3-13-2014

Giles v. Eagle Farms Respondent's Brief Dckt. 41469

IN THE SUPREME COURT OF THE STATE OF IDAHO

NEWMAN K. GILES, Claimant-Appellant, vs. EAGLE FARMS, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants-Respondents.	DOCKET NO. 41469-2013 **RESPONDENTS' BRIEF**

RESPONDENTS' BRIEF

Appeal from the Idaho Industrial Commission
State of Idaho, Thomas P. Baskin, Chairman, Presiding

Douglas G. Bowen
Residing at Idaho Falls, ID for Appellant, Newman K. Giles

Paul J. Augustine
Residing at Boise, ID for Respondents, Eagle Farms, Inc. and Idaho State Insurance Fund

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STATEMENT OF THE CASE

A. Nature of the Case

This is a worker's compensation case appealed from the Idaho Industrial Commission (hereinafter the "Commission"). Appellant Newman "Kal" Giles (hereinafter "Giles" or "claimant") appeals the Order of the Commission dated August 27, 2013, adopting the Findings of Fact and Conclusions of Law of the Referee finding that the defendants, Eagle Farms, Inc. and Idaho State Insurance Fund, met their burden of establishing that the 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.

B. Course of Proceedings

On June 15, 2009 claimant filed a Complaint alleging entitlement to medical and income benefits arising out of an automobile accident which he claims occurred while in the employ of Eagle Farms, Inc. (hereinafter "Employer" or "Eagle Farms"). R., pp. 1-4. In their Answer, defendants denied that any income benefits were owed to the claimant, but admitted that they owed continuing reasonable and necessary medical benefits beyond the defendants' current payment of $153,430.54 in medical benefits. R., pp. 5-6. Defendants also asserted as an affirmative defense that the claimant's intoxication was a reasonable and substantial cause of his injuries thus barring him from income benefits pursuant to Idaho Code §72-208. R., p. 7. Pursuant to a stipulation between the parties to bifurcate the issues, the Commission held a hearing on June 12, 2012 on the sole issue of whether claimant was precluded from recovering

income benefits pursuant to Idaho Code §72-208. R., pp. 11-13. On August 16, 2013 the Referee concluded that the defendants met their burden of proving that the claimant's intoxication was a reasonable and substantial cause of his injuries thus barring him from receiving income benefits pursuant to Idaho Code §72-208. R., p. 28. The Commission then issued an Order on August 27, 2013 adopting the Referee's findings of fact and conclusions of law and ordering that claimant is barred from receiving income benefits pursuant to Idaho Code §72-208. R., pp. 30-31. Claimant timely appealed.

C. Statement of the Facts

At the time of the hearing the claimant was twenty three years old. Tr., p. 31, L. 23. At the time of his motor vehicle accident in August 2008, the claimant was eighteen years old. Id. at Ll. 24-25. The claimant admitted that prior to his accident he liked to drive fast. Tr., p. 32, Ll. 18-21. In fact, at one point he was stopped for speeding over 100 mph while in Arizona. Tr., p. 38, Ll. 10-14. However, the claimant testified that although he was a huge speeder, he always felt that he could handle driving speeds of upwards of 100 mph. Defendants' Ex. 6, Claimant's Deposition dated July 22, 2010 ("Claimant depo.") p. 20, Ll. 7-14; Tr., p. 33, Ll. 14-23. Despite his propensity to speed, the claimant's accident which is the subject of his workers' compensation claim in August 2008 was his first motor vehicle accident. Tr., p. 35, Ll. 2-4.

1. August 17, 2008 Motor Vehicle Accident

In the early morning hours of August 17, 2008, at approximately 3:30 a.m., claimant was involved in motor vehicle accident while operating a grey 2002 GMC pickup traveling south on

Old Bassett Highway when he failed to negotiate a right hand curve as he neared 3145 East and ran off the east side of the highway. Claimant's Ex. 1, p. 2. At the time of the accident the claimant was driving his brother's truck which had been doubled chipped to provide more horsepower and speed. Tr., p. 37, Ll. 5-22. The claimant testified that he was driving after he had worked on a faulty pivot sprinkler at a farm in Terreton. Tr., p. 43, 6-15; p. 52, Ll. 9-15. His father, Newman Giles, clarified that the location of the accident was 30 miles south of the Terreton farm on the road returning to his house or the farm office. Tr., p. 105, LL. 3-17. While the exact time of the accident is unknown, according to City of Idaho Falls ambulance service records, dispatch was notified of the accident at approximately 3:39 a.m. Defendant's Ex. 1, p. 2. The ambulance arrived on the scene at 3:51 a.m. Id.

Claimant was found by paramedics ejected from his vehicle laying 20 yards from the road in the middle of a brush field. Defendant's Ex. 1, p. 2. At 3:53 a.m., the paramedics immobilized claimant's spine and administered oxygen. Id. He was then transported by ambulance to the hospital where he arrived at 4:17 a.m. Id. According to a blood test taken at the hospital at 4:28 a.m., the claimant's alcohol serum was .123. Defendants' Ex 2, p. 34.

At approximately 4:06 a.m., Corporal Allen Bivens, an Idaho State Trooper, was called out to the scene by his command center. Tr., p. 57, Ll. 2-7. He was advised that the injuries suffered by claimant were serious enough to be life-threatening. Tr., p. 57, Ll. 8-11. Corporal Bivens went to the scene of the accident where a Jefferson County Sheriff's deputy responsible for investigating the crash asked Corporal Bivens to measure and calculate claimant's speed at

the time claimant's vehicle left the roadway. Tr., p. 57, L. 22 – p. 58, L. 8. Corporal Bivens was not asked to investigate claimant's use of alcohol. Tr., p. 60, Ll. 23-25.

As part of his responsibilities, Corporal Bivens noted that the road was dry and visibility was good. Tr., p. 58, Ll. 14-18. Corporal Bivens also noted that the posted speed limit at the accident site on Old Bassett Highway was 50 mph. Id. at Ll. 22-24. Corporal Bivens testified that claimant's truck had been found 796 feet from the edge of the road where it left the pavement and that it had been airborne for approximately 48 feet. Tr., p. 62, Ll. 3-11. Using scientifically tested and proven math formulas, Corporal Bivens calculated that the truck operated by claimant was traveling at 123 mph when it left the roadway. Tr., p. 62, Ll. 18-25. Corporal Bivens did not find any pre-collision obstructive or debris on the highway that contributed to the crash. Claimant's Ex. 1, p. 4. According to Corporal Bivens' report, the highway at the crash location was described as follows:

> At the crash scene location, Bassett Road is a two-lane/two-way road and the general direction of the highway runs from south to north. It is bordered on both sides by grass and steep embankments that slope down from the road edge. The southbound lane is approximately 12.43 feet wide and is separated from the northbound lane by a solid/dashed yellow centerline. The line prohibits southbound traffic from passing because the road curves. The northbound lane is approximately 14.09 feet wide. The road does not have paved shoulders and the posted speed limit on this section of highway is 50 miles per hour.

Claimant's Ex. 1, p. 5. Corporal Bivens testified that the yellow center line pavement markings were an indicator of an upcoming curve in the road in the direction claimant was driving. Tr., p. 85, Ll. 14-17.

