INTOXICATION DEFENSE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
INTOXICATION DEFENSE

Few Illinois Workers’ Compensation decisions are more troubling to employers, carriers, and the general public than those awarding benefits to intoxicated employees. In Illinois, unlike most states, the impairment of an employee is not a per se bar to workers’ compensation benefits. In order to bar benefits, the defense must show that the intoxication was the cause of the injuries. If the employee could still perform his duties, and was in fact performing those duties at the time of injury, compensation will likely be awarded. In these materials we will view the Illinois law concerning intoxicated employees and review proposed legislative changes.

I. THE ILLINOIS INTOXICATION DEFENSE STANDARD

Illinois law is very liberal in allowing compensation for intoxicated employees. The Illinois standard was established in the case of Paganelis v. Industrial Comm’n, 132 Ill. 2d 468, 548 N.E. 2d 1033, 139 Ill. Dec. 477 (1989). In Paganelis, the Supreme Court held that for compensation to be denied on the basis of intoxication, the evidence must show either that the employee was so drunk that the intoxication was the sole cause of the accident, or, that the intoxication is so excessive that it constitutes a departure from the employment. Intoxication that does not prevent the employee from performing the duties of his occupation and is only a contributing cause of the injury does not bar recovery. In Paganelis, the petitioner, Benni Johnson was an employee of a laborers’ union. After having drinks with one business associate, Benni was on his way to meet another business associate. While he was driving to the second appointment, Bennie turned left into oncoming traffic and sustained serious injuries. The arbitrator found for Johnson and stated the injuries occurred while in the course of business. On Appeal, the Commission reversed the arbitrator’s decision. After lengthy procedures in the lower courts, the Supreme Court affirmed the Commission’s finding that the petitioner was so intoxicated that his injuries did not arise out of and in the course of his employment, but rather from his intoxication after drinking. During his original trial, evidence showed that Benni Johnson’s blood alcohol level was .238. Medical testimony during the trial showed that an alcohol level of that quantity would leave a person in a very intoxicated condition. Furthermore, a person with a .238 blood alcohol content would have poor judgment, slowed reaction times, and decreased motor skills. The Supreme Court said that due to his level of intoxication, and the fact that he turned left into oncoming traffic, he was unable to safely perform his duties. Basically, it was his level of intoxication that caused the accident; not his course of employment. Interestingly, while it seems that Mr. Johnson was encouraged to drink alcohol with clients, the courts did not visit that issue.

In Panagos v. Industrial Comm’n, 171 Ill. App. 3d 12, 524 N.E.2d 1018, 120 Ill. Dec. 836 (1st Dist. 1988), on the other hand, the petitioner was a belly dancer who was encouraged to drink champagne with customers. After leaving work one evening, she was injured in an automobile accident. The arbitrator awarded her $200 per week for life for total permanent disability and was affirmed by both the Industrial Commission and the Appellate Court. The Court found that, although she may not have been verbally encouraged to consume alcohol with customers, she
was not discouraged from doing so. Also the drinks she drank and the food she ate while socializing were paid for by the customers, with the profits going exclusively to the employer. The Court ultimately held that the injuries arose out of and in the course of employment. Panagos, 171 Ill. App. 3d at 16.

In Freeman United Coal Mining Co. v. Industrial Comm’n, the Court held that intoxication must have been a contributing cause to the injury. A deceased employee was found outside a gate with scratches on his face and an empty quart bottle of alcohol nearby. It appeared that the employee fell while trying to shut the gate when he slipped on the ice. The toxicology report showed he had a blood alcohol level of .155. The Court held that benefits were appropriate because it was impossible to prove that the alcohol was a contributing factor in the decedent’s fall. Freeman United Coal Mining Co. v. Industrial Comm’n, 160 Ill. App. 3d 524, 513 N.E.2d 555, 112 Ill. Dec. 141 (4th Dist. 1987).

Kropp Forge Co. v. Industrial Comm’n had a similar result. In Kropp, a deceased employee was found inside a furnace with empty beer cans nearby. Other employees testified that it was common for beer cans to be thrown into the furnace. They also testified that the decedent showed no signs of intoxication prior to his death. The toxicology report showed that he was intoxicated at the time of his death, however, they could not show that the intoxication was a contributing factor. Kropp Forge Co. v. Industrial Comm’n, 225 Ill. App. 3d 244, 587 N.E.2d 1095, 167 Ill. Dec. 480 (1st Dist. 1992).

