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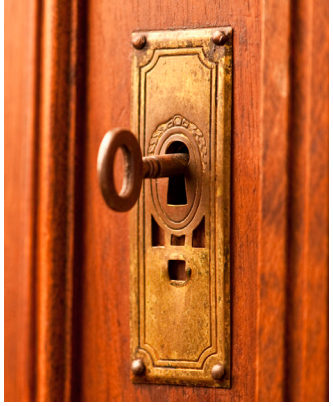

The 1st Report

A Workers' Compensation Update

Fall 2016

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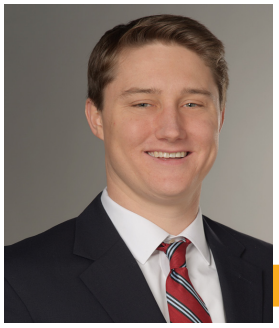

Bringing Down the Lunch Break Defense

By: Robert W. Smith

When an employee has an accident while engaged in anything other than his or her specific job duties, it goes without saying that the compensability of the claim should be examined with a high level of scrutiny. This is particularly true if the accident occurs during the employee's break, as it is the general rule in Georgia that accidents occurring during a scheduled break are not compensable. *Rockwell v. Lockheed Martin Corp.*, 248 Ga. App. 73, 545 S.E.2d 121 (2001). However, it is important to understand the elements of and exceptions to the lunch break defense. This will not only help you know what to look for during your initial investigation of the claim, but also give you confidence in your decision to deny or accept a claim!

It is important to keep in mind the mere fact an employee was on a "break" when an accident occurred will not necessarily mean the accident is not compensable. The break has to have been scheduled, and it has to have been one in which the employee had full control of personal actions. *Miles v. Brown Transp. Corp.*, 163 Ga. App. 563, 294 S.E.2d 734 (1982). Furthermore, it is actually the employer/insurer who have to prove both of these elements once the employee proves an injury by accident occurred on the employer's premises during a regularly scheduled workday. *Rampley v. Travelers Ins. Co.* 143 Ga. App. 612, 239 S.E.2d 183 (1977). Finally, regardless of whether the accident occurred during a scheduled break, it could still be compensable if it occurred on the employer's premises while the employee was coming back from or going to the break. *Rockwell*, 248 Ga. App. 73.

With regard to the requirement that it be a scheduled break, there is unfortunately no clear-cut rule as to what differentiates a scheduled break from an unscheduled break. Fortunately, the Court of Appeals has given us some guidance. For example, an employee using the restroom on an as-needed basis without having to obtain permission from her supervisor is not on a scheduled break. *Edwards v. Liberty Mut. Ins. Co.*, 130 Ga. App. 23, 202 S.E.2d 208 (1973). Also, a break is not a scheduled break when its timing each day depends entirely on an employee's changing workload. *Miles*, 163 Ga. App. 563. On the other hand, a lunch break which varies slightly in timing from day to day depending on the pace of a training could still constitute a scheduled break when the training agenda anticipated a lunch break at a particular time. *ATC Healthcare Service, Inc. v. Adams*, 263 Ga. App. 792, 589 S.E.2d 346 (2003). The key to look for is whether there was a set time or general time for the break or whether it was completely random. Also, focus on whether the break was taken every day or whether it depended on other factors.

The requirement the employee have full control of his or her personal actions during the break also must be examined on a case by case basis. The key is whether the employee is in any way subject to the employer's demands or control. *Rampley*, 143 Ga. App. 612. Notably, the relative brevity of the break has no effect on the underlying question of whether the employee had full control. *Wilkie v. Travelers Ins. Co.*, 124 Ga. App. 714, 185 S.E.2d 783 (1971). Finally, keep in mind that even if the employee is free to do as he or she chooses, if the employee engages in employment-related activities during the break, this can defeat an otherwise viable lunch break defense. *Swanson v. Lockheed Aircraft Corp.*, 181 Ga. App. 876, 354 S.E.2d 204 (1987).

