

Pate, Michael, Dec'd

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

Abandonment

Intoxication

To decide whether a worker's intoxication evidenced an abandonment of employment the Board will consider evidence of the worker's tolerance for alcohol and demeanor, behavior and speech immediately prior to the accident. In the absence of such testimony, the intoxication, together with eyewitness testimony of erratic driving, is sufficient to establish that the worker had abandoned the course of employment by reason of intoxication ...*In re Michael Pate, Dec'd, BIIA Dec., [97 1977](#) (1999)* [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 99-2-090250-9.]

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MICHAEL K. PATE, DEC'D

) **DOCKET NO. 97 1977**

CLAIM NO. W-141938

) **DECISION AND ORDER**

APPEARANCES:

Petitioner/Beneficiary, Carmen Pate, by
Vandeberg, Johnson & Gandara, P.S.C., per
Charles R. Bush

Self-Insured Employer, Pierce County, by
Law Offices of Charles D. Broderick, per
Charles D. Broderick

Department of Labor and Industries, by
The Office of the Attorney General, per
James S. Kallmer, Assistant

The self-insured employer, Pierce County, filed an appeal with the Board of Industrial Insurance Appeals on March 17, 1997, from an order of the Department of Labor and Industries dated February 28, 1997. The order corrected and superseded the provisions of an order dated February 21, 1997; determined that Michael K. Pate died on September 8, 1996, as a result of an injury suffered during the course of his employment; allowed the claim filed by the surviving spouse, Carmen Pate; and, approved the payment of benefits provided under industrial insurance law.

REVERSED AND REMANDED.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on January 19, 1999, in which the order of the Department dated February 28, 1997, was affirmed.

1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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3 no prejudicial error was committed and the rulings are affirmed, with one exception. The deposition
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5 of Sergeant William M. McCunn, Jr., of the Washington State Patrol, taken by telephone on
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7 September 22, 1998, is published as it is relevant to the probative value of Exhibits 1 through 5. All
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9 objections and motions made in that deposition are overruled and denied, respectively.

10 DECISION

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13 The appeal by the self-insured employer from the Department of Labor and Industries order
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15 allowing the claim raises the issue of whether Mr. Pate had abandoned the course of his
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17 employment when he died in a single car accident during the early hours of September 8, 1996,
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19 while driving to a judicial conference in Wenatchee. Pierce County has the burden, under
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21 RCW 51.52.050 and WAC 263-12-115(2)(a) and (c), of proceeding with the evidence, to establish a
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23 prima facie case for the relief sought. In *Flavorland Industries, Inc. v. Schumacker*, 32 Wn. App.
24
25 428 (1982), the court stated that: "Intoxication is a defense, in the absence of an applicable statute,
26
27 only when the claimant has become so intoxicated he abandons his employment. 1A A. Larson,
28
29 Workmen's Compensation § 34.21, at 6-72 (1979)." *Flavorland* at 434. The court also pointed out
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31 that the nature of the employment would have an impact on the determination of the course of
32
33 employment:

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35 The present case must be distinguished from those where the
36 consumption of alcohol is unrelated to the worker's job activities. *M & M*
37 *Parking Co. v. Industrial Comm'n*, 55 Ill. 2d 252, 302 N.E.2d 265 (1973);
38 *Richard v. George Noland Drilling Co.*, 79 Wyo. 124, 331 P.2d 836
39 (1958); *O'Neil v. Fred Evens Motor Sales Co.*, 160 S.W.2d 775 (Mo. Ct.
40 App. 1942). In those cases, the worker became intoxicated either prior
41 to or during his working hours. There was no anticipation by the
42 employer that the worker would be consuming alcohol. Here,
43 Mr. Schumacker's job included socializing where alcohol was served.
44

45 If an employer continually encourages and finances an
46 employee's attendance at weekly functions which expose that employee
47 to an atmosphere which results in the employee becoming intoxicated,
he may not then disclaim liability after that employee is killed on his way

1 home while driving his company car. In the case at bench, we hold that
2 Mr. Schumacker's intoxication was not an abandonment of his
3 employment.
4