In Parro v. Industrial Comm’n, the petitioner worked as a bartender and injured herself when falling down the stairs. On the night in question, she was celebrating with customers and admitted to having several sips of alcohol. As she was going up some stairs, she tripped and fell and was injured. She testified that the steps were greasy and slippery and the lighting was poor. Witnesses from the bar testified that the petitioner did not appear to be intoxicated and had only consumed only a small amount of alcohol. Several hours after the fall, however, a blood test showed an alcohol level of .288. Medical testimony during the trial showed that the petitioner would have been intoxicated and impaired at the time of the accident. Contrary to Szarek, where the Court held the hole the petitioner fell through was not accessible to the public, the Court found that the staircase in this matter was accessible to the public. The Court held that the testimony of the eyewitnesses could be disregarded due to the medical testimony, which showed she was intoxicated. The Supreme Court upheld the arbitrator’s denial of the workers’ compensation claim. Parro v. Industrial Comm’n, 167 Ill. 2d 385, 657 N.E.2d 882, 212 Ill. Dec. 537 (1995).

II. DRUG USAGE

Illinois law is the same with respect to employees who are injured while under the influence of drugs as it is for those employees who under the influence of alcohol. In 2009, the Appellate Court, Third District upheld a compensation award for an employee who had both marijuana and cocaine metabolites in his system. Lenny Szarek, Inc. v. Illinois Workers’ Compensation
Comm’n, 396 Ill. App. 3d 597, 919 N.E.2d 43, 335 Ill. Dec. 522 (3d Dist. 2009). Petitioner, Daniel Rub, filed a claim pursuant to the Workers’ Compensation Act alleging that he was injured while employed by Szarek, Inc. Daniel was working as an apprentice carpenter for Szarek when he fell through a 9 x 9 foot hole in the middle of the floor. He fell two stories to the basement level and is now a paraplegic. While being treated at the hospital, Daniel’s urine was tested with results showing both cocaine and cannabis. He admitted prior use of drugs, but denied any recent use. The defense retained Dr. Jerrold Leikin to review the medical records and testify as to the petitioner’s possible intoxication at the time of the accident. Dr. Leikin testified that the amount of cannabis in Daniel’s system was “consistent with impairment due to marijuana.” Dr. Leikin also testified that cannabis intoxication would result in visual deficits, perceptual abnormalities, coordination problems, impaired judgment and increased reaction time. In his ultimate opinion, Dr. Leikin testified that the use of the cannabis “might or could” have caused Daniel’s fall due to the vision and reaction changes attributable to marijuana intoxication. Dr. Leikin testified that marijuana intoxication definitely caused an increased risk of injury. Dr. Leikin testified that the amount of marijuana in Daniel’s system would likely make it difficult for him to perform his duties in a safe manner.

During cross examination, Dr. Leikin testified that Daniel’s amount of hydration and the length of time since the last time he urinated could have an effect on the results in the toxicology screening. He also testified that he could not actually quantify the amount of toxification, although he did state that it was significant. Dr. Leikin acknowledged that while he believes that Daniel was intoxicated by marijuana, there is nothing else in the medical records to show that he was impaired. Dr. Leikin further acknowledged that he could not state the petitioner’s intoxication was the only causal factor in the accident.

The arbitrator found for Daniel and awarded him $152,784.17. The employer appealed.

Like the circuit court, the Appellate Court affirmed the award. The employer argued that the petitioner did not prove his injuries were caused by his employment. Basing his argument on the marijuana intoxication, the employer stated it would be impossible to find that his injuries were caused by employment. The Court cited Paganelis v. Industrial Comm’n, as the basis for the intoxication defense. First, an employee can be denied benefits if the cause of the injury arose from the intoxication rather than the employment. Second, if the employee is extremely intoxicated to the point it becomes a departure from his employment, any injury sustained in that condition is not an injury in the course of employment. The Court held that Daniel was injured in the course of his employment. A 9 x 9 foot hole is not something to which the public is typically exposed. The only reason Daniel was exposed to it was due to his employment. Furthermore, the Court held that he was not intoxicated to the point of “departure from employment.” This was based on testimony from trial where his co-worker stated that Daniel did not seem intoxicated while they were working. Also, Dr. Leikin testified that the medical records make no mention of other signs of intoxication.

