IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 12

WCC No. 2016-3741

KENNETH DEVERS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner contends that he suffered a compensable injury because, although he drank before his accident, alcohol was not the major contributing cause of his accident, and his employers knew about his drinking and did not make a genuine attempt to stop it. Petitioner further claims his injury arose out of and in the course of his employment under the premises rule and the bunkhouse rule because he was a residential employee and on-call at all times. Respondent argues that given his lack of credibility and extent of intoxication, Petitioner's use of alcohol was the major contributing cause of his accident. Respondent further argues that although Petitioner's employers knew about his use of alcohol, their efforts to stop it were sufficient. Finally, Respondent contends that credible evidence shows that Petitioner's injury did not arise out of and in the course of his employment.

Held: Respondent met its burden of proving that Petitioner's use of alcohol was the major contributing cause of his accident. Moreover, Petitioner's employer knew about and attempted to stop it. Therefore, Petitioner's claim for benefits is barred under § 39-71-407(5), MCA, and this Court declines to address whether Petitioner's injury arose out of and in the course of his employment.

¶ 1 The trial in this matter was held on October 14, 2016, in Hardin, Montana. Petitioner Kenneth Devers was present and represented by Paul W. Adam and Hayley

Kemmick. Respondent Montana State Fund (State Fund) was represented by Stephanie A. Hollar. Amy Kirscher, claims adjuster, was present on behalf of State Fund.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 16 without objection. This Court overruled State Fund's timeliness objection to Exhibit 17 and admitted that exhibit after Devers laid a foundation.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Devers and Crissy Seminole into evidence. Devers, Seminole, Josh Myers, and Holly Yuhasz were sworn and testified at trial.

¶ 4 Issues Presented: The following issues are before this Court:

Issue One: Is Devers' claim barred by his intoxication?

Issue Two: Did Devers' injury arise out of and in the course of his employment under the premises rule[1] or the bunkhouse rule?[2]

FINDINGS OF FACT

¶ 5 The Court finds the following facts based on a preponderance of the evidence.

¶ 6 In January of 2013, Devers was living on Sanders Road just outside of Hardin. He had been doing maintenance work for Sunset Village Mobile Home Park (Sunset Village), for several years. Emery and Holly Yuhasz were members of the LLC that owned Sunset Village. Although they lived in California, Emery was in charge of maintenance and Holly was in charge of bookkeeping activities, such as paying bills and checking on rent deposits.

¶ 7 In mid-January, Emery hired Devers to be Park Manager at Sunset Village. Devers' job duties included maintaining all rental units — including putting together materials lists, conducting price comparisons, and making purchases — and keeping up

[1] The premises rule provides, "Compensable injuries include those sustained by employees having fixed hours and place of work who are injured while on the premises." *Massey v. Selensky*, 225 Mont. 101, 103, 731 P.2d 906, 907 (1987). *See also Popenoe v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 37, ¶ 9.

[2] The bunkhouse rule provides, "When an employee is required to live on the premises, either by his contract of employment or by the nature of his employment, and is continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. However, if the employee has fixed hours of work outside of which he is not on call, compensation is awarded usually only if the course of the injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises." 1A Arthur Larson, *The Law of Workmen's Compensation,* § 24.00, at 5-234 (1993). *See also Landeen v. Toole Cnty. Ref. Co.*, 85 Mont. 41, 55, 277 P. 615, 620 (1929) (citation omitted) (stating, "The general rule appears to be that when the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer.").

the grounds in the park. He was on-call at all times for the purpose of being able to respond to tenant emergencies.

¶ 8 Emery requested that Devers live in one of the park's units, rent- and utility-free, so he could be more readily available should any emergencies arise. By signing his employment agreement and handbook, Devers agreed that his tenancy was conditioned upon his continued employment as Park Manager and that he would follow the rules of the park, which prohibited alcohol consumption before 5 p.m. Soon thereafter, Devers moved into unit #8, which was close to the office. At the time Devers moved in, there were holes in the floors throughout his unit, including just inside the front door. Devers used scrap pieces of wood to cover the holes, like bridges, and moved the pieces around as he moved through the unit.