The main thing to remember is when someone says the word "break" during the course of your investigation of a claim, he or she could be referring to anything from running to the restroom during a lag in business to clocking out for lunch every day at the same time. Because the lunch break defense is so fact-intensive, your analysis and fact-finding should not stop once you hear the word "break." Keep all the elements and exceptions of the lunch break defense in mind as you continue to develop information. Inquire not only into all of the details of the employee's break on the

date in question, but also the parameters of the employee's break on a routine basis. Of course, even with all of the relevant information, the applicability of this defense is often an extremely close call. The attorneys at Swift Currie are always available to help you weigh the available options and make a decision.

For more information on this topic, contact Robbie Smith at 404.888.6204 or at robert.smith@swiftcurrie.com. ■

Should Employers Continue Drug Testing or Go Cold Turkey? GA WC Intoxication Defense Under OSHA's New Enforcement Rules

By: Crystal Stevens McElrath

OCGA §34-9-17 provides employers with a valuable affirmative defense if an employee is found to be under the influence of alcohol or drugs at the time of an alleged accident. Specifically, the statute provides that: "No compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, except as may have been lawfully prescribed by a physician for such employee and taken in accordance with such prescription." A blood alcohol content of 0.08 within 3 hours or any amount of drugs within 8 hours of the accident, as well as an unjustifiable refusal to submit to a drug test, trigger a rebuttable presumption the accident and injury were caused by the intoxication. If the presumption arises, the burden is on the employee to "show by clear, positive and uncontradicted evidence that the presence of drugs was not the cause of the injury." *Lastinger v. Mill & Machinery, Inc.*, 236 Ga. App. 430, 512 S.E.2d 327 (1999).

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) announced a final rule which may turn the above intoxication defense on its head. The "Improve Tracking of Workplace Injuries and Illness Rule" ("the Rule") requires employers to electronically **submit** injury and illness data instead of simply **documenting and preserving them**. The submitted data will then be made publicly available in hopes of encouraging workplace safety. 81. Fed. Reg. 29623, available online here: https://www.federalregister.gov/articles/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses. In Comments for the Rule, OSHA indicates an employer's blanket or automatic post-accident policy will be viewed as taking an adverse action against, retaliating against, or discouraging employees from reporting accidents.

At the same time, "the Rule" does not prohibit all post-accident drug testing policies. The Rule yields to state or federal laws requiring post-injury testing. In these cases, the reason for blanket post-accident drug testing is to comply with statute, rather than some adverse action. Georgia does not have state laws requiring all employers to administer post-accident tests, but US Department of Transportation employees, for example, may be required to submit to post-accident testing by law. The Rule also acknowledges many employers implement post-accident drug testing policies in order to qualify for Drug Free Workplace premium discounts, but it does not go so far as to agree these discounts are legitimate reasons for blanket post-accident drug testing. Georgia offers such a discount, by legislative creation; however, Georgia's Code does not specifically require blanket drug testing for medical-only claims. O.C.G.A. §§ 33-9-40.2, 34-9-413, 34-9-415. Thus, it appears simply invoking a Drug Free Workplace program, or pursuing an insurance discount, will be no safe harbor for blanket drug tests.

For all post-accident drug tests not required by law, OSHA advises employers "drug testing policies should limit post-incident testing to situations in which the employee's drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by the drug use." OSHA elaborates "while employers need not specifically suspect drug use before testing, there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require the drug testing, and, even then testing should be limited to only the employee who caused the accident rather than everyone involved." OSHA offers the following examples to show incidents which are unlikely to be caused by drug use: a bee sting, a repetitive strain injury, an injury caused by a lack of machine guarding, or an injury caused by a machine or tool malfunction.

