No. 69514-2-I 90587-8

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

RUDOLPH KNIGHT,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF MOVING PARTY

Petitioner, Rudolph Knight, respectfully submits this Petition for Review.

II. COURT OF APPEALS DECISION

Mr. Knight seeks review of the published Court of Appeals, Division One, decision filed in this case on June 16, 2014, after granting both parties' motions for reconsideration. Appendix (A) at 1-16.

III. ISSUES PRESENTED FOR REVIEW

1. This Court recently adopted the "continuous coverage rule" or "traveling employee doctrine" in *Ball-Foster Glass Container Co. v. Giovanelli,* 163 Wn.2d 133, 143, 177 P.3d 692 (2008). Under this rule, a traveling employee is considered to be in the course of employment continuously during the entire trip, except during a distinct departure on a personal errand. *Id.* In *Ball-Foster,* the Court reviewed the employer's evidence attempting to show a distinct departure at the time of injury. *Id.* at 149-153. Under the traveling employee doctrine, after the worker satisfies her burden to show that she was injured while on assignment, the party challenging coverage must show that, at the time of injury, the traveling employee was on a distinct departure from the course of employment.

Despite this precedent, the Court of Appeals' published opinion holds the opposite and thus conflicts with *Ball-Foster* and cannot be reconciled. The Court of Appeals holds that the employer in *Ball-Foster* had the burden to show departure simply because it was the non-moving party on a summary judgment motion. A at 12. Not so. The employer had the burden because the worker was considered in the course of employment the entire trip and it was the employer's burden to prove an exception to this rule. The Court is called upon to reaffirm its holding in *Ball-Foster*, supporting expanded coverage for workers whose employment calls them far from home for the benefit of their employer.

The Department of Labor & Industries (Department) provides no evidence as to the timing or circumstances of Mr. Knight's injury. Thus, the Department cannot prove an exception to the continuous coverage rule and Mr. Knight's claim for benefits should be allowed. [1]

> **ISSUE:** Whether the traveling worker's continuous coverage rule requires the party challenging coverage to prove departure?

2. Even if this Court holds that Mr. Knight must show that he is continuously in the course of employment, summary judgment against him is inappropriate. First, the Court of Appeals unnecessarily elevated the issue of Mr. Knight's alleged intoxication to a material fact despite all

[1] Summary judgment may be granted in favor of the nonmoving party if it becomes clear that she is entitled thereto. *Impecoven v. Dep't of Rev.*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (citations omitted).

sides agreeing that the mechanism and timing of his injury are unknown and no evidence connects his alleged intoxication to the injury. Second, the opinion conflicts with long-standing precedent that intoxication alone is insufficient to remove a worker from the course of employment, and that the determination is a question for the jury. Lastly, the court construed all facts and inferences against Mr. Knight, the non-moving party.

> **ISSUE:** Whether the court erred in affirming summary judgment when the evidence fails to connect Mr. Knight's injury with any alleged intoxication, intoxication alone cannot remove a worker from the course of employment, and a reasonable person could conclude that Mr. Knight was not on a distinct departure at the time injury?

IV. STATEMENT OF THE CASE

Factual Background

Mr. Knight seeks workers' compensation benefits under the Industrial Insurance Act (Act) with regard to a traumatic brain injury.

Mr. Knight, a Washington resident, worked for State Farm Insurance as a catastrophic claim adjuster and, at the time of injury, was stationed in Galveston, Texas assessing home owners' claims in the aftermath of Hurricane Ike. Hearing Transcript from June 20, 2011 (6/20/11 HT) at 35-36; 85-87.[2] State Farm paid Mr. Knight a *per diem*

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

when at the travel location and provided a work van containing a mobile office. *Id.* at 42; 45-46. State Farm arranged for a hotel about 30 minutes from Galveston due to the severe damage in the Galveston area. *Id.* at 36-38. State Farm also provided Mr. Knight with "provisional days," essentially days off work, but continued to pay a *per diem.* *Id.* at 42, 90-91. State Farm acknowledged these rest periods benefited the company because it kept workers fresh and rejuvenated for the long weeks and months of work away from home. *Id.* However, many employees used these days to catch up on work. *Id.* at 40-41.

On December 2, 2008, a provisional day, Mr. Knight was surveying beach damage in and around the Galveston Island area. 6/20/11 HT at 44-50. Surveying the damage is helpful with adjusting claims and offered a way to transition back to work coming off the Thanksgiving holiday. *Id.* at 50; 77-78; 89. At about 1:00pm, Mr. Knight saw men on dune buggies spraying surf on the beach. *Id.* at 13-15; 50-52. He got out of his work van/mobile office to watch the riders. *Id.* This is Mr. Knight's last memory of December 2, 2008. *Id.* at 52.[3]

That same day, at about 5:30pm, paramedics found Mr. Knight not far from his van, lying on his back in the sand and water, calling for help,

[3] The Court of Appeals correctly assumed that this stop did not amount to a distinct departure on a personal errand. A at 13.

disoriented, shivering uncontrollably, and completely alone. 6/22/11 HT at 7-12; 40-41. He also appeared "pretty beat up." *Id.* at 32.

Mr. Knight suffered a traumatic brain injury from blunt force trauma to the head. 6/22/11 HT at 82-83. However, none of the medical providers can say what circumstances led to the injury. The emergency room physician, Dr. Blake Chamberlain, testified, "I can't say when his injury happened." 6/22/11 HT at 119. Dr. Chamberlain agreed that he did not know at all exactly what happened to Mr. Knight. 6/22/11 HT at 101; 110. The paramedic agreed that he did not know what happened to Mr. Knight. 6/22/11 HT at 28-29.

