

NO. 66994-0-I

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

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DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

BRIAN I. SHIRLEY, DEC'D,

Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This matter involves a claim under the Industrial Insurance Act for death benefits, which are paid “where [the decedent’s] death results from the [industrial] injury.” RCW 51.32.050(2)(a). It raises a critical question about where the Department of Labor and Industries’ responsibility ends for a death sustained subsequent to an original industrial injury that was brought about by the worker-decedent’s intentional or reckless actions. The line must be drawn where, as here, the decedent’s behavior was an intervening act breaking the causal chain between his injury and his death.

Brian Shirley suffered a low back strain on June 8, 2004. The Department allowed his claim and paid benefits. It closed Mr. Shirley’s claim on March 2, 2005. Two years later, Mr. Shirley died. He died from the combined effects of consuming alcohol and six medications. Two of those medications – oxycodone and citalopram – were taken at toxic levels. Mr. Shirley chose to ingest alcohol simultaneously with these medications despite being warned by his doctor against it. Mr. Shirley’s decision to ignore his doctor’s advice ultimately cost him his life.

No one disputes that Mr. Shirley’s death was unfortunate. However, his act of intentionally or recklessly ingesting six medications simultaneously with alcohol, and against medical warnings, constituted an intervening act that broke the causal chain between his industrial injury on

June 8, 2004, and his subsequent death on May 3, 2007. The Department requests that this Court reverse the superior court's denial of its motion for summary judgment and hold, as a matter of law, that Mr. Shirley's death did not result from his industrial injury.

## **II. ASSIGNMENT OF ERROR**

### Assignment of Error

The superior court erred by entering its order dated March 18, 2011 which denied the Department's motion for summary judgment and affirmed the award of survivor benefits.

### Issue Pertaining to Assignment of Error

Was Mr. Shirley's intentional simultaneous ingestion of alcohol and multiple prescription medications, contrary to medical warning, an intervening activity that broke the chain of causation between his industrial injury and his death, thereby precluding the payment of survivor benefits to his beneficiary?

## **III. STATEMENT OF THE CASE**

### **A. Facts**

#### **1. Industrial injury**

On June 8, 2004, Brian Shirley sustained an industrial injury when the truck he was sitting in was about to be hit by another truck. Jangala at

9; Shirley at 15.<sup>1</sup> Mr. Shirley jumped out of the truck to avoid being hit. *Id.* He filed an application for benefits with the Department of Labor and Industries on June 10, 2004. Certified Appeal Board Record (BR) at 8; Finding of Fact (FF) 1. The Department allowed his claim and paid benefits. BR 8; FF 1. Mr. Shirley reached maximum medical improvement by February 5, 2005. Thorson at 10.

On March 2, 2005, the Department closed the claim without an award for permanent partial disability. BR 63; Mai at 15; Ex. 3. The Department affirmed the closing order on May 27, 2005. BR at 8-9; FF 1. When the claim was closed, no physician was prescribing Mr. Shirley opioids. Mai at 15.

On May 10, 2005, Mr. Shirley reported to Richard Thorson, M.D., an orthopedic surgeon who performed an independent medical examination on Mr. Shirley, that he was taking only ibuprofen at that time. Thorson at 26.

## **2. Mr. Shirley's death**

Mr. Shirley died on May 3, 2007. BR at 9, FF 1. He was employed at the time of his death. Shirley at 14. He had been employed since claim closure with the exception of four to five months when he had been incarcerated for driving under the influence of alcohol. Shirley at 23,

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

26. Desiree Shirley, Mr. Shirley's widow, reported that the day of Mr. Shirley's death was a typical day and he went to work as usual. Shirley at 11, 14. In the evening, he took a chainsaw over to his neighbor's place to help with cutting wood. Shirley at 14. He returned home and went to bed. Shirley at 10, 14. The next morning, he did not wake up. Shirley at 11.

### 3. Autopsy and toxicology reports

The King County Medical Examiner performed the autopsy. The cause of death was listed as:

[a]cute combined ethanol, oxycodone, citalopram, alprazolam, amitriptyline, carbamazepine, and acetaminophen intoxication. Hypertensive and atherosclerotic cardiovascular disease contributed to death.

Ex. 4.

