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A COMPREHENSIVE REVIEW OF MARYLAND WORKERS' COMPENSATION AND DISQUALIFICATION DUE TO INTOXICATION: "SOLE CAUSE" IS NOT THE ONLY WAY TO PROCEED

I. INTRODUCTION

The basic premise of the workers' compensation system is that, in the event of a workplace injury, regardless of fault, workers forfeit their right to sue employers in exchange for a guaranteed and defined set of benefits.¹ However, workers' compensation claims have continually increased and now cost the United States economy billions of dollars.² One reason is the rise in alcohol and drug related workplace accidents.³ A 1990 study conducted by the National Council on Compensation Insurance, Inc., (NCCI) discovered that there is a high correlation between per capita alcohol consumption, alcohol related job injuries, and average workers' compensation costs.⁴ The NCCI concluded that a "[ten] percent reduction in alcohol consumption in 1989 could have reduced workers' compensation costs by \$2.5 billion."⁵ Therefore, "state workers' compensation laws have been increasingly used as a tool to discourage the use of drugs and alcohol in the workplace."⁶

Since 1993, the Maryland Legislature has been involved in a continuing effort to limit the ability of employees to receive workers' compensation benefits when injured in alcohol and drug related accidents. These attempts have focused on lowering the employer's and insurer's burden for establishing the defense of drug or alcohol intoxication under section 9-506 of the Labor and Employment Article of the Maryland Code.⁷ Prior to October 1, 1998, the law required the employer to compensate a worker injured on

1. See, e.g., ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION* § 1.10, at 1-1 (Matthew Bender Desk ed. 1999).

2. See Kim Lucky & Ann Bok, *Drug-Free Workplace Programs: A Review of State Efforts*, "reprinted" in National Council on Compensation Insurance, Inc. 1 (1996).

3. See *id.*

4. See *id.*

5. *Id.*

6. *Id.*

7. See *infra* Part V.B for a complete legislative history.

the job while intoxicated *unless* the employer could demonstrate by substantial evidence that the *sole* reason for the injury was intoxication.⁸ This "sole cause" standard of review has proved an onerous burden for an employer to satisfy.⁹

Therefore, section 9-506 of the Labor and Employment Article of the Maryland Code was amended in 1998 to replace the standard of review for workers' compensation benefits resulting from a workplace injury caused by drugs or alcohol.¹⁰ Under the new standard all benefits, except for medical treatment, are denied to a covered employee if the *primary cause*,¹¹ as opposed to the former *sole cause*, of an accidental personal injury¹² is: (1) the intoxication of the employee while on duty, or (2) the effect of a controlled dangerous substance, the use of which was not in accordance with a prescription of a physician.¹³ Now the employer has the burden of proving that the effect of the controlled dangerous substance or the alcohol was only the *primary cause* of the accident.¹⁴

By enacting this legislation, Maryland has essentially fallen in line with other states who have tried to reduce the number of:

[D]rug-and-alcohol related workplace accidents by denying workers compensation benefits to employees if they were injured on the job due to intoxication or drug use. Currently, forty-four states deny benefits to workers injured due to intoxication; thirty-six of those states include the use of drugs under the statute. Another four states reduce benefits to workers injured due to drug use or intoxication. Eleven

8. See MD. CODE ANN., LAB. & EMPL. § 9-506(f)(1) (1991).

9. See *infra* Part V.A (discussing the "sole cause" standard of review in Maryland).

10. See MD. CODE ANN., LAB. & EMPL. § 9-506 (1999).

11. For a discussion of primary cause, see *infra* notes 271-74 and accompanying text.

12. Accidental personal injury is defined as:

(1) an accidental injury that arises out of and in the course of employment; (2) an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee; or (3) a disease or infection that naturally results from an accidental injury that arises out of and in the course of employment, including: (i) an occupational disease; and (ii) frostbite or sunstroke caused by a weather condition.

MD. CODE ANN., LAB. & EMPL. § 9-101 (1999).

13. See MD. CODE ANN., LAB. & EMPL. § 9-506(b)-(c) (1991).

14. See *id.* § 9-506(d) (forbidding recovery if the primary cause of an accidental personal injury was intoxication).

states have "rebuttable presumption" provisions relating to injuries due to intoxication or drugs.¹⁵

This Comment describes the national development of the workers' compensation system,¹⁶ illustrates the nature of workers' compensation in general terms, and provides a background for the workers' compensation system in Maryland.¹⁷ It discusses the statutory defense of intoxication¹⁸ and explains the effects of intoxication and drug use in the workplace.¹⁹ Maryland case law relating to sole cause is examined,²⁰ including the legislative history of Maryland's workers' compensation statute as it pertains to alcohol or drug-induced injuries.²¹ The Comment compares and contrasts existing intoxication defense statutes in other states and examines relevant case law.²² This Comment concludes with a prediction of issues Maryland courts may encounter as a result of modifying the intoxication defense under the workers' compensation statute.²³

II. NATIONAL DEVELOPMENT OF THE WORKERS' COMPENSATION SYSTEM

Prior to 1800 the common law principle of respondeat superior required a master to be liable for injuries caused by the negligence of a servant to fellow servants and to third parties.²⁴ In 1837, Lord Abinger created an exception to this rule in *Priestley v. Fowler*.²⁵ There, a butcher was held not liable when his servant negligently overloaded a van that subsequently broke down and injured another employee.²⁶ The court reasoned that holding a master liable for all mishaps would be unfair, as there were many that could occur.²⁷

15. See *infra* Appendix.

16. See *infra* notes 24-71 and accompanying text.

17. See *infra* notes 73-120 and accompanying text.

18. See *infra* Part IV.A.

19. See *infra* Part IV.B.

20. See *infra* Part V.A.

21. See *infra* Part V.B.

22. See *infra* notes 307-69, 315-77, 388-513 and accompanying text.

23. See *infra* notes 379-87 and accompanying text and Part VII.

24. See LARSON, *supra* note 1, § 4.20, at 2-2 to 2-3; see also RICHARD P. GILBERT & ROBERT L. HUMPHREYS, JR., MARYLAND WORKERS' COMPENSATION HANDBOOK § 1.1-3, at 9-10 (2d ed. 1993); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 80, at 568 (5th ed. 1984).

25. 3 Mees. & Welsby 1, reprinted in 150 Reprint 1030, 1032 (1837).

26. See *id.* at 1, 5, 150 Reprint at 1032.

27. See *id.*

From *Priestley*, three common law defenses developed: (1) implied contract,²⁸ implying that the employer was not liable; (2) assumption of risk,²⁹ absolving the employer of responsibility; and (3) contributory negligence,³⁰ relieving the employer of responsibility if the employee contributed in any way to the injury.³¹ These defenses greatly reduced an employer's liability.³² Generally, the only time an employer was liable was when the injury was a direct result of the employer's negligence or fault.³³ Even then, the employer had a low burden of proof to establish a defense.³⁴ As long as the employer could show reasonably prudent measures were taken to maintain a safe work environment, the courts held the employee to be equally responsible for providing notice to the employer of any unsafe working conditions.³⁵ However, when the employee did notify the employer of an unsafe working condition prior to injury, the employee would encounter difficulty gathering any witnesses to corroborate the report, as the witnesses were hesitant to testify for fear of retaliation.³⁶

During the Industrial Revolution, there were frequent and severe injuries to factory workers.³⁷ Recognizing this problem, legisla-

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28. See BLACK'S LAW DICTIONARY 322 (7th ed. 1999) (defining an implied contract as "[a]n obligation imposed by law because of the conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched").
 29. See *id.* at 121 (defining assumption of risk as "[t]he act or an instance of a prospective plaintiff's taking on the risk of loss, injury, or damage").
 30. See *id.* at 1056 (defining contributory negligence as "[a] plaintiff's own negligence that played a part in causing the plaintiff's injury").
 31. See LARSON, *supra* note 1, § 4.30, at 2-4 (noting that *any* negligence on the part of the employee, even if less than the employer's, would defeat recovery). See also GILBERT & HUMPHREYS, *supra* note 24, at § 1.1, at 3; MAURICE J. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 1-1, at 1 (1970); PROSSER & KEETON, *supra* note 24, § 80, at 569.
 32. See LARSON, *supra* note 1, § 4.30, at 2-4 (concluding that employees are remediless in 83% of all workers' compensation cases); GILBERT & HUMPHREYS, *supra* note 24, § 1.1, at 2-3; PRESSMAN, *supra* note 31, § 1-1, at 1; PROSSER & KEETON, *supra* note 24, § 80, at 568-69.
 33. See LARSON, *supra* note 1, § 4.30, at 2-4; PROSSER & KEETON, *supra* note 24, § 80, at 569.
 34. See LARSON, *supra* note 1, § 4.30, at 2-4 to 2-5; PROSSER & KEETON, *supra* note 24, § 80, at 569.
 35. See LARSON, *supra* note 1, § 4.30, at 2-4 to 2-5; PROSSER & KEETON, *supra* note 24, § 80, at 569-71.
 36. See LARSON, *supra* note 1, § 4.30, at 2-5.
 37. See Timothy A. Watson & Michael J. Valen, *A Historic Review of Workers' Compensation Reform in Florida*, 21 FLA. ST. U. L. REV. 501, 502 (1993).

tors enacted workers' compensation laws.³⁸ Nonetheless, success of recovery was minimal under these early statutes.³⁹ With the growth of industry came increased protection for the employee as the "unpredictability [of] an often *ad hoc* system of employee compensation became intolerable"⁴⁰ Employer susceptibility to liability for the injured worker's injuries increased.⁴¹ As a result, the defenses of assumption of risk, contributory negligence, and the fellow-servant rule eviscerated.⁴² Although the pendulum shifted to favor the employee, the employer's liability remained limited to medical care and lost wages, thereby precluding recovery of future wages.⁴³

Two primary models for workers' compensation laws developed during this time in Germany and England.⁴⁴ In 1884, Germany created a workers' compensation system as part of an overall package of benefits addressing health insurance, elder care, and disability care.⁴⁵ Both employers and workers paid the costs of this workers' compensation system.⁴⁶ Employees received sixty-six and two-thirds percent of their salary in indemnity and disability benefits, with disability determinations made by physicians.⁴⁷

The British created their system in 1897, featuring a more resolute set of benefits.⁴⁸ The system provided compensation only for workplace injuries resulting from the employer's negligence.⁴⁹ It did not cover injuries caused by the employee's own negligence.⁵⁰ In addition, employees had the option of bringing either a tort action or a workers' compensation claim in the judicial system.⁵¹

38. See PROSSER & KEETON, *supra* note 24, § 80, at 573.

39. See GILBERT & HUMPREYS, *supra* note 24, § 1.1, at 2. The majority of workers did not receive anything. *See id.*

40. *Id.* § 1.1, at 3.

41. See GILBERT & HUMPREYS, *supra* note 24, § 1.2, at 15.

42. See PROSSER & KEETON, *supra* note 24, § 80, at 575-76 (pointing out that many workers' compensation statutes abrogated some or all of these defenses).

43. See Watson, *supra* note 37, at 502.

44. See William E. Sadowski et al., *The 1979 Workers' Compensation Reform: Back to Basics*, 7 FLA. ST. U. L. REV. 640, 642-45 (1979). *See also* GILBERT & HUMPREYS, *supra* note 24, § 1.2, at 15-16.

45. See Sadowski et al., *supra* note 44, at 642.

46. *See id.* at 643. The employees paid two-thirds and employers paid one-third into the Sickness Fund, employers paid all 100% to the Accident Fund, and the costs were shared 50/50 for the Disability Fund. *See id.*

47. *See id.* at 643-44.

48. *See id.* at 644.

49. *See id.*

50. *See id.*

51. *See id.* This is opposed to the modern system, where workers' compensation is

By the end of the nineteenth century, the increase of industrial injuries and decrease of remedies in the United States created an environment for radical change.⁵² Beginning in 1904 "various state commissions prompted by industrialization and the resulting increase in workplace and railroad injuries engaged in intensive investigation into the issues surrounding worker's compensation programs."⁵³ In 1910, these various state commissions joined forces and drafted the Uniform Workmen's Compensation Law.⁵⁴ However, there was considerable debate at this conference, leading individual states to enact their own forms of workers' compensation legislation.⁵⁵ Two states, Washington and Ohio, patterned their workers' compensation programs after Germany's model, while most states chose the British model.⁵⁶

Maryland lead the national movement by enacting the first legislation to address workers' compensation.⁵⁷ As other states followed suit, the first worker's compensation laws were repealed by courts as unconstitutional.⁵⁸ The unfortunate result was the development of an unsuccessful system that provided only for voluntary or elective participation in compensation programs.⁵⁹ However, in 1913, New

an exclusive remedy. *See id.*

52. *See* LARSON, *supra* note 1, § 5.20, at 2-12; GILBERT & HUMPHREYS, *supra* note 24, § 1.2, at 14-15.

53. LARSON, *supra* note 1, § 5.20, at 2-12. The creation of these commissions began in Massachusetts in 1904, Illinois in 1907, Connecticut in 1908, and New York in 1909. *See id.* Soon after Minnesota, New Jersey, Ohio, Wisconsin, Washington and Montana also created their own commissions. *See id.*

54. *See id.* The laws were drafted at a 1910 conference in Chicago. *See id.*

55. *See id.*

56. *See* Sadowski, *supra* note 44, at 644.

57. *See* 1902 Md. Laws Ch. 139, 218-19. *See also* LARSON, *supra* note 1, § 5.20, at 2-12; GILBERT & HUMPHREYS, *supra* note 24, § 1.2, at 16 ("Maryland broke the ground for America in 1902 by creating a law which established an 'Employers and Employees Cooperative Insurance Fund.'")

58. *See* LARSON, *supra* note 1, § 5.20, at 2-12 to 2-15 (discussing the passing and striking down of the first workers' compensation laws). In Maryland, Judge Stockbridge declared the first workers' compensation law unconstitutional because it prohibited workers from pursuing their rights under Article 5 (right to a jury trial) and Article 19 (remedy by law for injury to person or property) of the Declaration of Rights of the Maryland Constitution. *See* Franklin v. United Rys. & Elec. Co. of Baltimore, 2 Baltimore City Rep. 309, 309 (1904) (declaring the Act unconstitutional as it was "framed in total disregard of the provisions of the Constitution").

59. *See* LARSON, *supra* note 1, § 5.20, at 2-12 to 2-15 (discussing the passage and failures of the first workers' compensation laws).

York successfully adopted a constitutional, compulsory system.⁶⁰ Only eight states had not adopted compensation acts by 1920; Hawaii was the last state to enact legislation in 1963.⁶¹

The intent of the new laws was to provide a more humanitarian approach to protecting industrial workers.⁶² Borrowing much from Great Britain, states began to depart from the common law rules and provide greater remedies for workers in hazardous industries by protecting employees and their dependents from an unexpected loss of income.⁶³

These laws were also considered beneficial to employers.⁶⁴ In states that implemented workers' compensation procedures, these laws became the exclusive remedy for employees.⁶⁵ This protected employers from the uncertainties of litigation.⁶⁶ In support of this reasoning, the Supreme Court of the United States wrote that:

[I]n the highly organized and hazardous industries of the present day[,] the causes of accident[s] are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat in justice.⁶⁷

60. *See id.* § 5.20, at 2-15.

61. *See id.* § 5.30, at 2-15.

62. *See* GILBERT & HUMPHREYS, *supra* note 24, § 1.2, at 14-16 (labeling the occurrence of employee injuries as the underlying reasons for the acts); PRESSMAN, *supra* note 31, § 1-1, at 1:

Social philosophers maintained that the common-law rules of tort liability were inconsistent with modern industrial conditions and that the repair of the human machine [the injured employee] should be made a part of the cost of producing the employer's goods, as is the cost of repairing the physical machinery of the employer.

Id.

63. *See* GILBERT & HUMPHREYS, *supra* note 24, § 1.2, at 16; *see also* Johnson v. Mountaire Farms of Delmarva, Inc., 305 Md. 246, 249-51, 503 A.2d 708, 709-11 (1986) (setting out the history of workers' compensation law).

64. *See* GILBERT & HUMPHREYS, *supra* note 24, § 1.2, at 15-16 (noting that the workers' compensation laws struck a balance between the interests of the employees, employers, and society); PRESSMAN, *supra* note 31, § 1-1, at 1-2.

65. *See* PRESSMAN, *supra* note 31, § 1-1, at 1 (noting that the laws took away an employee's common law right to sue their employer).

66. *See id.*

67. *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 197 (1917) (assessing the New York workers' compensation law and finding it constitutional).

During the legislative session of the Maryland General Assembly in 1914, Governor Phillips Lee Goldsborough introduced the Workmen's Compensation Act.⁶⁸ This bill was introduced given the rise of industrialization and railroads that resulted in an increase in workplace injuries.⁶⁹ Senate Bill 106 was approved on April 16, 1914 by the General Assembly.⁷⁰ The purpose of this new act was to distribute equitably the burden of workplace accidents among the State, its taxpayers, employees, and employers.⁷¹

III. NATURE OF WORKERS' COMPENSATION SYSTEM AND EXCEPTIONS TO COMPENSATION⁷²

A. *The Nature of Workers' Compensation Laws Defined*

Workers' compensation is a system of social legislation and insurance for working members of society.⁷³ The right to receive benefits is based on a social theory of providing support and a level of security for an injured worker.⁷⁴ One principle cited as a reason for the development of these systems is the premise that workers' compensation is to provide disability-income insurance, not liability insurance.⁷⁵ Workers' compensation provides an efficient and defined system for providing an injured worker prompt financial and medical benefits and allows for the proper allocation of the costs and

68. 1914 Md. Laws 1429 ch. 800.

69. *See id.* Goldsborough appointed a committee to report its considerations regarding the workmen's compensation system. *See Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 6, 338 A.2d 251, 254-55 (1975).

70. *See* 1914 Md. Laws 1429, 1464 ch. 800.

71. *See id.* at 1429; *see also* GILBERT & HUMPHREYS, *supra* note 24, § 1.2, at 15-16; PRESSMAN, *supra* note 31, § 1-2, at 2-3.

72. For other general sources on the nature of workers' compensation see EARL F. CHEIT, *INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT* (John Wiley & Sons, Inc. 1961); JACK B. HOOD ET AL., *WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS* (3d ed. 1999); WILLIAM R. SCHNEIDER, *SCHNEIDER'S WORKMEN'S COMPENSATION* (3d ed. 1958); HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, *WORKMEN'S COMPENSATION* (John Wiley & Sons, Inc. 1954).