The court determined that Mr. Knight became intoxicated and suffered an injury between 1:00pm and 5:30pm, but concedes that the facts do not indicate which came first. A at 9. These findings are based on a police officer's statement that Mr. Knight smelled of alcohol; Mr. Knight's statements that he had "drank a lot;" and Dr. Chamberlain's opinion that Mr. Knight's behaviors presented as intoxication. A at 2-3.

By contrast, Mr. Knight argues that he did not abandon his employment at the time of injury and intoxication, if any, was not sufficient to establish a distinct departure on a personal errand. To start, he has no memory of drinking, and believes he would *not* drink to the point of intoxication while at work and when scheduled to evaluate

people's homes the next morning. 6/20/11 HT at 71-72. Mr. Knight was a highly skilled and trusted claims representative at State Farm. *Id.* at 86-87.

Further, there were no witnesses to his behavior prior to the injury, no blood alcohol content test was completed, and no alcohol was found on or around Mr. Knight or his van. 6/22/11 HT at 40-41; 74-75; 95-96; 6/28/11 HT at 18. Mr. Knight does not recall any of the conversations after he stopped at the beach until he woke up in the hospital long after his interactions with the first responders and Dr. Chamberlain. 6/20/11 HT at 52. Moreover, his contemporaneous statements are unreliable because of his hypothermia and brain injury. 6/22/11 HT at 38; 109-110. Lastly, Dr. Chamberlain's diagnosis of intoxication is suspect and unreliable because the symptoms of intoxication overlap with those of hypothermia and a traumatic brain injury. 6/22/11 HT at 29-31; 103-105; 110-112.

Dr. Chamberlain states that Mr. Knight's injury is consistent with someone falling and hitting their head hard on sand, but he does not connect the injury to intoxication. 6/22/11 HT at 84-85. Importantly, falling onto sand is a risk inherent to Mr. Knight's work because surveying beach damage after a hurricane is part of his job.

Mr. Knight testified that he believes he was the victim of a crime, "I think I was mugged by the people that were driving the dune buggy."

6/20/11 HT at 57. His wallet, necklace, and money clip were all missing. 6/20/11 HT at 54-55. The men on the dune buggies were not found. 6/22/11 HT at 40-41; 6/28/11 HT at 19. Additionally, as the paramedic explained, a lot of people stayed on the beach because they were homeless at the time. 6/22/11 HT at 40-41.

Court of Appeals Decision

The extent and severity of Mr. Knight's injury is not in question; further, the parties agree that Mr. Knight was a traveling employee and was injured while in travel status. Yet, the Court of Appeals affirmed the dismissal of Mr. Knight's claim. First, while acknowledging that some level of drinking is permissible by a traveling employee, it held that Mr. Knight had the burden to prove he was not on a distinct departure due to intoxication at the time of injury. A at 8-9. To come to this conclusion, the court ignores the "continuous coverage rule" under *Ball-Foster*. Instead, the court relies on a Division Three case that concerned the "coming and going rule."

Second, the court misapplied accepted summary judgment standards. The court stated that Mr. Knight provided only speculation that he did not abandon his employment via intoxication. A at 12. The court ignored facts and inferences favorable to Mr. Knight. The court also overemphasized the importance of whether Mr. Knight was intoxicated.

The proper focus in this case is the injury itself and whether the injury is fairly attributed to the risk of travel.

V. ARGUMENT IN SUPPORT OF REVIEW

A. All Issues Should be Reviewed De Novo

The Court reviews questions of law de novo. *Federal Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 765, 261 P.3d 145 (2011). The Court uses the same de novo standard when it reviews mixed questions of law and fact. *Devine v. Empl. Sec. Dep't*, 26 Wn. App. 778, 781, 614 P.2d 231 (1980) (citations omitted). Under that standard, the court exercises its inherent and statutory authority to make a de novo review of the record independent of agency actions. *Id.* (citations omitted).

Additionally, the Court reviews summary judgment de novo and engages in the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (citations omitted). Summary judgment is appropriate 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); *see also* CR 56(c). The Court considers all facts and reasonable inferences in the light most favorable to the nonmoving party. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (citations omitted).

B. Review Should be Accepted Under RAP 13.4(b)(1), 13.4(b)(2), and 13.4(b)(4)

First, and most importantly to workers' compensation beneficiaries and practitioners, the decision directly conflicts with this Court's decision in *Ball-Foster.* RAP 13.4(b)(1). Second, *Ball-Foster*, unlike the decision here, upheld the Act's primary purpose. As such, this petition involves an issue of substantial public interest that should be determined by this Court; the published Court of Appeals decision directly affects all travelling employees and makes benefits for those suffering from traumatic brain injuries more difficult to secure. RAP 13.4(b)(4). Third, the Court of Appeals decision conflicts with well-established case law on summary judgment because the decision fails to draw all facts and inferences in favor of the non-moving party and because the decision fails to leave the issue of abandonment via intoxication to the jury. RAP 13.4(b)(1)&(2).

