Archer & Lassa LLC
www.askarcher.com (314) 241-2481

MO Comp News

- Joseph Archer, 11 months **May, 2021**

Post accident drug testing– is it worth it?

I had a client recently ask me this question and my answer was equivocal for sure. In 2017, a conservative Missouri legislature was hoodwinked into providing for the 50% intoxication penalty for a same day positive drug test to be applied in less cases. The 2017 changes are in boldface below:

287.120. 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) ….
(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 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 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.

Note the additional requirements that you have to provide an opportunity for split sample testing and an argument about forensic chain of custody. They were hoodwinked as the case law already provided for a rebuttable presumption. The biggest change in the use of this penalty however is not the new requirements, it is the simple fact that Missouri has adopted medical marijuana and we will start to see the use of marijuana as a prescribed drug. If prescribed, the positive test will no longer be positive.

The 50% penalty is on all forms of compensation which includes the medical expenses on a claim. It is potentially a large offset on the PPD and indemnity to what a Claimant is entitled to receive. Also, if they refuse to take the test, it is complete forfeiture of benefits. I would also add that having a policy of post accident drug testing probably stops injuries from being reported as the Claimant might want to preserve his or her employment knowing he or she would test positive. A positive test in cases I have handled result in a lower settlement of the claim for disability. I also enjoy the question I get to ask in a deposition as to their use of the drug but also the follow up question as to where they got the illegal drug. That one always wakes up the counsel in the deposition.

There are certainly industries that will require a drug free environment suggesting that drug testing, both random and post-accident, is not likely to disappear. In the cost-benefit analysis of whether to have post accident drug testing, it certainly has gotten to be a closer call in my opinion. The requirements the legislature added in 2017 create barriers to the submission of the positive test and the more widely use of marijuana as a prescribed drug will also impact the penalty to a greater and greater extent. Time will tell I guess on whether post accident drug testing will be worth the investment in having the policy and the program.

More Exposure for Employers

SIF v Parker- This Supreme Court case decided in April is the first one interpreting the 2014 statutory changes dealing with the scope of SIF liability that has been narrowly interpreted by the current Missouri Labor and Industrial Relations Commission.

Key language that needs to be analyzed from the decision:

"Therefore, an employee satisfies the second condition by showing the primary injury results in PTD when combined with all preexisting disabilities ***that qualify*** under one of the four eligibility criteria listed in the first condition." (emphasis in original opinion)

"The existence of non-qualifying disabilities does not count against (or for) the claimant in evaluating whether he meets the second threshold condition. In other words, two claimants with identical qualifying preexisting disabilities and primary injuries should be evaluated the same way when determining if they meet the second condition regardless of whether one has additional non-qualifying disabilities."

It is important to remember that an Employer will likely face paying the permanent total disability that the Second Injury Fund used to have to pay. The language in the same section 287.220 that provided: "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability," was eliminated and therefore does not apply to cases after 2014. This was a fairly large oversight in the drafting of the 2014 changes, omitting this language and protection for Employers.

Assisting to identify pre-existing disability or disabilities that qualify for SIF liability will become more of a practice for defense counsel. Having doctors and vocational experts testify to qualify pre-existing disabilities will also become common and the important opinion that a person is "permanently and totally disabled when considering the primary and preexisting **qualifying** disabilities" will obviously be key testimony.

Most immediately, Employers and their carriers will not be "let out" of a case alleging permanent total disability as there certainly are remaining question as to how the *Parker* opinion and decision will play out in cases moving forward with the Administrative Law Judges and with the current Missouri Industrial Relations Commission.

What is also true is that Employers in Missouri who understand the implications for this case and opinion are less likely to hire the older worker or worker with a significant prior disability. Why take the risk of being found liable for permanent total disability? There is no 50 week threshold for the primary injury to result in permanent total disability being awarded and with the vague language in *Parker,* an Employer understandably might not want to take that risk.

Defense counsel throughout Missouri are looking at their pending cases and adjusting to their client's higher exposure.

When to Order Surveillance?

I came across a recent Industrial Commission decision where a claimant was pursuing permanent total disability for a total knee replacement. The Defense did an excellent job in that case and no, it was not our firm handling the file.

The Defense had ordered surveillance which was the key evidence in defeating the permanent total claim. Claimant limped when going into the doctor's office and did not do so in the bar he frequented. Pretty good stuff.

For every one of these type of cases, there are 9 others where surveillance is performed and nothing is gained. My advice when to incur that expense and order surveillance:

- Order now more than before in light of increased exposure for cases after *Parker* decision.
- Only order however where there is a claim for permanent total disability and only when you can contrast the surveillance with claimant's deposition testimony or doctor's history taken around the same time.
- Order when you have some lead or tip that the claimant is active, is working for cash, owns a farm etc.
- Do not bother ordering it if the claimant is a 350 pound woman who is 60 years old. She ain't going to be jumping rope in her backyard and her loading her car with groceries is not good evidence.

Odds and Ends

- This year's **Kids' Chance Seminar** will take place virtually, but will be professionally broadcasted on **Friday, June 18th.** Anyone can register for the seminar at **mokidschance.org** The Chairman of the Labor and Industrial Relations Commission will speak as will the Director of the Division of Workers' Compensation. We will have an occupational medicine physician discuss covid claims. Email me at **chris@askarcher.com** if you want a complete syllabus and registration information for the seminar or simply go the website **mokidschance.org**
- Archer and Lassa's new address is **3668 S. Geyer Road, suite 365, St. Louis, Mo 63127**.
- The Missouri legislature will be approving an extension of the surcharge that is set to expire to fund the stream of payments required to be made by the SIF for adjudged permanent total claims. With the *Parker* decision, there will be less of a need of the SIF although they are paying well over 1,000 awards of total disability.
- As it certainly is not anticipated that Attorneys will be actually appearing in person at the DWC offices any time soon, does it make sense now to refer any or all of your Missouri work comp defense cases to our firm? I think so.