73. *See* LARSON, *supra* note 1, § 1.00, at 1-1 to 1-3; GILBERT & HUMPHREYS, *supra* note 24, § 2.1, at 17-19; Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800-03 (1982).

74. *See generally* LARSON, *supra* note 1, § 1.00, at 1-1 to 1-3; GILBERT & HUMPHREYS, *supra* note 24, § 2.1, at 17-19; Epstein, *supra* note 73, at 800-03.

75. *See* Arthur Larson, *Basic Concepts and Objectives of Workmen's Compensation*, "reprint" in Supplemental Studies for the National Committee on State Workmen's Compensation Law 31, 31-32 (Peter S. Barth, Director, Monroe Berkowitz, et al., eds. 1973).

the burdens of the system.⁷⁶ This is accomplished by requiring employers to purchase workers' compensation insurance from which a worker can receive financial and medical benefits while recovering from an injury.⁷⁷ Furthermore, the system allows the cost of the insurance to be passed on to the consumer of the product or service provided by the employer.⁷⁸

The work-related injuries covered by workers' compensation laws include accidental personal injuries that "arise out of and in the course of" employment.⁷⁹ The time, place, and circumstances of the accident are examined in determining if an injury arises "in the course of" employment.⁸⁰ "An injury arises out of employment when, after considering all the facts and circumstances of the case, it is apparent to a rational mind that there was a causal connection between the conditions under which the work is required to be performed and the ensuing injury."⁸¹ The cause of the accident must be incidental to employment and not independent of the employment relationship.⁸² As such, fault is not usually an issue related to compensability.⁸³

76. *See id.* at 36-37 (discussing the prompt and simple administration of workers' compensation laws).

77. *See id.* at 31-32.

78. *See id.* at 32.

79. LARSON, *supra* note 1, § 6.00, at 3-1. *See also id.* §§ 6.00 to 13.24, at 3-1 to 3-162 (discussing "arising out of the employment") and §§ 14.00 - 19.63, at 4-1 to 4-119 (discussing "course of employment"); *see generally* Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368, 375, 128 A.2d 635, 637 (1925) (providing that an employee who has sustained an injury arising out of and in the course of employment has a sole remedy under the Workers' Compensation Act). Whether an accident arises out of and in the course of employment is ordinarily a question of fact, "but when the facts have been ascertained and agreed upon by the parties, or are undisputed, and there is no dispute as to the inferences to be drawn from the facts, the question becomes one of law and may be decided by the Court." *Harrison v. Central Constr. Co.*, 135 Md. 170, 180, 108 A. 874, 878 (1919).

80. LARSON, *supra* note 1, § 14.00, at 4-1 (explaining that there must be a showing the injury occurred within the "time and space boundaries of the employment" and in the course of an employment activity).

81. *Blake Constr. Co. v. Wells*, 245 Md. 282, 289, 225 A.2d 857, 862 (1967). *Accord Consolidated Eng'g Co. v. Feiken*, 188 Md. 420, 424-25, 52 A.2d 913, 916 (1947); *Weston-Dodson Co. v. Carl*, 156 Md. 535, 538, 144 A. 708, 709 (1929).

82. *See Consolidated Eng'g Co.*, 188 Md. at 424, 52 A.2d at 916.

83. *See Wood v. Aetna Cas. & Surety Co.*, 260 Md. 651, 660-61, 273 A.2d 125, 131 (1971) (reiterating that the workers' compensation laws are applied without regard to fault or negligence of the employer); *Victory Sparkler & Specialty Co. v. Francks*, 147 Md. 368, 377, 128 A.2d 635, 638 (1925) (recognizing that

B. *The Exceptions*

Most jurisdictions have incorporated into their statutory laws specific exceptions to compensability that state common law has further defined.⁸⁴ There are certain defenses that an employer can raise if employees deviate from their course of employment or are guilty of some form of misconduct.⁸⁵ Three common statutory defenses available to employers are deliberate or intentional act,⁸⁶ willful misconduct,⁸⁷ and intoxication.⁸⁸

1. Deliberate or Intentional

There is a presumption in workers' compensation claims that the personal injury of a claimant was accidental.⁸⁹ However, if substantial evidence indicates that the injury or death was intentionally self-inflicted, the causal nexus of an injury "arising out of" the course of employment is broken⁹⁰ and claimants or their estates are

under the Workers' Compensation Act, the statutory definition of compensable injury makes no reference to fault of the employee, except in expressly defined cases).

84. See GILBERT & HUMPHREYS, *supra* note 24, § 6.0, at 97.
85. See LARSON, *supra* note 1, § 30.00, at 6-1. If the issue of a deviation is raised, the lawyer should focus on three issues: (1) whether a deviation occurred, (2) whether the deviation was significant, and (3) whether the injury was related to the deviation. See GILBERT & HUMPHREYS, *supra* note 24, § 6.1, at 98.
86. For a discussion of deliberate or intentional act see *infra* notes 92-120 and accompanying text.
87. For a discussion of willful misconduct see *infra* notes 96-102 and accompanying text.
88. See LARSON, *supra* note 1, § 4.31, at 6-33 (summarizing intoxication statutes); GILBERT & HUMPHREYS, *supra* note 29, §§ 6.1-6.5, at 103-04. See MD. CODE ANN., LAB. & EMPL. § 9-506 (1991) (providing that an employee is not entitled to compensation if caused solely by intoxication); PRESSMAN, *supra* note 31, § 2.6(9), at 54. For a discussion of intoxication see *infra* notes 115-39 and accompanying text.
89. See MD. CODE ANN., LAB. & EMPL. § 9-506(f)(1) (1999); *Krell v. Maryland Drydock Co.*, 184 Md. 428, 435, 41 A.2d 502, 505 (1945) (interpreting the Maryland Code presumption that death cannot be occasioned by the willful misconduct of an employee).
90. See MD. CODE ANN., LAB. & EMPL. § 9-506(a)(1) (1999); see also *Baltimore & Ohio R.R. v. Brooks*, 158 Md. 149, 161, 148 A. 276, 281 (1930) (resolving a case in favor of an employer because the accidental personal injury arising out of employment did not cause the employee's insanity and suicide). *But see* *Young v. Hartford Accident & Indem. Co.*, 303 Md. 182, 191, 492 A.2d 1270, 1274 (1985) (stating that a suicide attempt may not always break the causal nexus between an accidental injury and the employee's suicide attempt); *Barber v. John C. Knipp & Sons*, 164 Md. 55, 68, 163 A. 862, 867 (1933) (declar-

barred from any recovery.⁹¹

2. Willful Misconduct

An employee also is not entitled to compensation if the injury is occasioned by the worker's willful misconduct.⁹² Willful misconduct is defined as intentionally acting, either with knowledge that serious injury will likely result or with a wanton and reckless disregard for the probable consequences.⁹³ This includes exposure by an employee to an injury if the employee knows of and appreciates the susceptibility to injury.⁹⁴

By being in a position where injury or death might reasonably result from an act or by disregarding rules and orders, an employee may be committing willful misconduct.⁹⁵ Willful misconduct must be more than just thoughtlessness, heedlessness, or inadvertence.⁹⁶ Rather, there must be at least a willful breach of the rule or order.⁹⁷ For misconduct to rise to the level of willfulness, it must be proven that the claimant's violation of the rule was deliberate or intentional⁹⁸ and that the claimant's transgression occurred despite the fact that the claimant knew or should have appreciated the risk of injury caused by violation of the rule.⁹⁹

ing a new trial where a decedent committed suicide subsequent to two surgeries for a hernia).

91. See MD. CODE ANN., LAB. & EMPL. § 9-506(a).

92. See *id.* § 9-506(e).

93. See *Williams Constr. Co. v. Garrison*, 42 Md. App. 340, 346, 400 A.2d 22, 25 (1979) (citing 99 C.J.S. WORKMEN'S COMPENSATION SEC. 258 (1958)).

94. See *id.*; see also *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 338 A.2d 251 (1975) (stating that willful misconduct may be found where the employee intended to place himself in such a position that the injury or death might result). However, an employee is not guilty of willful misconduct because he is negligent, acted imprudently, thoughtlessly, or unwisely. See *Garrison*, 42 Md. App. at 346, 400 A. at 25.

95. See *Harris v. Dobson & Co.*, 150 Md. 71, 76, 132 A. 374, 375 (1926).

96. See *id.*

97. See *id.*

98. See *Red Star Motor Coaches, Inc. v. Chatham*, 163 Md. 412, 416-17, 163 A. 886, 888 (1933) (stating that a bus driver who died of carbon monoxide poisoning was not guilty of willful misconduct although a company rule prohibited starting vehicles in a garage with closed doors); see also *Karns*, 275 Md. at 18, 338 A.2d at 260 (regarding intoxication as willful misconduct); *Baltimore Car Foundry Co. v. Ruzicka*, 132 Md. 491, 492, 104 A. 167, 167 (1918) (determining that an employee's conduct was not willful because it lacked the element of intentional impropriety; although it was a thoughtless act, it was not a willful breach of a declared rule or duty).

99. See *Williams Constr. Co.*, 42 Md. App. at, 346, 400 A.2d at, 25 (concluding that

Therefore, it can be inferred that, in order to successfully prove willful misconduct, the employer must show five factors.¹⁰⁰ First, the employer must demonstrate that some company rule, regulation, or direct order existed.¹⁰¹ Second, the employer must offer proof that the claimant had knowledge of the rule, regulation, or direct order.¹⁰² Third, the employer must show that the claimant was aware or should have been aware of the attendant risk of injury caused by violating the rule, regulation, or order.¹⁰³ Fourth, it must be demonstrated that the claimant deliberately, not accidentally, violated the rule, regulation, or order.¹⁰⁴ Finally, the injury must be sustained by the claimant's violation of the rule, regulation, or order.¹⁰⁵

As stated by one scholar, "[t]he most impressive thing about the [misconduct] defense is the variety of situations in which it has not succeeded."¹⁰⁶ The most common ground the courts use to reject the misconduct defense is the absence of employee "willfulness."¹⁰⁷ Notwithstanding that a certain act is careless or prohibited by a safety rule, the employer has the difficult burden of rebutting the presumption that the employee's act was not willful.¹⁰⁸

the claimant's work as a tree trimmer with knowledge that he suffered from dizzy spells did not constitute willful misconduct when serious injuries occurred by falling from a ladder).

100. See *infra* notes 101-05 and accompanying text.

101. See *Harris*, 150 Md. at 76, 132 A. at 375 (stating that willful misconduct may consist of a willful breach of a rule or order).

102. See *Red Star Motor Coaches*, 163 Md. at 416-17, 163 A. at 888 (clarifying that willful misconduct requires proof of the claimant's appreciation of the rule and the danger caused by its violation, i.e., a willful breach).

103. *Williams Constr. Co.*, 42 Md. App. at 346, 400 A.2d at 25 ("[M]isconduct includes the exposure by an employee to an injury if he knows of, and appreciates, his liability to injury.")

104. See *id.*

105. See *id.*

106. 2 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 34.02, at 34-35 (Reg. ed. 1999) [hereinafter "*Larson*", Reg. ed.]

107. *Id.*; see also *Ruzicka*, 132 Md. at 492-93, 104 A. at 168 (determining that an employee's conduct was not willful because it lacked the element of intentional impropriety; although it was a thoughtless act, it was not a willful breach of a declared rule or duty); *F.B. Beasman & Co. v. Butler*, 133 Md. 382, 387-88, 105 A. 409, 410-11 (1918) (holding there was no willful misconduct where the employee attempting to board a rapidly moving truck was not deliberate, but merely spur of the moment conduct).

108. See *Red Star Motor Coaches*, 163 Md. at 416-17, 163 A. at 88 (discussing the burden of proof for willful misconduct). See generally MD. CODE ANN., LAB. & EML. § 9-506(f)(1) (1999) ("In a proceeding on a claim for compensation, there is,

3. Intoxication Generally

As courts construe the willful misconduct exception for compensation broadly, a more specific statutory defense is required if an employer intends to properly disqualify a claimant.¹⁰⁹ One such statutory defense that the majority of jurisdictions have adopted is employee intoxication.¹¹⁰

Maryland law delineates between raising the willful misconduct defense and the intoxication defense.¹¹¹ For instance, in *Karns v. Liquid Carbonic Corp.*,¹¹² the employee had been involved in a car accident as the result of intoxication and the employer claimed this also violated known company policy.¹¹³ In essence, the employer had raised two statutory defenses to the employee's claim for compensation, willful misconduct and intoxication.¹¹⁴ However, this created a problem for both the employer and insurer, as the alleged misconduct only involved intoxication.¹¹⁵

The Court of Appeals of Maryland held that an employer is not entitled to raise the statutory defense of willful misconduct where

absent substantial evidence to the contrary, a presumption that an accidental personal injury . . . was not caused by the intent of the covered employee to injure or kill the covered employee or another individual.")

109. See *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 20-21, 338 A.2d 251, 262 (1975) (declaring that there may be more than one proximate cause of an accident and that only where intoxication or willful misconduct is the sole cause of an accident will the employee be barred from recovery). See generally *Red Star Motor Coaches*, 163 Md. at 416-17, 163 A. at 888 (clarifying that not all employee violations of rules amount to willful misconduct and that some employee misconduct will not mean an employee is not entitled to compensation); *Harris v. R.P. Dobson & Co.*, 150 Md. 71, 76, 132 A. 374, 375-76 (1926) (concluding that where a willful breach of a rule or order is not clear, the question must be decided as one of fact, and the decision of the commissioner is taken as presumptively correct).

110. See Appendix.

111. See *Karns*, 275 Md. at 17-21, 338 A.2d at 260-62 (discussing both the intoxication and willful misconduct defenses); see also *infra* Part IV.A for a detailed discussion of the intoxication defense.

112. 275 Md. 1, 338 A.2d 251 (1975).

113. See *id.* at 4-6, 338 A.2d at 253-54 (showing that the employer's rule provided that "drunkenness, drinking during working hours, . . . or being under the influence of liquor or drugs during working hours, including lunch time, constituted grounds for immediate dismissal.") (quoting the Court of Special Appeals of Maryland).

114. See *id.* at 3, 338 A.2d at 253.

115. See *id.* at 18, 338 A.2d at 261 ("It must be borne in mind . . . that the only misconduct alleged relates to intoxication.").

that defense relies solely on the allegation that the misconduct was due to intoxication.¹¹⁶ The court's rationale hinged on statutory construction and legislative intent.¹¹⁷ Specifically, the court stated:

[W]e regard it as highly significant that the original proposal for a workmen's compensation act called for barring an employee from receiving compensation where the "injury [was] caused . . . by his intoxication," with *no mention* of any type of willful misconduct other than intoxication as a bar and no presumption written into it relative to intoxication, but what was enacted by the General Assembly barred the employee on the basis of willful misconduct "*or the intoxication of such employe [sic]*" with a presumption written into the statute "[t]hat the injury did not result solely from the intoxication of the injured employe [sic] while on duty."¹¹⁸

The court also noted that the General Assembly amended the statute to modify the presumption so that "an employee is barred from receiving compensation if his injury results from his willful misconduct *or* 'result[s] solely from the intoxication of the injured employee.'" ¹¹⁹ Hence, if an employer does not prevail on the intoxication defense, there is no alternative theory to use based on the claimant's alleged intoxication. By tracing the legislative history and intent, it is clear that an employer cannot use intoxication to sustain the statutory defense of willful misconduct in Maryland.¹²⁰

IV. INTOXICATION DEFENSE MORE CLOSELY EXAMINED

A. *Intoxication as a Statutory Defense*

Intoxication levels that render an employee incapable of working are a clear deviation from the "course of employment."¹²¹ However, under the statutory defense of intoxication, the standard of proof varies among states.¹²² In some states, an employer must only

116. *See id.* at 20, 338 A.2d at 262.

117. *See id.*

118. *Id.* at 20-21, 338 A.2d at 262 (emphasis added).

119. *Id.* at 21, 338 A.2d at 262 (emphasis added).

120. *See id.*

121. LARSON Reg. ed., *supra* note 106, § 36.02, at 36-13 (noting that when an employee reaches "an advanced stage of intoxication," he is incapable of engaging in duties of an employment).

122. *See id.* § 36.03[1], at 36-15 to 36-16; *see also* Appendix (listing each state and its requisite statutory standard of proof for intoxication).

show the *existence* of intoxication at the time of injury; while in others, an employer is forced to prove intoxication was the *sole* cause of the injury.¹²³

Every state recognizes that not all alcohol-related workplace injuries should be compensable in the same manner as substance abuse-related accidents.¹²⁴ Yet, each state handles its claims and disqualifications relating to substance abuse work-related accidents differently.¹²⁵ A few states eliminate only partial benefits to a claimant.¹²⁶ Nine states either require employers to be engaged or give credit¹²⁷ to employers who are engaged in the Drug Free Workplace program.¹²⁸

Generally, all states with relevant statutory provisions deny employees' compensation when an injury is caused by their own intoxication.¹²⁹ However, the standards vary greatly.¹³⁰ Approximately half of the country eliminates benefits on a slight causal connection between the intoxication and the personal injury, utilizing some variation of a "caused by," "due to," or "occasioned by" standard.¹³¹ Twelve states have enacted the "proximate cause" or "natural proximate cause" standards.¹³² Eight states have enacted a form of "substantial factor," "primary cause," and "results directly from" stan-

123. See LARSON Reg. ed., *supra* note 106, § 36.03[1], at 36-15 to 36-16 (listing the different types of state statutes).

124. See generally Robert T. Franklin, *Workers' Compensation Law: A State-by-State Analysis*, Workers' Compensation Practice Group (1997).

125. See *id.* The majority of states disqualify benefits under a specific intoxication defense statute. See *id.*; see also Appendix. Only five: Arizona, Illinois, Massachusetts, Michigan and Washington, disqualify benefits under a willful misconduct defense. See *id.* see also Appendix.

126. See generally, Franklin, *supra* note 124; see also Appendix. Colorado and Idaho mandate a fifty percent reduction in benefits, while Missouri, Utah and Wisconsin mandate a fifteen percent reduction in benefits. See *id.*; see also Appendix.

127. "See Kim Lucky, *Drug-Free Workplace Programs: A Trend Whose Time Has Come*, reprinted in NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC. 26 (1998) (stating that employers who comply receive discounts on their workers' compensation premiums)."

128. See *id.* at 26. Texas is the only state that mandates employer participation, while Alabama, Florida, Georgia, Mississippi, Ohio, South Carolina, Tennessee, Virginia and Washington have voluntary participation. See *id.* at 27 (detailing the elements of the program); Lucky & Bok, *supra* note 2, at 1-2.

