IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 19

WCC No. 2006-1758

MARTIN HETH, JR.

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
Appealed to the Montana Supreme Court June 13, 2008
Affirmed May 5, 2009 - 2009 MT 149

Summary: Petitioner was in a single-vehicle accident involving the septic pumper truck he drove for his employer. Petitioner's blood-alcohol content (BAC) tested at .0874 shortly after the accident and beer cans were found in and around the truck. Respondent argued that it is not liable for Petitioner's workers' compensation claim because alcohol was the major contributing cause of the accident. Petitioner argued that alcohol was not the major contributing cause of the accident, and in any event, his employer knew that he drank alcohol on the job and therefore he is not barred from recovery under § 39-71-407(4), MCA.

Held: Although Respondent proved that alcohol was the major contributing cause of the accident, Petitioner proved that his employer knew he used alcohol while performing his job duties. Therefore, Petitioner is eligible for workers' compensation benefits.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. In a vehicular accident case, the investigating officers and Respondent's expert witnesses considered the other possible contributing causes of the accident and systematically eliminated them. The accident occurred in good weather in broad daylight on a well-maintained dry road, and other conceivable causes for the accident including mechanical failure, obstructions in the roadway, and fatigue were ruled out by the investigators. Petitioner's BAC was measured at .0874 some time after the

accident and which was computed by an expert witness to have been .10 or .11 at the time of the accident. While the facts of the case indicate that fatigue may have played some role in the accident, in light of the evidence presented, the Court concluded that alcohol was the major contributing cause.

Defenses: Intoxication. Where Petitioner's BAC was measured at .0874 some time after the accident and which was computed by an expert witness to have been .10 or .11 at the time of the accident, although the parties made arguments as to whether the septic pumper truck Petitioner was driving was a commercial vehicle, the Court made no determination as to its status. The fact remained that Petitioner's BAC was over the .08 rebuttable inference of intoxication for a non-commercial vehicle under § 61-8-401(4)(c), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Although the Court determined that alcohol was the major contributing cause of Petitioner's industrial accident, under § 39-71-407(4), MCA, if the employer had knowledge of the employee's use of alcohol and failed to attempt to stop the employee from using alcohol, the subsection barring recovery does not apply. Where the evidence presented was that Petitioner's employer knew he consumed alcohol on the job, that he had urged Petitioner to moderate his on-the-job drinking and had directed him to place his empty cans in a sack rather than allow them to be loose in the vehicle, and where the last time Petitioner's employer saw him on the night before the accident, Petitioner was getting into his work vehicle with a six-pack of beer, the Court concluded that Petitioner's employer had knowledge of Petitioner's use of alcohol and failed to attempt to stop him from using it. Therefore, Petitioner is not barred from recovery of benefits under § 39-71-407(4), MCA.

Defenses: Intoxication. Although the Court determined that alcohol was the major contributing cause of Petitioner's industrial accident, under § 39-71-407(4), MCA, if the employer had knowledge of the employee's use of alcohol and failed to attempt to stop the employee from using alcohol, the subsection barring recovery does not apply. Where the evidence presented was that Petitioner's employer knew he consumed alcohol on the job, that he had urged Petitioner to moderate his on-the-job drinking and had directed him to place his empty cans in a sack rather than allow them to be loose in the vehicle, and where the last time Petitioner's employer saw him on the night before the accident, Petitioner was getting into his work vehicle with a six-pack of beer, the Court concluded that Petitioner's employer had knowledge of Petitioner's use of alcohol and failed to attempt to stop him

from using it. Therefore, Petitioner is not barred from recovery of benefits under § 39-71-407(4), MCA.

¶ 1 The trial in this matter was held on February 7, 2008, in Billings, Montana, and resumed and concluded on February 11, 2008, in the Workers' Compensation Court, Helena, Montana. Petitioner Martin Heth, Jr. was present for the February 7 portion of the proceedings and was represented by Patrick R. Sheehy. Respondent was represented by Kelly M. Wills.

