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# Giles v. Eagle Farms Appellant's Brief Dckt. 41469

# IN THE SUPREME COURT OF THE STATE OF IDAHO

NEWMAN K. GILES,

Claimant/Appellant,

v.

EAGLE FARMS, INC., Employer, and STATE INSURANCE FUND, Surety,

Defendants/Respondents.

Supreme Court Docket No. 41469-2013

## APPELLANT'S BRIEF ON APPEAL

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Appeal from Industrial Commission.
Chairman Thomas P. Baskin, presiding.

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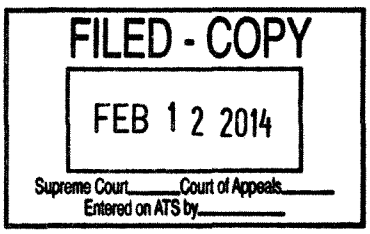
Douglas G. Bowen, Esq., residing at Idaho Falls, Idaho, for Appellant.

Paul J. Augustine, Esq., residing at Boise, Idaho, for Respondents.



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## STATEMENT OF THE CASE

This appeal arises from the Industrial Commission's Order dated August 27, 2013 ("Order") and its adoption and approval of Referee Michael Powers's Findings of Fact, Conclusion of Law, and Recommendation dated August 27, 2013 ("Findings"). In its Order, the Commission found that the defendant/appellee, Eagle Farms, Inc., and the State Insurance Fund (collectively "Employer") met their burden of proving that claimant/appellant's, Newman Kalahan Giles ("Kal"), intoxication was a reasonable and substantial cause of his injuries, such that Kal was barred from receiving income benefits pursuant to Idaho Code Section 72-208.

This case arises from a motor vehicle accident in which Kal, who was nineteen-years-old at the time, was seriously injured. On August 17, 2008, Kal was traveling down a highway at night in Jefferson County, Idaho, when his vehicle left the roadway and crashed. At the time of the accident, Kal was travelling at approximately 123 miles per hour. Kal was not wearing a seat belt and was ejected from his vehicle. Evidence in the record suggests that Kal was texting at the time he crashed. Also, Kal had a blood alcohol content of .11.

Now on appeal, Kal seeks a ruling from this Court that the Commission erred in refusing to consider evidence that Kal was texting at the time of the accident; the Commission erred in finding that the Employer met its burden that intoxication was a reasonable and substantial cause of his injuries; the Commission erred by relying on evidence of Kal's use of legally prescribed medication; and the Commission erred in refusing to find that Kal's failure to wear a seat belt was a reasonable and substantial cause of his injuries. For the reasons set forth

herein, this Court should reverse the Commission, vacate the Commission's Order and Findings dated August 27, 2013, and hold that the Employer has not met its burden, pursuant to Idaho Code Section 72-208(2), of proving that intoxication was reasonable and substantial cause of Kal's injuries.

## STATEMENT OF FACTS

A. Background.

Kal has an Axis 1 diagnosis of attention deficit hyperactivity disorder ("ADHD).[1] ADHD causes people to have addictive personalities.[2] One of Kal's major addictions is his addiction to speed.[3] Kal's "Axis I diagnosis of Attention Deficit/Hyperactivity Disorder [causes him] to engage in risk-taking behavior, including driving at excessive speeds. . . ."[4]

Kal describes himself as a "huge speeder," says he always goes fast, and that driving 100 miles an hour does not concern him.[5] Kal's father, Newman William Giles ("Newman"), describes Kal as a "habitual speeder."[6] Newman says Kal was not a good driver and that he drove fast.[7]

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1 *See* 14:7-12 of the deposition transcript of Dr. Joe Anderson dated February 13, 2013 ("Anderson Depo.").
2 Anderson Depo., 14:7-20.
3 Anderson Depo., 14:7-20.
4 *See* 77:1-10 of the deposition transcript of Gary Anderson, Ph.D., dated October 19, 2012 ("Dawson Depo."); see also Anderson Depo., 14:7-12
5 *See* Hearing Transcript ("HT") 33:14-21; *See also* 20:11-14 of the deposition transcript of Newman "Kal" Giles dated July 22, 2010 ("Kal Depo.").
6 HT 102:10-11.
7 HT 91:14-23 (Emphasis added).

Kal's truck was built for speed. Kal's truck was a Chevy Duramax diesel with a V8 engine[8] and was "double chipped" to make it go faster.[9] The double chip "amps up the horsepower tremendously" for "more speed" and "takes the governor off of the vehicle."[10] The chips gave the truck over 400 horse power.[11] In addition, Kal's truck had a methanol kit which included a button you pressed "when you've got the throttle down" to increase the horsepower and speed,[12] and Kal's truck had an adjusted air intake system to make it go faster.[13]

Prior to the accident, Kal bragged that he had the fastest truck in high school and everyone wanted to ride with him because it was the fastest.[14] Kal's brother's truck (the truck Kal was driving at the time of the accident) was modified just like Kal's truck to go fast.[15]

Prior to the accident, Kal had gotten at least three speeding tickets and he had received several warnings for speeding.[16] Kal was once arrested for driving over 100 miles per hour on his way from Arizona to Idaho,[17] and Kal stated that the Arizona incident was not the only time

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8 HT 45:2-6.
9 HT 37:8-9.
10 HT 37:13-22.
11 HT 45:14-18.
12 HT 44:16-45:1.
13 HT 45:7-21.
14 HT 44:3-7.
15 HT 46:12-19.
16 HT 46:20-47:6.
17 HT 49:11-14.

he had driven over 100 miles per hour.[18] Also, Officer Allen Bivins of the Idaho State Police remembers stopping Kal at least once or twice for speeding, but he did not give Kal a citation.[19]

Prior to the accident, Kal described himself as a "big drinker."[20] Kal has been charged with three misdemeanor offenses of "Possession of Alcohol by a Minor" in 2005, 2006, and 2007.[21] Also, Kal has had one prior DUI offense,[22] and he said he consumed alcohol "daily."[23]

B. Day Of The Incident.

Kal was an employee of Eagle Farms.[24] His job was to check and inspect the sprinkler pivots on the various farms owned by Eagle Farms.[25] In the early morning of August 17, 2008, Kal drove his brother's Chevy Duramax truck to Terreton, Idaho, to work on a sprinkler pivot[26] and Jonathan Glodo ("Jonathan") rode with Kal.[27]

Earlier that evening, Jonathan had been with Kal at Chili's restaurant in Idaho Falls.[28] Kal and Jonathan left Chili's restaurant at approximately 1:00 a.m. and took a friend home.[29] Then Kal and Jonathan went to Terreton to work on the sprinkler pivot.[30] Kal and Jonathan left

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18 HT 48:16-20.
19 HT 77:22-24.
20 HT 32:8-11.
21 *See* Jefferson County Case No. CR-2007-1809; Fremont County Case No. CR-2006-314; Jefferson County Case No. CR-2005-274. The case history for these cases was included in the Idaho State Police Report of Corporal Allen W. Bivins ("Officer Bivins Report").
22 Anderson Depo., 69:2-13.
23 Kal Depo., 22:16-25.
24 HT 43:3-5.
25 HT 43:6-15.
26 HT 91:9-11; Bivins Report p.3 and 6.
27 Bivins Report p. 6.
28 Bivins Report p. 6.
29 Bivins Report p. 6.
30 HT 91:9-11; Bivins Report p. 6.