129. See *supra* note 110 and accompanying text. Verify

130. See Appendix.

131. See Appendix.

132. See Appendix. Maryland tried to enact this standard in 1996. See *infra* Part V.B.

dards.¹³³ Maryland, prior to the legislative change, along with Washington, D.C.¹³⁴ and New York,¹³⁵ apply the most stringent standard, "sole cause."¹³⁶

Sole cause review is the most difficult standard of proof for an employer to establish¹³⁷ because a strict burden of proof—the intoxication must be the exclusive cause of the injury—is required for an employer to sustain the defense.¹³⁸ At its most basic level, the sole cause standard requires an employer to: (1) produce clear medical proof that intoxication existed at the time of the accident, and (2) prove by substantial evidence that the accident was not caused by any other factor.¹³⁹

Since the inception of workers' compensation and disqualification of benefits due to intoxication in Maryland, the sole cause standard prevailed.¹⁴⁰ This standard shifted the burden of proof onto the employer to sustain an intoxication defense. Employers had difficulty meeting this burden of proof.¹⁴¹ In order to more appropriately balance the evidentiary burden of defending intoxicated-related injuries, the Maryland General Assembly continually tries to redraft the standard of review.¹⁴²

133. See Appendix.

134. See D.C. CODE ANN. § 36-303(d) (1997) (utilizing the standard "occasioned solely by").

135. See N.Y. WORK. COMP. LAW § 10 (McKinney 1993) (utilizing the language "solely occasioned by").

136. See MD. CODE ANN., LAB. & EMPL. § 9-506 (1991). Maryland decreased its standard in 1998 to "primary" cause. See *infra* Part V.B.

137. See LARSON, Reg. ed. *supra* note 106, § 36.03[3], at 36-22. See also *infra* Part V.B and accompanying text for a discussion of the Maryland General Assembly's reasoning for altering the sole cause standard of review. See generally *infra* Part V.A and accompanying text (discussing the Maryland courts' rationale in applying the sole cause standard of review).

138. See Franklin *supra* note 124.

139. See LARSON, Reg. ed. *supra* note 106, § 36.03[3], at 36-24.

140. In 1914, the Maryland General Assembly adopted the general language of section 4 of the Uniform Workmen's Compensation Act. See *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 6-7, 338 A.2d 251, 254-55 (1975) (citing 1914 Md. Laws 1429, ch. 800). This Act states that "[n]o compensation shall be allowed for an injury caused (1) by the employee's wilful intention to injure himself or to injure another, or (2) by his intoxication." *Id.* Within two years, the General Assembly amended the statute to insert the word "solely." See *id.* at 7, 388 A.2d at 255 (citing 1916 Md. Laws ch. 597).

141. For a discussion of cases in which employers did not meet the sole cause burden of proof see *infra* Part V.A.

142. See *infra* Part V.B for a discussion of the Maryland General Assembly's efforts during the past six years.

B. *Magnitude of America's Workplace Substance Abuse Problem*

The social and economic dangers of substance abuse in the workplace are recognized and well documented.¹⁴³ Not only does substance abuse present dangers to the general public, but it also causes many workplace accidents.¹⁴⁴

Each year the problem of substance abuse grows in both public and private sectors.¹⁴⁵ In 1984, only eight percent of the nation's chief executive officers, governors, and mayors of the sixty-four largest cities deemed substance abuse a pivotal problem within their workforces.¹⁴⁶ Five years later, twenty-two percent of the same individuals considered substance abuse on the job a major problem.¹⁴⁷ According to estimates by several drug-prevention organizations, seventy-five billion to one hundred billion dollars are spent each year

143. See, e.g., Lucky & Bok, *supra* note 2; Shawn D. Twing, *Drug & Alcohol Testing by Private Employers . . . and its Relationship to Workers' Compensation Practice in Arkansas*, ARK. LAW. 31 (Fall 1996); George Gallup, Jr., *Stranglehold - Drugs And The American Workplace*, Baltimore County Office of Substance Abuse (April 1994) (estimating that every year drug-use costs American businesses from 50 billion to 100 billion).

144. See Lucky & Bok, *supra* note 2, at 1; Twing, *supra* note 143, at 31; Gallup, *supra* note 143 ("Drug abusers are involved in 3 1/2 times more on the job accidents than non-abusers.")

145. See *Currents in Compensation and Benefits*, 21 COMPENSATION & BENEFITS REV. 5, 13 (1989) ("Over three-fifths of the surveyed firms using drug testing reported that both alcohol and other drugs are significant problems among their employees. Over three-fifths of the respondents in nontesting firms said that alcohol is the primary substance abuse problem in their company."). "The federal government's annual household survey [reported that] nearly two-thirds of all drug users are employed . . . full-time." Maryland Governor's Drug and Alcohol Abuse Commission: Fact Sheet (1987). "In a random survey of 5,800 municipal employees in a southwestern city, 16% said they had personal knowledge of marijuana use by co-workers; [and] 13% reported knowing of co-workers' use of other drugs." *Id.* Further, 24% of paraprofessionals and 15% skilled or technical workers related knowledge of co-worker drug use. See *id.* In the federal government's household survey, those who admitted to using illegal drugs comprised 28% of the construction industry, 22.7% of the repair services industry, 18.4% of the transportation industry, and 14.8% of the manufacturing industry. See *id.* In addition, "[a] 1989 study of five large corporations revealed that between 62 [and] 75% of employees had used alcohol while on the job, [and] more than 5% had used marijuana." *Id.* Furthermore, employee drug and alcohol use is said to be three times more prevalent than actually reported. See *id.*

146. See *Currents in Compensation and Benefits*, *supra* note 145, at 14.

147. See *id.* These results were concluded from a survey consisting of 265 respondents. See *id.*

in lost productivity, increased health-care costs, and workers' compensation expenses caused by substance abuse.¹⁴⁸

Employee drug and alcohol use statistics indicate the negative impact that substance abuse is having on the workplace. For example, the National Cocaine Helpline reported that, of the employees that called, "75% [of them] had used drugs on the job; 64% admitted drugs adversely [affected] their job performance; 44% had sold drugs to other employees; [and] 18% had stolen from co-workers to support their drug habit."¹⁴⁹ Moreover, workers who do use drugs are "five times more likely to file a workers' compensation claim"¹⁵⁰ and nearly four times "more likely to be involved in a workplace accident."¹⁵¹ These statistics sparked the Maryland Legislature to reconsider the intoxication defense.

V. MARYLAND'S LEGISLATIVE EFFORTS AND CASE HISTORY REGARDING WORKERS' COMPENSATION AND THE USE OF CONTROLLED DANGEROUS SUBSTANCES

A. "Sole Cause" Case History

Maryland's Workmen's Compensation Act's (the "Act") intoxication defense first came under attack in *American Ice Co. v. Fitzhugh*.¹⁵² Fitzhugh was the driver of a two-ton ice and coal wagon whose duties included loading and unloading the wagon.¹⁵³ While working, he fell or was thrown from the wagon and died.¹⁵⁴ The em-

148. See David Warner, *The War on Drugs Wants You*, NATION'S BUS., Feb. 1996, at 54-55. Many organizations, including Partnership for a Drug-Free America, Community Anti-Drug Coalitions of America, The Employee Assistance Professional Association, and Institute for a Drug-Free Workplace have joined forces to combat drug abuse in the workplace. See *id.* To coordinate these efforts on a national level, "[t]he U.S. Chamber of Commerce, through a nonprofit affiliate, the Center for Workplace Preparation, . . . serves as a clearinghouse for information on state and local chambers' drug-free workplace programs" in an effort to raise awareness of drug abuse among workers in smaller companies. *Id.*

149. Maryland Governor's Drug and Alcohol Abuse Commission, *supra* note 140. In a three-year series of continued surveys of employees' attitudes about drug abuse and work, workers reported that drug abuse negatively affected almost all areas of job performance, including attendance, morale, safety, productivity, health-care expenses, and crime. See *id.*

150. *Id.*

151. *Id.*

152. 128 Md. 382, 97 A. 999 (1916).

153. See *id.* at 386, 97 A. at 1000.

154. See *id.*

ployer, American Ice Co., presented evidence that Fitzhugh was drunk at the time of the accident.¹⁵⁵ The State Industrial Accident Commission granted the widow workers' compensation benefits and the Baltimore City Circuit Court affirmed the Commission's decision.¹⁵⁶ The employer appealed twice, both to the Court of Special Appeals of Maryland and to the Court of Appeals of Maryland.¹⁵⁷ Both courts affirmed the lower court's holding.¹⁵⁸ The court of appeals held that where intoxication is used as a defense, the employer must prove the accidental personal injury was attributable "*solely and exclusively*" to the intoxication of the employee while on duty.¹⁵⁹ The court reasoned that the legislative intent was to eradicate contributory negligence as a defense and to compel compensation.¹⁶⁰

The next case to arise under the Act was *Southern Can Co. v. Sachs*.¹⁶¹ During the workday, Sachs and a co-worker purchased two one-half pints of alcohol.¹⁶² They drank one bottle between 12:00 noon and 12:30 p.m., and the other between 4:00 p.m. and 4:30 p.m.¹⁶³ One witness testified that he saw Sachs drunk and staggering at 2:15 p.m.¹⁶⁴ The same witness saw Sachs again at approximately 4:00 p.m., but could not determine his condition at that time.¹⁶⁵ Another employee, Baier, testified that he saw Sachs after 4:00 p.m. in the bathroom seated with his head in his hands.¹⁶⁶ Baier indicated to Sachs that it was time to go home and Baier exited the building.¹⁶⁷ Baier testified that approximately seven minutes later he heard a "noise,"¹⁶⁸ walked back over to the entrance of the build-

155. *See id.*

156. *See id.* at 383, 97 A. at 1000.

157. *See id.*

158. *See id.*

159. *Id.* at 393, 97 A. at 1002 (emphasis added).

160. *See id.* at 392-93, 97 A. at 1002. The court further explained that the system of workers' compensation was supposed to award benefits to injured workers who suffered an unfortunate accident on the job, not considering who or what caused the negligence. *See id.*

161. 149 Md. 562, 131 A. 760 (1926).

162. *See id.* at 565, 131 A. at 761.

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 564-65, 131 A. 761.

167. *See id.* at 565, 131 A. 761.

168. *See id.*

ing, and discovered Sachs at the bottom of the steps, bleeding.¹⁶⁹ Baier testified that Sachs had fallen down the steps.¹⁷⁰ These facts were undisputed at trial, however, there was insufficient direct evidence to conclude the intoxication was the sole cause of Sach's injury.¹⁷¹ Thus, the court denied the employer's defense.¹⁷²

In *S. Rosenbloom, Inc. v. Willingham*,¹⁷³ Willingham was on his way home from work by ferry.¹⁷⁴ At approximately 6:00 p.m., he drove his car onto the ferry and the deckhand noticed that Willingham had difficulty parking.¹⁷⁵ Willingham was seen exiting his car, staggering, and subsequently heading to the saloon deck.¹⁷⁶ At trial, another deckhand testified that Willingham had nearly drove into him while entering the ferry.¹⁷⁷ Before arriving, the first deckhand saw Willingham again, "staggering more than ever, . . . [as] he came down the wrong stairway, and had to go around the boat to reach his car."¹⁷⁸ Thus, the deckhand offered to drive the car off of the ferry and park it on dry land.¹⁷⁹ The deckhand testified that he smelled alcohol as he drove with Willingham in the passenger seat.¹⁸⁰ However, Willingham's wife testified that in their twenty years of marriage, she had never seen her husband intoxicated.¹⁸¹ About thirty-five minutes after the ferry departed its post, Willingham drove his car overboard and drowned.¹⁸²

Although the police officer who attempted to revive him did not detect any odor of alcohol or find a bottle, evidence was offered at trial that a half-pint bottle of whiskey with one drink left was found inside the vehicle when it was pulled from the water.¹⁸³ In

169. *See id.*

170. *See id.*

171. *See id.* at 566, 131 A. at 761.

172. *See id.* Not only did the court deny the employer's claim of intoxication, but it allowed a "logical inference" that, even though the employee had left his work area and was observed resting, the injury did arise out of and in the course of employment, as Sachs may have been returning to work when he fell. *See id.*

173. 190 Md. 552, 59 A.2d 311 (1948).

174. *See id.* at 555, 59 A.2d at 311.

175. *See id.*

176. *See id.*

177. *See id.* at 555, 59 A.2d at 312.

178. *Id.* at 555, 59 A.2d at 311-12.

179. *See id.* at 555, 59 A.2d at 312.

180. *See id.*

181. *See id.* at 554, 59 A.2d at 311.

182. *See id.* at 556, 59 A.2d at 312.

183. *See id.*

holding against the employer, the court noted that no one actually saw the decedent drink and that, even though his conduct may have been due to alcohol, it may also have been something else.¹⁸⁴ Moreover, the court explained that, although the inference of intoxication could have been drawn, the "evidence falls short of establishing that intoxication was the sole cause of the accident, as required by the statute."¹⁸⁵

The court in *Smith v. State Roads Commission*,¹⁸⁶ for the first time in fifty-two years, found that the employee's intoxication was the sole factor for the employee's death.¹⁸⁷ In *Smith*, the employee crashed his pickup truck into a telephone pole and died.¹⁸⁸ The evidence showed that the employee had a blood-alcohol level of .27.¹⁸⁹ Furthermore, no evidence of a tire blowout or other tire trouble existed, nor did any evidence of a defect in the road.¹⁹⁰ Thus, the court ruled the employer had met his burden of proof by providing overwhelming and unchallenged evidence.¹⁹¹

Interestingly, the court reasoned that:

[I]f the employment does no more than supply the setting, the stage or the situation in which the injury occurs, if it is no more than an inactive condition and not a moving cause, compensation must be denied. Concurrence of intoxication and the setting, alone, is *not* enough. There must be in addition, if compensation is to be awarded, some active or moving or contributing cause . . . [Otherwise] the Maryland statute is meaningless and we do not agree that it is meaningless.¹⁹²

Therefore, *Smith* created the rule that as long as the employer presents substantial evidence of intoxication and the employee or his estate offers *no* evidence of *any other* potential or contributing factor, the employer may prevail.¹⁹³ However, it is important to note that the employee's task is not a difficult one. The employee must

184. *See id.* at 558, 59 A.2d at 313.

185. *Id.*

186. 240 Md. 525, 214 A.2d 792 (1965).

187. *See id.*

188. *See id.* at 527, 214 A.2d at 793.

189. *See id.*

190. *See id.* at 530, 214 A.2d at 794.

191. *See id.* at 529, 214 A.2d at 793.

192. *Id.* at 535, 214 A.2d at 797 (emphasis added).

193. *See id.* at 534-35, 214 A.2d at 797.

only offer another "possible" cause of the work-related accident.¹⁹⁴

For example, in *Maryland Casualty Co. v. Lorkovic*,¹⁹⁵ the employee was injured in a one-car accident when he was driving his truck home from the airport after a business trip.¹⁹⁶ The evidence established that Lorkovic was suffering from sleep deprivation and intoxication when he began his drive.¹⁹⁷ The jury found for the employee, and the employer appealed, relying on *Smith*.¹⁹⁸ The employer claimed, as a matter of law, that Lorkovic's intoxication was the sole cause of his injuries; therefore, he was precluded from the recovery of benefits.¹⁹⁹ Nonetheless, the court pointed out that, unlike the employee in *Smith*, Lorkovic was still living and offered his own sworn testimony.²⁰⁰ Hence, because Lorkovic was able to establish another "possible" cause, it was reasonable for a jury to decide in Lorkovic's favor.²⁰¹

In *Zentz v. Peters & Taylor, Inc.*,²⁰² the trial court affirmed the Workers' Compensation Commission's denial of a compensation claim.²⁰³ The Court of Special Appeals of Maryland affirmed, holding that the lower court's finding that injuries sustained by the claimant in a fight with a co-worker were due solely to his intoxication was not clearly erroneous.²⁰⁴ The supervisor testified that the

194. See *Maryland Cas. Co. v. Lorkovic*, 100 Md. App. 333, 360, 641 A.2d 924, 937 (1994) (suggesting sleep deprivation during a business trip was a proximate cause of employee's injuries); see also *S. Rosenbloom, Inc. v. Willingham*, 190 Md. 552, 558, 59 A.2d 311, 313 (1948) (declaring intoxication as the contributing cause to be insufficient, as it must be the exclusive cause); *Southern Can Co. v. Sachs*, 149 Md. 562, 566, 131 A. 760, 761 (1926) (stating evidence did not show the injury or death of the employee resulted solely from the alleged intoxication); *American Ice Co. v. Fitzhugh*, 128 Md. 382, 393, 97 A. 999, 1002 (1916) (requiring accident resulting in injury to be caused solely and exclusively by the intoxication of the employee in order to receive compensation).

195. 100 Md. App. 333, 641 A.2d 924 (1994).

196. See *id.* at 340, 641 A.2d at 927.

197. See *id.* at 360, 641 A.2d at 937. The claimant proffered that his business trip caused his sleep deprivation—the reason he fell asleep at the wheel. See *id.*

198. See *id.*

199. See *id.*

200. See *id.* at 361, 641 A.2d at 937.

201. See *id.* Therefore, the court held that it was without authority to overrule the jury decision. See *id.* at 360-62, 641 A.2d at 937-38.

202. 11 Md. App. 1, 272 A.2d 430 (1971).

203. See *id.*

204. See *id.* at 2, 272 A.2d at 431. The Commission denied the claim not only because of the claimant's intoxication, but also as a result of provoking the fight. See *id.* at 2-3, 272 A.2d at 430-31.

claimant "appeared" to have been drinking, though he would not describe him as drunk.²⁰⁵ Controversy existed over how much alcohol was actually consumed, as well as the events that led to the argument and resulting injuries.²⁰⁶ However, both the co-worker and the claimant stated that the fight would not have occurred absent drinking.²⁰⁷ Thus, the court ruled in favor of the employer, reasoning that:

[H]ad appellant not been intoxicated there would have been no fight. Had there been no fight he would not have been injured. Thus the injuries were the result of the intoxication and a determination that the injuries were due solely to the intoxication is not clearly erroneous [and] compensation was properly denied.²⁰⁸

Hence, the claimant was justifiably disqualified from receiving workers' compensation benefits due to his intoxication.²⁰⁹

The Maryland statute that disqualifies claimants from receiving workers' compensation benefits due to intoxication encompasses more than just alcohol-induced intoxication. The statute also disqualifies claimants intoxicated as a result of illegal or prescription drugs not taken in accordance with a physician's prescription.²¹⁰ The same standard of review and evidentiary presumption for alcohol-induced intoxication cases applies to drug-induced intoxication cases.²¹¹

Drug-induced intoxication was added to Maryland's workers' law in 1972 when the General Assembly compensation statute disqualified a claimant whose on the job accidental injury occurred solely from taking a non-prescribed drug that rendered him incapa-

205. *See id.* at 4, 272 A.2d at 432.

