4-7-2014

Giles v. Eagle Farms Appellant's Reply 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 REPLY BRIEF ON APPEAL

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

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

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I.

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

A. The Texting Evidence Is Not Highly Improbable.

The Employer argues that the texting evidence is highly improbable because it was never disclosed until the hearing. However, in *Pierstorff v. Gray's Auto Shop*, 58 Idaho 138 (1937), the court explained the meaning of the term "improbable." The court stated that "[t]estimony which is inherently improbable may be disregarded . . . but to warrant such action there must exist either a ***physical impossibility*** of the evidence being true, or ***its falsity must be apparent***, without any resort to inferences or deductions." *Id.* at -- (emphasis added) (quoting *Arundel v. Turk*, 16 Cal.App.2d 293, 296-297, 60 P.2d 486, 487-488 (Cal.App.1936)); *see also Dinneen v. Finch*, 100 Idaho 620, 627 (1979).

In this case, nothing in the record shows that Kal's testimony regarding texting is a physical impossibility or that its falsity is apparent. To the contrary, 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.[1] Kal said that his phone showed that he sent his last text to Ryan at 3:30 a.m.[2]

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1 HT 50:6-51:6.
2 HT 50:6-51:6; 58:19-21.

Kal's testimony is uncontradicted and is corroborated by Newman's testimony. Newman testified that two or three days after the accident, he sent some of his employees over to the place of the accident with some flatbeds and track hoes to clean up the wreckage.[3] In the process of moving the truck, one of the employees found Kal's cellphone and brought it to Newman.[4] 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.[5]

Newman explained that 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.[6] Since that time, Newman has started using texting, and he has personally experienced texting and driving and now understands that it is not safe.[7] 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.[8] He was concerned for his son's life and not about gathering evidence.[9]

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3 HT 94:2-96:4.
4 HT 94:2-96:4.
5 HT 95:14-96:18.
6 HT 99:24-100:9.
7 HT 99:24-100:9.
8 HT 104:7-20.
9 HT 104:7-20.

Although the Employer is now claiming the evidence is improbable, the Employer never objected at the hearing to the admission of any texting evidence and the Employer offered no contrary evidence. Furthermore, if the Employer had any concerns regarding the veracity of the texting evidence, it could have conducted additional discovery. The hearing was held on June 12, 2012.[10] However, the record remained open and the matter was not taken under advisement until April 29, 2013,[11] giving the Employer an additional 10 months to conduct discovery.

The Employer makes much of the fact that Dr. Anderson did not identify texting in his pre-hearing report.[12] However, Dr. Anderson did not know about the texting evidence until after the hearing when Kal's counsel sent Dr. Anderson a transcript from the hearing in which Kal and Newman testified regarding Kal's texting.[13] Furthermore, the Employer's expert, Mr. Dawson, had an opportunity to review the texting evidence prior to his deposition held on October 19, 2012 and Mr. Dawson had an opportunity to address the texting evidence in his deposition.[14]

Thus, for all of these reasons stated above, the texting evidence is not highly improbable and the Court should rule that the Referee erred in excluding the evidence of texting in his Findings.

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10 R. Vol. I, p. 17.
11 R. Vol. I, p. 17.
12 Respondents' Brief pp. 12 and 37.
13 HT 47:10-49:3.
14 Dawson Depo., 4:1-8; 71:13-75:12.

B. The Evidence In The Record Supports The Fact That Kal Was Texting At The Time Of The Accident.

The Employer argues that there is "no evidence" that Kal was texting at the time of the accident. However, not only is there substantial evidence in support of Kal texting at the time of the accident, the defendant has admitted that Kal was texting.

In this case, Newman is an owner of Eagle Farms, Inc. (a defendant in this case), which was Kal's employer.[15] 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.

Moreover, the evidence strongly suggests that Kal was texting at the time of the accident. Officer Bivins and the Employer's expert witness, Mr. Dawson, testified that the accident occurred at about 3:30 a.m.[16] The Referee stated in his Findings that the accident occurred at about 3:30 a.m.[17] In Officer Bivins' report, he states that the accident was reported at 3:33 a.m.[18]

Kal testified that he looked at his phone after the accident and that his phone showed that he sent his last text to Ryan at 3:30 a.m.[19] Also, Newman checked the most recent text

15 R Vol. I, p. 17; HT 90:7-91:11.
16 HT 58:19-21; Dawson Depo., 14:3-4.
17 R Vol. I, p. 19.
18 Bivins Report pp. 1 and 3.
19 HT 50:6-51:6; 58:19-21.