¶ 2 Exhibits: Exhibits 1 through 7 were admitted without objection. During trial on February 7, 2008, Petitioner's counsel offered a yellow "sticky note" written by Emily Heth, Petitioner's step-mother, into evidence. Respondent's counsel was granted permission to voir dire witness Martin Robert Heth, Sr. regarding the note. Following voir dire, Mr. Wills objected to the admission of the note as it was not previously disclosed or identified. Mr. Wills' objection was sustained and the note was not admitted into evidence.

¶ 3 Witnesses and Depositions: The deposition of Robert Martin Heth, Sr. was taken, submitted to the Court, and can be considered part of the record. Heth[1] was sworn and testified at trial on February 7, 2008. Respondent's expert witnesses Richard Thomas Gill, M.S., Ph.D., and F. Denman Lee, Ph.D., were sworn and testified on February 11, 2008.

¶ 4 Issue Presented: The Pretrial Order states the following contested issue of law:

> ¶ 4a Whether Respondent is liable for this claim and payment of workers' compensation benefits to Petitioner.[2]

¶ 5 At the close of arguments, I issued a bench ruling pursuant to ARM 24.5.335 following a brief recess. The following findings and conclusions are in accordance with that ruling.

FINDINGS OF FACT

¶ 6 On September 17, 2005, Petitioner was involved in a single-vehicle accident. Petitioner sustained serious injuries when he was ejected from the large septic pumper and tank truck he was driving. Petitioner is totally disabled as a result of this accident. At the time of the accident, Petitioner was employed by Bob's Plumbing and Heating, an employer

[1] Throughout this decision, Robert Martin Heth, Jr., the Petitioner in this matter, is referred to as "Petitioner," and Martin Robert Heth, Sr., Petitioner's father and employer, is referred to as "Heth."

[2] Pretrial Order at 3.

enrolled under Compensation Plan III of the Montana Workers' Compensation Act and insured by Respondent.[3]

¶ 7 Petitioner filed a workers' compensation claim alleging that the accident occurred within the course and scope of his employment with Bob's Plumbing and Heating. Respondent denied liability on the grounds that Petitioner was intoxicated at the time of the accident and therefore his claim is not compensable pursuant to § 39-71-407(4), MCA.[4]

¶ 8 Heth was deposed on March 2, 2007. At the time of his deposition, Heth was hospitalized with acute respiratory distress and his testimony was taken with difficulty due to his breathing problems.[5]

¶ 9 Heth owns a business in Hardin, Montana, known as Bob's Plumbing & Heating and A-1 Septic Pumping.[6] Counsel for both parties agree that Bob's Plumbing and Heating and A-1 Septic Pumping are the same insured entity which Heth ran as a sole proprietorship.

¶ 10 Petitioner's main job duty for Heth was to perform septic pumping services. He drove the business' septic pumper truck most of the time.[7] When Heth first purchased the pumper truck, he drove it himself for the first year or two and then assigned Petitioner to drive it as part of his job duties. Heth testified that he did not establish too many rules for Petitioner's operation of the truck, but instructed Petitioner to operate the truck in a reasonable manner and to dump the tank after each pumping job.[8] Heth further testified that generally they drove the truck at approximately 55 to 60 miles per hour.[9]

¶ 11 When he worked for Heth's business, Petitioner lived in a basement apartment in Heth's residence.[10] Heth testified that from 1994 until the accident in 2005, he saw

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[3] Pretrial Order, Statement of Uncontested Facts.

[4] *Id.*

[5] Heth Dep. 3:4-8.

[6] Heth Dep. 5:12-23.

[7] Heth Dep. 7:3-11.

[8] Trial Test.

[9] Trial Test.

[10] Trial Test.

