163 Wn.2d at 150. This case sheds light on when a personal amusement venture ends and reasonable personal ministrations resume. There, a traveling salesman left his motel in the outskirts of Savannah, Florida to see a picture show downtown, catching a taxi. *N. & L. Auto Parts*, 111 So. 2d at 271. The worker had two beers that

evening, though it was unclear whether this was before leaving for the show, or after the show but before catching the taxi back to the motel. *N. & L. Auto Parts*, 111 So. 2d at 271. In any event, the worker was not intoxicated. *Id.* After arriving at the motel grounds and while walking toward his room, the worker's ankle turned and he fell and broke his leg. *Id.* The court would not have found coverage while the worker was on the picture show excursion, but found the injury compensable because this "private mission" had concluded by the time he was injured:

> [C]laimant deviated from the course of his employment when he elected to drive into Savannah to see a picture show. *Had he been injured while on this private mission, either in going into Savannah, or returning to the motor court, such injury would not have been compensable. Claimant's deviation, however, had been completed and came to an end when he debarked from the taxi on his return to the motor court.* It was while walking across the lawn, a place where he had a right to be, subsequent to the deviation, and while properly in the course of his employment that the accident occurred which resulted in claimant's injury.

Id. at 272 (emphasis added). This case reveals that, until concluded, even relatively short recreational trips take traveling employees outside the course of employment. Certainly, travel to a beach 25-30 miles away from one's hotel is outside the course of employment.

B. Except Where It Is Connected With One's Job, Drinking To Intoxication Is Not A Normal Creature Comfort Or Reasonably Comprehended Necessity

On a day off, traveling employees remain within the course of employment if they tend to "normal creature comforts" or "reasonably comprehended necessities." *Ball-Foster*, 163 Wn.2d at 143. These activities benefit the employer by having a rested and healthy employee. *Id.* at 152. On the other hand, an employee's pursuit of "strictly personal amusement ventures" is not acting in the course of employment. *Id.* at 143. Because "the traveling employee must face the perils of the street in order to satisfy basic needs, including sleeping, eating, and seeking fresh air and exercise," attending to personal comfort falls outside the course of employment "only if the method chosen is 'unusual or unreasonable.'" *Id.* at 151 (citing 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 21-08 (2006)). This Court should rule that intoxication as a matter of law is not fairly attributable to the increased risks of travel. It is "unusual" and "unreasonable" to drink to the point of intoxication and expect to remain covered for purposes of industrial insurance.

Cases dealing with persons who *are working while intoxicated* generally analyze whether the claimant was too intoxicated to have continued performing his or her job duties, thus evidencing abandonment.

See, e.g., In re: Austin Prentice, Dec'd, BIIA Dec., 50,892, 1979 WL 180289 (1979); *In re: Michael K. Pate, Dec'd*, BIIA Dec., 97 1977, 1999 WL 568539 (1999). Appearing to be in a "drunken or wanton state," as opposed to appearing sober and normal, evidences abandonment. *In re: Brian Kozeni, Dec'd*, BIIA Dec., 63,062, 1983 WL 470521 (1983). But if an employer encourages, finances, or creates an atmosphere that allows employees to become intoxicated, then an employee's intoxication may not remove him or her from the course of employment. *See Flavorland Indus., Inc. v. Schumacker*, 32 Wn. App. 428, 430, 435-35, 647 P.2d 1062 (1982) (considering anticipation by employer that worker would consume alcohol, given that worker's job as sales manager included socializing over alcohol). This case law does not apply here as the inquiry is whether the activity of alcohol consumption had its origin in a travel related risk.

There is nothing travel or work-related about drinking to the point of intoxication on a day off. "The injury must have its origin in a travel related risk." *Ball-Foster*, 163 Wn.2d at 144. While it may be reasonable for a traveling employee to consume a drink or two, especially with a meal, drinking to the point of intoxication is not a "travel related risk"; it is purely a personal amusement venture.

