

# Rebuttable Presumption

## Obtaining Proper Evidence

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### Field Consultant Information

- The information that follows offers guidance to the employers you represent when they seek a consideration of rebuttable presumption during the claims determination process.
- This information is for guidance only and does not guarantee BWC will consider rebuttable presumption for any specific claim.
- An employer seeking to disallow a claim that involves a positive test for alcohol or any of the nine controlled substances identified in section 4123.54(B) of the Ohio Revised Code must meet certain conditions specified by the state legislature.
- Inadequate documentation of reasonable cause is probably the most common reason BWC does **not** consider rebuttable presumption in the initial claim determination or the Ohio Industrial Commission does not consider it during the appeals process.
- Employers must also meet a number of additional rebuttable presumption requirements.
- Unless rebuttable presumption is applicable, the employer bears the burden of proof in showing that the presence of alcohol or controlled substances in an employee's system was the proximate cause of the work-related injury.
- Employers who follow all the requirements the Ohio legislature sets out in House Bill 223 have a better chance of getting a consideration of rebuttable presumption.
- However, the standard of documentation for reasonable cause requires a careful, thorough accident investigation by trained staff.
- It also appears to require eyewitness affidavits from other employees to show the employer had reasonable cause to request a chemical test for alcohol or other drugs.

*Obtaining proper evidence is the key for success*

## **Best practices ensure consideration of rebuttable presumption**

Under specified circumstances (noted below), effective for claims with dates of injury on or after Oct. 13, 2004, House Bill 223 – the rebuttable presumption law – places the burden of proof on an employee to prove that alcohol or drugs in his or her system was not the proximate cause of an injury at work. To maximize the likelihood of a successful challenge in relationship to a workers' compensation claim, an employer should:

- Have in place a written drug-free policy that addresses consequences of substance use in violation of the employer's policy, including, but not limited to, the employer's intent to seek disallowance of a workers' compensation claim documented by a positive drug or alcohol test or a refusal to test. Have the policy reviewed by legal counsel that has a background in employment law and drug-free case law;
- Use the Ohio Bureau of Workers' Compensation's (BWC's) drug-free program design as a model or participate in a BWC drug-free program to have testing in place that will allow consideration of rebuttable presumption. Clearly explain in policy that rebuttable presumption means a positive test for alcohol or any of nine specified controlled substances (drugs) or a refusal to be tested can create a presumption that the presence of alcohol/drugs in an employee's system is the proximate cause of a work-related injury, which may make the injured workers' claim non-compensable;
- Conspicuously post the required written notice, which BWC provided, to inform employees that the bureau may disallow workers' compensation benefits if they use drugs or alcohol and cause an injury to themselves. Then, educate all employees about this beyond simply posting the notice in the interest of compliance and prevention;
- If you have collective bargaining agreements, ensure you bargain this with all of your unions;
- Train all supervisors and managers to do a thorough post-accident investigation, especially when an injury occurs. They should be prepared to obtain documentation of a reasonable cause for testing to have occurred or to have been requested;
- Ensure you obtain eye-witness co-worker affidavits to confirm a reasonable cause for testing and provide clear documentation of reasonable cause for testing;
- Ensure all aspects of substance testing follow federal testing guidelines to obtain accurate test results, buffer the employer from legal liability and have in place maximum protections for employee rights;
- Ensure that specimen collection for an alcohol test occurs as close to the time of the injury as possible but no later than eight hours after this event and that specimen collection for a drug test occurs no later than 32 hours after the accident/injury;
- Arrange with a collection site or sites to do alcohol and drug testing in compliance with the federal testing model, and identify the drugs you want tested. Ensure the collection site uses the services of a certified medical review officer, and a laboratory certified by the Substance Abuse and Mental Health Services Administration for urine drug analysis.