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The New Intoxication Defense for Ohio Employers

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THE NEW INTOXICATION DEFENSE FOR OHIO EMPLOYERS

I. INTRODUCTION

Ohio workers' compensation system has been in a state of emergency for the last two years as labor and business groups battled over a series of employee-oriented Ohio Supreme Court decisions.[1] Labor groups hailed these decisions as the vehicle which would propel Ohio's workers' compensation law into the twentieth century.[2] Conversely, business groups condemned the decisions asserting that they exposed Ohio employers to infinite liability and destroyed Ohio's industrial climate.[3]

The crisis peaked when business groups launched a campaign designed to incite legislative reversal of the liberal flow of these decisions.[4] When a series of marathon hearings and negotiations failed to induce the warring factions to arrive at an equitable settlement, the Ohio Legisla-

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[1] J. HARRIS, OHIO WORKERS' COMPENSATION ACT: 1986 SENATE BILL 307 1 (1986).

[2] JOINT LABOR COMMITTEE TO SAVE WORKERS' COMPENSATION, THE FACTS ABOUT THE ATTACK ON OHIO WORKERS' COMPENSATION 3-4, 10 (1986).

[3] *Id.*

[4] J. HARRIS, *supra* note 1, at 2.

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ture enacted its own emergency compromise package, Amended Substitute Senate Bill 307 (hereinafter S.B. 307).[5]

S.B. 307 has changed the face of Ohio's workers' compensation law by revamping the definition of injury,[6] establishing an intentional tort fund,[7] and creating a new intoxication defense for Ohio employers.[8] The focus of this Note is section 4123.54(B) which sets forth the skeleton of an intoxication defense for Ohio employers by barring from compensation those injuries which are proximately caused by the employee being intoxicated or under the influence of a non-prescription controlled substance.[9]

Due to the emergent nature of S.B. 307, the Ohio Legislature failed to define many of the legal standards set forth therein. After examining the historical development of the law of workers' compensation and the intoxication defenses of other jurisdictions, this Note will define the burden which befalls an Ohio employer who attempts to establish that his employee was intoxicated or under the influence of a non-prescription controlled substance when injured and that such conduct was the proximate cause of the injury. The Note will also explore the methods by which an Ohio employee can rebut his employer's intoxication defense.

II. A Historical Perspective of Workers' Compensation

A. *Development of Workers' Compensation in the United States*

Prior to the development of a statutory workers' compensation scheme in the United States, it was estimated that seventy percent of industrial injuries were not compensated.[10] At common law, the employee had the nearly insurmountable burden of prosecuting his action within the scope

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[5] *Id.* at 4-5.

[6] *See generally* §§ 4123.01(C), 4123.54, and 4123.56 of 1986 Ohio Legis. Serv. 307 (Baldwin). S.B. 307 has since been published in the official Ohio Rev. Code. *See* Ohio Rev. Code Ann. §§ 4123.01(C), 4123.54, 4123.56 (Page 1986).

[7] *See generally* § 4121.80 of 1986 Ohio Legis. Serv. 307 (Baldwin).

[8] *See generally* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[9] *Id.*

[10] W. Schneider, Workmens' Compensation 1 (2d ed. 1932). *Cf.* R. Downey, History of Work Accident Indemnity in Iowa 71 (1912)(83%); First Report of the New York Employers' Liability Comm'n of 1910 § 1, at 25 (1910)(87%).

of the employer's minimal duty to exercise reasonable care[11] and subject to the employer's common law defenses.[12]

Influenced by the heightened societal awareness of the inequities of the common law system and the development of European compensation systems,[13] New York passed the United State's first statewide compensation program in 1910.[14] In Ohio, where it was estimated that ninety-four percent of industrial injuries were not compensated,[15] the General Assembly quickly followed New York's lead by enacting the Ohio Workers' Compensation Act in 1911.[16]

Best characterized as an industrial bargain,[17] these acts were designed to strike a balance between the interests of the employee and employer by providing *modest*[18] *compensation for workplace injuries without hampering industrial development.* The employee was required to surrender his common law right to sue his employer in negligence for personal injury, pain and suffering, loss of consortium, and punitive damages in exchange for guaranteed moderate compensation.[19] By relinquishing his common law defenses and subjecting himself to fixed, limited liability regardless of fault, the employer avoided costly litigation and the prospect of a substantial adverse judgment.[20]

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[11] The common law imposed upon the employer a minimal number of obligations to ensure the safety of his employees. These common law duties included:

1. The duty to provide a safe workplace.
2. The duty to provide safe appliances, tools, and equipment for work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 569-70, 573-74 (5th ed. 1984) [hereinafter PROSSER & KEETON].

[12] At common law, the employer had three affirmative defenses which made it difficult for an employee to recover a judgment against him. These defenses often called the "unholy trinity" included: (1) contributory negligence; (2) assumption of the risk; and (3) the fellow servant doctrine. *Id.* at 569.

[13] The first workers' compensation act was passed in Germany in 1884. 1 A. LARSON, THE LAW OF WORKMENS' COMPENSATION § 510 (1975).

[14] *Id.*

[15] REPORT OF OHIO EMPLOYERS' LIABILITY COMM'N OF 1911, 1 at XXXV-xliv (1911).

[16] The Ohio Workers' Compensation Act, 102 Ohio Laws 524 (1911).

[17] PROSSER & KEETON, *supra* note 11, § 80, at 573-75.

[18] The main objectives of Ohio's workers' compensation legislation were to prevent the destitution of the injured employee, to preserve the employee's dignity, and to restore the employee to a state of partial wholeness. *See generally* Industrial Comm'n v. Drake, 103 Ohio St. 628, 134 N.E. 465 (1921).

[19] PROSSER & KEETON, *supra* note 11, § 80, at 73-75.

[20] *Id. See also* 1 A. LARSON, *supra* note 13, at § 4.40.

B. Development of Workers' Compensation in Ohio

Although an improvement over the common law system, Ohio's Workers' Compensation Act was not flawless. Over a seventy-five year period, the Ohio Supreme Court and the Ohio Legislature have grappled with the issue of what injuries fall within the scope of the Act.[21] Efforts by the court and the legislature to resolve this issue have often met with strong criticism from either labor groups or the business community.[22] Recently, in the case of *Blankenship v. Cincinnati Milacron Chemical, Inc.*,[23] the Ohio Supreme Court unwittingly touched off what has become a contemporary civil war between labor groups and the business community.[24]

Blankenship was the first of a series of five landmark Ohio Supreme Court decisions which offset the balance of Ohio's workers' compensation scheme in favor of the employee.[25] In the 1982 *Blankenship* decision, the Ohio Supreme Court held that an employee was not precluded from bringing a civil action against his employer for intentional tortious conduct.[26] The court also ruled in *State ex rel. Ramirez v. Industrial Comm'n*[27] that an employee was entitled to temporary total disability until he could return to his former position of employment. In 1983, the Ohio Supreme Court's *Littlefield v. Pillsbury Co.*[28] decision threatened to destroy the "going and coming rule."[29]

In 1984, Ohio business and manufacturing interests joined forces to alter the court's 6-1 Democratic majority in an attempt to reverse the flow of the recent liberal decisions.[30] With the election of two new Republican

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[21] *See* JOINT LABOR COMMITTEE TO SAVE WORKERS' COMPENSATION, THE FACTS ABOUT THE ATTACK ON OHIO WORKERS' COMPENSATION 5-7 (1986).

[22] *Id.*

[23] 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

[24] *See* JOINT LABOR COMMITTEE TO SAVE WORKERS' COMPENSATION, THE FACTS ABOUT THE ATTACK ON OHIO WORKERS' COMPENSATION 9-12, 21 (1986).

[25] J. HARRIS, *supra* note 1, at 1.

[26] 69 Ohio St. 2d 608, 612-13, 433 N.E.2d 572, 576-77 (1982).

[27] 69 Ohio St. 2d 630, 433 N.E.2d 586 (1982).

[28] 6 Ohio St. 3d 389, 453 N.E.2d 570 (1983).

In *Littlefield*, the Ohio Supreme Court awarded compensation to an employee who was turning left into his employer's parking lot when injured. The decision carved out a special risk exception to the "going and coming rule" based on the following two prong test: (1) the worker must not have been at the location of the injury "but for the employment," and (2) the risk of such injury must be distinctive in nature or quantitatively greater than the risk common to the general public. *Id.* at 394, 453 N.E.2d at 575.

[29] The "going and coming rule" denied compensation for injuries sustained by the employee while traveling to and from work. These injuries were the result of personal risks and only indirectly related to the employment. Comment, *Littlefield v. Pillsbury Co.: A Turn to the Left in Workers' Compensation Defense*, 46 OHIO ST. L.J. 413 (1985).

[30] J. HARRIS, *supra* note 1, at 2.

justices and the Republican control of the senate, Ohio business and manufacturing interests had just begun to fight.[31]

Undaunted by these tactical maneuvers, the Ohio Supreme Court handed down two more employee-oriented decisions on December 31, 1984. Expanding upon *Blankenship*, *Jones v. VIP Development Co.*[32] defined the concept of intentional tort and held that damages awarded in a civil suit were not to be precluded by or to be set-off against the employee's workers' compensation benefits. Also, in *Village v. General Motors Corp.*,[33] the court established compensation for work-related injuries which developed gradually over the course of employment.

Jones and *Village* are often assailed as being the "proverbial straw that broke the camel's back."[34] It was argued that these decisions meant virtually "unlimited liability"[35] for Ohio employers. In response to the decisions, the Ohio Manufacturers' Association, assisted by the Ohio Chamber of Commerce and other employer groups, made workers' compensation reform its number one priority.[36]

C. Amended Substitute Senate Bill 307

The Ohio Manufacturers' Association utilized the media to induce public pressured legislative action. The heart of their program was that the recent Ohio Supreme Court decisions made Ohio "bad for business."[37] The propoganda induced swift legislative response in the Republican dominated Senate where Senators Gary Suhadolnik and Richard Finan

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[31] *Id.*

[32] 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984).

[33] 15 Ohio St. 3d 129, 472 N.E.2d 1079 (1984).

[34] J. HARRIS, *supra* note 1, at 3.

[35] *Id.*

[36] *Id. See also* JOINT LABOR COMMITTEE TO SAVE WORKERS' COMPENSATION, THE FACTS ABOUT THE ATTACK ON OHIO WORKERS' COMPENSATION 3 (1986).

