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Comments: A Comprehensive Review of Maryland Workers' Compensation and Disqualification Due to Intoxication: "Sole Cause" Is Not the Only Way to Proceed

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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. However, workers’ compensation claims have continually increased and now cost the United States economy billions of dollars. One reason is the rise in alcohol and drug related workplace accidents. 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. The NCCI concluded that a “[ten] percent reduction in alcohol consumption in 1989 could have reduced workers’ compensation costs by $2.5 billion.” Therefore, “state workers’ compensation laws have been increasingly used as a tool to discourage the use of drugs and alcohol in the workplace.”

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. 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).
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. This "sole cause" standard of review has proved an onerous burden for an employer to satisfy.

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. Under the new standard all benefits, except for medical treatment, are denied to a covered employee if the primary cause, as opposed to the former sole cause, of an accidental personal injury 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. 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.

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

9. See infra Part V.A (discussing the "sole cause" standard of review in Maryland).
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.
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.\footnote{15. See infra Appendix.}

This Comment describes the national development of the workers’ compensation system,\footnote{16. See infra notes 24-71 and accompanying text.} illustrates the nature of workers’ compensation in general terms, and provides a background for the workers’ compensation system in Maryland.\footnote{17. See infra notes 73-120 and accompanying text.} It discusses the statutory defense of intoxication\footnote{18. See infra Part IV.A.} and explains the effects of intoxication and drug use in the workplace.\footnote{19. See infra Part V.A.} Maryland case law relating to sole cause is examined,\footnote{20. See infra Part V.B.} including the legislative history of Maryland’s workers’ compensation statute as it pertains to alcohol or drug-induced injuries.\footnote{21. See infra notes 307-69, 315-77, 388-513 and accompanying text.} The Comment compares and contrasts existing intoxication defense statutes in other states and examines relevant case law.\footnote{22. See infra notes 379-87 and accompanying text and Part VII.} 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.\footnote{23. See infra.}

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.\footnote{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).} In 1837, Lord Abinger created an exception to this rule in Priestley v. Fowler.\footnote{25. 3 Mees. & Welsby 1, reprinted in 150 Reprint 1030, 1032 (1837).} There, a butcher was held not liable when his servant negligently overloaded a van that subsequently broke down and injured another employee.\footnote{26. See id. at 1, 5, 150 Reprint at 1032.} The court reasoned that holding a master liable for all mishaps would be unfair, as there were many that could occur.\footnote{27. See id.}
From Priestley, three common law defenses developed: (1) implied contract,\textsuperscript{28} implying that the employer was not liable; (2) assumption of risk,\textsuperscript{29} absolving the employer of responsibility; and (3) contributory negligence,\textsuperscript{30} relieving the employer of responsibility if the employee contributed in any way to the injury.\textsuperscript{31} These defenses greatly reduced an employer’s liability.\textsuperscript{32} Generally, the only time an employer was liable was when the injury was a direct result of the employer’s negligence or fault.\textsuperscript{33} Even then, the employer had a low burden of proof to establish a defense.\textsuperscript{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.\textsuperscript{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.\textsuperscript{36}

During the Industrial Revolution, there were frequent and severe injuries to factory workers.\textsuperscript{37} Recognizing this problem, legisla-
tors enacted workers' compensation laws. Nonetheless, success of recovery was minimal under these early statutes. With the growth of industry came increased protection for the employee as the "unpredictability [of] an often \textit{ad hoc} system of employee compensation became intolerable . . . ." Employer susceptibility to liability for the injured worker's injuries increased. As a result, the defenses of assumption of risk, contributory negligence, and the fellow-servant rule eviscerated. 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.