206. *See id.* at 4-6, 272 A.2d at 431-33.

207. *See id.* at 6, 272 A.2d at 433.

208. *Id.* at 9, 272 A.2d at 434. Although *Zentz* has been overruled as to application of appellate review, it remains valid on the issues of intoxication and the standard for establishing sole causation. *See Turner v. State*, 61 Md. App. 393, 400, 486 A.2d 804, 807 (1985) (holding that appeals from the Workmen's Compensation Commission with respect to accidental injuries are tried de novo).

209. *See Zentz*, 11 Md. App at 9-10, 272 A.2d at 434-35.

210. *See MD. CODE ANN., LAB. & EMPL. § 9-506(b)* (1991).

211. *See id.* § 9-506(f)(2). Intoxication must be the sole cause of the injuries, not merely a contributing factor. *See S. Rosenbloom, Inc. v. Willingham*, 190 Md. 552-58, 59 A.2d 311, 313 (1948). The employer has the burden of overcoming this statutory presumption. *See Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 17, 338 A.2d 251, 260 (1975).

ble of satisfactorily performing his work.²¹² The majority of states have followed Maryland law²¹³ and include a disqualification of benefits due to drug induced intoxication.²¹⁴

In *Cam Construction Co. v. Beccio*,²¹⁵ the Court of Special Appeals of Maryland held that a jury should have been able to hear evidence as to the claimant's taking of prescription drug medication.²¹⁶ Beccio was employed as a superintendent for a construction project when he tripped and fell, knocking himself unconscious, while walking down an unlit hallway under construction.²¹⁷ Beccio informed the doctor that earlier in the morning he had taken Dantrium, a muscle relaxant, prescribed by his physician.²¹⁸ Beccio stated that thirty minutes after he took Dantrium, he became unbalanced, fell forward, struck his face, and lost consciousness for several minutes.²¹⁹

The Commission awarded benefits to Beccio, holding that his injury arose out of and in the course of his employment. However, the Commission did not consider all of the medical reports.²²⁰ The employer was granted a motion for rehearing, during which the Commission reversed its position after hearing the previously excluded Dantrium medical evidence.²²¹ Beccio subsequently appealed to the Circuit Court for Baltimore City, which granted Beccio's motion in limine, once again excluding all of the Dantrium medical evidence because the drug was taken in accordance with a doctor's prescription.²²² Therefore, because the jury heard only about the debris and darkness in the hallway where the injury occurred, they returned a verdict in Beccio's favor.²²³

The court of special appeals ended the medical evidence de-

212. MD. CODE ANN., art. 101, § 45 (Supp. 1973).

213. See Appendix.

214. See LARSON, Reg. ed., *supra* note 1, § 34.39, at 6-142 to 6-147; see also Appendix.

215. 92 Md. App. 452, 608 A.2d 1264 (1992).

216. See *id.* at 464, 608 A.2d at 1270.

217. See *id.* at 453, 608 A.2d at 1264.

218. See *id.* at 454, 608 A.2d at 1265. "The Dantrium had been prescribed in 1987 to treat Beccio's life-long 'toe-walking' disorder, a condition which caused him to walk on his toes and lean forward." *Id.*

219. See *id.* The side effects of Dantrium are drowsiness, dizziness, weakness and general malaise. See *id.* (citing Medical Economics Data, Physician's Desk Reference, at 1619-20 (1992)).

220. See *id.*

221. See *id.* at 455, 608 A.2d at 1265.

222. See *id.* at 455-56, 608 A.2d at 1265-66.

223. See *id.* at 456-59, 608 A.2d at 1266-67.

bate,²²⁴ holding that, as the statute made no exception for admitting evidence of taking prescription drugs, the employer should have been able to introduce evidence of the employee's taking Dantrium to treat his medical condition.²²⁵ The court reasoned that even though Beccio presented credible and well-supported testimony that his injury was due to debris and darkness, the employer should not be deprived of the opportunity to present suitable contradictory evidence of the employee's use of prescription medication.²²⁶ However, it is important to note that claiming the Dantrium was a contributing cause to the accident would not have been enough. In order to bar compensation, the employer must prove that the prescription medication was both not taken according to a doctor's prescription, and that it was the sole cause of the injury.²²⁷

B. Maryland's Legislative Efforts Regarding Alcohol and Drug-Induced Intoxication

In 1993, controversial workers' compensation bills pertaining to work-related injuries as a result of intoxication and drug abuse began to filter through the Maryland General Assembly.²²⁸ The effort to reduce the disqualifying standard for intoxication originated with House Bill 1353.²²⁹ The purpose of House Bill 1353 was to reduce the standard from a "sole" cause factor to a "contributing" cause factor.²³⁰ The Bill was also drafted to make work environments more comfortable and secure for the current workforce as well as the public at large.²³¹ House Bill 1353 was submitted to the Economic Matters Committee, but was subsequently defeated.²³²

In 1994, the effort was repeated in modified House Bill 1374.²³³ The bill retained the contributing cause standard from House Bill

224. *See id.*

225. *See id.* at 464, 608 A.2d at 1270.

226. *See id.* (noting that there is no prescription drug exception in the statute that excludes injuries resulting solely from the effect of drugs).

227. *See id.* at 466, 608 A.2d at 1270; *see also* Karns v. Liquid Carbonic Corp., 275 Md. 1, 17, 338 A.2d 251, 260 (1975) (stating that intoxication must be the sole cause of injury, not merely a contributing factor).

228. H.B. 1353, 407th Leg. (Md. 1993).

229. *See id.*

230. *See id.*

231. H.B. 1353 Bill Analysis, 407th Leg. (Md. 1993).

232. Vote Tally of the House Economic Matters Committee, H.B. 1353, 407th Leg. (Md. 1993). The bill failed in committee— it was defeated by an unanimous vote. *See id.*

233. H.B. 1374, 408th Leg. (Md. 1994).

1353, but also added the sole cause factor for injuries that resulted from the employee using drugs not taken in accordance with a physician's orders.²³⁴ Sole cause was replaced by contributing cause elsewhere in the bill for consistency, but with many new conditions precedent that an employer would have to satisfy.²³⁵ Although these modifications seemed to have created more support for the legislation, the bill was again defeated in the Economic Matters Committee.²³⁶

Although in 1995 the legislation gained greater momentum, it once again failed.²³⁷ Two separate bills originated in both houses; House Bill 1137 in the Economic Matters Committee²³⁸ and Senate Bill 563 in the Finance Committee.²³⁹ House Bill 1137 was rejected by the Economic Matters Committee.²⁴⁰ The Senate bill received a favorable committee vote with amendments.²⁴¹ The previous safeguards that were added to the 1994 bill remained,²⁴² but the "contributing" cause standard was changed to a "substantial" cause standard.²⁴³

The bill placed the burden of responsibility equally upon the employer and the employee.²⁴⁴ It made an employee ineligible for workers' compensation when the injury suffered was substantially caused by drug or alcohol use.²⁴⁵ However, in order for an injured employee to be eligible for workers' compensation, the place of employment must be a certified Drug-Free Workplace as outlined by

234. *See id.*

235. *See id.* Some of those conditions included: (1) that the employment at issue be covered by a Drug-Free Workplace program that complied with the Governor's Commission on Drug & Alcohol Abuse and certified annually; (2) that the intoxication or drug be detected by a test conducted in accordance with certain established procedures; and (3) that the level of intoxication or drugs equal to or exceed the minimum positive level established by the U.S. Department of Transportation. *See id.*

236. Vote Tally of the House Economic Matters Committee, H.B. 1374, 408th Leg. (Md. 1994). The bill was defeated in committee. *See id.*

237. *See id.*

238. *See* H.B. 1137 (Md. 1995).

239. *See* S.B. 563 (Md. 1995).

240. *See* H.B. 1137 (Md. 1995) (noting that this bill was heard by the Economic Matters Committee on March 13, 1995, and reported unfavorably).

241. *See* Senate of Maryland, Senate Financing Committee Voting Record, S.B. 563 (Md. 1995).

242. *See supra* note 235 and accompanying text.

243. *See* S.B. 563 (Md. 1995).

244. *See id.*

245. *See id.*

the Governor's Drug & Alcohol Abuse Commission.²⁴⁶ In effect, the proposed bill created an incentive for employers to implement a Drug-Free Workplace policy, as doing so would entitle an employer to a lower burden of proof when defending workers' compensation claims involving drug or alcohol abuse by an employee.²⁴⁷

State and local support was rising in support of the legislation.²⁴⁸ In both committees and on the legislative floors, the Governor's office explained that the bill would inevitably "discourage the use of alcohol and other drugs in the workplace."²⁴⁹ Also, executives from hazardous occupational industries testified that although "significant money [is spent] on training, equipment inspections and supervisory efforts . . . an act of irresponsibility and poor judgment, such as the use of drugs or alcohol while working, cannot always be controlled by even the most vigilant employers."²⁵⁰ The increased support from various industries enabled the controversial bill to pass in the Senate.²⁵¹ However, the legislation failed in the House Economic Matters Committee.²⁵²

In 1996, the General Assembly again revisited the issue, looking at two predecessor bills: House Bill 788²⁵³ and Senate Bill 491.²⁵⁴ Sponsorship within the Senate Finance Committee for Senate Bill 491 rose from one to four sponsors,²⁵⁵ and again received a favorable committee report with amendments.²⁵⁶ The first amendment altered the title of the bill to reflect its emphasis on the em-

246. *See id.*

247. *See id.*

248. *See, e.g.*, Memorandum from Judith A. Green, Program Director, Drug-Free Workplace Initiative (Feb. 22, 1995) [hereinafter Green Memo] (on file with author); Letter from M. Beth Conte, Deputy Director, Maryland Delaware Solid Waste Association, to The Honorable Thomas L. Bromwell, Chairman Senate Finance Committee (Feb. 23, 1995) [hereinafter Conte Letter] (on file with author); Letter from Dawn C. Holibonich, President, Maryland Healthcare Human Resources Association, to Chairman and Members of the Committee (Feb. 15, 1995) [hereinafter Holibonich Letter] (on file with author).

249. Green Memo, *supra* note 248, at 2.

250. Conte Letter, *supra* note 248.

251. *See* Senate of Maryland, Senate Floor Voting Record, S.B. 563 (Md. 1995) (noting that the bill passed with 44 yeas and 1 nay).

252. *See* House Economic Matters Committee, Vote Tally, S.B. 563 (Md. 1995) (reporting that the bill failed with 4 yeas, 16 nays, with 2 absent votes).

253. *See* H.B. 788 (Md. 1996).

254. *See* S.B. 491 (Md. 1996).

255. *See id.*

256. *See id.*

ployer, instead of the employee.²⁵⁷ The title was changed from "Workers' Compensation — Use of Drugs or Alcohol"²⁵⁸ to "Workers' Compensation — Drug-Free Workplace Program — Use of Drugs or Alcohol."²⁵⁹ A second amendment lowered the standard of review from substantial cause²⁶⁰ to proximate cause.²⁶¹ Proximate cause was defined as "the cause that is first in importance and but for which an injury . . . would not have occurred."²⁶² The third amendment requested that the Workers' Compensation Commission report to the General Assembly by October 1, 1999, regarding the number of workers' compensation cases where benefits were denied, as well as tally the number of drug-free workplace programs that were certified.²⁶³ However, once again, this legislation, although adopted by the Senate,²⁶⁴ was rejected by the House Economic Matters Committee and thus failed.²⁶⁵

The bill's failure was due to labor unions'²⁶⁶ staunch opposition to the second amendment's alteration, which lowered the standard of proof to sole cause.²⁶⁷ Representatives on behalf of the labor unions insisted that the proposed change would create bad public policy for several reasons. The overarching concern was that this legislation would begin the process of whittling away the foundation of

257. See S.B. 491 (Md. 1996).

258. S.B. 563 (Md. 1995).

259. S.B. 491 (Md. 1996). Heavy emphasis was placed on the nation's drug problem and on the need for and positive outcomes from instilling the Drug-Free Workplace program. See Lucky & Bok, *supra* note 2, at 1. Parallel legislation in six other states: Alabama, Florida, Georgia, Tennessee, Texas, and Washington was also referenced. See *id.* Each of these states received widespread support by enacting the Drug-Free Workplace program, as well as for witnessing a dramatic impact on reducing workers' compensation claims and related expenses. See *id.* at 2.

260. See *supra* note 243 and accompanying text.

261. See S.B. 491 (Md. 1996). There was also a photocopied page of Black's Dictionary with the definition "proximate cause" attached to the bill. See *id.*

262. *Id.*

263. See *id.*

264. Vote Tally of the Senate Floor, S.B. 491, 410th Leg. (Md. 1996).

265. Vote Tally of the House Economic Matters Comm., H.B. 788, 410th Leg. (Md. 1996).

266. The labor unions consisted of the Maryland State and District of Columbia AFL-CIO and the Maryland division of the American Federation of County and Municipal Employees (AFSCME). See *infra* notes 268-74 and accompanying text.

267. Interview with Senator Mike Busch, Chairman of the House Economic Matters Comm., in Annapolis, Md. (October 12, 1988).

the workers' compensation system—the no-fault aspect.²⁶⁸ They claimed that the bill placed an unfair burden on the employee when the onus should, instead, have been on the employer to assure a drug-free workplace.²⁶⁹

The labor unions further claimed that, as a result of compensation risks becoming more affordable, the caseload would inevitably increase, resulting in delays throughout the system.²⁷⁰ Also, more employers would seek to take advantage of the new standard of proof.²⁷¹ The proposed change would create an incentive for employers to view all accidents as probable cause for suspicion of substance abuse.²⁷² Many workplace accident victims would become suspects, adding insult to their injury.²⁷³ While the labor unions believed that workplace safety was a worthwhile goal, they would not support a measure that was bad public policy for what they claimed contradicted with the nature of the workers' compensation system.²⁷⁴

In 1997, the legislation resurfaced as House Bill 736 and Senate Bill 668.²⁷⁵ Within the Senate Finance Committee, sponsorship again increased from four to eleven, including the committee chair.²⁷⁶ Senate Bill 668 received a favorable committee report with amendments.²⁷⁷ The first amendment reverted the title of the bill to its 1995 reading, "Workers' Compensation — Use of Controlled Dangerous Substances or Alcohol," de-emphasizing the Drug-Free Workplace initiative.²⁷⁸ In addition, the standard was altered from proximate cause to the more stringent standard of primary cause.²⁷⁹ Primary cause was defined as "the cause that is first in importance."²⁸⁰ Finally, the existing presumption was also modified to be

268. *Workers' Compensation — Use of Controlled Dangerous Substances or Alcohol: Hearing on H.B. 788 Before the House Economic Matters Comm.*, 410th Leg. (Md. 1996) (statement of Ray McInerney, Representative, AFSCME).

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *See id.*

274. *See supra* note 268.

275. H.B. 736 and S.B. 668, 411th Leg. (Md. 1997).

276. *See* S.B. 668, 411th Leg. (Md. 1997). The 1997 Senate Finance Committee Chair was Tom Bromwell. *See supra* note 248.

277. *See id.*

278. *Id.* at 1.

279. *See id.* at 2.

280. *See id.*

consistent with the modification on the defense itself.²⁸¹ This amendment provided that "absent substantial evidence to the contrary, a presumption that . . . the effect on the covered employee of a controlled dangerous substance . . . [or] the intoxication of the covered employee [will be held as] *not* the primary cause of the accidental personal injury" ²⁸²

In an effort to quell the labor unions opposition and to muster support for passage, the Governor's Drug & Alcohol Abuse Commission promoted the bill as "compromise legislation" and pointed out that alcohol and drug free workplaces were beneficial to all parties.²⁸³ Emphasis was placed on employees who had legitimate abuse problems in an effort to de-emphasize the fact that profits were increasing for insurance companies.²⁸⁴ The unions suggested that any savings from an alcohol and drug-free workplace program should be placed in a fund to be used to assist employees.²⁸⁵ However, this would leave the employer with no economic benefit for having installed a Drug-Free Workplace program.²⁸⁶

Supporters from various industries turned out in large numbers at the legislative hearings to express their views.²⁸⁷ The legislation

281. *See id.*

282. *Id.* at 3-4 (emphasis added).

283. *Workers' Compensation - Use of Drugs or Alcohol: Hearing on S.B. 668 Before Senate Finance Comm.*, 411th Leg. (Md. 1997) (statement of Judith Green, Program Director, Drug-Free Workplace Initiative, Governor's Drug & Alcohol Abuse Commission).

284. *See id.*

285. *Workers' Compensation — Use of Controlled Dangerous Substances or Alcohol: Hearing on S.B. 668 Before the Senate Finance Comm.*, 411th Leg. (Md. 1997) (statement of Primo Padeletti, Secretary-Treasurer, AFL-CIO).

286. *Workers' Compensation Benefit and Insurance Oversight Committee— Report of the 1995 Interim*, 411th Leg. (Md. 1995).