As part of his investigation, Corporal Bivens was asked to go to the hospital to get an evidentiary blood sample to determine claimant's blood alcohol content because the investigators found two unopened bottles of beer in the debris and the interior of the truck had a "strong odor of an alcohol beverage." Tr., p. 61, Ll. 6-16; Claimant's Ex. 1, p. 5. Again, a blood test taken at the hospital at 4:28 a.m. showed that claimant's alcohol serum was .123. Defendants' Ex 2, p. 34. Using scientific formulas based upon the results of this serum test defendants' expert pharmacologist, Gary Dawson, calculated claimant's forensic BAC of .11 at the time of the accident. Deposition of Gary Dawson dated October 19, 2012 ("Dawson depo."), p. 10, L. 23-p. 16, L. 4. Additionally, claimant's urine screen taken at 4:41 a.m. on August 17, 2008 tested positive for acetaminophen and opiates, which Dr. Dawson noted indicated that the claimant ingested opiates within 12 hours of his screen. Defendants' Ex. 2, p. 14;

Claimant was familiar with the section of the road where he crashed as he testified in deposition that he has driven Old Bassett Highway hundreds of times while speeding. Tr., p. 35, Ll. 9-17. The claimant also testified that he is a "huge speeder" but that he can "handle it because [he] always goes fast." Tr., p. 33, Ll. 4-21; Claimant's depo., p. 20, Ll. 7-13. He also admitted that he knew that there was a curve in the road where the accident occurred. Tr. p. 35, L. 22-p. 36, L. 2. Claimant admitted that driving down Old Bassett Highway at 122 mph was "reckless." Tr. p. 40, L. 6.

Although the claimant alleged for the first time at hearing that he was texting around the time of his accident, he had no independent recollection of texting before the accident. Tr., p.

50, Ll. 1-4. Claimant testified that he saw his phone after the accident and it showed that he was texting around 3:28 a.m., before the accident. Tr., p. 50, Ll. 6-14. Claimant could not corroborate his testimony because he was unable to produce or find his phone. Tr., p. 51, Ll. 17-19. The claimant's father, Newman Giles, whose employees supposedly found the phone a few days after the accident, was asked in deposition two years later to identify the factors causing his son's accident based upon his independent investigation of the incident. Tr., p. 96, L. 24-p. 97, L. 16. The only causative factor that Newman Giles could identify was speed; he did not mention texting as a factor. Tr., p. 98, Ll. 17-21.

With regard to claimant's last minute texting allegation, the morning after the accident Corporal Bivens met with Newman Giles at the accident scene. While there, Newman did not mention cell phones nor could Corporal Bivens find any cell phones at the scene after daylight, despite looking for them in the wreckage with the Sheriff's deputy. Tr., p. 64, Ll. 13-25; p. 84, Ll. 15-19. Later, when Corporal Bivens met Newman Giles at the hospital, Newman did not mention claimant's alleged use of his cell phone at the time of the accident. Tr., p. 65, Ll. 4-9. According to Corporal Bivens, the only evidence that a cell phone was used at the time of the accident was when claimant's passenger, Jonathan Glodo, told Corporal Bivens that he was looking down while texting on his cell phone at the time of the accident and did not realize how fast claimant was driving. Tr., p. 66, Ll. 9-15. Mr. Glodo, who was wearing his seatbelt at the time of the accident, suffered minor injuries as a result of the crash. Claimant's Ex. 1, p. 5.

Newman Giles admitted that as his son's employer, his employees (including claimant) are not allowed to drink on the job, that drinking and driving are not allowed by his company and that his company does not provide alcohol to employees. Tr., p. 101, Ll. 2-4, Ll. 21-25; p. 103, Ll. 7-9.

2. Opinion Testimony of Corporal Bivens

Corporal Bivens testified that even if he was stone cold sober, he would not want to try to negotiate the turn where the accident occurred at 123 mph. Tr., p. 63, Ll. 3-6. He admitted that it would not exercise good judgment to even try to do so. Id. at Ll. 7-9. He testified that based upon his experience and training, alcohol affects a person's judgment, inhibitions, and motor skills. Tr., p. 63. L. 13-p. 64, L. 3. He acknowledged that in his experience as a trooper dealing with intoxicated individuals, a person with a .12 BAC is intoxicated with a noticeable impairment. Tr., p. 71, Ll. 12-15. Moreover, he testified that a person with a BAC of .08, which was .03 lower than claimant's, has a noticeable, obvious impairment. Tr., p. 71, Ll. 18-22. He acknowledged that under Idaho law, the legal limit for BAC of an individual 18 years of age (such as claimant) was .02. Tr., p. 71, Ll. 10-11; Idaho Code § 18-8004(d).

In answer to a question posed by claimant's counsel he explained that an experienced drinker may not exhibit all the outward signs of intoxication that an inexperienced drinker would exhibit. Tr. p., 73, Ll. 20-23. Corporal Bivens opined that alcohol was a contributing factor to claimant's crash. Tr., p. 70, Ll. 17-24. However, he could not quantify the percentage that alcohol factored in causing the accident. Tr., p. 75, Ll. 11-14. He acknowledged that claimant's

speed was a major contributing factor to the crash. Tr., p. 70, Ll. 2-7. In a summary of his opinions, he testified that claimant's judgment, specifically how fast he was going under the circumstances, was affected by his alcohol consumption:

> Q. And would you agree with me that someone who has been drinking, has a blood alcohol content of .12, who's driving at 122 miles an hour on a road they've driven hundreds of times before, and even if they're texting, is exhibiting extremely poor judgment?
> A. Yes.
> Q. Would you believe that their judgment is affected by their consumption of alcohol?
> A. Yes.
> Q. And that would affect how fast they're going and what they're doing under the circumstances that they're driving, correct?
> (objections overruled) A. That would be correct.

Tr., p. 87, L. 15 - p. 88, L. 17.

3. Testimony and Opinions of Gary Dawson

Dr. Dawson has a Ph.D. in pharmacology, the study of the effect of drugs and alcohol on the human body and performance. Dawson depo., p. 5, Ll. 5-16. He is a licensed pharmacist in the State of Idaho and three other states. Id. at p. 5, Ll. 17-19. As a pharmacologist he averages fifty (50) hours per year of additional training and education studying extensively about the effects of drugs and alcohol on performance and behavior. Id. at p. 6, Ll. 1-16. Dr. Dawson frequently testifies as an expert in criminal and civil cases on how drugs or alcohol affect a person's operation of motor vehicles. Id. at p. 6, L. 22-p. 7, L. 20. Additionally, Dr. Dawson is a POST instructor teaching how drugs and alcohol affects the operation of vessels or motor vehicles; he is also a certified Breath Testing Specialist in Idaho. Id. at p. 7, L. 21-p. 8, L. 6.

Dr. Dawson calculated claimant's forensic blood alcohol content at the time of the crash. He explained that the major difference between medical BAC (alcohol serum in blood drawn from the hospital) and forensic BAC (whole blood for DUI) is that the medical BAC is 15% higher than forensic BAC. Id., at p. 12, L. 4-p. 13, L. 10. He testified that the claimant's BAC at the time of the crash was 11 grams per 100 cc's of blood or a BAC of .11 which was a third more than the per se limit for adults over the age of 21 driving under the influence in Idaho. Id. at p. 10, L. 23-p. 11, L. 17. Dr. Dawson described the process for determining the forensic BAC based upon the blood serum reading of .123 taken from the hospital at 4:28 a.m. which took into account the hour delay between the accident and the blood draw as well as the known rate of metabolism of between .018 and .02 milligrams percent per hour. Id., at p. 14, Ll. 1-13. Using a .02 rate of metabolism he calculated claimant's forensic BAC as .11 at the time of the crash. Id. at p. 15, L. 9-p. 16, L. 11.