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

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

\begin{footnotes}
\item 38. See PROSSER & KEETON, supra note 24, § 80, at 573.
\item 39. See GILBERT & HUMPREYS, supra note 24, § 1.1, at 2. The majority of workers did not receive anything. \textit{See id.} \\
\item 40. \textit{Id.} § 1.1, at 3. \\
\item 41. See GILBERT & HUMPREYS, supra note 24, § 1.2, at 15. \\
\item 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). \\
\item 43. See Watson, \textit{supra} note 37, at 502. \\
\item 45. See Sadowski et al., \textit{supra} note 44, at 642. \\
\item 46. See \textit{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. \textit{See id.} \\
\item 47. See \textit{id.} at 643-44. \\
\item 48. See \textit{id.} at 644. \\
\item 49. See \textit{id.} \\
\item 50. See \textit{id.} \\
\item 51. See \textit{id.} This is opposed to the modern system, where workers' compensation is
\end{footnotes}
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.\textsuperscript{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."\textsuperscript{53} In 1910, these various state commissions joined forces and drafted the Uniform Workmen's Compensation Law.\textsuperscript{54} However, there was considerable debate at this conference, leading individual states to enact their own forms of workers' compensation legislation.\textsuperscript{55} Two states, Washington and Ohio, patterned their workers' compensation programs after Germany's model, while most states chose the British model.\textsuperscript{56}

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

\footnotesize
\begin{itemize}
\item an exclusive remedy. \textit{See id.}
\item \textsuperscript{52} \textit{See Larson, supra note 1, § 5.20, at 2-12; Gilbert & Humphreys, supra note 24, § 1.2, at 14-15.}
\item \textsuperscript{53} \textit{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.}
\item \textsuperscript{54} \textit{See id. The laws were drafted at a 1910 conference in Chicago. See id.}
\item \textsuperscript{55} \textit{See id.}
\item \textsuperscript{56} \textit{See Sadowski, supra note 44, at 644.}
\item \textsuperscript{57} \textit{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.'")}
\item \textsuperscript{58} \textit{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").}
\item \textsuperscript{59} \textit{See Larson, supra note 1, § 5.20, at 2-12 to 2-15 (discussing the passage and failures of the first workers' compensation laws).}
\end{itemize}
York successfully adopted a constitutional, compulsory system. Only eight states had not adopted compensation acts by 1920; Hawaii was the last state to enact legislation in 1963.

The intent of the new laws was to provide a more humanitarian approach to protecting industrial workers. 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.

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

[In 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.]

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.

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

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

A. The Nature of Workers' Compensation Laws Defined

Workers' compensation is a system of social legislation and insurance for working members of society. The right to receive benefits is based on a social theory of providing support and a level of security for an injured worker. 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. 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.
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.
the burdens of the system.\textsuperscript{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.\textsuperscript{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.\textsuperscript{78}

The work-related injuries covered by workers' compensation laws include accidental personal injuries that "arise out of and in the course of" employment.\textsuperscript{79} The time, place, and circumstances of the accident are examined in determining if an injury arises "in the course of" employment.\textsuperscript{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."\textsuperscript{81} The cause of the accident must be incidental to employment and not independent of the employment relationship.\textsuperscript{82} As such, fault is not usually an issue related to compensability.\textsuperscript{83}

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

\textsuperscript{77} See id. at 31-32.

\textsuperscript{78} See id. at 32.

\textsuperscript{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).

\textsuperscript{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).


\textsuperscript{82} See Consolidated Eng'g Co., 188 Md. at 424, 52 A.2d at 916.

\textsuperscript{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. 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. Three common statutory defenses available to employers are deliberate or intentional act, willful misconduct, and intoxication.

1. Deliberate or Intentional

There is a presumption in workers' compensation claims that the personal injury of a claimant was accidental. 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 broken 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.
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
Therefore, it can be inferred that, in order to successfully prove willful misconduct, the employer must show five factors. First, the employer must demonstrate that some company rule, regulation, or direct order existed. Second, the employer must offer proof that the claimant had knowledge of the rule, regulation, or direct order. 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. Fourth, it must be demonstrated that the claimant deliberately, not accidentally, violated the rule, regulation, or order. Finally, the injury must be sustained by the claimant's violation of the rule, regulation, or order.

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." The most common ground the courts use to reject the misconduct defense is the absence of employee "willfulness." 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.

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) [herinafter “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. & EMP. §§ 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.\(^\text{109}\) One such statutory defense that the majority of jurisdictions have adopted is employee intoxication.\(^\text{110}\)

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

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.”

\(^\text{109}\) 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).

\(^\text{110}\) See Appendix.

\(^\text{111}\) 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.

\(^\text{112}\) 275 Md. 1, 338 A.2d 251 (1975).

\(^\text{113}\) 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).

\(^\text{114}\) See *id.* at 3, 338 A.2d at 253.