Petitioner almost every day.[11] Since the accident, Heth sold his residence and he and Petitioner now live together in a smaller residence.[12]

¶ 12 Heth testified that he was aware that Petitioner drank beer in the septic pumper truck. He had advised Petitioner that he needed to "control" his drinking and Heth did not want Petitioner getting drunk on the job. Heth stated that he told Petitioner to "modulate" the amount he drank while working.[13]

¶ 13 Heth stated that sometimes he would discover beer cans loose in the septic truck.[14] After the open container law changed in Montana, Heth ordered Petitioner to keep the empty cans in a plastic sack in the truck.[15]

¶ 14 In the week before Petitioner's accident, Heth was very busy. He had a plumbing contract for a large remodeling project and many of his company's 100 portable toilets were in use. Heth was servicing firefighting camps for the Bureau of Land Management and the U.S. Forest Service, including placing several portable toilets at locations for a fire in the Missouri Breaks area in the vicinity of Landusky. On September 15, 2005, his customer requested that the portable toilets be removed immediately because the campsite was being struck. At approximately 6 a.m. on September 16, 2005, Heth and Petitioner traveled to the campsite to remove the portable toilets. Afterward, they traveled to Malta where they planned to spend the night before returning home the following day. Heth recalled that they arrived in Malta at about 10 p.m. on the night of September 16.[16]

¶ 15 The last time Heth saw Petitioner prior to the accident was on the evening of September 16, 2005.[17] Heth planned to stay in a motel in Malta. He offered Petitioner a motel room, but Petitioner refused. Petitioner grabbed a six-pack of beer out of Heth's pickup truck and left in the septic pumper truck.[18] Heth testified that Petitioner was angry with him, refused to stay in Malta, and insisted on returning to Hardin that evening. Heth

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[11] Trial Test.

[12] Trial Test.

[13] Heth Dep. 8:8-22.

[14] Heth Dep. 8:23-25.

[15] Heth Dep. 9:5-17.

[16] Trial Test.

[17] Heth Dep. 9:20-23.

[18] Heth Dep. 10:4-17.

advised him to take care of the equipment.[19] Heth testified that he "started" to tell Petitioner not to take the six-pack but did not do so because he "could see it wouldn't do any good."[20] Heth knew that Petitioner would likely drink the beer while driving back to Hardin.[21] At trial, Heth stated that he was not trying to stop Petitioner from taking the six-pack, but rather he was trying to stop Petitioner from driving back to Hardin that night, and that he did not tell Petitioner not to take the beer.[22]

¶ 16 Heth did not speak to Petitioner on September 17, nor did he speak to his wife Emily, who was working with Petitioner that day. When he arrived home after his night in Malta, Heth found a note on his door from that day which stated that Petitioner and Emily were going to pump several septic tanks at two houses.[23] Heth knows that they pumped at least two tanks and possibly part of a third because the pumper truck's tank was full at the time of the accident.[24] Heth testified that after the industrial accident, Petitioner was in a coma for two or three months, and Petitioner does not recall the accident.[25]

¶ 17 Heth further testified that he knew Petitioner drank beer while pumping septic tanks and he cautioned Petitioner not to get drunk while working. Heth never saw Petitioner drive drunk, and he never saw him drunk at work.[26] Heth stated that prior to the accident, he knew Petitioner drank beer in the pumper truck. He testified that he never told Petitioner to stop drinking on the job, but he and Petitioner discussed DUIs, open containers, and not drinking in front of customers. He told Petitioner that he should collect the empty beer cans, place them in a sack, and bring them home for recycling. Heth advised Petitioner that his drinking needed to be "modulated" and controlled. Heth explained that by "modulated," he meant that Petitioner should spread out his drinking and not drink a six-pack all at once.[27] Heth further explained that he intended for Petitioner to take over the business and he did not want to damage their relationship by fighting over Petitioner's consumption of alcohol. Heth hoped to begin transferring the business operation to

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[19] Trial Test.

[20] Heth Dep. 10:18-24.

[21] Heth Dep. 10:25 - 11:2.

[22] Trial Test.

[23] Heth Dep. 16:12 - 17:5.

[24] Heth Dep. 17:15 - 18:1.

[25] Trial Test.

[26] Heth Dep. 29:1-22.

[27] Trial Test.