Dr. Dawson noted that the claimant's urine screen at the hospital was positive for opiates and acetaminophen which indicated that claimant ingested a product with both compounds such as Vicodin, Lortab or Norco. Id. at p. 17, L. 7-p. 18, L. 15. Dr. Dawson opined that based upon the positive screen, claimant ingested opiates within twelve hours of the screen. Id. at p. 19, Ll. 9-22. Dr. Dawson testified that the combination of alcohol and opiates are contraindicated -- meaning that patients are warned by their physicians not to take them together because of their additive depressant effects on the central nervous system. Id. at p. 20, Ll. 8-20.

Dr. Dawson explained how alcohol affects an individual. It included cognitive impairment, impairment in judgment and a phenomenon known as "disinhibition." Dr. Dawson described disinhibition as someone who may be quiet and shy and becomes the life of the party because alcohol removes the "brakes" that keep people behaving reasonably when they are sober. Id. at p. 25, L. 5-p. 26, L. 6. He testified that alcohol also impairs a person's decision making, causes a psychomotor impairment which includes delays in reaction times, interferes with the inability to perform learned tasks and causes divided attention which interferes with multitasking. Id. at p. 20, L. 23-p. 22, L. 19. Dr. Dawson testified that it does not take very much alcohol to impair cognitive psychomotor function -- an impairment can be caused with a BAC as little as .02, but at a BAC of .08 to .10 the impairment becomes quite marked. Id. at p. 24, Ll. 10-24.

Dr. Dawson, based upon his review of the evidence of record and his training, opined that claimant with a BAC of .11 had an impaired ability to operate his motor vehicle safely because it severely impaired his multitasking abilities, cognitive functioning and reaction times. Id. at p. 26, Ll. 7-23. He testified that people of a BAC of .11 have a risk of crash or injury that is several fold higher than normal. Id. Dr. Dawson opined that, in light of claimant's BAC of .11, the claimant was intoxicated. Id. at p. 26, Ll. 24-27. Dr. Dawson noted that the claimant's use of narcotics was additive and caused further impairment to the claimant's central nervous system. Id. p. 27, Ll. 2-8. He opined that claimant'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. His resultant intoxication was a reasonable and substantial cause of the crash and subsequent injury." Id., at p. 27, L. 23-p. 28, L. 2.

Dr. Dawson also opined that the claimant's alcohol use alone constituted intoxication which was a reasonable and substantial cause of his accident and injuries. Id. at p. 29, L. 25-p. 30, L. 5. Dr. Dawson noted that under Idaho law, the claimant's BAC was five and a half times the legal limit, a fact which was supported by the testimony of Corporal Bivens. Id. at p. 30, Ll. 12-21; Tr., 70, Ll. 17-24; see Idaho Code § 18-8004(d). Therefore, using the ratio set forth by claimant's expert, Dr. Anderson in his report (Claimant's Ex. 3, p. 1) the claimant's speed was actually 2.5 times the speed limit while his intoxication level was 5.5 times the legal BAC limit. Dawson depo., p. 31, Ll. 12-21.

Dr. Dawson also acknowledged that while speed was a factor in the accident, the claimant's intoxication arising from his use of alcohol caused impairment which severely limited the claimant's ability to multi-task, appreciate the danger posed by his actions on a road he was familiar with, and his ability to respond to anything under the circumstances. Id., at p. 28, L. 18-p. 29, L. 12. He further explained how judgment, cognitive function and decision making, i.e., multi-tasking when operating a vehicle are impacted by claimant's intoxication from alcohol. Id., at p. 94, L. 19-p. 95, L. 12.

4. The Testimony and Opinions of Dr. Joe Anderson

Dr. Anderson is an emergency physician, President of Intermountain Emergency Physicians and the Chief Medical Officer of Eastern Idaho Regional Medical Center. Deposition of Joe Anderson dated February 13, 2013, ("Anderson depo."), p. 5, Ll. 2-8. He was asked by claimant's counsel (who is Dr. Anderson's corporate attorney) to render an opinion as to the factors that caused the claimant's accident. Id. at p. 11, L. 24-p. 12, L. 3. In that regard he reviewed the exhibits and understood that the claimant was driving at 123 mph, under the influence of alcohol, tested positive for a drug screen for opiates and amphetamines and was asked by claimant's counsel whether "alcohol was the single most important factor in causing the accident." Id. at p. 13, Ll. 2-16.

Dr. Anderson, based upon his review of the exhibits and the hearing transcript opined that the factors, in descending order, that caused the claimant's accident were his speed, addictive personality caused by ADHD, texting while driving and alcohol. Id. at p. 14, Ll. 9-20; p. 16, Ll. 17-21. In his report prepared prior to hearing Dr. Anderson did not identify texting as a factor in the crash. Claimant's Ex. 3. Dr. Anderson testified that, in his opinion, the reasonable and substantial cause of the claimant's injuries was excessive speed caused by an addictive personality. Id. at p. 24, Ll. 14-19. He opined that alcohol did not cause the claimant to drive fast. Id. at p. 26, Ll. 1-4. He also opined that a person with a .11 or .12 BAC driving around the corner where the accident occurred below the speed limit would be able to negotiate the corner while intoxicated, which he claimed supported his opinion. Id. at p. 22, Ll. 17-20.

In his initial report, Dr. Anderson opined that the claimant's blood alcohol content was only1.5 times the legal limit while his speed was nearly 2.5 the posted speed limit, because he was trying to develop a sense of proportion using these ratios. Id. at p. 30, Ll. 12-22. He agreed that if he used .02 BAC as a legal limit for claimant, his ratios would change and the claimant's BAC would be 5.5 times the legal limit while his speed was only 2.5 times the posted speed limit. Id. at p. 59, L. 16-p. 60, L. 1. Dr. Anderson admitted that the claimant's intoxication played a role in the accident as it affected his judgment, impaired his motor skills, his executive functioning, his ability to multitask and caused disinhibition. Id. at p. 66, L. 8-p. 67, L. 17. He also admitted that that this was the sole occasion where claimant tried to drive 123 mph down the Old Bassett Highway and claimant was intoxicated at the time. Id. at p. 78, Ll. 4-11. He further admitted that there was no evidence that a person could negotiate the curve where the accident occurred with a BAC of .11 or .12 if they were going the speed limit. Id. at p. 80, Ll. 16-25.

Dr. Anderson opined that no one could testify to a reasonable medical probability that alcohol was a reasonable and substantial cause of the injuries that the claimant sustained. Claimant's Ex. 3, p. 1. Dr. Anderson based his opinions of what constituted "reasonable and substantial cause" upon his understanding that it is defined as "the number one cause. That is the main cause. That is a reproducible cause." Id. at p. 52, Ll. 1-6. Yet, he agreed that the claimant was intoxicated at the time of the accident. Id. at p. 52, Ll. 14-19. He also acknowledged that at the time he drafted his report (June 7, 2012—five days before hearing) he did not mention that the claimant was texting because there was no evidence given to him that the claimant was

texting. Id. at p. 47, Ll. 7-22. While Dr. Anderson blames the claimant's ADHD for contributing to the accident, he did not know if it was under control, did not know the name of claimant's treating physician for his ADHD, and did not know the dosage of his medications. Id. at p. 49, L. 6-p.51, L. 10. Dr. Anderson also acknowledged that he did not know the average speed the claimant traveled down the Old Bassett Highway or whether the claimant was ever involved in a crash prior to this motor vehicle accident. Id. at p. 60, Ll. 5-25.