\(^\text{115}\) 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. The court’s rationale hinged on statutory construction and legislative intent. 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.”

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.’ ” 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.

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.” However, under the statutory defense of intoxication, the standard of proof varies among states. 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.\textsuperscript{123}

Every state recognizes that not all alcohol-related workplace injuries should be compensable in the same manner as substance abuse-related accidents.\textsuperscript{124} Yet, each state handles its claims and disqualifications relating to substance abuse work-related accidents differently.\textsuperscript{125} A few states eliminate only partial benefits to a claimant.\textsuperscript{126} Nine states either require employers to be engaged or give credit\textsuperscript{127} to employers who are engaged in the Drug Free Workplace program.\textsuperscript{128}

Generally, all states with relevant statutory provisions deny employees' compensation when an injury is caused by their own intoxication.\textsuperscript{129} However, the standards vary greatly.\textsuperscript{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.\textsuperscript{131} Twelve states have enacted the "proximate cause" or "natural proximate cause" standards.\textsuperscript{132} Eight states have enacted a form of "substantial factor," "primary cause," and "results directly from" stan-

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


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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)."

\textsuperscript{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.

\textsuperscript{129} See supra note 110 and accompanying text. Verify

\textsuperscript{130} See Appendix.

\textsuperscript{131} See Appendix.

\textsuperscript{132} See Appendix. Maryland tried to enact this standard in 1996. See infra Part V.B.
Standards. Maryland, prior to the legislative change, along with Washington, D.C. and New York, apply the most stringent standard, "sole cause." Sole cause review is the most difficult standard of proof for an employer to establish 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. 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.

Since the inception of workers' compensation and disqualification of benefits due to intoxication in Maryland, the sole cause standard prevailed. This standard shifted the burden of proof onto the employer to sustain an intoxication defense. Employers had difficulty meeting this burden of proof. 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.

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").
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 VA 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

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\(^{143}\) 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 non-testing 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-
ployer, American Ice Co., presented evidence that Fitzhugh was drunk at the time of the accident. The State Industrial Accident Commission granted the widow workers' compensation benefits and the Baltimore City Circuit Court affirmed the Commission's decision. The employer appealed twice, both to the Court of Special Appeals of Maryland and to the Court of Appeals of Maryland. Both courts affirmed the lower court's holding. 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. The court reasoned that the legislative intent was to eradicate contributory negligence as a defense and to compel compensation.

The next case to arise under the Act was Southern Can Co. v. Sachs. During the workday, Sachs and a co-worker purchased two one-half pints of alcohol. 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. One witness testified that he saw Sachs drunk and staggering at 2:15 p.m. The same witness saw Sachs again at approximately 4:00 p.m., but could not determine his condition at that time. Another employee, Baier, testified that he saw Sachs after 4:00 p.m. in the bathroom seated with his head in his hands. Baier indicated to Sachs that it was time to go home and Baier exited the building. Baier testified that approximately seven minutes later he heard a "noise," 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. These facts were undisputed at trial, however, there was insufficient direct evidence to conclude the intoxication was the sole cause of Sachs's injury. Thus, the court denied the employer's defense.

In S. Rosenbloom, Inc. v. Willingham, Willingham was on his way home from work by ferry. At approximately 6:00 p.m., he drove his car onto the ferry and the deckhand noticed that Willingham had difficulty parking. Willingham was seen exiting his car, staggering, and subsequently heading to the saloon deck. At trial, another deckhand testified that Willingham had nearly drove into him while entering the ferry. 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." Thus, the deckhand offered to drive the car off of the ferry and park it on dry land. The deckhand testified that he smelled alcohol as he drove with Willingham in the passenger seat. However, Willingham's wife testified that in their twenty years of marriage, she had never seen her husband intoxicated. About thirty-five minutes after the ferry departed its post, Willingham drove his car overboard and drowned.

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. In

169. See id.
170. See id.
171. See id. at 566, 131 A. at 761.
172. 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. 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.”

The court in Smith v. State Roads Commission, for the first time in fifty-two years, found that the employee’s intoxication was the sole factor for the employee’s death. In Smith, the employee crashed his pickup truck into a telephone pole and died. The evidence showed that the employee had a blood-alcohol level of .27. Furthermore, no evidence of a tire blowout or other tire trouble existed, nor did any evidence of a defect in the road. Thus, the court ruled the employer had met his burden of proof by providing overwhelming and unchallenged evidence.

