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The following are the written materials for a presentation that was given by Mr. Klaber at the Fall Section Meeting of Pennsylvania Bar Institute Fall, held in Hershey, PA, on September 21, 2005. Questions regarding the content may be sent directly to Mr. Klaber.

CONSIDERATIONS IN CASES INVOLVING INTOXICATED EMPLOYEES IN PENNSYLVANIA

Section 301(a) of the Act (77 P.S. Section 431) provides as follows;

§ 431. Compensation according to schedule; injury or death self-inflicted or caused by violation of law

> *Every employer shall be liable for compensation for personal injury to, or for the death of each employe, by an injury in the course of his employment, and such compensation shall be paid in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article: Provided,* ***That no compensation shall be paid when the injury or death is intentionally self inflicted, or is caused by the employe's violation of law, including, but not limited to, the illegal use of drugs, but the burden of proof of such fact shall be upon the employer,*** *and no compensation shall be paid if, during hostile attacks on the United States, injury or death of employes results solely from military activities of the armed forces of the United States or from military activities or enemy sabotage of a foreign power.* ***In cases where the injury or death is caused by intoxication, no compensation shall be paid if the injury or death would not have occurred but for the employe's intoxication, but the burden of proof of such fact shall be upon the employer****.*

In the event that the medical evidence establishes the presence of alcohol or drugs in the injured worker's system, or suggests that intoxicating substances played a role in the accident, the parties must be prepared to address the defense of the claim under Section 301(a). The following steps represent suggested areas of inquiry and evidentiary development. They are not exhaustive but serve as starting point for the analysis of the legal issues involved in cases involving intoxication in workplace.

1. Existence of Intoxicating Substances

   As a preliminary issue, it must be noted that the burden in a Section 301(a) defense rests with the defendant. Assuming that there is a suspicion of drug or alcohol use by the injured worker, the

defendant's first step is proving that the substance was in the claimant's system at the time of the injury. It is essential that all medical records associated with the injury be obtained as soon as possible. Relevant tests include blood tests, urinalysis, and gas chromatography. ER records may contain observations or notes from the treating doctor that shed light on the intoxication issues. Finally, these records often contain a history that the claimant provided to the doctors. This is helpful in understanding the accident and the extent of the claimant's ingestion of intoxicating substances.

Testimony from the claimant is a good source for the information needed to prove the existence of the substance in question. Inquires should be made as to ingestion of the substance on the day of the accident as well as the days prior to the accident. Efforts should be made to confirm the existence of the suspected substance as well as the use of any other intoxicating substances that may not have been part of the tests performed to date. It may be determined that the claimant used both alcohol and drugs in the hours/days before the accident.

In the event that the claimant does not admit to the use of the substance, the defendant may have to rely upon medical records or expert testimony in order to establish the presence, type, and effects of the intoxicant.

2. "Intoxication" as Opposed to Mere Presence in System

After establishing the existence of as intoxicating substance, the defendant must next establish that the claimant was actually intoxicated. The cases do not offer specific guidance as to how this fact may be established.

It is submitted that cases involving alcohol provide a bit more guidance than those involving illicit drugs. Blood alcohol levels over .8 provide a good staring point that the claimant is impaired within the meaning of the law. This alone may not be sufficient. It is suggested that intoxication is best established through the testimony of a physician or a toxicologist.

Illicit drugs and the level of intoxication will almost always require the participation of a toxicologist to provide expert testimony regarding the level of drugs in the claimant's system and the effect of such drugs as it relates to intoxication and impaired abilities. The same may be said of alcohol. Such testimony is subject to attack in terms of testing procedures, margin of error, and certain assumptions of the witness with regard to the exact effect of the substance on the individual claimant involved in the accident.

Evidence of intoxication may also be demonstrated by fact witness testimony regarding the ingestion of the intoxicating substance, observations with regard to the claimant's behavior before/after the injury, and possibly with regard to a history of substance abuse. As part of this investigation, all prior medical records be secured in order to investigate prior incidences, or patterns of usage. While this may not be dispositive on the issue of intoxication on the day of the accident, it may offer additional guidance to the fact finder. Prior incidents of intoxication, particularly on the job, may also support arguments regarding work rules, course and scope of employment, and the level of impairment.

