

66994-0

66994-0

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2011 AUG 24 PM 3:14

EP

NO. 66994-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
AT SEATTLE

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

vs.

BRIAN I. SHIRLEY, DEC'D,

Respondent.

BRIEF OF RESPONDENT

BENJAMIN R. SLIGAR, WSBA # 27161
REBECCA M. LARSON, WSBA# 20156
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

ORIGINAL

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES.....	iii
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT.....	4
a.	Standard of Review.....	4
b.	Mr. Shirley’s Death was Proximately Related to..... His Industrial Injury	6
1.	Consequences of Treatment Are Covered as Original Injury	6
2.	The Industrial Injury Need Not be the Sole..... Proximate Cause of Death	7
c.	There is No Evidence that Mr. Shirley Acted Intentionally... or Recklessly To Cause His Own Death	11
d.	The <i>McDougle</i> Test Does Not Apply.....	20
e.	Even if the <i>McDougle</i> Test Did Apply, it Would Not..... Preclude Benefits, Since Mr. Shirley Did Not Behave Unreasonably.	26
IV.	CONCLUSION.....	27

I. TABLE OF AUTHORITIES

WASHINGTON CASELAW

<i>Anderson v. Allison</i> ,..... 12 Wn.2d 487 (1942),	6
<i>Cowlitz Stud Co. v. Clevenger</i> , 127 Wn. App. 542, 112 P.3d 516 (2005);	25
<i>Dennis v. Dept' of Labor & Indus.</i> , 109 Wash.2d 467, 745 P.2d 1295 (1987).	21
<i>Dep't of Labor & Indus. v. Baker</i> , 57 Wn. App. 57, 786 P.2d 821 (1990).	24
<i>Gaines v. Dep't of Labor & Indus.</i> , 1 Wn.App 547, 552; 463 P.2d 269 (1969)	21
<i>Garrett Freightlines, Inc. v. Dep't of Labor & Indus.</i> , 45 Wn. App. 335, 339, 725 P.2d 463 (1986)	5
<i>Groff v. Dep't of Labor & Indus.</i> ,..... 65 Wn.2d 35, 45, 395 P.2d 633 (1964).	13
<i>Lightle v. Dep't of Labor & Indus.</i> ,..... 68 Wn.2d 507, 510, 413 P.2d 814 (1966)	21
<i>McDougle v. Dept' of Labor & Indus.</i> , 64 Wn.2d 640, 645, 393 P.2d 631 (1964),	20, 22,
<i>McFarland v. Dep't of Labor & Indus.</i> , 188 Wash. 357, 62 P.2d 714 (1936)	24
<i>O'Keefe v. Labor & Indus.</i> , 126 Wn. App. 760, 766, 109 P.3d 484 (2005).	7
<i>Purdy & Whitfield v. Dep't of Labor & Indus.</i> , 12 Wn.2d 131, 120 P.2d 858 (1942).	24

<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn.App. 174, 180; 210 P.3d 355 (2009), review denied by 167 Wn.2d 1015, 220 P.3d 209 (2009)	5
<i>Ross v. Erickson Construction Co.</i> ,..... 89 Wash. 634, 155 P. 153 (1916).	6
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 5, 977 P.2d 570 (1999)	5
<i>Sacred Heart Med. Ctr. v. Carrado</i> ,..... 92 Wn.2d 631, 635, 600 P.2d 1015 (1979)	21
<i>Sayler v. Dep't of Labor & Indus.</i> ,..... 69 Wn.2d 893, 896, 421 P.2d 362 (1966).	4
<i>Scott Paper Co. v. Dep't of Labor & Indus.</i> , 73 Wn.2d 840, 843-844 (1968)	13, 23
<i>State ex rel. Crabb v. Olinger</i> ,..... 196 Wash. 308, 311 P.2d 865 (1938)	21
<i>Stertz v. Industrial Ins. Comm'n</i> , 91 Wash. 588, 590-591, 158 P. 256 (1916)	21
<i>Tollycraft Yachts Corp. v. McCoy</i> , 122 Wn.2d 426, 858 P.2d 503 (1993);	25
<i>Watson v. Dep't of Labor and Indus</i>	5
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 138, 814 P.2d 629 (1991).	7
<i>Wilber v. Dep't of Labor & Indus.</i> ,..... 61 Wn.2d 439, 446, 378 P.2d 684 (1963).	21
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).	5

NON-WASHINGTON CASELAW

Allen v. Industrial Commission of Arizona, 18, 19
124 Ariz. 173 (1979)

Brick v. R.B. Hamilton Trucking Co.,..... 13
60 A.D.2d 735, 401 N.Y.S.2d 12 (1977),

Carvalho v. James L.K. Tom, Inc., 25
1991 Haw. App. LEXIS 1 (Haw. Ct. App. 1991);

Crosby v. Grandview Nursing Home, 25
290 A.2d 375, (Me. 1972).