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.

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. 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.
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).


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.


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. Controversy existed over how much alcohol was actually consumed, as well as the events that led to the argument and resulting injuries. However, both the co-worker and the claimant stated that the fight would not have occurred absent drinking. 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.

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

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. The same standard of review and evidentiary presumption for alcohol-induced intoxication cases applies to drug-induced intoxication cases.

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 incap-

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).
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).
able of satisfactorily performing his work.\textsuperscript{212} The majority of states have followed Maryland law\textsuperscript{213} and include a disqualification of benefits due to drug induced intoxication.\textsuperscript{214}

In \textit{Cam Construction Co. v. Beccio},\textsuperscript{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.\textsuperscript{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.\textsuperscript{217} Beccio informed the doctor that earlier in the morning he had taken Dantrium, a muscle relaxant, prescribed by his physician.\textsuperscript{218} Beccio stated that thirty minutes after he took Dantrium, he became unbalanced, fell forward, struck his face, and lost consciousness for several minutes.\textsuperscript{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.\textsuperscript{220} The employer was granted a motion for rehearing, during which the Commission reversed its position after hearing the previously excluded Dantrium medical evidence.\textsuperscript{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.\textsuperscript{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.\textsuperscript{223}

The court of special appeals ended the medical evidence de-

\textsuperscript{213} See Appendix.
\textsuperscript{214} See Larson, Reg. ed., supra note 1, § 34.39, at 6-142 to 6-147; see also Appendix.
\textsuperscript{216} See id. at 464, 608 A.2d at 1270.
\textsuperscript{217} See id. at 453, 608 A.2d at 1264.
\textsuperscript{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.
\textsuperscript{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)).
\textsuperscript{220} See id.
\textsuperscript{221} See id. at 455, 608 A.2d at 1265.
\textsuperscript{222} See id. at 455-56, 608 A.2d at 1265-66.
\textsuperscript{223} See id. at 456-59, 608 A.2d at 1266-67.
bating,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 1353.234

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).
229. See id.
230. See id.
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.
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.
244. See id.
245. See id.
the Governor's Drug & Alcohol Abuse Commission.\footnote{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.\footnote{247}

State and local support was rising in support of the legislation.\footnote{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."\footnote{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."\footnote{250} The increased support from various industries enabled the controversial bill to pass in the Senate.\footnote{251} However, the legislation failed in the House Economic Matters Committee.\footnote{252}

In 1996, the General Assembly again revisited the issue, looking at two predecessor bills: House Bill 788\footnote{253} and Senate Bill 491.\footnote{254} Sponsorship within the Senate Finance Committee for Senate Bill 491 rose from one to four sponsors,\footnote{255} and again received a favorable committee report with amendments.\footnote{256} The first amendment altered the title of the bill to reflect its emphasis on the em-

\footnote{246} See id.
\footnote{247} See id.
\footnote{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 Health-care Human Resources Association, to Chairman and Members of the Committee (Feb. 15, 1995) [hereinafter Holibonich Letter] (on file with author).
\footnote{249} Green Memo, supra note 248, at 2.
\footnote{250} Conte Letter, supra note 248.
\footnote{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).
\footnote{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).
\footnote{253} See H.B. 788 (Md. 1996).
\footnote{254} See S.B. 491 (Md. 1996).
\footnote{255} See id.
\footnote{256} See id.
ployer, instead of the employee. The title was changed from "Workers' Compensation — Use of Drugs or Alcohol" to "Workers' Compensation — Drug-Free Workplace Program — Use of Drugs or Alcohol." A second amendment lowered the standard of review from substantial cause to proximate cause. Proximate cause was defined as "the cause that is first in importance and but for which an injury . . . would not have occurred." 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. However, once again, this legislation, although adopted by the Senate, was rejected by the House Economic Matters Committee and thus failed.

The bill's failure was due to labor unions' staunch opposition to the second amendment's alteration, which lowered the standard of proof to sole cause. 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).
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. 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.

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. Also, more employers would seek to take advantage of the new standard of proof. The proposed change would create an incentive for employers to view all accidents as probable cause for suspicion of substance abuse. Many workplace accident victims would become suspects, adding insult to their injury. 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.

