WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WILLIAM HUFFORD, *Applicant*

vs.

HOWELL'S FOREST HARVESTING;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ6465992
Redding District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted the Petition for Reconsideration (Petition)[1] filed by applicant William Hufford in order to further study the legal and factual issues raised therein. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the July 9, 2021 Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ). In the F&O, the WCJ found that applicant did not sustain a compensable injury arising out of and in the course of employment (AOE/COE) while employed on August 21, 2008 by defendant, Howell's Forest Harvesting, as a skidder operator. The WCJ determined that applicant's entitlement to benefits was barred because applicant was intoxicated at the time of the injury and the intoxication was the proximate cause of the injury. (Lab. Code, § 3600(a)(4).)[2] The WCJ noted that defendant had also argued that applicant's claim was barred by the "going and coming rule." However, the WCJ found that,

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[1] In addition, applicant filed a supplemental petition for reconsideration in July 2021. (Supplement to Petition for Reconsideration, July 29, 2021.) WCAB Rule 10964 precludes the filing of a supplemental petition unless it is requested or approved by the Appeals Board. (Cal. Code Regs., tit. 8, § 10964.) Applicant's supplemental petition does not include a specific request to authorize its filing, as required by WCAB Rule 10964. Additionally, the petition simply contains excerpts from the trial transcript, which is already part of the record; as a result, the supplemental petition is superfluous to applicant's original petition and does not require additional consideration. We also note that, in October 2021, applicant filed an additional supplemental pleading in accordance with WCAB Rule 10964, seeking consideration of an additional case. We have accepted and considered this filing.

[2] All future statutory references are to the Labor Code unless otherwise specified.

because defendant successfully established the intoxication defense, the issue of whether the going and coming rule also barred applicant's claim was a "moot" point. Applicant contends that his injury was not caused by intoxication so that his claim should not be barred by section 3600(a)(4) and that the going and coming rule does not apply.

No answer was received. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered applicant's Petition and the contents of the WCJ's Report with respect thereto. For the reasons that follow, we will rescind the July 9, 2021 F&O and substitute a new F&O which finds that: (1) defendant did not meet its burden to prove the affirmative defense of intoxication; (2) applicant's claim is not barred by the going and coming rule; and (3) injury AOE/COE to applicant's bilateral lower extremities. All other issues are deferred. The matter will be returned to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to his bilateral lower extremities, internal, psyche, sleep disorder, and sexual dysfunction while employed by defendant on August 21, 2008 as a skidder operator. That day, applicant was involved in a three-vehicle accident after leaving his job site with several coworkers. An accident report created by the responding California Highway Patrol (CHP) officer stated that, upon the officer's arrival, applicant was "observed trapped and seat belted behind the steering wheel of his vehicle…." (Exhibit A, CHP Collision Report, August 21, 2008 at p. 10.) While applicant was trapped inside of the vehicle, the CHP officer obtained the following statement from applicant:

> STATEMENTS:
>
> He had gotten off work in Paynes Creek and was on his way home traveling eastbound on 44 approaching Benthill Drive at approximately 55 MPH. He noticed that his right side mirror was out of adjustment. He then decided to adjust the mirror and by using the controller on the driver's door, he looked to the right side mirror and started to adjust the mirror. He then looked back forward and saw the stopped trailer directly in front of him. He tried to avoid the trailer by swerving to the right. Due to the fact that he was only approximately 25' away from the rear of the trailer, he was unable to move quickly enough to avoid the impact. After impact, he spun around in a counterclockwise rotation and came to rest on the south shoulder of the roadway. In talking with him there, I smelled a strong odor of an alcoholic beverage on his breath. I asked him if he had anything to drink and at first he replied "no" he hadn't. I then questioned him again and he admitted to drinking two beers after

work in the landing area of his job site. He again told me that he didn't even see the trailer until it was too late.

The CHP officer also interviewed the passengers in applicant's vehicle at the time of the accident, who provided the following statements:

Passenger #1 (Hufford, Tony), was contacted at the scene, where he gave me the following statement:

He had been the right front passenger in Vehicle #1 and didn't see the stopped trailer ahead of them. His father was adjusting the right side mirror at the time. Hufford told me that they were returning from work in the Paynes Creek Area.