De Shaw v. Energy Mfg. Co., 25
192 N.W.2d 777, 1971 Iowa Sup. LEXIS 808 (1971);

McDonough v. Sears, Roebuck and Co., 19
127 N.J.L. 158 (1941),

McKelvey v. City of DeQuincy, 14
970 So. 2d 682 (2007),

Sullivan v. B.A. Construction, Inc., 17
307 N.Y. 161 (1954),

Thornton v. Troublefield,..... 16
649 P.2d 538 (Okla. 1982),

Wheeler v. Glens Falls Ins. Co., 15
513 S.W.2d 179 (1974),

BIIA SIGNIFICANT DECISIONS

In re Arvid Anderson, 6
BIIA Dec., 65,170 (1986),

<i>In re Eugene Bullock</i> , BIIA Dec., 98 21683 (2000),	6
<i>In re William Fritts</i> , BIIA Dec., 91 2391 (1992)	7
<i>In Re Cynthia Hansen</i> , BIIA Dec., 97 7062 (1999),	6
<i>In re David M. Killian</i> , Dckt., No. 06 17478 (2007);	8
<i>In re Bobbie Thomas, Dec'd.</i> , Dkt. Nos. 04 17345 & 04 17346 (2006).	9, 26

STATUTES

RCW 51.04.010.....	20-23
RCW 51.12.010.....	21
RCW 51.32.020.....	24
RCW 51.52.115.....	4,5
RCW 51.52.160	7

PATTERN JURY INSTRUCTIONS

WPI 155.05.....	25
WPI 155.06.....	8

II. STATEMENT OF THE CASE

On June 10, 2004, Brian Shirley sustained an on-the-job injury to his low back while in the course and scope of his employment with Wells Trucking and Leasing, Inc. *Certified Appeal Board Record ("CABR")* 2, 62. Mr. Shirley filed a claim for industrial insurance benefits, which was allowed by the Department of Labor and Industries ("DLI"). *Id.* The claim was closed by order dated March 2, 2005 with no award of permanent partial disability, *CABR* 63, although Mr. Shirley continued to have significant back pain and continued to treat with medical providers. *Desiree Shirley*, 7.¹ Mr. Shirley filed a Protest and Request for Reconsideration, but on May 27, 2005, DLI affirmed its closing order. *CABR* 63.

After his claim was closed, Mr. Shirley continued to treat with his primary care physician, Chester E. Jangala, M.D., for his accident-related low back complaints and for depression that arose from his chronic back pain. *Jangala*, 10-11. He also saw Dr. Jangala for other health matters including pancreatitis. *Jangala*, 20. At different times after closure of the claim, Dr. Jangala prescribed Oxycodone, Citalopram (aka Celexa), Amitriptyline, and various other medications to Mr. Shirley. *Jangala*, 12-

¹ The portions of the Certified Appeal Board Record – CABR – containing witness testimony transcripts are cited to as witness name and page number(s).

14. It is not disputed that the prescription of these medications was necessary and appropriate. *Jangala*, 14; *Reay*, 19-20; *Harruff*, 14-15.

Mr. Shirley was found dead in his bed on May 3, 2007. *Shirley*, 11. DLI expert Dr. Reay confirmed that a post-death toxicology screen found relatively low levels of several prescription medications including, Oxycodone, Citalopram, and Amitriptyline in Mr. Shirley's system. *Reay*, 10-18, 29. DLI expert Dr. Harruff described levels of the subject medications as "slightly elevated." *Harruff*, 13, 15. In addition to the medications, Mr. Shirley's blood alcohol level at the time of his death was .07 grams per 100 cc's, below the legal intoxication level. *Jangala*, 15; *Reay*, 10.

The cause of death as identified in an autopsy was determined to be a combination of alcohol and medications, as follows:

[a]cute combined ethanol, oxycodone, citalopram, alprazolam, amitriptyline, carbamazepine, and acetaminophen intoxication.

CABR, Exhibit 4.

The combined medical opinions presented in this case are that it was only this mixture of medications and alcohol that suppressed Mr. Shirley's respiration and gag reflex while he slept and was the cause of his death. *Jangala*, 15; *Reay*, 8, 20-21; *Harruff*, 6, 13. Neither the medications alone nor the alcohol alone would have killed Mr. Shirley.

Reay, 10, 13; *Harruff*, 15. Dr. Harruff testified that “None of these drugs [were] highly elevated.” *Harruff*, 13. Dr. Jangala testified that “It wasn’t a toxic dose of any one thing, but it was multiple different meds altogether.” *Jangala*, 18.

There is no evidence that Mr. Shirley committed suicide or in any way intended to cause his death.

