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DRINKING ON THE JOB: THE INTOXICATION DEFENSE IN A CONSTRUCTION ACCIDENT CASE

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Employee drinking on the job is a problem for many employers, especially when it results in a serious accident. Unfortunately, after a construction accident, it is not uncommon to hear a report that the injured party or his co-worker had a few drinks at lunch or that somebody smelled alcohol after the accident. Evidence of intoxication is a powerful tool for convincing a jury that your company is not at fault for an accident. Because of this, however, evidence of drinking alcohol is only admissible at trial if it is found to be reliable and proves unfitness to drive, operate machinery or affect behavior.

Proving intoxication in a civil case can be difficult. It is not enough to simply show that the plaintiff's blood alcohol content (BAC) is above the legal limit that is commonly referenced in "drunk driving cases." Instead, you must be prepared to offer clear and concise testimony and corroborating evidence from witnesses, demonstrate a chain of custody for any breathalyzer or blood test results, and effectively explain the meaning and significance of any blood alcohol test result in court. Recently, the Superior Court of Pennsylvania, in *Braun v. Target Corporation*¹, addressed intoxication as a defense and outlined the procedures to follow in a construction accident case.

In *Braun*, a retail chain store entered into a construction contract for a new building. The general contractor subcontracted the steel erection work. Braun, the plaintiff, worked for the subcontractor connecting steel joists while using a scissor lift. The scissor lift was equipped with tie-offs and guardrails. Nevertheless, Braun left the elevated scissor lift without tying off, missed his step while crossing a beam, and fell. He was rushed to the hospital, but the accident left him permanently paralyzed.

Braun sued the project owner, the general contractor and other contractors working on the jobsite for his personal injuries. At trial, the jury was allowed to hear testimony that Braun and his co-workers took a 25 minute lunch at a bar and had a few drinks. There was also evidence that Braun's BAC after the accident was 0.27. Although the plaintiff argued that this evidence was too speculative and too prejudicial to be allowed to go to the jury, the defendants were allowed to use this evidence to argue that the plaintiff's intoxication was the cause of the accident. The jury returned a defense verdict. The plaintiff appealed to the Superior Court of Pennsylvania, arguing that the trial court mistakenly allowed the jury to hear testimony that he had been drinking before the accident. The Superior Court rejected Braun's appeal, and affirmed the judgment.

The plaintiff attacked the reliability of the BAC evidence based on gaps in the chain of custody and the time it took for the hospital to generate a report. He also objected to the admission of testimony about his consumption of alcohol at lunch as too unreliable to prove that he was intoxicated at the time of the accident, especially when this testimony was compared to its prejudicial effect.

The Superior Court held that the evidence in *Braun* was reliable enough to be presented to the jury. The Court noted that witnesses observed the plaintiff drinking at lunch before the accident, and his behavior after lunch — failing to use the fall protection available to him and unnecessarily trying to leave his work area on the scissor lift — all suggested impairment. Finally, there was expert testimony by a toxicologist who said that the BAC level indicated that Braun was impaired at the time of the accident.

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GUIDELINES FOR EVALUATING AND PROVING AN INTOXICATION DEFENSE

The Court's analysis provides a good working guideline for evaluating and presenting an intoxication defense. The general standard for admissibility is that evidence relating to a plaintiff's intoxication is not admissible unless it "reasonably establishes a degree of intoxication which proves unfitness" to perform the act at issue. In order to prove that the plaintiff was unfit, there must be enough evidence to amount to more than the "mere hint of intoxication."

Simple testimony that the plaintiff had a few drinks before the accident is considered by the courts as only the "mere hint of intoxication." Other corroborating evidence is needed to prove unfitness to drive or impairment at the time of the accident. An elevated BAC is potent evidence for the defense, when supported by corroborating evidence of plaintiff's behavior (e.g. acting impaired – slurred speech, wobbling or other signs of drunken behavior) and expert testimony that can relate the BAC level to impairment at the time of the accident.

A strong intoxication defense can lower the settlement value of a case and help the employer win the case if it does go to trial. Knowing what to look for and taking a few steps to preserve the evidence early on pays dividends in the long run. Of course, this defense is only available if the employer acts quickly to preserve evidence following an accident. If the employer suspects that an accident was the result of intoxication, good witness statements are crucial. Co-workers, including foremen and supervisors, should be asked whether they smelled alcohol or saw the potential plaintiff drinking before the accident. They should also be asked if there were any signs that he or she was impaired, such as slurring of speech, lack of coordination, or disorientation. If the potential plaintiff is taken for treatment at a hospital, the initial evaluation may include a BAC test or a toxicology screen. Confidentiality issues may be present, but if a claim is filed, the medical records must be examined for BAC test results. Finally, an expert must be consulted to promptly evaluate the handling, sampling and interpretation of BAC test results.

¹ 2221 EDA 2006 (decided October 23, 2009)

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