WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHERVIL GRIFFITH (DEC'D);
TABATHA BROWN; ZACHA JOHNSON;
ZOEY JOHNSON; TARYN RODELL, *Applicants*

vs.

SALUTE MISSION CRITICAL;
AMERICAN ZURICH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ15799651
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendants seek reconsideration of the Findings and Award (F&A) issued on July 22, 2025 by a workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that decedent Shervil Griffith sustained an injury arising out of and in the court of his employment (AOE/COE) resulting in his death, and that intoxication was not a substantial or proximate cause of decedent's death. The WCJ ordered death benefits payable to applicants, Mr. Griffith's dependents, in an amount to be determined.

Defendant contends that applicants failed to establish decedent's death was AOE/COE pursuant to Labor Code[1] section 3600, subdivision (a)(4) (section 3600(a)(4)), because decedent's injury was caused by decedent's "intoxication, by alcohol or the unlawful use of a controlled substance..." (Lab. Code, § 3600(a)(4).) Decedent argues that there is substantial evidence in the record that decedent was intoxicated under section 3600(a)(4) at the time of his death in the form of a toxicology report wherein decedent's blood tested positive for Phencyclidine (PCP), THC (active ingredient of marijuana and/or the prescription medication Marinol), alcohol, and other substances; and, that there is substantial evidence that decedent's intoxication caused the accident resulting in his death in the form of the Maricopa County Sheriff's Office Report of March 24, 2022, and the unrebutted October 14, 2024 report from qualified medical evaluator (QME) Bruce

[1] All further references are to the Labor Code unless otherwise noted.

S. Gillis, M.D., both of which state that decedent's intoxication was the cause of the accident resulting in his death.

Applicants filed an Answer to Petition for Reconsideration (Answer) contending that defendant failed to meet its burden to establish by a preponderance of the evidence that decedent was intoxicated *or* that his alleged intoxication caused his death. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied.

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. For the reasons set forth in the WCJ's Opinion on Decision and Report, which we adopt and incorporate herein, and for those reasons set forth below, we deny reconsideration.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 2, 2025 and 60 days from the date of transmission is Saturday, November 1, 2025. The next business day that is 60 days from the date of transmission is Monday, November 3, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 3, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 2, 2025, and the case was transmitted to the Appeals Board on September 2, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 2, 2025.

II.

The parties in this case stipulated that the commercial traveler's rule applies in this case. We concur with the WCJ's discussion of that rule in the Opinion on Decision and the Report and as stated above, we adopt and incorporate both the Opinion on Decision and the Report. (Opinion on Decision, pp. 3-4; Report, pp. 4-5.)

The issue on reconsideration is whether, in the context of the commercial traveler's rule, decedent's injury was caused "by [his] intoxication, by alcohol or the unlawful use of a controlled substance" pursuant to section 3600(a)(4). "Labor Code section 5705 expressly makes intoxication

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that: "Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day."

an affirmative defense and places the burden of proof upon the employer...” to establish by a preponderance of the evidence that decedent’s death was caused by his intoxication. (*Smith v. Workers’ Comp. Appeals Bd.* (1981) 123 Cal.App.3d 763, 770 (*Smith*) [46 Cal.Comp.Cases 1053].) Defendant’s burden encompasses two prongs: 1) that decedent was intoxicated; *and* 2) that the decedent’s intoxication caused the accident that resulted in his death. (*Id.*, at p. 774.) In fact, “**intoxication does not establish that intoxication caused the accident**.” (*Ibid.*, emphasis added.) Defendant’s burden is to “establish that intoxication is a proximate cause or substantial factor in bringing about an accident resulting in death...” (*Id.*, at p. 773.)[3]

A. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD THAT DECEDENT WAS INTOXICATED

We agree with the WCJ that there is no substantial evidence in the record of this case to establish that decedent was intoxicated at the time of the February 1, 2022 accident that resulted in his death. In order to meet its burden, defendant relies *exclusively* on the reporting of QME Gillis and a toxicology report from NMS Labs (Toxicology Report) showing that decedent’s blood tested positive for Phencyclidine (PCP), THC (active ingredient of marijuana and/or the prescription medication Marinol), alcohol, and had positive levels of caffeine, Cotinine, Nicotine and Citalopram (anti-depressant medication). (See Joint Exhs. 1-5, QME Gillis reports dated January 24, 2023, February 7, 2023, October 14, 2024, December 2, 2024, and January 2, 2025 respectively; Joint Exh. 7, Toxicology Report.) **However, in determining the question of fact as to whether the decedent was intoxicated under section 3600(a)(4), “results of blood tests are not conclusive” and the Appeals Board must weigh blood tests “with all other evidence...”** (*Smith, supra,* 123 Cal.App.3d at p. 774, emphasis added.)

Unfortunately, in this case, there is no evidence regarding decedent in the minutes and hours just prior to the accident that resulted in his death. As stated by the WCJ:

> Also absent from this record is any evidence suggesting that applicant appeared to have been intoxicated at the time of the accident:

[3] We disagree with applicants that the employer must prove intoxication is the “sole” cause of decedent’s injury in order to meet its burden. (See *Smith, supra,*123 Cal.App.3d at p. 773 [“we disagree with the language in the case summaries purporting to apply a ‘sole proximate cause’ standard...in each case, the facts recited support a reasonable inference that intoxication was not a proximate cause of the death”].)

> " ... there is no evidence ... that applicant acted in a manner prior to the accident that would cause an observer to conclude that he was impaired, intoxicated, or under the influence of alcohol or controlled substances. Because he was at the encl of a twelve-hour shift, he may well have been fatigued." Pirelli Armstrong Tire Corp. v. WCAB., 1999 Cal. Wrk. Comp. LEXIS 5653 (Writ Denied):

(F&A, Opinion on Decision, p. 7.)