¶ 9 On a typical day as Park Manager, Devers woke up at 6 or 6:30 a.m., put his dog on his line outside, went back inside to grab what he needed, and walked to the office. He usually worked until 4:30 or 5 p.m., although he worked late if he was on a deadline and responded to tenant emergencies at all hours with Seminole, the park's other maintenance person.

¶ 10 Devers occasionally had a few drinks at lunch and, on most days, drank a six-pack of beer starting at 4:30 or 5 p.m. Seminole did not know Devers drank at first. However, Seminole noticed Devers drinking more in the spring of 2015, when he started showing up to after-hours maintenance calls with signs of intoxication. When Devers showed up for an after-hours maintenance call with signs of intoxication, Seminole sent him home and handled the job herself.

¶ 11 In April of 2015, a resident complained that Devers was drinking during his regular workday and smelled of alcohol. Emery reprimanded him over the phone and told Devers that drinking during the workday was not allowed. Devers took this as "fatherly advice" and told Emery that he would curtail his lunch-time drinking.

¶ 12 Seminole communicated with Holly on a daily basis. However, she did not report Devers for drinking until she received a tenant complaint in the spring of 2015. According to the tenant, a window had been broken at Devers' unit, and he was outside drinking and yelling.

¶ 13 Seeking a way to verify Devers' drinking, Holly arranged for all Sunset Village employees to be tested for alcohol.

¶ 14 In early July 2015, however, another tenant complained about noise, partying, and drinking at Devers' home. Seminole passed the complaint on to the Yuhaszes, who in response decided to impose written discipline on Devers that would pave the way for his termination should it become necessary.

¶ 15 On July 9, 2015, Holly called Devers and told him to go to the fax machine. Devers then received a letter electronically signed by Emery, which states:

> We had several telephone conversations with you in the past, including recently in the last month, regarding complaints by tenants that there are disruptions, confrontations, partying and drinking taking place at your residence in the park. In the past we have bailed you out of jail and assisted you to be released from probation. We have discussed that you have had guests, including women and their children, staying overnight in your home without our knowledge or permission. We warned you that this behavior must not continue because it was disrupting the operations and peaceful enjoyment of thee [sic] environment in the park.
>
> Yesterday we received yet another resident complaint about partying and drinking at your home. ***This behavior must stop.*** No other people are to occupy your home without our express written permission and we may request they apply for and are approved to reside in the park. You as a Park employee and Manager are to set the example for behavior for tenants.[3]

The letter requested Devers' acknowledgement, but he neither signed it nor heard anything further from the Yuhaszes. However, Devers understood that Emery was telling him that his partying and drinking "needed to cease."

¶ 16 The morning of July 23, 2015, Devers went to the office, informed Seminole that he was doing a private tree-cutting job that day, and left.

¶ 17 At around 4:30 or 5 p.m. that day, Devers bought two growlers of beer at a restaurant in Hardin. He then returned to Sunset Village and, at some point, started drinking.

¶ 18 That evening around dusk, several tenants notified Seminole that Devers was talking to a person requesting entry to Sunset Village with an RV. As entering RVs was Seminole's domain, she went to meet Devers. He told her he could handle things, but Seminole noted that he was drunk, and told him to go home.

¶ 19 Thereafter, Devers went to the office to check his e-mail, browse the Internet, and take care of a work-related matter. Seminole received another call from tenants, this time indicating that Devers was passed out in the office.

¶ 20 Seminole and her husband went to check on Devers. They found him passed out and slumped over on the office desk. Devers was wearing a lime-green shirt and blue jeans. They tried shaking him, picking his head up, and spraying him with water, but they

[3] Emphasis added.

could not wake him up. Around 9:30 p.m., Seminole called Holly, who directed Seminole to call 9-1-1.

