

Employer (or its representative) Must Request Drug Test Directly for Refusal to Result in Forfeiture of Benefits

With the changes in the law in 2005, §287.120 was amended to add a provision that results in the forfeiture of all workers' compensation benefits if an employee refuses to take a drug test. Specifically, the pertinent part of the statute reads "An employee's refusal to take a test for alcohol or a non-prescribed controlled substance, as defined by §195.010, RSMo., **at the request of the employer** shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a non-prescribed controlled substance by the claimant or if the employer's policy clearly authorizes post injury testing." (emphasis added)

In a recent case handed down by the Labor and Industrial Relations Commission, *Roscom v. Woodstone Builders, LLC*, the ability of the employer to assert this penalty and claim a forfeiture of benefits has been substantially curtailed.

Employee sustained a work related injury as a result of an accident occurring on a construction site on July 17, 2008. While raising a wall with co-workers, the wall fell on the employee and as a result of the injuries, the employee was paralyzed from the waist down. The Administrative Law Judge denied compensation on the grounds that employee had forfeited his right to compensation under §287.120.6(3) in that he refused to take a drug test as requested by the employer. Employee appealed to the Labor and Industrial Relations Commission who subsequently entered a temporary award allowing compensation. In support of its opinion the Commission, citing strict construction, found that the request for the drug test did not come **at the request of the Employer**, as required by the statute.

Following the injury, employee was admitted to the hospital on an emergent basis and underwent immediate surgery as a result of his injuries. The employer notified its workers compensation carrier who, in turn, hired a nurse case manager to oversee employee's care. A representative of the employer spoke directly to the nurse case manager requesting that a drug test be performed. Likewise, the insurance adjuster for the workers' compensation carrier spoke directly to the nurse case manager requesting that a drug test be obtained. The nurse case manager testified that she never directly asked employee to consent or undergo a drug test, but that she did request that a drug test be performed by the hospital. She further testified that she followed the procedures established by the hospital in order for a drug test to be performed. Those procedures outline that the employee first had to consent to have his physician order a drug test. The nurse case manager testified that a request for a drug test was made on two occasions directly to employee's physician, however, the test was never performed. As such, the hospital informed the nurse case manager that the next step was to seek consent from the employee through the Department of Patient Safety.

Two nurses, employed by the hospital, were assigned the task of seeking consent or refusal from the employee to have his physicians order a drug test. Following the conversation held with those nurses, the employee declined to have his physician order

such a test. The Administrative Law Judge concluded that employee's conversation with the two nurses from the hospital met the statutory requirements, as they were speaking with employee at the request of the employer (or, in this case at the request of a representative from the employer, the nurse case manager). The Commission disagreed and indicated that neither of the nurses for the hospital was acting on behalf of the employer or the insurer at any time. The nurses testified they visited the employee to inform him that the insurance company wanted him to submit to a drug test and also informed him that he could consent or refuse to consent to that drug test. They also informed him that any refusal to do so may jeopardize his workers' compensation claim and they advised him that he may wish to check with the Human Resources Department of his employer or consult with an attorney regarding his rights. The Commission specifically found that the information conveyed to the employee by the two nurses from the hospital did not constitute a request by the employer that the employee submit to a drug test as contemplated by §287.120.6(3). As such, the Commission found that the employee never refused an employer request to submit to a drug test. As the Award was Temporary in nature, no right of appeal was available to the Missouri Court of Appeals.

So, in practical terms, what does this decision mean? Until we have binding precedent in the form of an opinion from the Court of Appeals on this issue, to be safe, the request for the drug test needs to be requested of the employee directly by a representative of the employer or the insurance carrier. In this case, as the nurse case manager was hired by the insurance carrier, she would likely have been considered an agent of the insurance company and therefore could have also requested the drug test directly from employee. Outside of a hospital setting or where there is no nurse case manager assigned, from a procedural standpoint, how will the employer ever be able to obtain a valid refusal? Just as the request made by the nurses at the hospital was deemed insufficient, how is that any different from the nurse at an occupational clinic informing an employee that the employer has requested a drug test? The nurse cannot be said to work for the employer or be an agent of the employer, which is the deciding factor upon which the Commission seems to have rested its decision. Does a representative from the employer need to travel with the injured employee to the initial doctor's visit to make the request and have the drug test performed? Does the insurance adjuster need to call and speak directly with the employee in order to have a valid request?

Unfortunately, the Commission's decision did not provide any useful guidance for future procedure. The decision only made clear that the nurses' conversation with the employee advising him of the employer's request for a drug test, and his subsequent refusal of the test, was not sufficient to meet the statutory requirement of a refusal to take a test "at the request of the employer."