For example, there was no testimony taken at the trial of this matter and no depositions or sworn statements admitted into evidence from *any* witnesses who may have had personal contact with decedent on the day of the accident. (See Minutes of Hearing and Summary of Evidence (MOH/SOE), April 29, 2025.) Nor was there any such evidence from the applicants or other family members or friends of decedent who may have provided relevant testimony regarding the day of the accident or the positive toxicology test results. (*Ibid.*)

QME Dr. Gillis did review a police body-cam video of a front desk clerk employed by the hotel where decedent was staying as of the morning of the accident, but there was no indication in the QME's summary of the video that the individual had seen or met decedent. (Joint Exh. 5, QME Dr. Gillis report, January 2, 2025, p. 3.) The video was not introduced into evidence. (MOH/SOE, April 29, 2025.) It is noted, however, that the desk clerk confirmed that there were no outside security cameras at the hotel. (*Ibid*.)[4] Finally, we reviewed the reports admitted into evidence from QME Dr. Gillis, and it appears that Dr. Gillis was not provided with prior medical records for decedent, thereby foreclosing the possibility of discovering any relevant information related to the positive toxicology test results.

A comparison of the evidence in *Smith* is instructive. There, the testimony of witnesses established that for the two hours preceding the injury causing accident, Smith worked outside in cold, wet conditions at a jobsite where no one was drinking alcohol; performed job duties normally in difficult conditions; and, appeared sober to coworkers. (*Id.*, at pp. 773-774.) However, the Court in *Smith* found that the employer in *Smith* rebutted that witness evidence by engaging a forensic pathologist who reviewed relevant testimony and documents and then testified as to the competent handling of the blood specimen and testing of the blood specimen for blood alcohol level. (*Id.*, at pp. 768-769.) In addition, the forensic pathologist also provided specific testimony explaining the effects of the blood alcohol level found in Smith's blood on an individual of Smith's size and

[4] This begs the question of internal security cameras, but apparently no such videos were requested by the Maricopa Sheriff's Department, the parties, and/or were provided to the QME.

weight at the time of the accident if that individual was a regular alcohol drinker or if that individual was not a regular drinker. (*Ibid.*)

We agree with the WCJ that the reporting of QME Gillis as to the effects of Phencyclidine does not constitute substantial evidence as did the type of testimony elicited from the forensic pathologist in *Smith*:

> Dr. Hayes, a forensic pathologist, was engaged by defendant in Smith (supra) to review the Coroner's Autopsy Report and testified in relevant part that: 1) decedent's blood alcohol content was .25 percent; 2) Smith would have been under the influence of alcohol; 3) his driving ability would be impaired at a blood alcohol level of .25 because he would have a prolongation of reaction time.
> . . .
>
> No similar analysis finding applicant was intoxicated due to Phencyclidine sufficient to diminish his capacity to decide whether to cross the street and that the intoxication was a substantial factor leading to his death can be made given the comments contained in the Toxicology report, questionable probative value of the QME opinion and other causative factors most appropriately ascribed to industrial factors within the context of the commercial travelers rule.
>
> Whereas, it appears that the relationship between the level of alcohol in the blood and level of intoxication is well known and established; the extent of intoxication associated with the level of Phencyclidine in the blood is not.
>
> The "reference comments" in the Toxicology Report do not appear to indicate a scientifically established relationship between the blood level of phencyclidine and intoxication or level of intoxication. It appears that the Toxicology Report provides what is known about the effects of Phencyclidine by indicating that "it has been reported that" certain levels of the compound have been associated with certain behaviors and outcomes. However, the report also indicates that "There appears to be no relation between plasma levels of phencyclidine and degree of intoxication".
>
> Dr. Gillis initially acknowledges the absence of specific toxicological information by indicating that a certain level of the substance *"could lead to intoxication"* but subsequently inserts likely unwarranted certainty by indicating that those levels *"illustrated that an individual was intoxicated"* and that applicant *"indeed, was intoxicated from this compound". (emphasis added)*
>
> It appears that Dr. Gillis may have arrived at his conclusion based upon a misreading or mischaracterization of the Toxicology Report. The Toxicology Report appears to offer only anecdotal information regarding any relationship between blood levels and degree of intoxication and which may or may not

> provide accurate information relevant to applicant's condition at the time of his death.
>
> While scientific certainty is not required, it appears that Dr. Gillis has found support for his opinion by essentially mischaracterizing the information set forth in the Toxicology Report.

(F&A, Opinion on Decision, pp. 5-6, italics and underling in the original.)[5]

B. ALTHOUGH MOOT, THERE IS NO SUBSTANTIAL EVIDENCE THAT INTOXICATION CAUSED DECEDENT'S DEATH

Even assuming arguendo defendant had met its burden on the "intoxication" issue precedent, defendant would *still* have needed to produce substantial evidence that the intoxication proximately caused the accident that resulted in applicant's death. (*Smith, supra,* 123 Cal.App.3d at p. 770.) First, causation is a question of fact to be determined by the Appeals Board. (*Smith, supra,* 123 Cal.App.3d at p. 773.; see *North Pacific S.S. Co. v. Industrial Acci. Com.* (1917) 174 Cal. 500, 502.)

> "Whether an employee's injury occurred in the course of his employment is a question of fact to be determined in light of the circumstances of the particular case." (*Industrial Indem. Exch. v. Industrial Acc. Com*., 26 Cal.2d 130, 136 [156 P.2d 926].) "The findings of the commission will not be disturbed on appeal where they are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence." (*Phoenix Indem. Co. v. Industrial Acc. Com*., 31 Cal.2d 856, 859 [193 P.2d 745].

(*Industrial Indem. Co. v. Industrial Acci. Com.* (1952) 108 Cal.App.2d 632, 635 [1952 Cal.App. LEXIS 1719].)

> [W]e are required to indulge all reasonable inferences which may be drawn legitimately from the facts in order to support the findings of the commission, and in doing so all that is required is reasonable probability; not absolute certainty. (citations) It is the duty of a reviewing court to search the record to discover whether the evidence is reasonably susceptible of the inferences drawn by the commission in support of its conclusion, and upon favorable discovery to affirm the award. (citation) **Neither may the award be annulled because there are two conclusions which fairly may be drawn from the evidence, both of which are reasonable, the one sustaining and the other opposing the right**

[5] The QME does not mention nor discuss the effects of (if any) and/or inter-action of (if any) the other substances for which decedent's blood tested positive.

