Virginia McInerney *Legislative Service Commission*

Sub. H.B. 223

125th General Assembly
(As Passed by the General Assembly)

Reps. **Gibbs, Cates, Schmidt, C. Evans, Calvert, Hagan, Aslanides, D. Evans, Buehrer, Setzer, Webster, McGregor, Raussen, Young, Faber, Peterson, Carmichael, Wolpert, Schlichter, Blasdel, Clancy, Collier, Core, Daniels, DeBose, Flowers, Gilb, Hoops, Martin, Niehaus, Raga, Reidelbach, Reinhard, Schaffer, Schneider**

Sens. **Spada, Mumper, Wachtmann, Nein, Harris, Hottinger, Padgett, Austria**

Effective date: *

ACT 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

Rebuttable presumption concerning workplace accidents involving alcohol or unprescribed controlled substances

Under a statutory provision that has been ruled unconstitutional (see **COMMENT**), a rebuttable presumption 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 was given notice that the results of, or the employee's refusal to submit to, any of the chemical tests described below could affect the employee's eligibility to receive workers' compensation benefits and if any of the following applied:

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

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

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

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

(4) Within 32 hours of the injury, the employee tested 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;

(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, was determined to have barbiturates, benzodiazepines, methadone, or propoxyphene in the employee's system that tested above levels established by laboratories certified by the United States Department of Health and Human Services.

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

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[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).)*

Notice provisions

The act 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. Whereas prior law expressly required that an employee be given written notice, the act 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 act may affect the employee's ability to receive workers' compensation benefits (sec. 4123.54(B)). However, the act 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 act 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 written notice must be the same size or larger than the certificate of premium payment notice furnished by the Bureau and employers must post the notice in the same location as the certificate of premium payment notice or the certificate of self-insurance (sec. 4123.54(F)). The act specifies that proper posting of the notice constitutes the employer's compliance with the notice requirement (sec. 4123.35(A)).

Qualifying chemical tests

Under the act, 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 being given notice that such a refusal could affect the employee's eligibility to receive workers' compensation benefits. Under the act, 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 act 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 act 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 act specifies that the act 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 act 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 was the case under prior law (sec. 4123.54(B)).

COMMENT

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.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-17-03	p. 601
Reported, H. Commerce & Labor	05-05-04	pp. 1832-1833
Passed House (58-40)	05-11-04	pp. 1881-1884
Reported, S. Insurance, Commerce, & Labor	05-25-04	p. 1991
Passed Senate (22-11)	05-25-04	p. 1997
House concurred in Senate amendments (58-41)	05-25-04	pp. 1985-1987

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