[37] The Ohio Manufacturers' Association argued that unlimited liability for workplace injuries would result in higher workers' compensation premiums and scare industry out of Ohio. The Ohio Manufacturers' Association also asserted that this was one of the reasons why Ohio lost the GM Saturn Plant to Tennessee. Daily News, April 29, 1985 at E2, col. 1.

However, the AFL-CIO alleged that: (1) Ohio workers' compensation scheme was not a financial burden to industry; and (2) Ohio did not lose the GM Saturn plant due to its workers' compensation scheme. A 1984 study by the National Council on Compensation Insurance revealed that Ohio employers pay the 12th lowest premium rates in the nation. In addition, Ohio provides benefits similar to those in other industrial states. Ohio's 1985 maximum average weekly wage was $345 which was similar to Michigan, $358; Kentucky, $305; Pennsylvania, $336; West Virginia, $321; and Wisconsin, $321. Low premium rates and good benefits will not deter business from settling in Ohio. Beacon Journal, April 14, 1985 § E2; Dispatch, May 11, 1985 at E6, col. 2.

The AFL-CIO also explained that GM chose to settle in Tennessee which is a state with a base premium rate of only a nickel less than Ohio's ($1.63 rather than $1.68 per $100 of payroll). Tennessee also ranks 49th in the amount of maximum average weekly wage it allows its employees ($136). The Plain Dealer, Sept. 2, 1985 § 16A.

introduced Senate Bill 155 (hereinafter S 155) on April 23, 1985.[38] Designed to revise recent Ohio Supreme Court decisions and restore a balance between the interests of Ohio employers and employees, S 155 accomplished nothing other than to drive labor and business interests further apart.[39]

Governor Richard Celeste also failed in a valiant attempt to force labor and management into a compromise package.[40] Labor stubbornly refused to surrender the long overdue court victories which they believed brought the Ohio workers' compensation scheme into the twentieth century.[41] Conversely, business continued to clamor for revision of the decisions which they argued were destroying Ohio's industrial climate.[42]

With business and labor in a deadlock, the General Assembly appointed a task force in September 1985.[43] However, once it became clear that this task force would fare no better, Senator Finan and Representative Skeen independently introduced legislation (S 307 and H 73) which sustained support only in their respective chambers.[44] A Conference Committee failed to hammer out the differences in the bills before the March 1986 recess.[45]

During the recess, Senator Finan and Representative Skeen struck a compromise.[46] After ten months of stalemate and five additional hearings, Amended Substitute Senate Bill 307 (hereinafter S.B. 307), received the approval of both houses of the legislature by May 15, 1986.[47] S.B. 307 was signed by Governor Celeste on May 23, 1986.[48]

Effective August 22, 1986, S.B. 307 sets the framework for reversal of the remnants of the Ohio Supreme Court's 1982 to 1984 liberal trend.[49]

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[38] J. HARRIS, *supra* note 1, at 3.

[39] *Id. See also Testimony on S.B. 155 Before the Ohio Senate Ways and Means Committee*, May 28, 1985 (statement by Irwin L. Silbert, Legislative Representative, Ohio D.R.I.V.E.).

[40] Since the adoption of the Ohio Workers' Compensation Act in 1911, all legislation in the area had been obtained via an agreed bill. When revision was required, labor and business groups met and resolved their differences. J. HARRIS, *supra* note 1, at 3.

[41] Letter from The Ohio Academy of Trial Lawyers to Governor Richard Celeste (1985)(discussing the Ohio intentional tort issue).

[42] *Id.*

[43] J. HARRIS, *supra* note 1, at 3.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 5.

[48] *Id.*

[49] Blankenship v. Cincinnati Milacron Chemicals Corp., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982) and Jones v. VIP Dev. Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) were rendered impotent by the creation of a special statutory proceeding and intentional tort fund to replace the employee's common law action for intentional tort. *See* § 4121.80 of 1986 Ohio Legis. Serv. 307 (Baldwin).

A new dimension has been added to the "former position test" set forth in State ex rel.

However, the crisis is not over. Due to the hurried and emergent nature of the bill, the language dissolves many of the old legal tests which were utilized in determining the compensability of an injury, and offers little guidance as to the application of the new standards set forth therein.[50] The question now remaining is whether the statutory construction yet to be offered by the new court with its Republication majority[51] will send labor and business back to the battlefield and the legislature back to the drawing board.

The central focus of this Note is section 4123.54(B) of S.B. 307 which provides Ohio employers with an intoxication defense, but which is silent as to how such a defense should be established. Proposed by the United Auto Workers (hereinafter UAW) and supported by the Teamsters as well as the AFL-CIO at a hearing of the Senate Ways and Means Committee, the legislation was eagerly incorporated into S.B. 307 and then forgotten amidst the massive turmoil which surrounded many of the bill's other major provisions.[52]

Specifically, the issues which will be addressed are twofold: (1) based upon a careful review of the litigation surrounding the intoxication defenses of other jurisdictions, what will be the Ohio employer's burden with regard to the establishment of the employee's intoxication at the time of his injury and the causal connection between the employee's intoxication and his injury; and (2) what evidence can the employee present to rebut an intoxication defense?

Section 4123.54(B) denies workers' compensation benefits for an injury "caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician where the intoxication or being under the influence of a controlled substance not prescribed by

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Ramirez v. Industrial Comm'n, 69 Ohio St. 2d 630, 433 N.E.2d 586 (1982). If the employee is capable of any type of work, he is not entitled to temporary total disability benefits. If the employer cannot find work within the capabilities of the employee, the employee must register with the Bureau of Employment Services which will assist him in finding suitable employment. *See* § 4123.56 of 1986 Ohio Legis. Serv. 307 (Baldwin).

Village v. General Motors Corp., 15 Ohio St.3d 129, 472 N.E.2d 1079 (1984) has been altered by a provision which states that the natural deterioration of the body is not a compensable injury. *See* § 4123.01(C) of 1986 Ohio Legis. Serv. 307 (Baldwin)

S.B. 307 does not directly address Littlefield v. Pillsbury Co., 6 Ohio St. 3d 389, 453 N.E.2d 570 (1983). J. HARRIS, *supra* note 1, at 57.

[50] J. HARRIS, *supra* note 1, at 5.

[51] The 1986 election resulted in a shift from a Democratic to a Republican majority on the court. Included in this political majority are Chief Justice Thomas Moyer and Justices Robert Holmes, Andy Douglas, and Craig Wright. Justices Herbert Brown, Ralph Locher, and A. William Sweeney form the Democratic minority. Goostree, *How New Will the New Court Be?*, 1 OHIO LAWYER 5 (1987).

[52] Telephone Interview with Amy Schowalter-Newman, Legislative Aide to Senator Finan (Feb. 5, 1987).

a physician was the proximate cause of the injury . . . ."[53] When asked to comment on the intended construction of the legal tests set forth in section 4123.54(B), the advice of Senator Finan's office was to "let the bill stand on its face."[54] Unable to obtain guidance from the legislature, the first step to developing a practical construction of section 4123.54(B) requires an examination of the provision's legislative history and the general effect of substance abuse in the workplace.

III. The History of Section 4123.54(B)

Economic and safety considerations motivated the UAW, Teamsters, and AFL-CIO to initiate and support the development of a statutory intoxication defense for Ohio employers.[55] In addition to the human loss due to injury or death, employees who abuse drugs or alcohol in the workplace collectively cost their employers billions of dollars each year. These additional expenditures hinder the development and expansion of industry.[56]

Recently, the Department of Health and Human Services funded a study by the Research Triangle Institute. Their study revealed that in 1980 drug abuse throughout the nation cost the employer $25.7 billion, while alcohol abuse cost nearly double at $50.6 billion.[57] The employers' costs can be attributed to one or more of the following alcohol or drug-induced problems: lost productivity, quality control problems, replacement and training of new employees, absenteeism, low morale, poor decision making, medical expenses, death claims, injury claims, and workplace theft.[58]

In terms of safety and human loss, the Employee Assistance Society of North America estimates that alcoholics are at a two to three times greater risk of being involved in an industrial accident than non-alcoholics.[59] They also submit that alcohol abuse has been linked to forty

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[53] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[54] Telephone Interview with Amy Schowalter-Newman, Legislative Aide to Senator Finan (Feb. 5, 1987).

[55] *Id. See* Angola, *Drug Testing in the Workplace: Is it Legal?*, 1985 Personnel Administrator 79.

[56] *See* Angola, *supra* note 55, at 79.

[57] The Plain Dealer, Oct. 5, 1986 § 1E.

[58] *See* Angola, *supra* note 55, at 79. *See generally* Dugan, *Affirmative Action For Alcoholics & Addicts?*, 5 Employment Relations L.J. 235, 238 (1979); Geidt, *Drug & Alcohol Abuse in the Workplace: Balancing Employer & Employee Rights*, 11 Employment Relations L.J. 181 (1985); Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 Lab. L.J. 42-43 (1985).

[59] *From Baseball Diamond to Shop Floor: Employees Battling Alcohol/Drug Abuse*, Daily Labor Report (BNA) No. 211, at C-1, C-2 (Oct. 31, 1985).

percent of industrial fatalities and forty-seven percent of industrial injuries.[60]

Section 4123.54(B) which empowers Ohio employers with the ability to invoke an intoxication defense provides the Industrial Commission, and ultimately the court, with grounds for denying compensation to the employee whose use of drugs or alcohol is the proximate cause of the injury.[61] The prospect of losing his workers' compensation benefits will undoubtedly deter the employee from abusing drugs or alcohol in the workplace. If the statute is a successful deterrent, the cost of substance abuse to the employer, and ultimately to society,[62] will be reduced.

IV. Proving that the Employee was "Intoxicated" or "Under the Influence"

The first element of an Ohio employer's intoxication defense requires the employer to show that the employee was intoxicated or under the influence of a controlled substance not prescribed by a physician when injured.[63] To sustain his burden of proof, the employer must understand what constitutes intoxication or being under the influence.

The legislature's silence on this matter forces the employer to examine the standards and definitions utilized in other areas, for instance the litigation in Ohio drunk driving cases. In *State v. Steele*,[64] it was determined that the accused must have consumed some intoxicating beverage in such quantity that it adversely affected his actions and reactions, and deprived him of that clearness of intellect and control which he would otherwise possess. A consistent theme in such definitions is the effect of the alcohol on the defendant's brain and reflexes. This author finds it helpful to conceptualize intoxication or under the influence as: the physical state in which alcohol or a non-prescription controlled substance has had such an effect on the employee's nervous system, brain, or muscles as to impair the employee's ability to perform his job in a manner as would an ordinary prudent person in full possession of his faculties and using reasonable care under similar

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[60] *Id.*

[61] *See* § 4123.54 of 1986 Ohio Legis. Serv. 307 (Baldwin).