Mr. Shirley’s widow, Desiree Shirley, filed a timely application for a widow’s pension with DLI on March 18, 2008. *CABR* 9. DLI denied the claim on April 11, 2008. *Id.* Mrs. Shirley protested the denial, but on May 28, 2008, DLI affirmed the denial. *Id.* Mrs. Shirley appealed to the Board of Industrial Insurance Appeals (“BIIA”). An Industrial Appeals Judge found that Mr. Shirley’s ingestion of alcohol with multiple medications constituted an independent supervening cause that broke the chain of causation between the original industrial injury and Mr. Shirley’s ultimate death. *CABR* 45. Mrs. Shirley appealed to the full Board, which reversed the Industrial Appeals Judge and allowed the claim. The BIIA held that Dr. Jangala prescribed opioid medications to Mr. Shirley for his chronic pain related to his industrial injury, and Mr. Shirley’s decision to combine alcohol with these medications did not rise to the level of a supervening cause that would break the causal chain and preclude benefits. *CABR* 8.

DLI appealed to the Superior Court in King County and moved for summary judgment on the issue of causation. The Superior Court judge denied the motion and affirmed the BIIA's award of widow's benefits to Mrs. Shirley. *CP*, 45-50. DLI then filed the present appeal.

III. ARGUMENT

a. Standard of Review:

RCW 51.52.115 provides that in all court proceedings under or pursuant to this title, the findings and decision of the Board of Industrial Insurance Appeals shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same. The burden is on the employer to overcome the presumption that the findings and decision of the BIIA are *prima facie* correct. *Saylor v. Department of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

In this context, "prima facie" means that there is a presumption on appeal that the findings and decision of the board, based upon the facts presented to it, are correct until the trier of fact finds from a fair preponderance of the evidence that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand.

Scott Paper Co. v. Dep't of Labor & Indus., 73 Wn.2d 840, 843-844 (1968)

Upon appeal to superior court, the standard of review of the Board of Industrial Insurance Appeal's findings of fact and conclusions of law is

de novo. RCW 51.52.115; *Garrett Freightlines, Inc. v. Department of Labor & Indus.*, 45 Wn. App. 335, 339, 725 P.2d 463 (1986). No new evidence is presented, however. Rather, the superior court reviews the same evidence presented to the BIIA. Neither is any new evidence presented when a superior court decision is appealed to the court of appeals:

In appeals of the superior court's decision to this court . . . , “[w]e review whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings.” *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006) (citing *Ruse*, 138 Wn.2d at 5).

This statutory review scheme results in a different role for the Court of Appeals than is typical for appeals of administrative decisions pursuant to, for example, the Administrative Procedure Act, where we sit in the same position as the superior court. To be clear, unlike in those cases, our review in workers' compensation cases is akin to our review of any other superior court trial judgment: “‘review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.’” *Ruse*, 138 Wn.2d at 5 (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).

Rogers v. Dep't of Labor & Indus., 151 Wn.App. 174, 180; 210 P.3d 355 (2009), review denied by 167 Wn.2d 1015, 220 P.3d 209 (2009)

Thus, if this court finds that there was substantial evidence for the superior court's ruling affirming the BIIA's decision, then it may not disturb that ruling on review.

Here, it is not disputed that Brian Shirley's death was due to a mixture of prescription medications and alcohol. The medications were prescribed by his physician to treat his chronic pain and depression directly related to his industrial injury. The only issue is the legal question of whether Mr. Shirley's act of combining alcohol and medications constituted an intervening act that broke the causal chain between the industrial injury and his death. The Board of Industrial Insurance Appeals and subsequently the superior court each held that it was not such an intervening act and that the widow's benefits should be awarded. The evidence and caselaw supports this decision, which should be allowed to stand.

b. Mr. Shirley's Death was Proximately Related to His Industrial Injury:

1. Consequences of Treatment Are Covered as Original Injury

It is long settled law in Washington that conditions (including death) caused by treatment for an industrial injury are considered part and parcel of the injury itself. *In re Arvid Anderson*, BIIA Dec., 65,170 (1986), citing *Anderson v. Allison*, 12 Wn.2d 487 (1942), and *Ross v. Erickson Construction Co.*, 89 Wash. 634 (1916). This rule has been followed consistently in BIIA decisions. *In re Eugene Bullock*, BIIA Dec., 98 21683 (2000), *In Re Cynthia Hansen*, BIIA Dec., 97 7062 (1999),

and *In re William Fritts*, BIIA Dec., 91 2391 (1992). The BIIA publishes its significant decisions and makes them available to the public. RCW 51.52.160. “These decisions are nonbinding, but persuasive authority for this court.” *O’Keefe v. Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005). See also, *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). This is especially true since the BIIA decisions are *prima facie* correct.

