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NO. 66994-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

BRIAN I. SHIRLEY, DEC'D,

Respondent.

REPLY BRIEF

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COURT OF APPEALS
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ORIGINAL

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I. SUMMARY OF REPLY BRIEF ARGUMENT

Respondent, Desiree Shirley, should be denied death benefits under RCW 51.32.050 because Brian Shirley's death was not proximately caused by his industrial injury. While the alcohol, alone, did not cause his death, neither did the Oxycodone or Celexa, alone, cause his death. Mr. Shirley's intentional or reckless decision to ingest alcohol simultaneously with his medications – against medical warnings – was an intervening act that broke the chain of causation between his injury and death. The Board of Industrial Insurance Appeals found, while Mr. Shirley did not intend to kill himself, his decision to take an excessive amount of Oxycodone with multiple other medications and, particularly, alcohol, was against medical advice. Certified Appeal Board Record (BR) at 8, Finding of Fact (FF) 6.

This Court should apply the “reasonable foreseeability” test from *McDougle v. Department of Labor and Industries*, 64 Wn.2d 640, 393 P.2d 631 (1964), to determine whether, in cases such as these, the causal link between an original injury and subsequent injury or death is broken. Applying the *McDougle* test would provide a reasonable limit on compensability for subsequent injuries or deaths. In applying the *McDougle* test to the facts of this case, Mr. Shirley's act of ignoring medical advice was not reasonably foreseeable and thus it should be held

that there is no direct causal relationship between his injury and death. As this negates proximate cause, Ms. Shirley's claim should be denied.

II. ARGUMENT

A. **Even Under A Multiple Proximate Cause Test, Mr. Shirley's Act of Combining Alcohol With Medications, Against Medical Warnings, Was An Intervening Act That Broke The Causal Chain Between His Industrial Injury And His Death**

1. **Mr. Shirley would not have died but for ingesting alcohol with his medications**

Ms. Shirley asserts that because the Oxycodone and Celexa were "a" cause of Mr. Shirley's death, she is entitled to death benefits. Resp. Br. at 7-8. A beneficiary is awarded death benefits when an original injury proximately causes the death. RCW 51.32.050. It is undisputed that the Industrial Insurance Act permits multiple proximate causes and that an industrial injury need not be "the" proximate cause of a subsequent injury or death to be compensable. However, to satisfy the proximate cause test, there must be a *direct causal relationship – unbroken by any new independent cause* – between the original injury and the subsequent injury or death. See WPI 155.06. Those facts are missing here.

While it is true that the alcohol, alone, would not have caused Mr. Shirley's death, it is also true that the Oxycodone and Celexa, alone, would not have caused his death. It was Mr. Shirley's decision to add alcohol to the equation that caused his death. This intentional or reckless

act by Mr. Shirley to ingest alcohol simultaneously with his medications – against medical warnings – was an intervening act that defeated any direct causal relationship between his injury and his death.

Chester Jangala, M.D., Mr. Shirley’s long-time attending physician, testified that he warns patients not to combine alcohol with medications, particularly, pain medications. Jangala, at 26.¹ He further testified that he likely warned Mr. Shirley in the same fashion. *Id.* Jaymie Mai, PhD, a pharmacy manager for the Department, testified that warning labels also appear on prescription bottles and that Mr. Shirley would likely have been advised against mixing medications with alcohol by dispensing pharmacies. Mr. Shirley ignored those warnings. *See* BR at 8, FF 6. This cost him his life.