Terreton at approximately 3:00 a.m. to drive back to Kal's home.[31] Jonathan never saw Kal drink any alcohol, and even though Jonathan rode in the same truck as Kal, he did not smell alcohol on Kal's breath.[32]

Throughout the evening and early morning hours and prior to Kal's accident, Kal had been sending and receiving several text messages to and from his friend Ryan Holm.[33] Kal was sending text messages to Ryan at approximately the same time the car accident happened (3:30 a.m.).[34]

On the way back to Kal's home, at approximately 3:30 a.m., Kal and Jonathan were involved in a motor vehicle accident traveling south on Old Basset Highway when Kal failed to negotiate a right-hand curve as he neared 3145 East and ran off the east side of the highway.[35] The vehicle traveled down a steep embankment and rolled several times.[36] At the time of the accident, Kal was traveling at approximately 123 miles per hour.[37] The posted speed limit was 50 miles per hour.[38]

Kal was not wearing a seatbelt and was ejected 90 feet from the vehicle.[39] Kal sustained critical injuries, including a lacerated liver, one broken rib, a severe head injury,

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31 HT 27:15-20.
32 Bivins Report p. 6.
33 HT 50:9-51:6.
34 HT 50:9-51:6.
35 HT 58:19:20; 57:5-7; Bivins Report p. 1.
36 Bivins Report p. 1.
37 HT 18:25.
38 HT 59:23-24.
39 Bivins Report pp. 1, 4, and 5.

fractured left clavicle, and compression fractures of the vertebrae in the neck and back.[40] Jonathan was wearing his seatbelt, was not ejected from the vehicle, and sustained minor injuries.[41] Also, at the time of the accident, Kal had a blood alcohol level of .11,[42] he was 19-years-old, and weighed 190 pounds.[43]

C. Newman's Testimony.

Newman is Kal's father.[44] Newman is also Kal's supervisor and an owner of Eagle Farms, Inc. (a defendant in this case).[45] After the accident, Newman sent some of his employees over to the place of the accident with some flatbeds and track hoes to clean up the wreckage.[46] In the process of moving the truck, one of the employees found Kal's cellphone and brought it to Newman.[47] Newman checked the most recent text messages on the cellphone and saw that there were about 3 or 4 text messages on the phone between the time period of 3:15 a.m. and 3:30 a.m. the morning of the accident.[48] The text messages were between Kal and Ryan Holm.[49] Newman said he read the text messages and that in the text messages Ryan Holm indicated he was having a hard time, and Kal was trying to console him.[50]

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40 Bivins Report pp. 1 and 6.
41 Bivins Report p. 6.
42 Dawson Depo., 16:14.
43 Bivins Report p. 1.
44 HT 90:9-11.
45 HT 90:7-91:8.
46 HT 94:2-96:4.
47 HT 94:2-96:4.
48 HT 95:14-96:18.
49 HT 95:14-96:18.

D. Officer Bivins' Testimony.

Officer Allen A. Bivins is employed with the Idaho State Police ("ISP") and he is an accident reconstructionist.[51] Officer Bivins investigated the scene of Kal's car accident.[52] Based on Officer Bivins' investigation, he concluded that Kal was travelling at a speed of around 123 miles per hour when he crashed.[53]

Officer Bivins testified he ***could not*** say whether alcohol was a "substantial cause" for Kal's speeding and that ***alcohol affects people in different ways***.[54] Officer Bivins testified that an inexperienced drinker may experience a greater level of impairment versus an experienced drinker consuming the same amount of alcohol.[55] Officer Bivins testified he knew that Kal had used alcohol prior to the day of the accident and had built up some tolerance for alcohol. [56] Officer Bivins cited Kal for underage drinking in 2007.[57]

Officer Bivins stated that ***"speed"*** was ***a substantial*** contributing factor to Kal's accident.[58] Officer Bivins stated that he has received special training as a patrol officer on how

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50 HT 95:14-96:18.
51 HT 55:19-56:11.
52 HT 56:21-58:11.
53 HT 62:18-25.
54 HT 76:4-11.
55 HT 73:17-74:10.
56 HT 74:11-75:7.
57 *See* Jefferson County Case No. CR-2007-1809 (this case history is included in Officer Bivins' Report).
58 HT 75:21-25.

to drive fast.[59] Officer Bivins stated that he would probably not be successful at negotiating the curve driving Kal's truck at 123 miles per hour, and he would not try to do it.[60]

Officer Bivins said texting can be a factor in causing an accident because it calls attention off the roadway.[61] Officer Bivins agreed that people can speed and exercise poor judgment, even when alcohol is not a factor at all.[62]

E. Dr. Joe Anderson's Testimony.

Dr. Joe Anderson is a board certified emergency room physician and Chief Medical Officer for Eastern Idaho Regional Medical Center.[63] He has been licensed to practice medicine in the State of Idaho since 1991.[64] He also works as a psychiatrist at the Mental Wellness Center, where he diagnoses mental illnesses and prescribes medication to treat mental illnesses.[65] He also provides diagnostic treatment at Children's Supportive Services and psychiatric evaluations and treatments for another organization called Transitions.[66] Dr. Anderson is trained in pharmacology and toxicology.[67]

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59 HT 79:22-25 (Emphasis added).
60 HT 80:19-81:21.
61 HT 82:14-83:6.
62 HT 84:5-8.
63 Anderson Depo., 5:2-15; 6:24-25.
64 Anderson Depo., 6:20-22.
65 Anderson Depo., 5:19-6:19.
66 Anderson Depo., 5:19-6:19.
67 Anderson Depo., 7:2-16.

Dr. Anderson stated that Kal has an Axis 1 diagnosis of attention deficit hyperactivity disorder ("ADHD")[68] and that ADHD causes a person to have an addictive personality.[69] Dr. Anderson opined that one of Kal's major addictions is his addiction to speed.[70]

Dr. Anderson testified that in his opinion the reasonable and substantial cause of Kal's injuries is "excessive speed caused by an addictive personality with his ADHD where he was addicted to speed."[71] Dr. Anderson bases his opinion that Kal was addicted to speed on "excessive speeding tickets. The need for speed. Building a truck that was built for speed. A badge of courage . . . in which he considered himself a speed demon, all those kinds of things. And we know that ADHD people do have addictive personalities."[72]

Dr. Anderson testified that he considered alcohol to be a minor factor for Kal's accident because he could find no medical evidence that supports the theory that drinking alcohol causes a person to drive faster.[73] In addition, Dr. Anderson stated that nobody can say based on reasonable medical probability that alcohol was a reasonable and substantial cause of the injuries Kal sustained because there is no way to quantify the exact percent of alcohol that is going to impair a person.[74] According to Dr. Anderson, Kal was not an "alcohol virgin."[75] He stated it is important to take into account a person's prior alcohol consumption because over

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68 Anderson Depo., 14:7-12.
69 Anderson Depo., 14:7-20.
70 Anderson Depo., 14:7-20.
71 Anderson Depo., 24:17-19.
72 Anderson Depo., 24:20-25:4.
73 Anderson Depo., 21:18-22:2; 25:5-20.
74 Anderson Depo., 21:11-15; 27:23-28:12.

time a person can build up a level of tolerance to alcohol and become better at functioning while under the influence of alcohol.[76]

Furthermore, Dr. Anderson stated that while a certain number of people could still negotiate that corner with a .11 BAC going at or below the speed limit, nobody could make that corner going 123 miles per hour.[77]

Dr. Anderson stated that Kal's ADHD caused Kal to engage in risk-taking behavior, including driving at excessive speeds and being very impulsive.[78] He stated that a correlation cannot be drawn between alcohol and speed because Kal received many speeding tickets when he was not intoxicated.[79]

F. Gary Dawson's Testimony.

Gary Dawson has a Ph.D. in pharmacology.[80] Mr. Dawson is not a medical doctor.[81] Mr. Dawson is not qualified to make a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD"), and he is not qualified to prescribe any medications for ADHD.[82]

Mr. Dawson stated that Kal's blood alcohol content together with the presence of opiates produced a marked impairment of his ability to operate a motor vehicle in a safe manner and his resultant intoxication was a reasonable and substantial cause of the accident

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75 Anderson Depo., 23:1-5.
76 Anderson Depo., 23:1-13.
77 Anderson Depo., 28:4-20; 21:18-22:20.
78 Anderson Depo., 28:21-29:25.
79 Anderson Depo., 29:17-25.
80 Dawson Depo., 5:10-11.
81 Dawson Depo., 32:9-11.

and Kal's injuries.[83] Mr. Dawson agreed that a person can have alcohol and opiates in their system which has an effect on a person but that is not a substantial cause of the accident.[84]