C. The Burden Of Proof Is On Knight to Show That He Was "Pursuing Normal Creature Comforts And Reasonably

Comprehended Necessities" And Not A "Strictly Personal Amusement Venture"

Knight argues that once he proved he was a traveling employee at the time of his injury, "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." App. Br. 22. He cites to *Ball-Foster* in support of his burden-shifting argument. App. Br. 22-23. As support he says that the *Ball-Foster* Court "reviewed the *employer's assertions* . . . . In short, the Court examined whether the *employer* established that the employee distinctly departed from his employment at the time of injury." App. Br. 23 (emphasis in original).

Knight ignores the context of *Ball-Foster*: it was an employer appeal. *See Ball-Foster*, 163 Wn.2d at 139-40. Of course, the Court reviewed the employer's assertions. In doing so, the Court did not, contrary to Knight's claim, introduce a burden-shifting principle into industrial insurance cases. If the Court intended to replace the requirement that claimants prove the right to receive benefits with a requirement only to prove one is a traveling employee, thereby triggering burden-shifting, then the Court would have so stated. Contrary to Knight's arguments, the *Ball-Foster* Court did not create a legal

presumption that a traveling employee was in the course of employment. He cites to the *Ball-Foster* Court's statement that "[a] traveling employee is generally considered to be in the course of employment continuously during the entire trip, except during distinct departure on a personal errand." App. Br. 24; *Ball-Foster*, 163 Wn.2d at 143 (citing *Larson's Workers' Compensation Law* § 25.01).[4] There is nothing in this sentence that introduces a new burden-shifting principle to the course of employment inquiries. By stating that traveling employees are generally continuously covered, the Court merely recognized that, in general, persons on business trips tend to engage in reasonable and necessary activities such as walking and eating near one's hotel. This is verified by the Court's recognition that the traveling employee doctrine is an exception to the general rule that injury is not compensable when it occurs off the employer's premises when the worker is not engaging in work activities. *See Ball-Foster*, 163 Wn.2d at 145. Moreover, the Court expressly articulated the inquiry to use: "whether the employee was pursuing normal creature comforts and reasonably comprehended necessitates or strictly personal amusement ventures." *Id.* at 143. Nothing about this creates a presumption for coverage for traveling employees or places the prima facie burden on the Department.

[4] It should be noted that the Court said "generally" considered to be within the course of employment, not "always" considered as Knight apparently urges.

Knight argues that placing the burden on him to show that he was pursuing normal creature comforts and reasonably comprehended necessities and not a strictly personal venture "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." *See* App. Br. 23. He asserts that this would negate the intent of the traveling employee doctrine where a traveling employee is generally considered to be in the course of employment continuously during the entire trip. App. Br. 23-24. He ignores that as a claimant seeking industrial insurance benefits he must prove that he was acting in the course of his employment at the time of his injury. RCW 51.32.010. He necessarily must show he has not deviated from this. Whether it is for a traveling employee or an employee at a fixed job site, the claimant must always show he or she was acting within the course of employment during the time period the claimant was injured. The Supreme Court recognized this by emphasizing that "[a] traveling employee may depart on a personal errand just like any other type of employee, thus losing the right to compensation benefits during such departures." *Ball-Foster*, 163 Wn.2d at 143.

Claimants appealing any order of the Department in an industrial insurance case, except for one alleging willful misrepresentation, bear the

burden of proving entitlement to benefits. *See* RCW 51.52.050(2)(a). "In any appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal." RCW 51.52.050(2)(a); *see also* WAC 263-12-115(2). The legislature specifically exempts only willful misrepresentation from this requirement. RCW 51.52.050(2)(c). To express one thing in a law implies the exclusion of the other. *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002); *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988) (under principle of *expressio unius est exclusio alterius*, the specific inclusion of certain conditions excludes the implication of others). By expressing that willful misrepresentation is the exception to the rule that an appealing party carries the burden of proof, the legislature meant to exclude the application of the burden of proof to the Department in any other workers' compensation appeal at the Board, including a case involving a traveling employee.

It is well-established that claimants are held to strict proof of their right to receive compensation. "[P]ersons who claim rights [under the Industrial Insurance Act] should be held to strict proof of their right to receive benefits provided by the act." *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *see also Lightle*, 68 Wn.2d at 510;

Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 19 Wn. App. 800, 804, 578 P.2d 59 (1978).