Ms. Shirley calls the Department’s contention that Mr. Shirley acted intentionally or recklessly against medical advice “not even close to the facts of the situation.” *Resp. Br.* at 11. However, the toxicology report shows that Mr. Shirley ingested alcohol with medications. *Ex.* 4. He was warned not to do so. Jangala at 23. While Ms. Shirley testified that she saw Mr. Shirley perhaps drink “one” beer after his industrial injury, Dr. Jangala testified that he diagnosed Mr. Shirley with alcoholism around the time he was hospitalized for pancreatitis shortly before his

¹ The witness testimony is not consecutively numbered in the certified appeal board record. It will be referred to by last name and page number.

demise. Jangala at 13, 21. Mr. Shirley was also incarcerated for four to five months for driving under the influence of alcohol. Shirley at 22-23. While Dr. Jangala may have *speculated* that Mr. Shirley used different combinations of medications to cope with his pain, there is no evidence in the record that Mr. Shirley drank alcohol for the same purpose.

Mr. Shirley's decision to ingest alcohol simultaneously with his prescription medications, contrary to medical warnings, broke the causal chain between his industrial injury and his death. Because this intervening act broke any direct causal link between his injury and his death, proximate cause fails even under a multiple proximate cause test. Ms. Shirley's claim for death benefits should be denied.

2. **The Board decisions, *Killian* and *Thomas*, are distinguishable from this case in that neither involved excessive levels of medications or any medical warnings against ingesting particular substances**
 - a. **Mr. Shirley did not die because of his medications, he died because he chose to mix alcohol with his medications**

Ms. Shirley points to several Board decisions for the proposition that conditions caused by treatment for industrial injury are considered part and parcel of the injury itself. Resp. Br. at 6. This principle does not apply here because there is an intervening cause. Mr. Shirley did not die because of his medications. He died because he ingested alcohol with six

different medications against medical advice. *See* BR 8, FF 6. Thus, there was an intervening cause of his death.

b. The worker in *Killian* took his medications at appropriate levels, was never warned not to combine marijuana with medications, and used marijuana to alleviate his pain

Ms. Shirley claims that *In re David M. Killian*, Dckt. No. 06 17478, 2007 WL 4986270, involves a fact pattern that is identical to the facts of this case. Resp. Br. at 9. This case has obvious distinctions from *Killian*. There, the Board allowed death benefits where the worker, Mr. Killian, died of a combination of methadone, flexeril, and marijuana. *Killian*, WL 4986270 at *5. However, the Board's ruling that the combined effects of Mr. Killian's medications were a proximate cause of his death was, in part, based on its determination that his medications were prescribed and taken at appropriate levels. *Id.* at *4. Mr. Killian used marijuana to alleviate his pain. *Id.* at **3, 5. Mr. Killian was not warned against combining marijuana with his medications. After years of taking the medications prescribed for the effects of his industrial injury, Mr. Killian's liver could not process drugs in a normal fashion, contributing to his death. *Id.* at *5.

Ms. Shirley suggests that Mr. Shirley took alcohol as a form of pain relief. Resp. Br. at 13. This is unsupported by the record. Unlike

Mr. Killian who took marijuana to alleviate his pain, there is no evidence in the record that Mr. Shirley drank alcohol to alleviate his pain. Mr. Shirley, unlike Mr. Killian, failed to take his medications at appropriate levels. The toxicology report indicates that the Oxycodone and Celexa were taken in the “toxic” range, *i.e.*, above their prescribed doses. Ex. 4. Dr. Jangala testified that he prescribed these medications over years of treatment, but not to be taken all at once. Jangala at 12-14. Dr. Mai also testified these medications are not to be taken together. Mai at 21. There would also have been directions accompanying the Oxycodone and Celexa medications. Reay at 12-14; Mai at 26, 28. Dr. Jangala was “puzzled” as to why Mr. Shirley took so many different things at once. Jangala at 15.