¶ 21 Deputies from the Sheriff's Office responded to the scene within minutes and were able to rouse Devers by squeezing him between his neck and shoulder. However, Devers did not lift his head. The ambulance arrived a few minutes later. The EMTs checked Devers over and noted he was belligerent and uncooperative, had slurred speech and rambled, and smelled strongly of alcohol. Devers admitted that he had been drinking, but refused to say how much. The deputies gave him a breathalyzer test, which revealed a blood alcohol content (BAC) of 0.238. The EMTs tried to get Devers to sit up straight, but he could not, and they laid him back down. The EMTs assessed "acute alcohol intoxication." Devers refused treatment and refused to ride in the ambulance. The deputies and EMTs left him in the office because "EMS felt that insisting the patient get treatment would only make the situation dangerous for the providers." The ambulance left the premises at 9:53 p.m.

¶ 22 At that time, Devers was, in Seminole's words, still "really, really drunk," and still could not sit up. After she reported to Holly that Devers refused to go with the ambulance and was still in the office, Holly called the Sheriff's Office and asked that a deputy escort Devers home. Seminole left the office around 11:30 p.m.

¶ 23 The Sheriff's Office called Seminole around midnight to advise her that Devers was home. She and her husband then drove by Devers' trailer and observed him standing on the third step of his porch, leaning against his trailer. In her written statement, Seminole wrote: "I was surprised he could stand, because he wasn't able to sit up straight in the office chair." During her recorded statement, Seminole explained: "And when I was on my way back—or, on my way over here I noticed he was standing on his porch, leaned over. I was like, that's crazy because he couldn't even sit up straight."

¶ 24 Seminole and her husband continued on to the office to lock up. Seminole, concerned that Devers was going to fall and get hurt, asked one of the deputies who remained at the office to check on Devers to make sure he got inside; the deputy said he would. Seminole spoke with Holly once more to let her know that she had locked up.

¶ 25 On the morning of July 24, Seminole took a route to the office that did not take her by Devers' trailer because she thought Devers might still be intoxicated, or would be hung over and in a bad mood, and she did not want to "deal with him."

¶ 26 Around noon, Seminole started to worry because she had not yet heard from Devers. After lunch, Seminole became more concerned. She then took a coworker with her and went to check on him after lunch. She spoke with Devers' neighbors, then spotted Devers laying on the ground. He had on the same lime-green shirt, blue jeans, and boots he had been wearing the night before. His sunglasses and hat were by the porch, and his keys were on the porch landing. Devers' dog was not on the dog line. Devers was

not moving and he was making a gurgling sound, not speaking clearly. He was bleeding from the head. She called 9-1-1.

¶ 27 After the ambulance left with Devers, Seminole grabbed his keys, called his family, picked his daughter up at work, and brought her to the hospital. According to Seminole, Devers' stepson Josh Myers told Seminole that Devers said he never made it inside because he could not unlock the door and that he dropped his keys. Seminole relayed this information to Holly, who in turn noted Devers' electronic tenant file on July 24 at 2:04 p.m.: "Josh (Ken's son) said he got Ken to talk to him, was out there all night, never made it inside his house. Tried to unlock door and dropped his keys." In her written statement concerning the accident: Seminole wrote:

> Just before the doctor came out to tell the family about Ken's condition, Josh, Ken's stepson, told me that Ken told Josh Ken never made it into his house because he couldn't unlock the door, he dropped the keys.

Likewise, in the recorded statement Seminole gave to Devers' attorneys, wherein Seminole acknowledged that Devers would be mad at her for what she said, Seminole stated:

> P: . . . What makes you feel that he had been out all night? Rather than, he says . . .
> C: That he went back inside, changed out of his clothes, went outside to get his dog bowl and feed his dog? Like what he told me when I went over there and I was like, "No, you were wearing the same clothes." He was wearing a bright, lime-green shirt. Almost yellow, you know, the neons? And his denim pants with his boots. And his hat was, his hat was laying by him, wasn't on him, it was laying by him and his glasses was kind of flung off to the side. They're the kind that have, you know, when you take them off they'll just dangle there? I remember that specifically.
> P: So if, let's just say, if he had gone in and gone to bed and woken up at seven in the morning to feed his dog and let his dog out, it's possible that he could have slept in his clothes that night, I suppose. Were there any other indicators to you that he had been out all night? That he never made it inside?
> C: When I went to the E.R. that same day, I met up with his, I don't know what to call him, his step-son? Josh? And his, I took his daughter, Sadie, over there, and Josh said, "Well I got him to talk." I said, "Oh, he is talking now?" And he said, "Yeah, he said that he was out there all night." And I said, "Really?"
> P: Ken told Josh, told you that he'd been out there all night?
> C: I said, "That's what I thought, because," I said, "He was pretty drunk last night." And he said, "Yeah, I heard." He said, "What did he blow?" And I told him what I could remember. He said, "Well tell me what happened."

> So I told him. He said, "Well what was it like today?" And I told him, you know, the whole story. And he said, you know, he wiped his face, and standing there, he said, "They think he might be paralyzed; quadriplegic." And I was sitting there, and I was like, you know, we were all shocked, and I said, "But he said he was out all night?" And he said that he said he never made it inside. And I said, "So he did fall off the porch?" And he said, "I'm pretty damn sure he did." . . . .

Seminole further stated that she did not think the Sheriff's deputies went back and made sure Devers was inside.

¶ 28 Seminole also thought it was implausible that Devers stepped in the hole at his door and fell:

> C: . . . And what he told me at one point over the phone while he was still in Billings was that he said, "I went inside and when I was coming out," he said, "I don't know how, but I stepped in the hole and somehow I locked my door and shut it behind me before I went down." And I said, "How would that be possible? You would have ended up on top of the porch." And he said, "No, no, no, I went down. I shut the door and I fell—I stepped in that hole and I fell out."
> . . . .
> . . . That's what made me know he is completely confused about the whole thing. But it's really hard to let him know when he's wrong, because he's never wrong.

¶ 29 At trial, Myers denied that Devers said he never made it inside. Myers further denied telling Seminole that Devers said he never made it inside.

¶ 30 Devers is a quadriplegic because of the injuries sustained in the accident.

Resolution of Whether Devers' Fall Occurred at Night or in the Morning

¶ 31 Devers denies that he fell on the night of July 23; rather, he claims that he woke up on the morning of July 24, got dressed, tripped in the hole inside his front door, and fell off his porch while leaving to go to the office to work. Notwithstanding, after weighing all of the evidence, this Court finds that after being escorted to his front door, Devers never made it inside and fell off his porch shortly after midnight. This Court makes these findings for the following reasons.

¶ 32 First, this Court gives little weight to Devers' statements and testimony because of numerous inconsistencies and contradictions, and because he indicated that some of his answers were not based on his actual memory, but on what he typically did before his accident or on what others have told him. Devers gave a statement to State Fund on

October 7, 2015,[4] testified at a deposition on August 18, 2016, and testified at trial on October 14, 2016. He was asked about the night of July 23 in each instance. At his deposition, Devers testified that after he got home, he drank beer, showered, cooled off, and turned on the air conditioning. He could not recall whether he drank alone or with others. But at trial, he recalled that he drank with two friends, and named them. During his statement, Devers claimed he was "resting" in the office. But Sheriff's Office records show that Seminole summoned help because Devers was passed out and she could not wake him up. During his statement, Devers said he had had a "couple of beers" and partly blamed his condition at the office on "sun stroke." But the ambulance records show that Devers had drunk much more, and that his condition was assessed to be "acute alcohol intoxication." During his statement, Devers emphatically stated he walked to his house alone. At his deposition, Devers testified that he could not recall whether he walked home from the office alone. But at trial, he testified that he was escorted by law enforcement and that Officer Contrerez was with him, but then admitted on cross-examination that he did not know if he actually remembered that, or if it was just something he was told. At his deposition, Devers had no specific memory of going into his trailer. But at trial, he testified that he remembered unlocking his door, taking his dog out, going back inside, and getting ready for bed.