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.[20]

Kal could not have gotten into an accident prior to 3:30 a.m. because 3:30 a.m. is when he sent his last text message and he was not capable of sending a text message after the accident due to his injuries—he was ejected from the truck, was unresponsive, and was in critical condition.[21] Thus, the evidence of Kal sending his last text at 3:30 a.m. and the crash being reported at 3:33 a.m. is consistent.

While the record does not state who called in the crash, a reasonable inference can be made that Jonathan Glodo, the passenger in Kal's truck, called in the crash. He would have been capable of making the call because he sustained only minor injuries, he had a cellphone with him at the time of the crash, and he was found walking around at the scene the accident.[22]

Thus, contrary to the Employer's argument that there is "no evidence" that Kal was texting at the time of the accident, substantial evidence suggests that the Kal was texting at 3:30 a.m., that the accident occurred at 3:30 a.m. and that the crash was reported at 3:33 a.m.

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20 HT 95:14-96:18.
21 Bivins Report pp. 4-5; Defendant's Exhibit 1, p.1.

C. The Exclusion Of All Texting Evidence Was Not Harmless Error.

The Employer's expert, Mr. Dawson, agreed that Idaho passed a law prohibiting texting while driving because texting while driving was causing people to get distracted and crash.[23] Mr. Dawson also agreed that it was not against the law to text and drive at the time of Kal's accident.[24] Mr. Dawson agreed that texting while driving is not safe and could have been a substantial factor in causing Kal's accident.[25] Although Mr. Dawson attempted to link alcohol to texting by stating that alcohol causes a person to think that texting is no longer bad while driving, Mr. Dawson admitted he had no evidence to show that Kal ever knew that texting while driving was bad without the presence of alcohol.[26]

Mr. Dawson agreed that texting while driving at 123 miles per hour on a corner is very dangerous and would likely result in an automobile accident even if Kal had not been drinking any alcohol.[27] Dr. Dawson admitted that alcohol did not cause Kal to speed or to text. He stated:

> 7 Q. And you don't have any evidence to say that he
> 8 would have done those things [drive fast and text]-- that he wouldn't have
> 9 done those things unless he had been drinking alcohol,
> 10 do you?
> 11 A. No.[28]

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22 HT 66:12-15; Bivins Report p. 4.
23 Dawson Depo., 72:2-20.
24 Dawson Depo., 72:13-15.
25 Dawson Depo., 98:11-16; 100:4-5.
26 Dawson Depo., 74:22-75:12.
27 Dawson Depo., 101:10-20.
28 Dawson Depo., 102:7-11.

Thus, given that both parties agree that alcohol did not cause Kal to text, that texting while driving causes people to crash, 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,[29] 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. The Fact Of Intoxication Alone Does Not Prove That Intoxication Was A Substantial Cause Of Kal's Injuries.

Idaho Code Section 72-208 places the burden on the Employer to prove that intoxication was a "reasonable and substantial cause of the injury." "Generally . . . the fact of intoxication alone at the time of the accident is not a sufficient basis for denying workers' compensation benefits. There must be a direct causal link between the use of the substance and the injury in order for the injury to be noncompensable." 82 Am. Jur. 2d Workers' Compensation § 208. "[T]he finding of intoxication does not necessitate a finding that the intoxication caused the accident." *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 722 (1976).

29 *http://www.nsc.org/Pages/NSCestimates16millioncrashescausedbydriversusingcellphonesandtexting.aspx*

"[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 mere fact of intoxication that the accident was caused by the intoxication."); *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."); *Ray v. Superior Iron Works & Supply Co., Inc.*, 284 So.2d 140, 144 (La.App., 1973) ("The mere fact that the employee was intoxicated at the time does not establish a causal relation, even though the evidence indicates that the employee was probably careless. The accident must be attributable to intoxication, as opposed to simple negligence (which is not a defense).").

The Employer "must prove by a preponderance of the evidence, that plaintiff's intoxication was a substantial cause of the accident, one which would not ordinarily happen absent intoxication." *Frost v. Albright*, 460 So.2d 1125, 1128 (La.App. 2 Cir.1984).

The expert witnesses in this case agree that the effects or impairment of a .11 reading vary from individual to individual. That is why the mere fact of an employee's intoxication does not establish a causal connection between the intoxication and the employee's injuries.