3. Connection Between Intoxication and the Accident

By far the most important element of the Section 301(a) defense and the most difficult to establish is the causal link between the intoxication and the injury. Specifically, the defendant must prove that the intoxication caused the accident. As noted in the Mahon, (see attached materials) case, the court will look for proof that the intoxication was the "cause in fact" of the injury. The medical experts involved in the case should be made aware of this standard and should be prepared to address the specific cause for the accident or injury.

It should also be noted that the Mahon court notes that the defendant need not disprove all other potential causes for the accident. The claimant, who may be seen as the entity in control of the most facts surrounding the accident, should be prepared to offer a reason, other than intoxication, for the accident. Similarly, the defendant must convince the WCJ that the facts support a conclusion that the intoxication was the deciding factor in the accident.

The proof need to establish the causal connection between intoxication and the accident may be found in witness testimony, or specific testimony from the medical expert or toxicologist as to the known effects of the substance on physical and mental abilities. Body type and history of use/abuse may also be a factor. The relevance of the prior history may be raised but it is suggested that this is a permissible area of inquiry in order to evaluate the effect of the intoxicant on the claimant. Finally, both parties should be prepared to analyze the mechanics of the accident and offer argument regarding the role of the intoxicant in the injury.

4. Evaluation of the Work Rules to Determine if a Violation of Policy Occurred

In recent years, many employers have adopted a zero tolerance policy toward drug and alcohol use in the work place and make clear that any violation of the policy will be grounds for immediate dismissal. For purposes of illustration, it will be assumed that the fact pattern establish the existence of a policy in the workplace, and further assume that the claimant was aware of the policy.

The policy itself should be introduced into the record and explained by a fact witness, if necessary. In order to avoid an argument that the claimant was unaware of the policy the employer should explain how it was distributed and how the employees were made aware of the policy. It may also be helpful, but not necessary, to introduce evidence of prior enforcement actions, and a consistent application of the policy.

If the policy is clear, and if the claimant violated the policy, the question arises as to the practical effect of such a violation on the claimant's entitlement to benefits. While the violation may serve as the basis for an immediate dismissal from employment, the claimant's entitlement to benefits remains at issue. Under the circumstances of drug use in the workplace, it is likely that the employer would deny benefits under a Section 301(a) defense, subject to the terms set forth above..

The use of alcohol may be handled differently. Arguably, the use of alcohol represents the violation of a positive work order. However, there is likely to be resistance to such a defense unless the employer also proves that the violation (alcohol use) was the cause of accident. As a secondary position, the employer may argue that the violation of the rule led to a fault based dismissal, thus removing the claimant from the work force.

Assuming that the claimant is not totally disabled, wage loss benefits are arguable suspended based upon evidence of available work, and the fault based dismissal of the claimant. Medical care would remain available. However, if the claimant is totally disabled as a result of the accident, the violation of a work rule, absent a full intoxication/violation of law defense under Section 301(a), may not be enough to deny benefits.

Depending on the nature of the violation, the employer may also wish to consider a defense based upon a course and scope of employment. (See below)

5. Violation of Law

Section 301 will also preclude recovery if the claimant's injury is caused by the violation of law. It is the defendant's burden to establish both the violation of a law and a causal connection between the violation and the accident in question.

A "violation of law" for purposes of Section 301 is either a conviction on a felony or a misdemeanor, OR a conviction on a summary offense that is a necessary element of, and was the direct cause for the more serious crime. In cases in involving this defense, it is suggested that a police representative be called to testify as to the crime. This testimony will clarify any issues regarding the commission of a crime, and may offer additional information regarding the connection between the crime and the injury. See Cronin case in which the claimant violated the law by ingesting cocaine. Benefits were awarded since the employer failed to link the cocaine use to the cause of death.

It should be noted that the defendant must also establish that the violation of the law was the cause of the injury. A leading example of this is the DUI situation in which a claimant is convicted of the crime. While this may satisfy the first part of the defense, the employer must also establish that the drunk driving was the cause of the crash. See Oakes case in which claimant stopped at six bars, had a blood alcohol level beyond the legal limit, but was nonetheless found to be entitled to benefits. The WCJ was not convinced that the alcohol caused the accident.