In the present case, the BIIA was correct to find that Mr. Shirley’s use of the medications implicated in his death were for his industrially related chronic low back condition. But for the use of the medications prescribed for the symptoms of his industrial injury, Mr. Shirley would not have died. *Reay*, 10, 13; *Harruff*, 15. There is a direct causal connection. Thus, as the BIIA determined, the death, as consequence of using the medications, should be covered under the claim. See *CABR 9 (BIIA Decision and Order*, Findings of Fact number 5). The trial court correctly affirmed this ruling.

2. The Industrial Injury Need Not be the Sole Proximate Cause of Death

The BIIA concluded that Mr. Shirley’s death was proximately caused by the June 8, 2004 industrial injury within the meaning of RCW 51.32.050. *CABR 9 (BIIA Decision and Order*, Conclusion of Law

number 2). There can be no argument that the Industrial Insurance Act allows for multiple proximate causes. So long as the industrial injury is a proximate cause, it need not be the only proximate cause.

The “term 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. There may be one or more proximate causes of a death. For a surviving spouse to recover benefits under the Industrial Insurance Act, the industrial injury must be a proximate cause of the alleged death for which benefits are sought. The law does not require that the industrial injury be the sole proximate cause of such condition.

WPI 155.06

The BIIA, in this case, addressed the issue of whether the alcohol rose to the level of a supervening or intervening cause and determined that it was not:

In order to determine that the alcohol was a supervening cause, we would have to be able to find that the alcohol *alone* would have caused Mr. Shirley to die; however, this determination is not supported by the evidence in this matter.

CABR 8 (emphasis added).

The BIIA has designated as a “significant decision” the case of *In re David M. Killian*, Dckt., No. 06 17478 (November 20, 2007); a case with a very similar fact pattern, and a case in which the multiple proximate cause analysis was applied to find coverage.

In the *Killian* case, the claimant died as the result of the combined effects of methadone, flexeril, and cannabis, any two of which would not be lethal, but only when all three were combined produced a lethal outcome. The medications were prescribed for the effects of the injury and were found to be necessary and proper.

The BIIA in *Killian* found that “The most important question was whether the industrial injury was a proximate cause of death. We iterated the longstanding proposition that the injury need be only one of the causes of, in that case, death, not the only cause.” Citing to *In re Bobbie Thomas, Dec’d.*, Dkt. Nos. 04 17345 & 04 17346 (May 17, 2006).

In the *Killian* case, the hearings judge ruled that but for the marijuana, the claimant would not have died and that the other medication prescribed for the industrial injury was not the proximate cause of Mr. Killian’s death. The BIIA reversed the hearings judge and found that the prescribed drugs were a proximate cause of the death and that the hearings judge was mistakenly looking for a sole cause of death, which he determined to be the addition of marijuana to Mr. Killian’s other medications.

This fact pattern is exactly what happened in the present case. Simply replace marijuana (an illegal substance) with alcohol (a legal substance), and the cases are completely analogous. The evidence clearly

demonstrates that but for the use of Oxycodone and Celexa, which were prescribed for the effects of the June 8, 2004, industrial injury, Mr. Shirley would still be alive. The use of these medications may have become lethal by the potentiating effect of moderate alcohol use. Nevertheless, it remains true that the prescribed medications were a cause of Mr. Shirley's death. Accordingly, the BIIA found that but for the claimant's industrially related use of the medications, he would not have died after ingesting alcohol. *CABR 9*, Finding of Fact 7, This is the same outcome from *Killian*, where the prescribed medications were only made lethal by the introduction of marijuana.

Proper application of a multiple proximate cause analysis to the facts of this case can lead to only one possible outcome. Mr. Shirley would not have died on May 3, 2007, but for the use of medication prescribed as a result of his industrial injury. There is no evidence that the alcohol alone would have killed Mr. Shirley, and his blood alcohol level was below the level for legal intoxication. Consequently, his death should be covered under the claim, and his surviving spouse is entitled to benefits.

c. There is No Evidence that Mr. Shirley Acted Intentionally or Recklessly To Cause His Own Death

DLI argues that Mr. Shirley's act of drinking alcohol while taking prescription medications was intentional or reckless, and such intentional or reckless behavior constituted an intervening act breaking the causal chain between the industrial injury and Mr. Shirley's death. The Department cites no Washington authority for this argument, and the specific facts of this case demonstrate no intentional or reckless behavior on Mr. Shirley's part.

To read the Department's version of what occurred prior to Mr. Shirley's death might lead one to believe that he was a raging alcoholic and drug addict who wantonly and intentionally disregarded a physician's direct order to avoid all alcohol. This is not even close to the facts of the situation. Dr. Jangala, the only testifying doctor that would have been in a position to give Mr. Shirley such advice about use of the medication, testified as follows:

Q. Doctor, when you were prescribing these medications to Mr. Shirley did you counsel him as to what to take when and how much to take of each medication?