In 1997, the legislation resurfaced as House Bill 736 and Senate Bill 668. Within the Senate Finance Committee, sponsorship again increased from four to eleven, including the committee chair. Senate Bill 668 received a favorable committee report with amendments. 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. In addition, the standard was altered from proximate cause to the more stringent standard of primary cause. Primary cause was defined as “the cause that is first in importance.” Finally, the existing presumption was also modified to be

269. See id.
270. See id.
271. See id.
272. See id.
273. See id.
274. See supra note 268.
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.\textsuperscript{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] \textit{not} the primary cause of the accidental personal injury . . . ."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{285} However, this would leave the employer with no economic benefit for having installed a Drug-Free Workplace program.\textsuperscript{286}

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

\begin{itemize}
\item \textsuperscript{281} See id.
\item \textsuperscript{282} Id. at 3-4 (emphasis added).
\item \textsuperscript{283} \textit{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).
\item \textsuperscript{284} See id.
\item \textsuperscript{285} \textit{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).
\item \textsuperscript{286} \textit{Workers' Compensation Benefit and Insurance Oversight Committee— Report of the 1995 Interim,} 411th Leg. (Md. 1995).
\item \textsuperscript{287} The telecommunications industry adamantly supported this bill, emphasizing their intolerance for drugs and alcohol on job sites. See \textit{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, as well as a sentiment that "a vote against this bill would be to endorse irresponsible, life-threatening behavior." However, it failed to pass the House before the legislative session ended.

After five years, the impetus for change was House Bill 373 and Senate Bill 36. 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. 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. Thus, the Chamber of Commerce broke the stalemate over the legislation by rounding up seventy-six co-sponsors of the bill in the House. This was enough votes to assure final passage, exactly five more than the bill needed to gain approval in the House. In effect, the bill was passed before its opponents were given a chance to protest. The bill overwhelmingly passed both houses.

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

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.
The presumption continues to serve the employee's interest, as the court presumes that the injury was not abuse related, until substantially proven otherwise. 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.

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. 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. 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.

In addition, the Workers' Compensation Commission is required to hear more disputes over whether alcohol or drug abuse caused the on-the-job accident. Having a lesser burden to prove, employers will be more likely to raise the defense of intoxication. 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.
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.\textsuperscript{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.\textsuperscript{315} Five other states use highly analogous standards of review: Arkansas,\textsuperscript{316} Iowa,\textsuperscript{317} Oklahoma,\textsuperscript{318} Utah,\textsuperscript{319} and Texas.\textsuperscript{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,”\textsuperscript{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.\textsuperscript{322} Using language similar to Maryland’s law, the statute denies compensation if the injury was “occasioned primarily”

\begin{itemize}
\item \textsuperscript{314} See \textit{id}.
\item \textsuperscript{315} See \textsc{Fla. Stat. Ann.} \textsection{440.09(3)} (West Supp. 1999) (barring compensation if the injury is caused primarily by the employee’s intoxication).
\item \textsuperscript{316} See \textsc{Ark. Code Ann.} \textsection{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).
\item \textsuperscript{317} See \textsc{Iowa Code Ann.} \textsection{85.16(2)} (West 1996) (barring compensation for injuries substantially caused by employee’s intoxication).
\item \textsuperscript{318} See \textsc{Okla. Stat. Ann. tit. 85, \textsection{11(A)(3)}} (West Supp. 1999) (excepting from workers’ compensation injuries directly resulting from use or abuse of alcohol or drugs).
\item \textsuperscript{319} See \textsc{Utah Code Ann.} \textsection{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).
\item \textsuperscript{320} See \textsc{Tex. Lab. Code Ann.} \textsection{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).
\item \textsuperscript{321} See \textsc{Md. Code Ann., Lab. & Empl. \textsection{9-506(d)(i)}} (1999).
\item \textsuperscript{322} \textsc{Fla. Stat. Ann. \textsection{440.09(3)}} (West Supp. 1999).
\end{itemize}
by the intoxication of the employee or by the influence of any
drugs or other stimulants not prescribed by a physician. However,
there are many provisions included in Florida's law that are not ad-
dressed by Maryland. In Florida, if the employee has a blood alco-
hol 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. This is unlike Maryland, which gives greater
deferece to the employee. This blood-alcohol percentage pre-
sumption is meant to shield an employer from the inequities of hav-
ing to pay compensation to a claimant, with the requisite blood al-
cohol level, where the originating cause of the accident is question­able.