Mr. Dawson stated that Kal's speed of 123 miles per hour was a "huge factor" and a substantial factor in causing Kal's accident.[85]

Mr. Dawson further stated that the only evidence "you need" to show that alcohol was a substantial cause of Kal's injuries is Kal's BAC and Kal's crash.[86] He testified as follows:

> Q. What facts do you have to say that, on the night of the accident, the alcohol was the substantial factor, as opposed to his general propensity to drive fast?
> A. The alcohol level of .11. He is drunk, and he crashed. He missed the turn. He didn't even try to make the turn, from what it looked like in the reconstruction. You are drunk, and you crash.
> Q. And that is all of the facts that you have got?
> A. That's all you need, to look at that relationship.[87]

Importantly, Mr. Dawson did not opine that Kal was driving at 123 mph and texting because he had been drinking alcohol.[88] Mr. Dawson agreed that alcohol probably did not cause Kal to drive 123 miles per hour[89] and that it is pure speculation to attempt to link Kal's speed at the time of the accident to Kal's alcohol consumption.[90]

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82 Dawson Depo., 76:14-20.
83 Dawson Depo., 27:22-28:5.
84 Dawson Depo., 50:5-11.
85 Dawson Depo., 79:14-22; 81:24-82:15.
86 Dawson Depo., 90:9-18.
87 Dawson Depo., 90:9-18.
88 Dawson Depo., 101:7-11.

## COURSE OF PROCEEDINGS

### *Kal's Complaint And Respondents' Answer*

On June 12, 2009, Kal filed a worker's compensation complaint against his employer, Eagle Farms, Inc. and the State Insurance Fund (collectively "the Employer").[91] The Employer filed its answer to the complaint and raised various affirmative defenses, including that Kal's intoxication was a reasonable and substantial cause of his injury "such that pursuant to Idaho Code Section 72-208, no income benefits shall be paid to Claimant."[92]

### *Motion to Bifurcate*

On July 24, 2009, Kal filed a motion to bifurcate the issues of compensability/liability and the issues related to benefits and damages.[93] The Employer stipulated to the motion to bifurcate the issues.[94] On January 26, 2010, the Commission entered an Amended Order Bifurcating Issues and ordered that "the only issue before the Industrial Commission at this time is whether Claimant is precluded from recovering benefits pursuant to Idaho Code § 72-208(2)."[95]

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89 Dawson Depo., 54:20-23.
90 Dawson Depo., 55:9-14.
91 R Vol. I, p. 1.
92 R Vol. I, pp. 5-7.
93 R Vol. I, pp. 8-9.
94 R Vol. I, p. 11.
95 R Vol. I, p. 15

*Hearing*

On June 12, 2012, Michael E. Powers (the "Referee") conducted the hearing for the Commission.[96] At the hearing, both parties presented oral and documentary evidence.[97] After the hearing, the record remained open for the taking of the post-hearing depositions of Mr. Dawson and Dr. Anderson.[98] The parties then submitted their briefs and the case was taken under advisement by the Commission on April 29, 2013.[99]

***The Commission's Findings Of Fact, Conclusion Of Law, And Recommendation, And The Commission's Order.***

On August 27, 2013, the Referee issued his Findings of Fact, Conclusion of Law, and Recommendation ("Findings").[100] In his Findings, the Referee refused to consider any evidence of texting because Kal could not "locate his cell phone," the issue was "not raised until the hearing," and the "evidence regarding texting cannot be corroborated."[101] The Referee also declined to find that Kal's failure to wear a seat belt was a reasonable and substantial cause of his injuries. The Referee stated that "the evidence in the record is insufficient to establish the degree, if any, to which Claimant's injuries would have been ameliorated, had he been belted in."[102]

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96 R Vol. I, p. 17; HT 2:1-4:22.
97 R Vol. I, p. 17; HT 2:1-4:22.
98 R Vol. I, p. 17.
99 R Vol. I, p. 17.
100 R Vol. I, p. 17.
101 R Vol. I, p. 20.
102 R Vol. I, p. 19.

The Referee also found the opinions of Mr. Dawson more persuasive than Dr. Anderson because, among other things, "Dr. Anderson did not have an opinion regarding the effects of hydrocodone or opiates [which] may [have] contributed to Claimant's accident. . . ."[103]

The Referee concluded that the "clearest explanation for Claimant's unusual reckless state of mind, based upon the evidence in the record, is that he was experiencing impairment due to intoxication" and that "Defendants have met their burden of proving Claimant's intoxication was a reasonable and substantial factor contributing to his accident and injuries."[104]

On the same day the Referee issued his Decision, the Commission issued its Order, approving and adopting the Referee's Decision as their own.[105] In its Order, the Commission ordered that: (1) "Defendants have met their burden in proving that Claimant's intoxication was a reasonable and substantial cause of his injuries, such that he is barred from receiving income benefits pursuant to Idaho Code § 72-208" and (2) "[p]ursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated."[106]

On September 26, 2013, Kal timely filed his Notice of Appeal.[107]

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103 R Vol. I, p. 11.
104 R Vol. I, p. 28.
105 R Vol. I, pp. 17 and 30.
106 R Vol. I, pp. 30-31.
107 R Vol. I, pp. 32-34.

## ISSUES PRESENTED ON APPEAL

1. Did the Industrial Commission commit reversible error by refusing to consider evidence that Kal was texting at the time of the accident?

2. Did the Industrial Commission commit reversible error by finding that intoxication was a reasonable and substantial cause of his injuries?

3. Did the Industrial Commission commit reversible error by relying on Kal's use of prescription medication to find that intoxication was a reasonable and substantial cause of Kal's injuries?

4. Did the Industrial Commission commit reversible error by refusing to find that Kal's failure to wear a seat belt was a reasonable and substantial cause of his injuries?

## ARGUMENT

### STANDARD OF REVIEW

The Idaho Supreme Court has stated:

> When reviewing a decision of the Industrial Commission, this Court exercises free review over questions of law. *Zapata v. J.R. Simplot Co.,* 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). This Court's review with respect to questions of fact is limited to whether the Industrial Commission's findings are supported by substantial and competent evidence; if so, they will not be disturbed on appeal. *Id.* Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 735, 40 P.3d 91, 93 (2002). This Court will not disturb the Commission's determination as to the weight and credibility of evidence unless clearly erroneous. *Zapata,* 132 Idaho at 515, 975 P.2d at 1180. "Finally, in reviewing a decision of the Commission, this Court views all the facts and inferences in the light most favorable to the party who prevailed before the Commission." *Id.* (internal quotations omitted).

***The terms of Idaho's workers' compensation statute are liberally construed in favor of the employee.*** *Haldiman v. Am. Fine Foods,* 117 Idaho 955, 956–57, 793 P.2d 187, 188–89 (1990). However, conflicting facts need not be construed liberally in favor of the worker. *Bennett v. Bunker Hill Co.,* 88 Idaho 300, 305, 399 P.2d 270, 272 (1965).

*Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 755 (2013) (emphasis added).

I.

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR BY REFUSING TO CONSIDER EVIDENCE THAT KAL WAS TEXTING AT THE TIME OF THE ACCIDENT.

In the Findings of Fact, Conclusion of Law, and Recommendation, the Referee stated:

> For the first time, Claimant alleged at hearing that he may also have been texting and was thereby distracted at the time he missed the curve. Although he has no independent recollection of texting,[108] he bases his proposition on the fact that once he recovered his cell phone from the accident scene, it showed that he had been texting a friend at the time of the accident. As Claimant cannot locate his cell phone, and his cell phone usage as a contributing factor in causing his accident was not raised until the hearing, ***any evidence regarding texting cannot be corroborated and will not be considered in this decision***, even though some quoted material may reference cell phone usage.[109]

The Commission erred in refusing to consider the evidence in the record regarding texting for the reasons stated below.

A. The Referee's Strict Adherence To The Rules Of Evidence Is Reversible Error And Is Contrary To The Policies Of Industrial Commission Proceedings.

