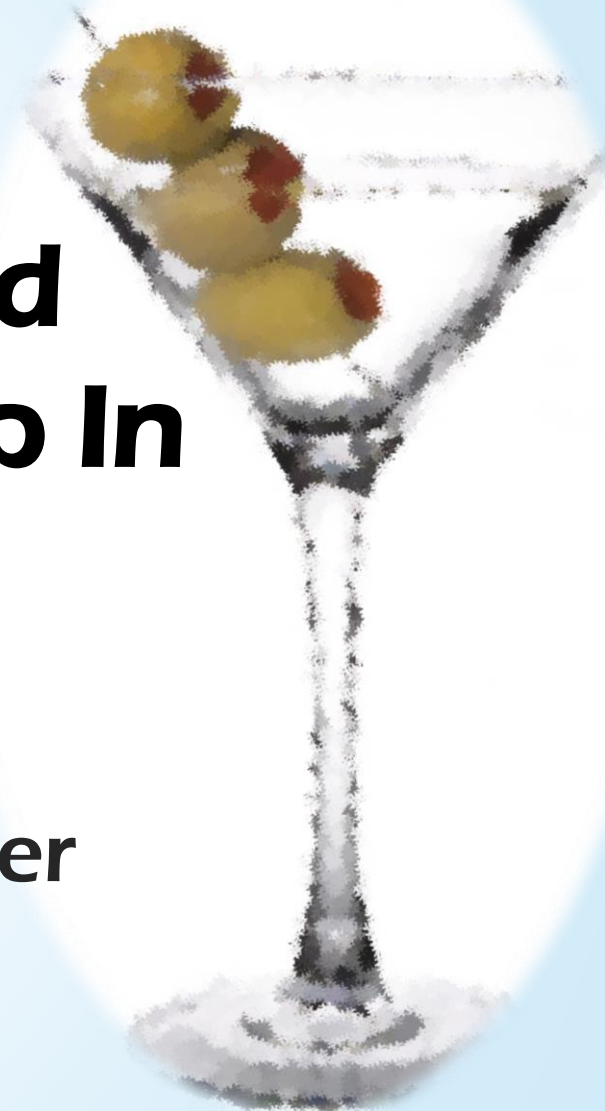


Shaken, Not Stirred... How Drugs, Alcohol, and Marijuana Are Mixing It Up In The Workplace

**Presented by
Jennifer Brill & Nicole Hunter**

September 8, 2016





Did you know...



38-50% of all workers' compensation claims
are related to the use of alcohol or drugs in the workplace.

(National Council on Compensation Insurance)

More than 90% of alcoholics and
74% of drug addicts
are employed.

(National Institute on Drug Abuse)

On average, employees with inappropriate substance
abuse cost their employers **\$7,000 annually.**

(Small Business Administration)

Intoxication and Workers' Compensation Claims

- Under Ohio Revised Code §4123.54, an injury is not compensable if the injury is proximately caused by the employee's intoxication or drug use.
- However, a positive post-injury drug test does not automatically mean that a claim will be denied.
- Employers should be aware that the Industrial Commission has strict requirements that must be met before a claim can be denied based on a positive drug test.

Getting Started

**Prepare your
defense...
before the injury
occurs!**



Step 1: Written Notice

- The employer must post written notice that an employee's eligibility for workers' compensation benefits may be affected if:
 - There is a positive post-accident drug test, or
 - The employee refuses to submit to a post-accident drug test.



Sample Handbook Policy

Drug and Alcohol Free Workplace

The Company is committed to providing a safe, efficient, and productive work environment for all employees. Employees who use or are under the influence of drugs or alcohol on the job pose serious safety and health risks to themselves and others. As a result, use of illegal drugs, illegal use of legal drugs, or the use of alcohol in the workplace or on job sites is strictly prohibited.

The Company will not tolerate substance abuse in the workplace and has a drug-free policy with respect to drugs and alcohol. The employer reserves the right to ask its employees to take and pass a drug test as a condition of employment, upon reasonable suspicion of intoxication, or following a workplace injury. Any employee who takes a drug test must be free from detectable amounts of controlled substances, other mind-altering substances or their metabolites without regard to apparent impairment.