The strict standard of proof that an industrial insurance claimant must in all cases meet, in order to establish the right to receive benefits, is not diminished by the rule that the Industrial Insurance Act is liberally construed to effect its remedial purpose. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996).

To prove entitlement to benefits, a claimant must show that an exclusionary basis does not apply. *See Superior Asphalt & Concrete Co.*, 19 Wn. App. at 804 (burden was on survivor to show that decedent was not on frolic at time of death); *Mercer v. Dep't v. Labor & Indus.*, 74 Wn.2d 96, 442 P.2d 1000 (1968) (when a worker commits suicide, the survivor must produce competent medical evidence that shows that decedent acted under an uncontrollable impulse or delirium). In the analogous crime victims context, the *Stafford* Court noted the absence of express statutory direction as to whether the Department must prove limitations on coverage or whether the claimant must prove their absence and held: "Strict proof of one's right to CVC benefits demands a showing that the victim of a criminal act comes within the statute's terms and is not excluded by its limitations." *Stafford v. Dep't of Labor & Indus.*, 33 Wn.

App. 231, 236, 653 P.2d 1350 (1982). The court analogized to industrial insurance cases. *Id.* at 236-37 (citations omitted).

That Knight had the burden of proof at superior court is made explicit by RCW 51.52.115, which provides that the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. *Ruse*, 138 Wn.2d at 5. The Board found that Knight drank a lot of alcohol, became intoxicated, and as result collapsed on the beach, and his head struck the sand and he sustained an injury. BR 2. The Board further found he departed from the course of employment and that consuming a large amount of alcohol and/or riding an ATV are not fairly attributable risks of travel and are not reasonably necessary activities to maintain one's health while traveling for work. BR 2. Knight has not assigned error to these findings and they are verities. *See Shirley*, 288 P.3d at 394. In any event, it is Knight's burden to prove these findings incorrect and he did not present a genuine issue of material fact to show these findings were incorrect. Knight does not know what happened. BR Knight 54, 81.

In summary, Knight's argument that *Ball-Foster* somehow places the burden on the Department to prove he was not pursuing normal creature comforts and reasonably comprehended necessities and to prove he was on a strictly personal amusement venture is incorrect. To place

this burden on the Department would require reversal of longstanding law that requires claimants to prove their entitlement to receive benefits. *Ball-Foster* did no such thing: the Court did not alter law on burdens or standards of proof.

D. Knight Was Not Engaged In A Travel Or Employment-Related Risk At Time Of His Injury

To receive benefits, Knight must show that he was acting in the course of employment. *See* RCW 51.32.010; RCW 51.52.050, .115; *Cyr*, 47 Wn.2d at 97; *Ball-Foster*, 163 Wn.2d at 140. The undisputed facts of this case compel the legal conclusion that Knight was not within the course of employment at time of his injury. As a matter of law, drinking to intoxication is not a risk of travel fairly attributable to Knight's employment. While traveling employees may reasonably tend to their health and comfort in or near their hotel, traveling nearly an hour away to the beach and proceeding to get drunk is not reasonably necessary for personal comfort and well-being. Knight argues that "Mr. Knight's employment occasioned the 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." App. Br. 28. Even accepting that walking on a beach 25 miles from his hotel is somehow a

"risk of employment" or a "risk of travel," drinking to the point of intoxication is not.

All competent 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. According to the people (i.e., paramedic, police officer, emergency physician) who observed him soonest after his injury, Knight was intoxicated. *See* BR Wunstel 18, 22, 29-30, 42; BR Garcia 12-13; BR Chamberlain 71, 89-90, 100. Indeed, Knight's breath filled an aid car with the strong smell of alcohol. BR Garcia 12. The emergency room nurse and physician perceived that Knight had a strong smell of alcohol. BR Chamberlain 71, 109, 113-14. Knight had slurred speech that improved with time. BR Chamberlain 90, 111. He admitted to drinking "a lot" of alcohol. BR Wunstel 23; BR Chamberlain 74. The emergency room doctor's diagnoses included intoxication.[5] BR 79, 89-90, 111. No witness or evidence denied Knight's intoxication.[6]

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[5] Knight argued below that Dr. Chamberlain's diagnosis of alcohol intoxication in the absence of blood testing was inadmissible. CP 47-51. This argument is waived for several reasons. First, Knight failed to assert it in his opening brief.