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.[30] Officer Bivins testified that an inexperienced drinker may experience a greater level of impairment versus an experienced drinker consuming the same amount of alcohol.[31] 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.[32]

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.[33] According to Dr. Anderson, Kal was not an "alcohol virgin."[34] He stated it is important to take into account a person's prior alcohol consumption because over time a person can build up a level of tolerance to alcohol and become better at functioning while under the influence of alcohol.[35]

Mr. Dawson agreed that alcohol can affect different people in different ways.[36] Mr. Dawson admitted that he had no way of knowing whether alcohol caused Kal to go fast or slow because ***he did not know "what normal is for [Kal]."***[37] Mr. Dawson admitted that ***he did not know whether Kal appreciated how fast he was going at the time of the accident.***[38] Likewise, Mr. Dawson admitted that alcohol did not cause Kal to put his foot on the accelerator and

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30 HT 76:4-11.
31 HT 73:17-74:10.
32 HT 74:11-75:7.
33 Anderson Depo., 21:11-15; 27:23-28:12.
34 Anderson Depo., 23:1-5.
35 Anderson Depo., 23:1-13.
36 Dawson Depo., 51:23-52:4.

speed, and that it was pure speculation to attempt to link Kal's speed with his alcohol consumption.[39]

Importantly, 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 on the average person's ability to operate a motor vehicle. Throughout Mr. Dawson's deposition, he makes general statements such as: Kal was impaired because an individual's "normal kind of . . . behavior is interfered with. . . . [T]heir behavior changes when they become intoxicated"[40] and "[y]ou are drunk, and you crash . . . . That's all you need, to look at that relationship."[41] Accordingly, Mr. Dawson's opinion is impermissibly "***couched in generalities***" and is not based on specific facts that relate to Kal. *Hatley*, 97 Idaho at 723.

Based on the evidence in the record, the Referee erred in finding that intoxication was a reasonable and substantial cause of the accident because the finding of intoxication alone does not prove that intoxication caused the accident. The expert witnesses in this case agree that alcohol can affect people in different ways and the effects vary from individual to individual. Furthermore, the Referee reached his conclusion that intoxication was a reasonable and

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37 Dawson Depo., 51:23-52:23.
38 Dawson Depo., 54:17-19.
39 Dawson Depo., 55:9-14; 56:9-17.
40 Dawson Depo., 25:14-15; 25:24-26:1.
41 Dawson Depo., 90:7-18.

substantial cause of the accident by exclusively relying on Mr. Dawson's opinion—an opinion that was impermissibly couched in generalities concerning the effects of alcohol on the general person, rather than the specific effects on Kal.

B. None Of The Experts Can Say Whether Alcohol Was A Substantial Cause Of Kal's Accident.

Officer Bivins testified that he could not say whether alcohol was a "substantial cause" for Kal's accident.[42] Underscoring Officer Bivins's uncertainty of whether alcohol even played a role in Kal's accident, Officer Bivins did not include alcohol as one of the contributing factors to Kal's accident on page 7 of his incident report under the heading "CONTRIBUTING FACTORS."[43]

Furthermore, Dr. Anderson testified that nobody can say based on reasonable medical probability that alcohol was a reasonable and substantial cause of the injuries.[44]

While Mr. Dawson testified on direct examination that alcohol was a substantial cause of Kal's accident,[45] on cross-examination Mr. Dawson admitted that all he could really say is that alcohol was a "contributing factor" but not a "substantial factor" of the crash. Mr. Dawson stated:

> 6 Q. And that's my point. Mr. Dawson, all you can
> 7 say -- in this case, given the speed that my client was
> 8 going, given the fact that you cannot link his speed to
> 9 the alcohol he consumed, all you can really say is that
> 10 ***alcohol was a contributing factor but not a substantial***
> 11 ***factor of the crash; isn't that true?***

42 HT 76:4-11; 76:4-11.
43 Bivins Report p. 7.
44 Anderson Depo., 21:11-15; 27:23-28:12.
45 Dawson Depo., 27:20-21.

12 A. Generally, ***yes***.[46]

The Referee ignored Mr. Dawson's admission that alcohol was really only a "contributing factor," not a "substantial factor," and instead proceeded to rely on Mr. Dawson's impeached preliminary opinion that alcohol was a substantial cause of the accident. Thus, the Referee erred in finding that intoxication was a reasonable and substantial cause of Kal's accident and injuries because none of the experts, including Mr. Dawson, could say whether alcohol was a substantial cause of Kal's accident.