Passenger #2 (Van Sickle), was contacted at the scene, where he gave me the following statement:

He had been the right rear passenger in Vehicle #1 and told me that he didn't see the stopped trailer either. They were returning home after working all morning in the woods in the Paynes Creek area of Tehama County.

The CHP Collision Report continued, stating:

INTOXICATION NARRATIVE:

Upon arrival at the scene, I contacted Driver #1 (Hufford) and immediately smelled the strong odor of an alcoholic beverage on his breath. He had red bloodshot eyes and speech was thick and slow. I was unable to give him any field sobriety tests, due to the nature of the collision and his injuries. I then determined that he was under the influence of alcohol and was subsequently arrested for 23153(A) VC, felony DUI causing injury to someone other than himself. The passenger in Vehicle #1 (Hufford, Tony), received minor injuries to the back of his head and numerous lacerations to his left arm. Hufford was released to the hospital for the treatment of his injuries.

CAUSE:

Driver #1 (Hufford), caused this collision by driving his vehicle while under the influence of an alcoholic beverage in violation of 23153(A) VC.

In addition, he should have paid closer attention to the roadway in front of him and adjusted his mirror prior to operating his vehicle. This is based on the physical evidence at the scene and the statements of the involved parties and witnesses.

(Exhibit A at pp. 13-15 & 17.)

The CHP Collision Report further explained that, after the accident, "a blood sample was drawn from Driver #1 by [a] blood technician at Mercy Medical Center and submitted for

alcohol/drug analysis. The sample was collected and placed into evidence at the Redding CHP office." (Exhibit A at p. 12.) The report concluded with the CHP officer's recommendation that the Shasta County District Attorney's Office charge applicant with felony DUI in violation of Vehicle Code section 23153(A). (Exhibit A at p. 18.)

A hospital intake report created on the date of the accident (Exhibit B, Mercy Intake Report, August 21, 2008) indicated that applicant was first seen by a physician roughly three hours after the collision occurred. There is nothing in the intake report indicating that applicant exhibited signs of intoxication, and the report did not discuss the contents of applicant's blood sample or indicate how long after the accident the sample was taken. A Blood Alcohol Analysis report subsequently issued by the California Department of Justice, Bureau of Forensic Services, indicated that one tube of applicant's blood was submitted by the CHP Department on August 26, 2008, and that, after analysis, was found to contain .04% alcohol. (Exhibit 2, Dept. of Justice document, September 3, 2008.)

On September 16, 2008, applicant was acquitted from the DUI charge recommended in the CHP Collision Report. The acquittal document, a Set Aside Order issued by the Department of Motor Vehicles (DMV), stated:

> You were issued an Order of Suspension effective October 8, 2008, from a DUI arrest occurring on August 21, 2008. Following receipt of certified court orders of acquittal pursuant to § 13353 2(e) VC, the Order of Suspension has been VACATED and SET ASIDE pursuant to § 13551 VC.

(Exhibit No. 1, DMV documents, September 16, 2008.)

The case proceeded to trial on April 27, 2021. (Hearing Transcript, April 27, 2021.) The issues identified for trial were: (1) whether the injury arose out of and in the course of applicant's employment, (2) whether applicant's injury was barred by the intoxication defense, and (3) whether applicant's injury was barred by the "going and coming rule." (*Id*. at p. 4.)