[62] Summarized by the old adage, "the cost of the product should bear the blood of the workman," industrial injuries are treated as a cost of production. Prosser & Keeton, *supra* note 11, § 80, at 573.

Built into the cost of any product is the cost of premiums for workers' compensation coverage or self-insurance. It is in this manner that the cost of the injury is spread throughout society. J. Young, Workmens' Compensation Law of Ohio §1.12 (2d ed. 1984 Supp. 1985).

[63] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[64] 95 Ohio App. 107, 117 N.E.2d 617 (1952).

circumstances.[65] Arguably, this state is reached prior to the employee being so inebriated or high that he can no longer engage in his employment.[66]

However, based on this definition, a difficult question arises as to what type and quantity of evidence will be sufficient to establish that the employee is intoxicated or under the influence.

A. Evidence of Intoxication

In the litigation of drunk driving cases, observed evidence offered by lay or expert testimony is admissible on the issue of intoxication.[67] Such evidence often includes testimony by police officers regarding the defendant's erratic driving, alcoholic breath, flushed face, slurred speech, staggering gait, and inability to perform sobriety tests.[68] When offered in various combinations, the following observations by supervisors and co-employees have been considered probative of intoxication in the workers' compensation setting: the employee's reputation as a heavy drinker, possession of a partially filled liquor bottle, and the fact that the employee had a few drinks.[69] More recently, the same observed evidence admissible in a drunk driving case has been held to be evidence of intoxication sufficient to justify drug and alcohol testing in the workplace.[70]

The employer can bolster these physical and behavioral observations with biochemical test results. In descending order of accuracy, tests of the employee's blood, breath, saliva, and urine can be utilized to determine the alcohol level in his system.[71] Evidence of the employee's blood alcohol level has been held admissible on the issue of intoxication in workers' compensation claims in Ohio and many other jurisdictions.[72]

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[65] *See* L. TAYLOR, DRUNK DRIVING DEFENSE 26-27 (1986). *See also* OHIO REV. CODE ANN. § 3720.01(C)(Baldwin 1972).

[66] Arthur Larson opposes the application of a stringent intoxication test. To illustrate his point, he quotes the popular quatrain:

> He is not drunk who from the floor
> Can rise again and drink some more;
> But he is drunk who prostrate lies
> And cannot drink and cannot rise.

Larson, *Intoxication as a Defense in Workmens' Compensation*, 59 CORNELL L. REV. 399 (1974). *See also infra* notes 152-54 and accompanying text.

[67] L. TAYLOR, *supra* note 65, at 28.

[68] *Id.*

[69] Larson, *supra* note 66, at 398-99.

[70] *See* Ass'n of Western Pulp & Paper Works v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986). *See also infra* note 114 and accompanying text.

[71] *See generally* R. Willette, *Testing Employers for Alcohol and Drugs* (Cuyahoga Bar Association's Worker's Compensation Seminar Oct. 17, 1986).

[72] *See generally* Phelps v. Positive Action Tool Co., 26 Ohio St. 3d 142, 497 N.E.2d 969 (1986). *See generally infra* note 84.

For guidance in drawing legal presumptions from the biochemical test results, the employer can analogize to the Driving While Intoxicated Statutes (hereinafter DWI statutes). Most states have patterned their statutes on the Uniform Vehicle Code which presumes intoxication at a blood level of 0.10%.[73] In Ohio, the Revised Code provides that no person shall operate any vehicle, streetcar, or trackless trolley if that person has a blood alcohol level of 0.10% or more.[74]

These "per se" statutes are based on studies of the clinical symptoms which commonly accompany various levels of blood alcohol in the average person.[75] These studies have divided intoxication into various stages. At the Subclinical Stage, a person with a blood alcohol level of 0 to 0.11% appears normal with slight changes detectable only with performance tests.[76] In the Emotional Instability Stage, a person with a blood alcohol level of 0.09 to 0.21% shows a decrease in inhibition, emotional instability, slight muscular incoordination, and a slowing of responses to stimuli.[77] A person with disturbed sensation, decreased pain sense, staggering gait, slurred speech, and a blood alcohol level of 0.18 to 0.33% is in the Confusion Stage.[78] With a blood alcohol level of 0.27 to 0.43%, a person has entered the Stupor Stage and shows a marked decrease in response to stimuli and muscular incoordination which approaches paralysis.[79] Blood alcohol levels of 0.36 to 0.56% have been designated as the Coma Stage which is accompanied by complete loss of consciousness, depressed reflexes, impaired circulation, and possible death.[80] Without medical intervention, death is likely to ensue at a blood alcohol level greater than 0.44%.[81]

It can be argued that in many types of employment an employee in the Emotional Instability Stage[82] may be a danger to himself and others. Emotional instability and decreased inhibition can cause the employee to lose his sense of caution and, if accompanied by slight incoordination and a slowed response time, may increase the risk that the employee or others will be injured on the job.

Despite the legal presumptions which have arisen from the biochemical tests in the area of drunken driving, a blood alcohol level at or above the presumptive level does not by itself establish intoxication in the workers'

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[73] UNIFORM VEHICLE CODE § 11.902.1 (Supp. 1983).

[74] OHIO REV. CODE ANN. § 4511.19 (Baldwin 1983).

[75] A. HAHN, R. BARKIN & S. OESTREICH, PHARMACOLOGY IN NURSING 179-80 (1982) [hereinafter HAHN & BARKIN]. *See generally* L. TAYLOR, *supra* note 65, at 26-31.

[76] HAHN & BARKIN, *supra* note 75, at 180.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

compensation setting.[83] For example, compensation has been granted in the following states despite the fact that the employee's blood alcohol level was above the presumption established by the DWI statutes: Alabama (0.17%), Colorado (0.195%), Florida (0.22%), Illinois (0.186%), Indiana (0.11%), Iowa (0.147%), Missouri (0.17%), Montana (0.34%), New Jersey (0.163%), New York (0.215%), Oregon (0.18%), Pennsylvania (0.285%), South Carolina (0.212%), Tennessee (0.11%), Virginia (0.227%), and Washington (0.28%).[84] These courts justified their decisions as follows: (1) the employer failed to sustain his burden on the issue of intoxication because he either did not account for the effect on the individual's tolerance level or there was a discrepancy in the testing procedures; (2) the employer satisfied his burden with regard to intoxication, but failed to establish the requisite causal connection between the employee's intoxication and his injury; or (3) the employer was stopped from asserting an intoxication defense because he acquiesced in or encouraged the employee to drink.[85]

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[83] There is no predetermined number above which compensation will invariably be denied, and below which compensation will be awarded. Larson, *supra* note 66, at 401.

[84] *See* Loftis v. Clift Chrysler-Plymouth, Inc., No. 265, slip. op. (Sup. Ct. Tenn. June 23, 1986)(WESTLAW, Tennessee cases file)(employer failed to account for individual tolerance levels to alcohol and failed to prove employee was intoxicated in course of employment); Chandler v. Suitt Constr. Co., 288 S.C. 503, 343 S.E.2d 633 (1986); American Safety Razor Co. v. Hunter, 2 Va. App. 258, 343 S.E.2d 461 (1986)(sudden movement of forklift not intoxication caused employee to fall); Swillum v. Empire Gas Transp., Inc., 698 S.W.2d 921 (Mo. Ct. App. 1985)(truck driver engaged in employment despite intoxication); Oakes v. Workmen's Compensation Appeal Bd., 79 Pa. Commw. 454, 469 A.2d 723 (1984) (intoxicated employee would have hit witness if he swerved to avoid collision); West Fla. Distrib. v. Laramie, 438 So. 2d 133 (Fla. Dist. Ct. App. 1983)(employer who acquiesced in and encouraged employee to drink with customers was estopped from asserting defense); Flavorland Indus., Inc. v. Schumaker, 32 Wash. App. 428, 647 P.2d 1062 (1982)(employer paid for employee to entertain buyers after weekly meeting); International Ass'n of Machinists & Aerospace Workers v. Industrial Comm'n, 79 Ill. 2d 544, 404 N.E.2d 787 (1980)(employee engaged in business despite intoxication); Joseph E. Seagram & Sons, Inc. v. Willis, 401 N.E.2d 87 (Ind. Ct. App. 1980)(employee taking medication prescribed by physician for previous work-related injury); Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84 (Iowa 1979)(rain and fog was proximate cause of accident and subsequent injury); Steffes v. 93 Leasing Co., 177 Mont. 83, 580 P.2d 450 (1978)(co-employee's intoxication caused accident); Lankford v. Redwing Carriers, Inc., 344 So. 2d 515 (Ala. Civ. App. 1977)(coroner was not statutorily authorized to withdraw specimen); Loucks v. Joy Automatics, 54 A.D.2d 1037, 388 N.Y.S.2d 378 (1976)(intoxication not the sole cause of employee's injury); Flowers v. SAIF, 17 Or. App. 189, 521 P.2d 363 (1974)(traveling salesman engaged in business despite intoxication); Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 154 Colo. 491, 391 P.2d 677 (1964)(proximate cause of injury was mechanical failure of car); Olivera v. Hatco Chem. Co., 55 N.J. Super. 336, 150 A.2d 781 (1959)(intoxication not the sole cause of employee's injury).

[85] *See generally supra* note 84 and accompanying text.

In addition to showing that an Ohio employee had a blood alcohol level of 0.10% when injured,[86] the aforementioned decisions suggest that the Ohio employer should present other evidence which is probative on the issue of intoxication. Such evidence might include expert medical testimony regarding the clinical symptoms which would have accompanied the employee's blood alcohol level;[87] evidence of the effect of individual tolerance levels on the clinical symptoms which would have accompanied the employee's blood alcohol level;[88] the employee's probable blood alcohol level at the time of his injury;[89] and the effect of the employee's past medical history on the test results or his tolerance for alcohol.[90] If available, the employer should also present lay testimony regarding the circumstances surrounding the injury;[91] the type of work the employee was engaged in when injured;[92] the employee's performance prior to injury;[93] and the employee's behavior, physical condition, and attendance record prior to the injury.[94] The employer should also consider presenting

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[86] *See* OHIO REV. CODE ANN. § 4511.19 (Baldwin 1983).