> **to compensation. (citations) Nor may an award be rejected solely on the basis of moral or ethical considerations.**

(*State Employees' Retirement System v. Industrial Acci. Com.* (1950) 97 Cal.App.2d 380, 382–383 [1950 Cal.App. LEXIS 1542], emphasis added.)

Consequently, we remind the parties that it is the role of the WCJ and/or the Appeals Board –not the Maricopa County Sheriff or the QME – to determine whether any alleged intoxication caused the accident that killed decedent.

Next, we affirm the WCJ's conclusion, offered *in dicta,* that defendant would have failed to meet its burden on this second prong of the section 3600(a)(4) intoxication defense had it successfully met the first prong, i.e., to establish that decedent was intoxicated.

> The report of the Maricopa County Sheriff's Office indicates that the pedestrian crossing a dark road, mid-block, not in a cross walk and having an impairing level of impairing substances in his blood appeared to be causal factors in the accident.
>
> However, the analysis that lead to the department's findings as to intoxication and causation bear no relation to the analyses required herein. The department ignored any issues relative to its finding that the tow truck retained only 40% of its braking capacity. Importantly, the report implies that it was applicant's misjudgment that caused him to cross a dark road, mid-block and not in a cross walk. Absent from the analysis is the fact that the inoperable streetlights were installed for the safety of drivers and pedestrians alike.
>
> It would be entirely speculative to attribute applicant's decision to cross a darkened street, mid-block and not in a cross walk to faulty judgment—whether or not due to intoxication as there is no evidence as to whether or not any nearby intersection might have been a safer place to cross the roadway or whether there were any cross walks in the vicinity. Unfortunately, the street was darkened and there is no indication that applicant would have known of any safer place to traverse the roadway
>
> It is found that causative factors leading to the accident are those incident to applicant's role as a commercial traveler which placed him in a hotel located adjacent to a darkened four-lane roadway and found him crossing the roadway as a matter of personal comfort at 12:53 a.m. when he was struck and killed by a tow truck with 40% braking capacity traveling either slightly above or below the 45 mph speed limit. The roadway was unlit as the streetlights were inoperable. There were no stop signs or traffic lights in the immediate vicinity.
>
> Missing from the record is evidence as to whether or not any nearby intersection might have been a safer place to cross the roadway, whether there were any cross

> walks in the vicinity and whether applicant appeared to be intoxicated at the time he crossed the street. Missing from the Sheriff's department report is any information or analysis as to whether or not the fatality may have been avoidable if the roadway were lit by the streetlights in place and/or the tow truck had retained 100% rather than 40% of its capacity for braking.
>
> It is as likely as not that applicant was faced on the night of this accident with the choice to either remain in his hotel room or to seek whatever he sought by crossing the darkened road in front of the hotel. Applicant arrived at the hotel only that morning and was not likely as attuned to his surroundings as he would have become in the following days. It would be unrealistic and speculative to impute to applicant knowledge of the unseen dangers inherent to crossing the road that night.

(F&A, Opinion on Decision, pp. 6-7; Report, p. 5-6.)[6]

We acknowledge there is only an inferential evidentiary record in this case related to the activity of personal comfort being pursued at the time of the accident that caused decedent's death. (See *3 Stonedeggs v. Workers' Comp. Appeals Bd. (Nanez)* (2024) 101 Cal.App.5th 1136, 1155 [89 Cal.Comp.Cases 417].) However, defendant raised no dispute as to whether decedent was pursuing an activity of personal comfort at the time of the accident that caused his death:

> It does appear based on the Sheriff's report that there is a gas station located nearby, and that applicant may have crossed the street to buy something for his personal comfort. **Defendant has not asserted that applicant had deviated from his employment at the time of the accident and it is found that applicant was in the course of employment as a commercial traveler and that his death arose from employment absent a finding that intoxication was a substantial cause.**

(F&A, Opinion on Decision, p. 7, emphasis added.)

The employer in *Nanez* similarly did not raise a dispute as to the issue of whether decedent was pursuing an activity of personal comfort at the time of his injury causing accident, but rather, argued that because applicant left the camp where he was working to pursue that personal comfort,

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[6] See Joint Exh. 8, Maricopa County Police Report, pp. 7-8, diagram and aerial photograph of roadway/accident site [four-lane roadway with no cross-walks in evidence]; p. 15 [deputy on scene discussing that all streetlights were non-operational and it was dark on the road and immediate area right in front of decedent's hotel where the accident happened; that eastbound lane obstructed by construction; and, "There are no traffic control devices in this area of McDowell Road."]; p. 18 [hotel confirmed to deputy that decedent checked in "earlier in the day" prior to the accident]; p. 24 [accident reconstruction determined breaking efficiency of tow truck that hit decedent at 40%]; p. 33 [vehicle inspection revealed tires on tow truck that hit decedent all had "poor tread depth"]; pp. 41, 44 [driver of tow truck states that her tow truck was moving at approximately 50 m.p.h. with another vehicle in the lane next to her moving at similar speed, when she noticed decedent in the road about 10 feet in front of the truck moving northbound across the roadway from the hotel parking lot, and it was too late to avoid hitting him].

the accident that caused his injury was not in the course of his employment (Lab. Code, § 3600(a), (a)(2)). (*Nanez, supra*, 101 Cal.App.5th at p. 1155.) Because the employer did not pursue the personal comfort issue, the Court in *Nanez* did not disturb the Appeals Board's finding that Nanez *was* pursuing an activity of personal comfort at the time of the injury causing accident. (*Nanez, supra*, 101 Cal.App.5th at p. 1155.)

Finally, we agree with the WCJ that even if defendant had met its burden of proof to establish decedent's intoxication, intoxication alone is insufficient to establish a deviation from employment sufficient in and of itself to meet defendant's burden to overcome compensability (Lab. Code, § 3600(a)). (See F&A, Opinion on Decision, pp. 6-8; Report, p. 4.)