At trial, applicant testified in relevant part as follows:

On August 21, 2008, he consumed between one and two small cans of beer at the end of his shift, but prior to leaving his job site. (*Id.* at p. 8.) Thereafter, he drove a company vehicle with two crew members, Tony Hufford and Don Van Sickle, down winding and unpaved forest roads. (*Id*. at pp. 9 & 14.) After roughly 45 minutes on the forest roads, applicant reached Highway 44, a paved, two-lane highway. (*Ibid*.) As applicant crested a hill on the highway, he was having the vehicle's passenger-side mirror adjusted. (*Id.* at p. 10.) Applicant explained that "I was just

getting out of the shade of the trees as I crested the hill, and the sun glared in all three mirrors because they were just adjusted, and I had to tip my head aside just to get the sun out of my eyes. And it was – kind of blurred my vision. And the window was being reflected upon from the sun, also." (*Id.* at p. 11.) As applicant drove over the hill, he witnessed a trailer "[p]robably 30 to 40 feet" in front of him, at which point he "swerved to the right to try to miss it, but [] wasn't fast enough." (*Id.* at p. 13.) After colliding with the trailer, applicant was pinned behind the vehicle's steering wheel for roughly 30 minutes before being extricated by the authorities using the Jaws of Life. (*Ibid*.) While applicant was trapped inside the vehicle, he was interviewed by the CHP officer. (Exhibit A at p. 17.)

During trial, applicant was also questioned about his alcohol intake and its impact upon his driving capabilities. Applicant testified as follows:

> Q: Okay. Did you feel in any way you were impaired driving the truck having had the beer?
>
> A: Not at all.
>
> Q: How long after you finished the beer did the collision occur?
>
> A: Between 45 minutes and an hour.
>
> Q: And you had no trouble whatsoever driving the truck all the way to the point of the collision, correct?
>
> A: Not at all.
>
> Q: Would you say in your opinion driving the truck over narrow, uneven, hilly, unpaved forest roads is more difficult than driving on a highway?
>
> A: Much more.

(Hearing Transcript at pp. 14-15.)

Applicant also produced the testimony of a crew member, Don Van Sickle, who was in the vehicle's rear seat when the accident occurred, who confirmed that, prior to the collision, applicant was "driving normally….not swerving or anything." (*Id.* at p. 24.)

Defendant did not produce any witnesses, and the CHP officer who authored the collision report did not testify.

After trial, the WCJ issued the F&O, ordering that applicant take nothing on his claim. The Findings of Fact stated, among other things, that "The applicant is not a credible witness." (F&O at p. 1, Finding of Fact No. 4.) The WCJ found that the CHP officer's statements were the only credible description of the events. (*Id.* at p. 6.) The WCJ stated that, unlike the CHP officer, who was "trained to accurately observe the situation and correctly record the observations in the report," applicant was "profoundly interested in avoiding liability for the accident, as is shown by his effort to first deny, and then minimize his alcohol intake." (*Ibid*.) The WCJ concluded:

> Therefore, the observations of this investigating officer…are found to be credible and substantial evidence that the applicant was intoxicated at the time of the accident due to his ingestion of beer, and that the intoxication was a proximate cause of the accident. No credible evidence to the contrary is in the record.
>
> For these reasons, it is found that the defendant has met its burden in proving the intoxication defense, as defined in the [Labor Code] and case law, which bars the applicant's claim for worker's compensation benefits.
>
> Finally, given this finding, the question of whether the applicant's injury is also barred by the going and coming rule is moot. However, having said that, the parties should note that the employer provided the applicant with a company truck, paid for the gas and maintenance, and the applicant was providing a service to the employer in driving himself and other employees home, and then taking the company truck directly to the employer's station to gas it, clean it, drop of logging tickets, and load it with gear for the next day's work. This evidence would support a clear and unequivocal exception to the going and coming rule.

(*Id.* at pp. 6-7.)

DISCUSSION

I.

A. Defendant Holds the Burden of Proof to Demonstrate the Affirmative Defense of Intoxication and Defendant Failed to Meet This Burden.