C. <u>The Clearest Explanation For Kal's Injuries Is That Kal Was Texting While Driving At 123 Miles Per Hour On A Curve</u>.

The Employer argues that it must be alcohol that caused Kal's accident because Kal had driven that road several times without crashing.[47] According to the Employer's logic, Kal would have crashed every time he drove after consuming alcohol—a conclusion which is unsupported by the evidence. The evidence in the record shows that prior to the accident, Kal was a "big drinker;"[48] had been charged with three misdemeanor offenses of "Possession of Alcohol by a Minor" in 2005, 2006, and 2007;[49] had one prior Driving Under the Influence offense;[50] and

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46 Dawson Depo., 71:6-12 (Emphasis added).
47 Respondents' Brief p. 25-26; The Employer states that Kal had driven on the Old Basset Road hundreds of times. However, at the hearing, Kal clarified that he was "exaggerating" when he used the expression "hundreds of times." *See* HT 35:9-12.
48 HT 32:8-11.
49 *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").
50 Anderson Depo., 69:2-13.

consumed alcohol "daily."[51] The evidence shows that Kal had previously driven while under the influence of alcohol and had not gotten into an accident. So for the Employer to conclude that alcohol had to be the cause of Kal's accident because it was the only thing different the day Kal got in the accident is based on faulty logic and is an incorrect statement.

Importantly, all parties agree that Kal's speed (travelling at 123 mph) was a substantial cause of the accident and all parties agree that alcohol does not necessarily cause a person to speed. Furthermore, the evidence in the record suggests that Kal was texting at the time of the accident and both experts agree that texting while driving is not safe and could have been a substantial factor in causing Kal's accident.[52] Therefore, the clearest explanation for Kal's accident, based on the evidence in the record, is that Kal was texting while traveling at 123 mph on a curve.

D. Aside From Kal's BAC, The Commission Fails To Identify Any Evidence Of Impairment.

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

51 Kal Depo., 22:16-25.
52 Dawson Depo., 98:11-16; 100:4-5.

most of the night, he stated that he never saw Kal drinking and that he could not smell alcohol on his breath.

The Employer argues that Kal's speed of 123 mph is evidence of impairment because it constitutes "irregular driving." However, the record is clear that there was nothing "irregular" about Kal speeding excessively. Prior to the accident, Kal had gotten at least three speeding tickets and he had received several warnings for speeding.[53] Kal was once arrested for driving over 100 miles per hour on his way from Arizona to Idaho,[54] and Kal stated that the Arizona incident was not the only time he had driven over 100 miles per hour.[55] Also, Officer Bivins remembers stopping Kal at least once or twice for speeding, but he did not give Kal a citation.[56]

Moreover, the evidence in the record is undisputed that alcohol did not cause Kal to speed. Thus, the Employer's attempt to use Kal's speed as evidence of impairment or "irregular driving" is wholly unsupported by the record.

E. The Cases That The Employer Relies On Are Distinguishable From This Case.

The Employer relies on two out of state cases in support of his argument that Kal's intoxication was a substantial cause of his accident—*Smith v. Workers' Compensation Appeals Bd.*, 123 Cal.App. 3d 763, 176 Cal. Rptr. 843 (1981); *Poole v. Meat Company*, 750 P.2d 1000 (Kan. 1988).

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53 HT 46:20-47:6.
54 HT 49:11-14.
55 HT 48:16-20.
56 HT 77:22-24.

Smith is distinguishable from this case because Smith had a BAC of .25. There is a significant difference between a .11 BAC and .25. In *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 722 (1976), the court noted the significance of this difference and ultimately found unpersuasive "[t]he cases from other jurisdictions cited by [the Employer] . . .[which] involved considerably higher blood alcohol level readings, e. g., .27, .29, .351 and .387 percent." *Id.* at 722.

Moreover, in Idaho, a BAC that is .20 or above is considered an excessive DUI and is a felony. *See* Idaho Code § 18-8004C. This further demonstrates the substantial difference between a .11 BAC and a .25 BAC. Thus, the holding in *Smith* is distinguishable from this case because Smith had a significantly higher BAC than Kal.

The other case relied on by the Employer is *Poole*. The Employer attempts to analogize *Poole* to this case because in this case Officer Bivins found two ***unopened*** beer bottles at the scene[57] and there was the smell of alcohol from beer that had spilled on the inside roof of the truck.[58] However, a review of the evidence in *Poole* shows that *Poole* is readily distinguishable from the facts of this case.