In *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 758 (2013), this Court held that:

> "Strict adherence to the rules of evidence *is not* required in Industrial Commission proceedings and admission of evidence in such proceedings is more relaxed." *Hagler v. Micron Tech.,* 118 Idaho 596, 598, 798 P.2d 55, 57 (1990) (emphasis

108 The Referee fails to mention the reason that Kal does not have an independent recollection of texting at the time of the accident was because he suffered a severe brain injury. *See* HT 42:2-43:21.
109 R Vol. I, p. 20 (emphasis added).

> in original). The policies of Industrial Commission proceedings are simplicity, accommodation of claimants, and justice. *Id.* at 599, 798 P.2d at 58. The legislature intended the industrial commission to have the "discretionary power to consider any type of reliable, trustworthy evidence having probative value ... even though that evidence may not be admissible in a court of law." *Hite v. Kulhenak Bldg. Contractor,* 96 Idaho 70, 72, 524 P.2d 531, 533 (1974).

*Id.* at 758. Furthermore, the exclusion of evidence based on the strict application of the rules of evidence is grounds for reversible error. *See Mussman v. Kootenai County*, 150 Idaho 68, 73 (2010); *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 598–99 (1990).

In this case, the Referee excluded all the texting evidence because it was "not raised until the hearing."[110] While the Referee cited to no rule or authority in his Findings to exclude the texting evidence, it appears he was relying on some sort of evidentiary standard to exclude the evidence.

The Referee's strict adherence to the rules of evidence is contrary to the policies of Industrial Commission proceedings. In particular, the polices of "simplicity, accommodation to the claimants and justice." *Mazzone* at 758.

This is particularly true in this case where: (1) the Employer never objected at the hearing or after the hearing to the admission of the texting evidence; (2) the hearing officer did not strike or disallow the testimony of the texting evidence at the hearing; (3) the record remained open for another approximately eight months after the hearing for further discovery during which the Referee or Employer could have conducted discovery or made further inquiry

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110 R Vol. I, p. 20.

regarding the texting evidence but simply chose not to;[111] (4) the Employer can show no prejudice for allowing the admission of the texting evidence; and (5) the Referee decided to exclude the texting information for the first time in his Findings issued 14 months after the hearing.[112]

Importantly, this is not a case where the Referee admitted and then simply "discounted" the significance of the texting evidence. *See Mussman* at 73 (2010). Instead, the Referee ***excluded*** the evidence altogether.

The Referee's exclusion of texting evidence because it was raised for the first time at the hearing "undermines the legal purpose of Industrial Commission proceedings to accommodate claimants and promote justice in simple proceedings." *Mazzone* at 761. Furthermore, the strict application of the rules of evidence is not required in Industrial Commission proceedings and is reversible error. Thus, the Court should rule that the Referee's erred in excluding the evidence of texting in his Findings.

B. The Referee Erred In Ruling That Corroborating Evidence Was Necessary.

In *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, -- (1935), this Court held that "[t]he board erred in considering that corroborating evidence was necessary. . . ." *Id.* Also, this Court has "held that the referee '***must*** accept as true the positive, uncontradicted testimony of a credible witness, unless this testimony is inherently improbable, or rendered so by facts and

111 R Vol. I, p. 17.
112 R Vol. I, p. 17.

circumstances disclosed at the hearing or trial.'" *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 758 (2013) (citation omitted) (emphasis added).

Here, another reason the Referee gave for refusing to consider Kal's testimony regarding texting is that the "texting evidence cannot be corroborated."[113] The Referee's finding that corroborating evidence was necessary is error and contrary to the holding in *Fields*. Moreover, even if corroborating evidence were required, the court ignored corroborating evidence in this case.

The verb "corroborate" is defined as follows:

> To strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. The testimony of a witness is said to be corroborated when ***it is shown to correspond with the representation of some other witnesses***, or to comport with some facts otherwise known or established. BLACK'S LAW DICTIONARY, 311 (5th ed.1979).

*State v. Grist*, 147 Idaho 49, 54 (2009) (emphasis added).

Kal does not have any memory of the accident because of the severe brain injury he sustained as a result of the accident.[114] At the hearing, Kal testified that after the accident he had a chance to look at his cell phone and he saw that he had been sending texts to his friend Ryan Holm throughout the evening of his accident.[115] Kal said that his phone showed that he sent his last text to Ryan at 3:30 a.m. (which was the approximate time of his accident).[116]

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113 R Vol. I, p. 20.
114 HT 42:2-43:21.
115 HT 50:6-51:6.
116 HT 50:6-51:6; 58:19-21.

In addition to Kal's testimony regarding texting, Kal's father and employer, Newman, also testified regarding Kal's texting. Newman testified that after the accident, Newman sent some of his employees over to the place of the accident with some flatbeds and track hoes to clean up the wreckage.[117] In the process of moving the truck, one of the employees found Kal's cellphone and brought it to Newman.[118] Newman checked the most recent text messages on the cell phone and saw that there were about 3 or 4 text messages on the phone between the time period of 3:15 a.m. and 3:30 a.m. the morning of the accident.[119] The text messages were between Kal and Ryan Holm.[120] Newman said he read the text messages and that in the text messages Ryan Holm indicated he was having a hard time, and Kal was trying to console him.[121]

The time sequence of when Newman learned about the cell phone and texting explains why Officer Bivins never included this critical information in his report. When Officer Bivins interviewed Newman, Newman would not have known anything to tell Officer Bivins about the cellphone and the texting[122] because Newman spoke with Officer Bivins the morning after the accident whereas Newman's employee did not discover the cellphone and tell Newman about it until approximately two or three days after the accident.[123]

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117 HT 94:2-96:4.
118 HT 94:2-96:4.
119 HT 95:14-96:18.
120 HT 95:14-96:18.
121 HT 95:14-96:18.
122 HT 64:11-65:9; 94:9-95:11.
123 HT 94:9-95:11.

Newman stated he had no idea when he was looking at Kal's cellphone that it would become an issue in the future regarding the cause of Kal's accident.[124] Newman said the reason he did not think to mention texting as a cause of the accident during his deposition was because at the time of his deposition he did not even know how to text, so he did not consider it a factor at the time.[125] Since that time, Newman has started using texting, and he has personally experienced texting and driving and now understands that it is not safe.[126] Newman stated that he obviously would have attempted to preserve the cell phone if he had only known it would be an issue, but at the time of the accident he did not even know if his son would live.[127] He was concerned for his son's life and not about gathering evidence.[128]

The consistent and uncontradicted testimony of Newman corroborates Kal's testimony regarding Kal's texting at the time of the accident. The Employer and the State Insurance Fund offered no contrary evidence. Nonetheless, the Referee refused to consider this corroborated evidence of texting in his Findings. Therefore, the Referee erred in requiring corroborating evidence and in ignoring the corroborating evidence in this case.

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124 HT 104:3-6.
125 HT 99:24-100:9.
126 HT 99:24-100:9.
127 HT 104:7-20.
128 HT 104:7-20.

C. The Industrial Commission Erred In Refusing To Consider The Evidence Of Kal's Texting At The Time Of The Accident Because It Is An Undisputed Fact.

Newman is an owner of Eagle Farms, Inc. (a defendant in this case), which was Kal's employer.[129] Because Newman is Kal's employer and a defendant in this case, his testimony regarding Kal's cell phone usage at the time of the accident is an admission by the opposing party. This makes the texting evidence an undisputed fact in this case. Thus, the Commission should have considered the undisputed texting evidence and the Commission erred in excluding this evidence from its Findings.

D. The Industrial Commission's Refusal To Consider Evidence Of Texting Is Not Harmless Error.

According to the National Safety Council, at least 28% of all traffic crashes – or at least 1.6 million crashes each year – involve drivers using cell phones and texting.[130] Idaho Code Section 49-1401A prohibits texting while driving.