1. The Court should accept review because the decision conflicts with the continuous coverage rule adopted in *Ball-Foster*

This Court in *Ball-Foster* held that under the Act's liberal construction framework, a traveling employee is considered continuously in the course of employment during the entire trip, *except* when a distinct departure on a personal errand is shown and the injury is not fairly attributed to the risks of travel. *See Ball-Foster,* 163 Wn.2d at 142-143 (emphasis added). Mr. Knight has argued that *Ball-Foster* created a

burden shifting presumption in favor of coverage for injuries suffered by traveling employees. It may be more accurate to state that under the traveling worker doctrine, a worker establishes a *prima facie* case supporting coverage when he proves 1) that he is a traveling employee and 2) that he sustained an injury. If the worker can establish his *prima facie* case, the burden is rightfully then on the party challenging coverage to prove a distinct departure at the time of injury.

a. *Ball-Foster* holds that a traveling employee is considered within the course of employment during the entire trip

Under *Ball-Foster*, a worker must prove that he was a traveling employee. *Ball-Foster*, 163 Wn.2d at 145. If proven, the traveling employee is considered to be acting within the course of his employment the entire trip. *Id.* at 149-153. In accordance with the Act, the worker must also prove he suffered an injury or occupational disease. RCW 51.08.100, .140. By proving that he was a traveling worker and that he suffered an injury, the worker has established his *prima facie* case and met his burden to show his entitlement to coverage. Should the Department or employer contest coverage, it must then prove by a preponderance of the evidence that at the time of injury the traveling employee abandoned the course of his employment by departure on a personal errand.

The Court in *Ball-Foster* applied this analysis when it held that Ball-Foster's employee was a traveling worker and was covered with regard to injuries sustained when struck by a car as he crossed the street from his hotel to attend a concert in a park. *Ball-Foster*, 163 Wn.2d at 139. The *Ball-Foster* Court then reviewed the *employer's* assertions; it did not require or suggest that the employee needed to prove that he crossed with the light, acted reasonably, or had otherwise not abandoned his employment. *Id.* at 151(emphasis added).

Here, the court held that the traveling employee must establish that he had not abandoned the course of employment at the time of injury. A at 11-12. The continuous coverage rule should not be held to require a worker to continuously reassert that he is in the course of employment. Such a requirement negates the purpose of the continuous coverage rule.

This interpretation accords with other jurisdictions that expressly hold that the Department or employer, not the worker, is responsible for providing 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); *see also Hansen v. Indus. Comm'n,* 258 Wis. 623, 46 N.W.2d 754 (1951).

Likewise under Washington law, private insurance cases hold that an insured need only present a *prima facie* 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 Cy. Physicians Corp.*, 120 Wn.2d 747, 758-59, 845 P.2d 334 (1993); *see also Gould v. Mut. Life Ins. Co. of New York*, 95 Wn.2d 722, 725, 629 P.2d 1331 (1981). A worker, like Mr. Knight, covered under the Act - a liberally construed social insurance - should also be entitled to such a burden shifting scheme, once a *prima facie* case is established.

b. Rather than apply *Ball-Foster's* continuous coverage rule, the decision applies *Superior Asphalt's* coming and going rule

Rather than accord this case with *Ball-Foster,* the Court of Appeals relies heavily on *Superior Asphalt*, a pre-*Ball-Foster* Division Three case in which a worker was held to have the burden of proving that he was not on a distinct departure at the time of injury. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 19 Wn. App. 800, 578 P.2d 59 (1978). The court's comparison is in error.

First, *Superior Asphalt* was not a traveling employee case. *Superior Asphalt* was a "coming and going rule" case; while a worker is

going to or coming from a jobsite he or she is generally considered *not* in the course of employment. *Hama Hama Logging Co. v. Dep't of Labor & Indus.,* 157 Wash. 96, 104, 288 P. 655 (1930). Thus, under the coming and going rule, the worker's initial status is reversed compared to a traveling employee. It is fitting then, that a worker seeking an exception to the coming and going rule would be required to provide evidence that she was in the course of employment.

More pointedly, in *Superior Asphalt,* it was clear that the worker had distinctly departed the course of employment *before* the injury. *Superior Asphalt,* 19 Wn. App. at 805. *Superior Asphalt* held that, even if the worker was entitled to a coming and going rule exception, the worker lacked evidence to establish that he returned before the injury occurred. *Id.*

Mr. Knight agrees that he would bear the burden to prove that he reestablished his course of employment should the Department have shown a distinct departure *prior* to his injury. That is not the case here. The Court of Appeals' rationale under *Superior Asphalt* does not reconcile its conflict with *Ball-Foster.*

c. The continuous coverage rule should support the injured worker, especially when the mechanism of injury is unknown

The decision in this case will make it impossible for traveling employees or their beneficiaries to secure benefits when the mechanism of

injury or death is unknown. Mr. Knight does not argue that every injury or death suffered by a traveling worker must be covered, merely that after a worker establishes a *prima facie* case she should receive the benefit of the doubt. This is particularly necessary when the injury or death itself creates a lack of evidence.

It is known that this injury happened while Mr. Knight was at the beach where he was occasioned to be due to work. In *Ball-Foster*, this 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." *Ball-Foster*, 163 Wn.2d at 152. Similarly here, Mr. Knight was in Galveston at the beach because of his employment. Mr. Knight's employment occasioned his use of the beach, and the risks of the beach - such as hitting one's head hard onto sand - become part of the risks of his employment. Mr. Knight's injury is sufficiently connected to his travel that the Department should bear the burden to show departure when the injury itself limits Mr. Knight's ability to produce evidence.

The parties agree that Mr. Knight was a traveling employee and that he was injured while on assignment in Texas. Under the traveling worker doctrine he is continuously covered under the Act. The Department cannot show a departure at the time of injury because there is no evidence of how or exactly when this injury happened, but it is shown

that Mr. Knight's injury is attributable to his employment. Thus, Mr. Knight is entitled to judgment in his favor and his claim allowed.