Second, he failed to assign error to the superior court's evidentiary rulings as required by RAP 10.3(a)(4). *See* CP 110 (noting that objections to Dr. Chamberlain's testimony "were and are overruled."). Third, Knight did not even assert evidentiary objections in each instance that Dr. Chamberlain testified concerning Knight's intoxication. In an appeal from an order of the Board, the courts may reconsider evidentiary issues only on the grounds stated and preserved on the record. *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); RCW 51.52.115. In

Medical testimony on a *more-probable-than-not* basis must support a worker's claim for industrial insurance benefits in order to remove a medical question from the field of speculation and surmise. *Zipp v. Seattle Sch. Dist.*, 36 Wn. App. 598, 601, 676 P.2d 538 (1984). Evidence of causation must go beyond a possibility. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987). Testimony that the injury "might have," "may have," or "could have" caused, or "possibly did" cause the subsequent physical condition is insufficient. *Seattle-Tacoma Shipbldg. Co. v. Dep't of Labor & Indus.*, 21 Wn.2d 233, 241-42, 173 P.2d 786

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several places, Dr. Chamberlain discussed his diagnosis of alcohol intoxication without any objection. *See* BR Chamberlain 79, 89, 90, 98, 99.

The sole evidence in the record about whether it is generally accepted to make a clinical diagnosis of alcohol intoxication without testing the patient's blood or breath provides it is generally accepted. BR Chamberlain 97. Last, while breath or blood tests confirm alcohol intoxication, they are not the only means of establishing it. Indeed, persons may be criminally convicted beyond a reasonable doubt of driving while intoxicated in the absence of a breath or blood test upon the observations of non-physicians. *See State v. Entzel*, 116 Wn.2d 435, 440-42, 805 P.2d 228 (1991); *State v. Woolbright*, 57 Wn. App. 697, 701, 789 P.2d 815 (1990); *State v. Wilhelm*, 78 Wn. App. 188, 192, 896 P.2d 105 (1995). These authorities logically support that a physician who frequently deals with intoxicated patients can lawfully diagnose alcohol intoxication, on a civil more-probable-than-not medical standard, based on a patient's clinical presentation. Thus, even if the Court were to consider now Knight's attempts to refute Dr. Chamberlain's diagnosis of intoxication, the argument lacks merit.

[6] Dr. Shaffer did not testify that Knight was not intoxicated. She called the discussions of alcohol consumption in the Texas medical providers' records a "fact" that did not surprise her given her patient's history. BR Shaffer 28. She said that the "only way to *know*" whether he had ingested alcohol was a blood test as that was the only test "that is completely accurate." BR Shaffer 33, 36 (emphasis added). Essentially she makes a legal conclusion of the level of certainty required. But 100 percent certainty is not required; only testimony on a more-probable-than-not basis is required. And, the law does not require breath or blood tests to confirm intoxication even using criminal standards of proof. *See Entzel*, 116 Wn.2d at 440-42; *Woolbright*, 57 Wn. App. at 701; *Wilhelm*, 78 Wn. App. at 192.

(1933); *Rambeau v. Dep't of Labor & Indus.*, 24 Wn.2d 44, 49, 163 P.2d 133 (1945).

Dr. Chamberlain testified that Knight was intoxicated. BR Chamberlain 79, 89-90, 111. He also testified that Knight's head injury was consistent with having fallen onto sand. BR Chamberlain 85. This testimony was on a more-probable-than-not basis. BR Chamberlain 90-91. Here, 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. Dr. Chamberlain testified, on cross examination:

> Q: Earlier you testified that someone could have a head trauma, and then the symptoms could come on a little later; isn't that right?
> A: That's correct.
> Q: Okay. So that is a *possibility* in this case?
> A: It's *possible*. Yes.
> Q: So in fact, Knight *could have* suffered a head injury before he drank or got on the dunes, if that's in fact what happened; is that right?
> A: Yeah. I can't say when his injury happened.

BR Chamberlain 119 (emphasis added). It was *possible* (not probable) that there could be delayed onset of the symptoms. *See* BR Chamberlain 91, 119. This testimony is insufficient to raise a genuine issue of material fact regarding the whole of the medical testimony, which

supports that Knight was intoxicated and fell onto the sand producing his injury.

