



Sub. H.B. 223*

125th General Assembly

(As Reported by S. Insurance, Commerce, and Labor)

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BILL SUMMARY

- Revises the conditions under which chemical testing of an employee may establish a rebuttable presumption that the employee's injury was proximately caused by the use of alcohol or an unprescribed controlled substance affecting the employee's eligibility to qualify for workers' compensation benefits.

CONTENT AND OPERATION

Background

Under Ohio's Workers' Compensation Law, every employee who is injured or who contracts an occupational disease, as well as the dependents of an employee who is killed or who dies as the result of an occupational disease contracted in the course of employment, is entitled to specified levels of compensation for the injury, if the employee experiences any lost work time, as well as payment for medical, nursing, and hospital services, medicines, and funeral expenses, if necessary. The only exceptions to this general eligibility standard are if the injury or disease is: (1) purposely self-inflicted, or (2) proximately caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician (sec. 4123.54).

* *This analysis was prepared before the report of the Senate Insurance, Commerce, and Labor Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

Rebuttable presumption concerning workplace accidents involving alcohol or unprescribed controlled substances

Under an existing statutory provision that has been ruled unconstitutional (see **COMMENT 1**), a rebuttable presumption (see **COMMENT 2**) arose that an employee was intoxicated or under the influence of a controlled substance not prescribed by a physician and that the intoxication or influence was the proximate cause of the employee's injury, if the employee is given or has been given notice that the results of, or the employee's refusal to submit to any of the chemical tests described below may affect the employee's eligibility to receive workers' compensation benefits and if any of the following applied:

(1) Within eight hours of the injury, the employee's blood alcohol level tests equal to or greater than .08%;

(2) Within eight hours of the injury, the employee's breath alcohol level tests equal to or greater than .08 g/210L;

(3) Within eight hours of the injury, the employee's urine alcohol level tests equal to or greater than .11 g/100ml;¹

(4) Within 32 hours of the injury, the employee tests above both the following levels established for an enzyme multiplied immunoassay technique screening test (EMIT) and above the following levels established for a gas chromatography mass spectrometry test, or in the alternative, above the levels established for a gas chromatography mass spectrometry test (GC/MS) alone as follows, for substances not prescribed by a physician:

(a) For amphetamines, 1000ng/ml of urine for the EMIT test and 500 ng/ml (nanograms per milliliter) of urine for the GC/MS test;

(b) For cannabinoids, 50 ng/ml of urine for the EMIT test and 15 ng/ml of urine for the GC/MS test;

(c) For cocaine, including crack cocaine, 300 ng/ml of urine for the EMIT test and 150 ng/ml of urine for the GC/MS test;

(d) For opiates, 2000 ng/ml of urine for the EMIT test and 2000 ng/ml of urine for the GC/MS test;

¹ *The levels listed in numbers (1) to (3) above are the minimum testing levels used to establish intoxication under the law prohibiting the operation of a motor vehicle while intoxicated (popularly known as the state "OMVI" law) and are referenced as such in the act. (R.C. 4511.19(A)(2) to (7).)*

(e) For phencyclidine, 25 ng/ml of urine for the EMIT test and 25 ng/ml of urine for the GC/MS test.

(5) The employee, through a chemical test administered within 32 hours of the injury, is determined to have barbiturates, benzodiazepines, methadone, or propoxyphene in the employee's system that tests above levels established by laboratories certified by the United States Department of Health and Human Services.

(6) The employee refuses to submit to a requested chemical test. (Sec. 4123.54(B).)

Notice provisions

The bill revises the statutory conditions for establishing a rebuttable presumption that an employee's intoxication or use of a controlled substance is the proximate cause of an injury. Where as current law expressly requires that an employee be given written notice, the bill requires the employer to have posted a written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described in the bill may affect the employee's ability to receive workers' compensation benefits (sec. 4123.54(B)). However, the bill also specifies that the employee's refusal to submit to a chemical test as described in (6) above establishes a rebuttable presumption on the condition that the employee is or was given notice that the refusal may affect the employee's eligibility for workers' compensation benefits (sec. 4123.54(B)(2)). The bill requires the Bureau of Workers' Compensation to mail to state fund employers (i.e., employers who pay premiums to the State Fund as compared to employers who are self-insured) the notice described above with the receipt or certificate certifying payment of the employer's workers' compensation premiums (sec. 4123.35(A)). The bill requires the written notice to be the same size or larger than the certificate of premium payment notice furnished by the Bureau and requires employers to post the notice in the same location as the certificate of premium payment notice or the certificate of self-insurance (sec. 4123.54(F)). (See **COMMENT 3**.) Proper posting of the notice constitutes the employer's compliance with the notice requirement (sec. 4123.35(A)).