2. This Court should accept review because the decision fails to uphold the purpose of the Act

Ball-Foster correctly upheld the Act's purpose, the decision below does not. The Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573, 141 P.3d 1 (2006) (citations omitted). As such, "the guiding principle in construing provisions of the [Act] is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citations omitted); *see also* RCW 51.12.010. Additionally, "where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker[.]" *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). Finally, under the Act there is no requirement that an

injury arise out of employment, only that the worker was within "the course of employment" when injured. *Ball-Foster,* 163 Wn.2d at 141; *see also* RCW 51.32.010.

In this case, the court failed to uphold the remedial intent of the Act in contravention of the Act's guiding principle to cover all injuries suffered by workers with all doubt resolved in favor of coverage. This published decision is a direct blow to all workers in the state whose employment requires travel away from home and particularly those that lack evidence due to the injury suffered.

3. This Court should accept review because the decision conflicts with summary judgment case law- it raises intoxication to a material fact; it interprets inferences against Mr. Knight; and it invades the province of the jury

The Court of Appeals found that Mr. Knight was on a distinct departure at the time of injury based on evidence of intoxication *after* the injury. First and foremost, this evidence is not material to this case because it does not answer the question of how or when Mr. Knight was injured. Under the continuous coverage rule, the worker's status at the time of injury is the only material fact regarding course of employment. The intoxication issue is a red herring because it has nothing to do with the mechanism or timing of the injury. Moreover, employee intoxication is a *defense* to the employer's liability for benefits; thus, again, even under an

intoxication theory the Department should be required to show intoxication at the time of injury. *See Flavorland Indus., Inc. v. Schumaker*, 32 Wn. App. 428, 434, 647 P.2d 1062 (1982).

Nonetheless, the Court of Appeals found that Mr. Knight became intoxicated and that he could not prove his injury was not due to intoxication. A at 9; 12. However, the medical witnesses could not link intoxication to the injury. Dr. Chamberlain testified that brain injuries can have delayed symptoms. 6/22/11 HT at 91. Dr. Chamberlain diagnosed intoxication but could not differentiate between the symptoms of intoxication and a traumatic brain injury or hypothermia. *Id.* at 103-107; 111-112. Dr. Chamberlain agreed he was speculating as to how much Mr. Knight may have drank. *Id.* at 96. Dr. Chamberlain stated that Mr. Knight's brain injury was consistent with hitting his head hard on sand, but he did not testify that this event was the result of being intoxicated. *Id.* at 84-85. Dr. Chamberlain had no idea how Mr. Knight was injured and agreed that, due to the delayed onset of symptoms, Mr. Knight could have suffered the injury and *then* drank. *Id.* at 119. Any finding that Mr. Knight was intoxicated at any time, let alone at the time of injury, is speculative, unfounded, and unreasonable.

Even if Mr. Knight's intoxication is material, and even if Mr. Knight bears the burden, summary judgment was not appropriate. The

court disregarded all of Mr. Knight's evidence and weighed all inferences against him. Mr. Knight provided evidence that casts serious doubt on the Department's intoxication theory and provides evidence that he did not abandon his employment. A jury could find Mr. Knight's testimony credible and decide on a more probable than not basis that he did not drink to intoxication or that any drinking occurring after his self-control was impacted by a head injury. Moreover, abandonment via intoxication is an issue for the jury and should not have been determined as a matter of law.

Although Mr. Knight's evidence is necessarily circumstantial due to his injury, the law does not distinguish between direct and circumstantial evidence in terms of weight and value in finding the facts in a case. Washington Pattern Jury Instructions (WPI) 1.03, *citing McKay v. Seattle Elec. Co.,* 76 Wash. 257, 136 P. 134 (1913). The evidence in this case, when viewed in the light most favorable to the nonmoving party, shows a material issue of fact in dispute (assuming intoxication is a material fact). That is, whether Mr. Knight had taken himself out of the course of employment at the time of injury due to alleged intoxication.

Intoxication removes an employee from the course of employment only if the employee becomes so intoxicated that he has abandoned his employment. *Orris v. Lingley*, 172 Wn. App. 61, 288 P.3d 1159 (2012); *Flavorland Indus., Inc.*, 32 Wn. App. 428. Whether an employee is so

intoxicated that she abandoned her employment is a genuine issue of material fact for the jury. *Orris*, 172 Wn. App. at 68; *see also Flavorland Indus., Inc.*, 32 Wn. App. at 434-435.

The Board of Industrial Insurance Appeals (Board) has consistently held that intoxication alone does not take a worker out of the course of employment. *In re Michael Pate, Dec'd,* BIIA Dec. 97 1977 (June 28, 1999).[4] Here, the court states that drinking alcohol in moderation may be appropriate, but finds Mr. Knight must have had too much. A at 8. The opinion in this case is bound to lead to inconsistent results at the Board and superior courts.

Instead, the Board's established framework for analyzing abandonment due to intoxication should be used when intoxication is a material fact at issue:

> It is not enough to prove that the worker had a high blood alcohol level at the time of the accident, rather the workers' continued ability to perform his job must be considered. In each of these cases the workers' tolerance for alcohol; demeanor, behavior, and speech; and their ability to perform work duties were considered in determining whether employment was abandoned.

In re Michael Pate, supra; *citing In re Brian Kozeni, Dec'd*, BIIA Dec., 63,062 (1983); *In re Austin Prentice, Dec'd,* BIIA Dec., 50,892 (1979); and *In re Al Thurlow, Dec'd*, BIIA Dec., 20,254 (1966). The court's

[4] The Board's interpretation of the Act is entitled to great deference. *Doty v. Town of South Prairie,* 155 Wn.2d 527, 537, 120 P.3d 941 (2005).

holding that as a matter of law Mr. Knight abandoned employment via intoxication conflicts with established law.