Knight argues that the Department "provided no direct evidence that Mr. Knight was intoxicated before or at the time of his injury." App. Br. 29. But it is his burden of proof to show that he was in the course of employment. RCW 51.52.050, .115; RCW 51.32.010. It is unrebutted that he was intoxicated while on the beach. Assuming *arguendo* that being on the beach was within the course of employment, it is Knight's burden to show that his injury occurred before his intoxication. *See* RCW 51.52.050; *Cyr*, 47 Wn.2d at 97 (claimant held to strict proof of claim); *Lightle*, 68 Wn.2d at 510 (claimant must prove claim by competent evidence); *Mercer*, 74 Wn.2d at 101 (claimant must prove that statutory bar did not apply); *Superior Asphalt & Concrete Co.*, 19 Wn. App. at 804 (survivor must show that decedent was not on frolic at time of death); *see also Stafford*, 33 Wn. App. at 236 (crime victim claimants, like workers' compensation claimants, must prove entitlement including showing limitations do not apply).[7]

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[7] Citing *Pearson v. Department of Labor & Industries*, 164 Wn. App. 426, 443, 262 P.3d 837 (2011), Knight argues that the absence of a fact cannot be construed in favor of a party seeking summary judgment. CP 60. But *Pearson* did not consider the circumstance of the Department moving for summary judgment when the industrial insurance claimant who had the burden of proof at superior court failed to have a record in support of his claim. Failure to prove an essential element of a claim may be a basis to grant summary judgment. *See Young*, 112 Wn.2d at 225.

The court may consider the employer's expectations when assessing whether Knight was engaged in "normal creature comforts" or "reasonably comprehended necessities." Knight's employer has zero tolerance for consuming alcohol while driving, thus supporting that Knight was not in the course of employment when he was intoxicated. BR Mack 94-95.[8] Knight's venture evidences distinct personal departure from the course of employment. This is especially the case where the employee has driven his company van, and the employer has a policy of zero tolerance for alcohol, let alone intoxication, with respect to driving such vehicles.

While Knight speculates he may have been a victim of crime while on the beach, claimants cannot rely on subjective speculation in opposing summary judgment. App. Br. 3, 16, 33; *see Boguch*, 153 Wn. App. at 610 (party cannot rely on speculation to oppose summary judgment); *see also McClelland*, 65 Wn. App. at 394 (claimant cannot rely on subjective impressions but must have objective proof of work conditions).

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[8] Knight does not deny that his employer had a zero tolerance for alcohol use related to the van, but he argues this fact should not be considered because "State Farm has not pursued any form of disciplinary action against Mr. Knight." App. Br. 33 n.5. Thus, he argues "[it] is unreasonable to use an employment policy that Mr. Knight has not violated as evidence against his eligibility for employment benefits." App. Br. 33 n.5. What Knight fails to point out is that his supervisor did not know about Knight's intoxication until the hearing, two and half years later. BR Mack 94. No doubt Knight did not report his violation of company policy. *See* BR Mack 93. In any event, disciplinary action by an employer is not required to refute a claim for industrial insurance benefits. Rather, the inquiry concerns whether the worker's actions were reasonably comprehended, which may include consideration of the employer's expectations and policies.

Moreover, the medical evidence does not bear out this speculative assertion. *See Dennis*, 109 Wn.2d at 477. Dr. Chamberlain saw no sign of swelling upon his examination of Knight, or in any other providers' medical records around this time, to include those of Paramedic Wunstel and the Methodist Hospital. BR Chamberlain 67-69, 83-84. Dr. Shaffer does not contradict Dr. Chamberlain's testimony that Knight's injury is consistent with falling onto sand, but not being hit by a fist or object. She states only that the cause of his head trauma is unknown. BR Shaffer 11. Dr. Chamberlain's ruling out of assault is unrefuted. Moreover, Knight's speculative theory that he was mugged does not negate his intoxication.