ADDITIONAL ISSUE PRESENTED ON APPEAL

Are Respondents Employer/Surety entitled to attorney fees on appeal pursuant to I.A.R. 11 and *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995)

ARGUMENT

A. The Commission's Finding That The Claimant's Intoxication Was a Reasonable and Substantial Cause of His Injuries is Supported by Substantial Competent Evidence

In his Brief, claimant argues that the Commission's sole factual basis for the application of Idaho Code § 72-208 was claimant's blood alcohol content ("BAC") of .11. It is an undisputed fact that claimant was intoxicated within the meaning of Idaho Code § 72-208(3) at the time of his accident. In an attempt to avoid the application of Idaho Code § 72-208, claimant relies heavily on the case of *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976) for the proposition that his intoxication alone does not establish that it was a reasonable substantial cause of his injures. However, when examined in light of the current statutory

construct, the *Hatley* case has no precedential value. Rather, as is shown in greater detail below, the Commission in this case carefully reviewed the evidence of record, including the opinions of each party's expert witnesses and concluded that claimant's admitted intoxication was a reasonable and substantial cause of his accident and injuries. Therefore, the Commission correctly found that the defendants are not liable for payment of claimant's income benefits by virtue of Idaho Code § 72-208.

In *Watson v. Joslin Millwork, Inc.*, 149 Idaho 850, 243 P.3d 666 (2010), the Supreme Court re-emphasized the standards for setting aside an order of the Industrial Commission:

> In fact, this Court may only set aside an order of the Industrial Commission on one of the following four grounds:
>
> (1) The commission's findings of fact are not based on any substantial competent evidence;
> (2) The commission has acted without jurisdiction or in excess of its powers;
> (3) The findings of fact, order or award were procured by fraud; [or]
> (4) The findings of fact do not as a matter of law support the order or award.

Stoddard v. Hagadone Corp., 147 Idaho 186, 190, 207 P.3d 162, 166 (2009) (citing I .C. § 72-732).

When the Supreme Court reviews a decision from the Industrial Commission, it reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Ogden v. Thompson,* 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund (In re Wilson),* 128

Idaho 161, 164, 911 P.2d 754, 757 (1996). The Supreme Court will not disturb the Commission's factual findings unless they are clearly erroneous. *Excell Constr., Inc. v. State, Dept. of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005) (citing *Hughen v. Highland Ests.*, 137 Idaho 349, 351, 48 P.3d 1238, 1240, (2002)). Nor will the Supreme Court re-weigh the evidence or consider whether it would have drawn a different conclusion from the evidence presented. Id. The Supreme Court will not disturb the Commission's determination as to the weight and credibility of evidence unless clearly erroneous. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). Finally, all facts and inferences must be viewed in the light most favorable to Respondents as they prevailed before the Industrial Commission. *Garcia v. J.R. Simplot*, 115 Idaho 966, 968, 772 P.2d 173, 175 (1989).

l. Idaho Code § 72-208 and Defendants' Liability

Pursuant to Idaho Code § 72-208(1), the issue decided by the Industrial Commission was whether the claimant's admitted intoxication with a BAC of .11 (which is 5.5 times the legal limit) was a "reasonable and substantial cause" of claimant's failure to negotiate a turn while driving 123 mph on a road he has driven hundreds of times, causing him to roll his truck and sustain substantial injuries. Idaho Code § 72-208(2) sets forth the intoxication defense and reads in pertinent part that "[i] if intoxication is ***a reasonable and substantial cause*** of an injury, no income benefits shall be paid..." Idaho Code § 72-208(2) (emphasis added). Defendants raised Idaho Code § 72-208 as an affirmative defense and they have the burden of proving the

intoxication defense by a preponderance of the evidence. *See*, *Seamans v. Maaco Auto Painting and Bodyworks*, 128 Idaho 747, 752, 918 P.2d 1192, 1197 (1996).

The term "reasonable and substantial cause" is not specifically defined by Idaho Code § 72-208 or its interpreting case law. Therefore, an examination of the amendment to Idaho Code § 72-208 in 1997 is critical. Prior to its amendment in 1997, Idaho Code § 72-208(2) required a showing by defendants that a claimant's intoxication was "***the proximate result***" of the claimant's injuries. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 721, 552 P.2d 484, (1976) (emphasis added). Under Idaho law, proximate cause is defined as "a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and ***but for*** that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage ***likely would have occurred anyway***." IDJI 2.30.1.[2] (emphasis added).

The Idaho Supreme Court noted there is a difference between proximate "but for" causation and "substantial factor" causation which is now required by Idaho Code § 72-208(2) following its amendment in 1997. In *Garcia v. Windley*, 144 Idaho 539, 543, 164 P.3d 819, 823 (2007), the Supreme Court stated:

> In Idaho, the "but for" test may be employed when there is a *single possible cause of the injury*; however, the "substantial factor" test must be employed when *there are multiple possible causes of injury*, and the jury must be instructed accordingly. *Newberry*, 142 Idaho at 288, 127 P.3d at 191. "The "but for" instruction and the "substantial factor" instruction are mutually exclusive." Id.

> (quoting *Le'Gall v. Lewis County*, 119 Idaho 182, 187, 923 P.2d 427, 432 (1996) (internal quotations omitted).

Garcia, 144 Idaho at 543, 164 P.3d at 823 (emphasis added).

The substantial causation factor test was first enunciated in *Fouche v. Chrysler Motors Corp.*, 107 Idaho 701, 692 P.2d 345 (1984). In *Fouche*—a product liability case—plaintiff sued his automobile manufacturer alleging it provided a defective seatbelt and steering column which allegedly caused severe injuries after he drove his vehicle into a parked car. The Idaho Court of Appeals stated that "the substantial factor" test consists of "whether ... the product defect was a substantial factor in causing the injury suffered. The conduct of the manufacturer *need not be the sole factor, or even the primary factor, in causing the plaintiff's injuries, but merely a substantial factor therein.*" *Fouche*, 107 Idaho at 704 (emphasis added). Ultimately the court reasoned in *Fouche* that plaintiff could establish the defective safety devices were substantial causes of the injuries suffered by plaintiff, based upon the facts of the case, including (1) the seatbelt and collapsible steering column were defective; (2) that due to these defects, plaintiff struck the steering column with considerable force; (3) that plaintiff suffered a chest injury due to the accident; and (4) that plaintiff's chest injury was the type which the safety devices were intended to prevent. *Fouche*, 107 Idaho at 705.

Additionally, in *Fusell v. St. Clair*, 120 Idaho 591, 818 P.2d 295 (1991), this court discussed the difference between the burden of establishing causation where there are multiple causes of an injury using substantial factor causation. In *Fusell*, this court affirmed the trial

court's decision to omit any mention of "but for" causation and omit the portion that it is not a proximate cause if the damage "likely would have occurred anyways" from the proximate cause jury instruction. Id. at 595, 818 P.2d at 299. Following this court's decision in *Fusell*, the Supreme Court made it clear that the use of a "substantial factor" instruction applies in civil cases when there are multiple causes of a plaintiff's injuries, even if there is only one potentially negligent defendant. *Newberry v. Martens*, 142 Idaho 284, 291, 127 P.3d 187, 194 (2005). It is clear from these cases that a party's burden of establishing substantial factor causation is less than but for proximate causation.

In the present case, the claimant attempted to avoid the application of Idaho Code § 72-208 by arguing that due to the claimant's speed alone, his accident would have occurred anyways. Then, on the date of hearing, claimant alleged the additional contributing cause of texting in support of its argument that Idaho Code § 72-208 did not apply. However, since there are admittedly several possible causes of claimant's injuries in light of the circumstances of his accident, defendants need not prove that his admitted intoxication was the sole or even primary factor in causing his injuries. *Fouche*, 107 Idaho at 704. As discussed further below, defendants only need prove that intoxication was **a** reasonable substantial cause.