Petitioner in late 2005.[28] However, Heth finished up his contracted jobs and then dissolved the business after Petitioner's accident.[29]

¶ 18 On cross-examination, Heth admitted that he was aware that if he testified that he knew Petitioner was drinking on the job, it could help Petitioner attain workers' compensation benefits.[30] He further testified that he understood that if Respondent is found liable for Petitioner's claim, Petitioner will likely receive financial and medical benefits. Heth admitted that he is concerned about his son receiving necessary care if he becomes unable to care for him.[31] At trial, Heth opined that he believes Petitioner's accident was more likely caused by fatigue than from alcohol because Petitioner had been working long hours. He further stated that he only learned that Petitioner had a blood-alcohol content (BAC) of .0874 on the day before his trial testimony.[32] Heth also testified that he was in very poor health at the time his deposition was taken and that he does not remember being questioned in the hospital.[33]

¶ 19 I find Heth to be a credible witness. Heth admitted that he knew if he testified that he had knowledge that Petitioner drank beer on the job, this might help Petitioner obtain workers' compensation benefits. However, having had the opportunity to observe Heth's demeanor at trial and observe his responses to questioning both on direct examination, cross-examination, and from this Court, I find Heth's testimony about his knowledge of Petitioner's drinking on the job to be credible. While he testified that he knew Petitioner drank beer while working, Heth also attempted to portray his son's drinking as a few beers spaced out throughout the day in response to Heth's urging that Petitioner "modulate" his drinking while working. Further supporting Heth's testimony that he knew his son drank on the job is the fact that Heth had daily contact with his son both during and after business hours each day as Petitioner not only worked for Heth's company, but lived in a basement apartment in Heth's home. Finally, a number of full and empty beer cans were found in and around the truck after the accident and there is nothing in the record to suggest that this was an atypical quantity. I do not believe that the presence of these cans in the truck on a regular basis would have gone unnoticed by Heth.

¶ 20 The Crash Investigator's Report describes Petitioner's accident as follows:

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[28] Trial Test.

[29] Trial Test.

[30] Heth Dep. 12:2-7.

[31] Trial Test.

[32] Trial Test.

[33] Trial Test.

> Vehicle #1 was traveling eastbound on Old Hwy 87 East, at milepost 23.6, when driver #1 drove off of the right road edge, then over-corrected toward the left, causing the vehicle to leave the roadway, rolling down an embankment. In the process, Driver #1 and a passenger were ejected from the vehicle. The passenger received fatal injuries.[34]

The report identified Petitioner as "Driver #1" and the passenger as Emily Elaine Heth.[35]

¶ 21 A September 25, 2005, memorandum prepared by Montana State Trooper Dell P. Aman of the Montana Highway Patrol states in part:

> On September 17th, 2005, at 1350 hrs, I was dispatched to a one vehicle rollover crash with serious injury. . . Investigation disclosed that [Petitioner] had been driving a 1997 Freightliner Septic Pump Truck eastbound when he drove off of the right road edge, over-corrected back across the roadway, and down an embankment at the left (north) side of the road. . . . Evidence of alcoholic beverage consumption was found at the scene consisting of empty beer cans and the odor of an alcoholic beverage emanating from [Petitioner]. . . . A blood draw has been completed and forwarded for analysis.[36]

The subsequent blood-alcohol test from a draw taken approximately one and one-half hours after the crash showed that Petitioner had a BAC of .06 at the time of the draw.[37] Another alcohol test taken after Petitioner arrived at the hospital placed his BAC at .0874.[38]

¶ 22 The Montana Highway Patrol Fatal Crash Report notes in part:

> Environmental conditions:
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> The roadway at this location is a two lane, non-divided rural route, former U.S. Highway. The road is now known as Old Highway 87 East. There is one travel lane established for eastbound traffic and one lane established for westbound traffic. The road surface is constructed of bituminous concrete (asphalt), in good condition, with no defects. There is no actual shoulder.

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[34] Ex. 2 at 3.

[35] *Id*.

[36] Ex. 2 at 4.

[37] Ex. 2 at 59-60.

[38] Ex. 5 at 8.