Interestingly, the employer argued that the Court should abandon the principles found in Paganelis. The Court stated that because it was a Supreme Court case, they had no ability to
overturn it. The Court seemed to throw the issue to the legislature by stating that it was a public policy issue that the legislature is much more suited to address.

In *McKernin Exhibits, Inc. v. Industrial Comm'n of Illinois*, 361 Ill. App. 3d 666, 838 N.E.2d 47, 297 Ill. Dec. 560 (1st Dist. 2005), the employer appealed the Industrial Commission decision which stated petitioner was not intoxicated at the time of a motor vehicle accident. Petitioner, driving a pick-up truck in the course of his employment, struck the rear of an 18-wheel semi-truck and sustained serious injuries. Blood tests taken at the hospital after the accident showed the presence of cocaine in the employee's blood. Medical testimony revealed that cocaine can stay in the body for up to two weeks without signs of intoxication. The employee's supervisor testified that he observed the employee for at least 30 minutes before instructing him to drive. During that time, he did not notice any signs of intoxication or impairment. The Appellate Court affirmed the decision of the Commission and held there was not enough evidence to prove intoxication caused the accident.

In the last 12 years, only two cases involving intoxicated or impaired employees (*Szarek* and *McKernin*) have been published. In each of those the Commission found for the employee. In the 1990's, there were about seven cases involving intoxication published. *Lock 26 Constructors v. Industrial Comm'n*, 243 Ill. App. 3d 882, 612 N.E.2d 989, 184 Ill. Dec. 113 (5th Dist. 1993) (Blood alcohol level of injured construction worker was .29; intoxication not the cause of injury; awarded compensation); *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 657 N.E.2d 1196, 212 Ill. Dec. 851 (1st Dist. 1995) (Compensation denied to deceased employee after he became intoxicated at a social function that followed a business-related meeting because employer could not foresee decedent's behavior); *Lakeside Architectural Metals v. Industrial Comm'n*, 267 Ill. App. 3d 1058, 642 N.E.2d 796, 204 Ill. Dec. 895 (1st Dist. 1994) (Compensation awarded to construction worker who smoked a marijuana cigarette just before falling through scaffolding to his death because no impairment could be proved); *Bailey v. Industrial Comm'n*, 247 Ill. App. 3d 204, 617 N.E.2d 305, 187 Ill. Dec. 97 (1st Dist. 1993) (Intoxicated employee found to be acting outside the scope of employment because he was traveling in the opposite way of his assignment); *Riley v. Industrial Comm'n*, 212 Ill. App. 3d 62, 570 N.E.2d 887, 156 Ill. Dec. 411 (3d Dist. 1991) (Compensation denied to an employee with a BAC of .220 who had been drinking at a work-related meeting with customers and, while driving home, struck a utility pole after falling asleep).

### III. OTHER REPRESENTATIVE STATES' STANDARDS

In Louisiana, the intoxication defense has three elements that must be met. First, a properly administered drug test must be given immediately after the accident. In *Fisher v. Westbank Roofing*, 670 So. 2d 1328 (La. App. 5th Cir. 1996), the employee was not presumed intoxicated at the time of the accident because the drug screen was done six days after the accident. Even though his drug screen was positive for illicit drugs and the employer requested a drug test immediately after the accident, the Court held they could not prove intoxication when the injury occurred. If, however, an employee refuses the drug test immediately after the accident,
intoxication will be presumed. The second element that must be proved is a positive test result. If a blood alcohol level is .10 or more or if any evidence of a non-prescribed controlled substance or other illicit drug is detected, a presumption of intoxication exists. Lastly the workplace must have a drug testing program. In Thompson v. Capitol Steel Co., 617 So. 2d 936 (La. 1993), the employer was able to show the accuracy of the test and chain of custody. However, the drug testing procedure was not a written policy. The Court declared the positive drug screen inadmissible.

Missouri has also amended their Workers’ Compensation Act in regard to intoxication. If an employee fails to obey the written policy for a drug free workplace, and the employee is injured while using alcohol or non-prescribed controlled medication, the compensation will be reduced by 50%. If it can be proven that the intoxication was the proximate cause of the employee’s injury, the benefits will be completely forfeited.