> Petitioner asserts that the undersigned erred in finding that "causative factors leading to the accident are those incident to applicant's role as a commercial traveler and argues that "simply being at that hotel on a business trip is not a medical opinion on whether the applicant's intoxication was a proximate or substantial cause of the accident".
>
> This argument reflects Petitioner's misunderstanding as to both causative factors incident to applicant's role as a commercial traveler and the doctor's role in connection with a determination as to whether intoxication was a proximate or substantial cause of the accident.
>
> As noted by the Supreme Court in Latourette v. Workers' Comp. Appeals Bd., 17 Cal. 4th 644: "Under the broad "positional risk" theory applicable to physical injuries in the workplace, it is sufficient if the work brings the employee within the range of peril by requiring his or her presence there when it strikes, and the employee need only establish that the employment placed him or her within the range of danger by requiring him or her to be in the precincts of the employer's premises at the time the peril struck".
>
> "Any reasonable doubt as to whether the act is contemplated by the employment, in view of the state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee. His or her acts in traveling and procuring food and shelter are all incidents of the employment, and where injuries are sustained during the course of such activities, the Workers' Compensation Act applies." Latourette (supra)
>
> Based thereon, and absent a showing of substantial deviation, the employee is deemed within the course of employment during the entire business trip and causative factors [of the accident causing decedent's death] incident to the employment in this case include the darkened roadway, absence of evidence of a safer place to cross the road and the tow truck's diminished breaking capacity.

> Defendant neither raised at trial nor presented evidence to support an argument that decedent had substantially deviated from employment at the time of the accident. Defendant's argument that applicant's alleged intoxication equates to deviation from employment fails as the proper inquiry is whether crossing the road in front of his lodging was a substantial deviation in the absence of intoxication. It was not.

(Report, p. 4; see pp. 5-6.)

Indeed, "[e]mployee misconduct, whether negligent, willful, or even criminal, does not necessarily preclude recovery under workers' compensation law." (*Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 249, 253 [53 Cal.Comp.Cases 157].) "Any employer could argue that reckless, intentional, or criminal conduct is not part of any job description and therefore not within the scope of employment. This argument, however, if permitted to succeed, would totally undermine the no-fault foundation of workers' compensation law." (*Id*., at p. 254; see *Nanez, supra,* 101 Cal.App.5th at p. 1160.)

Accordingly, given that defendant failed to meet its burden of proof to establish with substantial evidence that decedent was intoxicated under section 3600(a)(4) and therefore, that any alleged intoxication caused his death, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued on July 22, 2025 by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 3, 2025

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

TABATHA BROWN
ZACHA JOHNSON
ZOEY JOHNSON
TARYN RODELL
GLAUBER BERENSON VEGO
MAVREDAKIS PAIK

AJF/mc

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ15799651

SHERVIL GRIFFITH **-vs.-** **SALUTE MISSION CRITICAL; AMERICAN ZURICK INSURANCE COMPANY**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Russell Shuben**
DATE: **July 22, 2025**

OPINION ON DECISION[7]

BACKGROUND

Applicant was struck and killed by a tow truck traveling between 41 and 50 miles per hour while walking across McDowell Road, an unlit four lane road, at 12:53 at night while on a business trip as a commercial traveler in Maricopa County, Arizona. Applicant's hotel was located immediately South of the road and applicant crossed the road from South to North.

The Maricopa County Office of the Medical Examiner issued its report dated 3/16/2022 (exhibit 6) noting that the toxicology report prepared by NMS Labs (exhibit 7) was positive for Phencyclidine (angel dust; PCP) and other compounds. The report indicates the Cause of Death as Blunt Force Trauma and the Manner of Death as Accident.

Defendant stipulates that the "Commercial Traveler Rule" applies in this case, but, denies that applicant's death arose out of his employment contending that it was caused by applicant's intoxication pursuant to Labor Code §3600(a)(4). Applicant asserts that a presumption is triggered in favor of compensability based upon a "mysterious death".

FACTS

In evidence is the extensive 3/24/2022 reporting of the Maricopa County Sheriff's Office (exhibit 8) which includes findings and comments relevant to this court's decision as to whether or not decedent's death is compensable as follows:

1. It was found that neither speed nor impairment of the tow truck were factors in the collision
2. It was found that the pedestrian crossing a dark road, mid-block, not in a cross walk and having an impairing level of impairing substances in his blood appeared to be causal factors

[7] All typographical and/or citation errors are from the original.

3. Any criminal investigation was cleared as unfounded based on #1 and #2
4. The collision occurred in a work zone
5. The condition of the tow truck did not contribute to the circumstances
6. The tow truck attempted to avoid the collision by braking
7. The streetlights in the immediate area were not operational and the road and immediate area were dark
8. The posted speed limit is 45 mph
9. There did not appear to be visual obstructions when traveling in either direction
10. There were no traffic control devices in that area of McDowell Road
11. The tow truck was traveling westbound in the # 1 lane
12. The #2 eastbound lane was closed and coned off due to road work being performed
13. There were four light skid marks on the road made by the tow truck's "dually" rear tires
14. As only the rear "dually" tires marked the pavement, braking efficiency was adjusted to 40%
15. The tow truck's minimum speed when the tires first began to mark the pavement was calculated at between 41 mph and 48 mph in a posted 45 mph zone.
16. Both front tires and all four rear tires had poor tread depth
17. The tow truck driver said that she was traveling approximately 50 mph
18. The tow truck driver's shift was supposed to end at midnight
19. The accident occurred at McDowell Road and 89th Ave
20. There is a gas station at the corner of McDowell Road at 91st Avenue

Also in evidence is the 2/26/2022 NMS Labs Toxicology Report (exhibit 7) which includes findings and comments relevant to this court's decision as to whether or not decedent's death is compensable as follows:

1. Blood Alcohol Concentration result is 0.059 g/l00mL
2. Phencyclidine result is 600 ng/mL
3. 11-Hydroxy Delta-9 THC result is 56 ng/mL
4. Delta-9 Carboxy THC result is 440 ng/mL
5. Delta-9 THC result is >50
6. Citalopram/Escitalopram result is 430 ng/mL
7. Ethanol result is 85 mg/dL
8. Reference Comments include in relevant part:

"It has been reported that blood levels of phencyclidine ranged from 7-240 ng/mL (mean 75 ng/mL) in individuals stopped for driving under the influence of drugs or for being intoxicated in public.