> The roadway, at this location, curves slightly toward the right (when traveling eastbound). The road surface is level. The roadway was bare and dry. Roadway markings were clear with all lines on the road surface being clearly visible. All delineator posts were in place. The roadway, at this location, is governed by the non-Interstate (2-lane hwy) daytime truck speed limit of 60 miles per hour.
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> Weather conditions, at 1502 hrs, from the Montana Department of Transportation weather site at Arrow Creek were as follows: Temperature 57.6 degrees, Humidity 77%, winds northeast at 12 mph, with gusts to 14 mph. It was full daylight with unlimited visibility.[39]

¶ 23 The report further notes:

> Contributing factors: Contributing factors to this crash are the possibility of impairment due to the consumption of alcoholic beverages and/or fatigue. [Petitioner] was inattentive and careless in his driving by failing to negotiate a very slight curve, and driving off of the roadway.[40]

The narrative portion of the report states in part:

> [T]wo empty beer cans were observed lying in view within the cab of the truck. NOTE: additional beer cans, both full and empty, were later found by wrecker personnel . . . after the vehicle was up-righted and towed from the scene.[41]

The report concludes:

> [Petitioner], who may have been fatigued; or, under the influence of alcoholic beverages to the point of impairment, failed to operate his vehicle upon the paved portion of the roadway. For some inexplicable reason he drove off of the highway, over-corrected, caused the vehicle to roll down an embankment resulting in his ejection and injury. In the process, the vehicle passenger EMILY HETH, was also ejected and sustained fatal injury.[42]

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[39] Ex. 2 at 5-6.

[40] Ex. 2 at 8.

[41] Ex. 2 at 9.

[42] Ex. 2 at 10.

Expert Testimony

¶ 24 Floyd Denman Lee resides in Bozeman, Montana. He is a retired physics professor from Montana State University who now works as an accident reconstructionist. He has a B.S. in physics, and a Ph.D. in experimental nuclear physics. He belongs to the American Association for the Advancement of Science and the Society of Automotive Engineers. Dr. Lee has done accident reconstruction part time since 1970 and does it as a full-time job since retiring from MSU. He estimates that he has reconstructed between 700 and 1,000 accidents during his career.[43]

¶ 25 Respondent offered Dr. Lee as an expert witness with no objection from Petitioner's counsel. I find Dr. Lee to be a credible witness.

¶ 26 Dr. Lee was asked by Respondent's counsel to reconstruct Petitioner's accident and attempt to explain how the accident occurred. Dr. Lee relied on Aman's accident report, which included a report of weather conditions and extensive photographs of the accident scene which were taken by Aman or at his direction, as well as photographs taken by the wrecker service which towed the truck afterward. Dr. Lee stated he had 146 photographs from the investigation and towing, and he took an additional 56 photographs of the accident site and roadway.[44]

¶ 27 Dr. Lee also relied on a commercial vehicle inspection which Aman had completed, and he researched the truck's history to learn the vehicle specifications and gross vehicle weight rating. On August 3, 2007, Dr. Lee traveled to a wrecking yard in Glendive, Montana, where he inspected the truck, which he found to be in the same condition as after the accident. Dr. Lee verified the Vehicle Identification Number (VIN), took measurements of the vehicle, and looked for any indication that a mechanical problem could have played a role in the accident. He took 42 photographs of the vehicle. Dr. Lee pointed out that Aman had inspected the vehicle and had an inspection performed, and concluded that mechanical failure was not at issue, but Dr. Lee wanted to verify this conclusion. Dr. Lee's inspection revealed that the vehicle had been well-maintained prior to the accident. Dr. Lee opined that no mechanical failure had occurred. He further determined that the tires had good tread and there was no evidence of a blowout or any kind of tire failure.[45]

¶ 28 In addition to his inspection of the vehicle and the accident site and review of Aman's accident report, Dr. Lee also reviewed witness statements, hospital records associated with the accident, and weather reports. Dr. Lee noted that the weather was "good" at the time

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[43] Trial Test.

[44] Trial Test.