C. Fees and Costs

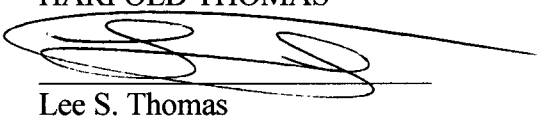
Mr. Knight requests that his claim be allowed as a matter of law or at the very least his claim remanded for a trial on the merits. If the Court agrees that his claim should be allowed, Mr. Knight requests reasonable fees and costs pursuant RAP 18.1 and RCW 51.52.130. The award of attorney fees in workers' compensation cases is controlled by RCW 51.52.130. RCW 51.52.130; *see also* RAP 18.1.

VI. Conclusion

Petitioner respectfully requests that the Court accept review of this case, reverse the Court of Appeals, and order that Mr. Knight's claim be allowed with attendant attorneys' fees and costs, or, alternatively, remand this case for trial on the merits.

DATED this 16th day of July, 2014.

HARPOLD THOMAS[PC]



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RUDOLPH E. KNIGHT, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	)	No. 69514-2-I PUBLISHED OPINION FILED: June 16, 2014

VERELLEN, A.C.J. — Under the "traveling employee" doctrine, the employee bears the burden of proving that he or she is eligible for workers' compensation benefits, including that he or she was not on a distinct departure from the course of employment at the time of his injury. Because Rudolph Knight failed to meet this burden, the trial court properly granted summary judgment for the Department of Labor and Industries (Department). We affirm and deny Knight's request for attorney fees and costs.

FACTS

In December 2008, Knight worked as a catastrophic claims adjustor for State Farm. Although his home base was in Seattle, he began working on assignment in Galveston, Texas, shortly after Hurricane Ike struck the area. While working on location, Knight stayed in a hotel in a suburb of Houston and used a company van for

transportation. He was responsible for homeowner and flood claims in Texas City, directly across the bay from Galveston Island.

Knight returned to Texas on December 1 after spending Thanksgiving weekend visiting family. He was not scheduled to work December 2 but decided to drive 30 miles from his hotel to Galveston Island to survey the devastation and get a better understanding of what was going on there. He explained that even though he had already been working there for two months, he wanted to survey the area because he was coming off of a long weekend away and he wanted to get "back into the frame of mind of dealing with that specific situation."[1]

While Knight was driving back to his hotel, he noticed some men riding dune buggies and pulled onto the beach to watch. This is the last thing that he remembers until his wife visited him in the hospital more than 24 hours later.

His wife talked to him around 1:00 p.m. on December 2 while he was watching the dune buggy riders and she heard the riders approach Knight. She then ended the phone call so that she could go to work.

At 5:30 p.m., paramedics responded to a 911 call and found Knight lying on his back in the surf and mumbling "help me."[2] According to the lead paramedic, Craig Wunstel, Knight had some small lacerations and bruising and was treated with fluid for both hypothermia and intoxication. Wunstel asked Knight if he had been drinking or using drugs. Knight denied using drugs but said that he "had a lot of alcohol to drink."[3]

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[1] Report of Proceedings (RP) (June 20, 2011) at 77.

[2] RP (June 22, 2011) at 8.

[3] Id. at 23.

Knight also told Wunstel that the last thing he remembered was getting tired and passing out on the beach.

Police Officer Ernesto Garcia also responded to the scene. While inside the ambulance with Knight, he observed that Knight smelled of alcohol. He did not take any witness statements from anyone else on the beach that evening. Neither Wunstel nor Officer Garcia know how Knight was injured.

Dr. Blake Chamberlain treated Knight at the hospital emergency room. Dr. Chamberlain testified that Knight smelled of alcohol and that Knight told him that he drank "[a] lot."[4] Knight also told Chamberlain that he had been "riding in [the] dunes" but could not remember what type of vehicle he was on.[5] Based upon Knight's actions, slurred speech, sleepiness, and the smell of his breath, Dr. Chamberlain's initial diagnosis was alcohol intoxication. Dr. Chamberlain did not notice any large bruises or signs of apparent trauma but ordered two CT (computed tomography) scans. The CT scans showed a subarachnoid hemorrhage in Knight's brain. Dr. Chamberlain amended his diagnosis to include this injury.

Knight was then transferred to Methodist Hospital because it was better equipped to handle his brain injury. Testing at Methodist Hospital indicated that Knight's subarachnoid hemorrhage was likely caused by a brain injury and not an aneurysm. Bruising on Knight's face indicated that he suffered a contrecoup injury, meaning there was some kind of blunt trauma to his head that caused a "sloshing" of the brain where the brain knocked up against the other side of the skull and caused his injury.

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[4] RP (June 22, 2011) at 73.

[5] Id.

Dr. Chamberlain testified this type of injury could be sustained by falling on sand and was not consistent with an injury received by a blow to the head with a fist, but admitted that there was no way to know for sure how Knight was injured.

Unfortunately, while at Methodist Hospital, Knight's cognitive condition worsened. He was not able to express himself clearly and he developed a wandering eye. This was possibly due to complications from an angiogram performed at the hospital.

Knight filed an application for workers' compensation benefits. The Department ultimately rejected his claim, and Knight appealed to the Board of Industrial Insurance Appeals (Board). The Board affirmed the Department's decision, finding that Knight suffered his head injury because he became intoxicated, collapsed on the beach, and struck his head on the sand. It concluded that Knight's decision to become intoxicated was a distinct departure from his course of employment.