There appears to be no relation between plasma levels of phencyclidine and degree of intoxication. Even so, death has been reported following the use of only 120 mg of phencyclidine. Blood concentrations in phencyclidine-related fatalities have been reported to range from 300-2500 ng/mL (mean 5000ng/mL)["]

Dr. Gillis issued five QME reports (exhibits 1 -5). Dr. Gillis' 2/7/2023 report (exhibit 2) includes the following at page 3:

"According to the references which were used, a blood level of phencyclidine of 7-240 illustrated that an individual was 'intoxicated'

At the time of the impact, Mr. Griffith had an extremely high level of Phencyclidine (PCP), as well as marked levels of marijuana-associated metabolites, alcohol and the tranquilizer of Citalopram."

Dr. Gillis' 10/14/2024 report (exhibit 3) includes the following at page 3:

"He had an amount of Phencyclidine (PCP) in his system that documented that he, indeed, was intoxicated from this compow1d, He concurrently was under the influence of alcohol, marijuana/cannabis, the anti-depressant Citalopram, caffeine, cotinine and nicotine.

"It is this physician's conclusion that but for Mr. Griffith's intoxication from the aforementioned compounds, he would not have died as and when he did."

Dr. Gillis' 12/2/2024 report (exhibit 4) includes the following at page 2:

"There was an included medical reference which stated that the existence of Phencyclidine/PCP could lead to intoxication if it ranged between 7-240 ng/mL"

DISCUSSION

COMMERCIAL TRAVELER RULE

Under the commercial traveler rule, an employee traveling on an employer's business is regarded as acting within the course of employment during the entire period of travel. *Wiseman v. IAC* (1956) 46 Cal. 2d 570. A commercial traveler is covered for workers' compensation for the travel itself as well as other aspects of the trip reasonably necessary for the sustenance, comfort and safety of the employee. *LaTourette v. WCAB* (1998) 63 CCC 253.

A commercial traveler's acts of traveling, procuring food or drink and obtaining and using lodging are all incidents of employment, and he or she is covered for workers' compensation for injuries sustained during such acts. *Dalgleish v. Holt* (1952) 17 CCC 25 As long as an employee is engaging in an activity necessitated by the travel, any injuries sustained during the activity are compensable, even if the employee is at the same time engaging in a personal activity. *Leonard Van Stelle, Inc. v. IAC (Hartman)* (1963) 28 CCC 140. An employee's negligence in engaging in an activity necessitated by travel will not defeat a claim for compensation. *California Casualty Indemnity Exchange v. IAC (Monahan)* (1936) 5 Cal. 2d 185.

The report of the Maricopa County Sheriff's Office indicates that the pedestrian crossing a dark road, mid-block, not in a cross walk and having an impairing level of impairing substances in his blood appeared to be causal factors in the accident. However, while the

Sheriff's Department report appears to speculate that it was applicant's faulty judgement that led him to cross the dark road, mid-block, not in a cross walk, his actions viewed through the lens of the Commercial Travelers Rule appear to fall within the business traveler's prerogative to seek personal comfort.

It appears that applicant found himself as a commercial traveler in an unsafe situation when he was placed by his employment at a hotel located adjacent to a darkened four-lane roadway and killed while crossing the roadway at 12:53 a.m. when he was struck by a tow truck with only 40% of its braking capacity intact and traveling either slightly below or slightly above the 45 mph speed limit. The roadway was unlit as the streetlights were inoperable. There were no stop signs or traffic lights in the immediate vicinity.

Importantly, the report implies that it was applicant's misjudgment that caused him to cross a dark road, mid-block and not in a cross walk. Absent from the analysis is the fact that the inoperable streetlights were in place for the safety of drivers and pedestrians alike. Absent from the record is any information as to whether it might have been safer to cross the road at any nearby intersection, and whether there were any cross walks in the vicinity. In fact, it appears unlikely that any cross walk was nearby as the Sheriff's Report indicates that there were no traffic control devices (e.g.: stop signs or traffic signals) in the vicinity of the accident.

INTOXICATION

Labor Code §5705 states in pertinent part:

> The burden of proof rests upon the party ... holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:(b) Intoxication of an employee causing his or her injury.

Labor Code §3600 states in pertinent part:

> (a) Liability for the compensation provided by this division ... shall ... exist against an employer ...for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:
>
> > (4) Where the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee.

The Court of Appeal noted the following in affirming the Board's decision finding that intoxication was a substantial factor in bringing about the accident resulting the employee's death in Smith v. Workers' Comp. Appeals Bd., 46 Cal. Comp. Cases 1053:

> Once the board found, on ample evidence, that decedent-was-intoxicated; the testimony of Dr. Hayes that anyone's judgment and reaction time would be impaired seriously at that

blood alcohol level provides the basis for an inference that such impairment was a substantial factor in bringing about the accident.

Dr. Hayes, a forensic pathologist, was engaged by defendant in Smith (supra) to review the Coroner's Autopsy Report and testified in relevant part that: 1) decedent's blood alcohol content was .25 percent; 2) Smith would have been under the influence of alcohol; 3) his driving ability would be impaired at a blood alcohol level of .25 because he would have a prolongation of reaction time.

The Court in Smith found that there was ample evidence that Smith was intoxicated, and that intoxication was a substantial factor in bringing about the accident based on Dr. Hayes' testimony that anyone's judgment and reaction time would be impaired seriously at that blood alcohol level and that his driving ability would be impaired at a blood alcohol level of .25 because he would have a prolongation of reaction time.

The facts in the instant case differ greatly from those in Smith. Applicant was killed while walking across the street. Smith's death occurred when he failed to negotiate a curve while descending a mountain road in inclement weather. It makes sense that the court in Smith found that intoxication was a substantial cause of death given expe11: testimony that Smith was under the influence of alcohol and that his blood alcohol level of .25% would have resulted in a prolonged reaction time.

