BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NEWMAN K. GILES, Claimant, v. EAGLE FARMS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-027691** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed August 27, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls on June 12, 2012. Claimant was present and represented by G. Lance Nalder and Bryan D. Smith of Idaho Falls. Paul J. Augustine of Boise represented Employer/Surety.[1] Oral and documentary evidence was presented. The record remained open for the taking of two post-hearing depositions. The parties then submitted briefs and this matter came under advisement on April 29, 2013. It is now ready for decision.

ISSUE

By agreement of the parties, the sole issue to be decided is whether Claimant's intoxication bars recovery of income benefits pursuant to Idaho Code § 72-208.

[1] Claimant's father is also Claimant's employer.

CONTENTIONS OF THE PARTIES

Defendants contend [2] that Claimant's intoxication was a reasonable and substantial cause of the injuries he received when the vehicle he was driving crashed, and he is, therefore, not entitled to income benefits

Claimant contends that his alcohol consumption was not a substantial factor in causing his motor vehicle accident. At the time of his accident, Claimant was traveling over 120 miles per hour. Claimant is a habitual speeder so the alcohol he consumed did not make him speed at the time of his accident. Further, Claimant's cell phone indicated that there had been a series of text messages between Claimant and a friend right before Claimant's accident. Therefore, Claimant's theory goes, while alcohol may have been a contributing factor in Claimant's missing a curve and crashing, speeding and texting were the substantial factors in causing Claimant to crash. Even had he not been under the influence, he never would have made the corner in question at over 120 miles per hour while texting.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's father, and Idaho State Police Trooper Allen Bivens, taken at the hearing.

2. Claimant's Exhibits 1-6, admitted at the hearing.

3. Defendants' Exhibits 1-3, admitted at the hearing.

4. The post-hearing deposition of Gary Dawson, Ph.D., taken by Defendants on October 19, 2012.

[2] Because Defendants assert Idaho Code § 72-208 as an affirmative defense, they carry the burden of proof.

5. The post-hearing deposition of Joe Anderson, D.O., taken by Claimant on February 13, 2013.

Defendants' objections at pp. 59 and 78-79 of Dr. Dawson's deposition are sustained. Defendants' objections at pp. 19-20, 22 and 36 of Dr. Anderson's deposition are sustained. All other objections are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 23 years of age and resided in the Idaho Falls area at the time of the hearing. He was 18 years of age at the time of the subject accident.[3] Claimant likes to drive fast; sometimes in excess of 100 miles an hour, but claims he can ". . . handle it." HT, pp. 32-33.

2. At about 3:30 a.m. on August 17, 2008, Claimant was traveling down Old Bassett Highway near Idaho Falls at speeds exceeding 120 miles an hour.[4] Claimant was familiar with the road, having driven it "100s" of times. HT, p. 35. Claimant was also aware of the curve in the road that he failed to negotiate. Claimant was unbelted and thrown from his vehicle.[5] He suffered serious injuries in the accident and has no clear memory of the events leading up to the accident, or of the accident itself.

---

[3] Claimant contends he was travelling in conjunction with a work-related task. No findings in this regard are made herein.

[4] Claimant was driving his brother's pickup truck that was "double chipped." According to Claimant, that means the vehicle produces more horsepower, and consequently, more speed than a stock pickup. It was also "jacked up," giving it a higher-than-stock center of gravity. The truck also sported over-size wheels and tires.

[5] Claimant argues that it was Claimant's failure to wear his seatbelt that caused his serious injuries and Defendants have failed to prove that alcohol caused Claimant to not use his seatbelt. The Referee finds this argument unpersuasive. It was the fact that Claimant left the roadway at 123 miles per hour while legally intoxicated that caused his accident which resulted in serious injuries. Moreover, the evidence in the record is insufficient to establish the degree, if any, to which Claimant's injuries would have been ameliorated, had he been belted in.

3. It is undisputed that Claimant was intoxicated at the time of the accident, with a blood alcohol content (BAC) of .11. Under Idaho law, an adult is presumptively under the influence of alcohol with a BAC of .08 or above. The legal limit for persons under 21 years of age is .02. See Idaho Code § 18-8004(d). Lab testing at the hospital following the accident also identified opiate and amphetamine substances in Claimant's system. There is no evidence that these results were inconsistent with the prescription medication Claimant was taking. For example, Claimant was taking Adderall, an amphetamine, for Attention Deficit Hyperactivity Disorder (ADHD).