If an employee is injured on the job, he or she may be required to complete a post-accident drug and/or alcohol test. If the post-accident drug or alcohol test is positive, or if the employee refuses to submit to the post-accident drug or alcohol test, this may affect the employee's eligibility for workers' compensation benefits.

Violations of this policy, including a positive drug test, may result in discipline up to and including termination. Employees with substance abuse problems are strongly encouraged to voluntarily obtain assistance before performance or other work-related issues arise.

So, as an employer, you think...

I have a drug policy!



**My employee was falling
over drunk and on drugs!**



I win!

No comp for you!

VICTORY IS OURS!



Right?



Step 2: Positive Qualifying Drug Test

- A test is **POSITIVE** if it was taken:
 - Within 8 hours of the injury for alcohol, or
 - Within 32 hours of the injury for drugs

Step 2: Positive Qualifying Drug Test

The Usual Suspects

Marijuana	Cocaine	Amphetamines	Opiates	PCP
50ng/mL EMIT	300ng EMIT	1000ng EMIT	2000ng EMIT	25ng EMIT
15ng/mL GCMS	150ng GCMS	500ng GCMS	2000ng GCMS	25ng GCMS

Downers

Benzodiazepines	Propoxyphene	Methadone	Barbiturates
50ng EMIT	300ng EMIT	1000ng EMIT	2000ng EMIT
15ng GCMS	150ng GCMS	500ng GCMS	2000ng GCMS

Alcohol

Whole Blood Test	Blood Serum/Plasma	Breathalyzer	Urine
.08 by weight per unit of volume of alcohol in the blood	.00096 by weight per unit of volume of alcohol per blood serum or plasma	.08g of Alcohol per 210L of breath	.11g of alcohol per 100mL

Step 2: Positive Qualifying Drug Test

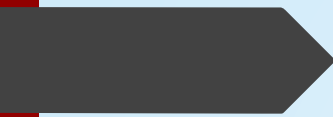
- ▶ A test is **QUALIFYING** if it was:
 - ▶ Given at the request of a police officer (rare), or
 - ▶ Given at the request of a licensed physician not employed by the employer (rare); or
 - ▶ Administered because the employer had **reasonable suspicion** that the employee may be intoxicated.

What creates a reasonable suspicion?

➤ Observable phenomena

- Direct observation of drug or alcohol use
- Possession or distribution
- Physical symptoms
 - Slurred speech
 - Dilated pupils
 - Odor of alcohol or marijuana
- Pattern of abnormal conduct
- Repeat or flagrant violation of company safety rules





If the employer can meet the requirements of (1) a positive, and (2) a qualifying drug test...

- ▶ The Industrial Commission will likely find that the employee's intoxication or being under the influence of drugs was the proximate cause of the injury, and the injury will **not** be compensable under workers' compensation.



If the employer cannot show that the drug test was qualifying...

- The only other way that the Industrial Commission can deny the claim is if there is a medical report from a reviewing doctor that reviews the intoxication levels and determines that the employee's intoxication was the proximate cause of the injury.

So as an employer, you think...

- I provided my employee with notice that I would drug test after an injury. ✓
- He or she was intoxicated on the job. ✓
- I have evidence of a positive drug test that was qualifying. ✓
- I have a medical report that says that the employee was intoxicated. ✓
- I automatically win NOW, right? ?



ASK
THE
ORACLE

If you meet these requirements...

- ➡ Then the burden then shifts to the employee to show that his or her intoxication was not the proximate cause of the injury.



A real story from the Industrial Commission...

Facts:

Date of Injury:	March 4, 2013
Claimant:	Concrete block factory worker running a block cutting machine.
Injury:	Machine jams and instead of hitting the emergency stop button, he bypasses a guard and cuts two finger tips off.
Drug Policy in Place:	Yes. Post-accident drug testing required by the employer.
Drug Test:	Positive for: marijuana, opiates, and methadone.
Hearing Result:	Claim allowed.

