DRUG IMPAIRMENT, WORKPLACE VIOLENCE, AND MENTAL CLAIMS: CURRENT TRENDS IN COMPENSABILITY
DRUG AND ALCOHOL IMPAIRMENT
Alcohol Use in the Workplace

• Alcoholics 2.7 times more likely to have industrial injury

• 16% of injured workers tested at ER are positive for alcohol

• 25% of workers self report having consumed alcohol during the work day

• Highest levels of alcohol abuse among labor-intensive job categories (construction, food prep, bartenders, etc.)

National Council on Alcoholism and Drug Dependence
Drugs in the Workplace

• 6% of Americans report having used illicit drugs in past 30 days

• 75% of these people are employed

• These numbers do not include legally prescribe narcotics

U.S. Department of Labor
Opioid Epidemic

• Drug overdose is the leading cause of accidental death in U.S. (47,055 lethal drug overdoses in 2014)

• Almost 19,000 of these overdose deaths related to prescription pain relievers

• Overdose death rate 4x that of 1999

• In 2012, 259 million prescriptions were written for opioids (enough to give every American adult their own bottle of pills)

American Society of Addiction Medicine, Opioid Addiction 2016 Facts and Figures
Results of Alcohol and Drug Use in the Workplace

• Absenteeism

• Loss of Productivity

• Interpersonal/Disciplinary Issues

• Injury

• Death

• Increased Workers’ Compensation Costs
Arizona’s Approach to Compensability

• Abandonment Standard
• Legislative Response
• Constitutional Challenges
• Back to the Future
Alcohol Fact Pattern

- Tractor driver employed by farm
- Manages to run himself over, severely injuring leg
- Tests .23 BAC at hospital
- Estimated 12 beers necessary to reach this BAC (200 pound man)
- Expert: Injured worker incapable of safely performing job
Compensable?

• Yes?

• No?
Producers *Cotton Oil v. ICA* (1992)

- Court adopts abandonment standard
- Claim Compensable unless claimant “could no longer perform the duties of employment.”
Legislative Response

• A.R.S. § 23-1021(D) (1999)

• Substantial Contributing Cause Standard
Constitutional Challenge - *Grammatico*

- Construction worker on “stilts” falls injuring knee
- Tests positive for methamphetamine and THC
- Expert testimony that drugs were a substantial contributing cause to injury
- Compensability denied by ALJ
Constitutional Challenge – Article 18, Sec. 8

• Finding of Non-Compensability overturned

• Constitutional change required

• Abandonment Standard reinstated
Recent Developments – Medical Marijuana

• Passed as Proposition in 2010

• Arizona 1 of 26 jurisdictions currently allowing consumption of medical marijuana
Medical Marijuana Act

• Card holder must show “debilitating condition”

• Marijuana must be for “medical use”

• Card holder may possess/purchase up to 2.5 ounces
Medical Marijuana Act – No Employer Discrimination

• Employers may not discriminate against card holders in hiring, termination, discipline unless:

  ✓ 1) employer would lose federal license or contract, or

  ✓ 2) the card holder used, possessed, or was impaired on the premises during work hours
Medical Marijuana Act - Continued

- A.R.S. § 36-2814 – Act does not require workers’ compensation insurance carrier to pay for medical marijuana
Recreational Marijuana Initiative (2016)

- 5 jurisdictions currently allow recreational use of marijuana (Colorado, Washington, Oregon, Alaska, and D.C.)

- More states (including Arizona and California) anticipated to vote on recreational marijuana propositions

- Arizona initiative lacks non-discrimination provisions

- Colorado experience
Proactive Employer Protections

- Have a policy
- Educate employees
- Train supervisors (regarding identifying impairment)
- Test
- EAP
WORKPLACE VIOLENCE: COMPENSABILITY ISSUES
Workplace Violence Defined

CDC defines workplace violence as “violent acts, including physical assaults and threats of assault, directed toward persons at work or on duty.”

• Can include threats, intimidation, harassment, physical assault, and homicide.
Prevalence of Workplace Violence

• Nearly two million American workers victimized each year

• Second highest cause of worker fatalities (2011)

• Accounts for almost 1 in 5 workplace deaths

• Leading cause of death for women in the workplace

Bureau of Labor Statistics, National Census of Fatal Occupational Injuries
Impact of Violence in the Workplace

- “Act of Crime” injury cause had 2nd highest indemnity and medical costs behind motor vehicle injuries

- Crime related injuries 10x more likely to involve a fatality than injuries due to other causes

- Highest percentage involves schools (11.4% of all injuries)

- Highest percentage of cost in banking (11.5%)

- Many of these claims involve stress component

NCCI, Violence in the Workplace (2012)
Categories of Workplace Violence
(1 – 4)
1. Criminal Intent

- Perpetrator has no legitimate relationship to the business
- Includes robbery, shoplifting, trespass
- Can involve domestic or international terrorism
- Highest risk among businesses handling cash, prescription medications, etc.
Criminal Violence Fact Pattern

- Bartender securing cash after closing time
- Robbed of cash at gunpoint
- No physical injuries
- Potentially compensable incident?
Criminal Violence Compensability Analysis

• Criminal acts against employees usually compensable
  • Arising out of analysis
  • Positional risk analysis
  • Physical injury
  • Mental injury
2. Client/Customer Violence

- Perpetrator has legitimate business relationship with employer
- May be customer, patient, student, etc.
- Victim may be nurse, flight attendant, police officer, teacher, etc.
- Represents a majority of non-fatal workplace violence incidents
Client/Customer Violence Compensability Analysis