The toxicology report revealed that the following substances were in Mr. Shirley's system:

BLOOD ETHANOL                      0.07 g/100mL

#### BLOOD ANALYSES

oxycodone	0.13	mg/L
carbamazepine	1.2	mg/L
citalopram	0.43	mg/L
acetaminophen	11.0	mg/L
desmethylcitalopram	pos	mg/L
promethazine	pos	mg/L
alprazolam	0.02	mg/L
caffeine	pos	
amitriptyline	0.10	mg/L
nicotine/cotinine	pos	

nortriptyline 0.11 mg/L

*Id.*; Harruff at 5-6.

Of these medications, both oxycodone and citalopram<sup>2</sup> were taken at toxic levels. Reay at 12-14; Harruff at 5-6; Mai at 17-18.

Jaymie Mai, Ph.D, the Department's pharmacy manager, testified that, at the time of claim closure, Mr. Shirley was not being prescribed any of the medications found in the 2007 toxicology report. Mai at 14, 34.

In addition to the six medications found in his system, Mr. Shirley's blood alcohol count was .07 grams per 100 cc's, close to the presumed intoxication level of .08 grams per 100 cc's. Reay at 10.

The medical experts agreed that the oxycodone and citalopram found in Mr. Shirley's blood during the autopsy were in the toxic range.<sup>3</sup> Reay at 13-14; Harruff at 13, 15; Mai at 17-18. There was evidence of aspiration of fluid from his stomach, which is an accumulation of fluid from the stomach in Mr. Shirley's lungs. Harruff at 6. Bronchopneumonia is associated with that condition. *Id.*

The medical experts explained that the medications that Mr. Shirley ingested were depressants. Harruff at 6; Thorson 29. Beverage alcohol is ethanol and is also a depressant. Harruff at 6, 10. Alcohol

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<sup>2</sup> The common name for citalopram is Celexa. Reay at 13.

<sup>3</sup> These substances can appear in an individual's bloodstream at one of three levels: (1) therapeutic; (2) toxic; or (3) lethal. Reay at 11-12; Mai at 17. "Toxic" refers to a quantity above the therapeutic range and "lethal" means deadly. Reay at 12, 13.

elevates the toxic effect of a drug. Reay at 25. Narcotics not only decrease respiration, but also decrease the gag reflex, so vomit that comes up from the stomach, is sucked back into the lungs and creates pneumonia. Reay at 26; Harruff at 6. Bronchopneumonia is an infection of the lung caused by the aspiration of the infected material from the mouth. Harruff at 7-8. Mr. Shirley's lungs were quite heavy as compared to the normal weight. Reay at 26. These conditions were caused by the overdose. Reay at 26; Harruff at 6-7.

The other abnormal findings from the autopsy included an enlarged heart, weighing 500 grams. Reay at 26; Harruff at 8. The upper limits of a healthy heart would be 400 grams. Reay at 26; Harruff at 9. Mr. Shirley also suffered from high grade coronary atherosclerosis, that is, a narrowing of the coronary arteries. Reay at 26-27; Harruff at 8-9. These two conditions made Mr. Shirley susceptible to a sudden cardiac death. Reay at 27; Harruff at 9-10. Alcohol can make the heart unstable by itself and lead to heart enlargement over a period of time. Harruff at 10.

Mr. Shirley also suffered from chronic pancreatitis. Reay at 27; Harruff at 11. Where there is chronic pancreatitis, it indicates that there have been previous episodes of acute pancreatitis. Harruff at 21. Chronic pancreatitis may be coexistent with acute pancreatitis and acute pancreatitis can be very severe. Harruff at 10-11. The most common

cause of pancreatitis is alcoholism and, in Mr. Shirley's case, Dr. Harruff testified, it would be reasonable to associate the pancreatitis with Mr. Shirley's alcoholism. Harruff at 12-13.

Drs. Harruff and Thorson testified that a narcotic drug, such as oxycodone, would be proper treatment for acute pain such as an acute episode of pancreatitis, but not chronic pain. Harruff at 14; Thorson at 26. Dr. Harruff concluded that the drugs alone would not have been lethal. Harruff at 17. The combination of all the drugs with alcohol and the heart disease caused Mr. Shirley's death. Harruff at 17. At the time of claim closure, Mr. Shirley was not taking any of the medications found in his blood after his death. Thorson at 26; Mai at 14, 34. At the time of his death, neither Mr. Shirley nor any health care provider on his behalf had filed an application with the Department to reopen his claim. Ex. 3.