[45] Trial Test.

of the accident. The temperature was 57 degrees Fahrenheit with a light 10-15 miles-per-hour north-northwest wind. Dr. Lee opined that weather was not a factor in the accident.[46]

¶ 29 Dr. Lee also examined the contemporaneous photographs of the roadway and determined that it was well-marked and, while it had no shoulder, there were no cracks or potholes. Dr. Lee examined the roadway in person and he noted that, while two years had passed since the accident, the roadway remained the same. Dr. Lee noted that, although the skid marks themselves had worn off, he found the original paint marks where the highway patrol had marked the truck's skid marks.[47]

¶ 30 Dr. Lee explained that, at the accident site, he determined where the vehicle had come to rest after leaving the roadway and surveyed the paint marks left by the highway patrol. Dr. Lee examined the original accident photographs and noted that the skid marks were actually "yaw marks" because the vehicle did not skid in the direction its wheels were turned. Dr. Lee explained that the truck's wheels were turned too sharply for the road, so it left yaw marks as it moved across the road surface. He stated that, after drifting off the roadway to the right, Petitioner traveled for about 150 feet with his right-side tires off the roadway as the highway investigation revealed. Then, Petitioner turned the truck's wheels too sharply to the left in an effort to correct onto the roadway. This caused the vehicle to slip sideways as it moved ahead. Dr. Lee found the yaw marks to be useful for calculating the truck's speed at the time of the accident.[48]

¶ 31 Dr. Lee used a laser surveying device which allowed him to record his measurements and input them into a computer program and then allowed him to produce a digital scale drawing of the accident site. Dr. Lee's survey included the edge of the roadway, the center line, and the highway patrol's paint marks. Dr. Lee knew that the highway patrol had also measured the accident scene and he obtained a copy of their data. He compared the highway patrol's measurements with his own and determined that the measurements matched. Therefore, he was satisfied that he knew where the skid or yaw marks had been on the roadway, their curvature, and their start and end points.[49]

¶ 32 Dr. Lee testified that he concurred with the highway patrol's investigating officer who concluded that the condition of the roadway was fine. Dr. Lee stated that both he and the highway patrol had used a "total station" system to survey the accident site and that this

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[46] Trial Test.

[47] Trial Test.

[48] Trial Test.

[49] Trial Test.

equipment allows a high degree of accuracy in reconstructing the scene. He opined that Aman had done a very good job in investigating the accident.[50]

¶ 33 Dr. Lee testified that because the truck left the roadway and rolled, traveling about 160 feet down an embankment and through a fence before coming to rest, it was more complicated to determine the speed of the vehicle prior to the accident than in a simpler collision. Dr. Lee used a computer program into which he input data such as the truck specifications, a map of the roadway, and the yaw marks, and the program calculated the speed of the vehicle. Using the program, Dr. Lee determined that the truck was traveling 57 miles-per-hour at the time of the accident.[51]

¶ 34 Dr. Lee used the software to demonstrate for the Court his reconstruction of the accident. He explained that the roadway as surveyed had a slight curvature to the right, and he entered his measurements into the computer. He also created a truck of the same scale as the septic pumper truck, and on the computer-simulated roadway, he drew the skid or yaw marks which were measured by the highway patrol. Dr. Lee programmed the software to experiment with various speeds and steering angles in order to get the simulated truck to match the mapped yaw marks. The simulation was able to match the yaw marks at a simulated speed of 57 miles per hour. Noting that the speed limit was 60 miles per hour on the roadway, Dr. Lee concluded that speed itself was not the cause of the accident and Petitioner was not traveling too fast for the road conditions, nor were road conditions a factor in causing the accident. Given the speed Petitioner was traveling, Dr. Lee calculated that Petitioner's right-side tires were off the roadway for about 1.7 seconds before he turned the wheel and over-corrected to the left.[52]

¶ 35 Dr. Lee testified that there were also no visual obstructions or any evident road hazards which could have contributed to the accident. All other possible causes being ruled out, he concluded that the cause of the accident was driver error. Dr. Lee agreed with the highway patrol's conclusion that Petitioner drifted off the right side of the road, over-corrected, crossed the center line, and exited the left side of the roadway, finally rolling down an embankment. Dr. Lee further testified that he could not state what caused Petitioner to drift off the right side of the road.[53]

¶ 36 Rick Gill, Ph.D. was also retained as an expert witness by Respondent and testified at trial. Dr. Gill is a human factors engineer based in Spokane, Washington. He performs engineering consulting. Dr. Gill has a B.S. and Master's degree in systems engineering

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[50] Trial Test.

[51] Trial Test.

[52] Trial Test.