6. Course and Scope of Employment

Even if the employer cannot meet its burden in establishing that the intoxication of a claimant was the cause of the injury, they may also wish to present a course and scope defense. This will depend on the specific fact scenario but such a defense has merit in cases involving a claimant who ingests alcohol or drugs at work, and is then involved in a car accident. While the Section 301(a) defense may not stand, it may still be possible to convince the fact finder that such behavior does not further the interests of the employer, and removes the claimant from the course and scope of employment. In order to be successful, the Judge must view the action as a significant detour from work duties. While a "few beers" on the way home from a business trip may not convince the Judge to deny benefits, it is difficult to predict the fact finder's reaction to more significant drinking or drug use that puts the claimant's co-workers in danger. For this reason, as well as appeal purposes, the argument should be presented to the Judge.

CASES RELEVANT TO INTOXICATION AND WORK PLACE INJURY

1. Mahon v. Workers' Comp. Appeal Bd. (Expert Window Cleaning), No. 2161 C.D. 2002 , COMMONWEALTH COURT OF PENNSYLVANIA , 835 A.2d 420; 2003 Pa. Commw. LEXIS 781, October 8, 2003, Argued, November 10, 2003, Decided, November 10, 2003, Filed, Appeal denied by Mahon v. Workers' Comp. Appeal Bd. (Expert Window Cleaning), 2004 Pa. LEXIS 1267 (Pa., May 19, 2004)

   Window washer who fell from a scaffold at 9:30 a.m. During treatment at the hospital, the claimant admitted to drinking two beers prior to work and also reported a habit of drinking two six packs per day. Blood alcohol at 11:32 a.m. was 238 milligrams per deciliter.

   The defendant accepted the injury through and NCP but then filed a petition to Review based upon later discovered evidence that the claimant was intoxicated at the time of the fall. The defense medical expert testified that the claimant had the equivalent of 13 one ounce shots in his system at the time of the fall and was thus significantly impaired. The expert testified that had the claimant not consumed the alcohol, he would not have fallen.

   The WCJ granted the review and found the defense evidence to be credible. The WCJ concluded that the defendant met its burden under Section 301(a) by establishing the intoxication as the cause of the injuries. The Board affirmed the decision of the WCJ

After discussing the timing of the Review petition and concluding that the defendant was indeed permitted to challenge the accepted injury, the Commonwealth Court discussed the intoxication defense.

The claimant challenged the denial of benefits and argued that the defense expert testified that the intoxication made it "more likely" that the claimant would fall off a ladder but did not testify that the claimant would not have fallen "but for" the intoxication. The court looked to the statute and the General Assembly's use of the "but for" language and concluded

By using the phrase "but for" we believe the General Assembly meant that an employer or insurer claiming an employee's intoxication as an affirmative defense under Section 301(a), must meet a burden similar to a plaintiff's in a negligence action by establishing that intoxication was the cause in fact of an injury, without regard to proof that the intoxication was the proximate cause of or a substantial factor in causing the injury

The Court determined that the WCJ, as fact finder, determined that the defense met its burden in this regard. It rejected that claimant's argument that the defendant was required to establish the existence of negative facts, i.e. that no other condition was the cause of the claimant's fall. In making this ruling, the court noted, "when the nonexistence of a negative fact can be established by one party more easily than another, the burden may lie on the party more able to prove the negative fact," The claimant had an opportunity to introduce such evidence but did not do so. Thus, the denial of benefits was upheld.