A. I am usually fairly cautious about warning the patients about not mixing meds and during the day to take them. Not to drive when taking them or not to mix meds.

Q. And not to consume alcohol do you counsel your patients?

A. Particularly if they're taking pain medications.

Q. Is it your recollection that you also counseled Mr. Shirley not to consume alcohol and mix medications?

A. It's likely that I did.

Jangala, 26.

This testimony hardly supports the Department's assertions that Dr. Jangala directly advised Mr. Shirley to consume no alcohol while he was on prescribed medications. Dr. Jangala could not state that he actually instructed Mr. Shirley not to mix his medications with alcohol; rather, he relied on the fact that it was what he likely would have done.

As to whether Mr. Shirley's actions were reasonable, Dr. Jangala provided his theory of why Mr. Shirley's blood contained what it did:

Q. Do you have an opinion as to whether it was that mixture that was the cause of death?

A. Yes, it was the total mixture, multiple medications. I'm puzzled why he took so many different things at once. I mean **none of them were in particular high dose**. I think he took a little bit of everything that he had in the house.

Jangala, 15 (emphasis added).

Q. Do you have any reason to believe that Mr. Shirley's death on May 3, 2007 was self-inflicted, intentional?

A. No, no. From knowing the person, I don't think it was, and then the mixtures of drugs that he took it doesn't

really fit intentional suicide. It puzzles me actually why he took so many different things. **It wasn't a toxic dose of any one thing**, but it was multiple different meds altogether. **I suspect that he was in a lot of pain and maybe tried one of something and it didn't help the pain, and he took a couple of something else and it still didn't help the pain and decided to take a couple more of something else and still didn't help the pain.** That is just my suspicion to what happened in that he was in pain at the time and trying to relieve his pain and he unfortunately combined too many medications.

Jangala, 17-18 (emphasis added).

Nowhere does Dr. Jangala state that Mr. Shirley's actions were unreasonable. In fact, Dr. Jangala suspected that Mr. Shirley was simply attempting to find anything that would help alleviate his chronic pain, as any person might be tempted to do. There was no evidence that Mr. Shirley was abusing drugs or alcohol in an attempt to get high. He was just trying to find some relief from his chronic pain.

As the treating physician, Dr. Jangala's testimony and opinions are to be given special consideration. *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 843-844 (1968); *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964).

Courts in other jurisdictions have recognized that mixing alcohol with medications or overusing medications or alcohol does not necessarily breach the causal chain between the initial injury and subsequent injury/death. In *Brick v. R.B. Hamilton Trucking Co.*, 60 A.D.2d 735, 401

N.Y.S.2d 12 (1977), a New York court upheld a Board decision finding that a worker's death caused by an overdose of Valium and Darvon prescribed for pain from an earlier industrial injury was causally related to the industrial injury and was compensable. Likewise, the court in *McKelvey v. City of DeQuincy*, 970 So. 2d 682 (2007), a Louisiana case, also allowed death benefits after a medication overdose.

In *McKelvey*, a worker suffered an industrial injury and was prescribed various medications. Later he was found dead, and his death was ruled a probable mixed drug intoxication. The employer argued that the employee had abused prescription medications in the past, and his death was related to current medication abuse. The court disagreed, pointing out that the issue of past drug abuse was irrelevant, and it was only speculation to say that the employee was abusing his current medications. The court found as follows:

[I]n this case, 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 medications. Thus, it was foreseeable that a dependence upon these medications may develop. . . . This dependence **as well as the possible use of medications in excess** "is fairly considered to have been caused by the work related injury which led to the prescription of the medications [in the first place]."

McKelvey v. City of DeQuincy, 970 So. 2d at 688 (Emphasis added).

The *McKelvey* court recognized that it was foreseeable that long-term use of prescribed pain medications might result in excess usage. As in *McKelvey*, 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. That is not unreasonable.

A Tennessee case allowed benefits to an injured employee who died from overdrinking alcohol. In *Wheeler v. Glens Falls Ins. Co.*, 513 S.W.2d 179 (1974), the evidence showed that, after an industrial injury, the injured employee drank even more heavily than he had pre-accident, to alleviate the pain he experienced. The employer argued that the employee failed to heed the warnings made by his doctors that continued drinking of alcohol could lead to his death. It contended that this behavior by the employee either amounted to "intentional misconduct" which broke the chain of causation between the injury and the death or, amounted to "willful misconduct" which barred recovery under state statute. The *Wheeler* court instead found that the evidence painted the picture of a man who drank, not with an intent to ignore his doctors' advice or to get drunk, but because the pain, despair, and idleness resulting from his injury forced him to do so.