Indiana, similarly, requires that the employer prove that the injuries were caused by the intoxication. In Jones v. Pillow Express Delivery, Inc., 908 N.E.2d 1211 (Ind. 2009 App.) the employee was using a prescription “patch” which caused him to feel intoxicated when he was killed in a car accident in the course of employment. Compensation was denied because the prescription drug was a controlled substance and was deemed the cause of the injuries.

IV. PREVALENCE OF ALCOHOL AND DRUG USE

Alcohol and drug usage during employment is an issue not only for the safety of the employees, but also for the bottom line of the employer. According to the Substance Abuse and Mental Health Services Administration, an estimated 19.9 million Americans are currently illicit drug users. Of full time employees, 8.4% are current illicit drug users. Alcohol is the predominant drug of choice of most working adults, with 79.4% of binge drinkers being employed. Of employed adults, 7.1% admit to drinking during the work day, 1.8% consume alcohol before coming to work, and 8.8% report heavy alcohol use. (samhsa.gov). When compared to non-abusing co-workers, employed substance abusers (both alcohol and drug users) are 3.5 times more likely to be involved in a work accident and five times more likely to file a workers’ compensation claim (samhsa.gov).

V. PROPOSED LEGISLATIVE REFORM

During the Spring session of the Illinois General Assembly several bills were proposed to codify intoxication and workers’ compensation. The relevant parts of Senate Bills 2155 and 1349, as well as House Bills 1032 and 2883 all had identical language, which read as follows:

There shall be a rebuttable presumption that no benefits under this Act shall be payable if (i) the employee’s intoxication is the proximate cause of the employee's accidental injury or (ii) at the time the employee incurred accidental
injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. Admissible evidence of the concentration of (1) alcohol, (2) cannabis as defined in the Cannabis Control Act, (3) a controlled substance listed in the Illinois Controlled Substances Act, or (4) an intoxicating compound listed in the Use of Intoxicating Compounds Act in the employee’s blood, breath, or urine at the time the employee incurred the accidental injury shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries. Intoxication shall be defined as 0.08% or more by weight of alcohol in the employee’s blood, breath, or urine or if there is any evidence of impairment due to the unlawful or unauthorized use of (1) cannabis as defined in the Cannabis Control Act, (2) a controlled substance listed in the Illinois Controlled Substances Act, or (3) an intoxicating compound listed in the Use of Intoxicating Compounds Act. If the employee refuses to submit to testing of blood, breath, or urine as soon as practical after the accident, he or she shall be considered to have been intoxicated at the time of the accident. Percentage by weight of alcohol in the blood shall be based on grams of alcohol per 100 milliliters of blood. Percentage by weight of alcohol in the breath shall be based upon grams of alcohol per 210 liters of breath. Any testing that has not been performed by an accredited or certified testing laboratory shall not be admissible in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injury.

97th Ill.Gen.Ass. SB 2155.

All sample collection and testing for alcohol and drugs under this section shall be performed in accordance with rules to be adopted by the Commission. These rules shall ensure:

1. compliance with the National Labor Relations Act regarding collective bargaining agreements or regulations promulgated by the United States Department of Transportation;

2. that samples are collected and tested in conformance with national and State legal and regulatory standards for the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable sample;

3. that split testing procedures are utilized;

4. sample collection is documented, and the documentation procedures include:

   (A) the labeling of samples in a manner so as to reasonably preclude the probability of erroneous identification of test result; and
(B) an opportunity for the employee to provide notification of any information which he or she considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs and other relevant medical information;

(5) that sample collection, storage, and transportation to the place of testing is performed in a manner so as to reasonably preclude the probability of sample contamination or adulteration; and

(6) that chemical analyses of blood, urine, breath, or other bodily substance are performed according to nationally scientifically accepted analytical methods and procedures.

It is important to note that while benefits could possibly be completely barred, the legislature has taken steps to insure the testing is done properly and accurately. Intoxication would be defined as .08% alcohol in the employee’s blood, breath, or urine. Impairment could also be proven if there is any evidence of impairment due to the unauthorized use of cannabis, a controlled substance, or intoxicating compound. To reach these results, the testing must be done according the accepted scientific procedures.