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

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-208(2) provides that if intoxication **is a reasonable and substantial cause** of an injury, no income benefits shall be paid subject to exceptions not applicable here. The burden of proof of establishing Claimant's intoxication lies with Defendants. See *Seamans v. Maaco Auto Painting and Bodyworks,* 128 Idaho 747, 918 P.2d 1192 (1996). Neither the legislature nor the Idaho Supreme Court has provided a definition of "reasonable" or "substantial." "Reasonable" is defined by Black's Law

Dictionary as "Just; proper. Ordinary or usual." It defines "substantial" as "Significant or large and having substance." See The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary, 2nd Ed.

EXPERT OPINIONS

5. **ISP Corporal Bivens.** Corporal Bivens testified at the hearing that he reconstructs accidents for the Idaho State Police in eastern Idaho. He has a combined 25 years of experience in military and civilian law enforcement. He did not reconstruct Claimant's accident because it did not result in any fatalities.

6. Corporal Bivens investigated the scene of Claimant's accident and took relevant measurements, leading him to the conclusion that Claimant's speed at the time he left the roadway was 123 miles an hour. Corporal Bivens described the road conditions as dry with clear visibility at the time of Claimant's 3:30 a.m. crash. The posted speed limit was 50 miles per hour.

7. Corporal Bivens testified that he would not attempt to negotiate the curve Claimant missed at 123 miles an hour if he was "stone cold sober." HT p. 63. He opined that alcohol affects an individual's judgment, inhibitions, and the ability to safely control a motor vehicle. He concluded that Claimant's speed was a "major contributing factor" in causing Claimant's accident. HT p. 70. He also concluded that alcohol was a contributing factor, but he was unable to quantify the extent of its contribution. Corporal Bivens was aware that Claimant had received three speeding tickets prior to his accident. Her has also personally stopped Claimant for speeding once or twice, but did not write a ticket.

8. Corporal Bivens summed up his opinions in this matter this way:

> Q. (By Mr. Augustine): And would you agree with me that someone who has been drinking, has a blood alcohol content of .12, who's driving 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?

[Claimant's objection overruled].

A. That would be correct.

HT pp. 97-88.

9. **Gary Dawson, Ph.D.** Employer/Surety retained Dr. Dawson of Boise to try to determine if, and to what degree, alcohol may have played a role in Claimant's accident. Dr. Dawson has a bachelor's degree in pharmacy, and masters and Ph.D. degrees in pharmacology.[6] Dr. Dawson is self-employed as an advisor and consultant in the areas of pharmacology, toxicology, and clinical trial and new drug development. He has provided extensive expert testimony in both civil and criminal courts in Idaho, is an instructor at the POST academy, and is a certified breath testing specialist in Idaho. Dr. Dawson also instructs the Ada County Sheriff's Office in DUI detection and enforcement.

10. Among the records Dr. Dawson reviewed were the ISP Collision Report, an ambulance (EMT) record, ER notes, Eastern Idaho Regional Medical Center (EIRMC) records, and prescription drug records.

11. Dr. Dawson opined that the combination of alcohol and opiates in Claimant's system at the time of the accident produced an additive depressant effect on Claimant's central nervous system and the two are contraindicated. This, in turn, impaired Claimant's

[6] According to Dr. Dawson, pharmacology is the study of the effects of drugs and alcohol on the human body.

cognitive abilities, judgment, alertness, decision-making, and attention, resulting in disinhibition.[7] Dr. Dawson opined that the alcohol Claimant consumed was a reasonable and substantial cause of Claimant's accident: "Blood alcohol, together with the presence of opiates, produced a marked impairment of his ability to operate a motor vehicle in a safe manner. His resultant intoxication was a reasonable and substantial cause of the crash and subsequent injury." Dr. Dawson Depo., pp. 27-28.

12. While acknowledging that speed was a factor in causing Claimant's accident, Dr. Dawson opined that it was the alcohol that caused it:

> Well, most of the factors that we have talked about are things that were occurring prior to the time the speed, apparently, became an issue.
>
> An individual who is impaired to that degree may or may not even seriously recognize the threat that was posed by a road that, apparently, he was familiar with.
>
> The ability to respond to that, for lack of a better word, threat associated with the sudden realization that, "Maybe I'm going too fast," or "Maybe I am distracted by somebody else in the car," or, "Maybe I'm looking at the radio or doing something else," the ability to multi-task is severely impaired; and the ability to respond to anything would be severely compromised.
>
> So it is the alcohol and the potential for - - the fact that the opiates were present there, plus the lithium that he was taking at the same time, all add up to that.[8]

Id., pp. 28-29.

13. On cross-examination, Dr. Dawson was asked whether Claimant's consumption of alcohol caused Claimant to speed in light of Claimant's history of driving fast. Dr. Dawson responded, "Again, it goes to judgment. If he is used to driving fast and

[7] Dr. Dawson used the example of a normally quiet and shy individual who becomes the life of the party after a few glasses of wine in describing disinhibition.