The Employer's expert, Mr. Dawson, agreed that people text all the time while driving a car without having consumed any alcohol.[131] Mr. Dawson agreed that the Idaho legislature passed a law outlawing texting and driving because people were getting into accidents while texting and driving.[132] Mr. Dawson testified that someone that talks on their cell phone while driving is the equivalent of someone driving with a BAC of .08.[133] Mr. Dawson stated that

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129 R Vol. I, p. 17., HT 90:7-91:11.
130 *http://www.nsc.org/Pages/NSCestimates16millioncrashescausedbydriversusingcellphonesandtexting.aspx*
131 Dawson Depo., 73:24-74:1.
132 Dawson Depo., 72:2-20.
133 Dawson Depo., 96:16-21.

texting while driving is not safe and that texting while driving at 123 miles per hour could be a substantial factor in causing the accident.[134] Moreover, Officer Bivins said texting can be a factor in causing an accident because it calls attention off the roadway.[135]

Thus, given the fact that all parties agree that texting could be a substantial cause of Kal's injuries and that almost one out of three car crashes in the U.S. results from cell phone use, the Referee's refusal to even consider any evidence of texting was not a harmless error in determining whether intoxication was a substantial cause of Kal's injuries.

II.

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR BY FINDING THAT INTOXICATION WAS A REASONABLE AND SUBSTANTIAL CAUSE OF KAL'S INJURIES BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

A. Kal's Blood Alcohol Level Of .11 Alone Does Not Prove That Intoxication Is A Substantial Cause Of Kal's Injuries.

Officer Bivins testified that he could not say whether alcohol was a "substantial cause" for Kal's accident.[136] Furthermore, Dr. Anderson testified that nobody can say based on reasonable medical probability that alcohol was a reasonable and substantial cause of the injuries.[137] Thus, the only testimony that the Referee relied on in finding that intoxication was a reasonable and substantial cause of Kal's injuries is Mr. Dawson's testimony.

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134 Dawson Depo., 100:1-16.
135 HT 82:14-83:6.
136 HT 76:4-11; 76:4-11.
137 Anderson Depo., 21:11-15; 27:23-28:12.

In the Findings, the Referee relied on the following testimony of Mr. Dawson in reaching the conclusion that intoxication was a reasonable and substantial cause of Kal's injuries:

> Q. What facts do you have to say that, on the night of the accident, the alcohol was the substantial factor, as opposed to his general propensity to drive fast?
> A. The alcohol level of .11. He is drunk, and he crashed. He missed the turn. He didn't even try to make the turn, from what it looked like in the reconstruction. You are drunk, and you crash.
> Q. And that is all of the facts that you have got?
> A. That's all you need, to look at that relationship.[138]

According to Mr. Dawson, the fact that Kal was "drunk" is all he needs to prove that alcohol was a substantial cause of Kal's accident. This logic and opinion is clearly contrary to the holding in *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 722 (1976), where the Court stated that the "the finding of intoxication does not necessitate a finding that the intoxication caused the accident."

Moreover, other jurisdictions have also found that intoxication alone does not prove that intoxication was a cause of the accident. "[T]he fact [that claimant] was over the legal limit, by itself, does not prove that intoxication was the factual cause of the accident." *Employers Mut. Cas. Co. v. Boiler Erection and Repair Co.*, 964 A.2d 381, 397 (Pa.Super. 2008); *see also Folse v. American Well Control*, 536 So.2d 686, 690 (La.App.1988) ("[T]he jurisprudence uniformly holds that the defendant must prove by some competent evidence other than the

138 Dawson Depo., 90:9-18.

mere fact of intoxication that the accident was caused by the intoxication."); 82 Am.Jur. 2d *Workers' Compensation* § 225 ("Generally . . . the fact of intoxication alone at the time of the accident is not a sufficient basis for denying workers' compensation benefits. . . ."); *Republic Indemnity Co. v. Workers' Comp. Appeals Bd.*, 138 Cal.App.3d 42, 46 (Cal.App.2.Dist.1982) ("We acknowledge that generally the fact of intoxication standing alone is not a sufficient basis for denying workers' compensation benefits.")

In his Findings, the Referee rejected Kal's reliance on *Hatley* because in *Hatley* the applicable statute required a "showing of proximate cause rather than showing a reasonable and substantial cause" and in *Hatley* "defendants had to overcome a rebuttable presumption."[139] However, regardless of whether the standard of proof is to show that intoxication was ***the*** cause of the accident or ***a*** substantial cause of the accident, the Employer's burden of proof requires more than just a blood alcohol reading of .11 or the mere happening of the accident to prove causation. *See Folse at* 692 (A blood alcohol level of .16 "at the time of the accident . . . [was] insufficient evidence that intoxication was ***a*** substantial cause of the accident"). Otherwise, Idaho Code Section 72-208 would be a strict liability statute and would deny benefits any time the claimant's blood alcohol was above the applicable legal limit. If the Idaho Legislature intended Section 72-208 to be a strict liability standard, it would ***not*** have placed the burden on the Employer to prove that intoxication was a "reasonable and substantial cause of the injury."

The facts in *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719 (1976) and *Folse v. American Well Control*, 536 So.2d 686 (La.App.1988) are strikingly similar to this case and demonstrate why a finding of intoxication alone is insufficient to find that the intoxication was a substantial case of the Kal's injuries and there has to be some other evidence of impairment.

1. The *Hatley* Case.

In *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719 (1976), Jesse Hatley ("Hatley") was killed in the course of his employment when his semi-truck overturned while he was returning to Lewiston, Idaho, from Great Falls, Montana, on U.S. Highway 12. Prior to the accident, Hatley had stopped outside of Missoula at a truck stop in Lolo, Montana, at approximately 2:30 p.m. He left the truck stop between 3:30 p.m. and 4:00 p.m. Approximately 30 minutes later, Hatley's truck overturned twenty miles west of the truck stop. A bottle of whiskey, which was one-third empty, was found in the cab, and a subsequent test revealed Hatley had a blood alcohol level of .117 percent.

The tire marks of Hatley's truck indicated that Hatley failed to negotiate a curve in the road and the rear wheels of the trailer went off the pavement. The investigating police officer testified that in his opinion Hatley took the curve too fast and that his ability to operate the vehicle was impaired by his consumption of alcohol. Also, defendants' expert, a clinical chemist and toxicologist, testified and gave his opinion that an individual's reflexes, depth perception, and overall ability to operate a vehicle would be impaired with a .117 BAC.

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139 R Vol. I, p.28.

In addition, a witness testified that she was with Hatley most of the time at the truck stop, Hatley did not appear drunk, and she could not smell alcohol on him. Another witness at the truck stop testified that he never saw Hatley take a drink of alcohol, although Hatley mentioned he had a bottle of whiskey in his truck.

The Industrial Commission found that although Hatley had a .117 BAC, Hatley was intoxicated to an "***unknown degree***." The Commission considered the evidence that Hatley did not appear to be intoxicated while at the truck stop and that he consumed no alcoholic beverages while being there. The Commission concluded that "there is an ***absence of substantial evidence*** that the claimant's death was occasioned by his intoxication." *Id.* at 721 (emphasis added).

The Idaho Supreme Court affirmed the Commission's decision and found that the employer did not present substantial evidence that intoxication caused Hatley's death. The Idaho Supreme Court analyzed the issue as follows:

> [I]t is incumbent upon an employer relying on the intoxication defense to come forth with ***substantial affirmative evidence*** showing that the employee was intoxicated at the time of death and also that the intoxication proximately resulted in the injury. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939). ***It is not sufficient that the defendant present negative evidence***, e. g., tending to rule out other possible causes of the injury such as mechanical difficulties, bad weather or another vehicle on the road. Evidence that the employee may have been drinking at the time of the accident does not necessarily establish that he was intoxicated at that time, ***nor does a finding that he was intoxicated lead to an inevitable conclusion that the intoxication caused the accident.***
>
> * * *
>
> The employer and surety have placed ***great emphasis*** on the blood alcohol level test results which were .117 percent, and the testimony of the toxicologist regarding

> the effect of a .117 blood alcohol level on an individual. . . . [I]t is clear that the Commission did utilize this evidence in arriving at its finding that Hatley was intoxicated to an ***unknown degree*** at the time of the accident. However, ***the finding of intoxication does not necessitate a finding that the intoxication caused the accident***. . . . The cases from other jurisdictions cited by appellants which have regarded blood alcohol level as persuasive evidence that intoxication caused the employee's injury had ***involved considerably higher blood alcohol level readings, e. g., .27, .29, .351 and .387 percent***. . . .
>
> The only other testimony regarding causation was the expert testimony of the toxicologist regarding the effect of a .117 blood alcohol level on a person's ability to operate a motor vehicle, and the opinion of the investigating officer. ***Since neither had witnessed the accident, both opinions were of necessity couched in generalities***. . . . Consequently, we conclude that the Industrial Commission did not err in its conclusion that there was a ***lack of substantial evidence*** in the record that Hatley's death was caused by intoxication.