1. Florida's Experience

The intoxication defense originated in the Florida Legislature
in 1935. Four years later, in Zee v. Gary, the Supreme Court of
Florida construed the primary cause standard following the legisla-
ture's intent. The court began with the basic rule of statutory con-
struction—when determining intent, words and phrases must be
read in conjunction with the entire statute, not just within a single
section. Originally, the law provided a presumption that the em-
ployee's injury was not occasioned primarily by intoxication.

323. See id.
324. See id. § 440.09(7) (b). The blood-alcohol level required to create a presump-
tion that the injury was occasioned primarily by intoxication is 0.10 or higher.
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.
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 Paring & 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) (hold-
ing 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

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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. 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.

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. 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. 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.

2. Similarly Worded Statutes

Similar to the Maryland General Assembly, the Arkansas Legislature recently amended its intoxication defense statute with respect to workers' compensation. 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. During the early part of the 1980s, Arkansas decreased its standard from sole cause to substantial cause. By replacing the word "sole" with "substantial," this portion of the applicability provision replicates Maryland law.

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

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.
346. See id. § 440.09(7)(b).
347. See id.
349. See id.
351. See supra note 136 and accompanying text.
352. See supra note 136 and accompanying text.
of employees, replacing it with an employer favored presumption.\textsuperscript{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.\textsuperscript{354}

Similarly, Iowa has enacted an intoxication defense statute that denies an employee compensation if intoxication was a "substantial" factor in causing the injury.\textsuperscript{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.\textsuperscript{356}

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

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\textsuperscript{353} See \textit{Weaver}, 935 S.W.2d at 585 (noting the shift in the presumption).

\textsuperscript{354} See supra note 303 and accompanying text.

\textsuperscript{355} See \textit{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 \textit{id.} Likewise, statutes in Maryland, Florida, Arkansas, Oklahoma and Texas, all include such a provision. See \textit{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 ... "); \textit{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 ... "); \textit{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 ... "); \textit{Okla. Stat. Ann.} tit. 85, § 11(A)(3) (West Supp. 1999) (excluding from coverage injury "resulting directly from the ... abuse of prescription drugs ... "); \textit{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").

\textsuperscript{356} See \textit{Iowa Code Ann.} § 85.16 (West 1996); see \textit{also supra} Part III (discussing willful employee misconduct).

\textsuperscript{357} See \textit{supra} notes 244-98 and accompanying text.

\textsuperscript{358} See \textit{supra} note 313 and accompanying text.

\textsuperscript{359} See \textit{Iowa Code Ann.} § 85.16(2).

\textsuperscript{360} See \textit{id.} See, \textit{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-

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).


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. STAT. ANN. tit. 85, § 11(A)(3). This provision provides the extent of Oklahoma's procedural considerations when invoking the intoxication defense statute. See id.


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. Nonetheless, the court rejected the claimant's argument and affirmed the denial of compensation. The court found that both fatigue and intoxication were direct factors in Birdsell's death. However, the court noted that the language of the statute now precluded compensation if intoxication was simply a direct cause. Therefore, where medical evidence proved that intoxication was one of the direct causes, the claimant was barred from recovery.

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. Utah's statute sets the intoxication limit for alcohol consumption to "a blood or breath alcohol concentration of .08 grams or greater . . . ."

Under Texas law, employers are not liable for injuries that occur while the employee was "in a state of intoxication." 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 Thornton 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.\textsuperscript{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 \ldots, a controlled substance \ldots, a dangerous drug \ldots, an abusable glue or aerosol paint \ldots, or any similar substance \ldots."\textsuperscript{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"\textsuperscript{378} of an injury.\textsuperscript{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.\textsuperscript{380} In addition, Maryland courts can examine case law from other states interpreting the word "primary" as it is used in similar statutes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{384}

\textbf{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.\textsuperscript{385}

\textsuperscript{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.
\textsuperscript{378} See supra note 298.
\textsuperscript{379} See supra note 298 and accompanying text.
\textsuperscript{380} See supra note 323 and accompanying text.
\textsuperscript{381} See supra notes 329, 332 and accompanying text.
\textsuperscript{382} See supra note 334 and accompanying text.
\textsuperscript{383} See supra notes 161-209 and accompanying text.
\textsuperscript{384} See supra notes 324-39 and accompanying text.
Additionally, Maryland courts have held that “at 0.15%, intoxication is presumed.”