Most of the Rule goes into effect on January 1, 2017, and these specific Enforcement Provisions were originally scheduled to take effect on August 10, 2016. However, the date was delayed to November 1, 2016, likely due in part to an injunction granted by the United States District Court for the Northern District of Texas at the request of a coalition of business and manufacturers. *See TEXO ABC/AGC et al v Thomas, et al*, No 3:16-CV-1998

How to Properly Utilize Evidence in a Drug Defense Case

By Jonathan G. Wilson

A toxicology report showing an employee consumed alcohol or drugs around the time of the alleged accident can bar the entire claim. According to O.C.G.A. § 34-9-17(b), "no compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance…." This is an affirmative defense, which means the burden of proof is on the employer/insurer. However, when qualified, a positive report can raise a rebuttable presumption that the employee's accident was caused by his consumption of alcohol or drugs. In that case, the employee "has the burden of showing by clear, positive and uncontradicted evidence that the presence of drugs was not the cause of the injury." *Lastinger v. Mill & Machinery, Inc.*, 236 Ga. App. 430, 512 S.E.2d 327 (1999). However, simply obtaining a positive test result does not mean you are "home free" just yet.

To raise the rebuttable presumption regarding alcohol consumption, O.C.G.A. § 34-9-17(b)(1) requires the blood alcohol test to be taken within three hours of the accident and show a blood alcohol content level of 0.08 grams or higher. Subsection (b)(2) addressing marijuana or controlled substances provides a lower threshold and states any amount of marijuana or controlled substances in the employee's blood or urine discovered by a toxicology test within eight hours of the accident raises the presumption.

Once these thresholds are met, the next (and quite long) bridge to cross is found in O.C.G.A. § 34-9-415(d). This detailed Code section with 12 subparts addresses everything from the proper collection and transportation of blood/urine samples to who must pay for additional toxicology tests. If an employee unjustifiably refuses to submit to a test performed in accordance with the requirements set forth in O.C.G.A. § 34-9-415(d), that refusal raises a rebuttable presumption the accident and injury were caused by the consumption of alcohol or marijuana/controlled substance. O.C.G.A. § 34-9-17(b)(3).

The first three subsections provide "chain of custody" rules to ensure the integrity and reliability of the actual blood/urine samples. In pertinent part, the samples must be taken "in a manner reasonably calculated to prevent substitution or contamination," and specimen collection, storage, and transportation must be done in a manner which will "reasonably preclude specimen contamination or adulteration." To that end, the collection of samples must be documented, and the specimen containers must be labeled "to reasonably preclude the likelihood of erroneous identification of test results." Similarly, O.C.G.A. § 34-9-415(d)(9) places these chain of custody requirements on employers who perform on-site drug testing or specimen collection. Finally, subsection (d)(2)(B) allows an employee to "record any information he or she considers relevant to the test," such as medications he or she recently ingested, and holds this information "shall be taken into account in interpreting any positive confirmed results." If the claimant's attorney will not stipulate to chain of custody, depositions will need to be taken of each person who handled the sample to establish proper chain of custody. This can be a timely process, so chain of custody issues should be addressed from the outset of the case.

O.C.G.A. § 34-9-415(d)(4) essentially holds that all laboratories which perform the tests must be certified and follow procedures similar to those detailed in the above paragraph to ensure quality control, proper specimen identification, and to avoid adulteration of the samples.

Next, O.C.G.A. § 34-9-415(d)(5) mandates who is qualified to collect blood/urine samples from the employee. Such qualified individuals listed in this five-part subsection include, but are not limited to, physicians, physician assistants, nurses, nurse practitioners, and certified paramedics at the scene of the accident.

Subsections (d)(6) and (d)(7) do not address specimens or testing. Rather, they list steps the employer/insurer must take shortly after obtaining positive test results. These subsections hold the employer/insurer must give written notice to the employee **about the results and how they affect a claim for benefits** no later than five working days after receipt of the results.

Recognizing the potential for "false positives," subsection (d)(8) requires initial positive tests to be confirmed by a second test in a qualified laboratory.

Subsections (d)(10) and (d)(11) hold the employer/insurer must bear the cost of initial and confirmation drug tests, while the employee has to pay for "any additional tests not required by the employer."

The final item on O.C.G.A. § 34-9-415(d)'s laundry list of requirements concerns testing conducted on the basis of "reasonable suspicion" of intoxication. In such a situation, the employer must memorialize the details giving rise to the suspicion a toxicology test was warranted. The original report must be kept confidential and preserved for at least one year. The employee is entitled to a copy of this report upon request.