In *Poole*, there was testimony that Poole "was not accustomed to the effects of alcohol" and "drank very little." *Id.* at 1002, 1006. Poole had a ".13% alcohol level," his "body smelled of alcohol" and "there were three or four ***empty*** cans [of beer]" found around the vehicle. *Id.*

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57 HT 61:10-11

58 HT 61:12-19. There was no evidence in the record of when, how, or from what the beer spilled onto the interior

at 1002-1003. Also, there was no evidence that Poole was speeding; no evidence that Poole had a history of speeding; and no evidence that he was texting while driving. Based on this evidence, the court concluded that Poole's accident was substantially caused by intoxication.

In contrast to *Poole*, Kal had a lower BAC of .11 and there is testimony that Kal had built up a level of tolerance to the effects of alcohol.[59] Kal described himself as a "big drinker"[60] and he said he consumed alcohol "daily."[61] In other words, Kal was accustomed to the effects of alcohol and drank a lot.

Unlike the investigating officer in *Poole*, Officer Bivins did not find any empty or broken beer cans or bottles at Kal's accident scene.[62] Unlike the claimant in *Poole*, there is no evidence that Kal smelled of alcohol. To the contrary, Jonathan Glodo, who was with Kal for most of the evening and rode with Kal in the truck at the time of the crash, said he never saw Kal drink any alcohol, and he did not smell alcohol on Kal's breath.[63]

Unlike in *Poole*, in this case there was evidence that Kal was texting while driving, he was speeding at 123 miles per hour, and he had a history of speeding. Moreover, on page 7 of Officer Bivins' incident report, under the heading "CONTRIBUTING FACTORS," he lists speeding as contributing factor, but does not mention alcohol.[64] Thus, the facts in this case are

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roof of the truck.
59 HT 74:11-75:7; Anderson Depo., 23:1-13.
60 HT 32:8-11.
61 Kal Depo., 22:16-25.
62 HT 61:20-23.
63 Bivins Report p. 6.
64 Bivins Report p. 7.

significantly different from the facts in *Poole*. Here, the record does not support a finding that intoxication was a substantial cause of Kal's injuries.

Evidence of impairment would be such things as stated in the *Folse v. American Well Control*, 536 So.2d 686 (La.App.1988), which includes:

> [S]lurring 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. See also Hatley v. Lewiston Grain Growers, Inc., 97 Idaho 719 (1976) (where witnesses stated that Hatley did not appear drunk, did not smell alcohol on him, and never saw Hatley take a drink of alcohol, although a one-third empty bottle of whiskey was found in his truck).

Here, there is no evidence Kal was impaired prior to the accident, such as slurring his speech, acting drowsy, staggering, or swerving on the road. Accordingly, the Commission's finding that intoxication was a reasonable and substantial cause of Kal's injuries was not supported by substantial and competent evidence.

F. Kal Was Almost 20 Years Old At The Time Of The Accident And His Physiological Makeup Was That Of An Adult.

Defendants argue that Kal's blood alcohol content was 5.5 times the legal limit because, under the law, Kal is considered a minor. However, Dr. Anderson stated that physiologically Kal was an adult and that the effects of alcohol on Kal would be that of an adult.[65] Furthermore, Mr. Dawson stated that generally alcohol does not affect a 190-pound man, age nineteen, any

65 Anderson Depo., 79:1-16; 31:12-20.

differently than a 190-pound man who is twenty-one years old.[66] Mr. Dawson stated that from a pharmacological standpoint, there is no relevant difference between a 19 and 21-year-old in determining the affect that alcohol has on the person.[67] Also, Officer Bivins testified that a minor could be legally drunk and not impaired.[68]

With regard to Kal's age, Kal's date of birth is [redacted] which means that he was almost 20 years old at the time of the accident which occurred on August 17, 2008.[69] Kal was also 190 pounds[70] and he drank alcohol on a daily basis.[71]

Thus, defendants' attempt to show that Kal was more intoxicated or impaired than an "adult" under the law is unpersuasive and factually inaccurate. Kal was physiologically an adult and the effects of alcohol on Kal would be that of an adult. Defendants' repeated focus on the legal standard for minors is really a distraction from the true standard that intoxication must be a "reasonable and substantial cause" of Kal's injury and fails to account for Kal's prior drinking experience, level of tolerance, physiological makeup, and actual level of impairment.