The 1997 amendment to Idaho Code § 72-208 also supports the conclusion that the Legislature intended to reduce a defendants' burden to prove the intoxication defense. Under the statute in effect prior to 1997, a defendant had the burden of establishing that the claimant's injury was "***the*** proximate result" of their intoxication. Idaho Code § 72-208(2) (1996)

(emphasis added). This required a defendant to prove that claimant's intoxication was the primary or main cause of their injuries, a difficult burden in most cases which involve multiple causes. In 1997, the Legislature clearly lessened defendants' burden under Idaho Code § 72-208(2) by changing "the proximate result" to "a reasonable and substantial cause" which takes into account injuries involving multiple causes where intoxication is not the primary or sole cause.

It is clear that the Legislature's substitution of the term "the proximate result" with the term "a reasonable and substantial cause" in Idaho Code § 72-208(2) took into account the fact that injuries often occur due to more than one contributing cause. As a result, defendants who raise the intoxication defense are no longer required to prove that the accident would have occurred "but for" or solely due to claimant's intoxication nor can the claimant argue that the accident would have likely occurred without intoxication (which is exactly what claimant's expert opined). Rather, defendants' burden herein is lessened because they need only prove that the claimant's intoxication was **a substantial factor**, not the sole or primary factor, in causing claimant's injuries.

Based upon the statute and Idaho law, it is clear that "substantial" does not mean the sole or primary cause of the claimant's injuries. The Industrial Commission used the definition contained in an online legal dictionary defining "substantial" as "significant or large in having substance." R., p. 21 (citing the law dictionary featuring Black's Law Dictionary Free Online Legal Dictionary, 2nd ed.) The Kansas Supreme Court, when interpreting a statute similar to

Idaho's statute defined the term "substantial" using Black's Law Dictionary as something "[o]f real worth and importance ... something worthwhile as distinguished from something without value or merely nominal." *Poole v. Earp Meat Company*, 750 P.2d 1000, 1006 (Kan. 1988) (citing Black's Law Dictionary, 280 5th ed. 1979). In *Poole*, the Kansas Supreme Court was asked to decide whether an employee's death resulted "substantially from the employee's intoxication." Id. at p. 1003. In *Poole*, a truck driver was killed when a semi-truck overturned while he was returning home. There was no evidence the claimant had been drinking. His truck jackknifed and rolled throwing the employee through the windshield killing him instantly. There was no evidence that the employee had been driving in an erratic manner and his speed was estimated to be approximately 65mph at the time of the accident. An investigating officer found beer cans, both full and empty in the cab and around the ground around the truck. The employee's blood alcohol content was found to be .13. *Poole* at p. 1002.

An administrative law judge denied compensation finding the employee's death was substantially caused by his "excessive use of alcohol." Id. at p. 1003. The judge relied on the following facts: (1) the employee's BAC of .13; (2) the employee's deliberate ingestion of alcohol liquids prior to driving; (3) that as a result of the alcohol consumption the employee's driving ability was very substantially impaired including the inability to drive his truck in a safe manner and remain fully alert while driving the truck; and (4) as a result of his intoxication the employee became inattentive while driving resulting in the truck going out of control and wrecking. Id. at p. 1003.

The employee's widow appealed arguing that the substantial cause of the employee's death is that he fell asleep and that the intoxication defense statute did not apply because her husband was so tired he fell asleep. Id. at p. 1005. The Kansas Supreme Court noted that the employer's burden under the intoxication statute required proof that the employee's death was substantially caused by intoxication, noting that if the employee's "tires had exploded, that would have been the substantial cause of his death and it would not matter how intoxicated [employee] was at the time." Id. at p. 1005. Thus, there must be some nexus between the employee's intoxication and the accident causing injuries. Otherwise, employers would simply rely on the fact of intoxication to avoid payment of workers' compensation income benefits. In *Poole*, the Kansas Supreme Court noted that there was a connection between the employee's intoxication and his injuries finding that the alcohol content of his blood, coupled with the smell of alcohol and empty beer cans at the accident scene was sufficient substantial competent evidence to support a finding that the fatal accident was substantially caused by the employee's impairment due to his intoxication. *Poole*, 750 P.2d at pp. 1006-1007.

Under California's workers' compensation system, employers are required to prove that the claimant's injury be "substantially" caused by intoxication. *Smith v. Workers' Compensation Appeals Bd.*, 123 Cal. App. 3d 763, 176 Cal. Rptr. 843 (1981). In *Smith*, the claimant's husband was killed in a car accident returning from a job site with a BAC of .25. A forensic pathologist testified that the employee's judgment reaction time would have been impaired seriously at that blood alcohol level, which the California Court of Appeals found was sufficient evidence to

support the board's finding that the employee's death was caused substantially by intoxication despite evidence that the weather was bad, the road was bad and the employee had appeared sober and coordinated to his coworkers. *Smith*, 123 Cal. App. 3d at p. 774.

2. Claimant's Admitted Intoxication Was a Reasonable and Substantial Cause of His Injuries

In reaching its finding that defendants met their burden of proving that the claimant's intoxication was a reasonable and substantial cause of claimant's injuries, it relied on the credible evidence of record and the expert opinions of Corporal Bivens, Dr. Dawson and Dr. Anderson. All experts testified that the claimant was intoxicated (impaired due to alcohol) at the time of his crash due to his use of alcohol. Intoxication under the statute means "being under the influence of alcohol or of controlled substances ..." Idaho Code § 72-208(3). The factors that support this finding include the "strong odor of alcohol" in his wrecked truck detected by Corporal Bivens when he arrived at the accident scene, the claimant's BAC of .11 at the time of his crash and the discovery of unopened beer bottles in the debris and interior of the truck. It is also undisputed, that based upon his forensic BAC of .11 and his age at the time of the accident (eighteen), the claimant's BAC was 5.5 times the legal limit of 0.2. See, Idaho Code § 18-8004(d).

The Commission then considered the opinions of the experts in this case. While Corporal Bivens opined that speed was a "major contributing factor" in causing claimant's accident, he also concluded that the claimant's alcohol consumption was a contributing factor as well. R., p.

21. The Commission considered Corporal Bivens' opinion that alcohol affects an individual's judgment, inhibitions and the ability to safely control a motor vehicle. R., p. 21. The Commissions also considered Corporal Bivens' opinions that a person with a BAC of .12 driving 122 mph on a road they had driven hundreds of times before even while texting, exhibits extremely poor judgment and that judgment would be affected by their consumption of alcohol, including judgment relating to speed. Tr., p. 87, L. 11-p. 88, L. 17; R., pp. 21-22. Similarly, Dr. Dawson opined that the claimant's intoxication was a reasonable and substantial cause of his crash and subsequent injury, which the Commission relied upon in reaching the same conclusion. R., p. 23. Dr. Dawson testified the claimant's intoxication due to his consumption of alcohol **alone** was a substantial cause of his injuries because his act of driving while under the influence of alcohol significantly impaired his judgment, inhibition, ability to multitask (drive safely and text) and his ability to understand upcoming risks, including the curve in the road while driving. Dawson depo., p. 29, L. 25-p. 30, L. 5. Even claimant's own expert, Dr. Anderson, agreed that claimant's use of alcohol impaired him in this manner. Anderson depo., p. 66, L. 8-p. 67, L. 17.

Further exacerbating the effects of his alcohol induced intoxication was claimant's use of opiates less than twelve hours prior to his accident as documented in his drug screen. Dr. Dawson noted that opiates had and addictive affect causing additional impairment. Dawson depo., p. 27, Ll. 2-8. Claimant argued that the Commission improperly considered his use of prescription pain medication and Adderall in determining that he was intoxicated. Idaho Code § 72-208(3) defines intoxication as

> "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 substances dispensed directly by a physician to the employee *where the employee's use of the controlled substance is in accordance with the instructions for use of the controlled substance*.

