Nicholas, Wesley

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Commission of felony (RCW 51.32.020)

The Department's ability to deny benefits or payments under RCW 51.32.020 is not a determination that the claim must be rejected. The claim may otherwise be allowed if the injury occurs in the course of employment. **….*In re Wesley Nicholas*, BIIA Dec., 10 15503 (2011)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WESLEY H. NICHOLAS	)	**DOCKET NO. 10 15503**
	)	
CLAIM NO. AF-92067	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Wesley H. Nicholas, by
Law Offices of Beemer & Mumma, per
Samuel W. Jordan

Employer, Wren Construction, Inc., per
Randy S. Bonsen, President

Department of Labor and Industries, by
The Office of the Attorney General, per
G. Ward McAuliffe, Assistant

The claimant, Wesley H. Nicholas, filed an appeal with the Board of Industrial Insurance Appeals on May 10, 2010, from an order of the Department of Labor and Industries dated April 8, 2010. In this order, the Department affirmed its order of January 25, 2010, in which it rejected this claim because the claimant was not in the course of employment at the time of his injury. The Department order is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on July 7, 2011, in which the industrial appeals judge affirmed the Department order dated April 8, 2010. This order addresses the issue of whether the claimant was in the course of employment when injured on October 13, 2009. This order also explains that the issue of whether the claimant can be denied benefits pursuant RCW 51.32.020 is not before the Board in this appeal.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

Course of Employment.

The salient facts are as follows: On October 13, 2009, Mr. Nicholas was driving in excess of 90 miles per hour, on Interstate 90, in the flat-lands of eastern Washington. The posted speed limit is 70 miles per hour. He was driving an employer-provided vehicle from Deer Park, Washington, to Spokane, Washington, and was paid for the time of which he was traveling. Just outside of

Ritzville, Washington, Mr. Nicholas was involved in a serious single-vehicle motor vehicle accident, sustaining significant injuries as a result. During the course of emergency treatment, point-of-care testing of Mr. Nicholas' urine revealed marijuana of at least 50 nanograms per milliliter, and (unprescribed) methadone of at least 300 nanograms per milliliter. Those levels were insufficient to determine that Mr. Nicholas was impaired while driving.

We start with the well established general rule that "an accident or injury need only be sustained in or during 'the course of employment.'" *In re Brian Kozeni*, Dec'd., BIIA Dec., 63,062, (1983), *citing Tilly v. Department of Labor & Indus.*, 52, Wn.2d 148 (195). While on travel status, the courts generally consider a worker to be in the course of employment. *Ball-Foster Glass Container Co. v. Giovanelli,* 163 Wn.2d 133, 142-143 (2008). Insofar as Mr. Nicholas was on travel status, driving an employer-provided vehicle, and being paid for his travel time on October 13, 2009, the preliminary inquiry supports a finding that the injuries sustained as a result of the motor vehicle accident occurred during the course of employment.

Whether Mr. Nicholas had abandoned his course of employment, by having ingested marijuana or methadone at some point in time prior to his October 13, 2009 motor vehicle is best viewed in light of prior analogous decisions addressing alcohol intoxication. In Washington, intoxication is an available defense to the course of employment rule if the claimant is so intoxicated that he or she abandons his or her employment. *In re Brian Kozeni*, *citing Flavorland Industries, Inc. v. Schumacher*, 32 Wn. App. 428 (1982); *see, also, In re: Connye M. Draper, Dckt. No. 95 1618 (September 12, 1996)* (a worker may deviate from the course of employment through voluntary intoxication). Consumption of alcohol (or drugs, in the current matter), alone, is not the deciding factor. Rather, the test is whether the worker is so intoxicated that he cannot perform his duties such that it could reasonably be said that he had thereby abandoned his employment. *In re Austin Prentice, Dec'd*, BIIA Dec., 50,892 (1979).

> One measure of that level is whether the outward appearance of the claimant is such that other people find her to be acting in a sober and normal manner or if she appears to be in a "drunken or wanton state."

Draper, at 6.

The facts of this matter fail to establish by any objective criteria (urinalysis) that Mr. Nicholas was intoxicated by the ingestion of drugs at the time of his October 13, 2009 motor vehicle accident. Any subjective criteria (slurred speech, water eyes), as described by the responding

Washington State Trooper, is significantly discounted due to the severe injuries to Mr. Nicholas' head and face, as well as the emergency-administered medications that rendered him drowsy.

Under the facts of this matter, we hold that Mr. Nicholas was not so intoxicated that he could not perform his duties, and that any suggestion of intoxicants in this system were not of the level such that he had removed himself from the course of employment.

Driving at Excessive Speed.

