Intoxication Defense and Penalty

By: Christopher T. Archer, 2017

287.120 Alcohol and Drug Defense and Penalty

6. (1) Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs.

(2) If, however, the use of alcohol or nonprescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited.

(3) The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption. An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

(4) Any positive test result for a nonprescribed controlled drug or the metabolites of such drug from an employee shall give rise to a rebuttable presumption, which may be rebutted by a preponderance of evidence, that the tested nonprescribed controlled drug was in the employee's system at the time of the accident or injury and that the injury was sustained in conjunction with the use of the tested nonprescribed controlled drug if:

(a) The initial testing was administered within twenty-four hours 64 of the accident or injury;

(b) Notice was given to the employee of the test results within fourteen calendar days of the insurer or group self-insurer receiving actual notice of the confirmatory test results;

(c) The employee was given an opportunity to perform a second 69 test upon the original sample; and

(d) The initial or any subsequent testing that forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures.

(Editor's note: **Boldface language** effective August 28, 2017 by HCS SS SCS 66, 99th General Assembly)

Notes and Comments:

- For the penalty to apply, no longer needed is a posting of the prohibition or record of enforcement of the policy. The penalty was also increased to 50% of the compensation and "compensation" includes the value of the medical expense incurred.

- The language "in conjunction with" has previously been interpreted to be a same day positive drug test although that interpretation may change to require some nexus between the intoxication and the accident. Note the new language explicitly provides for a rebuttable presumption that the penalty is to be applied for accidents after 8-28-17.

- Note the higher testing protocols that are now required after 8-28-17 including the preservation of the sample and the tendering of a second test on the sample although it is uncertain who has to bear that cost. Also required is chain of custody of the sample per the reference to "**using generally accepted medical or forensic testing procedures."**

- For the total bar to compensation to apply, the intoxication has to be the proximate cause of the accident, in which case no compensation is to be awarded.

- For alcohol intoxication above the legal limit, the burden shifts to the employee to prove it wasn't the intoxication that caused the accident.

- The refusing to take a test is an automatic forfeiture if there is a policy for post-injury testing or reasonable grounds to suspect their use.

- It is unknown if a positive post-accident drug test can also be considered post injury misconduct suspending the claimant's right to TTD or TPD. Section 287.170 states:

  4. If the employee is terminated from post injury employment based upon the employee's post injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section, section 287.170, or 287.180 are payable. As used in this section, the phrase "post injury misconduct" shall not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by a physician.