

No. 42343-0-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

PAUL H. ORRIS,

Appellant,

v.

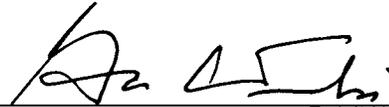
MATTHEW ARNOLD LINGLEY, decedent, and MICHAEL D.
LINGLEY and KATHY A. LINGLEY, as Personal Representatives and
Notice Agents of THE ESTATE OF MATTHEW ARNOLD LINGLEY,

Respondents.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY  DEPUTY

RESPONDENTS' BRIEF

ATTORNEYS FOR RESPONDENTS:



Gary A. Trabolsi, WSBA No. 13215
GARDNER TRABOLSI
& ASSOCIATES PLLC
2200 Sixth Avenue, Suite 600
Seattle, WA 98121
Tel. (206) 256-6309
Fax (206) 256-6318

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I. Response to Assignments of Error

Appellant argues that the trial court applied the doctrine of Judicial Estoppel in its decision to grant Respondents' Motion for Summary Judgment and deny Appellant's Motion to Reconsider. It did not. Rather, the trial court said that the logic of judicial estoppel was consistent with its ruling, but the reason it was granting Defendant's Summary Judgment was because the Appellant had applied for and received in excess of \$1,000,000 in worker's compensation benefits and therefore, the applicable statute and case law precluded Appellant from maintaining an action against his co-worker.

Secondly, an uncertified and inadmissible Toxicology Report stating that Respondent's decedent Matthew Lingley had THC in his blood following the accident does not raise a fact question about whether Mr. Lingley had abandoned his employment at the time of the accident.

II. Issues Pertaining to Assignments of Error

Where Appellant applied for and received in excess of \$1 million in worker's compensation benefits, did the trial court properly grant Summary Judgment dismissing Appellant's claim against his co-worker?

Does an uncertified report of THC in Respondent Matthew Lingley's blood, with no expert testimony, create a fact question about whether he abandoned his employment at the time of the accident?

III. Statement of the Case

On August 17, 2007, Appellant was working for Caliber Concrete Construction ("Caliber") on a job site in Grays Harbor County. (CP 25). At the conclusion of the project, Appellant rode with his co-worker Respondent Matthew Lingley in their employer's truck, intending to return it to Caliber's place of business in Edgewood, Washington. (CP 25). The truck driven by Respondent Matthew Lingley was registered to Caliber. (CP 40). Appellant was in the front passenger seat of the truck. (CP 40). On route to Caliber's place of business, Respondent lost control of the truck. (CP 40). Respondent was killed and Appellant was injured in the accident. (CP 40).

Following the accident, Appellant sought workers' compensation benefits and affirmatively represented that his injuries were work related. (CP 25, 36, 143). Appellant's employer and the Department of Labor & Industries ("DLI") accepted Appellant's request for workers' compensation benefits and provided benefits to him in excess of \$1 million. (CP 162-63). Appellant also made representations to DLI that due to his work related injuries he should continue to receive workers'

compensation benefits. (CP 164-65). DLI and Caliber accepted these requests and paid Appellant continued benefits. (CP 162-63).

At no time between the August 17, 2007 accident, and August 13, 2010, when Appellant filed his Complaint in this action, did Appellant represent that he was not entitled to the workers' compensation benefits for work related injuries.

Similarly, Respondent Matthew Lingley's Estate received benefits because it too represented that Matthew Lingley was killed in the course of his employment. (CP 40, 69-70, 77, 127). An uncertified toxicology report revealed that Matthew Lingley had THC in his blood at the time of the accident. (CP 46). No evidence was submitted from a toxicology expert regarding the report. Additionally, no evidence was submitted that Mr. Lingley had used any marijuana, smelled of marijuana or displayed any signs of being under the influence of marijuana at any time before the accident.

IV. Argument

Standard of Review

The issue of immunity under the Industrial Insurance Act ("Act") is a matter of law which is reviewed de novo. *Doty v. Town of South Prairie*, 122 Wn. App. 333, 336, 93 P.3d 956 (2004). Here, the trial court properly concluded that because Appellant received benefits under the

Act, his co-worker is immune from suit. As such, the trial court's ruling should be affirmed.

Where the facts are undisputed and reasonable minds cannot differ as to the conclusions and justifiable inferences from the evidence, whether an employee is acting in the course and scope of his employment at the time of an accident giving rise to injuries is a question of law. *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 496, 224 P.2d 627 (1950); *Hays v. Lake*, 36 Wn. App. 827, 830, 677 P.2d 792 (Div. II, 1984). As such this court will review de novo whether the uncertified Toxicology Report indicating that Mr. Lingley had THC in his blood is sufficient to raise a fact question about whether he abandoned his employment at the time of the accident.