An applicant's right to recover workers' compensation benefits is subject to the conditions set forth in section 3600. Among these is that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee." (Lab. Code, § 3600(a)(4).) Intoxication is an affirmative defense, and the burden of proof rests on the employer, as the defendant, to establish that affirmative defense. (Lab. Code, § 5705(b).) To carry its burden of proof, a defendant is required to prove each fact supporting its claim by a preponderance of the evidence. (Lab. Code, § 3202.5.) As explained in section 3202.5:

> "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

When a defendant asserts the intoxication defense, it must prove not only that the injured employee was intoxicated at the time of the injury, but also that the employee's intoxication was a proximate or substantial cause of the injury. (*Smith v. Workers' Comp. Appeals Bd*. (*Smith*) (1981) 123 Cal.App.3d 763, 774 [46 Cal.Comp.Cases 1053]; *Douglas Aircraft, Inc. v. Industrial Acc. Com.* (1957) 47 Cal.2d 903 [22 Cal.Comp.Cases 24], disapproved on another ground in *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 636 [35 Cal.Comp.Cases 16].)

In this case, as discussed below, the evidence does not establish that (1) applicant was intoxicated at the time of his injury or (2) that intoxication was a proximate or substantial cause of his injury. As a result, section 3600(a)(4) does not bar applicant's claim.

1. Defendant failed to prove that applicant was intoxicated at the time of the accident.

As just noted, as the party asserting the affirmative defense of intoxication, defendant was first required to prove that applicant was intoxicated at the time of the accident. (Lab. Code, § 3600(a)(4).) Here, the WCJ found that applicant's intoxication was "amply proven" by two pieces of evidence in the record, namely: (1) applicant's .04 blood alcohol level, and (2) the CHP officer's statement in the CHP Collision Report that applicant appeared to be under the influence of alcohol after the accident. (F&O at p. 5.) We disagree.

As an initial matter, blood alcohol test results are not conclusive evidence of intoxication and must be weighed with all other evidence in the record. (*Smith, supra,* 123 Cal.App.3d at p. 774.) Here, not only does the record lack evidence of the time that elapsed between the accident and the taking of applicant's blood, but there was also no evidence that a .04 blood alcohol level would have rendered applicant intoxicated, a critical determination in intoxication cases that requires medical expertise. There is also no evidence that applicant showed any outward signs of intoxication prior to the accident that would have bolstered the evidentiary value of the blood test results. This type of evidence is essential to establishing intoxication under section 3600(a)(4); without it, there was no basis upon which to find that defendant did so in this case.

In so holding, we find that comparison with several published cases involving a successful intoxication defense is instructive. For instance, in *Smith, supra,* tests of the applicant's blood

alcohol level after his accident produced a reading of .25. In that case, a doctor testified that "anyone" with a blood alcohol reading of .25 "would be intoxicated" and would have "impaired judgment, impaired sensory perception, and slowed reaction time." (*Smith, supra,* 123 Cal.App.3d at p. 774.) There, it was further concluded that the doctor's testimony supported an inference that the applicant's intoxication was a "substantial factor in bringing about the accident." (*Ibid*.) In *Eastridge v. Workers' Comp. Appeals Bd*. (*Eastridge*) (1995) 60 Cal.Comp.Cases 117 (writ denied), the applicant's blood alcohol level at the time of his autopsy was .27. In that case, using a person's typical ability to metabolize alcohol, doctors testified that the applicant's blood alcohol level at the time of his accident was between .282 and .302. The doctors determined that the applicant's "actions indicated that his judgment and motor skills were significantly impaired, that the level of impairment was consistent with his significantly elevated blood alcohol level that led to the accident, and that, absent his intoxication, the accident would not have occurred." (*Id.* at p. 119.)

In *Republic Indemnity Co. v. Workers' Comp. Appeals Bd*. (*Republic*) (1982) 138 Cal.App.3d 42 [47 Cal.Comp.Cases 1382], the evidence included a doctor's determination that, with a .429 blood alcohol level, the applicant was "severely intoxicated" with an "impaired…ability to function" at the time of his accident. (*Id.* at p. 45.) With respect to the cause of the accident, the court was able to find that,

> The effect of alcohol, especially the amount of alcohol which must be consumed to produce a .429 blood alcohol level on an individual's reaction, coordination and muscular control is a matter of common knowledge. No reasonable person, under the above set of circumstances, could reach any conclusion other than that the intoxication was a substantial factor in causing the individual to…injure himself.

(*Id.* at p. 46.)