*Id.* at 722-723 (emphasis added and citations omitted).

Similar to the defendant's expert in *Hatley*, the Employer expert's, Mr. Dawson, testified regarding the effect of a .11 blood alcohol level on a general person's ability to operate a motor vehicle. He concluded that all you need to show that alcohol was a substantial cause of Kal's injuries is that Kal had a blood alcohol level of .11 and he crashed.[140] He stated "That's all you need, to look at that relationship."[141]

This logic and opinion is clearly contrary to the case law cited above. The fact that Kal's BAC was .11, by itself, does not prove that intoxication was a substantial cause of Kal's injuries; otherwise, Idaho Code Section 72-208 would create a strict liability standard.

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140 Dawson Depo., 90:9-18.
141 Dawson Depo., 90:9-18.

Furthermore, the Commission erred in relying exclusively on Mr. Dawson's opinion because just like defendant's expert in *Hatley*, Mr. Dawson's opinion does not take into account any specific facts that relate to Kal, such as Kal's prior drinking experience, what level of tolerance Kal had built up to the effects of alcohol, testimony of how Kal was behaving that night, and when he had his last drink. Instead, Mr. Dawson bases his opinion on his understanding of the effect a .11 blood alcohol level has ***generally*** on person's ability to operate a motor vehicle. As such, Mr. Dawson's opinion ignores other relevant factors and is impermissibly "***couched in generalities***" and not based on the effects of alcohol in this case specifically. *Hatley*, 97 Idaho at 723.

Furthermore, in his Findings, the Referee ignored relevant facts specific to this case. For example, Jonathan said he was with Kal for most of the night. Jonathan was with Kal when Kal drove to Terreton to fix the sprinkler pivot. Jonathan was with Kal for almost two hours commuting to and fixing the sprinkler pivot and for half an hour driving back from fixing the sprinkler pivot. Jonathan said that he never saw Kal drinking alcohol. Jonathan also said that he could not smell any alcohol on Kal's breath even though he was sitting right next to him in the truck. The Referee ignores all these facts that tend to show that some factors other than alcohol caused the accident.

The Referee attempts to distinguish *Hatley* from this case by saying that "there is more evidence here that Claimant's intoxication was a reasonable and substantial cause of his

injuries than was present in *Hatley*."[142] However, the Referee never identifies in his Findings what "more evidence" exists here than in *Hatley* to conclude that Kal's intoxication was a reasonable and substantial cause of his injuries. To the contrary, there is significantly "more evidence" in this case to show that intoxication ***was not*** a reasonable and substantial cause of Kal's injuries, such as:

* Kal's texting while driving at time of the accident;

* Kal had ADHD, a disease that increases the likelihood of people to have addictions;

* Kal was addicted to speed as evidenced by multiple prior speeding tickets (one in excess of 100 miles per hour), a truck built for speed, and a need to have the fastest truck in high school (Officer Bivins also testified that he had given Kal warnings without tickets for speeding);

* Kal's prior history of alcohol use (drinking daily) and how that affected his tolerance to alcohol;

* ***Kal drove for well over 30 minutes before the accident without incident (which tends to show that Kal's texting on a corner while speeding is the reason he crashed)***; and

* Kal's prior history of driving while under the influence without getting in an accident.

Moreover, Mr. Dawson acknowledged that he did not know if alcohol impaired Kal from understanding how fast he was going[143] and he admitted that he has no evidence that Kal would not have been driving at 123 mph and texting unless he had been drinking alcohol.[144]

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142 R Vol. I, p. 28.
143 Dawson Depo., 54:17-19.
144 Dawson Depo., 101:7-11.

To the contrary, Mr. Dawson agreed that alcohol probably did not cause Kal to drive 123 miles per hour[145] and that it is pure speculation to attempt to link Kal's speed at the time of the accident to Kal's alcohol consumption. [146] Therefore, Mr. Dawson really cannot say that alcohol was a substantial cause of the accident.[147] Mr. Dawson testified:

> Q. And that's my point. Mr. Dawson, all you can say – in this case, given the speed that my client was going, given the fact that you cannot link his speed to the alcohol he consumed, all you can really say is that alcohol was a contributing factor but not a substantial factor of the crash; isn't that true?
>
> A. Generally, yes.[148]

The Referee's erred in exclusively relying on Mr. Dawson's opinion to find that intoxication was a reasonable and substantial cause of Kal's injuries because Mr. Dawson relies on the mere happening of the accident and Kal's BAC to conclude that intoxication was a substantial cause of Kal's injuries while failing to identify any other evidence of impairment.

2. The *Folse* Case.

An even more analogous case than *Hatley*, is *Folse v. American Well Control*, 536 So.2d 686 (La.App.1988), in which the court stated that "[i]n order for the defendants to prevail, they must prove by a preponderance of the evidence both the fact of intoxication and that the intoxication was ***a substantial cause*** of the accident." *Id.* at 690.

The facts in *Folse* are strikingly similar to this case. Mr. Folse was an employee of American Well Control. Mr. Folse got in a car accident at approximately 11 p.m. on his way

145 Dawson Depo., 54:20-23.
146 Dawson Depo., 55:9-14.
147 Dawson Depo., 55:9-14.

home from work. Mr. Folse was traveling along the same road he regularly traveled in going to and from work. Mr. Folse was negotiating a curve to his right and, as the road began to straighten out after the curve, he veered across the center line and into the left lane, where he collided with an oncoming vehicle and he was killed. A blood sample from Mr. Folse's body showed an alcohol level of .16 percent. Mr. Folse had driven almost the entire stretch of highway to his home without incident prior to the accident. *Id.*

The evidence showed that Mr. Folse was 29 years old, that he was an experienced drinker, that he drank almost "daily," that he had never gotten into any prior traffic accident, and that he had only one prior traffic violation.

The defendants presented expert testimony of a pathologist that testified of the effects of alcohol on one's ability to operate an automobile, and testified about the significant causal relationship between Mr. Folse's alcohol consumption and the car accident. Defendant's expert stated that a person with an alcohol level above .15 percent is usually considered "drunk," meaning "under the influence of alcohol," and that anything above .10 percent would be "drunk." Defendant's expert agreed that no two individuals are necessarily adversely affected to the same extent by the same level of alcohol.

However, plaintiff's expert, also a pathologist, testified that given all of the facts available, one simply could not say that intoxication was a substantial cause of the accident in this particular case. He stated that the adverse effect of alcohol is different in different people

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148 Dawson Depo., 71:6-12.

and that there are many factors which affect the degree of impairment from alcohol, such as age, sex, time of day, tolerance to impairment, and drinking experience. He stated that research shows that experienced drinkers are more tolerant and less affected by alcohol than those who are "alcohol naive."

In analyzing the facts of the *Folse* case, the court stated that in order to prove causation, the courts have generally looked for "some evidence other than the mere happening of the accident." *Id.* The court explains as follows:

> Such behavior could include slurring of speech, drowsiness, staggering, and erratic driving prior to the accident. At the very least, the above cited cases require a showing that ***the accident was of a sort that would not ordinarily happen absent intoxication***.

*Id.* (Emphasis added).

The court found that "the expert testimony alone is not enough to establish that Mr. Folse was intoxicated at the time of the accident. No other evidence was offered concerning any behavior of Mr. Folse prior to the accident that would suggest intoxication." *Id.* at 692.

