

Policy and Procedure Name	Intoxication, Under the Influence, and Rebuttable Presumption
Policy Number	CP-09-09
Ohio Revised Code (ORC) Reference	ORC 4123.54
Ohio Administrative Code (OAC) Reference	None
Other Law/Rule References	49 CFR 40.87
Ohio Industrial Commission (IC) Resolution/Memo Reference	None
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Approved by	Ann M. Shannon, Chief of Claims Policy and Support
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I. POLICY PURPOSE

This policy ensures that BWC staff knows how to evaluate evidence and determine a claim when the evidence includes a positive chemical test for alcohol, a controlled substance that was not prescribed by a physician, or marijuana.

II. APPLICABILITY

This policy applies to Claims Services staff.

III. DEFINITIONS

Burden of Proof

The responsibility of a party to prove or disprove a disputed fact.

Preponderance of Evidence

A standard of proof which is met when a party's evidence on a fact indicates that it is "more likely than not" that the fact is as the party alleges it to be.

Reasonable Cause

The basis for which an individual could objectively believe and conscientiously entertain suspicion based on observable facts; as further defined by ORC 4123.54(C)(2): evidence that an employee is or was using alcohol, a controlled substance or marijuana, drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training.

Rebuttable Presumption

A conclusion as to the existence or nonexistence of a fact that is drawn when certain evidence has been introduced and believed to be true, but that can be contradicted by evidence to the contrary.

IV. POLICY

- A. Application of Rebuttable Presumption
 - 1. It is the policy of BWC to apply rebuttable presumption and presume that intoxication, being under the influence of a controlled substance not prescribed by a physician, or being under the influence of marijuana is the proximate cause of an

- injured worker's (IW) injury when the requirements of ORC 4123.54(B) are met, including:
- a. The employer has provided proper notice that a positive chemical test or refusal to submit to a chemical test may impact eligibility for workers' compensation benefits;
 - b. The IW has tested positive on a properly administered and properly requested chemical test or has refused to be tested; and
 - c. The presumption has not been rebutted with credible, persuasive evidence that meets the preponderance of the evidence standard.
2. Upon verification that the employer has met evidentiary requirements for and rebuttable presumption to apply as outlined in procedures, the burden of proof shifts to the IW to prove that the intoxication, being under the influence of a controlled substance not prescribed by a physician, or being under the influence of marijuana, did not cause the accident.
 3. It is the policy of BWC to presume that:
 - a. Chemical tests submitted to a claim were conducted at a laboratory certified by the United States Department of Health and Human Services or a laboratory that meets or exceeds the standards of that department for laboratory certification; and
 - b. Positive test results are to be interpreted as being at a level equal to or in excess of the cutoff concentration level for the particular substance, as provided in 49 CFR 40.87; or
 - c. A positive test result for barbiturates, benzodiazepines, or methadone was at a level established by the certified laboratory.
 4. The employer's participation in a drug free workplace program alone is not sufficient to establish the rebuttable presumption in accordance with ORC 4123.54(B).
- B. Failure to Meet Standards for Rebuttable Presumption
1. When a claim does not meet the evidentiary requirements of rebuttable presumption, BWC will request a physician review to evaluate the evidence to determine whether the injury was proximately caused by alcohol use, use of a controlled substance not prescribed by a physician, or use of marijuana.
 2. If BWC determines that the alcohol use, use of a controlled substance not prescribed by a physician, or use of marijuana was the proximate cause of the injury, BWC will deny the claim.
 3. BWC will consider a positive chemical test, along with all the other evidence in a claim, in determining the proximate cause of an injury.

V. PROCEDURE

A. General Claim Note and Documentation Requirements

1. BWC staff will refer to the [Claim File Contents and Documentation](#) policy and procedure for claim note and documentation requirements; and
2. Must follow any other specific instructions for claim notes and documentation included in this procedure.

B. Allegations or Evidence of Intoxication

1. When a claim is received and the employer is alleging or there is evidence that the IW was intoxicated, under the influence of a controlled substance not prescribed by a physician or under the influence of marijuana, Claims Services staff will investigate:
 - a. The claim to determine if the employer has met all the requirements of ORC 4123.54 as listed in Section V.C of this procedure; and
 - b. Whether there is additional evidence that meets the preponderance of the evidence standard rebutting the presumption that intoxication, being under the influence of a controlled substance not prescribed by a physician or being under the influence of marijuana caused the accident or injury.
2. Claims Services staff may consult with the BWC attorney prior to making the initial determination on a claim involving positive chemical test results or an IW's refusal to submit to a chemical test.
3. Claims Services staff may use the "Investigation Tool for Intoxication, Under the Influence and Rebuttable Presumption" available on COR to assist in investigation of the claim.
4. Requests for additional assistance investigating circumstances of claims involving this policy may be staffed with Claims Services staff supervisors.