In *Mintz v. Workers' Comp. Appeals Bd*. (*Mintz*) (1996) 61 Cal.Comp.Cases 283 (writ denied), the evidence included a medical examiner's report showing that the applicant had a .21 blood alcohol level at the time of his accident, as well as eyewitness testimony of the applicant's erratic behavior prior to the accident. Upon review, we found that this constituted substantial evidence of both intoxication and causation, and that defendant therefore successfully established the intoxication defense. (*Id.* at p. 287.)

Here, unlike *Smith, Eastridge*, and *Republic*, defendant did not produce any medical evidence that a .04 blood alcohol level would have rendered applicant intoxicated or that

intoxication was a proximate or substantial cause of the accident. Also unlike *Republic*, the impact upon a driver's coordination of a .04 blood alcohol level is not a "matter of common knowledge," and, unlike *Mintz*, there was no evidence that applicant exhibited outward signs of intoxication prior to the accident that may have bolstered the evidentiary value of his blood alcohol test results. In fact, testimony from Don Van Sickle, a fellow crew member, passenger, and eyewitness to applicant's behavior prior to the accident, shows that this was not the case. During trial, Mr. Van Sickle testified that, prior to the accident, applicant was "driving normally.…not swerving or anything." (Hearing Transcript at p. 24.) Without more, defendant simply could not have demonstrated intoxication in this case.

The only other evidence in the record relating to intoxication was the CHP officer's statement in the CHP Collision Report that,

> Upon arrival at the scene, I contacted [applicant] and immediately smelled the strong odor of an alcoholic beverage on his breath. He had red bloodshot eyes and his speech was thick and slow. I was unable to give him any field sobriety tests, due to the nature of the collision and his injuries. I then determined that he was under the influence of alcohol….

(Exhibit A at p. 17.)

The WCJ found that the CHP officer's statement was the only credible statement in the record regarding applicant's intoxication. (F&O at p. 6.)[3] The WCJ explained that applicant's testimony that he was not impaired by the alcohol at the time of the accident was tainted by his "profound[] interest[]" in avoiding liability, whereas the CHP officer was "trained to accurately observe the situation and.…would be a disinterested observer, with no reason in evidence to record the situation in any way but accurately." (*Ibid*.) However, upon review, we find that such a determination is unsupported, where the WCJ's decision as to the CHP officer's credibility, and the resultant weight placed upon his statement, were unjustified.

[3] We note that, on several occasions, the WCJ stated that the officer's statements in the CHP Collision Report constituted "testimony." (Report at pp. 2-3 ["the testimony of the investigating CHP officer…was both credible and substantial influence that applicant was driving under the influence of alcohol…."]; p. 4.) We have seen this misunderstanding in the past, which caused us to add a definition of this term to our Rules of Practice and Procedure, which now define "testimony" as "oral evidence given under oath that is transcribed pursuant to Labor Code sections 5704 and 5708." (Cal. Code Regs., tit. 8, § 10305(x).) The CHP Collision Report does not constitute oral evidence, it was not given under oath, and it was not transcribed. As a result, the officer's statements in the CHP Collision Report do not constitute "testimony" under our rules.

The traditional basis for giving a WCJ's credibility determinations great weight is his or her "opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand…." (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500].) That opportunity was simply not present in this case. The WCJ had no opportunity to observe the CHP officer's demeanor, because the CHP officer did not testify at trial. The WCJ relied instead upon a collision report. As a result, it was not reasonable for the WCJ to find that the CHP officer was credible, disinterested, or able to accurately record the situation. Moreover, and more importantly, the CHP Collision Report was not accompanied by any *medical* evidence that applicant was intoxicated at the time of the accident. As a result, as with applicant's blood test results, the statement in the CHP Collision Report could not meet the proof of intoxication standard delineated in the aforementioned case law, and the WCJ's finding to the contrary lacks merit. (*Smith, supra,* 123 Cal.App.3d at pp. 774-775; *Eastridge*, *supra,* 60 Cal.Comp.Cases at pp. 119-120; *Republic, supra,* 138 Cal.App.3d at pp. 45-46; *Mintz, supra,* 61 Cal.Comp.Cases at p. 287.)