House Bill 2607 discusses another aspect of intoxication and workers’ compensation: Driving under the influence. House Bill 2607 in part states:

Notwithstanding any other defense, accidental injuries incurred while the employee is engaged in the active commission of and as a proximate result of the active commission of (a) a forcible felony, (b) aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, or (c) reckless homicide and for which the employee was convicted do not arise out of and in the course of employment if the commission of that forcible felony, aggravated driving under the influence, or reckless homicide caused an accident resulting in the death or severe injury of another person. If an employee is acquitted of a forcible felony, aggravated driving under the influence, or reckless homicide that caused an accident resulting in the death or severe injury of another person or if these charges are dismissed, there shall be no presumption that the employee is eligible for benefits under this Act. No employee shall be entitled to additional compensation under Sections 19(k) or 19(l) of this Act or attorney’s fees under Section 16 of this Act when the employee has been charged with a forcible felony, aggravated driving under the influence, or reckless homicide that caused an accident resulting in the death or severe injury of another person and the employer terminates benefits or refuses to pay benefits to the employee until the termination of any pending criminal proceedings (Emphasis added).

97th Ill.Gen.Ass. HB 2607.
This Bill would make it seemingly impossible for a person driving under the influence to receive workers’ compensation benefits if someone is killed in an accident. The legislature makes a point to specify “driving under the influence” to prevent any loopholes.

At the time of this publication, the bills containing proposed legislative changes are either back in Committee or pending a vote when the legislature comes back into session in early May, 2011.

VI. PRACTICE TIPS

Intoxication cases are very fact specific, as are most “arising out of” cases. As with any other claim, detailed investigations should be undertaken. The following steps are recommended:

- Employer should have in place policies and procedures for immediate post-accident drug screens. Drug tests are essential to prove the level of impairment. Further, many employers have found the number of work comp claims actually goes down when post-accident drug screening is implemented. Minor accidents are not reported or claimed for fear of the results of the drug screen.

- A complete incident report should be completed by the petitioner, outlining the activities and how the injury occurred.

- Co-workers and other witnesses should be thoroughly questioned regarding the injured worker’s activities, duties, and any and all observations related to possible impairment.

- A job description should be obtained, as well as a possible job site analysis, in an attempt to prove that the job would be difficult to perform with any level of impairment.

- In most instances, an expert witness will be necessary to testify regarding the level of intoxication and the effect that such level of intoxication would have on the injured worker. The injured worker’s personal characteristics which might influence the effect of alcohol or drugs should also be considered and made available to the expert.

For the present, intoxication defenses will remain difficult to prove. Legislative changes may bring needed reform. In the meantime, it is suggested that the vast majority of cases involving intoxication should be defended, even if the chance of a successful defense is a long shot. Compromise settlements can often be obtained in such claims.
Gary L. Borah
- Partner

Gary has spent his entire legal career with Heyl Royster beginning in 1975 in the Springfield office. Born in Mt. Erie, Illinois, Gary became a partner with the firm in 1981.

He has handled a wide range of cases, including workers’ compensation, medical malpractice, products liability, automobile, construction accidents, and coverage issues.

Gary concentrates his practice in the area of workers’ compensation and employment law. He has made presentations for the Law Ed Seminars of the Illinois State Bar Association, and has frequently spoken to management and insurance audiences on workers’ compensation and risk management. He regularly counsels self-insureds on their unique problems, offering experience and insight for implementing successful programs. He currently supervises the workers’ compensation practice group in Heyl Royster’s Springfield office.

Gary has been designated one of the “Leading Lawyers” in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Record, a designation awarded to only the top five percent of lawyers in the state.

Public Speaking
- “Repetitive Trauma - The Defenses are in the Details” Heyl Royster (2008)
- “Cumulative Trauma Disorders and Job Site Analysis: Minimizing Risk in the Workplace and the Courts” Midwest Rehabilitation (2008)
- “Investigating and Resolving the Death Case” Heyl Royster (2007)
- “Top Ten Things Every Employer Should Know About Workers’ Compensation” Gateway Rehabilitation Workers’ Compensation Spring Conference (2007)

- “Hot Topics in Illinois Workers’ Compensation” Midwest Rehabilitation (2006)

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Professional Associations
- Workers’ Compensation Lawyers’ Association
- American Bar Association
- Illinois State Bar Association (past member Workers’ Compensation Section Council)
- Sangamon County Bar Association

Court Admissions
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