No similar analysis finding applicant was intoxicated due to Phencyclidine sufficient to diminish his capacity to decide whether to cross the street and that the intoxication was a substantial factor leading to his death can be made given the comments contained in the Toxicology report, questionable probative value of the QME opinion and other causative factors most appropriately ascribed to industrial factors within the context of the commercial travelers rule.

Whereas, it appears that the relationship between the level of alcohol in the blood and level of intoxication is well known and established; the extent of intoxication associated with the level of Phencyclidine in the blood is not.

The "reference comments" in the Toxicology Report do not appear to indicate a scientifically established relationship between the blood level of phencyclidine and intoxication or level of intoxication. It appears that the Toxicology Report provides what is known about the effects of Phencyclidine by indicating that "it has been reported that" certain levels of the compound have been associated with certain behaviors and outcomes. However, the report also indicates that "There appears to be no relation between plasma levels of phencyclidine and degree of intoxication".

Dr. Gillis initially acknowledges the absence of specific toxicological information by indicating that a certain level of the substance *"could lead to intoxication"* but subsequently inserts likely unwarranted certainty by indicating that those levels *"illustrated that an individual was intoxicated"* and that applicant *"indeed, was intoxicated from this compound". (emphasis added).*

It appears that Dr. Gillis may have arrived at his conclusion based upon a misreading or mischaracterization of the Toxicology Report. The Toxicology Report appears to offer only anecdotal information regarding any relationship between blood levels and degree of intoxication and which may or may not provide accurate information relevant to applicant's condition at the time of his death.

While scientific certainty is not required, it appears that Dr. Gillis has found support for his opinion by essentially mischaracterizing the information set forth in the Toxicology Report.

Further, as the Court stated in Pirelli Armstrong Tire Corp. v. WCAB., 1999 Cal.Wrk.Comp. LEXIS 5653 (Writ Denied):

> ... the testimony of "defendant's expert [toxicologist] that the level of metabolites in applicant's system probably caused the accident is merely evidence regarding the conclusion that I [the WCJ] must draw."

INTOXICATION AS A PROXIMATE OR SUBSTANTIAL CAUSE

The California employer is required to establish that intoxication is a proximate cause or substantial factor in bringing about an accident resulting in death. A finding of intoxication does not establish that intoxication caused the accident. Smith v. Workers' Comp. Appeals Bd., 46 Cal. Comp. Cases 1053

The report of the Maricopa County Sheriff's Office indicates that the pedestrian crossing a dark road, mid-block, not in a cross walk and having an impairing level of impairing substances in his blood appeared to be causal factors in the accident.

However, the analysis that lead to the department's findings as to intoxication and causation bear no relation to the analyses required herein. The depigments ignored any issues relative to its finding that the tow truck retained only 40% of its braking capacity. Importantly, the report implies that it was applicant's misjudgment that caused him to cross a dark road, mid-block m1d not in a cross walk. Absent from the analysis is the fact that the inoperable streetlights were installed for the safety of drivers and pedestrians alike.

It would be entirely speculative to attribute applicant's decision to cross a darkened street, mid-block and not in a cross walk to faulty judgment whether or not clue to intoxication as there is no evidence as to whether or not any nearby intersection might have been a safer place to cross the roadway or whether there were any cross walks in the vicinity. Unfortunately, the street was darkened and there is no indication that applicant would have known of any safer place to traverse the roadway[.]

It is found that causative factors leading to the accident are those incident to applicant's role as a commercial traveler which placed him in a hotel located adjacent to a darkened four- lane roadway and found him crossing the roadway as a matter of personal comfort at 12:53 a.m. when he was struck and killed by a tow truck with 40% braking capacity traveling either slightly above or below the 45 mph speed limit. The roadway was unlit as the streetlights were

inoperable. There were no stop signs or traffic lights in the immediate vicinity.

Missing from the record is evidence as to whether or not any nearby intersection might have been a safer place to cross the roadway, whether there were any cross walks in the vicinity and whether applicant appeared to be intoxicated at the time he crossed the street. Missing from the Sheriffs department report is any information or analysis as to whether or not the fatality may have been avoidable if the roadway were lit by the streetlights in place and/or the tow truck had retained 100% rather than 40% of its capacity for braking.

It is as likely as not that applicant was faced on the night of this accident with the choice to either remain in his hotel room or to seek whatever he sought by crossing the darkened road in front of the hotel. Applicant arrived at the hotel only that morning and was not likely as attuned to his surroundings as he would have become in the following days. It would be unrealistic and speculative to impute to applicant knowledge of the unseen dangers inherent to crossing the road that night.

Also absent from this record is any evidence suggesting that applicant appeared to have been intoxicated at the time of the accident:

" ... there is no evidence... that applicant acted in a maimer prior to the accident that would cause an observer to conclude that he was impaired, intoxicated, or under the influence of alcohol or controlled substances. Because he was at the encl of a twelve-hour shift, he may well have been fatigued." Pirelli Armstrong Tire Corp. v. WCAB., 1999 Cal.Wrk.Comp. LEXIS 5653 (Writ Denied):

It does appear based on the Sheriff's report that there is a gas station located nearby, and that applicant may have crossed the street to buy something for his personal comfort. Defendant has not asserted that applicant had deviated from his employment at the time of the accident and it is found that applicant was in the course of employment as a commercial traveler and that his death arose from employment absent a finding that intoxication was a substantial cause.

In meeting its burden ... it is not sufficient for the defendant to show that applicant tested positive for ... substances. The inquiry does not end there. Defendant must also establish that the employee was "intoxicated" and that said intoxication was a substantial cause of the industrial injury. Pirelli (Supra)

In this case, the probative value of evidence as to intoxication or extent of intoxication clue to Phencyclicline is at issue and certainly diminished based upon the reference comments in the toxicology report and apparent mischaracterization of those comments by the QME.
Applicant was merely walking across the street with an alcohol level well below the legal limit for operating a motor vehicle. Dr. Gillis offers no analysis as to any contribution from THC and, mostly, implicates only the Phencyclicline level.