While having an alcoholic drink or two on a day off, in or near one's hotel, may fit the description of a "normal creature comfort" for a traveling employee, drinking to the point of intoxication that persists at least two hours, during which time fluid is provided by medical personnel, exceeds the definition. The call to 911 concerning Knight was around 5:24 p.m. BR Garcia 8. Paramedic Wunstel gave Knight fluids and warmed him during transport to the hospital, arriving at 6:53 p.m. BR Wunstel 21. Dr. Chamberlain saw Knight around 7:25 p.m., and diagnosed alcohol intoxication, still noting a strong smell of alcohol, and slurred speech that improved in the time Dr. Chamberlain spent with Knight. BR Chamberlain 71, 90, 111-12. Indeed, Knight was likely intoxicated for more than two

hours as he was in the surf for an unknown period of time before the paramedics arrived.

As a matter of law, this Court should rule that drinking alcohol to the point of intoxication is not a normal creature comfort nor a reasonably comprehended necessity for a traveling employee. Drinking "a lot" of alcohol is an unusual and/or unreasonable means of seeking personal comfort and therefore falls outside the personal comfort doctrine. Rather than "ensuring that an employee is healthy, well-rested, and comfortable," *Ball Foster*, 163 Wn.2d at 152, drinking "a lot," or until intoxication, is detrimental to employee health and well-being and decreased Knight's odds of being ready for work the next day, even in the absence of injury.

Knight appears to argue that there is no evidence of intoxication because there was no blood test. *See* App. Br. 32. However, Dr. Chamberlain's diagnosis of intoxication is unrebutted. BR Chamberlain 79, 89-90, 111-12. Knight contemporaneously admitted to two people that he had drank "a lot." BR Wunstel 23; BR Chamberlain 74. He further admitted to Paramedic Wunstel that he recalled getting tired and passing out on the beach. BR Wunstel 24. Knight claims that his "statements while suffering from hypothermia and a brain injury are unreliable." App. Br. 32. But Dr. Chamberlain was able to diagnose intoxication, and neither he nor the paramedic testified that they could not rely on his

statements for this purpose. BR Chamberlain 74, 79, 89-90, 111-12; BR Wunstel 23, 27, 29-30, 45. Knight cannot now claim unreliability in the face of his direct admissions. Knight cites no case law that the corroborated admissions of a party must be disbelieved.

Knight argues he was alone, with no bottles or cans around him. App. Br. 32. He says he was found bruised on a beach damaged by the hurricane and inhabited by transient workers. App. Br. 32. He was missing some personal items. App. Br. 32. He points out that he worked for State Farm for 23 years and never received a disciplinary action. App. Br. 32-33. Based on all of the above facts, he argues "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." App. Br. 33. The problem with Knight's arguments is that they ignore the medical evidence that he was intoxicated, fell to the sand, and was not assaulted. The Board found that he was intoxicated, and as a result collapsed on the beach and his head struck the sand and sustained a head injury. BR 2. It is Knight's burden to show this did not occur, that he was not intoxicated, and to contradict the medical evidence offered on a more-probable-than-not basis that he was. He did not do this.

That there is some overlap in the symptoms of head trauma, hypothermia, and alcohol intoxication does not create a genuine issue of

material fact, because neither Paramedic Wunstel nor Dr. Chamberlain retreated from their opinion of alcohol intoxication. The smell of alcohol on Knight's breath and the clearing of his slurred speech supported the diagnosis of alcohol intoxication even though Knight also suffered from other conditions. BR Chamberlain 89-90, 98-99, 111-12; BR Wunstel 22, 29-30. The witnesses refuted Knight's argument the symptoms are "identical" in his case. *See* BR Chamberlain 89-90, 98-99, 111-12; BR Wunstel 22, 29-30; App. Br. 12.

Knight states: "Whether an employee is so intoxicated that he or she abandoned her employment is a genuine issue of material fact for the jury." App. Br. 30 (citing *Flavorland*, 32 Wn. App. 428; *Orris v. Lingley*, 172 Wn. App. 61, 67-68, 288 P.3d 1159 (2012)). Yet the worker in *Flavorland* was actually working when intoxicated, and drinking was part of his job. *Flavorland*, 32 Wn. App. at 435. Knight's employer did not encourage, finance, or create an atmosphere that allowed employees to become intoxicated. *Cf. Flavorland*, 32 Wn. App. at 435 (considering anticipation by employer that worker would consume alcohol, given that worker's job included socializing where alcohol was served).