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66 Dawson Depo., 83:19-22.
67 Dawson Depo., 83:23-84:2.
68 HT 72:19-24.
69 Bivins Report p. 3.
70 Bivins Report p. 1.

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.

The Employer argues that the Commission properly considered Kal's use of prescription medication because patients are generally warned by their physicians not to take alcohol with Lithium or opiates. In support of the Employer's argument, the Employer relies soley on Mr. Dawson's testimony in which he stated that "you are warned not to take them together [referring to opiates and alcohol]."[72] However, Mr. Dawson is not a medical doctor and does not have a medical license.[73] As a result, Mr. Dawson is not qualified to prescribe medications, including medication to treat ADHD.[74] Mr. Dawson admitted he did not know which physicians provided treatment for Kal or how Kal's medical condition was being managed.[75] Mr. Dawson admitted that there was no evidence that Kal was on any controlled substances at the time of the accident that were not prescribed by a physician[76]

Moreover, there is no evidence in the record that Kal took any controlled substances contrary to instructions given to him for using the controlled substances. In fact, Kal testified that his doctor did not warn him to not drink alcohol while taking his prescription medication.[77]

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71 Kal Depo., 22:16-25.
72 Dawson Depo, 20:16-17.
73 Dawson Depo, 32:9-15; 76:14-20.
74 Dawson Depo, 32:9-15; 76:14-20.
75 Dawson Depo, 80:17-81:15.
76 Dawson Depo, 42:1-4.
77 Kal Depo., 23:10-15.

Also, there is no evidence that any warnings, labels, or instructions were ever given to Kal with his prescription medications, such as warning labels on the bottle or written instructions included with the prescription medication. The Referee even conceded that there was no evidence that the medication found in Kal's system was contrary to the "prescription medication Claimant was taking."[78]

Thus, the Employer's theory that Kal was instructed to not take his prescription medications while consuming alcohol is based on speculation and is unsupported by the evidence. Furthermore, 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. 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.

The Employer argues that Kal's argument regarding the seat belt issue is without merit because there is no connection between Kal's failure to wear a seatbelt and the occurrence of

78 R Vol. I, p. 20.

the accident.[79] However, similar to the Referee, the Employer improperly focuses 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).

Here, there is a strong connection between Kal's failure to wear a seat belt and his injuries. Kal's passenger, Jonathan Glodo, was wearing his seat belt and sustained only minor injuries.[80] Kal was not wearing a seat belt, was ***ejected*** from the vehicle, landed 90 feet away from the vehicle, and sustained life threatening injuries.[81] 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.[82] 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.

The Employer relies on *Quick v. Crane*, 111 Idaho 759 (1986) and *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314 (1969), to argue that a plaintiff's failure to use a safety restraint should not be considered as evidence of contributory or comparative negligence. This rule was codified in Idaho Code Section 49-673(8), which states:

> (8) The failure to use a safety restraint shall not be considered under any circumstances as evidence of contributory or comparative negligence, nor shall such failure be admissible as evidence in any ***civil action*** with regard to negligence.

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79 Respondent's Brief p. 39.
80 Bivins Report pp. 5, 6, and 7.
81 Bivins Report pp. 1, 4, and 5.
82 Bivins Report pp. 1 and 6.

I.C. § 49-673(8) (emphasis added). According to Section 49-673(8), the rule only applies to "civil actions." However, "worker's compensation cases are not civil actions." *Clark v. Shari's Management Corp.*, 155 Idaho 576, -- (2013). Therefore, the cases cited by the Employer and Section 49-673(8) do not apply to this case because this case is a worker's compensation case, not a civil action.

Moreover, in this case, the Employer's intoxication defense is distinguishable from a civil negligence action. Here, Kal has submitted some evidence that he would have suffered only minor injuries if he had worn a seat belt. Accordingly, the burden has shifted to the Employer to prove otherwise by a preponderance of the evidence. However, 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.

Thus, the Referee improperly shifted the burden back onto Kal after Kal submitted some evidence that he would have suffered only minor injuries if he had worn a seat belt. The Referee erred in shifting the burden onto Kal and in refusing to find that Kal's failure to wear a seat belt was a reasonable and substantial cause of his injuries—especially when the Employer presented no evidence to the contrary.

CONCLUSION

Based on the foregoing, 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.

RESPECTIVELY SUBMITTED this 3 day of April, 2014.

SMITH, DRISCOLL & ASSOCIATES, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of April, 2014, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY 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
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[ ] Overnight Delivery
[ ] Hand Delivery

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