As in the cases cited above, Mr. Shirley was suffering from pain. He may have inadvertently taken multiple medicines or combined them

with a moderate amount of alcohol. The exact circumstances may never be known. But what is known is that there is no evidence that his death was a deliberate act or due to Mr. Shirley's own recklessness. Without such evidence, the BIIA's ruling must stand.

The cases cited by the Department in its brief are distinguishable. In *Thornton v. Troublefield*, 649 P.2d 538 (Okla. 1982), an injured worker died after mixing drugs and alcohol. Of significance in that case, the injured worker had been requesting ever stronger pain medications from his doctor. The doctor refused to change medications, because he feared that the injured worker might be developing a dependency. On the day of his death, the injured worker in fact told his girlfriend that he wanted to "take all the pills" at one time, rather than one every four hours, as prescribed. Because she was afraid he would do so, the girlfriend removed the pills. They then both went out drinking, and the injured worker consumed one fifth to a quart of bourbon whisky. After returning home, the injured worker again requested his pills, and his girlfriend gave them back. The injured worker then apparently ingested all of the medication and said, "I took all the pills." *Id.*, at 540.

The appellate court in *Thornton* found that, based upon the evidence, it was not unreasonable for the trial court to determine that the death was a consequence of a separate and distinct volitional act of the

decedent, rather than something flowing from the original industrial injury. The *Thornton* court did *not* rule, however, that the trial court could not have found the death to be a consequence of the original injury. Rather, because there was evidence in the record to support the finding, the appellate court did not disturb the trial court's ruling.

In Mr. Shirley's case, there is nothing to support the position that he was taking large amounts of medication all at once or mixing his medications with a significant amount of alcohol. The *only* actual evidence available was the toxicology screen results. It showed multiple medications in Mr. Shirley's system, some in slightly elevated levels, along with a non-intoxicating level of alcohol. There was no evidence presented about the circumstances under which Mr. Shirley took any of the substances including the time frame, the amounts ingested, or his state of mind. It cannot be presumed that he was acting recklessly. As Dr. Jangala testified, it was likely that Mr. Shirley was simply trying one thing after another in an attempt to alleviate his chronic pain. Neither the BIIA nor the superior court found this to be unreasonable, and there are no grounds for this court to disturb their rulings.

The other cases cited by the Department are also distinguishable. In *Sullivan v. B.A. Construction, Inc.*, 307 N.Y. 161 (1954), the injured worker was aware that his injured knee had a tendency to lock, causing

paralysis and depriving him of all use and control of his entire right leg. This noticeably extreme event had occurred multiple times prior to the subsequent auto accident. This was not a case where a person ignored warnings of a potential harm. He had ongoing problems with his leg becoming paralyzed, an actual harm. And although he had experienced this condition multiple times, the worker still blatantly chose to risk driving. There is no evidence that Mr. Shirley had experienced any problems whatsoever, either with his medication or alcohol, or that he suffered any side effects. In *Sullivan*, the court had much more evidence of an intentional intervening act than in the present matter.

The Department also cites to *Allen v. Industrial Commission of Arizona*, 124 Ariz. 173 (1979), a case where an injured worker with a broken collar bone fell and subsequently fractured his vertebra while he was trying to get into a truck. In that case, the petitioner had not yet been released to work by his doctor and was awkwardly attempting to enter the passenger side of a 1968 Chevrolet three-quarter-ton pickup truck. He was wearing a clavicle splint, which incapacitated his right arm. In an effort to enter the passenger side of the pickup cab, he reached up to take hold of the dashboard with his left hand and pull himself into the vehicle. While attempting to do that, he experienced an "explosion" in his head,

"like a gun went off," and he became unconscious. He ultimately was found to have a fractured vertebra.

In the *Allen* case, the court denied coverage for the subsequent injury, finding that the injured collarbone was related to the fractured vertebra only because of petitioner's decision to enter the truck and the awkward physical movements chosen to do it. The court pointed out that questions of intervening acts must be decided on a case-by-case basis:

There are times when an injured person, experiencing restrictions on normal activity, must be held to have assumed responsibility for his physical actions. No hard or fast line can be drawn delineating at what point the employer's responsibility for the original injury ceases and the claimant's responsibility begins. The hearing officer in the present case determined that the fractured vertebra was caused by the intentional conduct of the claimant and not by the earlier industrial injury. We hold that the record supports this determination. While petitioner'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.

Allen v. Industrial Comm'n, 124 Ariz. 173, 175 (1979).

The *Allen* court pointed out that there is no hard and fast rule for determining when an injured employee's action breaks the causal connection. As in *Thornton, supra*, it deferred to the Board's findings.