Idaho Code § 72-208(3) (2008) (emphasis added). In this case, claimant's use of Lithium and opiates were not in accordance with instructions for their use because alcohol and opiates are contraindicated, meaning that patients are warned by their physicians not to take them together because of their additive impairing effect on the central nervous system. Dawson depo., p. 20, Ll. 8-20. Therefore, the Commission properly considered the claimant's use of opiates less than twelve hours prior to his crash, his admitted intoxication from alcohol and the claimant's intoxication resulting solely from his ingestion of alcohol. R., p. 23, fn 8.

Dr. Dawson's opinions are supported by substantial and competent evidence and are more persuasive than Dr. Anderson's opinions. First, claimant admitted that he has driven the Old Bassett Road where the accident occurred hundreds of times prior to his accident and despite his propensity to speed, he has never been involved in an accident on any roadway. Thus, his propensity to speed was a factor—but was not the sole cause of his accident—otherwise he would have crashed on this road hundreds of times. Since the claimant was driving two and a half times over the posted speed limit at the time he failed to negotiate the curve despite his ability to negotiate the curve hundreds of times before, the evidence establishes that his

acknowledged intoxication caused his admittedly reckless behavior on the night of his accident. This supports the Commissions' finding that claimant was experiencing impairment due to intoxication. R., p. 28. This evidence also establishes that claimant's intoxication was a reasonable and substantial factor in causing his accident and injuries.

The Commission properly determined that Dr. Anderson's opinions were less persuasive than Dr. Dawson's opinions. He opined that the reasonable and substantial cause of the claimant's injuries was excessive speed caused by an addictive personality due to his ADHD. Anderson depo., p. 25; R., p. 26. However, Dr. Anderson defined "substantial and reasonable cause as the main number one cause ... the main cause ... the reproducible cause." Anderson depo., p. 52; R., p. 26. He could not also explain why, if alcohol was not a substantial factor in the accident, claimant did not crash on the hundreds of times he has driven this stretch; nor did he know whether the claimant's ADHD was medically controlled at the time of the accident. R., p. 27. The Commission then noted that Dr. Anderson acknowledged that the claimant's alcohol was a factor in causing his injuries and that the only time the claimant attempted to negotiate the curve on the Old Bassett Highway at 123 mph he was intoxicated through his use of alcohol. R., pp. 26-27; Anderson depo. at 52 Ll. 1-6. The Commission, based upon the facts of record, its reliance upon the opinions of Dr. Dawson and Corporal Bivens, and its criticism of Dr. Anderson's opinions, applied Idaho Code § 72-208(2) and denied the claimant's income benefits.

There is a strong public policy supporting the Commission's decision based upon the facts of record. Idaho law sets forth a strong policy rationale for not permitting a claimant to

benefit from his intoxication because the employee is not allowed to point to another one of reckless behaviors, i.e., speeding, (or allegedly texting) as the sole "substantial" cause of his accident to prohibit the application of the intoxication defense. In *Doe v. Durtschi*, 110 Idaho, 466, 716 P.2d 1238 (1986), this court stated that "It is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm." Id. (quoting *Gibson v. United States*, 457 F.2d 1391, 1395 (3rd Cir. 1972). The same public policy argument applies to the claimant in this case. The claimant's inability to negotiate a turn while driving 122 mph while he was intoxicated was an anticipated result of his significantly impaired judgment, cognitive and executive function caused by his ingestion of alcohol. Accordingly claimant cannot rely solely on his propensity to speed (or alleged texting) as grounds to circumvent the application of the intoxication defense set forth by the Legislature in Idaho Code § 72-208(2).

If claimant prevails on his assertion that his intoxication was not a reasonable and substantial cause of his injuries because he was excessively speeding, allegedly texting and not wearing a seatbelt when the accident occurred, then the intoxication defense has no practical application. To avoid the application of Idaho Code § 72-208(2), intoxicated claimants throughout the state would simply be able to assert that their injuries were caused by the events immediately preceding the accident, such as swerving into traffic while attempting to pass a slower vehicle because the claimant had a propensity to pass cars. The Idaho Legislature's 1997 amendments to Idaho Code § 72-208 and Idaho Code § 72-228 (removing the statutory

presumption that intoxication did not cause injuries in cases of death or where claimant cannot testify) demonstrate the intent to lessen the barriers to the application of the intoxication defense. It also indicates that the Legislature did not want intoxicated individuals to benefit from causing their own injuries.

3. The Cases Relied Upon by Claimant are Distinguishable and Have no Precedential Value

Claimant relies heavily on the case of *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P2d. 482 (1976) for the proposition that his BAC of .11 alone does not establish that it was a reasonable and substantial cause of his injuries. However, the *Hatley* case is distinguishable from the present case on several grounds. First, in *Hatley*, Idaho Code § 72-208 required the employer to prove that claimant's injuries were "the proximate result" of his intoxication rather than "a reasonable and substantial cause" under the current statute. *Hatley*, 97 Idaho at 723, fn 1. Therefore in *Hatley* the employer was required to prove "proximate cause," a higher burden on the defendant. *Hatley,* 97 Idaho at 722. Second, in *Hatley*, the defendants had to overcome a rebuttable presumption that claimant's death was not caused by his intoxication. Idaho Code § 72-228 (1976). Id. Third, in the present case there is substantial evidence establishing that the Claimant's accident was caused by his intoxication beyond that produced in *Hatley.*

At the time of the claimant's accident in *Hatley*, Idaho Code § 72-208(2) read:

> if an injury is **the proximate result** of an employee's intoxication, all income benefits shall be reduced by fifty per cent (50%),

> provided that such reduction shall not apply where the intoxicants causing the employees intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or a supervising agent that the employee is intoxicated.

Hatley, 97 Idaho at p. 723, fn 1. (emphasis added). This statute required that defendants prove the intoxication defense by proximate "but for" causation or that it was the sole cause which is no longer required by Idaho Code § 72-708(2). Prior to the amendment of Idaho Code § 72-208(2)'s amendment in 1997, the statute required a showing by defendants that the claimant's intoxication was a "*the proximate cause*" of the claimant's injury. *Hatley,* 97 Idaho at 722. (emphasis added). The current statute requires proof that the claimant's intoxication be "a reasonable and substantial cause" of the injuries. As previously noted, under Idaho law there is a significant difference between the burden required for proving proximate "but for" causation and "substantial factor" causation now required by Idaho Code § 72-208(2). In an effort to avoid the application of Idaho Code § 72-208, claimant alleged several potential causes of his accident, among them his intoxication. Defendants need only prove that his admitted intoxication was a substantial factor in causing his injuries, not that his injuries likely would have occurred even if he were not intoxicated or that it was the primary cause of his injuries, as was the case in *Hatley*.

Additionally, the burden of establishing the intoxication defense upon the defendants in *Hatley* was much greater than in the current case because the defendants in *Hatley* had to overcome the rebuttable presumption set forth in Idaho Code § 72-228 as it existed in 1976. At the time of the decision in *Hatley*, Idaho Code § 72-228 provided a presumption in cases

involving an employee's death or where the claimant could not testify that that the injury or death was not occasioned by the employee's intoxication. *Hatley*, 97 Idaho at 722. However, the current version (which was amended in 1997 at the same time as Idaho Code § 72-208) specifically excludes the presumption in cases where defendants raise the intoxication defense under 72-208. Idaho Code § 72-228(2). In *Hatley* the defendants could not overcome the pre-1997 amendment presumption set forth in Idaho Code § 72-228. Moreover, the amendment of Idaho Code § 72-228 to specifically exclude the applicability of the presumption in cases involving an employee's intoxication indicates the Legislature's intent to reduce defendants' burden of proving the intoxication defense. This amendment coincides with the amendment of Idaho Code § 72-208(2) (which lessened the defendant's causation burden) demonstrating the Legislature's intent to reduce a defendant's burden to prove the intoxication defense under Idaho's workers' compensation laws.