A real story from the Industrial Commission...

► *Other facts:*

- Employee worked for the employer for two months
- Employee was a recovering heroin addict with a 6 year history of heroin use.
- Employee was going to an addiction clinic and was testing positive for drugs on a weekly basis over the course of the two months prior to the injury.
- His injury was caused because he broke a safety rule and bypassed a safety measure.

Why did this claim get allowed?

► Problems with the drug test:

- Supervisor took him to the ER immediately, but the ER refused to give him a drug test.
- Drug test took place two days after the injury, thus outside of the 32 hour window.
- To combat this, the employer requested a file review.
- The physician stated that given the levels found, the claimant would be intoxicated, which would impair his judgment and functional capabilities.

The Industrial Commission Order:

Regarding the timing of the drug test...

The Staff Hearing Officer finds the Employer has argued the claim should be disallowed pursuant to the provisions of Revised Code Section 4123.54. However, the Staff Hearing Officer finds the lab reports on which the Employer relies dated 03/06/2013 that show the presence of hydrocodone, methadone and marijuana are drug test results which were performed more than 32 hours after the industrial accident. The Staff Hearing Officer finds such a drug test is not a qualified drug test for purposes of Revised Code Section 4123.54.

The Industrial Commission Order:

Remember “the burden then shifts” part?

Here is what the employee had to say about his drug use:

The Staff Hearing Officer further finds the Injured Worker testified at the hearing before the District Hearing Officer, as recorded in the Record of Proceedings, that he was not under the influence of hydrocodone, methadone or marijuana at the time of his industrial accident, although he did admit to substance abuse subsequent to the industrial accident, and before the drug test, in lieu of pain medication.

The Staff Hearing Officer finds the Injured Worker's testimony (that his drug abuse was after the date of accident for purposes of self-medication) undermines the opinion reports of Dr. Borrillo dated 05/02/2013 and 09/09/2013; the Staff Hearing Officer finds that the drug test conducted more than 32 hours after the industrial injury does not prove the Injured Worker was under the influence of any substance at the time of the industrial injury, especially in view of the Injured Worker's testimony that his drug use was following he injury.

Another real story from the Industrial Commission...

Facts:

Date of Injury:	February 24, 2014
Claimant:	Assembly worker
Injury:	Assembly arm on a part she was working on “flew up” and hit her on her forehead.
Drug Policy in Place:	Yes. Post-accident drug testing required by the employer.
Drug Test:	Positive for: amphetamines
Hearing Result:	Claim denied.

Another real story from the Industrial Commission...

➤ *Other facts:*

- Safety investigation showed that the employee failed to secure a safety pin, which caused her injury.
- Immediate post-injury treatment included a drug screen, pursuant to company policy.
- The employer got a medical review in support of its argument that the claimant's intoxication was caused by drug use.

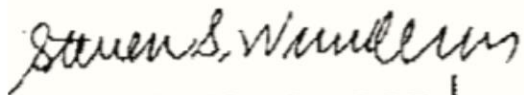
The medical report:

The Urine Drug Screen was noted for amphetamines. The results of the screen showed 12,407ng/mL with the expected value to be less than 500ng/mL.

This information was all taken into consideration.

The employee, through a qualified chemical test administered within 32 hours from the injury, had a controlled substance not prescribed by the employee's physician in the employee's system, that tested above the state guidelines for incapacitation. Per state guidelines for amphetamines, greater than 1000 ng/mL of urine is considered to be incapacitated. This claimant's levels were twelve times that and thus she would have been considered incapacitated at the time of the injury.

Sincerely,



Steven S. Wunder, M.D.¹

SSW/dh

For the best chances of winning a hearing at the Industrial Commission:

1. Have a drug policy in your handbook and file a copy of the policy with the Industrial Commission.
2. File a copy of the signed acknowledgement form with the Industrial Commission.
3. File the drug test with the Industrial Commission, and make sure that it was “**positive**”:
 - a) Taken within 8 hours for alcohol
 - b) Taken within 32 hours for drugs
4. Make sure your test is “**qualifying**”:
 - a) The test was given at the request of a doctor or a police officer, or was given because of reasonable suspicion
5. If your test isn't qualifying, get a **medical opinion** to support intoxication, and file it with the Industrial Commission.