Furthermore, in *Killian*, the worker was not warned against the risk of combining marijuana with his medications. Mr. Shirley, on the other hand, was advised by Dr. Jangala not to ingest alcohol simultaneously with his medications. Jangala at 26. Dr. Jangala testified that is what he tells his patients. *Id.* Mr. Shirley ignored these warnings. The Board found that he ignored medical warnings. BR 8, FF 6. One cannot simply replace the marijuana in *Killian* with the alcohol in this case and have a “completely analogous” scenario, as Ms. Shirley contends. Resp. Br. at 9. There are significant factual distinctions between the two cases.

c. The worker in *Thomas* did not abuse her medications or ignore medical warnings; she was found to have innocently relied on her physician's advice

Ms. Shirley also cites *In re Bobbie Thomas, Dec'd*, Dckt. Nos. 04 17345, 04 17346, 2006 WL2989442. Resp. Br. at 26. The present case is distinguishable from *Thomas*, because there is no evidence that the injured worker there abused her medications. *Thomas*, WL2989442 at *8. She died of an accidental Oxycodone toxicity, but there was no evidence to suggest that she took more than the prescribed dosage of the medication. *Id.* The Board awarded benefits to the worker's surviving spouse, because "Ms. Thomas was innocently relying on her treating physician's advice, her use of such medications did not break the chain of proximate causation between the industrial injury and the benefits sought . . ." *Id.* at *9.

Here, Mr. Shirley died of the combined effects of numerous substances in his system, including Oxycodone, Celexa, and alcohol. Unlike in *Thomas*, however, Mr. Shirley's level of Oxycodone and Celexa were found in his system at above their prescribed doses. There is no evidence to suggest that Dr. Jangala had advised Mr. Shirley to ingest toxic levels of medications. To the contrary, Dr. Jangala testified that he was "puzzled" as to why Mr. Shirley would ingest so many medications at once. In addition, Mr. Shirley was warned not to consume alcohol with

his medications whereas, BR 8, FF 6, the worker in *Thomas* was found to have innocently followed her doctor's advice. The causal link here was broken.

3. *Wheeler and McKelvey are distinguishable*

Ms. Shirley relies on *Wheeler v. Glens Falls Insurance Co.*, 513 S.W.2d 179 (Tenn. 1974), for the proposition that benefits can be allowed where the worker dies from overdrinking alcohol. Resp. Br. at 15. There, the employer asserted that the worker's intentional decision to drink alcohol despite medical warnings defeated proximate cause between his industrial injury and death and, further, that his drinking amounted to "willful misconduct" barring recovery under Tennessee's workers compensation statute. *Id.* at 180. The worker was injured when he slipped and fell on ice. *Id.* He died six months later from acute necrotizing pancreatitis and contributing factors bilateral lobular pneumonia and cirrhosis of the liver. *Id.*

Although the worker had a history of alcoholism at the time of his injury, the evidence showed that his drinking increased after the injury in order to alleviate the pain and despair from the injury. *Id.* at 181. The court found that the worker drank because of "pain, despair, and idleness resulting from his injury" *Id.* at 183. The court also found that because of a history of alcoholism, the worker had "no reasonable control

over his decision to continue drinking.” *Id.* The court upheld an award of benefits to the widow. *Id.* at 184.

The case here is distinguishable from *Wheeler* in two significant respects. First, unlike the worker in *Wheeler*, there is no evidence in the record that Mr. Shirley drank alcohol to cope with any condition related to his industrial injury. Second, while the *Wheeler* court noted that the worker ignored warnings that consuming alcohol could lead to his death, it also found that because of his alcoholism, the worker had no volitional control and thus could not resist the lure of alcohol. There is no evidence here that Mr. Shirley had no control over his decision-making. The evidence instead shows a worker who ignored medical warnings not only by combining alcohol with prescription drugs, but also by combining multiple drugs and taking these drugs above their prescribed doses. *See* BR 8, FF 6. Unlike in *Wheeler*, this act broke the causal chain.

Ms. Shirley also relies on *McKelvey v. City of Dequincy*, 970 So.2d 682 (La. 2007), for her assertion that mixing alcohol with medications or overusing medications or alcohol does not necessarily break the chain of causation between the industrial injury and subsequent death. Resp. Br. at 15. In *McKelvey*, the worker sustained back and lower extremity injuries. *McKelvey*, 970 So.2d at 685. He was prescribed a number of medications for his pain. *Id.* Approximately five years later he died of a probable

mixed drug interaction. *Id.* The worker received benefits continuously from the date of his industrial injury until the date of his death. *Id.* The toxicology report revealed that he had no alcohol or other controlled substances in his system when he died. *Id.* While he had ten medications in his body when he died, there was no evidence that any of those medications were misused. *Id.* The court found that the death was directly attributable to the industrial injury and affirmed a trial court's award of death benefits. *Id.* at 690.