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. 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. The following four cases are workers’ compensation cases in which the employee failed to rebut by substantial evidence the presumption of intoxication. 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., 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. The claimant, Sterling, was employed as an air conditioning mechanic at Mike Brown, Inc., an air conditioning company. Sterling arrived around 1:30 p.m. at a joint company Christmas party, hosted partially by Mike Brown, Inc. About an hour and a half later, Brown and another employee took Sterling’s car keys away

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).
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. The party began to disperse at about 7:00 p.m. when a co-worker of Sterling's offered to drive him home. Sterling, becoming angry, shoved his co-worker in the chest. His co-worker then punched Sterling in the face. Sterling's head hit the floor, resulting in serious permanent injuries.

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. However, both the trial court and the appellate court ruled against Sterling, after finding that there was sufficient evidence in the record proving otherwise. 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." 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. From 4:00 p.m. to 7:00 p.m., Sterling tapered off the drinking, yet his irrational behavior and slurred speech continued. There was also evidence presented that when Sterling got drunk, he was susceptible to becoming aggressive.

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. 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. 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-

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407. Id.
408. Id.
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.
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

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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.


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).
437. See supra notes 326-435 for a discussion of Orlando Waste Paper Co.
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.\textsuperscript{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.\textsuperscript{443} Nonetheless, this evidence did not prove to be substantial enough to overcome the statutory presumption of intoxication.\textsuperscript{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.\textsuperscript{445} Hence, the court held that the presumption of section 440.09\textsuperscript{446} was not rebutted and that the primary cause of the claimant’s accident was his own intoxication.\textsuperscript{447}

In \textit{R.P. Hewitt & Associates of Florida v. Murnighan},\textsuperscript{448} the court awarded Murnighan, an experienced ironworker, workers’ compensation benefits in connection with an injury he sustained while employed by R.P. Hewitt.\textsuperscript{449} Murnighan and a co-worker had been welding iron grating to horizontal supports on a stairway forty feet above the ground.\textsuperscript{450} The grating slipped, and Murnighan fell between the supports with half of his torso through the hole.\textsuperscript{451} Murnighan and his co-employee had two or three beers with their lunch, a practice that was condoned by the foreman.\textsuperscript{452} Murnighan’s blood-alcohol level was recorded at 0.14,\textsuperscript{453} greater than the statutorily prescribed level.\textsuperscript{454} Five doctors testified, but not definitively, to Murnighan’s intoxicated condition.\textsuperscript{455} In rebuttal, the claimant’s partner, his foreman, and other co-workers testified that

\begin{itemize}
\item \textsuperscript{442} See \textit{id.} at 913-14.
\item \textsuperscript{443} See \textit{id.} at 913.
\item \textsuperscript{444} See \textit{id.} (disagreeing there was substantial evidence to rebut the presumption of intoxication).
\item \textsuperscript{445} See \textit{id.} at 913-14.
\item \textsuperscript{446} See Fl. Stat. Ann. § 440.09 (providing a presumption of intoxication).
\item \textsuperscript{447} See \textit{McFalls}, 453 So. 2d at 913.
\item \textsuperscript{448} 382 So. 2d 353 (Fla. Dist. Ct. App. 1980).
\item \textsuperscript{449} See \textit{id.} at 354.
\item \textsuperscript{450} See \textit{id.}
\item \textsuperscript{451} See \textit{id.}
\item \textsuperscript{452} See \textit{id.}
\item \textsuperscript{453} See \textit{id.}
\item \textsuperscript{454} See Fl. 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).
\item \textsuperscript{455} See \textit{Murnighan}, 382 So. 2d at 354.
\end{itemize}
not only did Murnighan not appear drunk during the course of the day, but that grating work was normally quite hazardous. 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.

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. Sufficient testimony was presented to overcome the statutory presumption. 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. Furthermore, the evidence indicated that a “completely sober man could have suffered the same accident.”