#### **4. Dr. Jangala**

Chester Jangala, M.D., a family medicine practitioner, began treating Mr. Shirley before the industrial injury of June 8, 2004, and also treated him for the effects of that injury – a lumbar sprain. Jangala at 10. He testified that Mr. Shirley “seemed to have developed” depression from the low back injury. Jangala at 11. Of the substances found in Mr. Shirley's blood at the time of death, Dr. Jangala had prescribed oxycodone, citalopram, amitriptyline, and alprazolam. Jangala at 12. He

prescribed these drugs over years of treatment but not to be taken simultaneously. Jangala at 12-14. Dr. Jangala testified that he last prescribed alprazolam and amitriptyline “in the distant past.” Jangala at 12-14. Dr. Jangala stated: “I am puzzled why he took so many different things at once ... I think he took a little bit of everything that he had in the house.” Jangala at 15.

The oxycodone Dr. Jangala prescribed for Mr. Shirley was “a fairly strong pain reliever.” Jangala at 13. Dr. Jangala testified that this can be used for back pain and can also be used for pancreatitis, which Mr. Shirley had on April 30, 2007. *Id.* He opined that Mr. Shirley may have been taking oxycodone for pancreatitis as well, but thought he was taking it mainly for his back. *Id.*

In Dr. Jangala’s opinion, “the most lethal part to the mixture was amitriptyline, nortriptyline and the carbamazepine. Oxycodone didn’t help and the alcohol made everything a lot worse.” Jangala at 15. Dr. Jangala also testified that he treated Mr. Shirley for pancreatitis and that “an acute episode of pancreatitis can be one of the worst pains that you can have.” Jangala at 20. Mr. Shirley had been hospitalized for this condition, but when Dr. Jangala saw him on April 30, 2007 – three days before his death – the pancreatitis had improved. *Id.* At the April 30, 2007 visit, Dr. Jangala diagnosed Mr. Shirley as an alcoholic.

Dr. Jangala counseled Mr. Shirley not to drink alcohol with the prescribed medications. Jangala at 26. He testified that he is “fairly cautious about warning [his] patients about not mixing meds during the day to take them. Not to drive when taking them or not to mix meds.” *Id.* Dr. Jangala testified that he counsels patients not to consume alcohol “particularly if they’re taking pain medications.” *Id.* In addition to Dr. Jangala’s warning, dispensing pharmacies include a warning to avoid using alcohol with the medications found in Mr. Shirley’s blood. Mai at 15-16.

Dr. Jangala testified that Mr. Shirley had a long history of high blood pressure and high cholesterol which causes cardiovascular disease. Jangala at 24, 26.

## **B. Procedural Background**

On March 18, 2008, Ms. Shirley filed an application for death benefits with the Department of Labor and Industries. BR at 9. Her claim was denied on April 11, 2008. *Id.* Ms. Shirley protested the denial and the Department issued an order affirming its decision denying death benefits on May 28, 2008. *Id.*

Ms. Shirley appealed to the Board of Industrial Insurance Appeals (Board) and the Industrial Appeals Judge found that Mr. Shirley’s

ingestion of alcohol simultaneously with six medications constituted an intervening cause that broke the chain of causation between the industrial injury and Mr. Shirley's death. BR at 43-45.

The Board reversed the industrial appeals judge, ruling that Ms. Shirley's application for death benefits should be allowed. BR 9-10. It reasoned that Dr. Jangala "prescribed opioids for Mr. Shirley's low back condition, which was caused by the industrial injury of 2004. But for Mr. Shirley's use of opioids, to address his industrially related back pain, Mr. Shirley's use of alcohol would not have caused his death." BR 8. It further reasoned that Mr. Shirley's unwise decision to use alcohol with the prescription drugs did not rise to the level of a supervening cause as "benefits under the Industrial Insurance Act are not denied even when the injury is due to the worker's own act of negligence." *Id.*

The Department appealed to the superior court, where it moved for summary judgment on the single legal issue: whether Mr. Shirley's intentional simultaneous ingestion of alcohol and multiple drugs contrary to medical warning constituted an intervening act that broke the chain of causation between his industrial injury in 2004 and his death in 2007. CP at 38. The superior court denied the Department's motion and affirmed the Board's award of survivor benefits. CP 51-53.