Notably, the *McKelvey* court, in support of its finding of a causal link, stated:

Mr. McKelvey needed permanent medical treatment. However, because Mr. McKelvey was not suitable for surgery, his permanent medical treatment consisted of the long-term use of highly addictive prescription medication. *Thus, it was foreseeable that a dependence on these medications may develop.*

Id. at 688 (emphasis added).

Here, unlike the worker in *McKelvey*, the levels of Oxycodone and Celexa found in Mr. Shirley's system were above their prescribed doses. There is no evidence that the worker in *McKelvey* was warned against ingesting or combining particular substances. Unlike the worker in *McKelvey*, whose claim had been open continuously for benefits from his injury until his death, Mr. Shirley's claim had been closed for nearly two

years when he died. It was closed without a disability award. Ex. 3. At claim closure, he was taking ibuprofen. Thorson at 26. He was not taking Oxycodone or Celexa, substances found at toxic levels when he died. Thus, unlike the insurer in *McKelvey* who was paying benefits continuously until the worker's death, it was not reasonably foreseeable to the Department that Mr. Shirley would require Oxycodone or Celexa for his injuries, or that he would ignore medical advice and mix these medications with alcohol. The causal chain was broken.

Ms. Shirley argues that "Mr. Shirley was using prescription medications for long-term, chronic pain, and it was foreseeable that he might at some point have problems with this," which she asserts was not unreasonable. Resp. Br. at 15. This was not merely some "problems" with the medication. He took the Oxycodone and Celexa at toxic levels. It was unreasonable and unforeseeable to think that Mr. Shirley would ignore the advice of his doctor and the medications' warning materials to take alcohol with the medications at higher than prescribed dosages.

4. The cases cited by the Department from other jurisdictions together stand for the proposition that intentional or reckless acts by a worker can break the causal chain between an injury and subsequent death

Ms. Shirley attempts to distinguish the cases cited by the Department that together stand for the proposition that the intentional or

reckless actions of a worker can break the causal chain between the original injury and subsequent injury or death. Resp. Br. at 16-20.

The toxicology report indicates that Mr. Shirley had in his system Oxycodone and Celexa at toxic levels. Ex. 4. He also had alcohol in his system, which was against the advice of his physician and prescription label warnings. BR 8, FF 6. While Dr. Jangala speculated that Mr. Shirley took numerous medications to control his pain, there is no evidence in the record that he drank alcohol to control his pain. The medications alone would not have caused Mr. Shirley's death. Mr. Shirley's decision to combine medications with alcohol brought about his death. Just as in *Thornton v. Troublefield*, 649 P.2d 538 (Okla. 1982), this volitional act by Mr. Shirley broke the causal chain.

In *Sullivan v. B & A Construction, Inc.*, 307 N.Y. 161, 120 N.E.2d 694 (1954), the claimant knew of the danger of his knee locking when he was driving. He chose to ignore that risk and drive anyway. As a result, he caused an auto accident. Injuries from the accident were not compensable because his decision to ignore the risks was an intervening act. Similarly, Mr. Shirley was told by Dr. Jangala not to mix his medications with alcohol. Warnings would have also appeared on prescription labels. Mr. Shirley's decision to ignore these medical warnings, BR 8, FF 6, broke the chain of causation.

Ms. Shirley appears to assert that an *actual harm* must occur before a worker can have knowledge of a risk to the extent that acts taken inconsistent with that risk could rise to the level of an intervening act. *See* Resp. Br. at 18. However, an actual harm should not be required. The *potential* for harm should be sufficient.

