

Beyond the Course of Employment

When Workers Compensation May Not Be the Sole Remedy

The Scenario

Over the course of a day, an employee uses alcohol, marijuana or another drug and becomes intoxicated or physically impaired. This situation may have extreme consequences for the employer.

The Incident

Employees of a Contractor regularly smoke marijuana on the job site. The employees do what they can to hide this activity from their supervisors, but the smell is noticeable on several employees. One specific employee smokes marijuana several times on a given work day including right before he is assigned to drive a company-owned truck back to the shop. Another employee is allowed to ride back with him. After about 15 minutes on the road, the driver apparently falls asleep at the wheel and drives off the road, crashing into a tree. The truck catches fire, the driver is killed and the employee-passenger is critically injured and severely burned with second and third degree burns over much of his body and other injuries.

The Result

The injured employee-passenger brought suit against both the employer and the estate of his deceased co-worker. The state's Industrial Insurance Act says that if the injured employee has received and accepted workers compensation benefits, these benefits "shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Generally speaking, an injured worker has no separate remedy against any other person except where it is *specifically* authorized by the Act or interpreting case law. One of those exceptions came into play in this situation.

An injured person can bring an action against a third person who *does not have the same employer* as the injured person, but ordinarily an injured employee cannot sue one of his co-workers for negligence. However, "if both employees have a common employer but the negligent employee is not acting in the course of his employment at the time the injury occurs", the negligent employee is not immune from suit by the injured employee (*Evans v. Thompson*, 124 Wn.2nd 435, 444, 879 P.2d 938 (1994)).

Intoxication (from drugs or alcohol) may remove the negligent employee from the course of employment if the employee becomes so intoxicated he is considered to have abandoned his employment (*Flavorland Industries v. Schumacker*, 32 Wn. App 428, 434, 647, P2d 1062 (1982)). If this occurs, a lawsuit may be brought against the negligent employee which may result in a claim against the employer's Commercial General Liability or Automobile insurance, or the negligent employee's own Homeowner's insurance.

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Rather than take this case to trial, a settlement in favor of the injured employee was made at mediation.

The settlement was in the millions of dollars which was paid by the employer's commercial auto and umbrella policies plus the deceased employee's homeowners policy limits.

The Lessons Learned

The first and most important thing to recognize is that *it can happen*.

While this incident occurred in Washington, the legal concepts involved may be applied in other states as the case could be used as precedent in similar cases. To that end, the best course of action is to recognize the risk and work to manage and mitigate it to the maximum extent possible. There are some relatively simple actions that can be easily taken by prudent employers.

All employers must actively supervise and manage their employees and must be aware of their employees and their employee's actions. In this case, there was an indication that employees would sneak off the job during the day and use marijuana with some regularity. The employees all said they would try to keep their marijuana use a secret from supervisors, but they also said that was "pretty obvious," largely because of the smell that would get into their clothes.

Management and supervision of employees is especially important where employees work off-site. There must be adequate and effective supervision and control of all off-site employees so that each employee's location and activities can be accounted for at all times.

Employers should take all steps necessary to insure that their employees remain completely sober at all times during the work day. One prudent step is to institute a "drug- and alcohol-free" workplace policy. These are no longer the exception and have become a risk management measure that conscientious employers implement. One component of an effective drug- and alcohol-free work place program is testing that includes pre-employment, random, reasonable suspicion and post-accident testing for all on-site and off-site employees.

There are a number of resources for Drug-Free Workplace program development on the internet. One from the the US Department of Labor is available at <http://www.dol.gov/elaws/drugfree.htm>. This Drug-Free Workplace Advisor assists the employer build a tailored drug-free workplace policy and provides guidance on how to develop comprehensive drug-free workplace programs. It also provides information about coverage and requirements of the Drug-Free Workplace Act of 1988.

Protect your company and your employees from significant loss; a loss that could threaten your financial viability.

Looking the other way is looking for trouble. Supervise and manage your employees. If you don't have a drug and alcohol program, implement one. Then, enforce it!

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