287. The telecommunications industry adamantly supported this bill, emphasizing their intolerance for drugs and alcohol on job sites. *See Workers' Compensation - Use of Controlled Dangerous Substances or Alcohol: Hearing on S.B. 668 Before the Senate Finance Comm.*, 411th Leg. (Md. 1997) (statement of F. Ray Weems, President, Southern Maryland Cable, Inc.) (asserting that, although the bill would not significantly save money for business, it would provide more aid for the thousands of families suffering from the actions of alcohol and drug abusers everyday). *See id.* Additionally, management representatives from the construction industry illustrated the assistance this measure would provide to the State in protecting its most valuable resource, employees. *See id.* (statement of Mary E. Easto, Comptroller, Henry H. Lewis Contractors, Inc.). The construction industry also argued that people who chose to endanger the lives of others by partaking in drugs or alcohol should not be rewarded with compensation. *See id.* Other written testimony submitted from the construction industry in-

carried considerable support, again passing on the Senate floor,²⁸⁸ as well as a sentiment that "a vote against this bill would be to endorse irresponsible, life-threatening behavior."²⁸⁹ However, it failed to pass the House before the legislative session ended.²⁹⁰

After five years, the impetus for change was House Bill 373 and Senate Bill 36.²⁹¹ Senate Finance Committee Chairman, Tom Bromwell, did not hold a hearing on the corresponding Senate legislation, recalling that his committee passed a similar bill unanimously the previous year.²⁹² In addition, the Maryland Chamber of Commerce balked at the idea of watching this legislation be killed or overhauled again within the House Economic Matters Committee.²⁹³ Thus, the Chamber of Commerce broke the stalemate over the legislation by rounding up seventy-six co-sponsors of the bill in the House.²⁹⁴ This was enough votes to assure final passage, exactly five more than the bill needed to gain approval in the House.²⁹⁵ In effect, the bill was passed before its opponents were given a chance to protest.²⁹⁶ The bill overwhelmingly passed both houses.²⁹⁷

Senate Bill 36 is now codified in section 9-506 of Chapter 108

cluded: Precision Products Group, Inc. - Stone Industrial Division; Hopkins & Wayson, Inc., Building Contractors; L.R. Willson & Sons, Inc.; and, the Maryland Builders Association, representing more than 2400 member firms. *See id.* (hearing attendance record). Furthermore, employers should not suffer increased insurance rates to pay employees whose inebriation contributed to a workplace accident. *See id.* (statement of Fred Teeter, Jr., Chamber Executive, Chamber of Commerce Hagerstown-Washington County). Other Chambers of Commerce in support of Senate Bill 668 included: Maryland Chamber; Carroll County Chamber; and Queen Anne's County Chamber. *See id.* (hearing attendance record).

288. Vote Tally of the Senate Floor, S.B. 668, 411th Leg. (Md. 1997).

289. Letter from Fred Teeter, Jr., Chamber Executive, Chamber of Commerce of Hagerstown-Washington County to Thomas L. Bromwell, Chairman, Senate Finance Comm. (Mar. 5, 1997) (on file with Senator Thomas L. Bromwell).

290. Vote Tally of the House Floor, H.B. 736, 411th Leg., (Md. 1997).

291. H.B. 372 and S.B. 36, 412th Leg. (Md. 1998).

292. *See* Tom Johnson, *Maryland Chamber Goes on Offensive in Support of Workers' Comp Bill*, DAILY RECORD, 3 A (February 28, 1998).

293. *See id.*

294. *See id.*

295. *See id.*

296. *See id.*

297. *See* Vote Tally of the House Floor, H.B. 372, 412th Leg. (Md. 1998); Vote Tally of the Senate Floor, S.B. 36, 412th Leg. (Md. 1998). The bill passed with a House vote of 87 yeas to 44 nays. Vote Tally of House Floor, H.B. 372, 4112th Leg. (Md. 1998).

of the Labor and Employment Article.²⁹⁸ Under section 9-506, a claimant whose job-related injury was caused "primarily" by drug or alcohol intoxication will be denied certain benefits.²⁹⁹ Under this standard, all benefits, except for medical treatment, are denied to a covered employee if: (1) the *primary cause* of an accidental personal injury is either the intoxication of the employee while on duty,³⁰⁰ or the effect on the employee of a controlled dangerous substance;³⁰¹ and (2) the use of the substance was not in accordance with a prescription from a physician.³⁰² With the statutory presumption, the employer bears the burden of proving that the effect of the alcohol or the controlled dangerous substance was the "primary" cause of the accident.³⁰³

In effect, despite the labor unions' and the trial lawyers' vociferous opposition, the passage of this bill did not change the essence of Maryland's workers' compensation law.³⁰⁴ Workers are still entitled to medical benefits³⁰⁵ and the burden of proof remains with the

298. MD. CODE ANN., LAB. & EMPL. § 9-506 (Supp. 1999).

299. *Id.* § 9-506(d).

300. *See id.* § 9-506(d)(3).

301. *See id.* § 9-506(d)(2)(i). The controlled dangerous substances covered in this Act are defined and listed in section 277 or 279 of Article 27 of the Maryland Code. *See id.*

302. *See id.* § 9-506(d)(2)(ii).

303. *See id.* § 9-506(g).

304. Interview with Senator Tom Bromwell, Maryland General Assembly, in Annapolis, Md. (April 8, 1999). However, what seemed to be a quite significant part of the bill in years past, the Drug-Free Workplace program, was deleted from the new law altogether. *See id.* There is no mention of the requirement that businesses must be certified annually to qualify for the prohibition in section 9-506 of the Maryland Code. *See* MD. CODE ANN., LAB. & EMPL. § 9-506 (Supp. 1999). The Drug-Free Workplace initiative, in previous years, had been added by the pressures of union leaders and Maryland trial lawyers. *See* Interview with Senator Tom Bromwell, Maryland General Assembly, in Annapolis, Md. (April 8, 1999). Union leaders were concerned that workers should not be denied benefits for any reason, especially as they were already denied benefits for self-inflicted injuries. *See* S.B. 36 Bill File. Maryland trial lawyers were concerned that this law could signal a change in the compensation process from a no-fault system to a contributory tort system. *See id.* However, this opposition was countered by the overarching principle that it was absurd to award people compensation as a result of their own irresponsible, and in some cases illegal, behavior. *See id.* As such, the 1997 law was deemed unsatisfactory for the business climate in that it made a mockery of the valid and commendable justifications for having a workers' compensation system. *See id.*

305. MD. CODE ANN., LAB. & EMPL. § 9-506(d) (Supp. 1999).

employer.³⁰⁶ The presumption continues to serve the employee's interest, as the court presumes that the injury was not abuse related, until substantially proven otherwise.³⁰⁷ The no-fault system still remains intact, except that now *not all* intoxication related workplace injuries are compensable under the law; rather, the no-fault system recognizes that substance abuse related accidents are a logical exception.³⁰⁸

VI. PROPOSED EFFECTS AND POSSIBLE ISSUES STEMMING FROM SECTION 9-506 OF THE LABOR AND EMPLOYMENT ARTICLE OF THE MARYLAND ANNOTATED CODE

Financially, section 9-506 is not anticipated to have a major impact on the workers' compensation industry.³⁰⁹ The State, as an employer, is expected to have a minimal decrease in expenditures due to the decline in the number of workers' compensation claims and reduced benefits.³¹⁰ Local governments and small businesses are also expected to have a minimal decrease in expenditures to the extent that local governments, as employers, pay less workers' compensation claims or premiums.³¹¹

In addition, the Workers' Compensation Commission is required to hear more disputes over whether alcohol or drug abuse caused the on-the-job accident.³¹² Having a lesser burden to prove, employers will be more likely to raise the defense of intoxication.³¹³ Thus, with a greater number of employers challenging workers' compensation claims, the case dockets of the Workers' Compensa-

306. *See id.* at § 9-506(g).

307. *Id.*

308. *See* text accompanying *supra* note 272; *see also infra* Part VI and accompanying notes for an analysis of differing states' handling of the intoxication statute.

309. *See* S.B. Fiscal Note No. 36-412, at 1 (1998). A Fiscal Note is required to be attached to all newly passed legislation in order to assess the fiscal impact of the bill. *See* MD. CODE ANN., STATE GOV'T. § 2-1505(a)(1), (e) (1998).

310. *See* S.B. Fiscal Note No. 36-412, at 1. Revenues would not be affected. *See id.* The average workers' compensation claim cost is approximately \$21,000, including medical services and treatment. *See id.* However, the Injured Workers' Insurance Fund reports that alcohol and drug related claims tend to be more than twice as high as the average claim, or approximately \$50,000 per claim. *See id.* Assuming that \$10,000 must still be spent for medical services and treatment, workers' compensation costs would be reduced by \$40,000 per claim. *See id.*

311. *See id.* Revenues would not be affected. *See id.*

312. *See id.*

313. *See id.*

tion Commission and, consequently, the appellate courts, is expected to increase.³¹⁴

At its core, section 9-506 leaves open to interpretation certain issues not addressed in the statute or elsewhere in the Code. In order to examine the issues and determinations facing Maryland courts, it is helpful to review statutes and case law of other states that use the same primary cause or related standard. Only Florida employs the primary cause standard, recently enacted by Maryland.³¹⁵ Five other states use highly analogous standards of review: Arkansas,³¹⁶ Iowa,³¹⁷ Oklahoma,³¹⁸ Utah,³¹⁹ and Texas.³²⁰ Thus, Florida's statute and subsequent case law, as well as the five other states, may provide insight on how Maryland's case law may develop.

A. *Primary Cause*

The General Assembly has defined primary as "first in importance,"³²¹ but beyond that, the standard remains unclear. The courts can either maintain the heavily burdensome requirement of sole cause or relax the burden of proof permitting a proximate causal connection to satisfy the standard.

Under Florida law, disability or death due to the accidental acceleration or aggravation of a disease from habitual use of alcohol, controlled substances, or narcotic drugs is not an injury arising out of employment.³²² Using language similar to Maryland's law, the statute denies compensation if the injury was "occasioned primarily"

314. *See id.*

315. *See* FLA. STAT. ANN. § 440.09(3) (West Supp. 1999) (barring compensation if the injury is caused primarily by the employee's intoxication).

316. *See* ARK. CODE ANN. § 11-9-102(5)(B)(iv) (Michie Supp. 1997) (excluding from "compensable injury" those injuries "substantially occasioned" by the use of alcohol, illegal drugs, or prescription drugs used in contravention of doctor's orders).

317. *See* IOWA CODE ANN. § 85.16(2) (West 1996) (barring compensation for injuries substantially caused by employee's intoxication).

318. *See* OKLA. STAT. ANN. tit. 85, § 11(A)(3) (West Supp. 1999) (excepting from workers' compensation injuries directly resulting from use or abuse of alcohol or drugs).

319. *See* UTAH CODE ANN. § 34A-2-302 (1997) (barring compensation for injuries in which a major contributing cause was use of illegal substances, intentional abuse of prescription drugs or intoxication from alcohol).

320. *See* TEX. LAB. CODE ANN. § 406.032 (West 1996) (stating an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication).

321. *See* MD. CODE ANN., LAB. & EMPL. § 9-506(d)(1) (1999).

322. FLA. STAT. ANN. § 440.09(3) (West Supp. 1999).

by the intoxication of the employee or by the influence of any drugs or other stimulants not prescribed by a physician.³²³ However, there are many provisions included in Florida's law that are not addressed by Maryland. In Florida, if the employee has a blood alcohol level above a certain percentage or has a positive confirmation of drugs, it is presumed that the injury was occasioned primarily by intoxication or drugs.³²⁴ This is unlike Maryland, which gives greater deference to the employee.³²⁵ This blood-alcohol percentage presumption is meant to shield an employer from the inequities of having to pay compensation to a claimant, with the requisite blood alcohol level, where the originating cause of the accident is questionable.³²⁶

1. Florida's Experience

The intoxication defense originated in the Florida Legislature in 1935.³²⁷ Four years later, in *Zee v. Gary*,³²⁸ the Supreme Court of Florida construed the primary cause standard following the legislature's intent.³²⁹ The court began with the basic rule of statutory construction—when determining intent, words and phrases must be read in conjunction with the entire statute, not just within a single section.³³⁰ Originally, the law provided a presumption that the employee's injury was not occasioned primarily by intoxication.³³¹ "Pri-

323. *See id.*

324. *See id.* § 440.09(7)(b). The blood-alcohol level required to create a presumption that the injury was occasioned primarily by intoxication is 0.10 or higher. *See* FLA. STAT. ANN. § 316.193 (West Supp. 1999).

325. *See id.* 89-506(g) (stating that, without evidence to the contrary, a presumption exists that the effect of controlled substance or intoxication of the employee was not the primary cause of the injury).

326. *See* *Orlando Waste Paper Co. v. Meadows*, 460 So. 2d 434, 436 (Fla. 1st Dist. Ct. App. 1984) "(Smith, J. concurring in part and dissenting in part). Judge Smith explained that it was erroneous for the court not to follow this purpose of Florida's Workmen's Compensation Statute in the case sub judice because there was direct evidence establishing the cause of the accident. *See id.* at 437 (citing *C.A. Meyer Paving & Constr. v. McFalls*, 453 So. 2d 912 (Fla. 1st Dist. Ct. App. 1984)." *See also* *C.A. Meyer Paving and Constr.*, 453 So. 2d 914 (finding that there was not enough evidence to rebut the presumption). *But see* *Hacker v. St. Petersburg Kennel Club*, 396 So. 2d 161, 162 (Fla. 1981) (holding that "marginal" cases should be weighed in favor of claimant).

327. *See* 1935 Fla. Laws ch. 17481-8c.

328. 189 So. 34 (Fla. 1939).

329. *See id.* at 36-37.

330. *See id.* at 36.

331. *See id.* at 37. That presumption has since been altered in favor of the em-

marily" was defined as "originally," "in the first place," and "chiefly."³³² "Intoxication" was defined as "under the influence of intoxicating liquor to such an extent as to lose the normal control of one's bodily and mental faculties."³³³ Thus, by interpreting these defined terms as they relate to the presumptions in favor of the employee, and viewing it within the entire Act, the court concluded that "primary" cause meant that in order "for intoxication to bar recovery, it must be the proximate cause of the injury without which the accident would not have occurred."³³⁴

In *Zee*, the claimant was awarded compensation based on the construction of the word "primary."³³⁵ There, the claimant, a painter, was working on a swinging scaffold on the side of a building.³³⁶ While working, the claimant jumped upon the scaffold to ensure its security.³³⁷ After resuming work, the claimant walked along the scaffold, knocked into the guard rail, which broke, causing him to fall to his death.³³⁸ The employer denied liability on the ground that intoxication caused the death of the claimant.³³⁹ The employer supplied testimony that the deceased consumed whiskey throughout the day; however, no one could attest to a precise amount, and the testifying physician could only state that the death resulted from the fall.³⁴⁰

The court noted that the claimant was still functioning alertly and performing as usual in the course of his employment.³⁴¹ Also, witnesses stated that the strength of the guard rail should have protected the employee from falling even if he was intoxicated.³⁴² Therefore, the court held that the primary cause of injury was the breaking of the guard rail and that the intoxication could have

ployer when drug or alcohol testing produces a positive confirmation of the employee's intoxication or when an employee refuses to submit to a drug or alcohol test. See FLA. STAT. ANN. § 440.09(7)(b), (c) (West Supp. 1999); see also *infra* notes 388-461 and accompanying text.

332. *Zee v. Gary*, 189 So. 34, 36 (Fla. 1939) (citation omitted).

333. *Id.* (citing 2 WORDS AND PHRASES, Second Series, 1175).

334. *Id.* at 36-37.

335. *Id.* at 38.

336. *See id.* at 35.

337. *See id.*

338. *See id.*

339. *See id.* at 36.

340. *See id.* at 35, 37.

341. *See id.* at 37.

342. *See id.*

been at most a remote cause.³⁴³ Furthermore, the court stated that although there was a possibility the employee's intoxication could have been a contributing factor to the injury, the employer must prove that the intoxication was the *primary* factor.³⁴⁴

The exact evidentiary determinations between contributing cause and primary cause became less crucial after the Florida Legislature provided employers with alcohol and drug testing procedures when an employee sustained a work related injury.³⁴⁵ If a blood alcohol level of .08 or more was found in the employee's system at the time of injury, then the burden shifted to the employee to prove by substantial evidence that the intoxication was not the primary cause of injury.³⁴⁶ After the drug tests were admitted, the court would conduct an inquiry to determine if the employee presented substantial evidence in contradiction to the blood-alcohol test results.³⁴⁷

2. Similarly Worded Statutes

Similar to the Maryland General Assembly, the Arkansas Legislature recently amended its intoxication defense statute with respect to workers' compensation.³⁴⁸ In Arkansas, an employee who incurs a workplace injury is not entitled to receive workers' compensation benefits if the injury was "substantially occasioned" by the use of alcohol, illegal drugs, or prescription drugs without a doctor's orders.³⁴⁹ During the early part of the 1980s, Arkansas decreased its standard from sole cause to substantial cause.³⁵⁰ By replacing the word "sole" with "substantial," this portion of the applicability provision replicates Maryland law.³⁵¹

In Arkansas, the presence of intoxicants creates a rebuttable presumption that the injury was substantially occasioned by the use of intoxicants.³⁵² In 1993, Arkansas repealed its presumption in favor

343. *See id.* at 38.

344. *See id.* The court noted that Florida law does not provide for contributory negligence as a bar to compensation. *See id.*

345. *See* FLA. STAT. ANN. § 440.09(7)(a)-(d) (West Supp. 1999).

346. *See id.* § 440.09(7)(b).

347. *See id.*

348. *See* ARK. CODE ANN. § 11-9-102(4)(B)(iv)(a) (Michie Supp. 1997).

349. *See id.*

350. *See id.* § 11-9-102(4)(B)(iv)(a), (b).

351. *See supra* note 136 and accompanying text.

352. *See* § 11-9-102(5)(B)(iv)(b); *Weaver v. Whitaker Furniture Co.*, 935 S.W.2d 584, 585 (Ark. App. 1996) (explicating the revised rule). In *Weaver*, the court found that illegal drugs were present in the claimant's urine and that the

of employees, replacing it with an employer favored presumption.³⁵³ Arkansas's new presumption runs contrary to Maryland's, which places the burden on the employer to prove that the employee's injury was primarily caused by intoxicants.³⁵⁴

Similarly, Iowa has enacted an intoxication defense statute that denies an employee compensation if intoxication was a "substantial" factor in causing the injury.³⁵⁵ However, Iowa's intoxication defense, unlike Arkansas and a majority of states, is encompassed under the defense of willful misconduct; intoxication is not a separate defense, but part of the general defense of willful misconduct.³⁵⁶

Iowa, like Maryland, contemplated and altered its burden of proof.³⁵⁷ However, where Maryland decreased its burden on employers,³⁵⁸ Iowa moved in the other direction by increasing the employer's burden of proof.³⁵⁹ Iowa went from requiring the employer to prove intoxication was the proximate cause,³⁶⁰ to the more strin-

claimant did not present sufficient evidence to rebut the presumption that the injury occurred because of illegal drug consumption. *See id.* at 587.

353. *See Weaver*, 935 S.W.2d at 585 (noting the shift in the presumption).

354. *See supra* note 303 and accompanying text.