Knight appealed to King County Superior Court. The Department moved for summary judgment, arguing that there was no genuine issue of material fact that Knight abandoned his employment when he drank to the point of intoxication. In the alternative, the Department argued that Knight abandoned his employment by driving from his hotel to the beach and watching the dune buggy riders. The trial court agreed with both arguments and granted summary judgment to the Department.

Knight appeals.

DISCUSSION

Judicial review of a decision by the Board is de novo and is based solely on the evidence and testimony presented to the Board.[6] Either party is entitled to a jury trial to resolve factual disputes, but "the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same."[7] Appeals are governed by the civil rules, including CR 56 for summary judgment.[8]

Summary judgment decisions are reviewed de novo.[9] Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[10] A genuine issue of material fact exists if "reasonable minds could differ on the facts controlling the outcome of the litigation."[11] "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party."[12]

"Summary judgment is subject to a burden-shifting scheme."[13] The initial burden to show the nonexistence of a genuine issue of material fact is on the moving party.[14]

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[6] RCW 51.52.115; Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 800 n.4, 953 P.2d 800 (1998); Dep't of Labor & Indus. v. Fankhauser, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993).

[7] RCW 51.52.115.

[8] RCW 51.52.140; McClelland v. ITT Rayonier, Inc., 65 Wn. App. 386, 390, 828 P.2d 1138 (1992)).

[9] Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

[10] CR 56(c).

[11] Ranger Ins. Co., 164 Wn.2d at 552.

[12] Id.

[13] Id.

[14] Id.; see also Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

"A defendant may move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case."[15] Once this initial showing is made, the burden shifts to the plaintiff to make a showing sufficient to establish the existence of an element essential to his case.[16] In a claim for workers' compensation benefits, the injured worker bears the burden of proving that he is entitled to benefits.[17] If this burden cannot be met as a matter of law, summary judgment for the Department is proper. A nonmoving party must set forth specific facts showing a genuine issue for trial and may not rely on speculation.[18]

Workers' Compensation Benefits

Knight argues that the Department had the burden on summary judgment to show that Knight abandoned the course of his employment at the time of his injury. We disagree.

In Washington, an injured worker's right to benefits is statutory. An employee shall receive benefits for an injury only if it occurs "in the course of employment."[19] While the act should be liberally construed in favor of those who come within its terms,

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[15] Sligar v. Odell, 156 Wn. App. 720, 725, 233 P.3d 914 (2010).

[16] Id. (quoting Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

[17] Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 19 Wn. App. 800, 804, 578 P.2d 59 (1978) (holding that it was appellant's burden to prove that her husband's death occurred in the scope of employment and that she was eligible for widow's benefits).

[18] Young, 112 Wn.2d at 225-26.

[19] RCW 51.12.010.

individuals who apply for benefits are held to strict proof of an injury in the course of employment.[20]

In Ball-Foster Glass Container Co. v. Giovanelli, our Supreme Court adopted the traveling employee doctrine for employees on out-of-town business travel.[21] "A traveling employee is generally considered to be in the course of employment continuously during the entire trip, except during a distinct departure on a personal errand."[22] Under this doctrine, "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 employment even though the employee is not actually working at the time of injury."[23] The rule recognizes that a traveling employee is subjected to hazards he could otherwise avoid if he were home and that the hazards of travel become the hazards of the employment.[24] "Since 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 actually engaging in work activity, coverage should be limited to injuries fairly attributable to the risks of travel."[25]

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[20] Cyr v. Dep't of Labor & Indus., 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (quoting Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498, 505, 208 P.2d 1181 (1949)); DeHaas v. Cascade Frozen Foods, Inc., 23 Wn.2d 754, 759, 162 P.2d 284 (1945); Clausen v. Dep't of Labor & Indus., 15 Wn.2d 62, 68, 129 P.2d 777 (1942)).

[21] 163 Wn.2d 133, 142, 177 P.3d 692 (2008).

[22] Id.

[23] Id.

[24] Id. (quoting Chavez v. ABF Freight Sys., Inc., 2001-NMCA-039, 130 N.M. 524, 528, 27 P.3d 1011).

[25] Id. at 145.

The proper inquiry in determining if a traveling employee has left the course of employment is "whether the employee was pursuing normal creature comforts and reasonably comprehended necessities or strictly personal amusement ventures."[26] In making this inquiry, courts analogize to the "personal comfort" doctrine, i.e., that acts of personal comfort "'do not take the employee out of the scope of employment because they are necessary to his health and comfort.'"[27] A "distinct departure" occurs only if "the extent of the deviation is so substantial that an intent to abandon the job temporarily may be inferred or the method chosen is so unusual and unreasonable that the act cannot be considered incidental to the course of employment."[28]

Generally, intoxication is a defense to paying benefits when the claimant has become so intoxicated that he abandons his employment.[29] This generalization also makes sense in the traveling employee context. While drinking alcohol in moderation may be considered a personal comfort if it helps an employee relax at the end of the workday, drinking to the point of intoxication is a distinctly personal activity that is

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[26] Id. at 143.

[27] Id. at 150 (quoting N.&L. Auto Parts Co. v. Doman, 111 So.2d 270, 272 (Fla. Dist. Ct. App. 1959)).

[28] Id.