5 *Flavorland at 435.*

6
7 In three of our significant decisions, we have dealt with this specific issue. See *In re Brian*
8 *Kozeni, Dec'd*, BIIA Dec., 63,062 (1983); *In re Austin Prentice, Dec'd*, BIIA Dec., 50,892 (1979);
9 and *In re Al Thurlow, Dec'd*, BIIA Dec., 20,254 (1966). In each of these cases we considered the
10 same factors considered by the court of appeals in deciding *Flavorland*. It is not enough to prove
11 that the worker had a high blood alcohol level at the time of the accident, rather the workers'
12 continued ability to perform his job must be considered. In each of these cases the workers'
13 tolerance for alcohol; demeanor, behavior, and speech; and their ability to perform work duties were
14 considered in determining whether employment was abandoned.
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23 The self-insured employer presented the testimony of the only eye witness of the accident,
24 James Robertson, of two troopers who investigated the accident, Eldon D. Chowning and
25 William M. McCunn, Jr., and of the Chelan County Coroner, Dr. Gerald A. Rappe. Careful
26 consideration of this testimony convinces us that the self-insured employer has met its burden of
27 establishing that Mr. Pate had abandoned the course of employment by reason of intoxication.
28 Thus, the burden shifted to Mr. Pate's beneficiaries to prove by a preponderance of the evidence
29 that the Department order on appeal was correct. *Olympia Brewing Co. v. Department of Labor &*
30 *Indus.*, 34 Wn.2d 498 (1949); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).
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39 There is a dearth of information in the record regarding a number of factors that are pertinent
40 to determining the issue presented by this appeal. Although the parties' stipulation established
41 some of Mr. Pate's activities in the hours prior to his death, this information was incomplete. Much
42 of the information considered in the cases cited above is not present in this record.
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1 The record did not establish that Mr. Pate had a higher than usual tolerance for alcohol. The
2
3 only information that we have about Mr. Pate's demeanor, behavior, or speech was the testimony of
4
5 the only witness to the accident, James Robertson. As Mr. Robertson was in another vehicle he
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7 could not testify regarding Mr. Pate's speech or demeanor, however he did observe his erratic
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9 driving behavior. Mr. Robertson's testimony also bears on Mr. Pate's ability to perform work duties,
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11 which at the time of the accident consisted of driving safely to Wenatchee. Mr. Robertson first saw
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13 Mr. Pate shortly after going over the summit on the Blewitt Pass Highway. During the drive from
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15 the summit to the scene of the accident, a few miles from the intersection with the highway between
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17 Leavenworth and Wenatchee, Mr. Robertson observed that Mr. Pate's car slowed down and sped
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19 up erratically on a number of occasions. Mr. Robertson also observed Mr. Pate's car swerve or
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21 turn wide on several corners before he saw the car leave the road when the accident occurred.

22
23 The only other information about Mr. Pate's activities before the accident, other than
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25 provided by stipulation, was the testimony of Carmen Pate. She last talked to her husband a day or
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27 two before his death when they discussed whether she would accompany him to Wenatchee for the
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29 judicial conference. She indicated that at the time of the accident they were separated and that
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31 Mr. Pate was living with a friend. Although she identified alcohol as one of the problems leading to
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33 the separation it was not one of the primary causes. She testified that Mr. Pate had attended
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35 Alcoholics Anonymous meetings in Eatonville, but she did not testify directly about his use of
36
37 alcohol or that he had an increased tolerance for alcohol.

38
39 The parties stipulated that the evening prior to the accident Mr. Pate had dinner with the
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41 friend he was living with at the time, then went to a card room and tavern where he stayed until he
42
43 left to drive to Chelan. No one testified about Mr. Pate's activities during the time he was at the
44
45 tavern; about his tolerance for alcohol; or about his demeanor, behavior, and speech while he was
46
47 at the tavern; or about his ability to perform work duties when he left the tavern. In *Flavorland*,

1 *Kozeni, Prentice, and Thurlow* there was direct testimony about all of these topics. All of these
2
3 claims were allowed except *Thurlow*, and in all of the claims direct testimony was provided about
4
5 the deceased worker's tolerance for alcohol; demeanor, behavior and speech immediately prior to
6
7 the accident; and about the worker's capability of performing their job duties. That type of
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9 testimony is not present in this record.

10
11 What is available is the testimony of two expert witnesses who identified intoxication as the
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13 direct cause of Mr. Pate's accident. Dr. Gerald A. Rappe, a forensic pathologist who is the coroner
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15 and medical examiner for Chelan County, went to the scene of Mr. Pate's accident and then
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17 subsequently performed an autopsy. Following the autopsy Dr. Rappe received a report from the
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19 Washington State Toxicology Laboratory that identified a blood alcohol level of .19. When asked
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21 his opinion regarding the cause of the accident Dr. Rappe stated:

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23 My opinion has to be what I know about blood alcohol levels is that a
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25 blood alcohol level of .19 in my mind has to be the primary reason for
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27 the accident.

28
29 . . .

30
31 And given the fact that when I got there, the witnesses said this car was
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33 being driven in an erratic manner: We saw this car almost go off the
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35 road once before. And then we saw it happening.

36
37 Rappe Dep. at 14.

38
39 Eldon D. Chowning, a Washington State Patrol trooper, who has twenty years of experience
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41 with the State Patrol and extensive experience investigating automobile accidents, also testified on
42
43 behalf of the employer. Trooper Chowning was the primary investigator of Mr. Pate's accident. He
44
45 also reviewed all of the reports and interviews of others who investigated the accident. It was his
46
47 opinion that :

the collision occurred because Mr. Pate was under the influence of
alcohol and in no condition to drive a motor vehicle.

Chowning Dep. at 8.