[53] Trial Test.

with a Ph.D. in mechanical engineering with a specialty in human factors. Dr. Gill is board-certified in human factors and is a licensed trigonometrist. Dr. Gill has performed several hundred motor vehicle accident reconstructions.[54]

¶ 37 Respondent offered Dr. Gill as an expert witness with no objection from Petitioner's counsel. I find Dr. Gill to be a credible witness.

¶ 38 Dr. Gill testified that Respondent had asked him to attempt to identify the underlying causes of Petitioner's accident, and specifically to address the issue of alcohol and whether it was a factor in causing the accident. Dr. Gill reviewed the police report and accident photographs, the report from the state toxicology laboratory, laboratory reports from Big Horn Hospital and St. Vincent Hospital, and various medical records. Dr. Gill also traveled to the accident scene and consulted with Dr. Lee on the accident reconstruction.[55]

¶ 39 Dr. Gill testified that alcohol and the effects of alcohol on a person's ability to function are topics that were covered extensively during his graduate studies, and that alcohol is often a factor in accidents so he is required to be knowledgeable about the topic. Dr. Gill explained that the effect of alcohol on a person's ability to function is exponential and that each increase in BAC exponentially causes detrimental effects on a person's perception, reaction time, and decision-making abilities.[56]

¶ 40 Dr. Gill explained that in determining what factors are major factors in the cause of an accident, he looks at four main areas: environmental factors, external factors, vehicle factors, and driver behavior factors. Dr. Gill stated that environmental factors include weather and roadway design and maintenance. He did not find any environmental factors that contributed to the accident. External factors include obstructions on the roadway, other vehicles, pedestrians, and bicyclists. Dr. Gill did not find any external factors that contributed to the accident. Vehicle factors include items such as bad tire pressure, blown tires, and steering or braking problems. No vehicle factors were found. Therefore, Dr. Gill was left with driver behavior factors to possibly account for the accident.[57]

¶ 41 Dr. Gill testified that while Heth suggested that Petitioner's accident may have been caused by fatigue, Dr. Gill's investigation did not support that conclusion. Dr. Gill considered fatigue as a factor, but found that Petitioner had only been driving for about an hour at the time of the accident, which was not enough time for fatigue to set in. Dr. Gill further noted that the time of day goes against fatigue being a factor because mid-day is

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[54] Trial Test.

[55] Trial Test.

[56] Trial Test.

[57] Trial Test.

physiologically a person's peak level of alertness. Dr. Gill also considered Petitioner's activities on the day before the accident and determined that Petitioner was awake by 7 a.m. and probably did not get to bed until about 2 a.m. However, the evidence also demonstrated that Petitioner did not need to leave for his job on the day of the accident until 10:30 a.m., and therefore he had ample time to get at least 7 hours of sleep. Taking the three pieces of evidence together – one hour of driving, the time of day, and Petitioner's ability to get adequate rest the night before – Dr. Gill concluded that no evidence supported fatigue as a factor in causing the accident.[58]

¶ 42 Dr. Gill also concluded that if the evidence did not support fatigue, then it was even less likely that Petitioner could have fallen asleep while driving. Dr. Gill examined the photographs which illustrated how the septic pumper truck traveled after it drifted off the right side of the roadway and he determined that it traveled in a straight line after leaving the right-hand shoulder. Typically, when a driver falls asleep, the vehicle continues to drift further to one side. He further noted that when the vehicle's tires left the right side of the roadway, the sound would have changed, which would have instantly startled a sleeping driver, and an awakened driver would not have had a 1.7 second delay from the time the tires left the roadway until he attempted to regain the roadway.[59]

¶ 43 In considering whether alcohol was a factor in the accident, Dr. Gill reviewed the BAC tests performed on Petitioner in the hours after the accident. By his calculations, Dr. Gill concluded that a conservative estimate of Petitioner's BAC at the time of the accident was between .10 and .11. He opined that this BAC was not consistent with having one or two beers, but with Petitioner having drunk "significantly more." Dr. Gill testified that the tire marks from the accident indicate that Petitioner had a delayed reaction to driving off the right-hand side of the roadway and that when Petitioner did react, it was an exaggerated and panicked reaction which overcorrected and ultimately caused the vehicle to leave the roadway on the left-hand side. Dr. Gill found this to be consistent with alcohol impairment. Dr. Gill opined it was more probable than not that alcohol caused Petitioner's accident.[60]

CONCLUSIONS OF LAW

¶ 44 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[61]

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[58] Trial Test.