355. *See* IOWA CODE ANN. § 85.16(2) (West 1996). Note, however, that Iowa's law expressly delineates drugs not prescribed by an authorized physician, and answers what happens if the intoxication was substantially caused by prescription drugs not taken in accordance with a physician's orders. *See id.* Likewise, statutes in Maryland, Florida, Arkansas, Oklahoma and Texas, all include such a provision. *See* ARK. CODE ANN. § 11-9-102(4)(B)(iv)(a) (Michie Supp. 1997) (excluding injury "substantially occasioned by . . . prescription drugs used in contravention of physician's orders . . ."); FLA. STAT. ANN. § 440.09(3) (West 1991) (excluding injury "occasioned primarily by . . . the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician . . ."); MD. CODE ANN., LAB. & EMPL. § 9-506(d)(2)(ii) (1999) (noting that compensation would not be denied "if the controlled dangerous substance was administered, taken, or used in accordance with the prescription of a physician . . ."); OKLA. STAT. ANN. tit. 85, § 11(A)(3) (West Supp. 1999) (excluding from coverage injury "resulting directly from the . . . abuse of prescription drugs . . ."); TEX. LAB. CODE ANN. § 401.013(b)(1) (West 1996) (noting that intoxication does not include "the introduction into the body of a substance taken under and in accordance with a prescription written for the employee by the employee's doctor").

356. *See* IOWA CODE ANN. § 85.16 (West 1996); *see also supra* Part III (discussing willful employee misconduct).

357. *See supra* notes 244-98 and accompanying text.

358. *See supra* note 313 and accompanying text.

359. *See* IOWA CODE ANN. § 85.16(2).

360. *See id.* *See, e.g., Farmers Elevator Co. v. Manning*, 286 N.W.2d 174, 178 (Iowa 1979) (applying a burden of proof whereby the employee's injury is not com-

gent standard of proving the intoxication was a substantial factor in causing the injury.³⁶¹

In comparison, in Oklahoma where the burden on the employer is lower, an employer will not be subject to liability if an employee sustains "[a]n injury resulting directly from the use or abuse of alcohol, illegal drugs or chemicals, or the abuse of prescription drugs . . ." ³⁶² However, the statute limits the application of the employer's defense of intoxication, allowing it to apply only if the intoxication rendered the employee unable to reason and act like an ordinary prudent person at the time of the accident.³⁶³ Furthermore, Oklahoma's statute mandates the admission into evidence of post-accident alcohol or drug testing results for the purpose of establishing intoxication.³⁶⁴

Prior to 1987, Oklahoma courts interpreted their intoxication defense statute as mandating that the intoxication must have been the sole and direct cause of the injury.³⁶⁵ However, in *Birdsell v. Phillips Petroleum Co.*,³⁶⁶ the sole and direct construction given to Oklahoma's intoxication defense statute was altered to a more lenient direct cause standard in an effort to better reflect the intent of the Legislature.³⁶⁷ In *Birdsell*, the claimant attempted to take advan-

pensable if intoxication was a proximate cause of the injury).

361. *See id.*; *see, e.g.*, 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995) (applying a burden of proof whereby the employee's injury is not compensable if intoxication was a substantial cause of the injury).
362. OKLA. STAT. ANN. tit. 85, § 11(A)(3) (West Supp. 1999).
363. *See id.* It is interesting to note that neither Maryland nor Florida connected their statutes to the reasonably prudent person standard; instead, they enacted presumptions in favor of either the employee or employer. *See supra* notes 325 and 334 and accompanying text.
364. *See* OKLA. STATE ANN. tit. 85, § 11(A)(3). This provision provides the extent of Oklahoma's procedural considerations when invoking the intoxication defense statute. *See id.*
365. *See* Bama Transp. v. Goffe, 732 P.2d 483, 484-85 (Okla. Ct. App. 1986) ("An injured employee may not recover workers' compensation for an injury that results directly and solely from his voluntary intoxication" (citing 85 O.S.1991 § 11; 85 O.S.1981 § 27 (repealed 1986))). The court in *Bama* construed section 11 in conjunction with section 27 to reach the "sole and direct" cause requirement. *See id.*; *see also* Birdsell v. Phillips Petroleum Co., 910 P.2d 1097, 1098 (Okla. Ct. App. 1995) (examining Oklahoma's statutory intoxication standard after the legislature repealed section 27 to eliminate the "sole" cause requirement).
366. 910 P.2d 1097 (Okla. Ct. App. 1995).
367. *See id.* at 1098. The court noted that the Legislature explicitly repealed section 27 and enacted no replacement provision, thereby eliminating the "sole"

tage of the earlier construction given by the court to Oklahoma's intoxication defense statute.³⁶⁸ Nonetheless, the court rejected the claimant's argument and affirmed the denial of compensation.³⁶⁹ The court found that both fatigue and intoxication were direct factors in Birdsell's death.³⁷⁰ However, the court noted that the language of the statute now precluded compensation if intoxication was simply a direct cause.³⁷¹ Therefore, where medical evidence proved that intoxication was one of the direct causes, the claimant was barred from recovery.³⁷²

In Utah, an employee's claim for disability compensation will be reduced by fifteen percent if the "major contributing cause" of the employee's injury is alcohol use, illegal drug use, or medications not taken in accordance with a prescription.³⁷³ Utah's statute sets the intoxication limit for alcohol consumption to "a blood or breath alcohol concentration of .08 grams or greater"³⁷⁴

Under Texas law, employers are not liable for injuries that occur while the employee was "in a state of intoxication."³⁷⁵ Texas law defines intoxication as having a blood alcohol concentration of .10

cause requirement. *See id.*

368. *See id.* at 1098-99.

369. *See id.* at 1098.

370. *See id.* at 1099.

371. *See id.* at 1098.

372. *See id.* at 1099; *see also* Thorton v. Troublefield, 649 P.2d 538, 540-41 (Okla. 1982) (following a "direct" cause approach to an employer's claim that its employee was inebriated at the time of injury).

373. UTAH CODE ANN. § 34A-2-302(2)(b) (Supp. 1999); *see also* Lopez v. Kaiser Steel Corp., 660 P.2d 250, 252 (Utah 1983) (acknowledging that it was a statutory mandate to reduce an employee's claim for compensation by 15 percent where the employee was intoxicated). Within section 34A-2-302(2)(b) of the statute, disability compensation is expressly excluded; as a result, it is unclear as to whether a claimant may still be awarded "medical" benefits if the cause of injury is due to intoxicants. *See* UTAH CODE ANN. § 34A-2-302(b) (Supp. 1999).

374. UTAH CODE ANN. § 34A-2-302(2)(b)(iii) (Supp. 1999). "Chemical test" may or may not exclude certain types of testing procedures. *Id.* at § 34A-2-302(3)(a).

375. TEX. LAB. CODE ANN. § 406.032(1)(A) (West 1996); *see* March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785, 787 (Tex. 1989) (maintaining that "[u]nder the Workers' Compensation Act, injuries received while in a state of intoxication are not considered 'injuries sustained in the course of employment' "); Aetna Casualty & Sur. Co. v. Silas, 631 S.W.2d 551, 553 (Tex. 1982) (grappling with the proper interpretation to be given to "intoxication"); Smith v. Traders & General Ins. Co., 258 S.W.2d 436, 438 (Tex. 1953) (reiterating "that an injury received while in the state of intoxication is not an injury sustained in the course of employment").

or more.³⁷⁶ Intoxication also includes situations where the employee does "not hav[e] the normal use of mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage . . . , a controlled substance . . . , a dangerous drug . . . , an abusable glue or aerosol paint . . . , or any similar substance"³⁷⁷

Through this cursory review of various state's intoxication defenses, it appears that Maryland courts will find it necessary to elaborate on what precisely constitutes a "primary cause"³⁷⁸ of an injury.³⁷⁹ For example, Maryland could follow Florida, and discourage habitual drug and alcohol use in the workplace, by barring compensation if an intoxicated-related injury occurs in the workplace.³⁸⁰ In addition, Maryland courts can examine case law from other states interpreting the word "primary" as it is used in similar statutes.³⁸¹ At its most basic level, the term "primary" would seem to require that the intoxication be more than a contributing factor to the accident.³⁸²

Maryland courts will need to carefully examine the presentation of evidence via the employee's own testimony (if available), other employees' testimony, the employer's or supervisor's testimony, and any medical or coroner opinions relating to the cause of the injury or death.³⁸³ To aid Maryland courts in deciphering this testimony, reference to the case law of other states, which have established certain benchmark blood-alcohol content levels that give rise to a presumption of employee intoxication, also warrant consideration.³⁸⁴

B. *Substantial Burden*

The first issue is whether Maryland courts should accept a certain baseline blood-alcohol level to give rise to a presumption of intoxication. Currently, a blood-alcohol concentration of 0.10 percent creates a presumption that the person's driving ability is impaired.³⁸⁵

376. See TEX. LAB. CODE ANN. § 401.013(a)(2) (West Supp. 2000).

377. *Id.* The definition specifically excludes medications prescribed by a physician and taken in accordance with the instructions and also excludes the inhalation of glues and paints that is incidental to the employee's work. *Id.*

378. See *supra* note 298.

379. See *supra* note 298 and accompanying text.

380. See *supra* note 323 and accompanying text.

381. See *supra* notes 329, 332 and accompanying text.

382. See *supra* note 334 and accompanying text.

383. See *supra* notes 161-209 and accompanying text.

384. See *supra* notes 324-39 and accompanying text.

385. See MD. CODE ANN., TRANSP. II § 11-127.1(a) (1999).

Additionally, Maryland courts have held that "at 0.15%, intoxication is presumed."³⁸⁶

Second, under Maryland's current statute, absent "substantial evidence" to the contrary, a presumption exists that the injury was not primarily caused by drug or alcohol intoxication.³⁸⁷ Therefore, as a subsidiary issue, if intoxication is presumed to be a cause of the on-the-job injury, a question arises as to how that presumption should be rebutted.

There is a series of cases in Florida in which, after the employer met its burden by proving that the employee was primarily intoxicated, it shifted to the employee to prove that, even though he may have appeared to be intoxicated, his injury was substantially caused by a superseding factor.³⁸⁸ The following four cases are workers' compensation cases in which the employee failed to rebut by substantial evidence the presumption of intoxication.³⁸⁹ These cases are instructive as to the variety of factual scenarios that Maryland courts may face in reviewing what types of employee offered evidence do not survive judicial scrutiny.

In *Sterling v. Mike Brown, Inc.*,³⁹⁰ test results were not an issue where, even without the blood-alcohol percentage presumption, Sterling's intoxication was found to have primarily caused his injuries.³⁹¹ The claimant, Sterling, was employed as an air conditioning mechanic at Mike Brown, Inc., an air conditioning company.³⁹² Sterling arrived around 1:30 p.m. at a joint company Christmas party, hosted partially by Mike Brown, Inc.³⁹³ About an hour and a half later, Brown and another employee took Sterling's car keys away

386. *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 5, 338 A.2d 251, 254 (1975).

387. MD. CODE ANN., LAB. & EMPL. § 9-506(g) (Supp. 1998).

388. See *infra* note 421 and accompanying text.

389. See *Sterling v. Mike Brown, Inc.*, 580 So. 2d 832, 836 (Fla. Dist. Ct. App. 1991) (affirming a decision denying recovery to an employee where the employee was involved in an intoxicated brawl); *Avalos v. Williford Farms, Inc.*, 561 So. 2d 1344, 1346 (Fla. Dist. Ct. App. 1990) (holding that an employee who was denied benefits had presented insufficient evidence to overcome Florida's presumption of intoxication); *Orlando Waste Paper Co. v. Meadows*, 460 So. 2d 434, 434 (Fla. Dist. Ct. App. 1984) (holding that there was insufficient evidence presented to rebut the presumption of intoxication), *cert. denied*, 469 So. 2d 749 (Fla. 1985); *C.A. Meyer Paving & Constr. v. McFalls*, 453 So. 2d 912, 913 (Fla. Dist. Ct. App. 1984) (same).

390. 580 So. 2d 832 (Fla. Dist. Ct. App. 1991).

391. See *id.* at 835.

392. See *id.* at 834.

393. See *id.* The party had just begun at 1:00 p.m. See *id.*

from him because they believed Sterling was too drunk to drive home.³⁹⁴ The party began to disperse at about 7:00 p.m. when a co-worker of Sterling's offered to drive him home.³⁹⁵ Sterling, becoming angry, shoved his co-worker in the chest.³⁹⁶ His co-worker then punched Sterling in the face.³⁹⁷ Sterling's head hit the floor, resulting in serious permanent injuries.³⁹⁸

Sterling argued that he was entitled to workers' compensation benefits because his injury was caused, not by his intoxication, but by his co-worker's punch to the face.³⁹⁹ However, both the trial court and the appellate court ruled against Sterling, after finding that there was sufficient evidence in the record proving otherwise.⁴⁰⁰ One co-worker testified that "Sterling drank between thirteen and fifteen eight-ounce cups of beer . . . between . . . 1:00 and 3:00 or 4:00 p.m."⁴⁰¹ Within those few hours Sterling exhibited crazed behavior: screaming and raving when his keys were taken from him, tearing his shirt off, and tearing the pockets off of his co-workers' shirts.⁴⁰² From 4:00 p.m. to 7:00 p.m., Sterling tapered off the drinking, yet his irrational behavior and slurred speech continued.⁴⁰³ There was also evidence presented that when Sterling got drunk, he was susceptible to becoming aggressive.⁴⁰⁴

Thus, because of the uncontroverted evidence on the record regarding Sterling's furious behavior, the appellate court affirmed the trial court's holding that Sterling's injury was caused primarily by his own intoxication.⁴⁰⁵ Although Sterling offered another cause for his injury—the co-employee's blow to his face—he could not prove his theory by substantial evidence.⁴⁰⁶ The court noted there was no evidence presented that a "completely sober man could have

394. *See id.*

395. *See id.*

396. *See id.*

397. *See id.*

398. *See id.*

399. *See id.* at 835-36 (concluding that it was reasonable for the trial judge to determine that *but for* Sterling's intoxication and confrontation, the assault would not have taken place).

400. *See id.*

401. *Id.* at 835.

402. *See id.*

403. *See id.* at 835-36.

404. *See id.* at 836.

405. *See id.* The dissenting opinion stressed the substantial weight of the evidence and the application of controlling law. *See id.* at 837 (Ervin, J., dissenting).

406. *See id.* at 836.

suffered the same accident."⁴⁰⁷ The court concluded that, "[o]n th[e] record, it was reasonable for the judge to conclude that, but for Sterling's intoxicated confrontation with [his co-worker], the assault would not have taken place."⁴⁰⁸

In *Avalos v. Williford Farms, Inc.*,⁴⁰⁹ a Florida appellate court entered the same verdict when presented with a case that was strikingly similar to *Sterling*.⁴¹⁰ Avalos was employed by and lived on Williford Farms.⁴¹¹ One evening at the farm, while off duty, a co-worker, Javier, had a few drinks and fired a couple of shots from his gun.⁴¹² Becoming annoyed from the gun shots, Avalos, who had also been drinking, confronted Javier at his living quarters.⁴¹³ A brawl ensued from which Avalos was injured.⁴¹⁴ There were varying stories from both parties and witnesses as to the actual physical provocation and as to what fighting occurred thereafter.⁴¹⁵ The trial judge found no credible testimony and held that the claim was not compensable.⁴¹⁶ The judge reasoned that, but for the claimant's intoxication, the brawl with the co-worker would not have occurred.⁴¹⁷ As in *Sterling*, the employee was unable to overcome the presumption that his injuries were primarily caused by his intoxication.⁴¹⁸ Furthermore, Avalos, like Sterling, could not prove "that a 'completely sober man could have suffered the accident' that [he] suffered."⁴¹⁹

In Florida, scientific tests raise the presumption that the claimant was intoxicated beyond the allowable limit prescribed by stat-

407. *Id.*

408. *Id.*

409. 561 So. 2d 1344 (Fla. Dist. Ct. App. 1990).

410. *See id.* at 1345-46; *Sterling*, 580 So. 2d at 833-34; *Hopkins v. Diversified Steel Servs.*, 452 So. 2d 144, 144 (Fla. Dist. Ct. App. 1984) (holding that claimant was not entitled to compensation because "his injuries were [caused] primarily by his intoxication or because he was the aggressor in a fight").

411. *See Avalos*, 561 So. 2d at 1345.

412. *See id.*

413. *See id.*

414. *See id.*

415. *See id.* Avalos testified that, after he asked Javier to stop because the gun shots woke his children, Javier attacked him with the butt of his gun. *See id.* Conversely, Avalos's girlfriend testified that only one of the three children was awake. *See id.* Javier testified that he struck Avalos in self-defense only after Avalos tried to hit him. *See id.*

416. *See id.* at 1346.

417. *See id.*

418. *See id.*

419. *Id.*

ute.⁴²⁰ Once the results of a blood-alcohol test raise the presumption of intoxication, the employee can rebut the presumption.⁴²¹

In a case interpreting these provisions, *Orlando Waste Paper Co. v. Meadows*,⁴²² the appellate court reversed the commissioner's determination that the claimant presented substantial evidence to overcome positive blood-alcohol test results that normally warranted a presumption of intoxication at the time of injury.⁴²³ The claimant, Meadows, worked on a loading dock for employer, Orlando Waste Paper Company.⁴²⁴ One day, as Meadows was operating a fork lift, he drove backwards off the edge of the loading dock and died.⁴²⁵ The autopsy results revealed that Meadows's blood-alcohol level was .149 percent when the accident occurred.⁴²⁶

Uncontested testimony showed that Meadows had been drinking on the day of the accident.⁴²⁷ One co-worker stated that it was apparent Meadows had been drinking, as his eyes appeared "glossy" and he acted "high."⁴²⁸ Other employees who had previously used the same fork lift as Meadows had no problem with the brakes or steering, and, after the accident, a private investigator examining

420. See FLA. STAT. ANN. § 440.09(7)(b) (West, Supp. 2000) (providing that when an employee has a blood-alcohol level equal or greater than the level specified in the motor vehicle title, there is a presumption the injury was "occasioned primarily by the intoxication . . . of the employee") (citing *id.* § 316.193) (specifying the blood-alcohol level for a determination of intoxication for purposes of driving under the influence of alcohol as .08 percent or higher)); see also *City of Tampa v. Green*, 390 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 1980) (holding that the Workers' Compensation Deputy Commissioner has discretion to determine the reliability of the test being offered into evidence during the initial trial).

421. See FLA. STAT. ANN. § 440.09(7)(b). If the employer has a drug-free workplace plan, the presumption may be rebutted "only by evidence that there is no reasonable hypothesis that the intoxication . . . contributed to the injury." *Id.* If there is no drug-free program, the employee may rebut the presumption by "clear and convincing evidence that the intoxication . . . did not contribute to the injury." *Id.*

422. 460 So. 2d 434 (Fla. Dist. Ct. App. 1984).

