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I. INTRODUCTION

Under the fundamental principle of workers' compensation, a worker who is injured in an accident that arises out of and in the course of employment, is entitled to workers' compensation benefits regardless of fault.[1] Because the employer gives up his common law defenses and assumes a no-fault liability, he is relieved of the prospect of large common law judgments.[2] In effect, workers' compensation is just a cost of doing business. The compensation regardless of fault aspect of the workers' compensation formula may be inappropriate, however, when a worker is injured while he is voluntarily intoxicated. Intoxication not only increases the risk of injury for the worker himself, but also increases the risk of injury to fellow employees and society in general.

This comment explores the effect of intoxication upon workers' compensation law in Montana and in other jurisdictions. It focuses on three intoxication defense standards, including willful misconduct by the employee, intoxication as the proximate cause of the employee's injury, and the employee's abandonment of employment, and relates them to current Montana law. Prior to this discussion, however, general policy considerations concerning the effect of intoxication upon workers' compensation must be examined.

II. POLICY AND BACKGROUND

Intoxication is not a defense to deny workers' compensation benefits unless a jurisdiction provides such a defense as part of its workers' compensation act,[3] or unless a worker becomes so intoxicated that he is no longer capable of performing his job and thus abandons the course of his employment.[4] There are several reasons for granting workers' compensation benefits to a worker who is intoxicated at the time of his injury.

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1. MONT. CODE ANN. § 39-71-407 (1983); Wiggins v. Industrial Accident Bd., 54 Mont. 335, 170 P. 9 (1918).

2. A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10 (1983).

3. See, e.g., N.M. STAT. ANN. § 52-1-11 (Supp. 1984) which provides in pertinent part that "[n]o compensation [shall be awarded] in event such injury was occasioned by the intoxication of such workman." *See also infra* notes 21-32 and accompanying text.

4. *See, e.g.*, Steffes v. 93 Leasing Co., Inc., 177 Mont. 83, 580 P.2d 450 (1978).

First, as has been previously stated, the fundamental principle of workers' compensation is that, if an employee is injured while engaged in an activity arising out of and in the course of his employment, he is entitled to workers' compensation benefits regardless of fault.[5] Therefore, under the compensation formula, even if a worker is negligent when he is injured, benefits will be awarded and arguably the same is true even though a worker is intoxicated.[6] Second, if a worker is intoxicated, but continues to perform his duties, the employer is benefitting from the worker's activity and the worker is still within the course of his employment.[7] Third, as the Missouri Supreme Court noted, it is the employer's duty, not that of workers' compensation, to guard itself against intoxicated employees.[8] The Missouri court stated, it is the employer's duty "to enforce [its] rules against drinking by discharging offending employees, or by such other disciplinary measures as [it sees] fit to adopt."[9] In addition, because the workers' compensation law is liberally construed in favor of the injured worker,[10] inherent in workers' compensation policy is the acknowledgment that some work-related injuries occur regardless of whether the injured worker is intoxicated.[11] Finally, the policy and administration of workers' compensation dictate that any limitation on the broad scope of its coverage be narrowly construed to protect "the security and families of all workers, including the just and the unjust, . . . and even the sober and the not-so-sober."[12]

The reasons for awarding workers' compensation benefits must be weighed against the policy considerations for denying coverage when a worker is hurt as a result of his intoxication. The policy considerations for denying coverage include the employer. Required to insure against all work-related injuries, the employer must also insure a higher risk employee, not because of the normal risk of the workplace, which workers' compensation was meant to cover, but because an additional risk is brought to the workplace by an intoxicated employee.

Larson, a leading authority on workers' compensation law, also

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5. N. GROSFIELD, MONTANA WORKERS' COMPENSATION MANUAL § 1.20 (1979).
6. Gordon v. H.C. Smith Constr. Co., ___ Mont. ___, 612 P.2d 668 (1980).
7. Embree v. Industrial Comm'n, 21 Ariz. App. 411, 520 P.2d 324 (1974).
8. Phillips v. Air Reduction Sales Co., 337 Mo. 587, 85 S.W.2d 551 (1935).
9. *Id.* at 595, 85 S.W.2d at 555.
10. MONT. CODE ANN. § 39-71-104 (1983).
11. *See, e.g.*, Pittman v. Twin City Laundry & Cleaners, 300 S.E.2d 899 (N.C. Ct. App. 1983) (discussed in text accompanying note 44).
12. Larson, *Intoxication as a Defense in Workmen's Compensation*, 59 CORNELL L. REV. 398, 417 (1974).

recognizes that the intoxicated worker poses a problem for the compensation formula. Larson states: "The sympathy one is bound to feel for the workman who conscientiously tries to carry on his work in spite of internal weaknesses or illness does not carry over to the workman who voluntarily becomes intoxicated on the job."[13]

III. Intoxication Defense Standards

Most jurisdictions use one of three standards to determine whether compensation benefits will be denied because of intoxication. These standards include whether the intoxication violated a willful misconduct statute, whether there was a causal relationship between the worker's intoxication and his injury, and finally, whether the employee as a result of his intoxication abandoned the course of his employment.

A. *Willful Misconduct*

In some jurisdictions, workers' compensation benefits can be denied when an employee is injured while willfully violating a safety regulation, work rule, or statute.[14] Attempts to treat intoxication as willful misconduct, however, generally have been unsuccessful.[15] For example, in *Chancy v. Poper*,[16] where the pilot of a crop dusting plane drank approximately two cans of beer within six hours of his flight in violation of Federal Aviation Administration regulations, the Georgia Supreme Court refused to decide whether such conduct constituted willful misconduct in the absence of a causal relationship between the consumption of alcohol and the decedent's airplane crash. Similarly, a Pennsylvania court refused to deny workers' compensation benefits solely as a violation of a willful misconduct statute in a case in which a hospital orderly who had been drinking in violation of hospital regulations and state health statutes died as a result of a fall he sustained while working.[17] As in *Chancy*, the court refused to deny compen-

13. Larson, *supra* note 2, at § 34.34.

14. See, e.g., S.D. Codified Laws Ann. § 62-4-37 (Supp. 1984) which provides in pertinent part that "[n]o compensation shall be allowed for any injury or death due to the employee's willful misconduct." *See also* Mass. Ann. Laws ch. 152 § 27 (Michie/Law. Co-op. Supp. 1984); Mich. Stat. Ann. § 17.237(305) (Callaghan Supp. 1985). For a variation of the willful misconduct defense standard, see Neb. Rev. Stat. § 48-101 (1984) and N.J. Stat. Ann. § 34:15-1 (West Supp. 1984) which provide a defense to a workers' compensation claim if the injured worker was "willfully negligent" at the time of his injury.

15. Larson, *supra* note 2, § 34.22.

16. 136 Ga. App. 826, 222 S.E.2d 667 (1975).

17. Hopwood v. Pittsburgh, 152 Pa. Super. 398, 33 A.2d 658 (1943). *See also* Wheeler v. Glen Falls Ins. Co., 513 S.W.2d 179 (Tenn. 1974).

sation benefits by relying on a willful misconduct statute alone. Rather, the award of benefits was affirmed as there was no evidence of a causal relationship between the decedent's drinking and his death.

Workers' compensation benefits have been denied where intoxication was held to be willful misconduct.[18] In *Banks v. Department of Education, Bureau of Rehabilitation*,[19] an education counselor was killed in an automobile accident. The decedent, while highly intoxicated, had allowed an unlicensed driver to drive his car. In denying death benefits, the court stated that the decedent had committed willful misconduct not only in permitting an unlicensed person to drive his car, but in addition, when he became intoxicated.

B. *Causal Relationship*

1. *Background*

The majority of jurisdictions deny workers' compensation benefits when the claimant's intoxication has some causal relationship to the worker's injury.[20] The extent of causation required depends upon the statutory language of each individual jurisdiction. The scope of causation requirements, however, range from no causal connection to the requirement that intoxication be the sole cause of the injury.[21]

At one end of the causation spectrum, a minority of jurisdictions merely require proof of intoxication at the time of the injury to deny benefits.[22] In Texas, for example, proof that a worker was merely in a state of intoxication at the time of injury provides the employer with a complete defense against a workers' compensation claim.[23] On the opposite extreme of the causation spectrum, several jurisdictions require intoxication to be the sole cause of the injury.[24]

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18. Banks v. Department of Educ., Bureau of Rehabilitation, 462 S.W.2d 428 (Ky. 1971); Karns v. Liquid Carbonic Corp., 275 Md. 1, 338 A.2d 251 (1978). See also Herman v. Greenpoint Barrel & Drum Reconditioning Co., 9 A.D. 572, 189 N.Y.S.2d 353 (N.Y. App. Div. 1959), *aff'd*, 8 N.Y.2d 880, 203 N.Y.S.2d 922 (1960), in which the court denied compensation, reasoning that the decedent's intoxication causing his death was a voluntary act.

19. 462 S.W.2d 428 (Ky. 1971).

20. Thirty-nine states statutorily provide that intoxication is a defense against a workers' compensation claim. *See infra* notes 23-32 and accompanying text.

21. Larson, *supra* note 12, at 405.

22. NEB. REV. STAT. § 48-102(a) (1984); NEV. REV. STAT. § 616.565(1)(c) (1979); TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon Supp. 1984).

23. Traders & Gen. Ins. Co. v. Williams, 66 S.W.2d 780 (Tex. Civ. App. 1933).

24. *See, e.g.*, KAN. STAT. ANN. § 44-501 (Supp. 1984); Schmidt v. Jensen Motors, Inc.,

Somewhere between these two causal extremes lies the majority of jurisdictions which provide varying intoxication defense standards. To illustrate this point, consider that Alabama, Georgia, Indiana, South Dakota, Tennessee, and Virginia all deny workers' compensation benefits for work-related injuries "due to" intoxication.[25] Similarly, California, Connecticut, Louisiana, Pennsylvania, Utah, Vermont, West Virginia, and Wyoming courts deny benefits when a work-related injury is "caused by" intoxication.[26] If a work-related injury "results from" intoxication in Colorado, Maine, and Wisconsin[27] or is a "result of" intoxication in Delaware, compensation benefits may be denied.[28] While "due to," "caused by," "results from," and "results of" have been construed to require that intoxication be the proximate cause of the injury,[29] the states of Alaska, Minnesota, Mississippi, New Jersey, and North Carolina specifically require that intoxication be "the proximate cause" of the work-related injury in order to be the basis for denying workers' compensation benefits.[30] Still other jurisdictions have adopted

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208 Kan. 182, 490 P.2d 383 (1971); MD. ANN. CODE art. 101, § 45 (Supp. 1984); *Karns*, 275 Md. 1, 338 A.2d 251; N.Y. [WORK. COMP.] art. 1, § 10 (Consol. 1984); Curtis v. Cross Bay Excavating Co., 65 A.D.2d 638, 409 N.Y.S.2d 279 (1978); OKLA STAT. ANN. tit. 85, § 11 (West Supp. 1985). See also IOWA CODE ANN. § 85.16 (West Supp. 1985) which requires the intoxication to be a "substantial factor" in causing the injury.

25. ALA. CODE § 25-5-51 (Supp. 1984); GA. CODE ANN. § 34-9-17 (Supp. 1984); IND. CODE ANN. § 22-3-7-21(b) (Burns Supp. 1984); S.D. CODIFIED LAWS ANN. § 62-4-37 (Supp. 1984); TENN. CODE ANN. § 50-6-110(a) (Supp. 1984); VA. CODE § 65.1-38(3) (Supp. 1984).

26. CAL. [LABOR] CODE § 3600(a)(4) (West Supp. 1984); CONN. GEN. STAT. ANN. § 31-284(a) (West Supp. 1984); LA. REV. STAT. ANN. § 23:1081(1)(b) (West Supp. 1984); PA. STAT. ANN. tit. 77, § 41(c) (Purdon Supp. 1984); UTAH CODE ANN. § 35-1-14 (Supp. 1983); VT. STAT. ANN. tit. 21, § 649 (Supp. 1984); W. VA. CODE § 23-4-2(a) (Supp. 1984); WYO. STAT. § 27-12-102(xii)(B) (Supp. 1983).

27. COLO. REV. STAT. § 8-52-104(c) (Supp. 1984); ME. REV. STAT. ANN. tit. 39, § 61 (Supp. 1983); WIS. STAT. ANN. § 102.58 (West Supp. 1984).

28. DEL. CODE ANN. tit. 19, § 2353(b) (Supp. 1984).

29. LARSON, *supra* note 2, § 34.33. *See also* Republic Indem. Co. v. Workers Compensation Appeals Bd., 138 Cal. App. 3d 42, 187 Cal. Rptr. 636 (Cal. Ct. App. 1982); Stearns-Roger Mfg. Co. v. Casteel, 128 Colo. 289, 261 P.2d 228 (1953); Stephens v. Hartford Accident & Indem. Co., 116 Ga. App. 15, 156 S.E.2d 100 (Ga. Ct. App. 1967); Conley v. Travelers Ins. Co., 53 So. 2d 681 (La. Ct. App. 1951); Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478 (S.D. 1982); Wooten Transp. Inc. v. Hunter, 535 S.W.2d 858 (Tenn. 1976); King v. Empire Collieries Co., 148 Va. 585, 139 S.E. 478 (1927); Stevely v. Compensation Comm'r, 125 W. Va. 308, 24 S.E.2d 95 (1943); Nutrine Candy Co. v. Industrial Comm'n, 243 Wis. 52, 9 N.W.2d 94 (1943).

30. ALASKA STAT. § 23.30.235(2) (Supp. 1984); MINN. STAT. ANN. § 176.021(1) (West Supp. 1984), *construed in* Manthey v. Charles E. Bernick, Inc., 306 N.W.2d 544 (Minn. 1981); MISS. CODE ANN. § 71-3-7 (Supp. 1984); N.J. STAT. ANN. § 34:15-7 (West Supp. 1984), but see Anslinger v. Wallace, 124 N.J. Super. 184, 305 A.2d 797 (1973) in which the court stated that this provision applies only if the worker's intoxication is solely responsible for the injury; N.C. GEN. STAT. § 97-12 (Supp. 1983).

proximate cause standards using a variety of statutory language.[31]

2. *Proximate Cause*

Of the jurisdictions that provide a defense for intoxication, the majority use the proximate cause standard.[32] To be the proximate cause of an injury, the intoxication must be shown to be more than just a contributory cause to the work-related injury.[33] *Driscoll v. Great Plains Marketing Co.*,[34] in which compensation benefits were denied because intoxication was the proximate cause of the accident, is illustrative of this standard.

In *Driscoll*, a contractor, while returning from a job site, stopped at a bar to talk to a subcontractor and to socialize. Two hours later the contractor, with a 0.16% blood alcohol content, was injured in a car accident. In denying the claimant compensation benefits, the South Dakota court set forth the employer's burden of proof to substantiate a proximate cause defense. The court stated, "[E]ffects of employee's intoxication [sic] in causing his injury would lead reasonable men to conclude that [intoxication] was a substantial factor in causing the injury."[35] Applying this test, the court expressly stated that proximate cause in workers' compensation analysis carries the same meaning it has in the law of negligence.[36]

Under workers' compensation analysis, the defendant claiming the defense of intoxication has the burden of proof. Ordinarily, evidence of blood alcohol content, by itself, is insufficient to prove that intoxication proximately caused an injury.[37] For example, in

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31. Seven jurisdictions, using statutory language unique to each jurisdiction, provide a defense for intoxication when the intoxication was the proximate cause of the work-related injury or death. In lieu of the term "proximate cause," however, the following language is employed: "occasioned primarily by," FLA. STAT. ANN. § 440.09(3) (West Supp. 1985), *construed in* Zee v. Gary, 137 Fla. 741, 189 So. 34 (1939); "incurred by," HAWAII REV. STAT. § 386-3 (Supp. 1984); "proximate result," IDAHO CODE § 72-208(2) (Supp. 1984); "proximately caused primarily," KY. REV. STAT. ANN. § 342.610(3) (Baldwin Supp. 1984); "cause in whole or in part," N.H. REV. STAT ANN. § 281:15 (Supp. 1983); "occasioned by," N.M. STAT. ANN. § 52-1-11 (Supp. 1984), *construed in* Walker v. Woolridge, 58 N.M. 183, 268 P.2d 579 (1954); "because of," N.D. CENT. CODE § 65-01-02(7) (Supp. 1983); "resulting from," S.C. CODE ANN. § 42-11-100(2) (Law. Co-op 1984).

32. *See supra* notes 26-32 and accompanying text.

33. Thake v. Backhauls, Inc., 345 N.W.2d 745 (Minn. 1984); Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478 (S.D. 1982).

34. 322 N.W.2d 478 (S.D. 1982).

35. *Id.* at 479-80.

36. *Id.* at 479.

37. *Thake*, 345 N.W.2d 745. Blood alcohol content refers to the concentration of alcohol in a person's body at the time of testing. "When the blood alcohol [content] reaches a level of 0.10%, it means that there is one part alcohol for every thousand parts of blood."

Board of Commissioners v. Dudley,[38] the claimant was injured in a vehicle accident when the truck he was driving swerved from its lane and collided with an oncoming vehicle. The claimant at the time of the accident had a 0.41% blood alcohol content.[39] Additionally, there was no evidence of mechanical failure, and the state trooper at the scene of the accident detected an odor of alcohol in the claimant's truck. In reversing its previous decision to deny benefits, the appellate court remanded the case, holding that there had been no finding of fact as to the issue of intoxication.

The burden of proof that intoxication was the proximate cause of a worker's injury is not insurmountable. In *Richards v. Tulane Toyota, Inc.*,[40] the Louisiana Court of Appeals upheld the lower court's decision to deny an automobile salesman compensation benefits when it was proven that the claimant was intoxicated at the time of his injury and that his intoxication had caused his injuries. The *Richards* court noted several pieces of evidence in support of its decision to deny compensation benefits, including a broken bottle of vodka in the wrecked vehicle and the odor of alcohol in the vehicle. Additionally, Richards had a blood alcohol content of 0.24% and mumbled while being questioned by a highway patrolman. The accident occurred on a clear day and an expert testified that a person would not make a U-turn on a highway unless he was intoxicated. The court held that such evidence was sufficient proof that Richards was intoxicated and that his intoxication was the cause of his injuries.[41]

As stated in *Richards*, proximate cause analysis in the workers' compensation setting involves two issues: (1) whether the worker was intoxicated at the time of his injury; and (2) whether intoxication was the proximate cause of his injuries. This two-step

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Body weight, amount of alcohol consumed, and drinking time all affect the blood alcohol content of a particular person. For further information on blood alcohol concentration, see MONTANA HIGHWAY TRAFFIC SAFETY DIVISION DEPARTMENT OF JUSTICE, BLOOD ALCOHOL CONCENTRATION (1984) [hereinafter referred to as PAMPHLET]. *See also infra* note 40.

38. 167 Ind. App. 693, 340 N.E.2d 808 (Ind. Ct. App. 1976), *rev'd and remanded on reh'g*, 167 Ind. App. 707, 344 N.E.2d 853 (Ind. Ct. App. 1976).

39. In Montana it is presumed that a person is under the influence of alcohol if he has a blood alcohol content of 0.10% or more. MONT. CODE ANN. § 61-8-401(3)(c) (1983). *See also Gordon*, ___ Mont. ___, 612 P.2d 668. Generally, a person with a 0.05% to 0.08% blood alcohol content has a reduction in his reaction time and judgment. A person's senses of hearing, speech, vision, and balance are altered when his blood alcohol content reaches between 0.09% and 0.15%. At 0.16% to 0.30% blood alcohol content evidence of gross intoxication begins to occur and a person may become unconscious. When blood alcohol content reaches 0.30% or greater, most drinkers are unconscious and at a point near death. *See* PAMPHLET, *supra* note 38.

40. 419 So.2d 1306 (La. Ct. App. 1982).

41. *Id.* at 1307.

analysis insures against the denial of compensation benefits because of intoxication in and of itself.[42]

In *Pittman v. Twin City Laundry & Cleaners*,[43] the second step of the proximate cause two-step analysis was not satisfied and compensation benefits were awarded. In *Pittman*, the decedent, an employee at a laundromat, had been drinking all afternoon with his coemployees. Late in the day, while preparing to close the business, the decedent, an innocent bystander, was shot when two of his fellow employees got into a fight. The evidence showed that the decedent was intoxicated at the time he was killed. The court, however, awarded compensation benefits because the intoxication did not proximately cause Pittman's death. *Pittman*, therefore, emphasizes that proximate cause is a two-step process requiring the employer claiming intoxication as a defense to satisfy a heavy burden of proof for each step.

C. *Abandonment of Employment*

In the absence of a statutory defense for intoxication, a party claiming intoxication as a defense will attack the "in the course of" leg of the compensation formula.[44] In effect, the party claiming the defense will argue that the injured worker was so intoxicated that he could no longer perform the duties of employment, and therefore, the injury did not occur in the course of employment.[45]

In *Brown v. Mid-Central Fish Co.*,[46] the court analyzed a compensation claim using the abandonment of employment standard. The decedent's widow in *Brown* sought benefits when her husband, a traveling salesman, was killed in a one-car collision. The court stated the abandonment of employment test as follows: "While intoxication . . . may furnish a defense . . . for workmen's compensation, it must be shown that the employee was intoxicated to such an extent that it was impossible for him to physically and mentally engage in his employment."[47] Holding that although the decedent had been drinking, he was not so intoxicated at the time of the accident to have abandoned his employment, the court affirmed the award of compensation benefits.

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42. *See supra* text accompanying notes 23 and 24.

43. 61 N.C. App. 468, 300 S.E.2d 899 (1983).

44. In general, the "in the course of employment" test of the workers' compensation formula refers to the "time, place, and circumstances under which the accident took place." GROSFIELD, *supra* note 5, at § 4.21.

45. *See, e.g., Steffes*, 177 Mont. 83, 580 P.2d 450; Flavorland Indus., Inc. v. Schumaker, 32 Wash. App. 428, 647 P.2d 1062 (1982).

46. 641 S.W.2d 785 (Mo. Ct. App. 1982).

47. *Id.* at 787.

Simple intoxication does not constitute abandonment of employment.[48] In *Embree v. Industrial Commission*,[49] a truck driver who had a 0.153% blood alcohol content fell and injured himself while working on his truck. The court held that to deny compensation benefits upon the basis of abandonment of employment, proof of simple intoxication is insufficient. Stating that the employee must be so intoxicated that he can no longer follow his employment, the *Embree* court found ample evidence that the claimant was capable of performing his duty and thus awarded benefits.

IV. MONTANA LAW

The effect of intoxication on Montana workers' compensation awards has not been profound. The Montana Workers' Compensation Act provides no defense for intoxication. Nor does the Act provide a defense for willful misconduct. Not surprisingly, therefore, the Montana Supreme Court adopted the abandonment of employment standard when it reviewed intoxication defenses to workers' compensation claims in Montana.[50]

In only one of the relatively few cases the court has decided on this issue did the court directly analyze the effect of intoxication on a compensation claim.[51] In two other cases, the court merely addressed the issue in passing.[52] Two cases, however, are examined in order to determine the current effect of intoxication on Montana law and to present a recommendation for the future.

A. *Steffes v. 93 Leasing Co., Inc.*

In *Steffes v. 93 Leasing Co., Inc.*,[53] the Montana Supreme Court analyzed the effect of intoxication on workers' compensation claims in Montana. In *Steffes*, the decedent, a car salesman for 93 Leasing Company, was killed in a car accident when he and his friend Stephen Kottre were driving from Seeley Lake to Missoula in search of a stolen car. Earlier, the two had driven the car to Seeley Lake so that they could exchange a vehicle with a potential customer. While Steffes and the customer talked about the exchange in a Seeley Lake bar, both Steffes and Kottre had several drinks. At some time during the evening, the vehicle Steffes had

48. *Embree*, 21 Ariz. App. 411, 520 P.2d 324.
49. 21 Ariz. App. 411, 520 P.2d 324 (1974).
50. *Steffes*, 177 Mont. 83, 580 P.2d 450.
51. *Id.*
52. *Gordon*, ___ Mont. ___, 612 P.2d 668; Breen v. Industrial Acc. Bd., 150 Mont. 463, 436 P.2d 701 (1968).
53. 177 Mont. 83, 580 P.2d 450 (1978).

driven to Seeley Lake for his employer was stolen. Steffes and Kottre remained at the bar until it closed waiting for the car to return. After the bar closed, they ate breakfast, drank some coffee, and then decided to drive to Missoula in search of the stolen car. Steffes was killed on their return trip to Missoula when the vehicle driven by Kottre was involved in an accident. At the time of the accident, Steffes had a 0.34% blood alcohol content.[54]

In its defense, 93 Leasing Company argued that because of his intoxication, Steffes was incapable of performing his job and, therefore, was not within the course of his employment at the time of his death. The court, however, disagreed. Noting that the Montana Workers' Compensation Act provides no defense for intoxication, the court, citing Larson,[55] stated that in the absence of a statutory defense, the abandonment of employment standard must be applied.[56] It concluded that Steffes had not abandoned his employment and, therefore, was acting within the course of his employment at the time of his death. In reaching its conclusion, the court stated that even though Steffes had a 0.34% blood alcohol content, there was substantial evidence that he had not abandoned his employment. That evidence included Steffes' concern about the stolen automobile and, more importantly, the fact that at the time of the fatal accident, he was searching for the missing automobile that he had driven to Seeley Lake for his employer. In addition, Steffes was not driving the vehicle when the accident occurred. Finally, the court noted that there was no evidence that Steffes reached such a level of intoxication that he *intended* to abandon his employment.[57]

B. *Gordon v. H.C. Smith Construction Co.*

In 1980, the Montana Supreme Court, in dictum, once again analyzed the effect of intoxication on workers' compensation claims in *Gordon v. H.C. Smith Construction Co.*[58] The claimant, an electrician from Butte, lived in a motel in Lewistown while working on a missile site near Denton. Following work one day, Gordon and fellow employees met at a bar in Denton, drank for some time, then left in a pickup heading toward Stanford, which is in the opposite direction of Lewistown. During that trip, Gordon was killed when the pickup in which he was a passenger left the

54. *Id.* at 85, 580 P.2d at 452.
55. LARSON, *supra* note 2, § 34.21.
56. *Steffes*, 177 Mont. at 90, 580 P.2d at 454.
57. *Id.* at 90, 580 P.2d at 455 (emphasis added).
58. *Gordon*, ___ Mont. ___, 612 P.2d 668.

highway.

As part of its defense, H.C. Construction argued that Gordon's drinking after work constituted a deviation from the course of his employment. The court quickly dismissed this argument by stating that there was no evidence of "over-indulgence" by Gordon.[59] Apparently, Gordon's blood sample developed a leak and consequently no results from a blood alcohol test were obtained.[60] The two other people in the vehicle at the time of the accident, however, had relatively low blood alcohol contents.[61] Noting that a blood alcohol content of 0.10% to 0.15% merely gives rise to a presumption of intoxication under Montana law,[62] the court reaffirmed *Steffes* when it stated that intoxication in and of itself does not take a worker out of the course of his employment.[63]

C. *Analysis*

1. *Abandonment of Employment*

Steffes and *Gordon* are analogous to the *Brown* and *Embree* decisions in which the courts analyzed the effect of intoxication on workers' compensation claims using the abandonment of employment standard. To support a finding of abandonment of employment, the *Brown* court required the claimant to be so intoxicated that it would be impossible for him to "physically and mentally engage in his employment."[64] Similarly, in *Steffes*, the Montana court required both physical and mental abandonment of employment before intoxication could be used as a defense to deny compensation benefits. This became evident when the court stated that in order for an intoxicated worker to be considered outside the course of his employment, he must not only be unable to perform the duties of his employment, but also *intend* to abandon his employment.[65]

In *Embree*, the court stated that intoxication by itself is insufficient to constitute abandonment of employment.[66] Undoubtedly, the Montana court would agree. In *Steffes*, the decedent had a

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59. *Id.* at ____, 612 P.2d at 672.

60. *Id.* at ____, 612 P.2d at 669.

61. The driver of the vehicle had a 0.06% blood alcohol level and another passenger, also killed in the accident, had a blood alcohol level of 0.126%. *Id.*

62. Actually, MONT. CODE ANN. § 61-8-401(3)(c) (1983) provides that a person with a mere blood alcohol content of 0.10% is presumed to be under the influence of alcohol.

63. *Gordon*, ____ Mont. at ____, 612 P.2d at 672.

64. *Brown*, 641 S.W.2d at 787.

65. *Steffes*, 177 Mont. at 90, 580 P.2d at 455 (emphasis added).

66. *Embree*, 21 Ariz. App. 411, 520 P.2d 324.

0.34% blood alcohol content and the court recognized that at such a level Steffes was legally intoxicated at the time of his death. Nevertheless, the court affirmed the award of benefits.[67] Moreover, in *Gordon*, the court, in dictum, stated that intoxication by itself does not constitute a deviation from employment.[68] Therefore, as all four cases recognize, in order to invoke the abandonment of employment defense, the party claiming intoxication must not only prove that the injured worker was intoxicated at the time of his injury, but in addition, must prove that the injured worker was so highly intoxicated that he physically and mentally abandoned his employment.

2. *Causal Relationship*

In *Steffes*, the court hints that it could apply some causation analysis when a worker was intoxicated at the time of his injury. In affirming the award of compensation benefits, the court stated that "it cannot be said that Steffes' intoxication contributed to the cause of the accident."[69] It may be inferred from that statement that had Steffes been the driver of the vehicle at the time of the accident or had his intoxication been a factor in his death, the court may not have awarded benefits.

Later in *Gordon*, however, the court never mentioned the possibility of applying a causation standard. When analyzing the intoxication issue, the court stated that: "the insurer is attempting to inject fault into a no fault system. Workers' compensation legislation is the original no fault insurance. If an employee performs his job negligently and is killed as a result, his death is compensable."[70]

Although the abandonment of employment standard fits well within the no fault construction of the Montana Workers' Compensation Act, there are several reasons why Montana, through legislative intervention, should join the majority of jurisdictions and apply a causation standard when evaluating a case in which a worker was intoxicated at the time of his injury.

Implicit under current Montana law is tolerance for the intoxicated worker. Although it cannot be argued that workers' compensation encourages such activity, the no fault aspect of workers' compensation provides no deterrent to an employee who voluntarily becomes intoxicated and poses a greater risk to himself, his

67. *Steffes*, 177 Mont. 83, 580 P.2d 450.
68. *Gordon*, ___ Mont. ___, 612 P.2d 668.
69. *Steffes*, 177 Mont. at 90, 580 P.2d at 455.
70. *Gordon*, ___ Mont. at ___, 612 P.2d at 672.

fellow employees, and society.

Additionally, the two-step analysis of the proximate cause standard insures that workers' compensation benefits will not be denied unless the intoxication was the proximate cause of the injury. As in *Pittman*, the party claiming the defense of intoxication must prove not only that the injured worker was intoxicated at the time of injury, but in addition, that the worker's injury was proximately caused by his intoxication. Had proximate cause analysis been used in *Steffes*, workers' compensation benefits still would have been awarded. In *Steffes*, the court stated that although the decedent was legally intoxicated, his intoxication did not contribute to his death. Therefore, the second step of the proximate cause analysis would not have been satisfied and death benefits would have been awarded. Similarly, in *Gordon*, death benefits also would have been awarded as neither step of the two-step proximate cause standard was satisfied. Thus, proximate cause analysis insures a just result, since workers' compensation benefits should only be denied where the intoxication was the cause of the worker's injury.

Furthermore, compensation benefits do not have to be totally denied if a work-related injury results from intoxication. Rather, benefits could be reduced. Currently, four states that provide for intoxication as a defense to workers' compensation claims also provide for reduced benefits if the intoxication is the proximate cause of the worker's injury.[71] Of those four states that provide for reduced benefits, Utah's provision appears to be the most equitable. It provides in pertinent part: "Where injury is caused . . . from the intoxication of the employee, compensation . . . shall be reduced fifteen percent, except in case of injury resulting in death."[72]

The effect of reducing benefits rather than denying all compensation to an injured worker who was intoxicated at the time of his injury and whose intoxication was the proximate cause of his injury is twofold. First, upon such finding, the injured worker's benefits would merely be reduced, not completely denied. Thus, the injured worker's financial security is affected, but not totally jeopardized. Similarly, because death benefits would remain intact, the financial security of a decedent's family would not suffer as a result of the decedent's intoxication. Second, as one court noted,

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71. *See* COLO. REV. STAT. § 8-52-104(c) (Supp. 1984) (50% reduction in compensation "[w]here injury results from the intoxication of the employee"); IDAHO CODE § 72-208(2) (Supp. 1984) (50% reduction in compensation "[i]f an injury is the proximate result of an employee's intoxication"); UTAH CODE ANN. § 35-1-14 (Supp. 1983), *see infra* note 73 and accompanying text; WIS. STAT. ANN. § 102.58 (West Supp. 1984) (15% reduction in compensation not to exceed $15,000 "[w]here injury results from the intoxication of the employe").

72. UTAH CODE ANN. § 35-1-14 (Supp. 1983).

adoption of such legislation "is a statement of public policy, clear and unequivocal on its face."[73] Such a statement of public policy against intoxication at the workplace is warranted, even considering the no fault aspect of workers' compensation, when a worker's injuries are caused by his voluntary intoxication.

V. Conclusion

Intoxication is a defense to workers' compensation claims in the majority of jurisdictions, recognizing that the intoxicated worker poses a greater risk to himself and others. Of the jurisdictions that provide the intoxication defense, most will deny workers' compensation benefits when the worker is intoxicated and the intoxication is the proximate cause of the worker's injuries.

Implicit in Montana workers' compensation law is tolerance for the intoxicated worker. The Montana Workers' Compensation Act provides no defense for intoxication, and compensation benefits will be denied only if a worker is so intoxicated that he physically and mentally abandons his employment. Although the abandonment of employment standard fits well within the no-fault aspect of the Montana Act, Montana should join the majority of jurisdictions that provide at least a reduction in workers' compensation benefits when a worker is injured because he is intoxicated.

73. Hopper v. F.W. Corridori Roofing Co., 305 A.2d 309, 311 (Del. 1973).