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 Murnigham, 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. Maryland law omits an evidentiary standard for employer rebuttal. 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 dependents did not prove that there could have been another cause of the deceased’s accident besides intoxication).
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).
467. See id.
468. See id. at 366.
469. See id.
470. See id.
471. See id.
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 Commiss-
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-

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\(^{474}\) *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. However, Arkansas does not detail what is reasonable and responsible testing.

Maryland’s statute is silent on the issue of testing and testing procedures. 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. For example, Florida’s law expressly outlines what types of scientific analyses will be admissible. 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. 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.”

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

482. See supra notes 345-47 and accompanying text.
483. See supra note 346 and accompanying text.
485. Id.
Florida appellate court, in Stepanek v. Rinker Materials Corp., attempted to put an end to this debate. Stepanek appeared for work one day after an evening of heavy boozing and insufficient rest. His supervisor, smelling alcohol on his breath, did not confront Stepanek for fear of being mistaken. 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.

Tests revealed Stepanek's blood-alcohol level to be 0.15 percent, which invoked the presumption of intoxication. 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. 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 acquiescence" in this state of affairs.

"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).

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." Presuming that the legislature did not intend "express acquiescence' to be a contradiction in terms," 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." 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. Therefore, the court concluded that the claimant's injury was primarily caused by his intoxication.

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." In 2800 Corp. v. Fernandez, 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. 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.

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. 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.
employer permitted, encouraged, or had actual knowledge of the 
[employee’s use of illegal substances or alcohol.]."505 Second, in con­ 
trast 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 em­ 
ployees 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 em­ 
ployer “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 intoxica­
tion which generates some doubt as to whether the General Assem­
ibly 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 re­
fuses to submit to a drug test, it [is] presumed in the absence of 
clear and convincing evidence to the contrary that the injury was 
ocasioned primarily by the influence of drugs.”509

Second, the Florida statute also provides for a Drug Free Work­ 
place 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 
507. See supra notes 484-503 and accompanying text.
509. Id. § 440.09(c).
510. See id. § 440.09(7)(b).
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.


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.\textsuperscript{519} As it has been shown, intoxicated employees are responsible for increasing employers’ insurance costs.\textsuperscript{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.\textsuperscript{521}

Since its inception, the Maryland Workers’ Compensation Act has included an “intoxication” defense to claims for benefits by injured workers.\textsuperscript{522} However, the scope of the defense was narrowly defined by the statute and strictly applied by the Commission and the courts.\textsuperscript{523} Specifically, in order to bar recovery of compensation benefits, an employee’s intoxication must have been the sole cause of the accident.\textsuperscript{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.\textsuperscript{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.\textsuperscript{526}

In 1998, as a result of the inequity in the law, the Maryland intoxication defense was changed.\textsuperscript{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.\textsuperscript{528} If the defense is proven, the only benefit available to the claimant under the Workers’ Compensation Act is medical care and treatment.\textsuperscript{529} As with the prior version of the Act, this revised ver-

\textsuperscript{519}. See supra Part IV.B (discussing the magnitude of substance abuse in the workplace and its effects on the workers’ compensation system).

\textsuperscript{520}. See supra note 148 and accompanying text (discussing the increased costs due to substance abuse).

\textsuperscript{521}. See supra notes 250-74 and accompanying text.

\textsuperscript{522}. See supra Part IV.A for a discussion the affirmative defense of intoxication.

\textsuperscript{523}. See supra Part V.A for a discussion of Maryland’s sole cause case history and its strict application.

\textsuperscript{524}. See supra note 159 and accompanying text.

\textsuperscript{525}. See supra 161-72 and accompanying text.

\textsuperscript{526}. See supra notes 171-72 and accompanying text.

\textsuperscript{527}. See supra Part V.B for a discussion of Maryland’s legislative development of the present Labor and Employment section 9-506.

\textsuperscript{528}. See supra notes 152-227 and accompanying text for a discussion of Maryland’s sole cause case history and its strict application.

\textsuperscript{529}. See supra notes 299-303.
tion 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.
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.\textsuperscript{542}

\textit{Nicole Pastore}

\textsuperscript{542} See \textit{supra} notes 517-41 and accompanying text.
### APPENDIX

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