#### IV. STANDARD OF REVIEW

The superior court reviews the Board's findings of fact and conclusions of law de novo. RCW 51.52.115; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). Although judicial appeal of a decision of the Board of Industrial Insurance Appeals is de novo, it must be based solely on the evidence presented to the Board. RCW 51.52.115; *Dep't of Labor & Indus. v. Avundes*, 95 Wn. App. 265, 270, 976 P.2d 637 (1999). As with civil cases, a superior court may grant summary judgment only if there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. CR 56(c); RCW 51.52.140.

The appellate court conducts de novo review of a summary judgment order where no facts are in dispute and the only issue is a question of law. *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993). On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Avundes*, 95 Wn. App. at 269. Although judicial appeal of a decision of the Board of Industrial Insurance Appeals is de novo, it must be based solely on the evidence presented to the Board. RCW 51.52.115; *Avundes*, 95 Wn. App. at 270.

## V. SUMMARY OF THE ARGUMENT

To be receive death benefits under RCW 51.32.050(2)(a), the death must result from the industrial injury. That is, the death must be proximately caused by the injury. Proximate causation requires a direct causal chain, unbroken by any intervening act, between the industrial injury and the subsequent death. Mr. Shirley's intentional or reckless decision to ingest alcohol simultaneously with six medications – two at toxic levels – against the advice of medical warnings, constituted an intervening act that broke the causal chain between his industrial injury in 2004 and death in 2007.

It was not reasonably foreseeable that Mr. Shirley, given his heart condition and warnings about mixing alcohol with medications, would have ignored that medical advice. While fault is not a factor in the compensability decision for the original injury, an intentional or reckless act, such as that which occurred here, can constitute an intervening act that negates the required nexus between the original injury and the subsequent death. Sound public policy further dictates that benefits should be denied in this case. The superior court's decision denying summary judgment to the Department should be reversed and benefits denied to Ms. Shirley.

## VI. ARGUMENT

### A. **A Beneficiary May Receive Death Benefits Under RCW 51.32.050(2)(a) Only When The Decedent's Industrial Injury Proximately Caused The Death.**

#### 1. **To receive benefits, the death must be proximately caused by the industrial injury**

Claims for death benefits under the Industrial Insurance Act, RCW 51, are governed by RCW 51.32.050.

RCW 51.32.050(2)(a), in pertinent part, states:

Where death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title shall receive monthly for life or until remarriage payments ....

Stated differently, a beneficiary may receive death benefits when the original injury proximately causes the death.

Proximate cause means a cause which in a direct sequence, unbroken by any new independent cause, produces the death complained of and without which such death would not have happened. WPI 155.06; *Wendt v. Dep't of Labor & Indus*, 18 Wn. App. 674, 683-84, 571 P.2d 229 (1977).

#### 2. **Intentional or reckless acts by workers have been found to constitute intervening acts breaking the causal chain between the original injury and a subsequent injury**

Courts in other jurisdictions have found that intentional or reckless acts by the worker have constituted intervening acts that break the chain of

causation between the original injury and a subsequent accident. While these cases are not binding on this Court, they offer guidance in defining an “intervening act” under these circumstances.

In addition, Professor Arthur Larson, a leading authority on worker’s compensation, has stated: “when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of ‘direct and natural results,’ and of claimant’s own conduct as an independent intervening cause.”<sup>1</sup> Arthur Larson, *Larson’s Worker’s Compensation Law* § 10.01 (2010).

In *McDonough v. Sears, Roebuck and Co.*, 127 N.J.L. 158, 159, 21 A.2d 314 (1941), the court looked at whether an accident suffered by a worker undergoing hospital treatment for a compensable injury is also compensable as a residual of the original injury. The original injury resulted in an amputation of the worker’s left index finger. *Id.* While the worker was in the hospital, an alcohol dressing of his injured finger was ignited when he lit a cigarette. *Id.* The resulting burns were so severe that his remaining fingers and thumb had to be amputated. *Id.* While the worker disputed his doctor’s testimony that he had warned him about smoking in those circumstances, the worker admitted that he knew there was alcohol on the bandage and that it was flammable. *Id.* at 163-64. The

court ruled that the worker's act of lighting the cigarette was an intervening act negating the causal chain between the original injury and the subsequent accident. *Id.* at 165.