We find sufficient evidence that at the time of his October 13, 2009 motor vehicle accident, Mr. Nicholas was driving at excessive speeds, when considering the legal speed limit on that portion of Interstate 90. If we adopt Mr. Nicholas' version of the event, he had fallen asleep while driving, and would not know how fast he was traveling at the time of the accident. We are not aware of any authority to suggest that falling asleep while driving is deemed sufficient to remove a worker from the course of employment. Driving at excessive speeds, intentional or not, did not remove Mr. Nicholas from the course of employment.

Based on the foregoing, this claim must be allowed for the industrial injury of October 13, 2009.

RCW 51.32.020.

Extensively litigated in this matter, was whether Mr. Nicholas was in the commission of a felony at the time of his October 13, 2009 industrial injury. RCW 51.32.020 provides, in part, that:

> If injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death, or while the worker is engaged in the attempt to commit, or the commission of, a felony, neither the worker nor the widow, widower, child, or dependent of the worker shall receive any payment under this title.

We note the clear distinction between the "course of employment" allowance of this claim, and the Department's ability, then, to deny benefits, or "payments," under RCW 51.32.020. Through its January 25, 2010 order, the Department rejected the claim because Mr. Nicholas was not in the course of employment at the time of his October 13, 2009 motor vehicle accident. In that order the Department was silent as to whether benefits are denied based on the allegation that Mr. Nicholas was in the commission of a felony at the time. In other words, the Department has not yet passed on the "commission of a felony" issue. As such, it is beyond the Board's scope of review to make any determinations as to application of RCW 51.32.020. *See, In re Irene M. Uzzell*, Dckt. No. 09 18171 (December 13, 2010) (The Department has not decided whether this section of the statute applies; and if it does apply, whether it precludes the receipt of benefits; jurisdiction is

limited to review Department decisions specified in the order on appeal; other issues not addressed until the Department first decides it.), *citing, Lenk v. Department of Labor & Indus*., 3 Wn. App. 977 (1970). If a question is not passed upon by the Department, it cannot be reviewed either by the Board or the superior court. *Uzzell,* at 2.

Conclusion.

The Department order dated April 8, 2010 is reversed, and this matter is remanded to the Department to allow this claim, as Mr. Nicholas was in the course of employment at the time of his October 13, 2009 motor vehicle accident, and resulting injuries. Based on the foregoing, we make the following:

FINDINGS OF FACT

1. On October 22, 2009, the claimant, Wesley H. Nicholas, filed an Application for Benefits with the Department of Labor and Industries, in which he alleged that he was injured on October 13, 2009, while in the course of employment with Wren Construction, Inc.

   On October 27, 2009, the Department issued an order in which it allowed the claim. On October 29, 2009, the employer filed a protest to the October 27, 2009 order.

   On November 13, 2009, the Department issued an order in which it reconsidered its October 27, 2009 order. On January 5, 2010, the Department issued an order in which it affirmed its October 27, 2009 order. On January 6, 2010, the Department issued an order in which it reconsidered its January 5, 2010 order.

   On January 25, 2010, the Department issued an order in which it rejected the claim, and assessed an overpayment for time loss compensation benefits for the period October 14, 2009, through November 6, 2009.

   On January 29, 2010, the claimant filed a protest to the Department's January 25, 2010 order. On February 22, 2010, the Department issued an order in which it reconsidered its January 25, 2010 order. On April 8, 2010, the Department issued an order in which it affirmed its January 25, 2010 order.

   On May 10, 2010, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals, to the Department's April 8, 2010 order. On May 21, 2010, the Board granted the appeal under Docket No. 10 15503, and agreed that further proceedings be held.

2. On October 13, 2009, Mr. Nicholas was driving an employer-provided vehicle from Deer Park, Washington, to his job-site in Spokane, Washington. He was being paid for his travel time. Mr. Nicholas was traveling at speeds in excess of the posted 70 miles per hour speed limit

on Interstate 90, eastern Washington, just outside of Ritzville, Washington, when he was involved in a single-vehicle roll-over accident.

3. On October 13, 2009, point-of-care testing, while Mr. Nicholas was receiving emergency treatment, did not show, by any objective measurement that he was impaired at the time of his October 13, 2009 motor vehicle accident.

4. As a result of the October 13, 2009 industrial injury, Mr. Nicholas sustained multiple injuries, including broken bones in his right foot, broken left thumb, broken left wrist, broken facial bones, loss of teeth, ruptured spleen, fractured sternum, fractured right wrist, and low back pain, among others.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. On October 13, 2009, Mr. Nicholas sustained an industrial injury while in the course of his employment with Wren Construction, Inc, within the meaning of RCW 51.08.100.

3. The order of the Department of Labor and Industries dated April 8, 2010, is reversed. This matter is remanded to the Department allow this claim, and with instructions to take such further action as required by the facts and law.

DATED: October 11, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member