¶ 33 Devers was also asked what he could remember about July 24. At his deposition, Devers remembered waking up and putting on different clothes from the night before, though he could not remember the color of his T-shirt. But at trial, he testified that he woke up on the couch and put on a light-colored T-shirt and a black pair of pants. During his statement, Devers first said he woke up, brought his dog inside, and then fell when he was walking out the door. But during his deposition and at trial, Devers testified he woke up, took his dog outside and put him on his line, went back inside his trailer to get his keys and paperwork, and then fell as he was walking out the door. At his statement, Devers remembered opening his door to leave, getting his foot caught in a hole just inside it, and hitting the rail on the porch. But at his deposition, Devers could not remember stepping in the hole; he testified: "I remember getting my keys. And, you know, I grabbed the paperwork and, bam, lights out. . . . I remember grabbing the keys and the paperwork, and I remember opening the door. And then that's – that's – that's it." At trial, Devers testified he could not remember opening the door.

¶ 34 At trial, Devers blamed his faulty memory on his medications. Given the facts and circumstances, this Court did not expect Devers to have a perfect memory of what occurred. However, regardless of the reasons for the inconsistencies and contradictions, there were too many to find that Devers was a reliable witness.

¶ 35 Second, this Court gives substantial weight to Seminole's testimony because she was a credible witness and her version of events has remained consistent. Seminole

[4] Although Devers did not take an oath, the interview was recorded, and Devers stated that he had answered the adjuster's questions truthfully to the best of his knowledge.

provided a written statement on September 28, 2015, gave a recorded statement to Devers' attorneys on October 29, 2015, testified at a deposition on August 18, 2016, and testified at trial on October 14, 2016. Each time she was asked, Seminole stated: that when she found Devers on the ground, he was wearing the same clothes — a lime-green shirt, blue jeans, and boots — as the previous night, that his dog was nowhere to be seen, and that Myers told her Devers said he had been out all night. Devers argues that this Court should not give any weight to Seminole's statements that Myers reported that Devers said he was out all night because it is hearsay within hearsay and because Myers denied both parts of the hearsay at trial. However, Seminole reported her conversation with Myers to Holly on July 24, while Seminole was still at the hospital, and Holly recorded it in her notes that same day. Moreover, Seminole is a credible witness and consistently recounted this conversation in her written statement, at her recorded statement, and at trial. Although this Court is typically wary of hearsay within hearsay, this Court finds that this conversation occurred.

Resolution of Whether Devers' Alcohol Use was the Major Contributing Cause of his Accident

¶ 36 Since there was no other witness to his fall, Devers argues that this Court cannot find that alcohol was the major contributing cause of his fall because such a finding could be based only upon "speculation." However, this Court can make findings of fact based on circumstantial evidence, which is defined as "that which tends to establish a fact by proving another and which, though true, does not of itself conclusively establish that fact but affords an inference or presumption of its existence."[5]

¶ 37 Thus, in light of the facts that between approximately 9:30 and 10 p.m., Devers was passed out, could not be immediately roused, was belligerent and uncooperative, had slurred speech and rambled, smelled strongly of alcohol, could not sit up, had a BAC of 0.238, had to be escorted to his door, and, thereafter, was observed leaning against his trailer, this Court makes the following findings: Devers was intoxicated and, shortly after midnight, he lost his balance due to his intoxication and, consequently, fell off the porch,[6] and he lay where he landed until Seminole found him the next day.

¶ 38 This Court has considered other potential causes of Devers' fall — e.g., the condition of the stairs and porch of Devers' trailer and the hole in the floor inside Devers' door — and finds that none was an actual cause of Devers' fall and/or that none was a

[5] § 26-1-102(1), MCA.

[6] *See Hulse v. State, Dep't of Justice, Motor Vehicle Div.*, 1998 MT 108, ¶ 67, 289 Mont. 1, 961 P.2d 75 (citation omitted) ("Certain reactions to alcohol are so common that judicial notice will be taken of them . . . . "); *State v. Strobel*, 130 Mont. 442, 447, 304 P.2d 606, 609 (1956), *overruled in part on other grounds by State v. Pankow*, 134 Mont. 519, 333 P.2d 1017 (1958) (listing as examples of "the usual manifestations of intoxication, . . . slurred or thick speech, unsteadiness or staggering, or the smell of liquor on the breath"). *See also Ployhar v. Bd. of Trs. of Missoula Cnty. High Sch.*, 187 Mont. 363, 365, 609 P.2d 1226, 1228 (1980) (opinion evidence as to the cause of an accident is not necessary where the subject matter is relatively simple).

greater cause than Devers' use of alcohol. Devers' use of alcohol was the major contributing cause of his fall.

CONCLUSIONS OF LAW

¶ 39 This case is governed by the 2013 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Devers' accident.[7]

Issue One: Is Devers' claim barred by his intoxication?

A. Was alcohol the major contributing cause of Devers' injury?

¶ 40 Section 39-71-407, MCA, provides in pertinent part:

> (5) Except as provided in subsection (6) [not applicable here], 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.
>
> . . . .
>
> (16) 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 *Montana State Fund v. Grande*, the Montana Supreme Court affirmed this Court's ruling that the leading cause is "that cause which ranks first among all causes 'contributing to the result' . . . regardless of the respective percentages of multiple contributing causes."[8]

¶ 41 The burden of proving that an employee's use of alcohol or non-prescription drugs is the major contributing cause of the accident is on the workers' compensation insurer or uninsured employer.[9]

¶ 42 In *Van Vleet v. Montana Association of Counties Workers' Compensation Trust*, a deputy sheriff suffered an unwitnessed fall from a hotel balcony during a work conference, sustaining injuries from which he later died.[10] Although, pursuant to § 39-71-407(7), MCA, the deputy's intoxication did not render his widow ineligible for benefits, this Court initially found: "The claimant was extremely intoxicated [.203 BAC] at the time of the accident and

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[7] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[8] 2012 MT 67, ¶ 40, 364 Mont. 333, 274 P.3d 728.

[9] *See Van Vleet v. Montana Ass'n of Counties Workers' Comp. Trust*, 2004 MTWCC 8, ¶¶ 32-33, *rev'd on other grounds*, 2004 MT 367, 324 Mont. 517, 103 P.3d 544.

[10] *Van Vleet*, ¶ 6.

the best evidence is that in his intoxicated state he simply fell over the balcony to his death. His intoxication was clearly a major contributing cause to his accident and death."[11]

¶ 43 Based on his behavior and his BAC, Devers, like the deputy in *Van Vleet*, was intoxicated at the time of his fall. As evidenced by his inability to sit up at the office, requirement of an escort to get home, and need to lean against his trailer just outside his door, Devers' intoxication impaired his balance. As in *Van Vleet*, the best evidence is that in his intoxicated state, Devers lost his balance and fell off his porch. Devers' intoxication was the major contributing cause of his fall and injury.

B. Did the Yuhaszes know of, and fail to attempt to stop, Devers' use of alcohol?

¶ 44 Section 39-71-407, MCA, also provides:

> (7) The provisions of subsection (5) do not apply if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs not prescribed by a physician.

"The clear intent of the exception is to require employers to take steps to prevent accidents which are bound to happen when employees are intoxicated."[12]

¶ 45 While the cases focus mainly on the actions of an employer that will not suffice under the statute, they also offer guidance on the actions that will. Being aware of an employee's non-prescribed use of alcohol or drugs and doing nothing about it is clearly not sufficient. In *Thoreson v. Uninsured Employers' Fund*,[13] the employer observed the claimant and another man smoking on the morning of the accident.[14] Thereafter, he smelled the odor of marijuana where the men had been, but did not know who had been smoking the substance.[15] He did, however, know that both men would soon be up on the roof of the house on which they were working.[16] This Court concluded that the employer "could have inquired as to whom was smoking the dope and barred him from the roof or from further smoking, but he did nothing. Because of his failure, claimant is eligible for benefits."[17]

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[11] *Van Vleet*, ¶ 33.

[12] *Thoreson v. Uninsured Employers' Fund*, 2000 MTWCC 40, ¶ 48, *aff'd in nonciteable decision*, 2002 MT 6.

[13] 2000 MTWCC 40A-2 (amending 2000 MTWCC 40).

[14] *Thoreson*, 2000 MTWCC 40A-2, ¶ 5 (amending 2000 MTWCC 40, ¶ 31).

[15] *Id.*

[16] *Id*.

[17] *Thoreson*, 2000 MTWCC 40, ¶ 48.

¶ 46 Moreover, it is not sufficient for an employer to simply set boundaries while otherwise condoning the use of the intoxicating substance; the statute requires the employer to attempt to stop the use of the intoxicating substance. In *Van Vleet*, the deputy sheriff's direct supervisor "was aware of the availability of alcoholic beverages" in the conference's hospitality room.[18] "He did not disapprove [of the deputy sheriff] or other agents drinking; he had simply instructed them not to drive if drinking."[19] This Court concluded, "The situation in this case is no different than in *Thoreson . . .* wherein I held that the employer's knowledge of the claimant's marijuana use immediately preceding his injury precluded the drug and alcohol defense otherwise available . . . . I therefore conclude that the claim in this case is not barred [by the deputy sheriff's use of alcohol]."[20]

¶ 47 Similarly, in *Heth v. Montana State Fund*,[21] the employer knew that the claimant "drank alcohol on the job on a regular, recurrent basis."[22] He had advised the claimant to " 'modulate' the amount he drank while working,"[23] meaning, "not drink a six-pack all at once."[24] Notwithstanding State Fund's argument to the contrary, this Court stated that the employer did not have to "witness the [claimant's] drinking immediately before the accident."[25] This Court concluded, "Although [the employer] may have attempted to get [the claimant] to moderate his on-the-job consumption of alcohol and to spread his drinks out throughout the day, [he] made no attempt to actually ***stop*** [the claimant's] use of alcohol on the job. Therefore, . . . the bar of eligibility for benefits [due to the use of alcohol] does not apply . . . ."[26]

¶ 48 Here, the Yuhaszes knew Devers was drinking during his regular workday and in the evenings. Unlike the employers in *Thoreson*, *Van Vleet*, and *Heth*, however, they made their disapproval of Devers' drinking clear and they attempted to stop it with progressive discipline: Emery reprimanded Devers over the phone and told him that drinking during regular work hours was not allowed, then Holly had him tested by an independent testing company, and finally Emery faxed him a warning letter two weeks before Devers' accident. Emery's letter did not equivocate; Emery told Devers that his partying and drinking "must stop," which Devers understood to mean that his partying and drinking "needed to cease." While the Yuhaszes could have done more, e.g., requiring Devers to acknowledge the July 9 letter, following up with him when he did not, or barring

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[18] *Van Vleet*, ¶ 11.

[19] *Id.*

[20] *Van Vleet*, ¶ 35 (issue not appealed).

[21] 2008 MTWCC 19, *aff'd*, 2009 MT 149, 350 Mont. 376, 208 P.3d 394.

[22] *Heth*, ¶ 48.

[23] *Heth*, ¶ 12.

[24] *Heth*, ¶ 17.

[25] *Heth*, ¶ 48.

[26] *Id.* (emphasis in original).

him from working at Sunset Village, § 39-71-407(7), MCA, simply requires an "attempt to stop" the behavior; under the statute, their actions were sufficient.

¶ 49 Because Devers' use of alcohol was the major contributing cause of his accident, and his employer attempted to stop it, Devers is not eligible for workers' compensation benefits under § 39-71-407(5) and (7), MCA.

Issue 2: Did Devers' injury arise out of and in the course of his employment under the premises rule or the bunkhouse rule?

¶ 50 Since this Court's resolution of Issue 1 is dispositive, this Court declines to address Issue 2.

JUDGMENT

¶ 51 Devers is not eligible for workers' compensation benefits under § 39-71-407(5) and (7), MCA.

¶ 52 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 this 11th day of September, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Paul W. Adam/Hayley Kemmick
Stephanie A. Hollar

Submitted: December 22, 2016