The decision in *McDonough v. Sears, Roebuck and Co.*, 127 N.J.L. 158, 21 A.2d 314 (1941), demonstrates that no actual harm needs to occur; rather it is merely the potential for harm that puts a claimant on notice not to engage in certain activity and engaging in that activity with the potential for harm breaks the causal chain. In *McDonough*, there was no evidence that the claimant had been burned before. However, his doctor's warning not to light a cigarette in his hospital bed due to the potential of being burned was sufficient to put the claimant on notice of the risk such that his subsequent act of lighting a cigarette against his physician's warning was an intervening act breaking the causal chain. Similarly, here, medical warnings about the potential for harm when mixing alcohol and medications was sufficient. Ignoring those warnings about the potential for harm, like in *McDonough*, was an intervening act.

B. The *McDougle* “Reasonable Foreseeability” Test Should Be Applied To Determine Whether A Subsequent Injury Or Death Is Compensable Because It Sets A Reasonable Limit On The Compensability For Injuries Or Death Subsequent To The Original Compensable Injury

1. *McDougle* applies to more than aggravation cases

While it is true that *McDougle* has been applied only in aggravation cases, the test from *McDougle* should be applied to cases where it is asserted that an injury or death following an original compensable industrial injury is compensable as a residual of the original injury. The Department does not dispute that, in considering the original injury, fault is not considered. However, fault should be considered when looking at whether a subsequent injury or death is compensable. Otherwise, *McDougle* would have no application in any case, including aggravation cases.

In *McDougle*, the court stated:

The test to be applied, in cases such as the present, is whether the activity which caused the aggravation is something that the claimant might reasonably be expected to be doing, or whether it is something that one with his disability would not reasonably be expected to be doing.

McDougle, 34 Wn.2d at 645.

This “reasonable foreseeability” test should be applied in cases where the issue is whether a subsequent injury or death is compensable. Just like with aggravation cases, there is an original compensable injury.

Like with aggravation cases, there is a worker (or in cases such as this, a beneficiary) seeking additional benefits stemming from the original compensable claim. Just like with aggravation cases, there should be a bright line test to determine whether the worker's subsequent acts are reasonable and therefore compensable under the original claim. The court has already adopted such a test in the context of aggravation cases, which was based on rules adopted in other jurisdictions for determining whether a subsequent injury or death is compensable as part of the original injury. *McDougle*, 64 Wn.2d at 645-46. This test would create a reasonable limit on compensability, and that limit, just as with aggravation cases, would be set at the point where the worker engages in acts that are not reasonably foreseeable given a disability. If that act is not reasonably foreseeable, then it should be held to be an intervening act that breaks the causal chain.

2. A previous disability award is not required for *McDougle* to apply

Ms. Shirley asserts that a prior disability award is required in order for the *McDougle* test to have any applicability. Resp. Br. at 25. However, aggravation claims often involve injuries that did not result in any prior disability award. *E.g.*, *Tollycrafts Yachts Corp. v. McCoy*, 122 Wn.2d 426, 428, 858 P.2d 503 (1993); *In re Robert D. Tracy*, BIIA Dec. 881695, 1990 WL 95662 (1990). While *McDougle* happened to involve a

worker with a 30 percent disability award, the court imposed no requirement that a worker actually have received a disability award before *McDougle's* “reasonableness test” can be applied, as evidenced in *Tollycrafts* and *Tracy*.

3. The *McDougle* test would be meaningless if the question of compensability for subsequent injuries was forever resolved by the compensability decision for the original workplace injury

Ms. Shirley essentially argues that once an initial compensability decision is made, any subsequent injuries flowing in any way from that original injury is also compensable. If that were the case, then the court would not have adopted the *McDougle* test which places at least some reasonable limit on compensability when activity that is not reasonably foreseeable is engaged in.