[29] Flavorland Indus., Inc. v. Schumacker, 32 Wn. App. 428, 434, 647 P.2d 1062 (1982). An exception exists if an employer encourages, finances, or creates an atmosphere that allows employees to become intoxicated. See id. at 435-36 (where there was evidence that employer knew employee drank at a weekly meeting, expected him to buy drinks for others, encouraged the drinking, and paid for the drinks, whether employee became so intoxicated that he abandoned his employment was properly presented to the jury). But such facts are not alleged in this case.

outside of the scope of employment.[30] Becoming intoxicated is not necessary to the employee's health and comfort and, in fact, may be detrimental to the employee's health. Furthermore, Knight presents no argument and cites no authority that an employee who drinks to the point of intoxication remains within the scope of employment under the traveling employee doctrine, especially where the employer had no involvement in such intoxication.

Knight and the Department both agree that the traveling employee doctrine applies because Knight was traveling on assignment for State Farm in Texas when he was injured. But they disagree whether Knight was still within the scope of his employment at the time of his injury. The Department argues that Knight was on a personal errand when he stopped to watch the dune buggy riders at 1:00 p.m. and when he drank to the point of intoxication. Even assuming that he was still within the course of his employment when he stopped to watch the dune buggy riders, there is substantial evidence that by 5:30 p.m., he was both intoxicated and injured. Sometime between 1:00 p.m. and 5:30 p.m., Knight drank to the point of intoxication and suffered his head injury. There is no direct or circumstantial evidence as to which event occurred first. Because of this lack of evidence, it is impossible to determine whether Knight was injured before or after he became intoxicated. Therefore, the outcome of this case depends upon who had the burden of proving whether or not Knight was on a distinct departure from his employment due to his intoxication at the time of his injury.

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[30] See, e.g., Superior Asphalt, 19 Wn. App. at 806 (in the context of the "coming and going rule," decedent's intoxication was evidence that he was not in the course of his employment when involved in an accident during his commute).

In determining which party bears this burden, we find Superior Asphalt & Concrete Co. v. Department of Labor & Industries helpful.[31] There, Division Three of this court considered who had the burden of proving whether an employee was acting in the course of employment while commuting from the job site in a company car. Generally, an employee is not in the course of employment while going to or from the job site unless the employer furnishes the employee's vehicle as an incident of employment.[32] But if the vehicle is provided solely for the employee's convenience or the employee is "on a recreational excursion which is not incident to employment or in furtherance of the employer's interests," his commute using a company car is not within the course of employment.[33]

In Superior Asphalt, the employee used his employer's vehicle to commute three to four hours from the job site to his home for the weekend.[34] Work ended around 11:00 a.m. and the employee began his commute home.[35] Approximately 12 hours later, the employee was six miles from home when he drove the employer's car across the center line, collided with another car, and died.[36] The employee's blood alcohol level was 0.23.[37] Due to the amount of time that lapsed after the employee left the job site and his intoxication, the superior court concluded that the employee's widow was not entitled to

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[31] 19 Wn. App. 800, 578 P.2d 59 (1978).

[32] Id. at 802-03.

[33] Id. at 803.

[34] Id. at 802.

[35] Id.

[36] Id.

[37] Id.

benefits because the employee left the course of his employment and was engaged in a "frolic of his own" at the time of the accident.[38] On appeal, the employee's widow argued that the employee had resumed his direct route back home at the time of the accident.[39] Division Three affirmed, holding that the widow did not meet her burden to prove that the employee ended his frolic at the time of the accident and that "[i]t was appellant's burden to prove her right to receive benefits under the act."[40]

Although Superior Asphalt involved the "coming and going" rule rather than the traveling employee doctrine, we find it is instructive. If a commuting employee has the burden to show that he was not on a frolic at the time of his injury, a traveling employee should also bear the burden of showing that he was not on a distinct departure from his employment at the time of injury. Under both doctrines, the employee must establish that an injury occurred in the course of employment.

When the Department moved for summary judgment, it had the initial burden to show the nonexistence of a genuine issue of material fact. The Department met this burden by showing that there is an absence of evidence to support Knight's case; mainly that there is no evidence that he was still within the scope of employment at the time of his injury.

The burden then shifted to Knight to show that there is a genuine issue of material fact that he was within the scope of his employment at the time of his injury.

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[38] Id. at 804.

[39] Id.

[40] Id.

Based on the lack of evidence, any theory as to how his injury occurred was purely speculative and summary judgment was warranted.

Knight argues that Ball-Foster created a presumption that a traveling employee is acting within the course of employment at the time of injury unless the Department proves that the employee departed on a personal errand. But Knight misconstrues the Ball-Foster analysis. Knight relies upon the Supreme Court's question whether the *employer* established that the employee distinctly departed from his employment at the time of injury. He asserts that the Supreme Court therefore signaled that the employer always has this burden. But in Ball-Foster, the employer was self-insured and the Board ordered it to pay for the employee's benefits.[41] The employer appealed to the trial court, and the Department moved for summary judgment.[42] As the nonmoving party, the employer then had the burden to demonstrate a genuine issue of material fact for trial. Here, because Knight is the nonmoving party, he bears this burden. Ball-Foster's straightforward application of the rules on summary judgment did not articulate a presumption in favor of the employee. No Washington case law supports Knight's contention that the employer bears the burden of establishing a distinct departure under the traveling employee doctrine.[43]

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[41] Ball-Foster, 163 Wn.2d at 139.

[42] Id.