[8] However, Dr. Dawson reiterated that when the opiates and lithium were excluded, it was the alcohol alone that was a reasonable and substantial cause of Claimant's accident and resultant injuries.

he gets drunk and he tries to drive fast, he is going to have a problem with his ability to operate a motor vehicle." *Id.,* p. 56.

* * *

> Q. (By Mr. Smith): How can you say that (alcohol) was a substantial cause? What facts - - let me say this very specifically. What facts do you have to say that, on the night of the accident, the [sic] alcohol as the substantial factor, as opposed to his general propensity to drive fast?
>
> A. The alcohol level of .11. He is drunk, and he crashed. He missed the turn. He didn't even try to make the turn, from what it looked like in the reconstruction. You are drunk, and you crash.

Id., p. 90.

14. On redirect, Dr. Dawson further explained the effects of alcohol on one's judgment:

> There are two pieces that we know specifically about the effects of alcohol, particularly, at these levels. It is not only judgment but, also, in terms of the decision-making and the planning process that is associated with the multi-tasking piece of operating a motor vehicle.
>
> What we also know is that reaction time is also dramatically reduced - - or increased by about fifty percent in those circumstances where the time for assessment of a threat or assessment of a problem and the response to that problem is delayed.
>
> What we also know is that, just from the standpoint of making that judgment about, "Oh, that light is turning red," or "Yes, it's red," as opposed to saying, "I need to stop because the light is going to turn yellow and then turn red."
>
> It is that kind of cognitive function that is impaired to the point where the true significance of danger or a threat is not fully appreciated.

Id., pp. 94-95.

15. **Joe Anderson, D.O.** Dr. Anderson[9] is board certified in emergency medicine and is employed as an emergency room physician at EIRMC in Idaho Falls. Dr. Anderson also works at outpatient child and adult psychiatric clinics. He has been licensed

[9] Claimant's counsel is Dr. Anderson's corporate attorney.

to practice medicine in Idaho since 1991. Dr. Anderson explained his training in toxicology and pharmacology as follows:

> Sure. As an emergency physician, we see - - a large part of our practice is regarding drug overdoses, people that try to off - - you know, suicide attempts with pharmacology. And we get a big dose as part of our curriculum of alcohols - - you know, both ethanol, which we - - is the one you drink plus methanol, ethylene glycol, just – it's all part of our deal. It's toxicology. We're the first line in toxicology when people come to the hospital or sent there for poisonings whether it be accidental or whether it be, you know, self-induced.

Dr. Anderson Deposition, p. 7.

16. Dr. Anderson feels comfortable in diagnosing and treating ADHD and has done so in the past. He has also prescribed medications for ADHD and feels he is qualified to discuss the effects of medications on patients afflicted with that condition.

17. Claimant retained Dr. Anderson to render an opinion regarding factors that may have caused or contributed to his accident. Based on Dr. Anderson's review of Claimant's Rule 10 disclosures, Dr. Dawson's report and the hearing transcript, he opined that Claimant's accident was caused by:

a. Addiction to speed (driving fast). Dr. Anderson reasoned that because of Claimant's ADHD, he had an addictive personality; he was addicted to speed (driving fast). He further cited Claimant's many speeding tickets and the effort and money he spent making his truck the "fastest in town" as evidence of this addiction.

b. Texting while driving.[10]

c. Alcohol impairment.[11]

[10] As previously indicated, Claimant's alleged cell phone use will not be considered in this decision.

[11] Idaho Code § 72-208 provides that no income benefits shall be paid if intoxication is a, not the, reasonable and substantial cause of a claimant's injuries. When later asked if he believed alcohol was a reasonable and substantial cause, Dr. Anderson responded that he did not.

18. Dr. Anderson summed up his opinion on direct examination:

> Q. (By Mr. Smith) Okay. So in your opinion, what is the reasonable and substantial cause of the claimant's injuries in this case?
>
> A. Excessive speed caused by an addictive personality with his ADHD where he was addicted to speed.
>
> Q. Now, what do you base your opinion on that he had an addictive personality that caused him to speed?
>
> A. Excessive speeding tickets. The need for speed. Building a truck that was built for speed.[12] A badge of courage, for lack of a better term in which he considered himself a speed demon, all those kind of things. And we know that ADHD people do have addictive personalities. We know that.
>
> Q. Okay. Is there any evidence that you've seen in this record that on the night of the accident, alcohol caused him to drive at 123 miles an hour?
>
> A. There is no evidence and there are no - - as I did a literature search I could not come up with an article that said if you drink alcohol, you drive faster. Reaction times are slower, can be slower, depending - - and again, it's a linear kind of thing. The higher the alcohol level, the more impairment you get.