A "causal connection between the employment and the injury ... need not be the sole cause; it is sufficient if it is a contributory cause." *(Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal. 3d 729, 733-734, 190 Cal. Rptr. 904, 661 P.2c l 1058.) "All reasonable doubts as to

whether an injury is compensable are to be resolved in favor of the employee. This is consistent with the mandate that the workers' compensation laws 'shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment". *Guerra v. Workers' Comp. Appeals Ed.* (2016) 81 Cal. Comp. Cases 324.

"In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury... ' South Coast Framing v. WCAB Cal. Comp. Cases 80489

Based on the foregoing, employment must merely contribute to the cause of any injury to support a finding that the injury is compensable and a finding that injury is precluded by intoxication requires a finding that intoxication is a proximate or substantial cause.

MYSTERIOUS DEATH

"Where an employee dies under "mysterious circumstances," doubts are resolved in favor of the deceased employee. *(Kobayashi v. Dni Seafood Wholesaler & Sompo Jnt'l Ins. Co.* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 361.

Applicant's burden of proof as to causation is greatly diminished in those cases finding that applicant's demise arose in connection with a "Mysterious Death".

However, it appears that a "Mysterious Death" is found only when the cause of death is unknown. Whereas, applicant's death in this case was caused by blunt force trauma when he was struck by a tow truck.

CONCLUSION

Based on all of the foregoing; as applicant's employment has contributed to the circumstances leading to his death and as defendant has not shown by a preponderance of the evidence that intoxication was a proximate or substantial cause of his death; it is found that the injury arose out of and occurred in the course of employment and that death benefits are payable in an amount to be determined.

Date: July 22, 2025

Russell Shuben
Workers' Compensation Judge

CASE NUMBER: ADJ15799651

SHERVIL GRIFFITH **-vs.-** **SALUTE MISSION CRITICAL; AMERICAN ZURICK INSURANCE COMPANY**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: Russell Shuben

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION[8]

I
INTRODUCTION

1.	Applicant's Occupation:	Computer Data Technician
	Applicant's Age on Date of lnjury:	--
	Date of Injury:	2/1/2022
	Parts of Body Injured:	death
	Manner in Which Injury Occurred:	vehicle vs pedestrian collision
2.	Identity of Petitioner: Timeliness: Verification:	Defendant filed the petition The petition is timely filed The petition is properly verified
3.	Date of Issuance of Findings:	7/22/2025

4. Petitioner's Contentions:

A. Defendant did not list specific statutory grounds for reconsideration as set forth at Labor Code §5903
B. That the undersigned erred in finding applicant's death compensable in light of the intoxication defense set forth at Labor Code §3600 (a)(4)

[8] All typographical and/or citation errors are from the original.

II
FACTS

The parties stipulate that applicant was in Arizona on a business trip for the employer at the time of his death and that the commercial traveler's rule applies in this case. Applicant was struck and killed by a tow truck while crossing a dark road adjacent to his hotel mid-block, not in a cross walk and allegedly intoxicated.

In evidence is the extensive 3/28/2022 report of the investigation of the Maricopa County Sheriff's Office Major Crimes Division; Vehicular Crimes Unit (exhibit 8). Among the facts and findings contained in the report are: 1) the area of the collision was dark; 2) the streetlights in place were inoperable; 3) the tow truck's breaking capacity was reduced to 40% as all 6 tires had poor tread depth and 4) there were no traffic control devices in the area.

The ultimate findings of the report were that: "Speed and impairment by vehicle #2 were not considered factors in this collision. The involved pedestrian crossing a dark road, mid block, not in the cross walk and having an impairing level of impairing substances in his blood appear to be causal factors in this collision. This case is cleared as unfounded.

Also in evidence is the 2/26/2022 NMS Labs Toxicology Report (exhibit 7) which finds that applicant's blood testing revealed "Phencyclidine result is 600 ng/mL" The toxicology report includes "reference comments" relative to Phencyclidine indicating:

> "It has been reported that blood levels of phencyclidine ranged from 7-240 ng/mL (mean 75 ng/mL) in individuals stopped for driving under the influence of drugs or for being intoxicated in public."
>
> "There appears to be no relation between plasma levels of phencyclidine and degree of intoxication. Even so, death has been reported following the use of orally 120 mg of phencyclidine. Blood concentrations in phencyclidine-related fatalities have been reported to range from 300-2500 ng/mL (mean 5000ng/mL)"
>
> Dr. Gillis issued five QME reports (exhibits l - 5).
>
> His 12/2/2024 report {exhibit 4) includes the following at page 2:
>
> "There was an included medical reference which stated that the existence of Phencyclidine/PCP could lead to intoxication if it ranged between 7-240 ng/mL"
>
> His 2/7/2023 report (exhibit 2) includes the following at page 3:
>
> "According to the references which were used, a blood level of phencyclidine of 7-240 illustrated that an individual was 'intoxicated'
>
> At the time of the impact, Mr. Griffith had an extremely high level of Phencyclidine (PCP), as well as marked levels of marijuana-associated metabolites, alcohol and Citalopram."

His 10/14/2024 report (exhibit 3) includes the following at page 3:

"He had an amount of Phencyclidine (PCP) in his system that documented that he, indeed, was intoxicated from this compound, He concurrently was under the influence of alcohol, marijuana/cannabis, the anti-depressant Citalopram, caffeine, cotinine and nicotine.

"It is this physician's conclusion that but for Mr. Griffith's intoxication from the aforementioned compounds, he would not have died as and when he did."

III

DISCUSSION

INTOXICATION

Petitioner argues, in essence, that the undersigned erred in questioning the probative value of Dr. Gillis' findings regarding intoxication and/or level of intoxication arising from apparent discrepancies between the "reference comments" set forth in the intoxication repott and Dr,. Gillis' paraphrasing of those comments in his own reports.

There is no record of any objection to Dr. Gillis' reporting and the doctor was not deposed. However, it is clear that Dr. Gillis cited those "reference comments" in terms different than set forth in the Toxicology report.

The toxicology report indicates: "It has been reported that blood levels of phencyclidine ranged from 7-240 ng/mL (mean 75 ng/mL) in individuals stopped for driving under the influence of drugs or for being intoxicated in public."