2. Schweitzer v. Workers' Comp. Appeal Bd. (C.D. Carlton Roofing), No. 2097 C.D. 2000, COMMONWEALTH COURT OF PENNSYLVANIA, 2001 Pa. Commw. LEXIS 783, June 7, 2001, Submitted, September 7, 2001

Claimant fell from a ladder on May 2, 1997 while carrying a bucket of tools to a roof . During the litigation of the case, he testified that he consumed twenty 12 ounce bottled of beer between the afternoon of May 1, 1997 and 2:30 a.m. on May 2, 1997. (The opinion does not include the specific blood alcohol level) The claimant awoke at 6:00 a.m. on May 2, 1997 and reported feeling tired and hung over but he denied that he ingested any other alcohol or drugs on May 1 or 2. The hospital records revealed alcohol and traces of marijuana, and amphetamines in the claimant's system. The records also recorded a history where the claimant told of ingesting a lot of alcohol and marijuana on May 1, 1997.

In an effort to address the intoxication defense, the claimant's doctor testified that any number of conditions, including the ladder, the weight of the tool bucket, and the moisture level could have caused the fall. Thus, the claimant argued that the intoxication did not cause the injury. The defendant's medical expert testified that the intoxication was the "sole cause" of the fall.

The WCJ accepted the testimony of the defendant's medical expert. The WCJ rejected the other possible sources for the fall, and found that the claimant's medical expert assumed facts not in evidence, and further failed to address the levels of amphetamines and marijuana. The WCJ went on to find that the claimant's intoxication was the "exclusive cause" of the work injury and the Board affirmed.

The claimant appealed based upon an argument that the WCJ erred by failing to credit the testimony of the claimant's medical expert that alcohol was not the "but for" cause of the fall. The claimant argued that the ladder and weather conditions contributed to the fall. The claimant also argued that the defendant's medical expert failed to consider these other factors in rendering his opinion.

The Commonwealth Court found that the WCJ acted within proper standards in determining that the defendant's medical expert was more credible than the claimant's expert.

3. City of Philadelphia v. Workers' Compensation Appeal Bd. (Cronin), No. 764 C.D. 1997, COMMONWEALTH COURT OF PENNSYLVANIA, 706 A.2d 377; 1998 Pa. Commw. LEXIS

37, October 10, 1997, Argued, January 22, 1998, Decided, January 22, 1998, Filed, Petition for Allowance of Appeal Denied June 18, 1998.

Claimant, a firefighter, was exposed to heat smoke, fumes, and gases under emergency conditions for 15 years of his tenure as a firefighter. He passed away at home and the dispute arose with regard to the cause of death.

The claimant's medical expert attributed his death to his occupational exposure and testified that he had arteriosclerosis, and blockage in three coronary blood vessels that were all related to his work duties. The defendant's medical expert testified that the claimant died as a result of underlying atherosclerotic coronary disease, with cocaine intoxication as a contributing cause. The coroner testified that the cocaine levels in the claimant's system were very high at the time of death , up to ten times greater that most people examined by his office who died from cocaine ingestion.

The WCJ credited both witnesses and found that the cardiovascular arteriosclerosis was a substantial contributing factor to the death and that cocaine intoxication was also a contributing factor. He awarded death benefits to the claimant. The employer appealed and the Board affirmed the decision.

The defendant argued that the finding of cocaine intoxication as a contributing factor precluded the award of benefits under Section 301.The defendant asserted that these findings established the necessary causal link between the illegal use of drugs and the death. The Commonwealth Court rejected this argument and pointed out that Section 301 places the burden of the defendant to prove both the illegal use of drugs as well as a causal connection between the illegal act and the injury. The claimant's medical expert testified that the primary cause for the death was occupational exposure to fumes etc, and the WCJ accepted this as credible. Although the cocaine use may have been a contributing factor, the defendant failed to establish that this particular illegal activity was the cause of death.

4. Kovalchick Salvage Co. v. Workmen's Compensation Appeal Board (St. Clair), 102 Pa. Commw. 562, 519 A.2d 543 (Pa. Cmwlth. 1986),

Claimant was driving a company car to his home after being out of town on a job site. He was killed in an automobile accident. The records reflects that he had stopped at several bars on his way home and he was found to have a blood alcohol content of .26 at the time of the accident.

After a remand to clarify the course of employment finding, the WCJ awarded benefits finding that the claimant was in course of his employment. However, the WCJ did not make a finding with regard to the intoxication of the claimant. The defendant appealed and the Board affirmed.