423. See *id.* at 434.

424. See *id.*

425. See *id.*

426. See *id.*

427. See *id.* One co-worker testified that Meadows drank three beers before noon and shared a half-pint of gin and grapefruit juice with another co-worker. See *id.* at 434-35. Furthermore, Meadows had a record of drinking on the job. See *id.* at 435.

428. *Id.*

the lift could not detect any defects.⁴²⁹

Claimant's rebuttal evidence rested on the testimony of two witnesses and his widow.⁴³⁰ The two witnesses testified that Meadows "did not appear intoxicated."⁴³¹ His wife testified that Meadows "could 'hold his liquor.'"⁴³² To effectively rebut the presumption of intoxication the claimant must show either an independent or superseding cause of the accident,⁴³³ or that the accident would have happened despite intoxication.⁴³⁴

After considering the positive blood-alcohol test, co-workers' testimony, documentary evidence and the totality of the circumstances, the court concluded that the primary cause of the accident was the claimant's intoxication.⁴³⁵

In *C.A. Meyer Paving & Construction v. McFalls*,⁴³⁶ the appellate court, like the court in *Orlando Waste Paper Co.*,⁴³⁷ reversed the trial court's holding that the claimant had presented substantial evidence to rebut the presumption of positive blood-alcohol test results.⁴³⁸ The claimant, McFalls, was returning to the job site after picking up equipment parts when he crashed his car and died.⁴³⁹ An autopsy revealed a blood-alcohol level of .196 percent at the time of death,⁴⁴⁰ raising the presumption of intoxication under the statute.⁴⁴¹

429. *See id.*

430. *See id.*

431. *Id.*

432. *Id.*

433. *See id.* (citing *City of Tampa v. Green*, 390 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 1980) (concluding that substantial evidence provided by the claimant warranted the commissioner's conclusion that the primary cause of the injury was not intoxication)).

434. *See id.* at 415. *But see* *R.P. Hewitt & Assocs. of Fla. v. Murnighan*, 382 So. 2d 353, 355 (Fla. Dist. Ct. App. 1980) (concluding that the claimant met the burden of proof by showing substantial evidence that intoxication was not the primary cause of the accident).

435. *See Orlando Waste Paper Co.*, 460 So. 2d at 435. *But see id.* at 434 (Smith, J., dissenting) (arguing that the limited function of appellate review does not allow for a reweighing of the evidence presented and that the majority expropriated the fact-finder's duty reversing the Deputy Commissioner).

436. 453 So. 2d 912 (Fla. Dist. Ct. App. 1984).

437. *See supra* notes 326-435 for a discussion of *Orlando Waste Paper Co.*

438. *See C.A. Meyer Paving & Constr. v. McFalls*, 453 So. 2d 912, 912 (Fla. Dist. Ct. App. 1984).

439. *See id.* at 912-13.

440. *See id.* at 913.

441. *See id.* (citing FLA. STAT. ANN. § 440.09(3) (West Supp. 2000)).

McFalls's dependents rebutted the presumption by providing testimony of co-workers claiming they had not seen him drinking, nor had he appeared drunk before he departed.⁴⁴² Furthermore, there was no evidence of alcohol in the vehicle that could have proven McFalls was drinking after he departed and while he was driving.⁴⁴³ Nonetheless, this evidence did not prove to be substantial enough to overcome the statutory presumption of intoxication.⁴⁴⁴ Specifically, the court noted that even though McFalls did not appear intoxicated when he departed, his two and a half hour absence prior to the accident was never explained.⁴⁴⁵ Hence, the court held that the presumption of section 440.09⁴⁴⁶ was not rebutted and that the primary cause of the claimant's accident was his own intoxication.⁴⁴⁷

In *R.P. Hewitt & Associates of Florida v. Murnighan*,⁴⁴⁸ the court awarded Murnighan, an experienced ironworker, workers' compensation benefits in connection with an injury he sustained while employed by R.P. Hewitt.⁴⁴⁹ Murnighan and a co-worker had been welding iron grating to horizontal supports on a stairway forty feet above the ground.⁴⁵⁰ The grating slipped, and Murnighan fell between the supports with half of his torso through the hole.⁴⁵¹

Murnighan and his co-employee had two or three beers with their lunch, a practice that was condoned by the foreman.⁴⁵² Murnighan's blood-alcohol level was recorded at 0.14,⁴⁵³ greater than the statutorily prescribed level.⁴⁵⁴ Five doctors testified, but not definitively, to Murnighan's intoxicated condition.⁴⁵⁵ In rebuttal, the claimant's partner, his foreman, and other co-workers testified that

442. *See id.* at 913-14.

443. *See id.* at 913.

444. *See id.* (disagreeing there was substantial evidence to rebut the presumption of intoxication).

445. *See id.* at 913-14.

446. *See* FLA. STAT. ANN. § 440.09 (providing a presumption of intoxication).

447. *See* *McFalls*, 453 So. 2d at 913.

448. 382 So. 2d 353 (Fla. Dist. Ct. App. 1980).

449. *See id.* at 354.

450. *See id.*

451. *See id.*

452. *See id.*

453. *See id.*

454. *See* FLA. STAT. ANN. § 440.09(3) (West Supp. 2000) (referencing the motor vehicle title, which provides that the blood-alcohol level for a driving while intoxicated charge is .10 percent).

455. *See* *Murnighan*, 382 So. 2d at 354.

not only did Murnighan not appear drunk during the course of the day, but that grating work was normally quite hazardous.⁴⁵⁶ The claimant's partner stated that the accident actually occurred as a result of the grating already being out of line prior to Murnighan's fall.⁴⁵⁷

Based upon the totality of the circumstances, the reviewing court agreed with the lower court, holding that the claimant's injury was not occasioned primarily by his intoxication.⁴⁵⁸ Sufficient testimony was presented to overcome the statutory presumption.⁴⁵⁹ The claimant was able to demonstrate that the dangerous occupation in connection with the attendant circumstances surrounding the accident was enough to be the primary cause of the injury.⁴⁶⁰ Furthermore, the evidence indicated that a "completely sober man could have suffered the same accident."⁴⁶¹

It is interesting to note that, in the first three cases examined, the employee had died and therefore was unable to provide his own rebuttable testimony. Whereas, in *Murnighan*, the employee survived, offering his own testimony to rebut the scientific test results. This is instructive to Maryland law, as it appears that if the person who is claiming benefits is available to testify, the scale may be tipped in favor of the employee receiving workers' compensation benefits.

In Arkansas, an employee can rebut the presumption of intoxication by a preponderance of the evidence that the intoxicants did not substantially cause the injury.⁴⁶² Maryland law omits an evidentiary standard for employer rebuttal.⁴⁶³ Florida, on the other hand, explicitly requires the employee to rebut by substantial evidence in

456. *See id.*

457. *See id.*

458. *See id.* at 355.

459. *See id.*

460. *See id.* at 353 (agreeing with the trial judge's conclusion that the accident "primarily resulted from the inherent dangerousness of [the appellee's] work upon the grating").

461. *Id.* at 355. *But see* *Sterling v. Mike Brown, Inc.*, 580 So. 2d 832, 836 (Fla. Dist. Ct. App. 1991) (holding for defendant because, although decedent's dependents offered another cause for Sterling's death, there was insufficient evidence to avoid the presumption of intoxication); *Avalos v. Willford Farms, Inc.*, 561 So. 2d 1344, 1346 (Fla. Dist. Ct. App. 1990) (holding that a deceased's dependants did not prove that there could have been another cause of the deceased's accident besides intoxication).

462. ARK. CODE ANN. § 11-9-102(4)(B)(iv)(d) (Michie Supp. 1999).

463. *See supra* note 387 and accompanying text.

order to overcome the presumption of intoxication.⁴⁶⁴

C. Procedural Error, Scientific Testing

In the past few years, Florida courts have heard cases on the admissibility and reliability of blood-alcohol testing procedures.⁴⁶⁵ In *Beasley v. Mitel of Delaware*,⁴⁶⁶ the examiners failed to follow the proper alcohol testing procedures, which resulted in a finding that the blood-alcohol test was unreliable.⁴⁶⁷ After Beasley died in a high speed car crash, his blood sample revealed a blood alcohol level of 0.16.⁴⁶⁸ Beer cans and the aroma of alcohol filled the car, yet the investigating officer could not testify to the fact that Beasley drank any alcohol because the officer did not see him prior to the accident.⁴⁶⁹

The crux of this case did not involve rebutting the statutory presumption of intoxication,⁴⁷⁰ rather, the claimant's dependents objected to the procedure utilized when testing his blood-alcohol level.⁴⁷¹ They contended, and the court agreed, that the evidentiary admission fell outside the scope of the statutorily prescribed standards.⁴⁷² Because the trial court admitted test results into evidence without certifying their authenticity, the appellate court reversed, holding that Florida law demands substantial compliance with statutory procedure when determining blood-alcohol levels.⁴⁷³ Thus, the

464. See *supra* notes 388-461 and accompanying text.

465. See *Domino's Pizza v. Gibson*, 668 So. 2d 593, 596 (Fla. 1996) (holding that testing a claimant's blood serum is a proper way to test blood-alcohol content); *J & J Baker Enters. v. Gaylord*, 676 So. 2d 67, 68 (Fla. Dist. Ct. App. 1996) (following *Gibson* by adhering to the admissibility of blood serum testing to raise the required statutory presumption of intoxication); *George H. Austin, Inc., v. Gardner*, 440 So. 2d 35, 36 (Fla. Dist. Ct. App. 1983) (holding that Florida law relies on the percentage of blood-alcohol content at the time of the employee's injury, not at the time the test is administered; thus, a reading of exactly .10 would still raise the statutory presumption of intoxication).

466. 449 So. 2d 365 (Fla. Dist. Ct. App. 1984).

467. See *id.*

468. See *id.* at 366.

469. See *id.*

470. See *id.*

471. See *id.*

472. See *id.*; See also FLA. STAT. ANN. § 316.1933(2)(a) (West 1990) (delineating who is authorized to draw blood); FLA. STAT. ANN. § 316.1933(2)(b) (West 1990) (providing how blood is to be drawn and subsequently analyzed).

473. See *Beasley*, 449 So. 2d at 367; FLA. STAT. ANN. § 316.1934(2). But see *Tampa v. Green*, 390 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 1980) (holding that the admissibility of blood-alcohol tests rests in the discretion of the Deputy Commis-

court maintained that the totality of the circumstances in *Beasley* exhibited "a lack of trustworthiness," and awarded the claimant compensation.⁴⁷⁴

The Supreme Court of Florida, in *Domino's Pizza v. Gibson*,⁴⁷⁵ certified that testing a claimant's blood serum, rather than whole blood, is a reliable method, and thus admissible.⁴⁷⁶ The court reasoned that Florida law, neither expressly nor impliedly, imposed restrictions on the procedure for proving blood-alcohol content.⁴⁷⁷ Furthermore, serum blood-alcohol tests satisfied the *Frye* standard of general scientific approval that Florida courts have followed for decades.⁴⁷⁸ Thus, the *Gibson* court held that "the admission of evidence bear[s] upon an employee's intoxication comport[ing] with the purpose of the statute, namely that an employee is not entitled to receive workers' compensation benefits if an injury was caused by the employee's intoxication."⁴⁷⁹

However, a different approach to admissibility of tests has been taken by the Arkansas Legislature. According to Arkansas law, simply by working, an employee "impliedly consent[s] to reasonable and responsible [drug or alcohol] testing" by established profession-

sioner at trial).

474. *Beasley*, 449 So. 2d at 367. The court also concluded that based upon the totality of the circumstances, the "lack of trustworthiness" in the procedures utilized would also warrant the test results inadmissible under the business record hearsay exception. *See id.* (citing FLA. STAT. ANN. § 90.803(6)); *see also* *Brown v. State*, 389 So. 2d 269, 270 (Fla. Dist. Ct. App. 1980) (finding that, although not reversible error, the trial court improperly allowed a doctor to testify about medical tests he neither performed nor had any knowledge regarding the actual testing processes).

475. 668 So. 2d 593 (Fla. 1996).

476. *See id.* at 594.

477. *See Domino's Pizza*, 668 So. 2d at 595, *overruling*, *Florida Tile Industr. v. Dozier*, 561 So. 2d 654, 655 (Fla. Dist. Ct. App. 1990) (holding that section 440.09(3) required claimant's whole blood to be tested, not the blood serum). The *Gibson* court disagreed "with *Florida Tile's* narrow construction of section 440.09(3)." *Id.* Note that both cases were based upon the language of the 1991 statute. *See id.* at 595 n.2. To correct for the varying court interpretations of section 440.09(3), the Florida legislature amended the section in 1994 to expressly allow for the use of blood serum to test for blood-alcohol level. *See* FLA. STAT. ANN. § 440.09(7)(b) (West Supp. 2000).

478. *See Domino's Pizza*, 668 So. 2d at 596; *see also* *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that a "sufficiently established" scientific principle or discovery can be admitted at trial as expert testimony); *Hayes v. State*, 660 So. 2d 257, 262 (Fla. 1995) (reaffirming the *Frye* test in Florida).

479. *Domino's Pizza*, 668 So. 2d at 596.

als familiar with testing procedures.⁴⁸⁰ However, Arkansas does not detail what is reasonable and responsible testing.

Maryland's statute is silent on the issue of testing and testing procedures.⁴⁸¹ Therefore, an examination of what types of blood-alcohol tests have been accepted by other courts, should provide Maryland with sufficient guidance as to what kinds of procedures should be allowed into evidence.⁴⁸² For example, Florida's law expressly outlines what types of scientific analyses will be admissible.⁴⁸³ Maybe Maryland courts will decide, as have the Arkansas courts, that the employer-employee relationship itself permits reasonable and adequate drug and alcohol testing procedures to be automatically used in determining the cause of work-related injuries.

D. Estoppel

One issue Maryland must address is whether to permit any exceptions to the intoxication defense. Professions that warrant a special exception, such as, those where being allowed to drink on the job is permitted, including undercover law enforcement officers or alcohol salesmen, should be examined. Courts also have to determine whether there are any occasions when drinking on the job should not be allowed. For example, holiday parties or after-hours functions. A final area that must be addressed is the consequences of an employer being aware of an employee's drinking on the job and refusal to take any action.

Florida law, unlike Maryland law, provides the employee with a defense to the employer's statutory presumption that when alcohol is involved in an accident, the claimant's injury is primarily caused by intoxication.⁴⁸⁴ Specifically, the employer will be estopped from raising the defense of employee intoxication if, prior to the accident, the employer had "actual knowledge of and expressly acquiesced in the employee's presence at the workplace while under the influence of such alcohol or drug."⁴⁸⁵

Construing the precise meaning of the estoppel clause has been heavily debated in the Florida courts.⁴⁸⁶ Most recently, the

480. ARK. CODE ANN. § 11-9-102(4)(B)(iv)(c) (Michie Supp. 1999).

481. See MD. CODE ANN., LAB & EMPL. § 9-506 (1999).

482. See *supra* notes 345-47 and accompanying text.

483. See *supra* note 346 and accompanying text.

484. FLA. STAT. ANN. § 440.09(7)(b) (West Supp. 2000).

485. *Id.*

486. See *Stepanek v. Rinker Materials Corp.*, 697 So. 2d 200, 202 (Fla. Dist. Ct. App. 1997) (construing the precise language of the estoppel defense to mean that

Florida appellate court, in *Stepanek v. Rinker Materials Corp.*,⁴⁸⁷ attempted to put an end to this debate. Stepanek appeared for work one day after an evening of heavy boozing and insufficient rest.⁴⁸⁸ His supervisor, smelling alcohol on his breath, did not confront Stepanek for fear of being mistaken.⁴⁸⁹ While Stepanek boarded a cinder block cubing machine to arrange some cinder blocks, the operator of the machine, not noticing Stepanek's location, rolled over Stepanek's foot.⁴⁹⁰

Tests revealed Stepanek's blood-alcohol level to be 0.15 percent,⁴⁹¹ which invoked the presumption of intoxication.⁴⁹² However, Stepanek claimed that the employer was estopped from utilizing the presumption, because his supervisor knew that he was intoxicated before he began working that day.⁴⁹³ The court held that, although testimony demonstrated the supervisor knew that Stepanek was under the influence of alcohol, that evidence did not amount to the supervisor's "express acquiesce[nce] in this state of affairs."⁴⁹⁴

"a claimant must show the employer made some overt expression, either by words or conduct, showing that although the employer knew the claimant was under the influence of intoxicants, the claimant could nevertheless remain at work . . ."); *Sterling v. Mike Brown, Inc.*, 580 So. 2d 832, 834-35 (Fla. Dist. Ct. App. 1991) (applying a three-prong test in holding that an employer was not estopped from raising the intoxication defense where the employer derived no business benefit from a company Christmas party); *Avalos v. Williford Farms, Inc.*, 561 So. 2d 1344, 1346 (Fla. Dist. Ct. App. 1990) (holding that specific employer involvement, demonstrating approval of employees' intoxication, was required to estop an employer from raising the intoxication defense, and finding that casually sharing a few beers with employees was not sufficient to meet that requirement); *West Fla. Distribs. v. Laramie*, 438 So. 2d 133, 135-36 (Fla. Dist. Ct. App. 1983) (holding that employer was estopped from raising intoxication defense where employer expressed it was a common practice of employees to drink on the job as part of their employment as liquor salesmen to further their product knowledge). *Cf. Duval Eng'g & Contracting Co. v. Johnson*, 16 So. 2d 290, 292 (Fla. 1944) (holding an employer was not estopped from raising defense of intoxication where employee suffered accident in connection with an annually established social function financed by the employer and meant to derive more business for the employer).

487. 697 So. 2d 200 (Fla. Dist. Ct. App. 1997).

488. *See id.* at 201.

489. *See id.* at 201-02.

490. *See id.* at 201.

491. *See id.*

492. *See* FLA. STAT. ANN. § 440.09(7)(b) (West Supp. 2000).

493. *See Stepanek*, 697 So. 2d at 202.