[87] *See generally* Phelps v. Positive Action Tool Co., 26 Ohio St.3d 142, 145, 497 N.E.2d 969, 971 (1986); *American Safety Razor Co.*, 2 Va. App. at 265, 343 S.E. 2d at 464; *West Fla. Distrib.*, 438 So. 2d at 134; Garcia v. City of Albuquerque, 99 N.M. 746, 663 P.2d 1203 (1983); Aetna Casualty & Sur. Co. v. Silas, 631 S.W. 2d 551, 552 (Tex. Ct. App. 1982); Davis v. C&M Tractor Co., 627 S.W.2d 561 (Ark. Ct. App. 1982); *Joseph Seagram & Sons, Inc.*, 401 N.E.2d at 89; Inscoe v. DeRose Indus., Inc., 30 N.C. App. 1, 226 N.E. 2d 201 (1976); *Electric Mut. Liab. Ins. Co.*, 154 Colo. at 491, 391 P.2d at 679; Smith v. Sunshine Mining Co., 72 Idaho 8, 15, 236 P.2d 87, 93 (1951).

[88] *American Safety Razor Co.*, 2 Va. App. at 264, 343 S.E.2d at 463 (physician evaluated effect of alcoholism on person's tolerance for blood alcohol level of 0.227%); *West Fla. Distrib.*, 438 So. 2d at 133-34 (physician testified that even if employee had a greater than average tolerance level, blood alcohol of 0.22% would have dulled his reflexes and diminished his ability to drive).

[89] *See American Safety Razor Co.*, 2 Va. App. at 205, 343 S.E.2d 464; *West Fla. Distrib.*, 438 So. 2d at 134; *Electric Mut. Liab. Ins. Co.*, 154 Colo. at 491, 391 P.2d at 679.

[90] *See American Safety Razor Co.*, 343 S.E.2d at 463 (employee was an alcoholic); *Garcia*, 99 N.M. at 746, 663 P.2d at 1203 (employee had back problem and history of alcoholism); *Joseph E. Seagram & Sons, Inc.*, 401 N.E.2d at 87 (compensation awarded to an employee taking valium and librium for a prior work-related injury where employee died from the combined effect of drugs and alcohol).

[91] *See generally Phelps*, 26 Ohio St. 3d at 142-43, 497 N.E.2d at 969; United Pac. Ins. Co. v. Jones, 710 S.W.2d 551 (Tex. Ct. App. 1986); Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478, 479 (S.D. 1982); Loucks v. Jay Automatics, 54, A.D. 2d 1037, 388 N.Y.S. 2d 378 (1976); Inscoe v. DeRose Indus., Inc., 30 N.C. App. 1, 226 S.E.2d 201 (1976); Olivera v. Hatco Chem. Co., 55 N.J. 336, 150 A.2d 779, 783-85 (1959); *Sunshine Mining Co.*, 72 Idaho at 125, 236 P.2d at 92.

[92] *Id.*

[93] *Id.*

[94] J. Gecht, E. Casper, & R. Kaplan, *Controlled Substances: Use, Abuse, and Effects* (Cuyahoga County Bar Association's Workers' Compensation Seminar Oct. 17, 1986).

expert industrial testimony regarding what the employee's job entailed and how the injury may have occurred.[95]

B. *Evidence of Being Under the Influence*

Nine states,[96] including Ohio,[97] have incorporated into their intoxication defenses a denial of compensation for those injuries caused by the employee's use of non-prescription controlled substances. A controlled substance is a "drug, compound, mixture, preparation, or substance"[98] included in Schedules I through V of the Ohio Revised Code.[99] If the employees tests positively for any of the over two hundred drugs in Schedule I through V,[100] he may be under the influence of a controlled substance not prescribed by a physician. Section 4123.54(B) is silent on the question of whether a trace of a controlled substance or a particular blood level will be required.[101] Ohio's DWI statute affords the employer no guidance because it simply states that no person shall operate a vehicle, streetcar, or trackless trolley if that person is "under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse."[102]

Discerning what evidence will be probative of "being under the influence" is difficult when some jurisdictions refuse to recognize an intoxication defense which is based upon the employee's use of a non-prescription controlled substance. In *Aetna Casualty & Surety Co. v. Silas*,[103] the court held that because the statute granting the employer an intoxication defense did not explicitly include drugs, the employee could not be precluded from recovering his workers' compensation benefits. However, studies have indicated that much of the same type of observed evidence admissible in proving intoxication is probative of being under the influence as well. Such evidence includes slurred speech, incoordination, staggering gait, flushing of the skin, sniffing, and drowsiness.[104] Drug abusers may also have needle marks on their bodies.[105]

In terms of biochemical testing, the following levels of commonly used controlled substances have been suggested as per se evidence of being

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[95] *Olivera*, 55 N.J. at. 342-43, 150 A.2d. at 784-85.

[96] *See* ALASKA STAT. § 23.30.235 (1982); CONN. GEN. STAT. § 31-275 (1969); FLA. STAT. ANN. § 440.09 (West 1937); KAN. STAT. ANN. § 44.501 (1975); MD. ANN. CODE art. 101, § 15 (1972); N.C. GEN. STAT. § 97-12 (1975); N.D. CENT. CODE § 65-01-02 (1960); § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin); R.I. GEN. LAWS § 28-33-2 (1982).

[97] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[98] OHIO REV. CODE ANN. § 3719.01(D)(Baldwin 1977).

[99] OHIO REV. CODE ANN. § 3719.01(FF)(Baldwin 1977).

[100] *Id.*

[101] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[102] OHIO REV. CODE ANN. § 4511.19 (Baldwin 1983).

[103] 631 S.W.2d 551 (Tex. Ct. App. 1982).

[104] *See generally* R. Willette, *supra* note 71.

[105] *Id.*

under the influence: blood levels of marijuana at 5 ng/ml, serum levels of cocaine at 200 ng/ml, blood levels of phenycyclidine at 25 ng/ml, serum levels of codeine at 50 ng/ml, serum levels of heroin at 25 ng/ml, serum levels of morphine at 25 ng/ml, plasma levels of methadone at 100 ng/ml, blood levels of methaqualone at 2,000 ng/ml, and plasma levels of barbiturates at 1,000 at 4,000 ng/ml.[106] These levels are based on studies of the clinical symptoms which accompany various blood levels of these controlled substances in the average person.[107] As in the case of alcohol, a blood level of a controlled substance at or above these presumptive levels will probably not by itself establish that the employee was under the influence when injured. If the blood level was "per se" evidence of being under the influence, an employee who had used a drug which stays in the body for several weeks would test positive and possibly be denied compensation despite the fact that he was not under the influence when injured.

To be consistent with section 4123.95 which requires that Ohio workers' compensation legislation be construed liberally in favor of the employee,[108] the Ohio employer's burden should not be satisfied by merely presenting the results of a blood test. Blood tests are but one piece of evidence to be considered in the totality of the circumstances surrounding the injury.[109] Instead, the employer should present lay and expert testimony on the same issues discussed in regard to intoxication.

C. Drug Testing in the Workplace

Ohio employers may wish to establish drug testing programs in their workplaces to facilitate obtaining biochemical test results which can be presented in conjunction with other evidence of the employee's intoxication or being under the influence. Presently drug testing in the workplace is gaining national attention. More than one quarter of all Fortune 500 companies perform drug testing on their employees.[110] However, such testing raises major concerns among civil libertarians including privacy rights, due process violations, and unreasonable search and seizure.[111]

Employers interested in establishing a drug testing program to facilitate testing of their employees for workers' compensation and general employment purposes can model theirs after the Boise Cascade Corp. (hereinafter Boise).[112] Three groups of employees are tested: (1) those

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[106] *Id.*

[107] *Id.*

[108] OHIO REV. CODE ANN. § 4123.95 (Baldwin 1959).

[109] *See supra* note 107 and accompanying text.

[110] Rust, *Drug Testing: The Legal Dilemma*, 1986 A.B.A.J. 51.

[111] *Id.*

[112] *See* Ass'n of Western Pulp & Paper Worker v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986).

whom the supervisors have reasonable cause to believe are under the influence of alcohol or an illegal drug; (2) those who suffer an injury on the job which requires medical attention beyond first aid; and (3) all those involved in the accident, but not injured.[113] The following signs are sufficient to give a supervisor reasonable cause to have the employee tested: alcohol on the breath, lapses in performance, inability to appropriately respond to questions, and physical signs of drug or alcohol abuse.[114] If the employee refuses testing or the test shows that he was intoxicated or under the influence of an illegal drug, the employee is subject to immediate suspension and possible discharge.[115]

Presently, the major obstacle to the Boise program is the Union which alleges that the Boise program violates the employee's common law right to privacy and constitutes a breach of Boise's contract with the Union.[116] However, the Oregon district court recognized that a company involved in a union contract retains the right to institute reasonable work rules.[117] The court held that if the Union wishes to challenge the reasonableness of Boise's work rules, then it must do so through arbitration.[118]

Given the enthusiastic support of section 4123.54(B) by the UAW, Teamsters, and AFL-CIO, it may be easier for Ohio employers to establish drug testing programs. Ohio employers can attempt to circumvent the Boise problems by soliciting union support in the early planning stages of their project. This Note will not address the constitutional implications of drug testing in the workplace; however, such programs may be challenged on constitutional grounds by employees alleging that their rights to privacy and equal protection are being violated.[119]

V. The Causal Connection

After proving that the employee was intoxicated or under the influence, the employer must establish the second element of his defense—the causal connection between the employee's conduct and his injury.[120] All 50 states provide the employer with an intoxication defense: six[121] have

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[113] *Id.* at 184.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 185.
[117] *Id.*
[118] *Id.* at 186.
[119] Note, *Workers, Drinks, and Drugs: Can Employers Test?*, 55 U. Cin. L. Rev. 127 (1986).
[120] J. Harris, *supra* note 1, at 102.
[121] *See* Swillum v. Empire Gas Transport, Inc., 698 S.W.2d 921 (Mo. Ct. App. 1985); Flavorland Indus., Inc. v. Schumaker, 647 P.2d 1062 (Wash. Ct. App. 1982); International Ass'n of Machinists & Aerospace Workers v. Industrial Comm'n, 79 Ill. 2d 544, 404 N.E. 2d 787 (1980); Steffes v. 93 Leasing Co., 177 Mont. 83, 580 P.2d 450 (1978); Simons v. SWF

common law defenses and forty-four[122] have statutory defenses. The tests utilized by these jurisdictions to establish the employee's intoxication or the influence of drugs as the cause of his injury vary.