C. Supporting Documentation Necessary to Apply Rebuttable Presumption

1. Claims Services staff will review the file for the following evidence to show that the rebuttable presumption should be applied pursuant to ORC 4123.54:
 - a. Positive chemical test results or written documentation of the IW's refusal to submit to a chemical test;
 - b. Documentation showing that the specimen collected for the chemical test was obtained within the appropriate time frame, which is:
 - i. Within eight hours of injury to determine alcohol concentration levels; or
 - ii. Within 32 hours of injury to determine levels of controlled substances or marijuana.
 - c. A written statement, affidavit, or other verification that the employer had a written notice to employees, posted prior to the date of injury, stating that the

results of, or the employee's refusal to submit to, a chemical test may affect the employee's eligibility for workers' compensation and benefits. Such notice must be:

- i. The same size or larger than the proof of workers' compensation coverage notice furnished by BWC; and
 - ii. Posted in the same location as the proof of workers' compensation coverage notice or the certificate of self-insurance.
- d. Documentation that the post-accident chemical test was conducted at the request of one of the following:
- i. The employer, with reasonable cause to suspect that the IW was intoxicated, under the influence of a controlled substance not prescribed by the IW's physician or under the influence of marijuana. The documentation must include a description by the employer of the facts and behavior supporting the reasonable cause;
 - ii. A police officer as part of a traffic violation stop, and not at the request of the employer; or
 - iii. A licensed physician who is not employed by the IW's employer and is not conducting the test at the request of the IW's employer (e.g., an emergency room doctor).
2. If any of the above information is not on file, Claims Services staff will request the missing evidence from the employer.
 3. Claims Services staff will document attempts to obtain the necessary documentation in claim notes.
 4. Claims Services staff will update the claim handling profile statement in the claims management system with the results of a positive test result and who submitted the test results (employer or provider).
 5. If the IW refused to take the test or to release test results, Claims Services staff will document the refusal in claim notes.

D. Evidence Supports Utilizing Rebuttable Presumption

1. When all necessary evidence, as detailed above, has been submitted, Claims Services staff will:
 - a. Apply the rebuttable presumption and presume that intoxication, being under the influence of a controlled substance not prescribed by a physician, or being under the influence of marijuana is the proximate cause of an IW's injury; and
 - b. Deny the claim.
2. If the rebuttable presumption applies, Claims Services staff will:
 - a. Deny the claim; and
 - b. Issue an order using:

- i. The denial order insert for “Intoxication or Under the Influence” in the claims management system; or
- ii. If the IW refused to submit to a test:
 - a) Select “Other Reasons;” and
 - b) Insert: *The employer has complied with Ohio Revised Code Section 4123.54 and the injured worker has refused to take a chemical drug test. This refusal has created a presumption that the proximate cause of the injury was due to being intoxicated, under the influence of a controlled substance not prescribed by a physician or under the influence of marijuana and the injury is not compensable.*

E. When Rebuttable Presumption Should Not be Applied

1. When evidence has been submitted to show that the injury would have occurred regardless of the intoxication, being under the influence of a controlled substance not prescribed by a physician or under the influence of marijuana (i.e., the evidence does rebut the presumption), Claims Services staff must not apply rebuttable presumption to deny the claim.
2. When the supporting documentation outlined in Section B has not been submitted, Claims Services staff will not apply rebuttable presumption.
3. When the rebuttable presumption is not applicable, Claims Services staff will consider positive test results in the same manner as any other evidence.
 - a. Positive test results alone will not be considered sufficient evidence to find the injury was caused by intoxication, being under the influence of a controlled substance not prescribed by a physician or being under the influence of marijuana.
 - b. Claims Services staff will consider all the evidence and circumstances of the injury that may corroborate or discount allegations of intoxication, being under the influence of a controlled substance, or under the influence of marijuana as being the proximate cause of the injury.
 - c. Claims Services staff will request a physician file review to help determine if the alcohol, controlled substances, or marijuana for which the IW tested positive was likely to be the proximate cause of the injury. Documentation of the level of alcohol or controlled substance must be included.
4. If the evidence doesn’t show that the alcohol or drug use was the proximate cause of the injury, then the positive test results will not be used as a factor in determining the claim. If the evidence does show that the alcohol or drug use was the proximate cause of the injury, then the claim will be denied.