The defendant argued that the claimant was in violation of the law at the time of the accident, based upon his blood alcohol content of .26. The Commonwealth Court acknowledged the argument but found that the WCJ was not presented with substantial evidence linking the violation of law to the death.

The defendant also challenged the finding that the claimant was in the course of his employment at the time of death. The WCJ found that the claimant was on his way home after being out of town performing his job duties. The Commonwealth Court rejected the argument that the claimant removed himself from his job duties, based upon his failure to leave the company car at the employers offices, rather than driving it home.

The Commonwealth court agreed with the Judge that the claimant's detour for a "few drinks" did not remove the claimant from the course of his job duties. The Commonwealth Court also rejected the argument that the claimant failed to follow the employer's policy in dropping the car off before going home. The Court credited the finding of the WCJ that this policy had not been fully communicated to the employees.

5. Oakes v. Workmen's Compensation Appeal Bd. (Pennsylvania Electric Co.), No. 2099 C.D. 1982, Commonwealth Court of Pennsylvania, 79 Pa. Commw. 454; 469 A.2d 723; 1984 Pa. Commw. LEXIS 1124, October 5, 1983, Argued, January 10, 1984, Decided, Application for Reargument Filed and Denied.

   Claimant died in an automobile accident while driving the company car. Prior to the accident, the claimant had stopped at six bars and consumed alcohol. In the decision denying benefits, the Judge found that A gas chromatography test showed that the Decedent, at the time of his death, had a blood alcohol content of 285 milligrams of ethanol.13. 285 milligrams of ethanol indicates a severe degree of ethanol intoxication or poisoning and would result in major disturbances of equilibrium and coordination. However the Judge further found that the claimant's level of intoxication was not the cause of his death. Benefits were denied based upon a finding that he was not in the course of his job duties at the time of the accident. The Board affirmed the decision

   The Commonwealth Court analyzed the Course and Scope of employment and reversed the decision of the WCJ. The Court found that the claimant was engaged in his employer's business that he had started earlier in the day, and was in the course of his employment at the time of the accident. The Court further pointed out that the intoxication was not the cause of the accident or the death, as found by the WCJ.

   The court also rejected the defendant's argument that the intoxication was prohibited by Company Policy. Finally, the court rejected the argument that the illegal nature of the drinking and driving would not preclude benefits since the act itself was not the cause of the accident.

6. Rox Coal Company, Petitioner, v. Workers' Comepnsaiton Appela Board (Snizaski), No. 55 WAP 2001, No 56 WAP 2001, 570 Pa. 60, 807 A.2d 906 (2002)

   Claimant died in an automobile accident while driving a company vehicle to work on May 7, 1996. Claimant sought benefits and argued that the claimant was required to work at all hours. Thus, he fell outside the "coming and going rule" and was entitled to compensation. The defendant denied benefits based upon Section 301(a) of the Act and argued that his violations of law (careless driving, unsafe speed, driving on wrong side of road, failure to use restraint system) as well as the violation of company policy regarding the use of company vehicles.

   The WCJ denied benefits, finding that the claimant did not fall outside the coming and going rule. The WCJ further found that the claimant's injury "occurred as a result of the Decedent's violation of law and the defendant/ Employer's company policy".

   The WCAB reversed the determination of the WCJ that Decedent's death occurred as a result of his violation of law and the company policy of Rox Coal, finding that conclusion unsupported by the evidence and erroneous as a matter of law. The WCAB relied on Burger King v. Workmen's Compensation Appeal Board (Boyd), 134 Pa. Commw. 547, 579 A.2d 1013 (Pa. Cmwlth. 1990), in which the Commonwealth Court held that the phrase "violation of law" contained in section 301(a) means the commission of a felony or misdemeanor; a summary offense can only be considered a violation of law pursuant to that section in circumstances where the summary offense is a necessary element of a felony or misdemeanor conviction.

   The Commonwealth Court, as well as the Supreme Court, found that the Police report, as uncorroborated hearsay, would not serve as competent evidence to support a finding. As a result, there was no evidence regarding the violation of the law of the violation of corporate policy. Since the finding with regard to the violation was uncorroborated, the Supreme Court did not address the nature of the violation..