In those states where intoxication or being under the influence has been recognized without special statutory provision, an "abandonment of the employment" test is utilized.[123] The underlying theory of this test is that when the employee becomes so intoxicated that he is incapable of engaging in his employment or an incident natural thereto, he has abandoned his employment.[124] Any injury sustained thereafter does not arise out of and in the course of his employment, and is not compensable.[125]

Although the test is not conceptually complicated, denial of compensation is not the rule. In these common law jurisdictions, intoxication which does not prevent the employee from engaging in his occupational duties is not sufficient to defeat the causal connection between the employee's injury and his employment even where the intoxication was a contributing factor.[126] The employee is often deemed to be engaged in his employment when he acts at his employer's direction or in furtherance of his employer's business, especially if his employer encourages or finances the employee's attendance at functions which expose the employee to an atmosphere which allows the employee to become intoxicated.[127]

Plywood Co., 552 P.2d 268 (Or. Ct. App. 1976); Pottinger v. Industrial Comm'n, 22 Ariz. App. 389, 527 P.2d 1232 (1975).

[122] ALA. CODE § 25-5-51 (1973); ALASKA STAT. § 23.30.235 (1982); ARK. STAT. ANN. § 81-1324 (1976); CAL. LABOR CODE § 3600 (West 1971); COLO. REV. STAT. § 81-13-4 (1953); CONN. GEN. STAT. ANN. § 31-275 (West 1969); DEL. CODE ANN. tit. 19 § 2353(b) (1953); FLA. STAT. § 440.09(3)(1966); GA. CODE ANN. § 34-9-16 (1933); HAWAII REV. STAT. § 386-3 (1969); IDAHO CODE § 72-208 (1973); IND. CODE ANN. § 22-3-2-8 (Burns 1971); IOWA CODE ANN. § 85.16 (West 1939); KAN. STAT. ANN. § 44.501 (1964); KY. REV. STAT. § 342.015(3)(1916); LA. REV. STAT. ANN. § 81-1324 (West 1964) tit. 23; ME. REV. STAT. ANN. tit. 39 § 61 (1965); MD. ANN. CODE art. 101 § 15 (1972); MASS. GEN. LAWS ch. 152 § 27 (1935); MICH. COMP. LAWS § 412.2 (1948); MINN. STAT. ANN. § 176.021 (West 1984); MISS. STAT. ANN. § 6998-04 (West 1966); NEB. REV. STAT. § 48-127 (1960); NEV. REV. STAT. § 616-565 (1967); N.H. REV. STAT. ANN. § 281:15 (1966); N.J. REV. STAT. ANN. § 34:15-7 (West 1959); N.M. STAT. ANN. § 52-1-28(B)(1978); N.Y. WORKMEN'S COMP. LAW § 10 (McKinney 1965); N.C. GEN. STAT. § 97-12 (1975); N.D. CENT. CODE § 65-01-02 (1960); § 4123.54(B) of the 1986 Ohio Legis. Serv. 307 (Baldwin); OKLA. STAT. ANN. tit. 85 § 11 (1970); Pa. Workmen's Comp. Act. § 301(a) (1915); R.I. GEN. LAWS § 28-33-2 (1968); S.C. CODE ANN. § 42-9-60 (Law Co-op. 1976); S.D. CODIFIED LAWS ANN. § 62-4-37 (1967); TENN. CODE ANN. § 50-6-110(b)(1966); TEX. R. CIV. P. ANN. 8309 (Vernon 1967); UTAH CODE ANN. § 35-1-14 (1953); VT. STAT. ANN. tit. 21, § 649 (1967); VA. CODE ANN. § 65.1-7 (1950); W. VA. CODE ANN. § 23-4-2 (1973); WIS. STAT. § 102.58 (1973); WYO. STAT. § 27-12-101 (1977).

[123] Larson, *supra* note 66, at 403. *See also supra* note 100.

[124] Larson, *supra* note 66, at 403.

[125] *Id.*

[126] *Id.*

[127] Flavorland Indus., Inc. v. Schumaker, 647 P.2d 1062-63 (Wash. Ct. App. 1982)(em-

The difficulty of maintaining an intoxication defense in such jurisdiction is demonstrated in the following situations: (1) a Missouri truck driver was granted compensation for injuries when he lost control of his truck despite the fact that he drank twelve sixteen ounce cans of beer the evening before, his blood alcohol level was 0.17%, and he had overloaded his truck with propane;[128] (2) dependents of a Washington employee who was attending a weekly meeting with local livestock buyers at the direction of his employer and was killed in a car accident were awarded compensation despite the fact that the employee had been drinking with the buyers and had a blood alcohol level of 0.28%;[129] (3) an Illinois union official attending a series of hearings and negotiations at the direction of his employer was granted compensation even though he had been drinking with several other officials, had a blood alcohol level of 0.186%, and was injured when he drove into a truck equipped with a large, flashing yellow light;[130] (4) an Arizona employee who was assigned to host an out of town convention and was severly burned as he attempted to light a cigarette did not abandon his employment simply because he was intoxicated;[131] and (5) the dependents of an Oregon car salesman were awarded compensation when he was killed returning home in a company car after drinking at a business meeting held in a bar.[132]

However, the intoxication defense in jurisdictions which utilize an "abandonment of the employment" test can be effective. An Oregon employee was denied compensation despite the fact that he had been drinking at an employer-sponsored meeting where alcohol was provided by the employer because the employee continued to drink after the meeting and was killed while driving randomly around the downtown area.[133] If the employee had been returning home from the meeting when he sustained the accident, especially if he had been driving a company car, compensation may have been awarded to his dependents.

Prior to the enactment of section 4123.54(B), Ohio employers utilized the "abandonment of the employment" test in establishing an intoxication defense.[134] In *White v. Yaple*,[135] an employee who had been drinking died of heatstroke while digging manholes. The court of common pleas held that the employee's intoxication was irrelevant because the em-

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ployer encouraged and paid for employee to entertain local livestock buyers after weekly meetings).

[128] Swillum v. Empire Gas Transp., Inc., 698 S.W. 2d 921 (Mo. Ct. App. 1985).

[129] *Flavorland Indus.*, Inc., 647 P.2d at 1062-63.

[130] International Ass'n of Machinists & Aerospace Workers v. Industrial Comm'n, 79 Ill.2d 544, 404 N.E.2d 787 (1980).

[131] Pottinger v. Industrial Comm'n, 22 Ariz. App. 389, 527 P.2d 1232 (1975).

[132] Simons v. SWF Plywood Co., 552 P.2d 268 (Or. Ct. App. 1976).

[133] Seidl v. Dick Niles, Inc., 18 Or. App. 332, 525 P.2d 198 (1974).

[134] *See infra* notes 135-41 and accompanying text.

[135] 23 Ohio N.P. 217 (1920).

ployee died in the course of his employment.[136] Similarly, in *City Fuel & Ice Co. v. Karlinsky*,[137] the court of appeals held that when an intoxicated employee returning from delivering a load of coal was thrown from the wagon as the wheel hit a hole in the road, the employee's subsequent injury occurred in the course of his employment. Consistent with these early decisions is *Martin v. Bernard Co.*[138] where the court held that an intoxicated employee who ran off the road and into a guardrail while returning the company truck two hours after the completion of his work was not outside the scope of his employment.

The Ohio Supreme Court has denied compensation to intoxicated employees based on the "abandonment of the employment" test. In *Stephens v. Young*,[139] the court held that a salesman who parked his employer's truck and visited a tavern abandoned his employment. The employee did not re-enter his employment when he later accepted a ride with a stranger to a nearby town to pick up his route book and was assaulted.[140] In *Ruddy v. Industrial Comm'n*,[141] a salesman who stopped to buy cigarettes and had two beers was not in the course of his employment when he was hit by a car as he crossed the street.

In 1986, the Ohio Legislature adopted a statutory intoxication defense for Ohio employers.[142] *Phelps v. Positive Action Tool Co.*[143] is the Ohio Supreme Court decision which marks the transition. Three days prior to the *Phelps* decision, S.B. 307 providing the statutory intoxication defense took effect.[144] Attempting to bridge the gap between the old law and the new law, the Ohio Supreme Court decided *Phelps* based upon the old common law standards, while incorporating some language from the new proximate cause test set forth in section 4123.54(B).[145]

After work one evening, Phelps, a foreman for Positive Action Tool Co. (hereinafter PATCO), went to a bar while on call and drank and socialized until midnight.[146] Phelps was then summoned back to work. On his way to PATCO, he stopped at a drilling site and socialized for another hour. Upon resuming his trip to PATCO, Phelps' truck ran off the road into a ditch. The evidence before the court included: Phelps'

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[136] *Id.* at 221.
[137] 33 Ohio App. 42, 168 N.E. 475 (1929).
[138] No. 3819, slip op. at 5 (Lorain App. June 26, 1985) (WESTLAW, Ohio cases file).
[139] 115 Ohio App. 13, 184 N.E.2d 112 (1961).
[140] *Id.* at 17, 184 N.E.2d at 114.
[141] 153 Ohio St. 475, 92 N.E. 2d 673 (1950).
[142] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).
[143] 26 Ohio St. 3d 142, 497 N.E.2d 969 (1986).
[144] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).
[145] *See generally*, Phelps v. Positive Action Tool Co., 26 Ohio St. 3d 142, 497 N.E. 2d 969 (1986).
[146] *Id.* at 142-44, 497 N.E.2d at 969.

blood alcohol level of 0.21%, the fact that no skid marks were left at the scene, Phelps' statement to the police that he could not remember the accident, Phelps's statement to a physician that he fell asleep at the wheel, and Phelps' later allegation that his tire blew and was the cause of the accident.[147]

The Ohio Supreme Court denied Phelps' claim for workers' compensation because his voluntary intoxication was "tantamount to abandonment of his employment."[148] Phelps' injury was in effect, deemed to not arise out of and in the course of his employment, and as such the requisite causal connection between his employment and his injury did not exist.[149]

The Ohio Supreme Court determined the issue of intoxication by considering biochemical test results, observed evidence, and expert testimony.[150] The court then applied the old common law "abandonment of the employment" test to ascertain whether there was causal connection between Phelps' intoxication and his injury.[151] Not until the end of the opinion did the court attempt to apply section 4123.54(B) by adding some proximate cause language.

