

Risk Management

## *Preserving Intoxication Offsets in Workers' Compensation Claims*

by

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Under Colorado law an injured workers' non-medical benefits may be reduced by 50% if the injury results from the presence of alcohol or controlled substances in the worker's system, during working hours, that are not medically prescribed or where a blood alcohol level is at or above 0.10 percent, or at a lower level as set forth by federal statute or regulation.

In order to take this offset there are several requirements that must be met. **First, the positive forensic test must have been conducted by a medical facility or laboratory licensed or certified to conduct such tests.** This requirement is usually met by having the designated medical provider conduct the test pursuant to your Alcohol and Drug Policy following an injury or accident. Your designated medical clinic and their lab is almost certainly certified to conduct the tests, but verification may be necessary if you have any doubts.

The statute also requires that **a duplicate sample must be preserved and made available to the injured worker for purposes of a second test to be conducted at the worker's expense.** If the second test also indicates the presence of controlled substances or alcohol at a prohibited level, **it is then presumed that the employee was intoxicated and that the injury was due to the intoxication.** This presumption may only be overcome by evidence that clearly and convincingly shows that the test is incorrect. C.R.S. § 8-42-112.5.

If these two requirements are met, the intoxication offset may be a powerful remedy that can considerably reduce your liability in a workers' compensation claim.

However, nothing is ever easy. There are significant problems that you may encounter when trying to assert the penalty against an injured worker. First, as you may have noticed, the statute does not say who must maintain the sample, or for how long. As a practical matter any sample should be maintained by the testing lab or agency to protect chain of custody issues and allegations of tampering. **That of course places you at the mercy of a third party and their own internal policies on testing and preservation.** The amount of time each lab keeps a sample varies, and usually is not much longer than a week. A call to Concentra revealed that their lab generally does not keep the samples for more than 10 days. Other labs have reported keeping samples 15 days. Information from some local hospitals suggest that they may only keep samples for 3 days.

**In any case, that is simply not long enough,** considering that the statute of limitations to bring a claim in Colorado is 2 years. Even where a claim is moving forward and benefits are being paid, it may be weeks or months before an injured worker and his attorney make a challenge to the

intoxication offset and penalty. Unless you take precautions immediately following any test, it is highly unlikely that a second sample will be available to the injured worker as required.

**So, what can you do to help protect your right to take the intoxication offset? Here are some suggestions:**

1. Follow your written policy regarding drug and alcohol testing, and require testing by the authorized medical provider or facility after an accident or injury. Seek legal advice on how to set up your drug and alcohol policy if you do not have one.

2. Following an injury, make a formal, written request to the authorized medical provider or facility that they conduct drug and alcohol testing, and that they and/or the lab **obtain and maintain a second sample** (should the test comes back positive). Retain a copy of the request for your files.

3. Advise the authorized medical provider or facility in writing that, **if the initial test is positive, the second sample must be maintained indefinitely**, or until they are otherwise advised by you or your representative that that the second sample is no longer needed. Identify what their retention policy is and let them know if it is insufficient for the particular case. **Advise them to contact you before any sample is destroyed.** Retain a copy of the request for your files.

4. Discuss the testing and retention policy of the authorized medical provider or facility with your carrier and/or attorney so that they may assist in preservation of any samples and documenting any requests appropriately.

5. **Consider advising the injured worker in writing that a second sample has been maintained by the authorized provider or lab and is available for repeat testing at their expense.** Although it is unclear how long a second sample must be maintained under the statute, consider advising the injured worker that repeat testing should be done as soon as possible (or even with a set period of time) to assure that testing of the second sample may be accomplished. **In any case, a second sample should be maintained indefinitely in any positive test, should you have any hope of protecting a valid intoxication offset.**

Unfortunately, even the simplest of concepts in the workers' compensation arena can become complicated. **Creating a simple process that can be duplicated on a daily basis is key.** If you need help putting together a drug and alcohol policy that best preserves your rights under the Colorado Workers' Compensation Act, please feel free to contact me at 303-575-8096 for any advice.

If you have any questions, feel free to contact me at 303-575-8096 for any help or advice you need in association with your hiring of subcontractors or sub-subcontractors.

**\*\* Note: The information contained in this document does not convey legal advice of any kind. Please consult your attorney for advice on the application of the law to the specific facts of your case or legal problem.**

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