



# Workers' Compensation Post-Accident Drug Testing

D. Faye Caldwell

[fcaldwell@caldwelleverson.com](mailto:fcaldwell@caldwelleverson.com)

## **PRESUMPTION OF IMPAIRMENT AND HOW TO PRESERVE IT**

SAPAA Webinar – July 18, 2013



2777 Allen Parkway, Suite 950  
Houston, Texas 77019  
tel: (713) 654-3000  
fax: (713) 654-3002  
[www.caldwelleverson.com](http://www.caldwelleverson.com)



# Workers' Compensation

- Almost every state in the nation mandates that employers have workers' compensation insurance coverage.
- Workers' compensation provides benefits to employees injured on the job.
  - Medical benefits and coverage.
  - Wage replacement benefits.
  - Lifetime disability benefits.



## Why is drug testing relevant to Workers' compensation?

- Traditionally, workers' compensation coverage extended to all workplace injuries.
  - A no-fault mandatory compensation system.
- However, over time, exceptions have been added to reduce or eliminate benefits.
  - Willful, intentional conduct.
  - Impairment causing accident or injury.



## Establishing the exception

- Most states require some type of legal proceeding to establish an exception denying or reducing workers' compensation benefits.
- At these proceedings, the employer will be required to produce evidence that supports the exception.



# Burden of proof

- Burden of proof defines the duty placed upon a specific party to prove or disprove a disputed fact.



## Proving impairment caused an accident or injury

- Historically, in order to reduce or eliminate benefits for an injured employee, an employer has been required to prove:
  - That an employee was legally impaired.
  - That the employee's impairment was the cause of the accident or injury.



## Proving impairment caused an accident or injury

- Absent compelling circumstances, this process was often time consuming and expensive.
  - Some states do not even define impairment.
    - e.g. Connecticut, Delaware, Indiana, South Dakota.
- To lessen the burden on employers, some states have enacted presumptions.



# What is a presumption?

- A presumption is a legal principle of evidence shifting the burden of proof to the other party.
- A presumption means that if a party establishes 'A' then 'B' and 'C' are assumed.
- The other party is then required to disprove 'B' and 'C' as opposed to the initial party proving 'B' and 'C'.



# How a presumption is important

- In some states, a positive drug test result can give rise to a “presumption” that impairment—or drug use—caused the accident or injury.
  - These presumptions vary drastically between states.
- Such a presumption reduces the evidentiary burden on employers seeking to reduce benefits to an employee testing positive for controlled substances.



# What types of presumptions are available to employers?

- **Rebuttable**

- A conclusion that a judge or jury must draw when certain evidence has been introduced and admitted as true.
- Can be overcome by employee if employee presents sufficient evidence to the contrary.

- **Conclusive**

- Employer no longer required to prove a fact – the issue is conclusively established.
- Employee cannot submit evidence to the contrary.



In many of these states, a positive drug test result may be used as evidence of impairment in benefit determination hearings.



# Rebuttable presumptions

- **Presumption of Impairment**
  - Positive drug/alcohol test after accident provides presumption employee was impaired at time of accident.
  - No further proof from employer required to establish impairment.
  - Puts the burden on the employee to prove not impaired.
- **Presumption That Impairment Was Cause of Accident**
  - Positive drug/alcohol test after accident presumes employee was impaired at time of accident.
  - That impairment was cause of accident.
  - Puts the burden on the employee to prove impairment was not cause of accident.



# Conclusive presumptions

- Not as common as rebuttable presumptions.
- Evidence of Impairment
  - Current laws only provide for conclusive presumption of impairment.
  - Employee cannot rebut being impaired at time of accident regardless of evidence.
- Employer may be still required to prove impairment caused accident.



# Example – Florida

- Two different rebuttable presumptions –
  - When employee, at time of the injury, has a positive drug/alcohol test, it is presumed that the injury caused primarily by intoxication.
  - If employer has implemented drug-free workplace, presumption rebutted only by evidence that there is no reasonable hypothesis that the intoxication or drug influence contributed to the injury.
  - If employer has not implemented drug-free workplace program, presumption may be rebutted by clear and convincing evidence that the intoxication or influence of drugs did not contribute to injury.



## Example – Kansas

- In 2011, Kansas changed its WC statute:
  - Positive drug/alcohol test using designated cut-offs is conclusive presumption of impairment.
  - If impaired, rebuttable presumption that the injury was contributed to by impairment.
  - Employee may rebut presumption of contribution by clear and convincing evidence.
  - Many restrictions exist to get presumption, including written policy containing specific items, split specimen collection, collection by licensed health care professional, HHS certified or Kansas licensed testing laboratory



## Example – Alabama

- **Conclusive presumption of impairment.**
  - No compensation for accidents due to the employee being intoxicated from use of alcohol or being impaired by illegal drugs.
  - Positive drug test conducted and evaluated pursuant to DOT standards is conclusive presumption of impairment resulting from the use of illegal drugs.
  - This requires all standards that would be used in DOT test to be used in Alabama post-accident testing, e.g., split specimen urine collection, written policy, DOT cutoffs and testing protocols, MRO review.



## Example – Nevada

- Rebuttable presumption.
- If employee has any amount of a controlled substance in his or her system at time of injury without a valid prescription, the controlled substance must be presumed to be the proximate cause unless rebutted by evidence to the contrary.
- Testing must comport with Nevada testing procedure and testing must be conducted at a laboratory licensed by Nevada.



# Example – Wyoming

- Specific requirements.
- Must meet DOT requirements for collection and testing.
- HHS laboratory must be used.
- Specific testing cut-offs for alcohol and drugs.
- Specifics drugs provided.
- Specific drug-free workplace program requirements include.
  - Written policy.
  - Statement providing for including of all workers' compensation covered employees in testing program.
  - Statement of required types of substance abuse testing.
  - Statement of actions employer may take on basis of positive test result.
  - Statement of consequences for refusal to submit to drug test.
  - Confidentiality statement.
  - Statement that employee may contest positive test result within 5 days after notification of test result.
  - Statement affording provision of 60 days notice to implementation of substance abuse testing.
  - Locations for posting of policy.



## Other issues

- Certain states have presumptions of impairment which, if met, reduce but do not eliminate benefits, including:
  - Colorado
  - Missouri
  - New Mexico
  - Wisconsin



# Best practices for employers

- Review the law in the states in which you have employees.
  - Ask your service agent for testing that complies with workers' compensation testing requirements.
- Have a written policy notifying employees that they will be tested in the event of on the job accidents or injuries.
- Discuss testing issues and requirements with your workers' compensation carrier before implementing a testing program.

# QUESTIONS



2777 Allen Parkway, Suite 950  
Houston, Texas 77019  
tel: (713) 654-3000  
fax: (713) 654-3002  
[www.caldwelleverson.com](http://www.caldwelleverson.com)