Although not inconsistent with section 4123.54(B) of S.B. 307, *Phelps* is limited by the facts to situations in which the evidence shows the employee is so intoxicated that he no longer could be considered engaged in his employment or an incident natural thereto when injured.[152] It can be argued that some employees are capable of engaging in their employment until they are so intoxicated that they have reached the Confusion or Stupor Stage with a blood alcohol level of 0.18 to 0.33% or 0.27 to 0.43%, respectively.[153] However, in light of the staggering costs of drug and alcohol abuse in the workplace,[154] it is unreasonable to surmise that the legislature intended an intoxication defense bar compensation only when the employee is so intoxicated that he could no longer engage in his employment. To be an effective deterrent, an intoxication defense must also be effective against those employees who are intoxicated or under the influence and engaged in their employ when injured.

Various standards are being utilized in other jurisdictions to establish the causal connection between the employee's intoxication and his injury in order to bar or reduce[155] compensation. In those states which have a

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[147] *Id.* at 144-45, 497 N.E.2d at 969-70.

[148] "Thus, we hold that under the facts of this case, Phelps' voluntary intoxication was tantamount to his abandonment of employment and that his injury was proximately caused by his gross state of intoxication." *Id.* at 145, 497 N.E.2d at 971.

[149] *Id.*

[150] *Id.* at 144-45, 497 N.E.2d at 970-71.

[151] *Id.*

[152] *See supra* notes 147-51 and accompanying text.

[153] HAHN & BARKIN, *supra* note 75, at 180.

[154] *See generally supra* notes 55-60 and accompanying text.

[155] In four states, a successful intoxication defense will result in a reduction, but not a

statutory intoxication defense, the case law with regard to causation has developed along the following lines: (1) fourteen states and one federal statute require that the employee's intoxication or being under the influence be the proximate cause of the injury before compensation will be denied;[156] (2) thirteen states require a simple causal connection between the intoxication and the injury;[157] (3) six states and one federal statute require that the injury be substantially or primarily occasioned by the intoxication;[158] (4) three states deny recovery upon a mere showing

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complete bar to the employee's recovery of workers' compensation. COLO. REV. STAT. § 81-13-4 (1953)(50% reduction); IDAHO CODE § 72-208 (1973)(50% reduction); UTAH CODE ANN. § 35-1-14 (1953)(15% reduction except where death occurs); WIS. STAT. ANN. § 102.58 (1973)(15% reduction).

In Ohio, § 4123.54(B) of the new workers' compensation legislation provides that every employee who is injured and the dependents of an employee who is killed in the course of employment are entitled to workers' compensation provided that the injury was not proximately caused by the employee's being intoxicated or under the influence of a controlled substance not prescribed by a physician. 1986 Ohio Legis. Serv. 307 (Baldwin). The provision implies that when the employee is contributorily negligent by drinking or abusing drugs in the workplace and as a result is injured, he is not entitled to workers' compensation.

However, in Ohio, contributory negligence is not a bar to recovery where the negligence of defendant is fifty-one percent or greater. OHIO REV. CODE ANN. § 2315.19 (Baldwin 1980). In such a case, the plaintiff's recovery is diminished by the percent his own negligence contributed to the harm. *Id.*

It is arguable that § 4123.54(B) should be construed so as to allow a similarly reduced compensation in cases where the employee's intoxication or being under the influence contributed to greater than fifty percent to his injuries. *Cf.* Note, *Associated Construction and Engineering Co. of California v. Workers' Compensation Appeals Bd: Comparative Negligence in the Workers' Compensation System*, 68 CALIF. L. REV. 895, 901 (1980).

[156] *See generally* Phelps v. Positive Action Tool Co., 26 Ohio St. 3d 142, 497 N.E.2d 969 (1986); Harrell v. First Union Nat'l Bank, 316 N.C. 191, 340 S.E.2d 111 (1986); Theorin v. Dilec Corp., 377 N.W. 437 (Minn. 1985); Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478 (S.D. 1982); Home Indem. Co. v. White, 154 Ga. App. 211, 267 S.E.2d 849 (1980); Lankford v. Redwing Carriers, Inc., 344 So. 2d 515 (Ala. Civ. App. 1977); Petroleum Equip. v. Lancaster, 199 So. 2d 52 (Miss. 1977); Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84 (Iowa 1979); McCarty v. W.C.A.B., 12 Cal. 3d 672, 572 P.2d 617 (1974); Penn Salvage Inc. v. Wills, 282 A.2d 613 (Del. Super. Ct. 1971); Woosley v. Central Uniform Rental, 463 S.W.2d 345 (Ky. Ct. App. 1971); Smith v. Sunshine Mining Co., 72 Idaho 8, 236 P.2d 91 (1951). *See also* FEDERAL EMPLOYER'S COMPENSATION ACT, 5 U.S.C. § 8102 (1966); ALASKA STAT. § 23.30.235 (1982).

[157] *See generally* Loftis v. Clift Chrysler-Plymouth, Inc., No. 265 slip. op. (Sup. Ct. Tenn. June 23, 1986) (WESTLAW, Tennessee cases file); American Safety Razor Co. v. Hunter, 2 Va. App. 258, 343 S.E.2d 461 (1986); Alco v. Baker, 651 P.2d 266 (Wyo. 1982); Joseph E. Seagram & Sons, Inc. v. Willis, 401 N.E.2d 87 (Ind. Ct. App. 1980); Liptak v. Connecticut, 176 Conn. 320, 407 A.2d 980 (1978); Beauchesne v. David London & Co., 118 R.I. 651, 375 A.2d 920 (1977); Dribble v. Industrial Comm'n, 40 Wis. 2d 341, 161 N.W.2d 913 (1968); Erikson v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 292 (N.D. 1963); Martin v. City of Biddeford, 138 Me. 26, 20 A.2d 715 (1941). *See also* HAWAII REV. STAT. § 386-3 (1969); UTAH CODE ANN. § 35-1-14 (1953); VT. STAT. ANN. tit. 21 § 649 (1967).

[158] *See generally* Chandler v. Suitt Constr. Co., 288 S.C. 503, 343 S.E.2d 633 (1986); Frost

of intoxication;[159] (5) three states require that the intoxication be the sole cause of the injury;[160] (6) two states adopt a wilful misconduct standard;[161] (7) one state requires the intoxication to be the direct cause of the injury;[162] (8) one state adopts a whole or partial causation standard;[163] and (9) one state adopts a violation of the law standard.[164]

The employer whose jurisdiction requires that he merely show that the employee was intoxicated or under the influence when injured has the easiest burden of proof. In *Texas Indemnity Ins. Co. v. Dill*,[165] the court denied compensation to an intoxicated employee despite the fact that the intoxication did not contribute to his injury. Although this type of statute may have a strong deterrent value, it is arguably unjust because it denies compensation for injuries which would have occurred regardless of sobriety.[166]

A slightly more stringent burden must be sustained in those jurisdictions which require that the injury be shown by a preponderance of the evidence to be due to, caused by, or resulting from the employee's intoxication or being under the influence.[167] In contrast, the heaviest burden is borne by employers whose jurisdiction requires that the intoxication or being under the influence be the "sole cause" of the employee's injury. Since employers in such jurisdictions seldom sustain their burden, the intoxication defense is not an effective deterrent to substance abuse in their workplace. A typical example of such a decision is *Olivera v. Hatco*.[168]

In *Olivera*, a centrifuge operator was found nearly dead in a shed

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v. Albright, 460 So. 2d 1125 (La. Ct. App. 1984); West Fla. Distrib. v. Laramie, 438 So. 2d 133 (Fla. Dist. Ct. App. 1983); Garcia v. City of Albuquerque, 99 N.M. 746, 663 P.2d 1203 (1983); Davis v. C&M Tractor Co., 627 S.W.2d 561 (Ark. Ct. App. 1982); Woodring v. United Sash & Door Co., 152 Kan. 413, 103 P.2d 827 (1940). *See also* LONG SHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT §§ 3(b), 20, 33 U.S.C. §§ 903(b), 920 (1976 & Supp. III 1979).

[159] *See generally* United Pac. Ins. Co. v. Jones, 710 S.W.2d 551 (Tex. Ct. App. 1986); Johnson v. Hahn Bros. Constr. Inc., 188 Neb. 252, 196 N.W.2d 109 (1972). *See also* NEV. REV. STAT. § 616-565 (1967).

[160] *See generally* Loucks v. Joy Automatics, 54 A.D.2d 1037, 388 N.Y.S.2d 378 (1976); Karns v. Liquid Carbonic Corp., 275 Md. 1, 338 A.2d 251 (1975); Olivera v. Hatco, 55 N.J. Super. 336, 150 A.2d 781 (1959).

[161] *See generally* Carson's Case, 351 Mass. 406, 221 N.E.2d 871 (1966); Scroggins v. Corning Glass Co., 382 Mich. 628, 172 N.W.2d 367 (1960).

[162] *See generally* Bell v. J.H. Rose Trucking Co., 452 P.2d 141 (Okla. 1969).

[163] *See generally* Allison v. Brown & Horsch Insulation Co., 98 N.H. 434, 102 A.2d 493 (1953).

[164] Oakes v. Workmen's Compensation Appeal Bd., 79 Pa. Commw. 454, 469 A.2d 723 (1984).

[165] Larson, *supra* note 66, at 407 (citing Texas Indem. Co. v. Dill, 42 S.W. 2d 1059 (Tex. Civ. App. 1931)).

[166] Larson, *supra* note 66, at 407.

[167] *Id.* at 405, 407.

[168] 55 N.J. Super. 336, 150 A.2d 781 (1976).

which accommodated only himself and the machine. The operator had a blood alcohol level of 0.163%. A piece of board from 1,000 feet outside the shed had mysteriously found its way into the machine and broken in two. Half of the board remained in the machine. The other half fractured the operator's sternum and ruptured his heart before it came to rest 6 to 12 feet from the shed. The employer offered an expert who opined that the operator in his drunken condition probably placed the board in the machine. Nevertheless, the court granted compensation because the employer failed to show that the intoxicated employee definitely placed the board in the machine, thereby causing his own injury.[169]

An intermediate level burden is placed on employers whose jurisdiction requires that the employee's intoxication or being under the influence be the proximate cause of the employee's injury.[170] Ohio is one such jurisdiction.[171] Initially, the employer in these jurisdictions must show that the employee's conduct was the cause-in-fact of his harm.[172] In negligence actions, two tests may be utilized in determining what part the employee's conduct played in bringing about his harm. The "but for" test[173] requires that the event would not have occurred without the act or omission of one of the parties. If the employee's injury would not have occurred but for his intoxication or being under the influence, then the employee's conduct is the cause-in-fact of his harm, and his injury is not compensable.