We also note that the CHP officer's conclusion that applicant was intoxicated was drawn after an extremely limited interaction with applicant, without performing any field sobriety tests, and while applicant was still pinned inside the vehicle. (Exhibit A at p. 17.) With the exception of the odor of alcohol on applicant's breath, it is wholly plausible that the remaining symptoms observed by the officer, namely, applicant's thick, slurred speech and red eyes were the effects of having been in a significant collision moments earlier. This conclusion is supported by the record, where applicant testified that, after the collision, he was "out of it" and was "in pain." (Hearing Transcript at p. 18.)

Additionally, while not a conclusive factor in the case, we also find interesting the fact that applicant was acquitted of the DUI charge that was recommended by the officer in the CHP Collision Report. Applicant's acquittal is worth noting because it occurred less than a month after his DUI arrest and weeks before his license was even scheduled for suspension. (Exhibit No. 1 [DUI arrest occurred on 8/21/2008; acquittal notice issued on 9/16/2008; license suspension scheduled for 10/8/2008].) One can reasonably infer from this peculiar and very short timeline that the district attorney saw no basis from the evidence to pursue a DUI charge under Vehicle Code section 23152(a), which states: "It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle."

Similarly, we find that the evidence does not support a finding that applicant was intoxicated under the lower, preponderance of the evidence standard used in workers' compensation cases. (Lab. Code, §§ 3202.5; 3600(a)(4).)[4] This is particularly the case given the similarities between the term "under the influence" used in the Vehicle Code and the term "intoxication" in the Labor Code. With regard to the former, the California Supreme Court has explained that:

> To be "under the influence" within the meaning of the Vehicle Code, the liquor…must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties.

(*People v. McNeal* (2009) 46 Cal.4th 1183, 1192-1193.)

Under the Labor Code, indicators of "intoxication" include, but are not limited to, mental confusion, muscular incoordination, slowed reaction time, impaired depth perception, and impaired reasoning. (Lab. Code, § 3600(a)(4); *Smith, supra,* 123 Cal.App.3d at p. 774; *Eastridge*, *supra,* 60 Cal.Comp.Cases at p. 119; *Republic, supra,* 138 Cal.App.3d at p. 46.) Here, the evidence presented regarding applicant's behavior prior to the accident does not demonstrate to our satisfaction (or, apparently, the district attorney's) that applicant drank to the point of intoxication. In fact, applicant's DUI acquittal makes us even *less* likely to believe that this was the case.

For these reasons, we find that defendant failed to meet its burden to prove, by a preponderance of the evidence, that applicant was intoxicated at the time of the accident. Because defendant failed to demonstrate intoxication, we need not reach the second requisite hurdle of the affirmative defense, namely, whether defendant demonstrated that intoxication was a proximate or substantial cause of the accident. (*Smith, supra,* 123 Cal.App.3d at p. 774.) However, for the sake of argument *only*, we will explain why the evidence would not support such a finding.

2. Defendant failed to prove that intoxication was a proximate or substantial cause of the accident.

Even if we were to find that defendant established that applicant was intoxicated at the time of the accident - which it did not - such a finding would not end our inquiry under section 3600(a)(4). As explained in *Smith, supra,* 123 Cal.App.3d at pages 772-773, for the affirmative

[4] *People v. Randolph* (2018) 28 Cal.App.5th 602, 620 (under Veh. Code, § 23152(a), the prosecution bears the burden to prove that "the defendant was actually impaired by his drinking" *beyond a reasonable doubt*).

defense of intoxication to be sustained, a defendant must also prove that the applicant's intoxication was a proximate or substantial cause of the accident.

In this instance, the sole basis for the WCJ's determination that applicant's alcohol intake was a proximate or substantial cause of the accident was CHP officer's statement in the CHP Collision Report that,

> Driver #1 (Hufford), caused this collision by driving his vehicle while under the influence of an alcoholic beverage in violation of [Vehicle Code section] 23152(A).