Finally, in *McDonough v. Sears, Roebuck and Co.*, 127 N.J.L. 158 (1941), the injured worker lost a finger and was wearing a bandage. He knew the alcohol bandage on his hand was flammable but chose to light a

cigarette with that hand. This caused a fire that ultimately led to amputation of other fingers that had not been involved in the original injury. In that case, the court held the subsequent damage was clearly distinguishable from the consequences of medical or surgical treatment of his compensable injury. This is in contrast to the present matter, where complications from the use of opioid medications clearly was a foreseeable risk.

d. The *McDougle* Test Does Not Apply:

The Department argues that *McDougle v. Dept' of Labor & Indus.*, 64 Wn.2d 640, 645, 393 P.2d 631 (1964), imposes a “reasonably foreseeable” standard that, when applied to this case, breaks the chain of causation between Mr. Shirley’s industrial injury and his subsequent death. This argument should not be persuasive because *McDougle* is limited in its application and distinguishable from the present case.

The 1964 *McDougle* case involved an attempt to reopen a closed claim for aggravation of the covered injury, after a prior permanent partial disability award had been made. The court held that, to reopen a claim, the injured worker must have been acting reasonably at the time of the aggravation. The holding from *McDougle* appears to be a narrow, and very seldom applied, exception to the statutory, no-fault rule from RCW 51.04.010.

RCW 51.04.010 provides that the Industrial Insurance Act applies without regard to fault. The no-fault foundation of the Industrial Insurance Act is discussed in detail by the Supreme Court in *Dennis v. Dept' of Labor & Indus.*, 109 Wash.2d 467, 745 P.2d 1295 (1987).

In *In Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916), this court explained the genesis of this state's workers' compensation scheme: The Industrial Insurance Act (Act), RCW Title 51, was the result of a compromise between employers and workers. In exchange for limited liability the employer would pay on some claims for which there had been no common law liability. The worker gave up common law remedies and would receive less, in most cases, than he would have received had he won in court in a civil action, and in exchange would be sure of receiving that lesser amount without having to fight for it. Industrial injuries were viewed as a cost of production. RCW 51.04.010 embodies these principles, and declares, among other things, that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided [by the Act] regardless of questions of fault and to the exclusion of every other remedy". To this end, the guiding principle in construing provisions of the Industrial Insurance 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. RCW 51.12.010; *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Lightle v. Department of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Wilber v. Department of Labor & Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 311, 82 P.2d 865 (1938); *Gaines v. Department of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d 269 (1969).

Dennis, supra at 469-470.

The Department argues in its brief that the no-fault provisions of RCW 51.04.010 are inapplicable to questions of whether intervening acts break the causal chain. This ignores the fact that the purpose of the Industrial Insurance Act is to compensate workers for *all* injuries arising from their employment. If a later death is causally related to an initial injury or treatment, even if some fault is found on the part of the worker, there is no reason that it should not still be covered. Here, Mr. Shirley's death was due directly to his taking medications prescribed for the effects of his industrial injury. Even if he made an error in taking too much medication or in also imbibing alcohol, such an error in judgment should not preclude benefits.

In the *McDougle* case, questions arose as to whether Mr. McDougle's physical exertion at the time he aggravated his prior low back condition was reasonable in light of his permanent low back condition. The specific rule announced was:

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, supra at 645.

The rule from *McDougle* stands alone in its application of a reasonableness standard that arguably erodes the statutory prohibition against consideration of fault found in RCW 51.04.010.

The *McDougle* Court remanded the matter back for further investigation. The case eventually found its way back to the Supreme Court and is published as *Scott Paper Co. v. Dept' of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968). The *Scott* Court clarified, and limited, the rule from *McDougle* when it held that it was not Mr. McDougle's personal subjective standard of what would be reasonable but rather what would reasonably be expected from a man who specifically had been awarded a 30% permanent partial disability. After reviewing the new facts established upon remand, and applying those facts to the correct criteria (i.e., a prior 30% impairment award), the Court ultimately found that Mr. McDougle's actions were not unreasonable and ordered the claim to be reopened. *Scott* at 848.

There are two obvious and important distinctions to be made between *McDougle* and the present case. First, *McDougle* is specifically dealing with an application to reopen a claim based on a claim of worsening of the original injury, not a separate claim for survivor benefits. Second, the *Scott* court clarified that the *McDougle* rule was to be applied

only as it relates to reasonableness in light of a previously awarded permanent partial disability, which is not present in the current matter.

As to the first distinction, Mrs. Shirley, as the surviving spouse, is not seeking to reopen the claim and is not asserting a worsening of the original injury. She is making application for benefits after her husband died as a proximate cause of complications arising out of medications prescribed for his industrial injury. Claims for compensation by beneficiaries of a deceased worker are not derived from the claim of the deceased but are new and original. *McFarland v. Department of Labor & Indus.*, 188 Wash. 357, 62 P.2d 714 (1936); *Purdy & Whitfield v. Department of Labor & Indus.*, 12 Wn.2d 131, 120 P.2d 858 (1942).