Finally, as opposed to the defendants in *Hatley*, here defendants provided sufficient proof that the claimant's admitted intoxication was a reasonable and substantial cause of his accident. In *Hatley* the defendants relied solely on the fact that the claimant had a BAC of .11 at the time of the accident. In *Hatley*, as opposed to this case, there was testimony that prior to his accident the claimant was not drunk and did not seem intoxicated to people who saw him. *Hatley*, 97 Idaho at p. 721. Additionally, there was evidence that the curve where the accident occurred had caused several previous accidents, including one where a semi-truck had failed to negotiate the curve one year prior to the accident. Id.

In the present case, claimant was admittedly intoxicated, he had driven the road where the accident occurred hundreds of times prior to this accident without incident despite his propensity to speed, he had never been involved in an accident prior to his August 2008 crash, he was driving two and a half times over the speed limit at the time he failed to negotiate the curve despite the fact that he was able to negotiate that curve hundreds of times before while presumably driving over the speed limit as was his habit, and he admitted that his actions on the night of the accident were reckless. Thus defendants produced significant evidence that claimant's intoxication was a substantial cause of his injuries.

Moreover, in *Hatley*, the Supreme Court specifically limited its holding in the case stating "we only hold that the blood alcohol level of .117% in this case is not sufficiently high to *overcome the statutory presumption against causation*." *Hatley*, 97 Idaho at 722. (emphasis added). It is clear that this statutory presumption no longer applies to cases involving an employee's admitted intoxication. Idaho Code § 72-228(2). Therefore, *Hatley* is not dispositive and does not control the present case before the Commission.

Claimant's reliance on *Folse v. American Well Control* is also misplaced and of no precedential value. In his Brief, claimant argues that *Folse*, 536 So.2d 686 (La. App. 3 Cir. 1988), is even more analogous to his case than *Hatley*. Appellant's Brief, pp. 33-37. Claimant extensively argues that the decedent in *Folse* had traveled the same road numerous times before and was an experienced drinker, thereby proving that defendants herein failed to meet their burden under Idaho Code § 72-208. However, claimant's argument is misplaced.

The *Folse* court, in large part, reached its decision because it could not determine whether the decedent was actually intoxicated. *Folse*, 536 So.2d at p. 692. In the present case, however, it is undisputed that claimant was intoxicated. In determining whether intoxication was a substantial factor in causing the accident, the *Folse* court correctly noted that there must be some evidence other than the happening of the accident, such as behavior that would demonstrate "the employee's intoxication and resulting impairment or loss of control." *Folse*, 536 So.2d at 690. "Such behavior could include slurring of speech, drowsiness, staggering, and erratic driving prior to the accident." Id. (emphasis added). Significantly, there was no evidence of erratic driving in *Folse* (a fact ignored by claimant in his Brief):

> The investigating officer inspected the roadway for a distance of about six-tenths of a mile back from the scene of the accident and found no evidence of irregular driving on the part of Mr. Folse.

Folse, 536 So.2d at 691. In the present case, claimant drove off the road at 123 mph, which claimant admitted was reckless.

Aside from the fact that the legal standard employed by the Louisiana Court was significantly different than Idaho's and that the *Folse* court determined that the decedent in that case was not intoxicated for the purpose of Louisiana's statute, claimant ignores the salient fact that he – unlike Folse, who was driving normally – was driving at 123 miles per hour at the time of the accident. This is perhaps the epitome of "irregular driving." Moreover, claimant admitted he was driving recklessly.

Claimant attempts to get around this obvious problem by claiming that he was "texting on a corner while speeding" and "texting on a corner while going 123 miles per hour." Claimant's Brief at pp. 36-37. However, claimant's assertion that he was texting at the time of the accident and texting on a corner is blatant speculation and should be disregarded as such– there is no evidence whatsoever in or out of the record that claimant was texting at the time of the accident or while he was going around a curve. [1]

B. The Commission's Determination That Claimant's Alleged Texting Would Not be Considered is Supported by Substantial and Competent Evidence

1. The Commission Has Discretion to Refuse to Consider Evidence that is Unreliable, Improbable, Not Credible, or Has Little Probative Value

The Commission has the discretion to refuse to consider evidence – such as claimant's last-minute evidence of texting – that is unreliable, improbable or has little probative value.

> Under the Idaho Administrative Procedure Act, the Commission may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. IDAPA 09.01.06.026.13; Idaho Code § 67-5251. The Commission is not, however, bound by the Idaho Rules of Evidence. *Stolle v. Bennett,* 144 Idaho 44, 49-50, 156 P.3d 545, 550-51 (2007). The Commission has the discretionary power to consider any type of reliable evidence having probative value, even if that evidence is not admissible in a court of law. Id. at 50, 156 P.3d at 551. The Commission has the discretion to admit evidence if "it is a type commonly relied upon by prudent

[1] See Section B, infra. Claimant had no recollection of texting; the investigating officer did not find a cell phone at the scene of the accident; claimant's father –who allegedly found the phone and for the first time at the hearing claimed he saw texts had been sent and or received (at some undetermined time before the accident)—did not keep the phone; Claimant's father did not mention the alleged texting during deposition; and Claimant's expert did not address texting as a cause of the accident in his report, prepared five days before the hearing.

> persons in the conduct of their affairs." Id.; I.C. § 67-5251. This does not mean, however, that the Commission is required to admit such evidence.

Higgins v. Larry Miller Subaru-Mitsubishi, 145 Idaho 1, 5 175 P.3d 163, 167, (2007).

The credibility of witnesses and evidence is a matter within the province of the Industrial Commission. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). Conclusions reached by the Commission as to the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. Id., *Hughen v. Highland Estates,* 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002). On appeal, this court does not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *See, Warden v. Idaho Timber Corp.*, 132 Idaho 454, 457, 974 P.2d 506, 509 (1999).

A referee need not accept as true testimony of a witness when the testimony is "inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial." *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447, 74 P.2d 171, 175 (1937). *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 754, 302 P.3d 718, 726 (2013). On appeal, this court must view all facts and inferences "in the light most favorable to the party who prevailed before the Commission." *Taylor v. Soran Rest., Inc.*, 131 Idaho 525, 527, 960 P.2d 1254, 1256 (1998) (internal quotations and citation omitted).

Here, the Commission had considerable latitude whether to consider or give weight to claimant's improbable claim that he was texting. The Commission acted within its discretion when it determined that Claimant's last-minute and uncorroborated "evidence" of texting would

not be considered. The facts and circumstances disclosed (for the first time) at the hearing concerning the alleged texting render it highly improbable.

2. Claimants' Argument that He was Texting at the Time of the Accident is Disingenuous, Does Not Reflect the Testimony, and is Speculative.

At various times, claimant argues in his brief that he was texting at the time of the crash:

- "Evidence in the record suggests that **Kal was texting at the time he crashed**." Claimant's Brief, 3 (emphasis added).

- "**Kal was sending text message to Ryan at approximately the same time the car accident happened** (3:30 a.m.)." Claimant's Brief, 7 (emphasis added).

- Newman's testimony "....corroborates Kal's testimony regarding **Kal's texting at the time of the accident**." Claimant's Brief, 23 (emphasis added).

- "[Newman's]...testimony regarding **Kal's cell phone usage at the time of the accident** is an admission by the opposing party." Claimant's Brief, 24 (emphasis added).