It is undisputed that fault is not a factor in the original compensability decision. However, the Industrial Insurance Act, which provided for no-fault compensation for workplace injuries, was enacted in 1911, well before the *McDougle* decision. Thus, the *McDougle* court had this “no fault” mandate in mind when it established the “reasonable foreseeability” test in aggravation cases. The *McDougle* court cites a number of decisions that place limits on compensability, such as *McDonough* and *Sullivan, supra*, which, notably, involved claims for

compensability for subsequent injuries. *See McDougle*, 64 Wn.2d at 644-45. Thus, fault should be considered in determining whether subsequent injuries or deaths are compensable under the original injury claim. The *McDonough* and *Sullivan* courts make clear that such compensability terminates upon the worker's intervening act.

Public policy considerations militate against granting death benefits in light of Mr. Shirley's act of mixing alcohol and multiple medications against medical advice. The Department's initial compensability decision should not render it responsible for all future acts of a worker. The line for compensability should be drawn where, as here, a worker's intentional or reckless decision to disregard medical advice breaks the causal chain. The *McDougle* court drew the line at the reasonableness of the worker's acts. That same line should be drawn here. Mr. Shirley's case should not be covered, because his choice brought about his death.

C. Applying The "Reasonable Foreseeability" Test From *McDougle*, Mr. Shirley's Act Of Ignoring Medical Warnings Was An Intervening Act That Broke The Causal Chain Between His Injury And His Death

Mr. Shirley engaged in behavior that was not reasonably foreseeable. The Department closed Mr. Shirley's claim in 2005 without an award for permanent partial disability. Ex. 3. Stated differently, he

had no ratable impairment for his back. He did not appeal that determination to the Board. At the time of closing, he was taking ibuprofen, not Celexa or Oxycodone which were found in his blood at toxic levels. Thorson at 26. The Department could not have foreseen that someone with no disability and taking only ibuprofen at the time of claim closure would, nearly two years later, choose to ignore medical advice and mix alcohol with his prescription medications. This was more than an error in judgment that Ms. Shirley contends. Resp. Br. at 22. Because this behavior was not reasonably foreseeable under *McDougle*, it was an intervening act.

As discussed above, Ms. Shirley cites *McKelvey*, which actually suggests that there is an element of foreseeability in the causal relationship analysis. In that case, the claim had been open for five years when the claimant died. The insurer had been paying medical benefits during that time, but then suddenly stopped benefits when he died because the worker “apparently ingested excessive amounts of medications and the death was not caused by his work-related injury.” *McKelvey*, 970 So.2d at 685. The court found that it was foreseeable that the claimant could become addicted to these medications. The insurer clearly knew or should have known about these medications and the risk of addiction because the worker’s claim was open for treatment from his injury until his death.

Here, unlike the claim in *McKelvey*, Mr. Shirley's claim was closed when he died and had been for almost two years. Mr. Shirley did not begin taking Oxycodone or Celexa until after the claim had closed. *See Mai* at 15. His claim was closed with no award for disability. Dr. Mai testified that it would be unusual to find alcohol in someone's system when they are taking pain medications. *See Mai* at 18. Dr. Mai also testified that while the claim is open, the Department is billed for prescriptions and thus is able to monitor prescription use. *Mai* at 13-14.

Because Mr. Shirley's claim was closed without any disability award, it was not reasonably foreseeable that Mr. Shirley would use Oxycodone or Celexa in the first place, let alone at excessive levels. It was also not reasonably foreseeable that he would ignore medical warnings and combine these medications with alcohol. Since his actions were not reasonably foreseeable to the Department under the *McDougle* test, they amounted to an intervening act. His death is not compensable.

III. CONCLUSION

Based on the above, the Department requests that the Court reverse the March 18, 2011 order of the superior court, which affirmed the Board's award of death benefits, thereby reinstating the Department's May 28, 2008 order affirming the denial of benefits for the death of Mr. Shirley.

RESPECTFULLY SUBMITTED this 23rd day of September,

2011.

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A handwritten signature in black ink, appearing to read "Scott T. Middleton", written over the printed name.

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