• Usually arises out of work

• Positional risk analysis

• Increasing in frequency in certain industries (airlines, education, etc.)
3. Co-worker Violence

- Involves violence by employee or former employee
- May be prompted by downsizing or termination
- May be escalation of ongoing friction and stress among or between employees
Employee on Employee Violence Fact Pattern #1

- Employees A and B unloading bales of hay from truck
- Employee A hits Employee B in head with bale
- Fight ensues with Employee A being the aggressor
- Aggressor Employee A sustains serious injury
- Compensable?
Fighting Compensability Analysis

- Claim compensable if fight arose from dispute regarding work (as opposed to personal dispute)

- Who is aggressor is irrelevant

- Arising out of analysis is key

Employee on Employee Violence Fact Pattern #2

• Employee A has favorite parking space
• Employee B parks in this parking space
• Fight ensues regarding this issue
• Employee A sustains injury
• Compensable?
Fighting Compensability Analysis

- Claim not compensable
- Court reasons that employee’s personal preference for a particular parking space is private matter
- Key is no benefit or relationship to employment duties

Employee on Employee Violence Fact Pattern #3

- Employee A perceives Employee B as a threat to his career path
- Employee A physically attacks Employee B in the breakroom
- Attack is not preceded by discussion between employees
- Compensable?
Employee on Employee Violence Fact Pattern #4

- Employees A and B are co-workers at Chinese restaurant
- Employee A repeatedly makes fun of Employee B’s accent
- Employee B, having reached his limit, attacks Employee A (his Supervisor)
- Employee B sustains injuries
- Compensable?
Fighting Compensability Analysis

• Claim compensable

• Court applies the “friction and strain rule”

• Applies where there is ongoing harassment, no animosity between employees outside of the workplace, and works activities brought the combatants together and resulted in the clash

4. Violence Based on Personal Relationships

- No employment-based relationship between perpetrator and victim
- Personal relationship between perpetrator and intended victim
- Often involves domestic violence
Personal Relationship Violence Fact Pattern

- Female employee has abusive and threatening ex-boyfriend
- Despite restraining order, ex-boyfriend enters work premises with a gun
- Ex-boyfriend shoots ex-girlfriend
- Ex-boyfriend inadvertently also shoots co-worker
- Compensable claim(s)?
Personal Relationship Violence Compensability Analysis

• Injuries/death to ex-girlfriend are probably not compensable

• Injuries to co-worker probably compensable

• May include physical and mental injury claims

• May involve civil litigation
Prevention of Workplace Violence

• Perform background checks and call references

• Adopt a zero tolerance of violence/harassment policy

• Train employees on de-escalation

• Train supervisors to spot and deal with potentially violent employees

• Improve physical security
MENTAL/PSYCHOLOGICAL INJURIES
• How many of you have an employee who experienced work-related stress?

• Did it ever cause them to miss time from work?

• Did it result in physical symptoms?

• Did they seek medical attention?
Prevalence of Work-Related Stress Injuries

• APA predicts stress-related injuries will be the most prevalent occupational diseases of the 21st century

• These injuries already in the top 10

• Dramatic increase in past two decades

• Nature of the 21st century workplace
  ✓ Service related
  ✓ More mental than physical labor
  ✓ Changed expectations
Legislative Responses to Stress Claims

• Based upon fears of fraud and subjective nature of injury
  • Absolute bars to recovery
  • Heightened requirements for compensability
  • Limits on recovery
Arizona Approach
A.R.S. § 23-1043.01(B)

“A mental injury, illness or condition. . .is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition.”
Two Types of Mental Injury

1. Mental stimulus causing mental injury

2. Physical trauma resulting in mental injury
Mental/Mental Injuries

• Precipitating stress must be work-related and unexpected, unusual, or extraordinary

• Reasonable man standard

• May be single stressful incident or gradual in nature
Mental/Mental Injury Fact Pattern

• Claimant is police officer

• Confronted by suspect with a deadly weapon

• Officer shoots suspect, resulting in fatal injuries

• Officer experiences anxiety, depression, and stress after incident
Mental/Mental Compensability Analysis

- Key to analysis is whether events were unusual, unexpected, or extraordinary in this occupation
- Court finds compensable claim
- Outcome shaped by expert testimony including statistics regarding use of deadly force by officers
Gradual Mental Injury Fact Pattern

• Claimant is claims representative with insurance carrier

• Claimant’s three colleagues seek new employment

• Claimant inherits their caseloads

• Claimant overwhelmed by 400% increase in workload

• Experiences anxiety, depression
Gradual Mental Injury Compensability Analysis

• Case hinges on whether unusual, unexpected, or extraordinary

• Court finds these factors met
Other Common Mental/Mental Injury Scenarios

- “Difficult” boss
- Negative reaction to discipline
- Negative response to reduction in force
- Long term selective abuse or discrimination (e.g. sexual harassment)
Physical/Mental Injuries

- Often depression associated with chronic pain

- Can be anxiety disorder associated with physical trauma

- Key is whether work related injury (or its sequela) are a “substantially contributing cause” to the development of the mental injury
Physical/Mental Injury Fact Pattern

- Injured worker experiences bilateral amputation of legs
- Has phantom pain and inability to pursue activities of daily living and past times
- Becomes extremely depressed
Physical/Mental Injury Compensability Analysis

• Absent other obvious triggers for depression, probably compensable
Hot Topic: PTSD

• Dramatic increase in claims
• First responders
• Private employees
• Pressure to modify standards
Arizona Legislature Responses

• Access to EAP services

• Anticipated push for relaxed standards as to peace officers in 2016-17