The Trial Court's Decision Was Based on the Industrial Insurance Act and Case Law, Not Judicial Estoppel

Appellant's assertion that the trial court applied the doctrine of judicial estoppel in granting Respondent's Motion for Summary Judgment is simply incorrect. (CP 173). In its letter decision, the trial court acknowledged that the "logic" of judicial estoppel was consistent with its ruling granting Respondent's Motion for Summary Judgment, but stated that technically it did not control. (CP 189). Rather, the trial court found that the Industrial Insurance Act and the case law that applied to the Act,

prohibited a person who applied for and received worker's compensation benefits from maintaining a third party action against his co-worker. (CP 189). The trial court stated its rationale in part as follows:

...
At the time of oral argument on the summary judgment motion, it was undisputed that Mr. Orris has been receiving significant benefits under the Industrial Insurance Act for more than three years. No law has been cited to convince me that he is entitled to pursue alternative tort remedies at this time.

(CP 190).

Washington's Industrial Insurance Act and the case law applying it support the trial court's ruling: Benefits provided under the Act are exclusive in nature. In exchange for certain relief to an injured worker, employers and co-workers are provided immunity from common law actions and civil suits. RCW 51.32.010.

The Act provides an exclusive remedy for workers. *Bankhead v. Aztec Constr. Co.*, 48 Wn. App. 102, 104, 737 P.2d 1291 (1987); *Rushing v. ALCOA*, 125 Wn. App. 837, 841, 105 P.3d 996 (2005). "A worker who receives workers' compensation benefits under the Act has no separate remedy for his or her injuries except where the Act specifically authorizes a cause of action." *Id.* The exclusive remedies of the Act are "sweeping, comprehensive, and of the broadest, most encompassing nature." *Cena v.*

State, 121 Wn. App. 352, 356, 88 P.3d 432 (2004)(citing *Tallerday v. Delong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993)).

The guaranteed relief that the Act provides injured workers is based on a compromise between employees and employers, wherein workers receive speedy relief, and employers and co-workers receive immunity from common law actions and civil suits. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002).

RCW 51.04.010 is clear:

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. **The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy,**

proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided. (Emphasis added).

The statute's clear language precludes Appellant from now maintaining a claim against Respondent when he has asserted and exercised his right to worker's compensation benefits. The trial court identified the flaw and inequity of Appellant's position when the Court said:

The big issue I have, which I don't think was really briefed, is, and I don't know whether there is any case law out there, but the issue that I am struggling with is this inconsistency that, to me, my understanding of worker's comp law is that you have to, ultimately you are seeking and representing to the Department of Labor and Industries that I need benefits and should receive benefits because I was in the course of my work when I was injured. And obviously he has been, by what you said today, he has been continually, on a monthly basis, I assume, receiving benefits from the Department of Labor and Industries. It just seem inconsistent and totally unfair on the one hand to say I need benefits and I am going to receive those and use those because I was in the course of my work, but on the other hand, I want you to believe, Judge, that there was a question of fact, in my position, as I was not in the course of work, and therefore I want to bring a third-party lawsuit...

And I don't think it's a collateral source issue, that's a different story. That would be, for instance, if he received L&I benefits and then was suing, let's say, a third party that had ran a red light and hit their truck that day and caused the injuries. At the trial against the person who injured him when he or she ran the red light, collateral source L&I would not be mentioned during the trial, even though it might be something that would be factored in later on if there was a full, one-hundred percent award.

But this is a different issue. It's the inconsistency in his representation, I guess, to L&I versus the court, in this case, and the court has to insist on people being open, honest and taking consistent positions, and I just really struggle with that.

(CP 157-159).

As stated above, the trial court did not base its ruling on the doctrine of Judicial Estoppel. Rather, it based its decision on the fact that Appellant had exercised his right to worker's compensation benefits under the statute, in exchange for giving up his right to sue his employer or co-worker.

RCW 51.32.010 provides that "[e]ach worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, **such payment**

shall be in lieu of any and all rights of action whatsoever against any person whomsoever.” (Emphasis added).

Appellant chose to obtain worker’s compensation benefits because he maintained he sustained a work related injury. Alternatively, if he was not injured in his employment, Appellant was free to sue the third party tortfeasor. This choice was Appellant’s to make, and he made it not once, but multiple times as he sought continued benefits under the Industrial Insurance Act.

Appellant Applied for and Received Workers’ Compensation Benefits

Appellant applied for and received workers’ compensation benefits from his employer and DLI. In his effort to secure worker’s compensation benefits, Appellant, on his own behalf, represented that he sustained a work related injury. He also made these same representations when he was represented by counsel.