[59] Trial Test.

[60] Trial Test.

[61] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 45 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[62]

¶ 46 The basic facts of this case are not in dispute. As the findings illustrate, Petitioner was injured in a single-vehicle crash on September 17, 2005, when the septic pumper truck he was driving left the roadway. Whether Petitioner's resulting injuries are compensable depends on how § 39-71-407(4), MCA, applies to the facts of this case. The statute states:

> An employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident. However, if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs, this subsection does not apply.

¶ 47 I conclude that Petitioner's use of alcohol was the major contributing cause of his industrial accident. Section 39-71-407, MCA, states, "As used in this section, 'major contributing cause' means a cause that is the leading cause contributing to the result when compared to all other contributing causes." In the present case, the police officers investigating the accident and Respondent's expert witnesses did a thorough job considering all of the possible contributing causes of this accident and systematically eliminating them. Petitioner's accident occurred in good weather in broad daylight on a well-maintained dry road. The state troopers who investigated the accident and Respondent's expert witnesses considered all other conceivable causes for the accident, including mechanical failure, obstructions in the roadway, and fatigue, and systematically ruled out each of those alternate causes. What remained was Petitioner's BAC at the time of the accident, which was measured at .0874 some time after the accident and which Dr. Gill computed to be .10 or .11 at the time of the accident. I note that while the parties argued as to whether the septic pumper truck was a commercial vehicle – which under Montana law has a stricter BAC limit for legal operation[63] – I ultimately make no determination as to its status. Whether it was a commercial vehicle or not, the fact remains that Petitioner had a .0874 BAC which is over the .08 rebuttable inference of intoxication for a non-commercial vehicle under § 61-8-401(4)(c), MCA. While fatigue may have played some role in the accident, all of the evidence in this matter indicates that alcohol was the ***major*** contributing cause.

¶ 48 Pursuant to § 39-71-407(4), MCA, if a court determines that an employee's use of alcohol was the major contributing cause of an industrial accident, the employee is not eligible for benefits. However, § 39-71-407(4), MCA, further states that if the employer had

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[62] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[63] See §§ 61-8-401, -406, MCA.

knowledge of the employee's use of alcohol and failed to attempt to stop the employee from using alcohol, this subsection does not apply. As I found above, I have no doubt that Heth knew that Petitioner consumed alcohol on the job. However, Respondent further argued that for the statutory exception to apply, Heth would had to have known that Petitioner was drinking alcohol on the job on that particular day and failed to attempt to stop him from doing so. From Heth's testimony and the beer cans found at the accident scene, I am convinced that Petitioner's consumption of alcohol on the job was a regular occurrence and that Heth had knowledge of its ongoing nature. The facts of this case are not such that the employer discovered his employee drinking on the job on one isolated incident prior to the injury. This is a situation where Petitioner's employer knew that he drank alcohol on the job on a regular, recurrent basis. I do not believe the statutory language means that an employer can be aware of and condone regular drinking on the job, yet can escape liability under the statute provided the employer did not witness the employee's drinking immediately before the accident. Even in that event, Heth testified that the last time he saw Petitioner before the accident, he removed a six-pack of beer from Heth's truck and got into the septic pumper truck to drive home. Although Heth may have attempted to get Petitioner to moderate his on-the-job consumption of alcohol and to spread his drinks out throughout the day, Heth made no attempt to actually ***stop*** Petitioner's use of alcohol on the job. Therefore, I conclude that since Heth knew of his employee's use of alcohol and failed to attempt to stop it, the bar of eligibility for benefits found in § 39-71-407(4), MCA, does not apply in the present case.

JUDGMENT

¶ 49 Respondent is liable for Petitioner's claim and payment of workers' compensation benefits to Petitioner.

¶ 50 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 25th day of April, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Patrick R. Sheehy
Kelly M. Wills
Submitted: February 11, 2008