1 There is no testimony in the record to contradict the opinions of Dr. Rappe and
2
3 Trooper Chowning. Beyond their opinions we have only supposition and conjecture.
4

5 Linda Tollefson, the wife of a superior court judge attending the same judicial conference,
6
7 went to the accident scene the Monday following the accident and took pictures that have been
8
9 identified and admitted as Exhibits 1 through 5. The pictures show a number of skid marks on the
10
11 pavement in the vicinity of the accident. These pictures were presented for the purpose of
12
13 establishing the possibility that another vehicle was involved in Mr. Pate's accident. We do not
14
15 believe this happened, as it is directly contradictory to testimony of Mr. Robertson and
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17 Sergeant McCunn. Sergeant McCunn, a trooper for thirty-two years and specially trained in
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19 accident investigation, was of the opinion that the skid marks identified by Ms. Tollefson in Exhibits
20
21 1 through 5 had nothing to do with Mr. Pate's accident. In addition, he shared Dr. Rappe and
22
23 Trooper Chowning's opinions about the cause of the accident.
24

25 The self-insured employer has presented at least a prima facie case in support of its
26
27 contention that Mr. Pate had abandoned the course of his employment by reason of intoxication.
28
29 We are not particularly impressed by blood alcohol level standing alone, more significant is the
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31 testimony of Mr. Robertson and the absence of testimony establishing the factors that were
32
33 convincing in securing the allowance of other claims that involved intoxicated workers. Mr. Pate's
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35 beneficiaries have not presented evidence that overcomes the prima facie case presented by
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37 Pierce County.
38

39 After careful consideration of the Employer's Petition for Review, the Claimants Response
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41 To Employer's Petition for Review, the Proposed Decision and Order and the entire record we are
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43 convinced that the Department of Labor and Industries order allowing the claim is incorrect and
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45 should be reversed. The claim will be remanded to the Department of Labor and Industries with
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1 directions to issue an order rejecting the claim for the reason that Michael Pate had abandoned his
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3 employment.

4 FINDINGS OF FACT

- 5
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- 7 1. On September 11, 1996, the Department of Labor and Industries
8 received an application for benefits filed on behalf of the claimant and
9 surviving spouse, Michael K. Pate and Carmen Pate, respectively,
10 alleging that the claimant, Michael K. Pate, died in a fatal motor vehicle
11 accident during the course of his employment with Pierce County. On
12 February 28, 1997, the Department issued an order correcting and
13 superseding the provisions of a prior Department order dated
14 February 21, 1997; holding that the claimant sustained an injury during
15 the course of employment resulting in his death on September 8, 1996;
16 approving the claim filed by the surviving spouse, Carmen Pate; and
17 approving the payment of benefits provided under the industrial
18 insurance laws. On March 17, 1997, the Board of Industrial Insurance
19 Appeals received a Notice of Appeal filed on behalf of the self-insured
20 employer, Pierce County.
21
 - 22 2. On September 8, 1996, shortly after 3 a.m., Michael K. Pate died as the
23 result of a single car accident while he was driving east on the Blewitt
24 Pass Highway to attend a judicial conference in Chelan, Washington.
25
 - 26 3. As part of his work as a Pierce County District Court Commissioner,
27 Michael K. Pate was required to attend the judicial conference in
28 Chelan, Washington, and was permitted to use his own vehicle to travel
29 to the location.
30
 - 31 4. When the accident occurred on September 8, 1996, Michael K. Pate
32 was on the most direct and appropriate route to travel from Tacoma to
33 Chelan, Washington.
34
 - 35 5. Michael K. Pate left a tavern in Tacoma late in the evening of
36 September 7, 1996, or in the early morning hours of September 8, 1996,
37 to drive to Chelan, Washington, by way of the Blewitt Pass Highway,
38 and at the time of his death his blood alcohol level was .19.
39
 - 40 6. Because of alcohol intoxication, Michael K. Pate was unable to
41 successfully control his vehicle in a manner sufficient to complete the
42 trip to the judicial conference in Chelan, his only job duty at that time.
43
 - 44 7. That at the time of the accident on September 8, 1996, Michael K. Pate
45 had abandoned his employment as a Pierce County District Court
46 Commissioner by reason of intoxication.
47

1
2 **CONCLUSIONS OF LAW**
3

- 4 1. The Board of Industrial Insurance Appeals has jurisdiction over the
5 parties and the subject matter to this appeal.
6
7 2. Michael K. Pate was not in the course of his employment with Pierce
8 County District Court when he died as the result of a single car accident
9 on September 8, 1996.
10
11 3. The order of the Department of Labor and Industries dated February 28,
12 1997, is incorrect and is reversed. This claim is remanded with
13 directions to issue an order rejecting the claim for the reason that at the
14 time of his death Michael K. Pate had abandoned his employment.
15

16 It is so **ORDERED**.

17
18 Dated this 28th day of June, 1999.
19

20 BOARD OF INDUSTRIAL INSURANCE APPEALS
21

22
23
24 /s/ _____
25 THOMAS E. EGAN Chairperson
26

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29 /s/ _____
30 JUDITH E. SCHURKE Member
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