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The Arizona Supreme Court has rejected provisions of the state workers' compensation statute precluding any award of benefits when alcohol or controlled substances contributed to injury.

Arizona Edition

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Arizona Supreme Court Strikes Down Denial of Workers' Compensation Benefits Due to Presence of Alcohol or Drugs

By Neil Alexander and Laurent Badoux

On August 9, 2005, the Arizona Supreme Court issued an opinion in the consolidated cases of *Grammatico v. Industrial Commission* and *Komalestewa v. Industrial Commission* holding that certain provisions the Legislature added to the workers' compensation statute were unconstitutional. The provisions in dispute precluded an award of benefits to an injured worker when the consumption of alcohol or use of a controlled substance contributed at least in part to the injury.

In both cases, the injured worker appealed a denial of an award of workers' compensation benefits based on the application of the new statutory provisions that excluded injured employees from workers' compensation coverage if alcohol or controlled substances were involved.

Was it Grammatico's Fault?

In the first case, David Grammatico was standing on 42" stilts while installing metallic trim at his employer's worksite. As he was walking through a cluttered area of the worksite, Grammatico tripped and injured his wrist and knee. A post-accident drug test revealed that Grammatico had ingested methamphetamines and other controlled substances during the two days preceding the accident. Grammatico, however, was not working on either of those two days. Grammatico filed a claim for workers' compensation benefits that the

Industrial Commission ultimately denied. An Administrative Law Judge (ALJ) held that Grammatico's injury did not qualify for a workers' compensation award because statutory language passed by the Legislature in 2003, provided that, when an employee fails an approved drug test following a workplace accident, the injury is not compensable unless the employee can prove that the consumption of a controlled substance was not at least a factor in the workplace accident. Grammatico could not present any evidence that his consumption of a controlled substance was not at least a contributing factor in his accident. A divided three-member panel of the court of appeals overturned the ALJ's decision and declared that the new statutory provisions were unconstitutional.

Too Many Cocktails for Komalestewa

Austin Komalestewa sustained severe injuries to his arm when he tried to fix a conveyor belt that had "bogged down," which he claimed was a common occurrence at his job. A post-accident blood test revealed that Komalestewa had a significantly high blood alcohol level, allegedly attributable to the "at least" four vodka cocktails he drank the night before. Komalestewa denied he was impaired, and no one at his job site could testify that he appeared intoxicated.

Komalestewa was also denied an award of workers' compensation benefits based on the new statute. He appealed the ALJ's decision, but another three-judge panel of the court of appeals unanimously upheld the denial of the award. The Arizona Supreme Court consolidated the two appeals and issued a single decision.

It Does Not Matter Whose Fault It Is Under the Workers' Compensation Statute Unless the Constitution Says Otherwise

The Supreme Court began its analysis of the two appeals with a reference to a long-established principal that the common law rights of Arizonans, as they existed prior to Arizona becoming a state, could not be abrogated by the Legislature. Instead, only a constitutional amendment can eliminate or restrict the rights Arizonans possessed prior to statehood.

The Supreme Court explained that the basic principal of the workers' compensation system, i.e., a no-fault alternative to common law tort litigation, defined the rights of substantive pre-statehood rights of Arizonans and could only be restricted through an amendment of the Constitution. As an example, the court cited a 1921 decision in which it struck down a legislative amendment to the workers' compensation statute, limiting workers' rights to opt-out of the workers' compensation system only at the time that employment begins, rather than after the injury had been sustained. The Legislature submitted a proposition for a constitutional amendment. Voters approved that amendment in 1925, which provides that employees can only opt out of the workers' compensation system by indicating their intent clearly at the time of hire.

The court determined that the Legislature's latest restrictions on the receipt of workers' compensation benefits due to positive drug or alcohol test results were unconstitutional. The court explained that forcing employees to prove that they are not impaired by the use of alcohol or drugs is equivalent to requiring that employees prove they were not contributorily negligent. Therefore, the only appropriate way to implement this

modification effectively is through a constitutional amendment, even though the court agreed with the public policy behind the legislation. The court further noted that the Legislature had introduced, but not acted upon, a proposition for a constitutional amendment that, if submitted to the voters, would have changed Article 18, Section 8 of the Arizona Constitution to incorporate the drugs and alcohol exemption from coverage.

Practical Effects and Recommendations

Although employers may have at least temporarily lost any workers' compensation incentives provided by drug and alcohol testing, there are numerous reasons why companies should continue to consider testing employees who may appear impaired at work or following accidents or injuries. Even if the business community and Chambers of Commerce are not successful in an attempt to amend the Constitution to disallow benefits for positive tests, employees who test positive may, of course, still be disciplined, up to and including termination, depending upon the circumstances of each individual case. Furthermore, an employer that buries its head in the sand and ignores signs of potential drug use by its employees could be held liable for the negligent acts of its employees, and potentially any reasonably foreseeable drug-induced intentional misconduct by employees. Drug testing programs help decrease the chances an employer may be sued for claims of negligent hiring, negligent supervision, or negligent retention of employees prone to engage in misconduct. Finally, employers that continue to follow the testing parameters set forth in the Arizona Revised Statutes will continue to enjoy immunity from lawsuits that arise from the results of drug and alcohol tests.

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