Medical Marijuana Arrives TODAY!



OH-IO!!

The Changing Times...



**MARIJUANA IS
100% LEGAL
IN COLORADO
& WASHINGTON**

WHO'S NEXT?

MarijuanaMajority.com

TWO STATES DOWN, FORTY-EIGHT TO GO



So What DOES the Law Say???

- ▶ House Bill 523—Effective Date 9/8/16
- ▶ Legalizes *medical marijuana* only for the following “qualifying” conditions:
 - ▶ PTSD
 - ▶ Traumatic brain injuries
 - ▶ AIDS
 - ▶ Alzheimer’s
 - ▶ Cancer
 - ▶ Crohn’s
 - ▶ Epilepsy
 - ▶ Fibromyalgia
 - ▶ Glaucoma
 - ▶ *Pain that is either Chronic and Severe or Intractable*
 - ▶ (multiple other enumerated diseases or injuries)

So What DOES the Law Say???

➡ Who can prescribe?

- ➡ Only individuals licensed to practice medicine and surgery or osteopathic medicine and surgery
- ➡ The State Board of Pharmacy will create an advisory committee, made up of two pharmacists, two physicians, a member of local law enforcement, a member who represents employers, a member who represents lawyers, a member who represents person in each mental health, nursing, caregivers, patient advocates, agriculture, and drug/alcohol addiction.

Workers' Comp Issues With Medical Marijuana

CONFLICT BETWEEN STATE AND FEDERAL LAWS

FEDERAL:

- Schedule 1 drug under the Controlled Substances Act
- Cannot be prescribed, administered, or dispensed
- Illegal to use, purchase, sell, or cultivate. Same category as heroin and LSD.



STATE:

- May be legally prescribed drug by a doctor.
- HB 523 categorizes medical marijuana as a Schedule II drug



Workers' Comp Issues With Medical Marijuana

RISKS POSED TO WORKPLACE SAFETY

- Does bringing an injured worker back to the job present additional concerns if they are using medical marijuana?
- If so, is workplace safety as required by OSHA compromised?
- What if you have a driver? What if state law says your driver can legally take medical marijuana, but US Department of Transportation regulations and guidelines prohibit it?



Workers' Comp Issues With Medical Marijuana

DO I HAVE TO ACCOMMODATE?

ABSOLUTELY NOT!

- HB 523 does not require you to accommodate an employee's use of medical marijuana.
- It does NOT prohibit you from refusing to hire, discharge, or take an adverse employment action because of a person's use of medical marijuana.
- It specifies the marijuana is covered under the *rebuttable presumption* laws for intoxication, regardless of whether the marijuana was prescribed by a physician.

Workers' Comp Issues With Medical Marijuana

THE “PROOF PROBLEM”

- Is the presence of marijuana in the system what led to the accident?
- Marijuana can remain in a person's system anywhere from 24 hours to 30 days depending on usage.
- Proving impairment can be very difficult or even impossible.



Workers' Comp Issues With Medical Marijuana

WHAT ABOUT EEOC ISSUES?

- Employers must accommodate those with ADA protected disabilities.
- Is the use of medical marijuana an ADA protected treatment for a disability?



Other States: A Broad Spectrum of What Insurers and Workers' Compensation must Cover



OREGON

**COVERAGE NOT
REQUIRED:**

Medical Marijuana Act does not require workers' comp to pay for medical marijuana.



WASHINGTON

INSURER'S CHOICE:

Health insurers have sole discretion whether they will pay for medical marijuana.



NEW MEXICO

MUCH OVERSIGHT:

Workers' comp requires a patient identification card, supervision and monitoring, and caregiver licensing for medical marijuana to be compensable.