The court also found that "even assuming Mr. Folse was intoxicated at the time of the accident, there is insufficient evidence that intoxication was a substantial cause of the accident." *Id.* The trial court found it was significant that Mr. Folse had driven almost the entire stretch of highway to his home without incident prior to the accident.

Based on the reasons cited by the trial judge, the inconclusiveness of the scientific evidence of alcohol impairment, and the absence of other evidence of alcohol impairment, the

court affirmed the trial court's finding that "Mr. Folse's blood alcohol level of .16 was not a substantial cause of the accident." *Id.* at 692.

Similar to the facts in *Folse*, at the time of the accident, Kal was a 19-year-old adult male and "experienced drinker." He had been convicted of 3 prior underage drinking charges in the 3 years leading up to his accident (in 2005, 2006, and 2007). He also received a DUI, and his counseling records indicated that he drank "daily."[149] Kal had not been in any prior car accident and he had a habit of speeding.

Like the claimant in *Folse*, Kal had traveled the Old Basset Highway many times. However, there is no evidence in the record that Kal, prior to the accident, had ever traveled down the Old Basset Highway at night, or while texting, or while going 123 miles per hour, or while not being intoxicated. Similar to the claimant in *Folse*, Kal had traveled on the Old Basset Highway for 30 minutes without incident prior to his accident (which again tends to show that texting on a corner while speeding is the cause of Kal's accident). In addition, Kal's .11 BAC was substantially less than Mr. Folse's .16 BAC.

Here, the Commission does not point to any evidence of Kal's behavior prior to the accident that would indicate Kal was impaired, such as slurring his speech, acting drowsy, staggering, or swerving on the road. In fact, the evidence is just the opposite. Just prior to the accident, Kal demonstrated his ability to function at a high level. He drove to the job site and fixed a sprinkler pivot. He was able to send several texts while driving for 30 minutes without

incident prior to the accident (all while presumably speeding). And although Jonathan was with Kal for most of the night, he stated that he never saw Kal drinking and that he could not smell alcohol on his breath.

Importantly, the facts in Kal's case are even more compelling than they were in *Folse* because unlike *Folse*, substantial evidence weighs against the Commission's conclusion that alcohol was a substantial cause of Kal's injuries, including the facts that he was texting on a corner while going 123 miles per hour (which Officer Bivins stated he could not do), he had ADHD, he was addicted to speed, he was driving a truck built for speed, he did not act impaired prior to the accident, and he was not wearing his seat belt. Moreover, there is no evidence in the record that alcohol causes a person to speed.

The Commission committed reversible error by finding that intoxication was a reasonable and substantial cause of Kal's injuries based solely on the mere happening of the accident and Kal's blood alcohol level of .11. In doing so, the Commission has transformed Idaho Code Section 72-208(2) into a strict liability statute and removed the burden on the Employer to prove that intoxication was a substantial cause of Kal's injuries. This is contrary to Section 72-208(2) and contrary to the case law cited above that holds that claimant's .11 BAC alone is not sufficient to show that intoxication was a substantial cause of his injuries.

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149 Kal Depo., 22:16-25.

B. The Referee's Conclusion Is Based On Negative Evidence And Is Not Supported By Substantial And Competent Evidence.

In *Hatley*, the court stated that, "It is not sufficient that the defendant present negative evidence, e. g., tending to rule out other possible causes of the injury such as mechanical difficulties, bad weather or another vehicle on the road." *Id.* at 722.

Here, the Referee essentially concluded that intoxication must be the a substantial cause of his injuries by default after ignoring or ruling out other possible causes, or in other words, the Referee relied on "negative evidence" to reach his conclusion. In particular, the Referee made the following findings:

- The Referee ruled out evidence of texting by concluding that the evidence was not corroborated and needed to be raised prior to the hearing.[150]
- The Referee ruled out Kal's failure to wear a seat belt as a substantial cause of Kal's injuries by shifting the burden on Kal to show that his injuries would have been minor if he had been wearing a seat belt. [151]
- The Referee ruled out Kal's ADHD and addiction to speed by making the unsupported finding that "if Claimant's ADHD was under control, then it follows his speed addiction would be, too." [152]

150 R Vol. I, p. 20.
151 R Vol. I, p. 19.
152 R Vol. I, p. 27.

- The Referee ruled out speed as the cause by finding that since he never gotten into an accident while speeding before the incident, speed could not be the cause of his injuries.[153]

After ruling out these possible causes, the Referee then concluded that the clearest explanation for Kal's accident is that he was experiencing "impairment due to intoxication."[154] However, the Referee's conclusion cannot simply be based on negative evidence. According to *Hatley*, negative evidence does not suffice as "substantial" evidence. *Id.* Thus, the Referee's reliance on negative evidence is insufficient to reach the conclusion by default that intoxication was a substantial cause of Kal's injuries.

C. The Referee's Finding That Kal Had An "Unusual" Reckless State Of Mind The Night Of The Accident Is Not Supported By Substantial And Competent Evidence.

In his Findings, the Referee stated that:

> Claimant testified that he generally drove safely, even when speeding. Yet the night of his accident he admitted to driving recklessly. The clearest explanation for Claimant's unusual reckless state of mind, based upon the evidence in the record, is that he was experiencing impairment due to intoxication.[155]

The Referee's finding misconstrued Kal's testimony. Kal testimony was that he was "a huge speeder," driving 100 miles per hour did not concern him, and that he "can handle [going 100 miles per hour] because [he] always [goes] fast."[156] Kal testified that he cannot remember

153 R Vol. I, p. 27-28.
154 R Vol. I, p. 28.
155 R Vol. I, p. 28.
156 HT 33:14-21; Kal Depo., 19:11-14; 20:11-14.

anything from the night of the accident,[157] but when asked if he thought driving at 122 miles per hour was reckless, Kal said "Yes, I know it's reckless driving."[158]

Kal's testimony shows that there was nothing unusual about Kal speeding or driving over 100 miles per hour. In fact, Kal was a "habitual speeder."[159] Thus, for the Referee to conclude that Kal somehow had an "unusual reckless state of mind" the night of the accident because he was speeding is not supported by competent and substantial evidence and ignores the facts in the record. The record shows that Kal was not a good driver and always sped.[160] Speeding by its very nature is reckless and unsafe. It follows that if Kal was always speeding, he was always driving recklessly and unsafely. There was nothing "unusual" about Kal speeding the night of the accident.

The Referee's finding that Kal's "unusual" state of mind for speeding results from his drinking alcohol is unsupported by the record. Even the Employer's own expert agreed that alcohol probably did not cause Kal to drive 123 miles per hour[161] and it is pure speculation to attempt to link Kal's speed to his alcohol consumption.[162]

Thus, the Referee's finding that Kal's intoxication caused an "unusual" reckless state of mind the night of the accident is not supported by substantial and competent evidence. As such, this Court should reverse the Referee's finding.

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157 HT 42:2-43:21.
158 HT 39:24-40:6
159 HT 102:10-11.
160 HT 91:14-23.
161 Dawson Depo., 54:20-23.

III.

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR BY RELYING ON KAL'S USE OF PRESCRIPTION MEDICATION TO FIND THAT INTOXICATION WAS A REASONABLE AND SUBSTANTIAL CAUSE OF KAL'S INJURIES.

Idaho Code Section 72-208(3) states that:

> (3) 'Intoxication' as used in this section means being under the influence of alcohol or of controlled substances, as defined in section 37-2701(e), Idaho Code. Provided, however, that ***this definition shall not include*** an employee's use of a controlled substance for which a prescription has been issued authorizing such substance to be dispensed to the employee, or when such substance is dispensed directly by a physician to the employee, and where the employee's use of the controlled substance is in accordance with the instructions for use of the controlled substance.

I.C. § 72-208(3) (emphasis added).