Dr. Anderson Deposition, p. 25.

19. Dr. Anderson does not disagree that alcohol was a factor in causing Claimant's injuries:

> I agree. As I mentioned, I think it's probably number four as a factor, but I disagree that it's the primary thing. I think I've made a pretty good case that I still believe that people that are .11 or .12 could negotiate that corner, so no. I don't think so.

Id., p. 43.

20. Dr. Anderson's ultimate opinions are less persuasive than those of Dr. Dawson and Corporal Bivens because:

a. Dr. Anderson defined "reasonable and substantial" cause as: "…the number one cause…the main cause…the reproducible cause." *Id.*, p. 52. The

[12] Claimant was driving his brother's truck at the time of his accident. However, that truck was also altered in ways that would make it go faster than a stock pickup.

applicable statute, Idaho Code § 72-208, however, does not require Defendants to prove intoxication was the main cause of Claimant's injuries.

b. Dr. Anderson did not know how many times or how fast Claimant drove sober on Old Bassett Highway. Dr. Anderson could not explain why, if alcohol was not a substantial factor in the accident, Claimant had not crashed before while driving on this stretch.

c. Dr. Anderson concedes that alcohol "played a role" in causing Claimant's injuries and agrees that alcohol slows one's reflexes, impairs judgment, motor skills, cognition and executive functioning including slowing reaction times, and can produce disinhibition. *Id.*, p. 66.

d. Dr. Anderson did not know if Claimant's ADHD was medically controlled at the time of his accident. If Claimant's ADHD was under control, then it follows that his speed addiction would be, too.

e. Dr. Anderson admitted that the only time Claimant attempted to negotiate the curve in the road at 123 miles per hour, "[h]e had alcohol on board" and was intoxicated "by definition." *Id*., p. 78.

f. Dr. Anderson admitted that when he prescribes hydrocodone to patients, he advises them not to drink alcohol while taking the medication. He does not have an opinion regarding the effects of hydrocodone or opiates may have contributed to Claimant's accident because he does not know when Claimant last took the medications.

21. Claimant cites *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1076) for the proposition that Claimant's intoxication alone is not sufficient to

establish such to be a reasonable and substantial factor in causing his injuries. There, a claimant truck driver with a BAC of .117 missed a curve, ran off the road, and was killed. There was evidence that the claimant did not act impaired in the time shortly before his accident. The Supreme Court affirmed the Industrial Commission's decision that defendants therein had failed to prove that Claimant's intoxication **caused** his injuries. However, as Defendants point out, *Hatley* is readily distinguishable from the case at bar. First, the applicable statute required a showing of proximate cause rather than showing a reasonable and substantial cause as is required in the present statute. Second, the defendants had to overcome the rebuttable presumption set forth in Idaho Code § 72-228 that the claimant's death was not caused by his intoxication. Third, there is more evidence here that Claimant's intoxication was a reasonable and substantial cause of his injuries than was present in *Hatley*.

22. The Referee finds Defendants have met their burden of proving Claimant's intoxication was a reasonable and substantial factor contributing to his accident and injuries. While perhaps not the proximate cause, alcohol was certainly a reasonable and substantial cause. Claimant testified that he generally drove safely, even when speeding. Yet on the night of his accident he admitted to driving recklessly. The clearest explanation for Claimant's unusual reckless state of mind, based upon the evidence in the record, is that he was experiencing impairment due to intoxication.

CONCLUSION OF LAW

Defendants have met their burden of proving that Claimant's intoxication was a reasonable and substantial cause of his injuries, such that he is barred from receiving income benefits pursuant to Idaho Code § 72-208.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this _16th_ day of August, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __27th___ day of __August___, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

G LANCE NALDER
591 PARK AVE STE 201
IDAHO FALLS ID 83402

BRYAN D SMITH
PO BOX 50731
IDAHO FALLS ID 83405

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NEWMAN K. GILES, Claimant, v. EAGLE FARMS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-027691** **ORDER** Filed August 27, 2013

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants have met their burden of proving that Claimant's intoxication was a reasonable and substantial cause of his injuries, such that he is barred from receiving income benefits pursuant to Idaho Code § 72-208.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __27th___ day of __August__, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

__/s/_____
R. D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __27th___ day of __August_____ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

G LANCE NALDER
591 PARK AVE STE 201
IDAHO FALLS ID 83402

BRYAN D SMITH
PO BOX 50731
IDAHO FALLS ID 83405

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge ___/s/_____