By statute, a survivor is not entitled to benefits when the worker deliberately commits suicide:

If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, . . . neither the worker nor the widow, widower, child, or dependent of the worker shall receive any payment under this title.

RCW 51.32.020.

However, this section “bars survivor claims only when the intentionally caused death is the singular event for which compensation is claimed. . . .”

Department of Labor & Indus. v. Baker, 57 Wn. App. 57, 786 P.2d 821 (1990). In the present matter, again, there is no evidence that Mr. Shirley

ever intended to or did commit suicide. And his death clearly is tied to his initial industrial injury in that it would not have happened but for his taking the medications prescribed for that injury. Therefore, there is no reason that Mrs. Shirley, as the survivor, should be denied widow's benefits.

As to the second distinction from *McDougle*, Mr. Shirley was not awarded a permanent partial disability at time of claim closure. The handful of reported cases that have cited to it in the 47 years since it was issued have all involved aggravations of pre-existing injuries. See *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 858 P.2d 503 (1993); *Cowlitz Stud Co. v. Clevenger*, 127 Wn. App. 542, 112 P.3d 516 (2005); *Carvalho v. James L.K. Tom, Inc.*, 1991 Haw. App. LEXIS 1 (Haw. Ct. App. 1991); *De Shaw v. Energy Mfg. Co.*, 192 N.W.2d 777, 1971 Iowa Sup. LEXIS 808 (1971); *Crosby v. Grandview Nursing Home*, 290 A.2d 375, (Me. 1972). We do not have that in the Shirley case.

The footnotes to WPI 155.05 "*Negligence Not An Issue*", citing the *McDougle* case indicates that "[T]his instruction may not be applicable in all cases. For example, in a case in which aggravation is asserted **subsequent to an award**, the reasonableness of the claimant's conduct **after the award** may become an issue." (Emphasis added). The *Scott* Court specifically narrowed the reasonableness standard to only review

reasonableness in light of a prior disability award. Since Mr. Shirley received no such prior award, such an analysis is inherently impossible.

e. Even if the *McDougle* Test Did Apply, it Would Not Preclude Benefits, Since Mr. Shirley Did Not Behave Unreasonably.

Even if this court were to apply the *McDougle* reasonableness standard, as discussed above, the facts of the present case do not reveal unreasonable behavior on the party of Mr. Shirley. The present matter is very similar to the BIIA significant decision of *In re Bobbie Thomas*, BIIA Dec., 04 17345 (2006). In that case, Ms. Thomas, a nurse who suffered an industrial injury involving her low back, was prescribed pain medication, including Oxycodone. Ms. Thomas died from an accidental overdose of Oxycodone. The autopsy toxicology screen revealed that Ms. Thomas' Oxycodone blood content was 1.09 milligrams per liter, a very high amount. Ms. Thomas was a nurse and presumably should have known that taking doses at that high a level put her health at risk. Nevertheless, the BIIA found no reason to break the proximate causation chain, finding that her death was subject to coverage under the Industrial Insurance Act. Of note, the Oxycodone levels found in Mr. Shirley's blood were eight (8) times lower than Ms. Thomas', at .13 milligrams per liter (well below the toxic level of 2.5 milligrams per liter). *Reay*, 11-12. If Ms. Thomas'

actions (especially with her medical training) were not unreasonable, then Mr. Shirley's were certainly not.

Similarly, consider again the case of Mr. Killian, discussed above, whose lethal mixture included use of illegal marijuana. That claim was allowed. Mr. Shirley, on the other hand, mixed a moderate amount of alcohol (.07, below the presumed intoxication level of .08), a legal substance, with his medications. There is no reason that Mr. Shirley should be held to a higher standard than those engaged in illegal activity.

IV. CONCLUSION

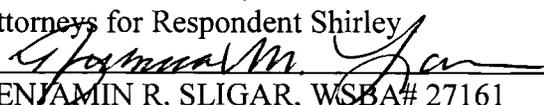
Brian Shirley's death was proximately related to his industrial injury of June 10, 2004. For the reasons set forth above, Respondent respectfully requests that this court affirm the March 18, 2011 order of the King County Superior Court which affirmed the BIIA's award of death benefits to Desiree Shirley.

In addition, Respondent respectfully requests that he be awarded attorneys fees and costs pursuant to RCW 51.52.130 as a result of this appeal.

RESPECTFULLY SUBMITTED this 24TH day of August, 2011.

DAVIES PEARSON, P.C.

Attorneys for Respondent Shirley


BENJAMIN R. SLIGAR, WSBA# 27161

REBECCA M. LARSON, WSBA# 20156

920 Fawcett Avenue
P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500 Telephone
(253) 572-3052 Facsimile
bsligar@dpearson.com
rlarson@dpearson.com

cad / s:\0xxxx\014xx\01467\4xx\475\appeal\appellate brief.doc