Despite the prohibition from considering legally prescribed medication, the Referee, in his Decision, frequently referred to the presence of "opiate and amphetamine substances in [Kal's] system."[163] In particular, the Referee stated:

> Dr. Dawson opined that the combination of alcohol and opiates in Claimant's system at the time of the accident produced an additive depressant effect on Claimant's central nervous system and the two are contraindicated. This, in turn, impaired Claimant's cognitive abilities, judgment, alertness, decision-making, and attention, resulting in disinhibition. Dr. Dawson opined that the alcohol Claimant consumed was a reasonable and substantial cause of Claimant's accident: 'Blood alcohol, ***together*** with the presence of opiates, produced a marked impairment of his ability to operate a motor vehicle in a safe manner. His resultant intoxication was a reasonable and substantial cause of the crash and subsequent injury.'[164]

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162 Dawson Depo., 55:9-14.
163 R Vol. I, pp. 20, 22, 23, and 27.
164 R Vol. I, pp. 22-23 (emphasis added).

After Kal's accident, a urinalysis revealed that Kal had medication in his system.[165] However, as the Referee conceded, "[t]here [is] no evidence that these results were inconsistent with the prescription medication Claimant was taking."[166] Furthermore, there is no evidence in the record that Kal took any controlled substances contrary to the instructions given to him for using the controlled substances.

Thus, pursuant to Idaho Code § 72-208(3), the Commission is barred from considering Kal's use of legally prescribed medication in reaching the conclusion that intoxication was a reasonable and substantial cause of Kal's injuries.

Furthermore, the Referee was critical of Dr. Anderson's opinion and stated that one of the reasons Dr. Anderson's opinion was less persuasive then Dr. Dawson's opinion was because "[h]e does not have an opinion regarding the effects of hydrocodone or opiates [which] may have contributed to Claimant's accident. . . ."[167] However, Dr. Anderson properly excluded the effects of these prescription medications from his opinion.

Later in the Referee's decision, the Referee concluded that there was "more evidence" in this case than in *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719 (1976) to find that "Claimant's intoxication was a reasonable and substantial cause of his injuries." Since in *Hatley* the driver's blood alcohol content was also .11, a reasonable inference can be made that the

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165 Dawson Depo., 17:3-20:7.
166 R Vol. I, p. 20.
167 R Vol. I, p. 27.

"more evidence" of intoxication that the Referee was referring to in Kal's case was his use of prescription medication.

The Referee's reliance on evidence regarding the effects of prescription medication on Kal is strictly prohibited under Idaho Code § 72-208(3). Idaho Code § 72-208(3) specifically states that "intoxication" does not include controlled substances that are prescribed by a physician. Notwithstanding this statue, the Referee relied on the medication evidence to distinguish this case from the *Hatley* case, criticize Dr. Anderson's opinion, and support his conclusion that Kal "was experiencing impairment due to intoxication."[168] Therefore, the Commission erred and violated Idaho Code § 72-208(3) in considering and relying on evidence of legally prescribed medication to reach the conclusion that intoxication was a reasonable and substantial cause of Kal's injuries.

IV.

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR BY REFUSING TO FIND THAT KAL'S FAILURE TO WEAR A SEAT BELT WAS A REASONABLE AND SUBSTANTIAL CAUSE OF HIS INJURIES.

In the proceedings below, Kal raised the argument that the Employer failed to show that Kal's injuries would have been the same if Kal had worn a seat belt, or in the alternative, the Employer failed to show that intoxication was a substantial cause for why Kal did not wear a seat belt. In the Findings, the Referee stated:

168 R Vol. I, p. 20.

> The Referee finds [Claimant's seat belt] argument unpersuasive. It was the fact that Claimant left the roadway at 123 miles per hour while legally intoxicated that ***caused his accident*** which resulted in serious injuries. Moreover, ***the evidence in the record is insufficient to establish the degree, if any, to which Claimant's injuries would have been ameliorated, had he been belted in.***[169]

In the Referee's analysis, the Referee improperly focused on the cause of the accident, rather than the cause of Kal's injuries. Idaho Code Section 72-208(2) requires the Employer to prove that "intoxication is a reasonable and substantial cause of an ***injury***," ***not an accident***. (Emphasis added).

Furthermore, the Referee improperly shifted the burden onto Kal to show that he would not have sustained the same injuries if he had been wearing a seat belt. Importantly, the Employer has the burden of proof to show that "intoxication is a reasonable and substantial cause" of Kal's ***injuries***. In other words, the Employer has to show that Kal would have sustained the same injuries if he had been wearing a seat belt; otherwise, the reasonable and substantial cause of Kal's injuries is failing to wear a seat belt, not intoxication. The Employer failed to present any expert testimony or any evidence to establish that Kal's injuries would have been the same if had been wearing a seat belt. In fact, the only evidence in the record regarding Kal's seat belt supports the opposite position—that Kal's injuries would have been minor if he had worn a seat belt.

169 R Vol. I, p. 19 (emphasis added).

In this case, Kal's passenger, Jonathan Glodo, was wearing his seat belt and sustained only minor injuries.[170] Kal was not wearing a seat belt, was ***ejected*** from the vehicle, landed 90 feet away from the vehicle, and sustained life threatening injuries.[171] Kal's injuries included a lacerated liver, one broken rib, a severe head injury, fractured left clavicle, and compression fractures of the vertebrae in the neck and back.[172] The Referee ignored this evidence showing that if Kal had been wearing a seat belt, he likely would not have sustained life threatening injuries, but only minor injuries.

Furthermore, the Employer was unable to show any evidence in the record that Kal's intoxication caused Kal not to wear a seat belt. In fact, the evidence in the record was just the opposite. Prior to Kal's accident, Kal had already been cited for failing to wear a seat belt.[173] This means that Kal did not wear a seat belt even when he was not intoxicated.

Kal has submitted some evidence that he would have suffered only minor injuries if he had worn a seat belt (Kal was ejected from the vehicle and sustained a severe brain injury). Therefore, the Employer had the burden to prove otherwise by a preponderance of the evidence—which burden the Employer has failed to carry. Furthermore, the Referee improperly focused on the cause of the ***accident***, whereas Section 72-208(2) requires the Referee to focus on the cause of the ***injuries***. Thus, the Referee erred in shifting the burden on

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170 Bivins Report pp. 5, 6, and 7.
171 Bivins Report pp. 1, 4, and 5.
172 Bivins Report pp. 1 and 6.
173 *See* Bonneville County Case No. CR-2006-13341, where Kal was charged and convicted for failing to wear his seat belt. This case history is attached to Officer Bivins's Report.

Kal to show that wearing a seat belt would have prevented his injuries and in refusing to find that Kal's failure to wear a seat belt was a reasonable and substantial cause of his injuries.

V.

THIS COURT SHOULD AWARD KAL HIS ATTORNEY'S FEES AND COSTS.

On appeal, "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." I.A.R. 40(a). Thus, if Kal is the prevailing party, the Court should award costs to Kal.

Furthermore, Idaho Code Section 72-804 "permits the award of attorney fees if it is determined that an employer . . . contested a workers' compensation claim without reasonable ground." *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 761 (2013). Here, the Employer's contention of Kal's workers' compensation claim was without reasonable ground because there is no evidence that intoxication was a reasonable and substantial cause of Kal's injuries. Thus, the Court should award Kal his attorney's fees and costs.

**CONCLUSION**

In conclusion, this Court should rule that the Commission erred in refusing to consider evidence that Kal was texting at the time of the accident; the Commission erred in finding that intoxication was a reasonable and substantial cause of his injuries; the Commission erred by considering and relying on evidence of Kal's use of legally prescribed medication; and the Commission erred in refusing to find that Kal's failure to wear a seat belt was a reasonable and substantial cause of his injuries. For the reasons set forth herein, this Court should reverse the

Commission, vacate the Commission's Order and Findings dated August 27, 2013, and hold that the Employer has not met its burden, pursuant to Idaho Code § 72-208(2), of proving that intoxication was reasonable and substantial cause of Kal's injuries. Furthermore, the Court should also award Kal his costs and attorney's fees incurred below and on appeal.

RESPECTFULLY SUBMITTED this 10 day of February, 2014.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Douglas G. Bowen
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10 day of February, 2014, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

[X] U.S. Mail
[ ] Facsimile Transmission
[ ] Overnight Delivery
[ ] Hand Delivery

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