The Court in *Sullivan v. B & A Construction, Inc.*, 307 N.Y. 161, 164, 120 N.E.2d 694 (1954), addressed a similar issue. The worker there sustained two compensable workplace injuries to his right knee. *Id.* at 163. As a result of these injuries, his right knee frequently locked such that the worker would feel paralyzed from his knee to his hip and was deprived of all use and control of his right leg. *Id.* The worker often suffered these episodes when walking and driving. He continued to operate his car despite these risks. *Id.* While subsequently operating his car, his knee locked, he could not press down on the brakes and was injured when his car struck a tree. *Id.* at 164.

Since the worker was driving on personal business, the court stated: “[a]n award is, therefore, warranted only if the automobile accident and the consequent injuries resulted directly and naturally from claimant’s prior injuries and the disability thereby produced.” *Id.* The court found it was worker’s “own temerity, not the physical handicap resulting from the industrial accidents, that was primarily responsible for the later [car] accident.” *Id.* It held that “it is indisputable that the claimant’s act of

driving, supervening between the industrial accidents and the car crash, broke the essential chain of causation. *Id.* at 165.

In *Allen v. Industrial Commission of Arizona*, 124 Ariz. 173, 174, 602 P.2d 841 (1979), the worker sustained a fractured collarbone. The claim was allowed and prior to closure, the worker had a nonindustrial accident when he suffered a compression fracture on his lumbar vertebrae. *Id.* He contended that the second accident resulted from the first injury because he had to wear a clavicle splint over his right arm and thus had to awkwardly pull himself up into a truck with his left hand. *Id.* While pulling himself into the cab of the truck with his left arm, he heard an “explosion” and sustained the compression fracture. *Id.*

The court looked at whether the causal chain between the original industrial injury and the subsequent accident was direct and unbroken by any intervening cause attributable to the worker’s own intentional conduct. *Id.* at 175. It ruled “while the [worker’s] injured collarbone may have caused him to maneuver awkwardly, it did not require him to attempt a physical movement which would endanger other parts of his body and affirmed denial of compensability for the accident. *Id.* at 176.

Finally, an Oklahoma Supreme Court decision upheld a trial court’s decision denying death benefits where the injured worker died from an overdose of his pain medications prescribed for the effects of his

injury. See *Thornton v. Troublefield*, 649 P.2d 538 (Okla. 1982). The court found that the decedent intentionally disregarded the medical directions for his medication by taking more than the specified dosage. *Id.* at 540-541. The “cause of death was not a legitimate consequence flowing from a compensable injury, but was in fact a consequence of a separate and distinct volitional act” of the decedent. *Id.* at 541.

Together these cases stand for the proposition that the intentional or reckless actions of the worker can break the chain of causation from the original injury.

**3. Mr. Shirley’s intentional or reckless act of ingesting alcohol with multiple drugs against medical warnings constituted an intervening act that broke the causal chain between his industrial injury and his death**

Here, Mr. Shirley’s intentional or reckless decision to mix alcohol with multiple drugs against medical warnings was an intervening act that broke the chain of causation between his original injury and his death. He suffered an injury to his low back on June 8, 2004. The Department compensated him for that injury. When his claim was closed, he was not being prescribed opioids. He was taking ibuprofen. Two years after his claim was closed, Mr. Shirley died as a result of the combined effects of taking six medications, including oxycodone, simultaneously with alcohol.

Just like the worker in *McDonough* who was warned by his physician not to light a cigarette under those circumstances, Mr. Shirley was warned by Dr. Jangala not to ingest alcohol with prescription medication, particularly the oxycodone. *See McDonough*, 127 N.J.L. at 165. Dr. Mai testified that pharmacies dispense these drugs with a warning against mixing alcohol with these substances. Dr. Jangala prescribed the medications over a period of time. He did not prescribe them to be taken all at once. Despite these clear warnings, Mr. Shirley chose to ingest alcohol simultaneously with six medications, two above their prescribed dosages. His behavior was an intervening act that broke the chain of causation between his original injury and death.