The "but for" test was utilized in Kentucky to deny compensation where a truck driver with a blood alcohol of 0.25% skidded off the road into a tree. The court held that but for the truck driver's intoxication he would not have lost control of the truck and been injured.[174]

When several contributing factors exist, the substantial factor test is often utilized.[175] The substantial factor test requires that one's conduct be a substantial factor in bringing about the harm in question.[176] Under the substantial factor test, the employee's intoxication or being under the influence must have been a material and substantial factor in bringing about his injury.

The substantial factor test was applied in a South Dakota case involving a superintendent responsible for coordinating a construction job who drove into a bridge after a bar room meeting with a subcontractor. The contributing factors included the fact that the employee had a

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[169] *Id.* at 337-40, 150 A.2d at 782-86.
[170] Larson, *supra* note 66, at 405.
[171] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).
[172] *See* PROSSER & KEETON, *supra* note 11, § 41, at 264-66.
[173] *Id.*
[174] Woosley v. Central Uniform Rental, 463 S.W.2d 345 (Ky. Ct. App. 1971).
[175] *See* PROSSER & KEETON, *supra* note 11, § 41, at 267-68.
[176] *Id.*

blood alcohol level of 0.20% at the time of the accident, and the road was icy. After the sheriff testified that he had no difficulty driving the same road at speeds of 30, 40 and 50 miles an hour, the court held that the employee's intoxication was a substantial factor in bringing about the accident.[177]

Once it has been established that the employee's conduct is the cause-in-fact of his harm, then it must be determined whether the conduct has been so significant a cause that the employee should be legally responsible for the consequences.[178] The test of proximate or legal cause is best summarized by Harry Street:

> It is always to be determined on the facts of each case upon the consideration of logic, common sense, justice, policy and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations in which judicious men upon careful considerations have adjudged to be on one side of the line or the other.[179]

An examination of how other jurisdictions apply the proximate cause test will assist Ohio employers in establishing their intoxication defenses pursuant to section 4123.54(B) of S.B. 307.

When the facts present a situation where a special hazard of the employment bears on the accident, courts have often held that intoxication or being under the influence was not the proximate cause of the employee's injury.[180] Such a case involved an Alabama truck driver who had a blood alcohol level of 0.17% and skidded off the road on a foggy, wet night. Compensation was awarded because fog and rain are conditions which constitute special hazards to traveling employees.[181]

Compensation has also been awarded where both intoxication and a hazard typical to the employment are established.[182] Compensation was awarded where an intoxicated Colorado employee required to use his own car for out of town business was involved in an accident when his car malfunctioned. Despite his blood alcohol of 0.195%, the court held that the malfunction of the car was the proximate cause of the injury.[183] It is arguable that serious malfunction of a vehicle is a typical hazard of any employment that requires traveling. Perhaps an easier example is *Smith*

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[177] Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478 (S.D. 1982).
[178] *See* PROSSER & KEETON, *supra* note 11, § 42, at 272-74.
[179] 1 H. STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906).
[180] Larson, *supra* note 66, at 408.
[181] Lankford v. Redwing Carriers, Inc., 344 So. 2d 515 (Ala. Civ. App. 1977).
[182] Larson, *supra* note 66, at 409.
[183] Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 154 Colo. 491, 391 P.2d 677 (1964).

Bros. v. Dependents of Cleveland[184] where an intoxicated employee was killed when a log fell from a log truck. The court awarded compensation because a typical risk inherent in the loading logs is that one might fall and injure the person loading them.

It has also been held that employers who furnish their employees with defective equipment may expect such employees to work with it.[185] Thus, when an employee who is intoxicated or under the influence is injured by the defective equipment, his conduct arguably is not the proximate cause of the injury.

Many jurisdictions have held that the intoxication which caused the employee's injury must be his own and not that of a co-employee or third party.[186] Thus, a Georgia mover who drank vodka while on the road with the company truck driver was awarded compensation for injuries sustained in an accident despite the fact that the driver's blood alcohol level was 0.26%.[187]

Conversely, some jurisdictions relieve the employer of responsibility for the employee's injury if the employee's intoxication or being under the influence created a risk of harm which the employer could not foresee.[188] An intoxicated North Carolina deliveryman who drove through a stop sign into a fire hydrant was denied compensation because his intoxication created the harm.[189] A drunken Minnesota employee who lay down on a shearing machine and accidentally activated it causing it to clamp down on her legs was denied compensation.[190] Finally, an intoxicated Louisiana employee was denied compensation when he inadvertently amputated three fingers while operating a radial saw which was in perfect working order.[191]

In light of these recent decisions from other jurisdictions, Ohio employers have no concrete standard to guide them in their attempt to sustain an intoxication defense. Their burden is raised by the fact that courts are reluctant to deny compensation except in cases where the employer has clearly established[192] the causal connection between the employee's intoxication or being under the influence.[193] Thus, it is

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[184] Larson, *supra* note 66, at 409 (citing Smith Bros. v. Dependents of Cleveland, 240 Miss. 100, 126 So. 2d 519 (1961)).

[185] *See* PROSSER & KEETON, *supra* note 11, § 102, at 710-12.

[186] Larson, *supra* note 66, at 409.

[187] Home Indem. Co. v. White, 154 Ga. App. 211, 267 S.E.2d 849 (1980).

[188] *See generally infra* notes 189-91 and accompanying text.

[189] Harrell v. First Union Nat'l Bank, 316 N.C. 191, 340 S.E.2d 111 (1986).

[190] Theorin v. Ditec Corp., 377 N.W.2d 437 (Minn. 1985).

[191] Frost v. Albright, 460 So. 2d 1125 (La. Ct. App. 1984).

[192] The Ohio employer's burden of proof may require the use of the clear and convincing evidence test. *See* D. MCCORMICK, MCCORMICK ON EVIDENCE 959-61 (3d ed. 1984).

[193] Courts will often give the intoxication defense a narrow scope in order to protect the "security and families of all workers. . . ." Larson, *supra* note 66, at 417.

essential that Ohio employers carefully examine the distinctions drawn by courts from other jurisdictions and organize all available evidence accordingly.

VI. The Employee's Defense

Once the employer has presented his intoxication defense, the burden of rebuttal shifts to the employee.[194] The employee must present competent factual evidence that he was either not intoxicated or under the influence, or that his intoxication or being under the influence was not the proximate cause of his injury.[195]

The easiest way to rebut the presumption that he was under the influence is for the employee to show that he was taking a drug prescribed by a physician.[196] If the prescription[197] is found to be legitimate, compensation cannot be denied under section 4123.54(B).[198]

However, if the employee wishes to establish the fact that he was legally sober at the time of the injury, he can attack the credibility of the employer's witnesses,[199] or attack the accuracy of the biochemical test

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[194] Donofrio v. B.G.R. Inv. Corp., 10 Ohio Misc. 2d 25 (1983).

[195] J. Harris, *supra* note 12, at 102-03.

[196] A physician is an individual who has been licensed by the state medical board to engage in the practice of medicine. Ohio Rev. Code Ann. § 4730.01(B)(Baldwin 1976). A dentist is an individual who performs dental operations, diagnoses and treats diseases or lesions of the human teeth or jaws, attempts to correct malpositions of jaw or teeth, and constructs or supplies dentures, bridges or other appliances. Ohio Rev. Code Ann. § 4715.01 (Baldwin 1982). Physicians and dentists are licensed and governed by separate boards. Ohio Rev. Code Ann. §§ 4731.05, 4731.08, 4715.01, 4715.02 (Baldwin 1982).

In the area of privilege, it has been determined that a dentist is not a physician, and thus, is not privy to the physician-patient privilege. Belichick v. Belichick, 37 Ohio App. 2d 95, 99, 307 N.E.2d 270, 272 (1974).

Based on the heretofore mentioned facts, an employee whose injury is deemed to be caused by his being under the influence of a controlled substance prescribed by a dentist after the extraction of a tooth cannot recover workers' compensation. Such a result would be unjust. In light of Ohio Rev. Code Ann. § 4123.95 (Baldwin 1959) which requires the workers' compensation legislation be construed liberally in favor of the employee, it is more probable that a physician and dentist will not be viewed as mutually exclusive for the purpose of § 4123.54(B).

[197] A prescription is:

> A written or oral order for a controlled substance for the use of a particular person . . . given by a practitioner in the course of professional practice and in accordance with the regulations promulgated by the director of the United States drug enforcement administration pursuant to the federal drug abuse control laws.

Ohio Rev. Code Ann. § 3719.01(CC)(Baldwin 1977).

[198] 1986 Ohio Legis. Serv. 307 (Baldwin).

[199] *See supra* note 88.

results presented by the employer.[200] Furthermore, the Ohio Revised Code provides that "section 4123.01 to 4123.94, inclusive, of the Ohio Revised Code shall be liberally construed in favor of employees and dependents of deceased employees."[201] Thus, reasonable doubts in the evidence may be resolved in favor the employee.

In addition to presenting his own test results,[202] the employee can argue that the employer failed to establish the proper chain of evidence with regard to the sample of bodily fluid removed from him for testing.[203] It was decided that a North Dakota employer failed to prove that his employee was intoxicated at the time of his injury where the coroner drew a blood sample from the employee 3½ hours after the accident and delivered the sample in an open container to the hospital 1½ hours later.[204] Once in the hospital laboratory the open containers were placed in the refrigerator with many other samples overnight. The test results were ruled incompetent evidence because the court, with justification, questioned whether the blood, when tested, was in the same condition as when taken from the employee's body.[205]

Another fact which should have concerned the North Dakota court was that the specimen was allowed to sit and decay. Decay results in increased blood alcohol levels to as much as 0.25% in a sample of a sober person's blood.[206] Refrigeration merely slows down the rate of decay. To stop decay, a preservative, sodium flouride must be added to the sample.[207]

In addition to taking precautions for the physical care of the specimen, the employer should obtain the specimen and test results in compliance with the appropriate administrative procedures. For guidance in this area, employers can consult Ohio's DWI statute. The statute provides that when "a person submits to a blood test at the request of a police officer . . . only a physician, a registered nurse, or a qualified technician or chemist shall withdraw blood for the purpose of determining its content. This limitation does not apply to the taking of breath or urine

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[200] *Id.* Chandler v. Suitt Constr. Co., 288 S.C. 503, 343 S.E.2d 633 (1986); Lankford v. Redwing Carriers, Inc., 344 So. 2d 515 (Ala. Civ. App. 1977)(coroner withdrew blood through a syringe that had been cleansed with alcohol-containing germicide). *See also infra* notes 182-83, 187-88, 190-99 and accompanying text.