(F&O at p. 6, citing Exhibit A at p. 18.)

Upon review, we find that this statement is insufficient to support the WCJ's causation determination. Not only was the CHP officer not called to testify to explain his observations, but defendant has wholly failed to provide a case, nor have we located any, wherein a single sentence in a police report was held to prove causation under section 3600(a)(4) by a preponderance of the evidence. Instead, as explained above, the requisite causation is typically demonstrated using medical evidence and corroborative testimony. (See *Smith, supra,* 123 Cal.App.3d at p. 774; *Eastridge*, *supra,* 60 Cal.Comp.Cases at pp. 119-120; *Republic, supra,* 138 Cal.App.3d at p. 46; *Mintz, supra,* 61 Cal.Comp.Cases at p. 287.)

Here, despite having ample opportunity to do so, defendant did not produce any medical testimony or other evidence showing that intoxication was a proximate or substantial cause of applicant's accident. Rather, the evidentiary record establishes that the accident occurred because applicant was adjusting his mirror immediately prior to the accident, which directed sunlight into his eyes that blurred his vision. (Hearing Transcript at pp. 10-13, 15 & 23-24.) Even the CHP officer recognized that the mirror adjustment was a causative factor in the accident, stating later in the CHP Collision Report that, "in addition" to the consumption of alcohol, applicant "should have paid closer attention to the roadway in front of him and adjusted his mirror prior to the operation of his vehicle." (Exhibit A at p. 18.)

The remaining evidence in this case, namely, the smell of alcohol on applicant's breath, his red eyes, and thick and slurred speech also do not establish the requisite causation. (Exhibit A at p. 18.) As noted above, applicant had just been in a serious car accident, which could have caused him to have red eyes and impaired speech. The only red flag in this case is therefore the smell of alcohol on applicant's breath, which, standing alone, is insufficient to prove by a preponderance of the evidence that alcohol was a *proximate* or *substantial* cause of the accident.

In summary, even if defendant had proved that applicant was intoxicated at the time of the accident (which it did not), we conclude that defendant could not have met its burden to prove that intoxication was a proximate or substantial cause of applicant's accident. As a result, we find that applicant's claim is not barred by the affirmative defense of intoxication set forth in section 3600(a)(4).

II.

A. Applicant's Claim Is Not Barred By the "Going and Coming Rule."

In addition to the affirmative defense of intoxication, defendant argued that applicant's claim was barred by the "going and coming rule." (Hearing Transcript at p. 4.) In the F&O, the WCJ found that, because applicant's claim was barred by the intoxication defense, the question of whether the claim was also barred by the going and coming rule was "moot." (F&O at p. 6.) However, the WCJ then noted,

> [H]aving said that, the parties should note that the employer provided the applicant with a company truck, paid for the gas and maintenance, and the applicant was providing a service to the employer in driving himself and other employees home, and then taking the company truck directly to the employer's station to gas it, clean it, drop of logging tickets, and load it with gear for the next day's work. This evidence would support a clear and unequivocal exception to the going and coming rule.

(F&O at pp. 6-7.)

While we do not agree with the WCJ's determination that the going and coming rule is a moot issue, we do agree with the WCJ's view that the evidence, if considered, supports a clear exception to the going and coming rule. We will elaborate on this issue below.

The "going and coming rule" ordinarily makes non-compensable an injury sustained during a normal commute to or from work by an employee who has a fixed place of work and fixed work hours. (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157 [37 Cal.Comp.Cases 734].) The going and coming rule essentially derives from the fact that, under California law, a condition of compensation is that the employee must be "performing service" to the employer at the time of injury and must be "acting within the course of his or her employment." (Lab. Code, § 3600(a)(2).) The courts have concluded that, generally, an employee is not rendering any service to the employer, and the employment relationship is suspended, from the time the employee leaves his work to go home until he resumes his work. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 352 [50 Cal.Comp.Cases 626].)