On 09/23/07, because of Appellant’s acute injuries, Appellant’s father Gary Orris completed an Application for Worker’s Compensation Benefits on his son’s behalf. (CP 143). Under the signature portion of the document, Gary Orris signed his name and stated “patient unable to sign.” (CP 143). Under question 18, Appellant was asked: “Describe in detail how your injury or exposure occurred.” The Appellant’s father answered:

“Company Vehicle Accident - passenger returning to shop from worksite.” (CP 143). Under question number 19, Appellant was asked: “Were you doing your regular job?” Appellant’s father answered: “Yes.” (CP 143).

Appellant argues that in response to question 20 on the Application for Benefits, his father indicated that Orris was “on way home” when the accident occurred and that an unknown person crossed out “on way home” and inserted “returning to shop from worksite” instead. Brief of Appellant, p.6. To support this contention, Appellant relies solely on his attorney’s Declaration that, “it is apparent someone else changed that information. At this time it is unknown who made that change.” (CP 142). However, Gary Orris never submitted a declaration stating that he did not cross out “on way home.” In the absence of evidence from Mr. Orris that he did not make this change, the only reasonable inference is that Gary Orris was the one who made the changes on the Application and signed the form.

The Act provides for benefits to the injured worker *and their families*. RCW 51.04.010. Appellant’s natural parent, Gary Orris, started the process for seeking and receiving benefits under the Act, and Appellant continued to do so once he was capable. Once Appellant was discharged from the hospital, he never disavowed the representation his father made on his behalf to acquire worker’s compensation benefits.

Second, in response to Appellant's Application for worker's compensation benefits, DLI conducted an investigation, to determine whether Appellant was entitled to benefits under the Industrial Insurance Act in this situation. On October 30, 2008, DLI informed Appellant through his then attorney, Wesley McLaughlin, that it was accepting Appellant's Application for worker's compensation benefits. DLI's Order of October 30, 2008 to Appellant stated the following:

This claim for the **industrial injury** that occurred on 08/17/2007 while working for CALIBER CONCRETE CONSTRUCTION is allowed. The worker is entitled to receive medical treatment and other benefits as appropriate under the industrial insurance laws.

This claim has been assigned to the employer above [Caliber Concrete], and its claim costs will be used to set premium rates.

...

THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING...

(CP 162).

Appellant never contested the above Order.

Third, in conjunction with Appellant's application for worker's compensation benefits, Caliber sent a letter to DLI dated January 10, 2008, that stated: "Caliber Concrete Construction will continue to pay Mr.

Orris' wages for as long as he is unable to work." (CP 166). Caliber paid Appellant's wages through June 9, 2009, nearly two years after the accident. Appellant received \$2,900.01 per month from his employer in time loss worker's compensation benefits. (CP 167). At no time did Appellant notify his employer or DLI that he should not be receiving worker's compensation benefits because his injuries did not arise out of a work related accident.

Fourth, in an effort to continue to acquire income continuation benefits, Appellant signed a document on January 15, 2010, under penalty of perjury in which he stated, "Due to my work-related injury/illness, I didn't work, and I wasn't able to work from 8/07 to now." On April 23, 2010, Plaintiff again signed a document under penalty of perjury that, "Due to my work-related injury/illness, I didn't work, and I wasn't able to work from 10/09 to now." (CP 164-165). Appellant signed these documents long after he had been discharged from the hospital.

Finally, in a letter dated January 26, 2011, Appellant's attorney Wesley K. McLaughlin stated that his firm continued to represent Mr. Orris regarding his worker's compensation claim. (CP 127). It is established law that an attorney appearing on behalf of his client is his client's representative and is presumed to speak and act on his behalf. *State v. Peeler*, 7 Wn. App. 270, 274, 499 P.2d 90 (1972); *Clay v. Portik*,

84 Wn. App. 553, 561, 929 P.2d 1132. Mr. McLaughlin's letter is clear evidence of Appellant continuing to seek benefits under the Industrial Insurance Act.

Appellant Cannot Maintain an Action Against His Co-worker

The following facts are undisputed: 1) Appellant and Respondent were employees of Caliber at the time of the accident; 2) Respondent was driving a truck owned by Caliber and Appellant was riding as a passenger in the truck at the time of the accident; 3) Appellant and Respondent were returning Caliber's truck to Caliber's place of business from a job site at the time of the accident; 4) There was no evidence presented that Mr. Lingley had used any marijuana, smelled of marijuana or displayed any signs of being under the influence of marijuana at any time before the accident; 5) The Death Investigation Toxicology Report that found THC in Mr. Lingley's blood after the accident states: "This report is not certified and cannot be admitted into evidence without the presence of a toxicologist;" and 6) There was no evidence presented from a toxicologist in this case.

Here, Appellant's assertion that an uncertified Toxicology Report, without any evidence from a toxicologist, can raise a fact question on whether Mr. Lingley abandoned his employment at the time of the accident is without merit.