As with the worker in *Sullivan*, who knew that his right knee often locked when driving a vehicle such that he could not operate it safely, Mr. Shirley knew or should have known that consuming alcohol simultaneously with six different medications was unsafe. *See Sullivan*, 30 N.Y. at 164. The worker in *Sullivan* continued to drive knowing the risk and that the behavior was determined to be an intervening act. The result should be no different here.

It is true that the alcohol alone did not kill Mr. Shirley. It is also true, however, that the oxycodone and citalopram, even though found in his system at toxic levels, likely would not have killed him in the absence

of alcohol. He was warned against mixing drugs and alcohol. Dr. Jangala prescribed the medications over time, not to all be taken at once. Mr. Shirley knowingly engaged in this activity despite those warnings. His act of ingesting multiple drugs beyond the level that he was prescribed with alcohol, and against medical warnings, was an intervening act that broke the causal chain between his 2004 injury and 2007 death. Because this act negates proximate cause, his death is not compensable.

**B. A “Reasonably Foreseeable” Test Has Already Been Applied In Aggravation Cases To Determine Whether An Intervening Act Breaks the Causal Chain Between the Injury and a Claim for Aggravation of that Injury**

**1. The *McDougle* test determines when an act breaks the causal chain**

Washington Courts have developed a test to determine when an intervening act breaks the casual chain between the injury and the claimed condition in the context of aggravation applications. The Court should apply this analogous test to the context of death claims.

In *McDougle v. Department of Labor & Industries*, 64 Wn.2d 640, 645, 393 P.2d 631 (1964), the worker suffered a work-related back strain on July 28, 1955. *Id.* at 641. His claim was allowed and closed two years later with an award of 30 per cent permanent partial disability for unspecified disability. *Id.* On November 12, 1958, the worker was helping his brother-in-law load sacks of ground feed. *Id.* The next day,

the worker received back treatment. *Id.* at 642. He filed a claim to re-open his claim for further treatment. *Id.* The Department rejected the claim on the grounds that the worker's "present low back condition [was] attributable to a new injury occurring on November 12, 1958." *Id.*

Testimony established that the worker's condition had worsened between the closing date and the denial of reopening. *Id.* However, the Board affirmed denial of the claim finding that, while his back condition was aggravated by the sacklifting incident, "such aggravation was due to a new intervening independent cause, namely, lifting a sack or sacks of grain . . . ." *Id.* at 643. The trial court affirmed the Board. *Id.*

The supreme court determined that aggravation of the worker's condition caused by the ordinary incidents of living such as work he is expected to do, including sports in which he is expected to participate, are compensable because they are attributable to the condition caused by the original injury. *Id.* at 644. On the other hand, activities the worker would not be expected to engage in because of an existing disability due to risk of injury would not be compensable. *Id.*

The *McDougle* court, relying in part on *McDonough* and *Sullivan*, discussed above, adopted the following "reasonable foreseeability" test in determining whether the industrial injury caused the aggravation:

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. See 1 Arthur Larson, *Workmen's Compensation Law*, 183 § 13.11.<sup>4</sup>

*Id.* at 644-45.

The matter was reversed with instructions for the Board to set aside the Department's decision and engage in further consideration in light of the test set forth by the supreme court. *Id.* at 646.

In *Scott Paper Co. v. Department of Labor & Industries*, 73 Wn.2d 840, 841, 440 P.2d 818 (1968), the court confirmed that the test to be applied for compensability is: “[w]hether 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 be reasonably expected to be doing.” *Id.* at 841. The court in *Scott Paper* clarified its earlier decision in *McDougle* to state that “reasonable foreseeability” is determined by what someone with a Department-established disability would be reasonably expected to be doing as opposed to the worker's subjective personally known condition as of the date of aggravation. *Id.* at 848.

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<sup>4</sup> The current edition of Larson's *Workers' Compensation Law* addresses “compensable consequences” of injury in Chapter 10.

**2. The *McDougle* test should be applied to determine whether Mr. Shirley's ingestion of alcohol with medications contrary to medical warnings was an intervening act that broke the causal chain**

While the *McDougle* “reasonable foreseeability” test was established in an aggravation case, the test should also be applied to cases where the issue is whether an intervening act by the worker broke the causal chain between an original injury and a subsequent injury or death.