However, the courts have carved out numerous exceptions to the going and coming rule. Of relevance here is the long-recognized exception, sometimes referred to as the "vehicle-use exception," which arises where the employer provides the employee with a vehicle and requires it to be used as an incident of employment. (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932; *Kobe v. Industrial Acc. Com*. (1950) 35 Cal.2d 33, 35 [15 Cal.Comp.Cases 85]; *California Highway Com. v. Industrial Acc. Com.* (1923) 61 Cal.App. 284; *California Casualty Indemnity Exchange v. Industrial Acc. Com.* (*Duffus*) (1942) 21 Cal.2d 461 [7 Cal.Comp.Cases 305].) As stated in *Duffus*,

> It is well recognized, however, that if an employer, as an incident of the employment, furnishes his employee with transportation to and from the place of employment and the means of transportation are under the control of the employer, an injury sustained by the employee during such transportation arises out of and is in the course of the employment and is compensable.

(*Id.* at p. 463.)

Here, the evidence shows that defendant, i.e., the employer, furnished the vehicle to applicant for the purpose of transporting himself and his fellow crew members to and/or from work, and that the vehicle was under defendant's control. During trial, applicant testified that defendant owned the vehicle, paid for its insurance, maintenance, and fuel, and required applicant to drive the vehicle "as part of [his] work duties…." (Hearing Transcript at pp. 13-14 & 20.) Additionally, at the end of each workday, applicant was required to drive the vehicle to defendant's work yard in order to submit "log tickets" for the vehicle, obtain tools and supplies, clean the vehicle, and refuel. (*Id.* at pp. 16-17 & 19-21.) These facts amply support the application of the "vehicle-use exception" to the going and coming rule.

Defendant claims, however, that applicant's decision to consume alcohol after work, but prior to driving the vehicle away from the job site, constitutes a "material deviation" from his work-related duties that renders the going and coming rule applicable. (Defendant Verified Post-Trial Brief at p. 5.) Defendant is incorrect.

As explained by the California Supreme Court in *Duffus, supra*, 21 Cal.2d at page 465, under the vehicle-use exception, "[i]t is not indispensable to recovery…that the employee be rendering service to his employer at the time of the injury." The Court reasoned that the "essential prerequisite" to compensation was that the danger-causing injury was one to which the employee was exposed as an employee in his or her particular employment. There, the Court held that this requirement was met when a stenographer, as an employee and solely by reason of her relationship

to her employer, entered a vehicle regularly provided by her employer for the purpose of transporting her to or from the place of employment. (*Id.* at p. 466.)

Here, as discussed above, at the time of the injury, applicant was driving a vehicle provided to him by defendant for the purpose of transporting himself and fellow crew members to or from work, thus satisfying the "essential prerequisite" of the vehicle-use exception. Applicant's choice to consume one to two beers before driving the vehicle does not change this conclusive fact.

Moreover, excerpts from the trial testimony, the CHP Collision Report, and the Mercy Intake Report constitute substantial evidence that applicant, while employed as a skidder operator by defendant on August 21, 2008, sustained injury arising out of and in the course of employment (AOE/COE) to the bilateral lower extremities. (Hearing Transcript at p. 13; Exhibit A at pp. 15-16; Exhibit B at p. 3.)

Thus, we reverse and rescind the F&O and substitute a new F&O that finds that, on August 21, 2008, applicant sustained injury AOE/COE to the bilateral lower extremities, and that the affirmative defenses of intoxication and the "going and coming rule" do not bar applicant's claim. All other issues will be deferred.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 9, 2021 F&O is **RESCINDED** and the following is **SUBSTITUTED** in lieu thereof:

FINDINGS OF FACT

1. Applicant, William Hufford, while employed as a skidder operator by Howell's Forest Harvesting on August 21, 2008, sustained injury arising out of and in the course of employment to the bilateral lower extremities. The issue of injury to any other claimed body parts is deferred.

2. Applicant's claim is not barred by the affirmative defense of intoxication set forth in Labor Code section 3600(a)(4).

3. Applicant's claim is not barred by the "going and coming rule."

4. All other issues are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 4, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

WILLIAM HUFFORD
ROBERT ROBIN & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

AH/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS