

"Intoxication Defense in Workers' Compensation"

California

Alcohol and drug usage during employment is an issue not only for the safety of the employees, but also for the bottom line of the employer. According to the Substance Abuse and Mental Health Services Administration, it is estimated over 22 million Americans are currently illicit drug users. Of full time employees, 8.9% are current illicit drug users. Alcohol is the predominant drug of choice of most working adults, with 79.4% of binge drinkers being employed. Of employed adults, 7.1% admit to drinking during the work day, 1.8% consume alcohol before coming to work, and 8.8% report heavy alcohol use. (samhsa.gov). When compared to non-abusing co-workers, employed substance abusers (both alcohol and drug users) are 3.5 times more likely to be involved in a work accident and five times more likely to file a workers' compensation claim (www.samhsa.gov).

Unless required, there are two major reasons to drug test: first, to limit your liability and second, to make money by defeating workers compensation claims when an employee is positive. Most days, but especially in this economy, it is incredible that any employer would ignore a practice that will save money. Today, drug and alcohol testing may be the only thing you can do to return money to the company's bottom line.

How can this work? Typically, to defeat a workers' compensation claim an employer must show two things: first, that the employee was intoxicated at the time of the injury and second that the intoxication caused or contributed to that injury.

California has laws that provide that "intoxication" or controlled substance use (positive test/refusal) **may** affect eligibility for **workers compensation or unemployment benefits**. Generally speaking, an injury which is caused from drug or alcohol intoxication is not compensable. However, drug or alcohol intoxication at the time of injury does not necessarily mean that there is a complete bar to recovery. It must be proven that the intoxication basically caused the injury.

The basic California statutory requirement is that to be compensable, an injury must arise out of and in the course of the employment [CA Labor Code §3600(a)]. Other statutory conditions of compensability included in Labor Code §3600 are that: (1) neither employer nor employee is excluded by statute; (2) the employee is performing service incidental to the employment at the time of injury; (3) the injury is proximately caused by the employment; (4) **the injury is not caused by the employee's intoxication**; (5) the injury is not intentionally self-inflicted; (6) the employee did not willfully and deliberately cause his or her own death; (7) the injury did not arise out of an altercation in which the injured employee was the initial physical aggressor; (8) the injury is not caused by the injured

employee's commission of a felony; (9) the injury did not arise out of voluntary participation in an off-duty recreational, social, or athletic activity; and (10) the claim was not post termination.

In California, if an employee alleges a work accident, the employer may raise a defense that the injured worker was intoxicated. If the employer prevails, the employee takes nothing. The employer has a rather high bar to meet though.

In order to succeed the employer must prove two things. Labor Code Section 5705 (B) says that the intoxication must have CAUSED the injury. First the employer must prove the employee was intoxicated. Most employers don't have a breathalyzer in the office – so you need the ability to get a mobile breath alcohol technician (BAT) out to your facility as soon as possible. A drug test should be conducted also as soon as possible. Lab based oral fluid testing would be advisable because it shows more recent use of the drug as opposed to urine or hair testing.

If the judge decides the employee was intoxicated the second issue must be decided,

CAUSE. It's not enough to show the employee was intoxicated. The employer must show that intoxication CAUSED the injury. If an employee is intoxicated at work and injured because a box falls on them. The intoxication did not cause the injury; rather it was the falling box. On the other hand if an employee is intoxicated at work and slips and falls, the intoxication may have caused the fall thus the employee will take nothing.

California Labor Code Section 5705

The burden of proof rests upon the party or lien claimant holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:

- (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer.
- (b) Intoxication of an employee causing his or her injury.
- (c) Willful misconduct of an employee causing his or her injury.
- (d) Aggravation of disability by unreasonable conduct of the employee.
- (e) Prejudice to the employer by failure of the employee to give notice, as required by Sections 5400 and 5401.

Published California court decisions do not fully explain what kind of causation is required to prove the defense of intoxication. However, the results reached in the cases indicate that the courts interpret the statutes as requiring that intoxication must be shown to be a proximate cause or substantial factor in causing injury, but not necessarily the sole cause. Research shows judges have gone both ways, sometimes favoring the employee and sometimes favoring the employer and denying the workers'

comp claim.

California Division of Workers' Compensation (DWC) monitors the administration of workers' compensation claims, and provides administrative and judicial services to assist in resolving disputes that arise in connection with claims for workers' compensation benefits.

Finally, it must clearly be noted that the intoxication defense in California is not automatic and could potentially be difficult to prove. The employer has the burden of proving intoxication as a proximate cause of the injury. It is not sufficient to show that the worker was intoxicated at the time of his accident. For defense of intoxication to be sustained, it must be shown that the intoxication was a substantial cause of the injury.

An employer that condones or encourages drinking or use of illegal drugs may be estopped from asserting the intoxication defense. The Supreme Court Decision in *McCarty v WCAB* (1974) 12 C3d 677, 39 CCC 712 (employer estopped to raise intoxication because it permitted the consumption of alcohol at Christmas party) led many employers to seriously curtail employer-sponsored holiday festivities. Employers that allow employees to drink or used drugs on the job will not prevail.

Realizing that any one workers compensation claim could cost tens or hundreds of thousands of dollars, it is clearly a best practice to maintain a drug free workplace in efforts to maintain a safer workplace and reduce the risk of accidents. If the accident does occur the post accident drug test is the first step in using the intoxication defense to deny the workers compensation claim, the employer must first determine intoxication. From there an employer would consult with the insurance carrier and legal counsel to determine the potential of claim denial and potential challenge from the employee.

How you handle post-accident testing and workers' compensation claims is paramount to establishing the intoxication defense and preventing claimants from rebutting the statutory presumptions. The following procedures can help you protect your ability to use the intoxication defense.

- **Have a Written and Promulgated Drug-Testing Policy.**
The policy should contain a statement that all employees are subject to drug testing and that a refusal to take a drug screen will result in a presumption that the test would have been positive. Furthermore, the drug policy should be signed by the employee and be universally enforced. If the policy is not enforced, the claimant can argue that no policy exists.
- **Training & Education**
Your drug free workplace program must have a training and education component. Employees and supervisors must know the policy, the consequences of violating the policy and the harmful effects of drugs/alcohol in the workplace. Supervisors must be able to make decisions for reasonable suspicion testing and must know the company policy inside and out.

- **Always Test an Employee Immediately Following the Accident.**
Test after even minor accidents. A court can deny the intoxication presumption if the test occurs too late after the accident.
- **Take a Written Statement From an Injured Employee After an Accident.**
The statement should ask specifically whether the employee had consumed any alcohol within 24 hours of the accident or any non-prescribed controlled substances, including cocaine or marijuana, within 30 days of the accident. Have the employee sign the statement.
- **Take Written Statements of Co-workers.**
If you suspect drug use by the injured employee, ask the co-employees whether they noticed any unusual behavior. Never discuss the results of any drug tests with the injured worker's co-employees.
- **Have Drug Tests Collected and Performed by a Reputable Vendor.**
A medical drug test performed for treating a patient is different from an employment drug test. The employment drug test procedure must follow company policy, Federal and/State law and specifically quantifies the drug and alcohol levels. Furthermore, the testing entity should follow the Federal guidelines the collection and testing procedures.
- **Approve Emergency Care for an Injured Employee, Despite Positive Drug Results.**
The injured employee will be entitled to reasonable emergency medical care until he is stabilized or discharged.
- **Do Not Encourage the Use of Alcohol.**
An exception to the intoxication defense occurs when employers provide the intoxicating beverage and encourage its use or if the intoxication occurs in pursuit of the employer's interest. Have a written policy against using alcohol, even in work-related activities.

Employers should note that even if the injured employee is found or presumed to be intoxicated, they are responsible for any reasonable emergency medical care until the employee is stabilized or discharged. Our compliance specialists recommend three main things needed to successfully prove intoxication: a compliant workplace drug-testing program, a properly administered drug-test and a positive test result. Prepare now for lower workers comp costs and potential denial of claims achieving a return on investment for your drug free workplace program.