Here, under the *McDougle* test, Mr. Shirley's decision to mix alcohol with multiple drugs was an intervening activity that broke the chain of causation between his 2004 injury and his 2007 death because that activity was not reasonably foreseeable given his condition. He injured his low back in 2004 and his claim was allowed. When his claim was closed, he was not being prescribed opioids. Two years later, Mr. Shirley died as a result of the combined effects of ingesting six different medications – the oxycodone and citalopram at toxic levels – with alcohol. He engaged in this activity despite being warned by Dr. Jangala not to. Dr. Mai testified that pharmacies dispense these drugs with warnings against mixing alcohol with these substances. Dr. Jangala prescribed the medications over a period of time. He did not prescribe them to be taken all at once. Certainly, drinking alcohol in combination with six

medications contrary to medical advice cannot be seen as reasonably foreseeable behavior.

Given his condition, Mr. Shirley was particularly rash in misusing the alcohol and multiple medications. Dr. Jangala testified that Mr. Shirley had a long history of high blood pressure and cholesterol, which is what he was mainly treating him for. His heart condition made him a candidate for cardiac failure even without the use of opioids. Mr. Shirley ignored Dr. Jangala's advice and mixed alcohol with multiple drugs, an act his body simply could not tolerate. Dr. Jangala was himself perplexed as to why Mr. Shirley took so many medications at once. Thus, even his treating physician did not expect Mr. Shirley to act in such a manner.

The drugs alone were not lethal. Had he not consumed alcohol against medical warnings, while consuming multiple prescription drugs in combinations and amounts that were not prescribed, Mr. Shirley would likely be alive today. Under *McDougle*, Mr. Shirley's act should be seen as reasonably unexpected for a person in his condition, and therefore as an intervening act that breaks any causal connection between the industrial injury in 2004 and his death three years later.

**C. While the No-Fault Provisions of RCW 51.04.010 Are Relevant to the Initial Compensability Determination, They Do Not Apply To Whether Mr. Shirley's Intervening Act Broke the Causal Chain Between his Original Injury and His Death.**

It is true that under the 1911 compromise that replaced tort remedies for accidental injury with a workers' compensation system, accidental injuries to workers are generally compensable "regardless of questions of fault" as to the cause of the accident. RCW 51.04.010. However, what is at issue here is not the threshold question of whether Mr. Shirley's June 8, 2004, industrial injury is compensable under the no-fault rule. The threshold question of compensability of the accident was resolved forever when the Department allowed his claim for injury.

The question in this case is whether, under the well-established proximate cause test, Mr. Shirley's intentional or reckless actions in 2007 that caused his death broke the chain of causation from his June 8, 2004, industrial injury. *McDougle's* adoption of a reasonableness test for proximate cause would be meaningless if the no-fault provision of RCW 51.04.010 meant that, no matter what a worker does subsequent to an industrial injury, the chain of causation back to the original accident can never be broken. Moreover, the *McDonough* and *Sullivan* decisions make clear that compensability to subsequent injuries terminates upon the worker's intervening act. Mr. Shirley's fault can be considered here.

Public policy considerations militate against granting death benefits in light of Mr. Shirley's act of ingesting alcohol and multiple drugs against his physician's advice.

Here, Mr. Shirley deliberately ignored his physician's advice not to mix alcohol with his medications. He took multiple medications, two at toxic levels, which were not prescribed to be taken together. He ingested this lethal combination knowing that his heart was weakened due to high blood pressure and high cholesterol. As a matter of public policy, Mr. Shirley's case should not be covered under the Act, as Mr. Shirley's choice brought about his death.

## VII. CONCLUSION

For the reasons stated 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 22<sup>nd</sup> day of July, 2011.

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

DEPARTMENT OF LABOR &  
INDUSTRIES,

Appellant,

v.

BRIAN I. SHIRLEY, DEC'D,

Respondent.

DECLARATON OF  
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on July 22, 2011, I mailed the original and two copies of the Department's Brief of Appellant document to Court of Appeals and a copy to counsel for all parties on the record by depositing in postage prepaid envelopes in the U.S. mail addressed as follows:

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RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of July, 2011.

  
DORIS ROGERS  
Legal Assistant

FILED  
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STATE OF WASHINGTON  
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