Will the Ohio BWC cover my employee's prescription for marijuana after an accident?

- The answer to this question is likely “no” for a number of reasons:
 - The O.A.C. provides that BWC approval is limited to those drugs approved by the US Food & Drug Administration....
 - BWC funded prescriptions must be dispensed by a registered pharmacist—medical marijuana will be dispensed by retail dispensaries.
 - BWC only reimburses drugs on its pharmaceutical formulary, or its specific list of approved drugs.



Where will it come from?

- HB 523 specifically states that a township zoning commission can regulate the location of medical marijuana cultivators, processors, or dispensaries, or from prohibiting them altogether.
- Does anyone have a problem with the new law?

Where will it come from?

➤ Just a few folks.....

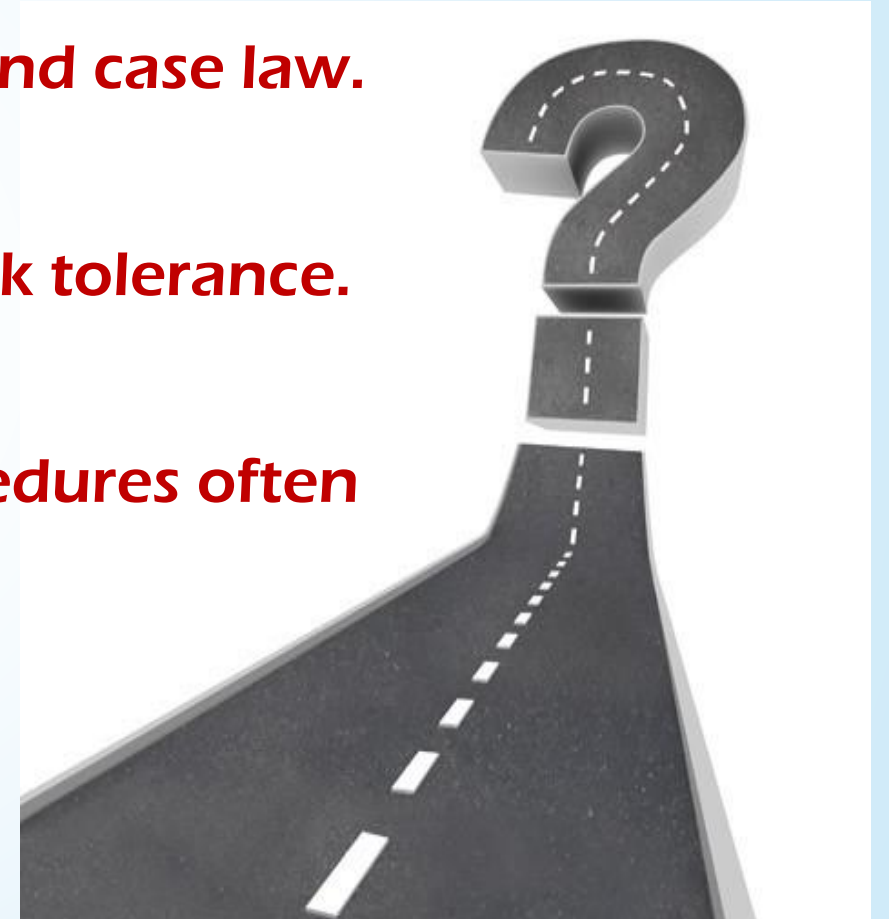
- Kettering
- Beavercreek
- Miamisburg
- Miami Township
- Clayton
- Troy
- Xenia (six month moratorium)

Where will it come from?

- ➡ Who's on the fence or planting seeds?
 - ➡ West Chester
 - ➡ Huber Heights (no plans for a moratorium)
 - ➡ Fairborn
 - ➡ Yellow Springs Village Council
 - ➡ Liberty Township

What can you do as an employer?

- ☒ Stay abreast of changing legislation and case law.
- ☒ Determine your company's level of risk tolerance.
- ☒ Review and update policies and procedures often to ensure that you are in compliance.
- ☒ Wait and see!





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