Orris also is of no support. This case says if there is evidence of an employee's intoxication while driving a car the company allowed him to use for the company's arguable benefit, this creates a genuine issue of

material fact whether the employee is acting in the course of employment. *Orris*, 172 Wn. App. at 67-69. *Orris* is distinguishable because it does not involve a traveling employee. For traveling employees, the test is as supplied by *Ball-Foster*: namely, whether one's injury is fairly attributable to the increased risks of travel. *Ball-Foster*, 163 Wn.2d at 144. That test turns upon whether the traveling employee tends to a normal creature comfort or reasonably comprehended necessities when injured. *Ball-Foster*, 163 Wn.2d at 143.

Coverage for commutes (*Orris*) is a different test from coverage for traveling employees (*Ball-Foster*). A commuting employee who acts in furtherance of his or her employer's business (e.g., by driving the company car as directed for efficiency) remains in the course of employment even when intoxicated unless he or she is so intoxicated as to evidence job abandonment. *See* RCW 51.32.010; RCW 51.08.013(1); *Orris*, 172 Wn. App. at 68-69. The employee is covered because the employee is still doing his or her job or following orders, despite the intoxication. But a traveling employee who consumes alcohol while not performing any job duties or in any way acting at the employer's direction is covered only if the alcohol consumption is a normal creature comfort or reasonably comprehended necessity. The line—as a matter of law—can be drawn at intoxication. It may be reasonable to have a drink or two in

order to relax, but not to become intoxicated (and then expect to remain covered, as Knight apparently seeks). Becoming intoxicated exceeds the *Ball-Foster* limits for coverage. Contrary to Knight's implication, getting intoxicated on the beach is not a "reasonable" activity. Moreover, as Knight acknowledges, the injury must relate back to a risk incidental to the employment related travel. App. Br. 27; *see Ball-Foster*, 163 Wn.2d at 144 (injury must be "fairly attributable to the risks of travel" and "related to a risk of employment."). Intoxication on a beach is not a risk fairly attributable to travel.

When a traveling employee is not working, this Court may decide as a matter of law that drinking to intoxication does not advance the employer's interests or meet the *Ball-Foster* test for industrial insurance coverage. Drinking to the point of intoxication is not a normal creature comfort or a reasonably comprehended necessity for a traveling employee who is not at work; this is a purely legal issue.

Moreover, *Orris* does not control because the context of the two cases are vastly different. *Orris* involved a personal injury lawsuit where the evidence is developed in the superior court. *Orris*, 172 Wn. App. at 65. Presumably Orris can present testimony about intoxication in the remand for further trial. However, in a workers' compensation case, the only evidence is that submitted at the Board (absent exceptions not present

here). RCW 51.52.115; *Grimes*, 78 Wn. App. at 560; *Gilbertson v. Dep't of Labor & Indus.*, 22 Wn. App. 813, 816-17, 592 P.2d 665 (1979). Here, Knight had his opportunity to present evidence that he was not intoxicated, but he failed to do so. In *Orris* the question was whether a lab report was enough to show intoxication. *See Orris*, 172 Wn. App. at 58. Here, there is medical and other testimony that Knight was intoxicated, and Knight presents no evidence that he was not intoxicated. He cannot create a material issue of fact by failing to present evidence on a contested issue, and instead presenting only speculation. *See Boguch*, 153 Wn. App. at 610. As the superior court recognized in its order, no reasonable jury would find him not intoxicated based on the record created at the Board. *See* CP 97. Given that a jury could determine only that Knight was intoxicated when injured, this Court should conclude as a matter of law that such intoxication fails the *Ball-Foster* test for coverage.

Certainly, to the extent Knight is arguing that summary judgment should be granted to him, he has not proven–taking the evidence in the light most favorable to the Department–that he is entitled to summary judgment in view of the unrebutted evidence by the police officer, paramedic, and emergency room physician of intoxication. *See* App. Br. 34.