[201] OHIO REV. CODE ANN. § 4123.95 (Baldwin 1959).

[202] In the litigation of drunk driving cases, the defendant may present evidence of a set of test results which he independently obtained. OHIO REV. CODE ANN. § 4511.19 (Baldwin 1983).

[203] Woosley v. Central Uniform Rental, 463 S.W.2d 345 (Ky. Ct. App. 1971).

[204] *Erikson v. North Dakota Workmen's Compensation Bureau*, 123 N.W.2d 292 (N.D. 1963).

[205] *Id.* at 295.

[206] L. TAYLOR, *supra* note 65, at 547.

[207] *Id.*

specimens."[208] The statute also provides that the specimen shall be analyzed in accordance with the methods approved by the director of health and by an individual who possesses a valid permit issued by the director of health.[209] Where an Alabama coroner withdrew a sample of the employee's blood with a needle that had been cleansed in an alcohol-containing germicide, the court held that only a physician, registered nurse, or clinical laboratory technician was qualified to take a blood sample for the purpose of analysis, thus the employer's intoxication defense failed.[210]

It is also important that alcohol swabs are not used to cleanse the employee's skin prior to taking a blood sample. These swabs often contain 70% alcohol and can cause a falsely elevated result.[211] One study revealed that a sober subject whose blood was drawn after his skin was cleansed with alcohol had a blood alcohol level of 0.12% due to the contamination.[212]

In a case where the employer has complied with all the administrative procedures and has established the appropriate foundation for his evidence, the employee may attempt a more general attack upon the accuracy of the test itself. Such a defense is costly because the employee must present expert testimony on the inaccuracy of the testing method utilized by the employer, the inaccuracy of the calibration of the equipment utilized in the testing process, or the inability of the test to account for the individual tolerances to alcohol or controlled substances.[213]

Potentially, the most accurate test results are obtained by testing a sample of the employee's blood for drugs or alcohol.[214] The three methods utilized are gas chromatography, enzymatic reaction, and alcohol separation.[215] The accuracy of these tests depends upon the precision of the person performing the test and the proper preparation of the solutions utilized in the testing process.[216]

The breathalyzer measures the amount of alcohol exhaled in vapor from the lungs.[217] It has an error rate of 0.03%.[218] The test results are affected by any of the following factors: hyperventilation, hypoventila-

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[208] OHIO REV. CODE ANN. § 4511.19 (Baldwin 1983).
[209] *Id.*
[210] Lankford v. Redwing Carriers, Inc., 344 So. 2d 515 (Ala. Civ. App. 1977).
[211] L. TAYLOR, *supra* note 65, at 544.
[212] *Id.*
[213] *Id.* at 65.
[214] *Id.* at 539.
[215] *Id.*
[216] *Id.*
[217] *Id.* at 447.
[218] *Id.*

tion, gender of subject, stress, subject's blood count, smoking, pulmonary disease, and barometric pressure.[219]

Urine tests are relatively inexpensive with the most popular being the EMIT test.[220] Antibodies are added to urine specimens which turn a characteristic color when certain drugs are present.[221] Rarely, does the test not detect a drug abuser. However, it often misidentifies a legal over-the-counter medication as an illegal drug. "False positives," or test results which indicate one is under the influence of a controlled substance when he is not, are created by the following medications: cold medications are mistaken for amphetamines, cough syrups are mistaken for morphine, and some antibiotics such as amoxicillin are misidentified as cocaine.[222]

Challenging the accuracy of the method of testing utilized by the employer can be a powerful weapon in the hands of the employee whose counsel is well versed in this area. The problem is that many attorneys do not have the specialized knowledge necessary to effectively cross-examine the employer's experts on the issue.[223]

If the employee is unable to rebut the presumption of intoxication or being under the influence, he can argue that his conduct was not the proximate cause of his injury. Analogizing to the distinctions drawn in other jurisdictions, the Ohio employee can defend his right to compensation by showing that his injury was proximately caused by a hazard of his employment[224] or by a co-employee.[225]

The employee may also argue that his employer is estopped from raising an intoxication defense because he had knowledge of the employee's intoxication,[226] supplied the liquor which caused the employee to become intoxicated,[227] or acquiesced in the employee's use of alco-

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[219] *Id.* at 448-54. *See* City of Columbus v. Day, 24 Ohio B. 263 (1986).

[220] Rust, *supra* note 110, at 51, 52.

[221] *Id.*

[222] *Id.*

[223] L. TAYLOR, *supra* note 65, at 542.

[224] *See supra* notes 180-84 and accompanying text.

[225] *See supra* notes 186-87 and accompanying text.

[226] Frost v. Albright, 460 So. 2d 1128 (La. Ct. App. 1984)(employer not deemed to have knowledge of employee's intoxication where employee told employer he had been drinking the night before and a store clerk could tell employee was drunk). *See also supra* note 209 and accompanying text.

[227] Beauchesne v. David London Co., 118 R.I. 651, 375 A.2d 920 (1977)(compensation awarded where employee became intoxicated at office Christmas party and fell from window); McCarthy v. W.C.A.B., 12 Cal. 3d 672, 527 P.2d 617, 117 Cal. Rptr. 65 (1974)(compensation awarded where employee drove home intoxicated from office party and was involved in an accident).

But cf. § 4123.01(C)(3) where employee can waive his right to compensation by signing a waiver before voluntarily engaging in an employer-sponsored recreation or fitness activity.

hol.[228] Knowledge on the part of the employer has been difficult to prove in some jurisdictions. Knowledge of the employee's propensity to drink will not usually estop an employer from raising an intoxication defense.[229] The underlying rationale is that the employer should not have to ferret out each employee who violates the rule prohibiting the use of alcohol or controlled substances on the job.[230] In *Davis v. C&M Tractor Co.*,[231] the court refused to impute the employee's immediate supervisor's knowledge of his intoxication to his employer.

VII. Conclusion

Establishing an intoxication defense under Ohio workers' compensation law will not be an easy task. The Ohio Legislature created a two pronged test requiring the employer to show: (1) the employee was intoxicated or under the influence of a non-prescription controlled substance when injured, and (2) the intoxication or being under the influence was the proximate cause of the employee's injury.[232]

The language of section 4123.54(B) is consistent with the slight majority of jurisdictions which place upon the employer an intermediate level burden of proof. These jurisdictions require that the employer present more than a blood alcohol or controlled substance level over the DWI legal limit.[233] The employer must prove, through observed evidence and expert testimony, that based on the totality of circumstances, the alcohol or controlled substance had such an effect on the employee's nervous system, brain, or muscles as to impair his ability to perform his job in a manner equivalent to an ordinary prudent person in full possession of his faculties using reasonable care under similar circumstances.[234]

Once the employer proves that the employee was intoxicated or under the influence, these jurisdictions require the employer to establish the causal connection between the employee's conduct and his injury.[235] The burden lies somewhere between showing that the employee's intoxication was the sole cause[236] of his injury and that the employer's intoxication

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1986 Ohio Legis. Serv. 307 (Baldwin). In these situations, it would be of no consequence if the employer supplied alcohol to his employee.

[228] *Frost*, 460 So. 2d at 1128.

[229] Davis v. C&M Tractor Co., 4 Ark. App. 34, 627 S.W.2d 561 (1982).

[230] *Id.* at 37, 627 S.W. 2d at 564.

[231] *Id.*

[232] *See* § 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[233] *See supra* notes 84-85 and accompanying text.

[234] *See supra* notes 86-95 and accompanying text.

[235] *See supra* note 120 and accompanying text.

[236] *See supra* notes 168-69 and accompanying text.

was merely a contributing cause of the injury.[237] Ultimately, Ohio employers will be required to prove that the employee's intoxication or being under the influence was so significant a cause of his injury that the employee should be held legally responsible for his own harm.[238]

After the employer in these jurisdictions has presented his intoxication defense, the employee must prove that he was not intoxicated or under the influence of a non-presciption controlled substance[239] or that his conduct was not the proximate cause of his injury[240] to avoid being barred from receiving reduced compensation. The new Ohio Supreme Court has not yet spoken on the issue of whether compensation will be barred or reduced in proportion to the degree of the employee's negligence. However, the language of section 4123.54(B) leaves many unanswered questions which will be resolved only after Ohio employers begin to assert intoxication defenses before the Industrial Commission, and ultimately, the new Ohio Supreme Court.[241]

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[237] *See supra* note 167 and accompanying text.

In its original state, the Senate passed an exclusion from the definition of compensable injury which required that the employee's intoxication or being under the influence of a controlled substance be merely a contributing cause of his injury or disability. J. HARRIS, *supra* note 1, at 102.

However, the enacted version now requires that the employee's injury be proximately caused by his intoxication or being under the influence of a non-prescription controlled substance. Section 4123.54(B) of 1986 Ohio Legis. Serv. 307 (Baldwin).

[238] *See supra* notes 178-79 and accompanying text.

[239] *See supra* notes 196-13 and accompanying text.

[240] *See supra* notes 180-91 and accompanying text.

[241] "Historically, the Ohio Supreme Court has not been known as innovative or creative. The leading edge of the law in the state has, as in most others, long been legislative rather than judicial, and the court has accepted a role of self-restraint vis-a-vis the General Assembly." Goostree, *supra* note 51, at 6.

Exercising self-restraint, the court has been reluctant to substitute judicial opinion for the wisdom of the Ohio Legislature. However, the Ohio Supreme Court under the leadership of Chief Justice Celebrezze aroused public controversy by abruptly departing from the court's traditionally deferential posture in the area of workers' compensation. *Id.*

Based upon Chief Justice Moyer's court of appeals decisions which "fit well within the Ohio Supreme Court's historical context of legislative deference, self-restraint, and strict construction of both statutes and administrative regulations," it is expected that the new court will revert back to its historical decisional pattern. *Id.* at 8.