- "* **Kal's texting while driving at time of the accident**." Claimant's Brief, 32 (emphasis added).

- "However, there is no evidence that Kal, prior to the accident, had ever traveled down the Old Bassett Highway at night, **or while texting**.....: Claimant's Brief, 36 (emphasis added).

- "(...**texting on a corner while speeding is the cause of Kal's accident)**." Claimant's Brief, 36 (emphasis added).

- "...**including the facts that he was texting on a corner while going 123 miles per hour**...." Claimant's Brief, 37 (emphasis added).

- "...the Commission erred in refusing to consider **evidence that Kal was texting at the time of the accident**;...". Claimant's Brief, 46 (emphasis added).

Contrary to claimant's various assertions, there is no evidence that claimant was texting at the time of the accident; there is no evidence that he "was texting on a corner." At most, if the testimony is to be believed, is there may have been some texts to and/or from claimant's cell phone at some unknown point prior to the accident. Claimant is simply presenting argument as fact. In fact, claimant testified that he had no independent recollection of texting before the accident. Tr., p. 50, Ll. 1-4. There is no evidence in the record as to the exact time the accident actually occurred nor is there testimony or other evidence of the time(s) that claimant was allegedly texting.

3. Evidence of Claimant's Alleged Texting is Improbable and Unreliable.

Numerous facts disclosed at the hearing support the improbability and unreliability of claimant's last-minute assertion that he was texting:

- Claimant had no independent recollection of texting at the time of the accident. Tr., p. 50, Ll. 1-4.
- The issue of the alleged texting was never raised – not even once – before the hearing. Tr., p. 40, Ll. 7-11; Tr., p. 99, Ll. 16-21.
- Corporal Bivens never found the cell phone despite his thorough search immediately after the accident. Tr., p. 64, Ll. 13-25; p. 84, Ll.15-19.
- Neither claimant nor his father ever notified the police or the defendant that a cell phone had been found. Tr., p. 41, Ll. 11-14; Tr., p. 66, Ll. 4-7.
- Claimant could not produce his phone. Tr., p. 51, Ll. 17-19.
- Claimant never mentioned the alleged texting during his deposition or in answer to interrogatories. Tr., p. 54, Ll. 10-24.

- Claimant's father never mentioned the alleged texting during his deposition and cited speeding as the cause (not texting), despite being asked what his investigation showed caused the accident Tr., p. 96, L. 24 – p. 97, L 16.; p. 98, Ll. 17-21.

- Claimant never asked the friend he was allegedly texting if he still had his phone to verify the texting. Tr., p. 52, Ll. 1-8.

- Claimant's expert Dr. Joe Anderson (who's own son was involved in a serious car accident caused by texting) NEVER cited texting as a cause of the accident in his report, which was dated a mere five days before the hearing. Claimant's Ex. 3; Anderson depo., p. 47, Ll. 7-22.

The claimant's alleged texting was never disclosed until the hearing, even to claimant's own expert who prepared a report five days before hearing. The facts outlined above highlight the improbability and unreliability of claimant's "texting evidence." Combined with the fact that the most that claimant could show was that that texting occurred at some point prior to the accident, the Commission was correct and within its authority as finder of fact in determining that the uncorroborated evidence regarding texting would not be considered, and that the clearest explanation for the claimant's driving off the road and rolling his truck at 123 miles per hour was that "he was experiencing impairment due to intoxication." R., p. 28.

4. The Alleged Texting Was Not an "Undisputed Fact"

Claimant's argument that his alleged texting is an "undisputed fact" because his father is his employer ignores the fact that Newman Giles is claimant's father, and thus was essentially in the position of a hostile witness. Moreover, admissions by a party opponent relate to whether out of court statements are considered hearsay – not whether such statements must be considered true. Newman's testimony was impeached on cross examination, thus he is not credible. The

Commission determined, for the reasons discussed above, that the so-called texting evidence was improbable and unreliable.

5. Any Refusal to Consider Evidence of Texting was Harmless Error

It is undisputed that claimant had a BAC of .11 at the time of the accident. Claimant concedes that someone talking on their cell phone – much less texting – "while driving is the equivalent of someone driving with a BAC of .08." Claimant's Brief at 24, citing Mr. Dawson's deposition. Therefore, texting at most was additive and his intoxication alone from a .11 BAC was sufficient to cause his reckless driving. As such, even if the Commission found that claimant was texting at the time he rolled the vehicle at 123 miles per hour, his intoxication level would have been the equivalent of a .19 BAC. Under these circumstances, a finding that intoxication was a reasonable and substantial cause of the accident was within the Commission's role as finder of fact.

C. The Commission's Finding That Claimant's Injuries Were Caused by The Accident – Rather Than Claimant's Failure to Wear a Seatbelt – is Supported by Substantial and Competent Evidence

In his Brief, the Claimant argues—without citing any supporting authority—that his injuries were caused by his failure to wear a seatbelt, rather than his 123 mile per hour rollover accident, while he was legally intoxicated at 5.5 times the legal limit. This argument is without merit. Just as a defendant cannot argue that a plaintiff's damages should be reduced for failure to wear a seatbelt, a claimant should not be able to force a defendant to prove what injuries would have occurred had a seatbelt been worn. *See Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187

(Idaho 1986); *see also Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 460 P.2d 739 (1969) ("the fact that a plaintiff was not using his seat belt at the time of the accident is not admissible as evidence that he was contributorily negligent"). Id. at 317, 460 P.2d at 742. As the *Hansen* Court stated, "The reason for this rule is the lack of connection between failure to wear a seat belt and the occurrence of the accident." Id. at 318, 460 P.2d at 743.

Here, there is no connection between claimant's failure to wear a seatbelt and the occurrence of the accident which resulted in his injuries. The accident did not occur because he was not wearing a seatbelt, it occurred – as the referee determined – because claimant was intoxicated, was impaired as a result of that intoxication, and was driving recklessly at 123 miles per hour.

D. Respondents Employer/Surety Are Entitled to Attorney Fees Pursuant to I.A.R 11 and *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995)

Pursuant to Idaho Appellate Rule 11.1, a party may be subject to sanctions if an appeal is brought frivolously and without foundation. "Under IAR Rule 11.1, sanctions will be awarded on appeal if the party requesting them proves: (1) the other party's arguments are not well grounded in fact, warranted by existing law, or made in good faith, and (2) the claims were brought for an improper purpose, such as unnecessary delay or increase in the costs of litigation." *Frank v. Bunker Hill Co.*, 142 Idaho 126, 124 P.3d 1002, 1008 (2005). In *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995), this court held that all the claimant's attorney asked the court to do on appeal was re-weigh the evidence and reach a different conclusion than that reached by the Commission and awarded attorney fees on appeal against the claimant's counsel.

As was the case in *Talbot*, all that the claimant asked this court to do is re-weigh the evidence and enter a new conclusion favorable to him. Claimant's argument that intoxication was somehow not a reasonable and substantial cause of his injuries—while claimant's BAC was 5.5 times the legal limit and he was driving at 123 miles per hour—is clearly contrary to the applicable statues and the substantial factor test that must be employed when there are multiple possible causes of an accident. In fact, claimant devotes almost his entire brief arguing that the court should employ an outdated standard, arguing the facts, and asking this court to re-weigh the evidence. As such, Defendants herein are entitled to attorney fees.

CONCLUSION

This court should affirm the Commission's finding that defendants' proved by substantial and competent evidence that claimant's intoxication was a reasonable and substantial cause of his injuries such that income benefits are barred by Idaho Code § 72-208. For the above reasons, the Order of the Commission should be affirmed.

Dated this 13th day of March, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of March, 2014, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

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___Hand Delivered
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_____
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