E. Even Aside From His Intoxication, Knight Was On a Recreational Trip At Time of His Injury And He Had Not Returned To The Course of Employment

The facts of this case are a far cry from crossing the street from the hotel to go the park, as in *Ball-Foster*. *See Ball-Foster*, 163 Wn.2d at 139. The Supreme Court appears to support non-coverage of traveling employees' injuries during personal errands including such activities as swimming and fishing with co-workers on a long weekend, riding a taxi downtown from the outskirts to see a movie, reaching into a bee tree for honey, or even walking into a different area of a construction site to increase one's knowledge for potential promotion. *Ball-Foster*, 163 Wn.2d at 143 (citing *Silver Eng'g Works*, 180 Colo. 309); *id.* at 150 (citing *N. & L. Auto Parts Co.*, 111 So. 2d 270); *id.* at 144 (citing *Morrill*, 1970 WL 104554); *id.* at 144 (citing *Young*, 200 Wash. 138). With this narrow scope of coverage in mind—even *aside from* Knight's alcohol intoxication—Knight departed on a personal errand merely by his trip from Houston to the beach in Galveston. His personal amusement venture had not concluded when he sustained his injury, so he was not acting in the course of employment. Contrary to his suggestions, going to a beach to watch "men riding dune buggies splashing in the surf" is not personal comfort, it is a personal amusement venture. *Contra* App. Br. 26. Knight argues that his supervisor did not think it would be unreasonable for Knight to ride a dune buggy on his day off to rejuvenate himself. App.

Br. 27. Whether someone's activities on a personal amusement venture are reasonable or not is not the question. The question is whether someone is *on* a personal amusement venture. Going to the beach 25-30 miles from the hotel and watching men ride dune buggies is not an activity that is part of the risks attributable to travel; rather, it is a strictly for personal amusement.

Although Knight contends he was working when he went to Galveston, he was on leave that day. App. Br. 9, 26-28; BR Knight 44-45. He says he was "surveying the area," but according to his supervisor although seeing the area would be useful initially, a claims manager would not survey the area after two months. *See* App. Br. 27; BR Knight 47; BR Mack 89, 100. This is confirmed by Knight's testimony about the purpose of his trip to "survey." He testified that the purpose of the survey in Galveston was to "get me in the mindset of dealing with my people [policy holders] in the next couple of days." BR Knight 77. It was a mental transition. BR Knight 77-78. He did this to put him in the "frame of mind to listen what [the people making claims] – really listen to what these people are telling me and not just going through the motions." BR Knight 78. It was to help him "empathize." BR Knight 78. As laudable as it may be to put oneself into the frame of mind to do claims adjusting, this is not work. If that were the case, then every time a worker thought about work on a day off, then he or she would be in course of employment. That simply is not the

standard. *See* RCW 51.08.013. Knight choose to go 25-30 miles away on a trip and watch dune buggies on the sand on his day off; this was his own personal amusement venture.[9] Thus, the superior court's alternative basis for granting the Department's motion for summary judgment is correct. CP 97.

F. Knight Should Not Be Awarded Attorney Fees

Knight asks for attorney fees if the Court agrees that summary judgment should be granted to him. App. Br. 35. His request for summary judgment is based on his mistaken theory that the Department had the burden of proof, and it should be denied. *See* App. Br. 34.

Knight is correct in his implication that this Court cannot award attorney fees if it decides to remand for a trial. Fees are awarded against the Department only if the worker requesting fees prevails in the action and "if the accident fund or medical aid fund is affected by the litigation." RCW 51.52.130; *Pearson*, 164 Wn. App. at 445; *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 987, 478 P.2d 761 (1970). Remand for a new trial would not affect the accident fund or medical aid fund. In any event, because he should not be a prevailing party, this Court should not award him attorney fees. *See* RCW 51.52.130; *Pearson*, 164 Wn. App. at 445.

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[9] Contrary to his argument, Knight was not "commuting to and from job sites or work activities"; he was on a day off going to the beach to get himself in the right frame of mind to his job. *See* App. Br. 26 n.4 (citing *Shelton*, 90 Wn. App. 923); BR Knight 78. This case is not like *Shelton* where the workers were going to the hotel from the airport. *Shelton*, 90 Wn. App. at 926.

VII. CONCLUSION

The Department asks that this Court affirm the superior court's order.

RESPECTFULLY SUBMITTED this 27th day of August, 2013.

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