Prentice, Austin, Dec'd

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

Intoxication

Intoxication evidenced by a blood alcohol content of .24 did not remove the worker from the course of employment where the worker had an above average tolerance for alcohol, was described as "sober and normal," and was still able to perform his work duties.In re Austin Prentice, Dec'd, BIIA Dec., 50,892 (1979)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: AUSTIN PRENTICE, DEC'D)	DOCKET NO. 50,892
)	
CLAIM NO. S-215313)	DECISION AND ORDER

APPEARANCES:

Widow-petitioner, Marcella Prentice, by Felthous, Peters, Schmalz, Leadon and Fowler, per Douglas D. Peters

Employer, Longview Fibre Company, by Walsh and Margolis, per Harry Margolis

This is an appeal filed by the claimant on November 21, 1977, from an order of the Department of Labor and Industries dated November 9, 1977, which adhered to a prior order which denied the claim for widow's benefits on the basis that the deceased was not in the course of employment at the time of his death. **REVERSED AND REMANDED**.

DECISION

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 employer to a Proposed Decision and Order issued by a hearing examiner for this Board on February 9, 1979, in which the order of the Department dated November 9, 1977 was reversed, and the claim remanded to the Department with instructions to allow the petitioner's claim for widow's benefits.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The nature and background of this appeal, and the salient evidence, are well summarized in the hearing examiner's Proposed Decision and Order, and shall not be reiterated herein.

From the evidence as a whole, it may fairly be concluded that the decedent's fatal injury arose out of his intoxication, and not his employment. This, however, is not necessarily fatal to the petitioner's claim. Under our Act, an injury, to be compensable, need not arise out of employment; it need only occur during the course of employment. Tilly v. Department of Labor and Industries, 52 Wn. 2d 148 (1958).

The time spent by the decedent (from three to four hours) drinking and socializing in the Lariat Room, although interspersed with business phone calls of which one resulted in a sales order, would, in our opinion, constitute a personal deviation by the decedent from his course of

employment. The fatal injury in question, however, did not occur during this deviation. It occurred after the decedent's personal deviation had been completed, and he had commenced his travel home, and upon the very road he would have taken had he never stopped at the Lariat Room. In other words, once the decedent commenced his journey home, he re-entered the course of his employment. Morris v. Department of Labor and Industries, 179 Wash. 423 (1934). The critical inquiry presented by this appeal is whether the decedent's intoxication, itself, removed him from the course of employment?

Unlike a number of jurisdictions, intoxication is not a statutory defense to a claim under our Workers' Compensation Law. Accordingly, it must be dealt with the same as any other type of deviation from the course of employment. Thus, the decedent's intoxication would not disenfranchise him from coverage under the Act unless he became so intoxicated that he could no longer perform his work duties. In that event, he would be deemed to have "abandoned" his employment. See <u>Tilly</u>, <u>supra</u>.

The decedent's homeward drive was part and parcel of his employment -- he was a traveling salesman. The fact that the accident in question did not occur until the decedent had covered some 40 miles of his homeward drive, conclusively demonstrates that he could drive. This fact alone, to our mind, is sufficient to negate any contention that the decedent was so intoxicated as to have "abandoned" his employment.

We would, additionally, note further evidence in the record bearing upon the decedent's state or degree of intoxication. The testimony of the cocktail waitress who served the decedent characterizes him as sober and normal when she went off duty at 4:00 p.m. on the day in question. The testimony of Bob Walthers, one of the decedent's drinking companions in the Lariat Room who was with him up to about 5:30 p.m., describes the decedent as "feeling pretty good, the same as himself," and about the way one would feel "after three or four drinks." The decedent's blood alcohol reading of .24, although relatively substantial, must be viewed in light of the fact the decedent was alcoholic. As such, he had a much higher than average tolerance for alcohol. Thus, a reading of .24 for him would not be the same, in terms of its devastating effects, as it would for the "normal" or "social" drinker. In short, the evidence of this matter does not depict the decedent as being under a high degree of intoxication. Certainly, it does not paint a picture of a person who was so intoxicated that it could reasonably be said that he had thereby "abandoned" his employment.

All told, we hold that the decedent's intoxication did not remove him from the course of employment at the time of his fatal accident, and that the petitioner's claim herein for widow's benefits should be allowed.

FINDINGS OF FACT

Findings 1 through 3 of the Proposed Decision and Order entered herein are hereby adopted by the Board and incorporated herein by this reference. Finding 5 of said Proposed Decision and Order is hereby renumbered 4, and incorporated herein by this reference.

Findings 4 and 6 of said Proposed Decision and Order are hereby stricken. The Board makes the following Findings 5 and 6:

- 5. A blood alcohol test revealed that at the time of his death Mr. Prentice had a blood alcohol reading of .24 grams percent. Being alcoholic, Mr. Prentice had a much higher tolerance for alcohol than the "normal" or "social" drinker. Thus, a high blood alcohol level for him would not be the same, in terms of its devastating effects, as it would be for the "normal" or "social" drinker.
- 6. The decedent, Austin Prentice, was not intoxicated to the extent that it could reasonably be said that he had thereby abandoned his employment.

CONCLUSIONS OF LAW

Conclusions 1 through 3 of the Proposed Decision and Order entered herein are hereby adopted by the Board and incorporated herein by this reference.

It is so ORDERED.

Dated this 27th day of June, 1979.

	OF INDUSTRIAL	INICHIDANICE	ADDEALS
DUARD	OF INDUSTRIAL	INOUKANCE	AFFEALO

/S/	
MICHAEL L. HALL	Chairman
/s/	
SAM KINVILLE	Member