



Sir, Have You Been Drinking? Alcohol, Drugs and Workers' Compensation

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Most of us have seen the commercials where the police officer asks, "Sir, have you been drinking?" It's a question they must consider at every traffic stop. It's also a question and issue that should be explored in workers' compensation cases.

Intoxication – whether by alcohol or illegal drugs -- can provide an absolute defense in workers' compensation claims. However, employers must take care to document such a defense properly, or it can evaporate in a matter of days. Employers also must recognize that drug cases are far more difficult to document and prove than alcohol cases and must take extreme care in pursuing such a defense.

In Kentucky, the intoxication defense involves two basic elements. First, the employer must prove that the worker was under the influence of alcohol or an illegal drug at the time of a work injury. Second, the employer must prove that such influence or intoxication was a substantial factor in actually causing the work injury. In other words, if a forklift injures a worker through no fault of his own, the worker receives comp benefits – even if the worker tests positive for high levels of marijuana or has a blood alcohol level of .12. However, if drugs or alcohol caused a worker to stumble or fall in the path of a forklift, the employer would have an intoxication defense.

Ohio has similar requirements. An injury that is *caused* by alcohol intoxication is not compensable. In drug cases, an injury is not compensable if it was the result of an employee being under the influence of a controlled substance that was not prescribed by a physician. Intentional misuse of a prescribed drug can be a valid defense, but an accidental overdose might not be a defense.

To preserve the alcohol/drug defense, employers should adopt a pro-active approach:

- Talk to fellow workers and supervisors as soon as possible after a work injury. That means within hours if possible, before memories fade. Had anyone smelled alcohol on the worker's breath recently? Did the worker often go out for a meal break? Did the worker mention prior or recent drinking or drug use? Was the worker having any trouble doing his job before the injury? Was the worker behaving oddly before the injury? Any findings should be documented by having co-workers or supervisors sign written statements.
- Obtain medical records quickly and look for alcohol use (often referred to as ETOH), medications and lab work. Employers are entitled to review medical records relating to a comp claim, although they are not free to share these results with just anyone. However, employers must beware even if medical records show narcotic use. The narcotic listed in the records may be one that is *legally* prescribed by a physician.
- Make alcohol and/or drug testing a required practice in case of injury. Employers can adopt policies requiring a drug or alcohol test as soon as practical after a work injury. Alcohol testing is relatively inexpensive. However, testing for illegal drugs often is quite expensive, and a particular test may not cover all illegal drugs. Employers also must be careful with drug data. An employee may test positive for opiates, but nevertheless have a valid prescription for Vicodin (containing hydrocodone, an opiate) that would not be illegal and not necessarily render the employee intoxicated.
- Consult legal counsel if the employee fails a drug test or refuses to consent to a drug test. Ohio law has very specific due-process notice and posting requirements that an employer *must* follow or the defense may be ruled invalid.

Of course, any kind of intoxication and drug use can raise disciplinary questions and issues that fall into the field of employment law. By documenting work-relatedness, however, employers have a chance to nip their potential workers' compensation losses in the bud.