[43] Knight also relies on Shelton v. Azar, Inc., 90 Wn. App. 923, 954 P.2d 352 (1998). But in Shelton, the court applied the traveling employee doctrine to award benefits to an employee injured in a car accident on his way from the airport to a hotel. Id. at 926. A third party to the accident argued that the coming and going rule should be applied to deny benefits because the employee had been at that work location for over two months. Id. at 936. That case did not in any way address who has the burden to prove that a traveling employee is on a distinct departure from employment at the time of an injury.

Knight argues that his decision to stop on the beach and watch the dune buggy riders was an activity within the personal comfort doctrine and did not take him outside of the scope of employment. Even if we accept this premise, becoming intoxicated is beyond the personal comfort doctrine, and Knight did not meet his burden on summary judgment to show that his injury occurred before he became intoxicated.

Knight argues that the Department provided no direct evidence that he was intoxicated before or at the time of his injury. But, as discussed above, it was not the Department's burden to show that Knight was intoxicated at the time of his injury. Rather, Knight had the burden to show that at the time of his injury, he had not distinctly departed from the course of his employment by becoming intoxicated.

Knight argues that whether he abandoned his employment through intoxication is a material question of fact for the jury. In support of this argument, he cites Orris v. Lingley.[44] But Orris is readily distinguished. In that car accident case, the court held that summary judgment was inappropriate because a toxicology report raised a genuine issue of material fact about whether the driver was so intoxicated that he abandoned the course of his employment.[45]

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[44] 172 Wn. App. 61, 288 P.3d 1159 (2012), review denied, 177 Wn.2d 1020 (2013).

[45] Id. at 68. Orris was injured in a car accident and Lingley, the driver, died. Id. at 64. The Department awarded Orris workers' compensation benefits for his injuries. Id. The death investigation toxicology report showed the presence of THC (tetrahydrocannabinol) and cannabinoids in Lingley's body. Id. at 67. Orris then sued Lingley's estate for negligence, but the estate argued that Orris's receipt of benefits was his exclusive remedy under the act, precluding a lawsuit against the estate. Id. at 66. The trial court granted summary judgment for the estate, but Division Three of this court reversed, recognizing that while the act generally provides an exclusive remedy for injuries, an injured worker may sue a negligent coworker if that coworker was not acting in the course of employment at the time of the injury. Id. at 66.

Knight does not raise a genuine issue of material fact precluding summary judgment. The Department presented extensive evidence that Knight was intoxicated when he was found and treated after 5:30 p.m. Both Officer Garcia and Dr. Chamberlain testified that Knight smelled like alcohol. And paramedic Wunstel and Dr. Chamberlain testified that Knight admitted that he had a lot of alcohol to drink. Knight cites to no evidence in the record that raises a genuine issue of material fact that he was not intoxicated.

Knight also argues that Dr. Chamberlain testified that even if Knight was intoxicated, his head injury could have occurred before intoxication. But because there is no evidence as to what happened to Knight between 1:00 p.m. and 5:30 p.m., this testimony is pure speculation and does not defeat summary judgment.

Knight argues that summary judgment was inappropriate because "a jury could reasonably find that Mr. Knight was the victim of a crime or accident; that he did not purposefully drink at all or at the very least did not drink to the point of abandonment; and that when the injury occurred Mr. Knight was not intoxicated."[46] But Knight points to no evidence in the record supporting any genuine issue of material fact for trial. Because there is absolutely no evidence of what happened to Knight between 1:00 p.m. and 5:30 p.m. except that he concluded the period both injured and intoxicated, his theories rely on pure speculation.

Knight argues that other jurisdictions do recognize a presumption that a traveling employee is within the scope of employment and that it is the employer or agency's burden to show a distinct departure. Because neither the statute nor Washington case

[46] Appellant's Br. at 31.

law support such a presumption and burden shift to the Department, we do not find this argument persuasive.

Attorney Fees

Knight requests reasonable attorney fees and costs on appeal under RAP 18.1 and RCW 51.52.130. RAP 18.1 allows an award of attorney fees and costs on appeal if applicable law authorizes them. An award of fees and costs under RCW 51.52.130 requires both that the injured worker requesting fees prevail in the action and that the accident fund or medical aid fund be affected.[47] Because Knight does not prevail on appeal, he is not entitled to attorney fees or costs under this authority.

We affirm the trial court.

WE CONCUR:

Cox, J.

[47] Pearson v. Dep't of Labor & Indus., 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

RUDOLPH E. KNIGHT, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	)	No. 69514-2-I ORDER GRANTING MOTIONS FOR RECONSIDERATION, WITHDRAWING AND REPLACING OPINION

Both parties filed motions for reconsideration of the court's April 7, 2014 opinion. The court has considered the motions and determined that reconsideration should be granted, the opinion withdrawn, and a substitute published opinion be filed.

Now, therefore, it is hereby

ORDERED that the opinion of this court filed April 7, 2014 is withdrawn and a substitute published opinion is filed.

Dated this 16th day of June, 2014.

Verellen, ACJ

Cox, J.

Appelwick, J

No. 69514–2–I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RUDOLPH KNIGHT, Petitioner, vs. STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	**CERTIFICATE OF SERVICE**

I, Lee S. Thomas, 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 Petitioner's Petition for Review to the Supreme Court upon the individuals listed by the following means:

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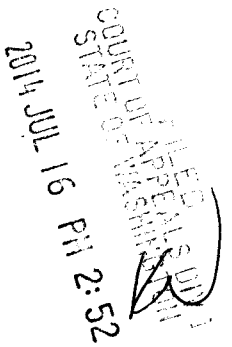

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DATED this 16th day of July, 2014.

Lee S. Thomas

CERTIFICATE OF SERVICE
Regarding: Petition for Review