494. *Id.*

In construing what the legislature meant by "express acquiescence," the court determined that "[e]xpress' mean[t] clear and unmistakable, not left to inference, while 'acquiescence' mean[t] passive compliance or assent inferred from silence."⁴⁹⁵ Presuming that the legislature did not intend "'express acquiescence' to be a contradiction in terms,"⁴⁹⁶ the court held that the employee must prove the "employer made some overt expression, either by words or conduct, showing that although the employer knew the claimant was under the influence of intoxicants, the claimant could nevertheless remain at work in such condition."⁴⁹⁷ The court stated there was no certain knowledge on the employer's part that Stepanek was indeed intoxicated and no such overt communication that Stepanek could remain on the job while under the influence.⁴⁹⁸ Therefore, the court concluded that the claimant's injury was primarily caused by his intoxication.⁴⁹⁹

In Iowa, the court went beyond statutory law and established an exception to the general workers' compensation rule whereby "[work related] injuries caused by intoxication are generally not compensable."⁵⁰⁰ In *2800 Corp. v. Fernandez*,⁵⁰¹ the employer was held liable for an employee's injuries where evidence was sufficient to support the conclusion that the employer condoned drinking on the job.⁵⁰² The court reasoned that where the employer encourages drinking to benefit business, the employer should be held responsible for foreseeable injuries suffered by the employee as a result of his or her intoxication.⁵⁰³

Similarly, in Utah, there are two exceptions for which a claimant may still be awarded compensation benefits even though intoxicants are found to be the major contributing cause of the employee's injury.⁵⁰⁴ First, consistent with Florida and Iowa, Utah estops an employer from raising the intoxication defense "when the

495. *Id.* (citing BLACK'S LAW DICTIONARY 580, 24 (6th ed. 1990)).

496. *Id.*

497. *Id.*

498. *See id.*

499. *See id.*

500. *2800 Corp. v. Fernandez*, 528 N.W. 124, 128 (Iowa 1995) (examining a workers' compensation claim filed by an exotic dancer who was injured on her way home from work due to her intoxicated condition, which was known and condoned by her employer).

501. 528 N.W. 124 (Iowa 1995).

502. *See id.*

503. *See id.*

504. *See UTAH CODE ANN. § 34A-2-302* (1999).

employer permitted, encouraged, or had actual knowledge of the [employee's use of illegal substances or alcohol.]”⁵⁰⁵ Second, in contrast to a majority of states, Utah will disregard the cause of injury and award compensation to the dependents of an employee in cases of work-related injury that result in the employee's death.⁵⁰⁶

Viewing other states' exceptions to the intoxication defense gives Maryland courts guidance when deciding whether to allow employees to raise certain issues in order to rebut the fact that alcohol was indeed the primary cause of their injuries. Generally, it has been accepted that a showing of additional evidence that the employer “permitted” the consumption of alcoholic beverages may, nevertheless, entitle an employee to receive workers' compensation benefits.⁵⁰⁷

E. Miscellaneous Issues

The Florida statute addresses two particular areas of workers' compensation benefits and injury resulting from employee intoxication which generates some doubt as to whether the General Assembly should make substantive changes to Maryland's law. First, the Florida statute addresses the issue of what conclusion, if any, can be drawn from an employee who suffers an injury, yet refuses to take a breathalyser or drug test. Florida law, unlike the new Maryland law, provides for a presumption of intoxication if the employee refuses to take a drug test.⁵⁰⁸ The statute states: “[i]f the injured worker refuses to submit to a drug test, it [is] presumed in the absence of clear and convincing evidence to the contrary that the injury was occasioned primarily by the influence of drugs.”⁵⁰⁹

Second, the Florida statute also provides for a Drug Free Workplace program, which entitles participating employers to greater benefits when invoking the statute as a defense.⁵¹⁰ One such benefit is that a higher burden of proof is placed upon the employee when countering that intoxication was not the primary cause of injury.⁵¹¹ For example, if an employee tests positively for drugs or alcohol in

505. *Id.* § 34A-2-302(2)(b).

506. *See id.* § 34A-2-302(2). Subsection (2) was added by amendment effective May 1, 1995. *See* 1995 UTAH LAWS ch. 328, § 2.

507. *See supra* notes 484-503 and accompanying text.

508. *See* FLA. STAT. ANN. § 440.09(7)(a)-(d) (West 1991 & Supp. 1999).

509. *Id.* § 440.09(c).

510. *See id.* § 440.09(7)(b).

511. *See* FLA. STAT. ANN. § 440.09(7)(b) (West 1991 & Supp. 1999).

accordance with statutory procedures, the presumption of intoxication against the employee can only be rebutted

[B]y evidence that there is no reasonable hypothesis that the intoxication or drug influence contributed to the injury. In the absence of a Drug-Free Workplace program, [the] presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury.⁵¹²

Another benefit for employers substantially complying with the Drug Free Workplace Initiative is that no "compensation," meaning both disability and medical benefits, will be awarded to a claimant if injury was primarily caused by intoxication.⁵¹³ Maryland also denies full compensation to claimants, but only if the injury was occasioned solely by the employee's intoxication.⁵¹⁴ Otherwise, only disability benefits will be denied.⁵¹⁵ Medical benefits can still be awarded under sections 9-660 and 9-661.⁵¹⁶

The issues addressed by the Florida statute, but not by Maryland law, may necessitate Maryland legislators making substantive changes to the law. Meanwhile, as Florida is the only jurisdiction with an intoxication standard of review verbatim to Maryland's, courts in Maryland may refer to Florida's workers' compensation statute and case law for guidance.

VII. CONCLUSION

The workers' compensation system is based upon social principles.⁵¹⁷ The social responsibility is to financially compensate those who, as a result of an unfortunate accident, are injured on the job.⁵¹⁸ However, the system has evolved to the point where some persons are not protected. Employees who are intoxicated while

512. *Id.* However, no presumption in the employer's favor is applied if it is determined that the employer expressly acquiesced to the intoxication or drug use. *See id.* *See supra* Part VI.D for a discussion of when an employer is estopped from raising the intoxication defense.

513. *See id.* § 440.09(3); *see also* *Gustafson's Dairy, Inc./Prof'l Adm'rs Inc. v. Phillips*, 656 So. 2d 1386, 1388-89 (Fla. Dist. Ct. App. 1995).

514. *See* MD. CODE ANN., LAB. & EMPL. § 9-506(b), (c) (1999).

515. *See id.*

516. *See id.* § 9-506(d).

517. *See supra* Parts II, III (discussing the historical development of the workers' compensation system).

518. *See supra* Parts II, III (discussing the general nature of the workers' compensation system).

working not only pose a hazard to themselves, but also to their fellow workers.⁵¹⁹ As it has been shown, intoxicated employees are responsible for increasing employers' insurance costs.⁵²⁰ Thus, awarding benefits to employees who are injured due to their own intoxication is socially irresponsible and strikes at the very foundation of the workers' compensation system.⁵²¹

Since its inception, the Maryland Workers' Compensation Act has included an "intoxication" defense to claims for benefits by injured workers.⁵²² However, the scope of the defense was narrowly defined by the statute and strictly applied by the Commission and the courts.⁵²³ Specifically, in order to bar recovery of compensation benefits, an employee's intoxication must have been the sole cause of the accident.⁵²⁴ Consequently, some employers were forced to pay benefits to employees for injuries seemingly caused by their own fault. For example, the estate of an employee killed after consuming approximately two one-half pints of liquor before falling down a stairwell was not precluded from recovery.⁵²⁵ The employer, invoking the intoxication defense, did not meet his burden of showing not only that the employee was intoxicated, but also that his death or injury was solely occasioned by the intoxication.⁵²⁶

In 1998, as a result of the inequity in the law, the Maryland intoxication defense was changed.⁵²⁷ Section 9-506 now provides that there shall be no liability for monetary compensation where the injury was primarily caused by the intoxication of the injured employee.⁵²⁸ If the defense is proven, the only benefit available to the claimant under the Workers' Compensation Act is medical care and treatment.⁵²⁹ As with the prior version of the Act, this revised ver-

519. See *supra* Part IV.B (discussing the magnitude of substance abuse in the workplace and its effects on the workers' compensation system).

520. See *supra* note 148 and accompanying text (discussing the increased costs due to substance abuse).

521. See *supra* notes 250-74 and accompanying text.

522. See *supra* Part IV.A for a discussion the affirmative defense of intoxication.

523. See *supra* Part V.A for a discussion of Maryland's sole cause case history and its strict application.

524. See *supra* note 159 and accompanying text.

525. See *supra* 161-72 and accompanying text.

526. See *supra* notes 171-72 and accompanying text.

527. See *supra* Part V.B for a discussion of Maryland's legislative development of the present Labor and Employment section 9-506.

528. See *supra* notes 152-227 and accompanying text for a discussion of Maryland's sole cause case history and its strict application.

529. See *supra* notes 299-303.

sion still mandates that employers bear the burden of proof when invoking this affirmative defense.⁵³⁰

However, section 9-506 also provides a presumption in favor of employees.⁵³¹ Specifically, the statute states that, "absent substantial evidence to the contrary, [there is] a presumption that the intoxication of the covered employee was not the primary cause of the accidental personal injury, compensable hernia, or occupational disease."⁵³² This presumption has proven to be the determining factor in cases where intoxication is raised as a defense.⁵³³

The newly enacted Maryland Workers' Compensation Act's primary cause standard is unique by nationwide standards.⁵³⁴ In fact, Florida is the only other state to adopt this language.⁵³⁵ While the standard lies somewhere between intoxication being the sole cause of the accident and intoxication being simply a cause of an injury,⁵³⁶ the exact meaning of this standard has not yet been construed by Maryland courts. Therefore, a review of cases in which this standard was applied in Florida courts could play a critical role for Maryland's commissioners and judges.⁵³⁷

Although the Maryland General Assembly altered the standard of review for the intoxication defense, it left unresolved some of the basic procedures to guide employers in how to utilize the affirmative defense.⁵³⁸ Specifically, the statute does not address the manner in which the presence of illicit substances must be established.⁵³⁹ Further, the statute does not discuss the weight of proof required for an employer to rebut the presumption, nor does it detail what types of evidence will be deemed admissible.⁵⁴⁰ Also, the statute does not explicitly address the situation where an employee unjustifiably refuses to submit to a drug or alcohol test.⁵⁴¹ As the foregoing

530. See *supra* note 303 and accompanying text.

531. See *supra* notes 281-82.

532. MD. CODE ANN., LAB. & EMPL. § 9-506(g)(2) (1999).

533. See *supra* Parts V.A and V.B.

534. See Appendix.

535. See *id.*

536. See *supra* Part V for a discussion of different causation standards of intoxication.

537. See *supra* Part VI.

538. See *supra* Part VI for a discussion of the proposed effects and possible issues stemming from section 9-506 accompanied by an examination of other state's statutes and resulting case law.

539. See *supra* notes 378-84, 507, 514 and accompanying text.

540. See *supra* notes 385-87 and accompanying text.

541. See *supra* notes 298-308, 508-09 and accompanying text.

illustrates, many procedural issues remain unresolved, both in general and regarding the effect that the new decreased standard may have on the revised Workers' Compensation Act.⁵⁴²

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542. *See supra* notes 517-41 and accompanying text.

APPENDIX

| STATE | DISQ- YES | DISQ- NO | PENALTY | STANDARD OF REVIEW |
|--|--------------|-------------|-------------------|--|
| ALA. CODE § 25-5-51 (1992) | X | | 0.00 | Due to; Caused by |
| ALASKA STAT. § 23.30.235 (Michie 1998) | X | | 0.00 | Proximately cause |
| ARIZ. REV. STAT. (1998) | | X | | No provision |
| ARK. CODE ANN. § 11-9- 102(5)(B)(iv)(a) (Michie 1996) | X | | 0.00 | Substantially occasioned by |
| CAL. LAB. CODE § 3600(a)(4) (West 1989) | X | | 0.00 | Caused by |
| COLO. REV. STAT. ANN. § 8-42-112 (West 1994) | X | | Reduced by 50% | Results from |
| CONN. GEN. STAT. ANN. § 31-284(a); § 31- 275(1c) (West 1997) | X | | 0.00 | Caused by |
| DEL. CODE ANN. tit. 19, § 2353(b) (1995) | X | | 0.00 | As a result of |
| D.C. CODE ANN. § 36- 303(d) (1997) | X | | 0.00 | Occasioned solely by |
| FLA. STAT. ANN. § 440.09(3) (West 1991) | X | | 0.00 | Occasioned primarily by |
| GA. CODE ANN. § 34-9- 17(b) (1998) | X | | 0.00 | Due to |
| HAW. REV. STAT. ANN. § 386-3 (MICHIE 1993) | X | | 0.00 | Incurred by; Caused by |
| IDAHO CODE § 72-208 (1999) | X | | 0.00 | Reasonable and substantial cause of |
| ILL. COMP. STAT. (West 1993) | | X | | No provision |
| IND. CODE ANN. § 22-3- 2-8 (Michie 1997) | X | | 0.00 | Due to |
| IOWA CODE ANN. § 85.16(2) (West 1996) | X | | 0.00 | Substantial factor |
| KAN. STAT. ANN. § 44- 501(d)(2) (1996) | X | | 0.00 | Contributed to |

| | | | | |
|--|---|---|------|-------------------------------------|
| KY. REV. STAT. ANN. § 342.610(3) (Banks- Baldwin 1999) | X | | 0.00 | Due to |
| LA. REV. STAT. ANN. § 23:1081(1)(b) (West 1998) | X | | 0.00 | Caused by |
| ME. REV. STAT. ANN. tit. 39-A, § 202 (West 2000) | X | | 0.00 | Resulting from |
| MD. CODE ANN., LAB. & EMPL. § 9-506(a)-(c) (1999) | X | | 0.00 | Primary Cause |
| MASS. GEN. LAWS ANN. (WEST 2000) | | X | | No Reterant Statute |
| MICH. STAT. ANN. (LAW CO-OP 2000) | | X | | No Reterant Statute |
| MINN. STAT. ANN. § 176.021(1) (West 1993) | X | | 0.00 | Proximate cause |
| MISS. CODE ANN. § 71- 3-7 (1999) | X | | 0.00 | Proximate cause |
| MO. ANN. STAT. § 287.120(6)(2) (West 1993) | X | | 0.00 | Proximate cause |
| MONT. CODE ANN. § 39- 71-407(4) (1999) | X | | 0.00 | Sole & Exclusive |
| NEB. REV. STAT. ANN. § 48-127 (Michie 1999) | X | | 0.00 | Being in a state of intoxication |
| NEV. REV. STAT. ANN. § 616C.230(1)(c) & (d) (Michie 1995) | X | | 0.00 | Proximately caused by |
| N.H. REV. STAT. ANN. § 281-A:14(1999) | X | | 0.00 | Caused in whole or in part |
| N.J. STAT. ANN. § 34:15- 7 (West 1988) | X | | 0.00 | Natural and Proximate cause |
| N.M. STAT. ANN. §§ 52- 1-11 & -12 (Michie 1991) | X | | 0.00 | Proximately Caused |
| N.Y. WORK. COMP. LAW §§ 10 & 21 (McKinney 1992) | X | | 0.00 | Solely due to |
| N.C. GEN. STAT. § 97-12 (1999) | X | | 0.00 | Proximately caused by |

| | | | | |
|---|---|---|-------------|----------------------------------|
| N.D. CENT. CODE § 65-01-02(7) (1983) | X | | 0.00 | Caused by |
| OHIO REV. CODE ANN. § 4123.54(B) (West 1995) | X | | 0.00 | Proximate cause |
| OKLA. STAT. ANN. tit. 85, § 11 (West 1992) | X | | 0.00 | Results directly from |
| OR. REV. STAT. § 656.005 (1997) | X | | 0.00 | Major Contributing Cause |
| PA. STAT. ANN. tit. 77, § 41 (West 1992) | X | | 0.00 | Proximate cause |
| R.I. GEN. LAWS § 28-33-2 (1995) | X | | 0.00 | Results from |
| S.C. CODE ANN. § 42-9-60 (Law. Co-op 1985) | X | | 0.00 | Proximate cause |
| S.D. CODIFIED LAWS § 62-4-37 (Michie 1983) | X | | 0.00 | Due to |
| TENN. CODE ANN. § 50-6-110(a)-(c)(1) (1999) | X | | 0.00 | Proximate cause |
| TEX. LAB. CODE ANN. § 406.032(1)(A) (West 1996) | X | | 0.00 | While in a state of intoxication |
| UTAH CODE ANN. § 34A-2-302 (1997) | X | | 0.00 | Major contributing cause |
| VT. STAT. ANN. tit. 21, § 649 (1987) | X | | 0.00 | Caused by |
| VA. CODE ANN. § 65.2-306 (Michie 1995) | X | | 0.00 | Caused by |
| WASH. REV. CODE ANN. (West 1990) | | X | | No provision |
| W. VA. CODE § 23-4-2 (1998) | X | | 0.00 | Caused by |
| WIS. STAT. ANN. § 102.58 (West 1997) | X | | Reduced 15% | Results from |
| WYO. STAT. ANN. §27-14-102(a)(xi)(B)(I) (Michie 1999) | X | | 0.00 | Caused by |

**STATE WORKERS' COMPENSATION STATUTORY
PROVISIONS DISQUALIFYING INJURED WORKERS
FROM BENEFITS IF INJURY DUE TO:**

| STATE | INTOXICATION | DRUG ABUSE |
|---------------|--------------|------------|
| Alabama | X | X |
| Alaska | X | X |
| Arizona | | |
| Arkansas | X | X |
| California | X | |
| Colorado | X | X |
| Connecticut | X | X |
| Delaware | X | |
| D.C. | X | |
| Florida | X | X |
| Georgia | X | X |
| Hawaii | X | |
| Idaho | X | X |
| Illinois | | |
| Indiana | X | |
| Iowa | X | X |
| Kansas | X | X |
| Kentucky | | |
| Louisiana | X | X |
| Maine | X | |
| Maryland | X | X |
| Massachusetts | | |
| Michigan | | |
| Minnesota | X | |
| Mississippi | X | |
| Missouri | X | X |
| Montana | X | X |
| Nebraska | X | |
| Nevada | X | X |
| New Hampshire | X | |

| | | |
|----------------|-----------|-----------|
| New Jersey | X | X |
| New Mexico | X | X |
| New York | X | X |
| North Carolina | X | X |
| North Dakota | X | X |
| Ohio | X | X |
| Oklahoma | X | X |
| Oregon | X | X |
| Pennsylvania | X | |
| Rhode Island | X | X |
| South Carolina | X | |
| South Dakota | X | X |
| Tennessee | X | |
| Texas | X | X |
| Utah | X | X |
| Vermont | X | |
| Virginia | X | X |
| Washington | | |
| West Virginia | X | |
| Wisconsin | X | X |
| Wyoming | X | X |
| TOTAL | 45 | 30 |

X = YES
BLANK = SILENT