As such, while a positive toxicology report can be useful in barring a claim in its entirety, it must first meet O.C.G.A. § 34-9-17(b)'s thresholds and the extensive requirements of O.C.G.A. § 34-9-415(d) to be effective.

For more information on this topic, contact Jonathan Wilson at 404.888.6227 or jonathan.wilson@swiftcurrie.com. ■

(NDTx, July 8, 2016). OSHA announced on July 13, 2016, five days after this injunction, it would delay the enforcement date "to conduct additional research."

In the meantime, OSHA also increased its fines by 70% "to keep pace with the cost of living," according to US Secretary of Labor, Thomas E. Perez. Thus, the fine for the first serious citation will be $7,000 - $12,740. Deliberate or willful violations could be subject to fines of $70,000 - $127,400.

Some employers have already expressed that the only foolproof response appears to be suspending all post-accident drug testing. However, this response essentially forfeits a potential intoxication defense in workers' compensation cases. Frankly, an employer could potentially spend $7,000 - $127,400 paying out a workers' compensation claim that could have been outright denied with a properly administered, positive drug test. Therefore, proper administration of a drug test appears to be the best answer for employers when it comes to minimizing the potential exposures in workers' compensation cases.

Certainly, proper administration of a drug test just became more complicated! Supervisors now bear the burden to make important judgment calls in a narrow window of time. We suggest creating a checklist or form for supervisors to use as part of work injury protocols. If it appears the injured employee's acts or failure to act, has caused or contributed to an accident, an employer will likely have the right to request a drug test. Likewise, if the initial investigation suggests some type of intoxication, a drug test may be warranted. As stated above, test only the employee(s) involved/injured in the accident, and do so only where it is clear neither the employer nor the employer's equipment is to blame. The checklist or form should confirm all the above: there is a reasonable possibility drugs or alcohol could have caused the injury, and it has been ruled out that the employer or employer's equipment is the root cause.

Employers would do well to conduct formal trainings on how to use these checklists and administer drug tests to ensure consistency, among other things. Furthermore, supervisors should also take great care to test ALL employees when, and only when, the criteria on the checklist are met. This will help avoid any EEOC claims or allegations that the drug tests, administered at the subjective discretion of various supervisors, are used to discriminate against members of a protected class.

Fortunately, pre-employment and random drug testing are not affected by the Rule as they do not deter reporting of accidents. Thus, employers may want to increase random drug testing to continue to detect and deter drug use before injuries occur.

The challenges raised by OSHA's new Rule and enforcement provisions are too numerous to address here -- from the types of drug tests which can "identify impairment" to restrictions on incentive programs and the potential impact on an employer's ability to qualify for insurance premium discounts. However, there is some good news. The upfront analysis proposed by OSHA is not too far from the analysis defense counsel employs before pursuing an intoxication defense. A thorough workers' compensation defense attorney considers whether there is evidence a claimant can carry his or her burden to show there was no causal connection between the drug test and the accident/injury, i.e. (s)he was not injured because of intoxication. An employer who considers these same factors, per OSHA's guidelines, only helps its own case. By the time a case goes into litigation, the intoxication defense will be even stronger inasmuch as the drug test was administered with reasonable suspicion and/or a probable causal connection.

For more information on this topic, contact Crystal McElrath at 404.888.6116 or at crystal.mcelrath@swiftcurrie.com. ■

Events

Workers' Compensation Annual Client Seminar: "Swift Currie's Got Talent"
September 30, 2016
9:00 am - 3:30 pm
Cobb Energy Performing Arts Centre
Approved for 2 general and 3 ethics CE hours by the GA DOI

Property and Coverage Insurance Client Seminar
November 4, 2016
Cobb Energy Performing Arts Centre

Litigation Client Luncheon
December 7, 2016
Maggiano's - Cumberland Mall

Many Swift Currie programs offer CE hours through the GA Dept. of Insurance. To confirm the number of hours offered, for more information on these programs, or to RSVP, visit swiftcurrie.com/events.

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