Dr. Gillis indicates: "According to the references which were used, a blood level of phencyclidine of7-240 illustrated that an individual was 'intoxicated'

The fact that "blood levels of phencyclidine ranged from 7-240 ng/mL (mean 75 ng/mL) in individuals stopped for driving under the influence of drugs or for being intoxicated in public" does not mean that "a blood level of phencyclidine of 7-240 illustrated that an individual was 'intoxicated'.

Importantly, no information is provided as to whether some or all of those individuals stopped for driving under the influence had intoxicating substances in their blood other than phencyclidine.

INTOXICATION AS A PROXIMATE OR SUBSTANTIAL CAUSE OF INJURY

As the Court stated in Pirelli Armstrong Tire Corp. v. WCAB., 1999 Cal. Wrk. Comp. LEXIS 5653 (Writ Denied): " ... the testimony of "defendant's expert [toxicologist] that the level of metabolites in applicant's system probably caused the accident is merely evidence regarding the conclusion that I [the WCJ] must draw."

Petitioner asserts that the undersigned erred in finding that "causative factors leading to the accident are those incident to applicant's role as a commercial traveler and argues that "simply being at that hotel on a business trip is not a medical opinion on whether the applicant's intoxication was a proximate or substantial cause of the accident.

This argument reflects Petitioner's misunderstanding as to both causative factors incident to applicant's role as a commercial traveler and the doctor's role in connection with a determination as to whether intoxication was a proximate or substantial cause of the accident.

As noted by the Supreme Court in Latourette v. Workers' Comp. Appeals Bd., 17 Cal. 4th 644: "Under the broad "positional risk" theory applicable to physical injuries in the workplace, it is sufficient if the work brings the employee within the range of peril by requiring his or her presence there when it strikes, and the employee need only establish that the employment placed him or her within the range of danger by requiring him or her to be in the precincts of the employer's premises at the time the peril struck".

"Any reasonable doubt as to whether the act is contemplated by the employment, in view of the state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee. His or her acts in traveling and procuring food and shelter are all incidents of the employment, and where injuries are sustained during the course of such activities, the Workers' Compensation Act applies." Latourette (supra)

Based thereon, and absent a showing of substantial deviation, the employee is deemed within the course of employment during the entire business trip and causative factors incident to the employment in this case include the darkened roadway, absence of evidence of a safer place to cross the road and the tow truck's diminished breaking capacity.

Defendant neither raised at trial nor presented evidence to support an argument that decedent had substantially deviated from employment at the time of the accident. Defendant's argument that applicant's alleged intoxication equates to deviation from employment fails as the proper inquiry is whether crossing the road in front of his lodging was a substantial deviation in the absence of intoxication. It was not.

The cases cited by petitioner's assertion that intoxication as a proximate cause of injury are inapposite.

Latourette involved a commercial traveler's death resulting from treatment provided for a non-industrial medical condition and the Supreme Court noted that:

> "The general rule governing injury from nonoccupational disease thus differs markedly from that governing physical injury from a condition of the employment that places the employee in a position of danger. Under the broad 11positional risk" theory applicable to physical injuries in the workplace, e.g., cuts from flying glass, injury from a fall, "[i]t is sufficient if the work brings the employee within the range of peril by requiring his or her [*654] presence there when it strikes, and the employee need only establish that the employment placed him or her within the range of danger by requiring him or her to be 'in the precincts' of the employer's premises 'at the time the peril struck."

Based thereon, the holding in Latourette provides little guidance for the instant case as Latourette involved a nonoccupational disease and the instant case involves a physical injury.

The applicant in Magnani v. Workers Compensation Appeals Bd., 1999 Cal. Wrk. Comp. LEXIS 5303 was a commercial traveler at time of injury whose actions leading to his injury were a personal errand and a distinct departure from his employment. The court found that applicant had deviated from his employment as applicant drank alcoholic beverages in contravention of the employer1s rules and applicant, a truck driver, was subject to immediate termination for such conduct.

The employer's defense in Magnani was that he was injured during a substantial deviation from his employment and not that injury was caused by intoxication. Based thereon, the holding in Magnani provides little guidance for the instant case.

Petitioner asserts that the case of Smith v. Workers' Comp. Appeals Bd., is relevant only as to its holding in favor of defendant and notwithstanding gross differences in their facts.

The facts in the instant case differ greatly from those in Smith, Applicant was killed while walking across the street, whereas, Smith's death occurred when he failed to negotiate a curve while descending a mountain road in inclement weather. It makes sense that the court in Smith found that intoxication was a substantial cause of death given expert testimony that Smith was under the influence of alcohol and that his blood alcohol level of .25% would have resulted in a prolonged reaction time.

No analogous finding is possible in this case as the Toxicology Report indicates that "There appears to be no relation between plasma levels of phencyclidine and degree of intoxication". There is no evidence as to applicant's actual demeanor or level of intoxication at the time of the accident and nothing to indicate that his death was due to anything other than an accident associated with: 1) a road adjacent to applicant's hotel darkened by inoperable street lights; 2) a tow truck with bald tires reducing it's breaking capacity to 40%; 3) the absence of traffic controls likely associated with the absence of any cross walk or safe place to cross the street

The tow truck's speed was somewhere slightly below, at or above the posted speed limit which reasonably assumes a safe speed when the streetlights are operable. Missing from the Sheriff's Department Criminal Investigation is any information or analysis as to whether or not the accident may have been avoidable had the streetlights been on and the tow truck's braking capacity at or near l00%,

The Sheriff's Department conducted a criminal investigation to determine whether the tow truck driver was criminally culpable, and the results thereof have little or no bearing on the issues addressed herein.

While Petitioner asserts that compensability requires a finding that the injury was "proximately caused by the employment", it is well established that "In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury ...' South Coast Framing v. WCAB Cal. Comp. Cases 804.

Petitioner has failed to prove by a preponderance of the evidence that intoxication was a proximate or substantial cause of the accident.

IV.
RECOMMENDATION

It is respectfully recommended that the defendant's Petition for Reconsideration dated 8/14/2025 be Denied.

DATE: September 2, 2025

RUSSELL SHUBEN
WORKERS' COMPENSATION JUDGE