Qualifying chemical tests

Under the bill, the rebuttable presumption applies if the employee either submitted to a *qualifying* chemical test indicating that the employee's alcohol or unprescribed controlled substance levels exceed the amount allowed in law, or refused to submit to a chemical test after receiving notice that such a refusal could affect the employee's eligibility to receive workers' compensation benefits. The bill adds that a chemical test is considered to be a qualifying chemical test if it is

administered to an employee after an injury under at least one of the following conditions:

- (1) When the employee's employer had reasonable cause to suspect that the employee may be intoxicated or under the influence of a controlled substance not prescribed by the employee's physician;
- (2) At the request of a police officer pursuant to a traffic stop, and not at the request of the employee's employer;
- (3) At the request of a licensed physician who is not employed by the employee's employer, and not at the request of the employee's employer. (Sec. 4123.54(C)(1).)

The bill specifies that laboratories certified by the United States Department of Health and Human Services or laboratories that meet or exceed the standards of that Department for laboratory certification must be used for processing the test results of a qualifying chemical test (sec. 4123.54(E)).

Reasonable cause of suspicion

The bill adds that an employer has reasonable cause to suspect that an employee may be intoxicated or under the influence of a controlled substance not prescribed by the employee's physician when, but not limited to, the employer has evidence that an employee is or was using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training. These facts and inferences may be based on, but are not limited to, any of the following:

- (1) Observable phenomena, such as direct observation of use, possession, or distribution of alcohol or a controlled substance, or of the physical symptoms of being under the influence of alcohol or a controlled substance, such as but not limited to slurred speech, dilated pupils, odor of alcohol or a controlled substance, changes in affect, or dynamic mood swings;
- (2) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent accidents, that appears to be related to the use of alcohol or a controlled substance, and does not appear to be attributable to other factors;
- (3) The identification of an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

(4) A report of use of alcohol or a controlled substance provided by a reliable and credible source;

(5) Repeated or flagrant violations of the safety or work rules of the employee's employer, that are determined by the employee's supervisor to pose a substantial risk of physical injury or property damage and that appear to be related to the use of alcohol or a controlled substance and that do not appear attributable to other factors. (Sec. 4123.54(C)(2).)

The bill specifies that it should not be construed to affect the rights of an employer to test employees for alcohol or controlled substance abuse (sec. 4123.54(D)).

The bill also distinguishes that a rebuttable presumption may arise when an employee is under the influence of a controlled substance not prescribed by the employee's physician versus *any* physician, as is the case in current law (sec. 4123.54(B)).

COMMENT

1. Based on a recent Ohio Supreme Court decision, R.C. 4123.54 is unconstitutional as it currently exists and therefore unenforceable. (*The State Ex Rel. Ohio AFL-CIO et al. v. Ohio Bureau of Workers' Compensation et al.*, (December 18, 2002) 97 Ohio St.3d 504.) The Ohio Supreme Court held that the statute permitted warrantless drug and alcohol testing of injured workers in violation of the 4th Amendment to the U.S. Constitution and Art. I, Sec. 14 of the Ohio Constitution.

2. In law, a "rebuttable presumption" is an evidentiary rule of law typically used in court proceedings that takes a set of facts and makes a specified inference as to the meaning of those facts (i.e., presumption). The presumption normally remains in force until disproved by the side in the dispute against whom it operates, and if not disproved or if no other evidence is offered to counter its effect, the presumption often will be sufficient to win the case for the party in whose favor it exists.

3. Under the bill, presumably the Bureau of Workers' Compensation would be responsible for developing the notice required. Also, presumably, employers who are self-insured under the workers' compensation laws would either be responsible for obtaining a copy of the notice themselves or the Bureau would send the notice to the self-insured employer when sending some other communication to the employer as, for example, the receipt for the administrative assessment paid by the self-insuring employer.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-17-03	p. 601
Reported, H. Commerce & Labor	05-05-04	p. 1832
Passed House (58-40)	05-11-04	p. 1881
Reported, S. Insurance, Commerce, & Labor	---	---

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