First, the report by its own admission does not meet the requirement of CR 56 as competent evidence, as it is uncertified and is not accompanied by an expert toxicologist's declaration or affidavit. The Toxicolog report invites speculation and conjecture, nothing more.

Second, our Courts have rejected employer's attempts to establish that an employee's degree of intoxication constituted such a deviation from their employment that they could not have been furthering the employer's interests as a matter of law. In *Flavorland Industries v. Schumacher*, 32 Wn.App. 428, 647 P.2d 1062 (1982), Division III rejected the employer's contention that its employee's degree of intoxication constituted such a deviation from the scope of his employment that he could not have been furthering any of the employer's interests. The Court affirmed a jury's finding that the employee was acting in the course and scope of his employment, despite the fact that the employee admitted he had been drinking more than usual on the night of the accident with business associates at a local tavern, that he had a BAC level of .28, that he was heading home at the time of the accident, and that he was traveling at 70 - 90 mph in the moments before the accident. Despite these facts, the Court affirmed a jury's finding that the employee's actions did not constitute an abandonment of employment. *Flavorland* held that intoxication is a defense, in the absence of an applicable statute, only

when competent evidence establishes that the Claimant has become so intoxicated he abandons his employment.

The case of *Faust v. Albertson*, 167 Wn.2d 531 (2009), is equally instructive. In *Faust*, the Washington State Supreme Court held that in the overservice line of cases, BAC evidence by itself is insufficient to establish a triable issue of fact regarding alleged overservice to an apparently intoxicated person. Rather, the Court held that BAC evidence is only relevant when corroborated and supported by first hand observations of the Defendant's condition.

In our case, there is simply no evidence of intoxication. There is no evidence that Mr. Lingley had used marijuana, smelled of marijuana or displayed any signs of being under the influence of marijuana at any time before the accident. Rather the only evidence offered in support of the contention that Mr. Lingley abandoned his employment is an uncertified Toxicology Report that found THC in Mr. Lingley's blood, without any accompanying expert opinion. As such, a jury would be left to speculate on what the Toxicology Report evidence means.

The Industrial Insurance Act prohibits one injured worker from bringing suit against another worker in the same employ of the injured worker:

If a third person, **not in a worker's same employ**, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

RCW 51.24.030(1) (emphasis added).

Here, it is undisputed that Appellant and Respondent were in the same employ and there is neither competent nor adequate evidence to present a fact question to a jury about whether Mr. Lingley abandoned his employment at the time of the accident. Therefore, Appellant is precluded from bringing an action against Respondent when he has already elected to, and received, benefits under the Act.

V. Conclusion

This Court should affirm the Trial Court's granting of Summary Judgment Dismissal for the following reasons:

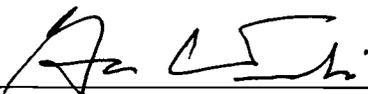
1. Appellant elected to seek worker's compensation benefits for a work related injury, something that he affirmed several times in his effort to acquire continued benefits. His choice and receipt of benefits under the Industrial Insurance Act specifically precludes Plaintiff from now bringing a third-party action against his coworker.

2. No competent evidence was presented to the Trial Court that Respondent's decedent Matthew Lingley was not acting within the course of his employment at the time of the accident. An uncertified Toxicology Report standing alone, without any expert testimony, is not competent evidence under CR 56 and fails to raise a fact question about whether Respondent's decedent Matthew Lingley abandoned his employment.

For these reasons the Trial Court's granting of Summary Judgment to Respondents should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

GARDNER TRABOLSI & ASSOCIATES, PLLC

By 

Gary A. Trabolsi, WSBA #13215
Attorneys for Respondents

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LINGLEY, as Personal
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ARNOLD LINGLEY,

Respondents.

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DECLARATION OF
SERVICE

I, Kimm Harrison, declare as follows:

1. I am now and at all times herein mentioned was a citizen of the United States and resident of the state of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the firm of Gardner Trabolsi & Associates PLLC, 2200 Sixth Avenue, Suite 600, Seattle, Washington.

3. On December 15, 2011, I filed and served in the manner noted below, a true and correct copy of Respondents' Brief on the parties in this action:

VIA LEGAL MESSENGER:

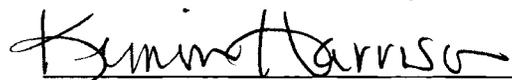
Kamela J. James
Law Offices of Kamela J. James, PLLC
209 Quince Street N.E.
Olympia, Washington 98506-4041
Phone: (360) 943-0555
Fax: (360) 943-0475

VIA LEGAL MESSENGER:

K. Michael Fandel
Diane Meyers
Graham & Dunn
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Phone: (206) 340-9693
Fax: (206) 340-9599

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 15th day of December, 2011, in Seattle, Washington.



Kimm Harrison
Legal Assistant to Gary A. Trabolsi