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IN THE OHIO SUPREME COURT

STATE, EX REL. OHIO AFL-CIO, et al.,	:	
	:	Case No. 01-642
Relators,	:	
	:	**ORIGINAL ACTION IN MANDAMUS**
v.	:	
	:	
OHIO BUREAU OF WORKERS' COMPENSATION, et al.,	:	
	:	
Respondents.	:	

BRIEF OF RELATORS OHIO AFL-CIO, ET AL.

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I. STATEMENT OF THE CASE AND FACTS

All workers in this state, including members of unions affiliated with Relator Ohio AFL-CIO and members of Relator U.A.W.[1], are potentially subjected to suspicionless drug/alcohol testing under R.C. 4123.54, as amended by Am. Sub. H.B. 122.[2]

Am. Sub. H.B. 122 permits suspicionless drug/alcohol testing of any worker who is injured in the course and scope of their employment, solely because they have sustained an industrial injury. There is no requirement that there be a suspicion that the injury occurred because the injured worker had been under the influence of a controlled substance.

The legislature delegated the decision of whether or not to require an injured worker to submit to a drug/alcohol test to the whim of the Employer.

Under Am. Sub. H.B. 122, if the Employer requires a drug/alcohol test the injured worker is required to submit to "chemical tests" or face denial of workers' compensation

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[1] Relators United Auto Aerospace & Agricultural Implement Workers of America Region 2 and Region 2-B are jointly referred to in this Brief as the "U.A.W."

[2] A copy of Am. Sub. H.B. 122, as signed by the Governor, was included in Relators' Submission of Evidence, hereinafter "Ev.", at pp. 3-8.

benefits. The statute, as amended, provides that an injured worker who refuses a test will be presumed to have been under the influence of a controlled substance, which will result in a denial of workers' compensation benefits.

The "chemical tests" which an injured worker's Employer may require include blood, urine and breath tests:

1] R.C. 4123.54(B)(1) requires that an injured worker submit to alcohol testing provided for in R.C. 4511.19(A)(2) through (A)(7), which provide for blood, breath, and urine testing;

2] R.C. 4123.54(B)(2) and (B)(3) refer to levels in urine, indicating that urine testing may be required; and

3] R.C. 4123.54(B)(4) refers to "chemical test" levels established by "certified" laboratories, without specifying the type of testing, potentially leaving the employee open to any type of testing.

Urine, blood and breath tests are intrusive upon an individual's privacy because of the nature of the tests and the information which the Employer and others may learn from the tests. The amended statute provides no protection for workers' privacy. There are no controls over what may be done with test results and no limitation on the performance of additional tests

on the substances procured. Furthermore, because the results are to be used to deny workers' compensation benefits, the statute ensures that test results will become publicly known.

Because of the harm caused to all injured workers in this State by the suspicionless drug/alcohol testing requirements and the presumptions which will result in denial of workers' compensation benefits, Relators have filed this original action challenging the constitutionality of the changes made to R.C. 4123.54 by Am. Sub. H.B. 122.

Under Am. Sub. H.B. 122, if an injured worker tests positive, or refuses to take a required chemical test, there is a so-called "rebuttable presumption" that the injured worker was under the influence of a controlled substance and therefore is to be denied workers' compensation benefits. The rebuttable presumption puts a burden on the injured worker to prove a negative, *i.e.*, that s/he was not injured due to the use of drugs or alcohol.

This means that Respondents will deny workers' compensation claims filed by employees (including members of unions affiliated with the Ohio AFL-CIO and members of the U.A.W.) based on the unconstitutional requirements of R.C. 4123.54, as amended.

The fact that Respondents will deny workers' compensation

claims for failure to comply with R.C. 4123.54, as amended, harms employees in this state (including members of unions affiliated with the Ohio AFL-CIO and members of the U.A.W.) because it will be used to coerce employees to submit to the unconstitutional testing requirements of R.C. 4123.54, as amended and will also discourage employees with valid workers' compensation claims from filing for workers' compensation.

Relators Ohio AFL-CIO and U.A.W. represent significant numbers of employees, citizens and taxpayers who work in the state of Ohio. The Ohio AFL-CIO represents 850,000 members of affiliated Unions and the U.A.W. represents over 100,000 members. [Affidavit of William Burga, para. 5, Ev. p. 28; Affidavit of James W. Harris, para. 3, Ev. p. 29.]

Union members represented by the Ohio AFL-CIO and U.A.W. work in the State of Ohio and are subject to the Ohio Workers' Compensation law. Therefore, they are potential subjects of the unconstitutional testing requirements contained in Am. Sub. H.B. 122. [Affidavit of William A. Burga, para. 6, 9, Ev. p. 28; Affidavit of James W. Harris, para. 3, 6, Ev. p. 29, 30.]

II. ARGUMENT

PROPOSITION OF LAW I:

AN AMENDMENT TO THE WORKERS' COMPENSATION LAW WHICH REQUIRES INJURED WORKERS TO SUBMIT TO SUSPICIONLESS DRUG/ALCOHOL TESTING INVOLVES A SIGNIFICANT PUBLIC RIGHT AND IS PROPERLY CHALLENGED IN MANDAMUS.

Every worker in Ohio may be injured in their work, thereby becoming subject to the requirements of R.C. 4123.54, as amended by Am. Sub. H.B. 122.

Because Am. Sub. H.B. 122 subjects all Ohio workers to the possibility of a drug/alcohol test, this case involves a significant public right which should be addressed by this Court. State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, syl. 1.

Relators Ohio AFL-CIO and U.A.W. represent significant numbers of employees who work in Ohio and are the potential subjects of the unconstitutional testing requirements of Am. Sub. H.B. 122. [Affidavit of William A. Burga, para. 6, 9, Ev. p. 28; Affidavit of James W. Harris, para. 3, 6, Ev. p. 29, 30.]

Employees represented by these Unions are also citizens and taxpayers of Ohio, as is Relator William Burga. [Affidavit of William A. Burga, para. 2, 6, Ev. p. 27, 28; Affidavit of James W. Harris, para. 3, Ev. p. 29.]

Relators have asked this Court to issue a writ of mandamus ordering Respondents to apply R.C. 4123.54 without the unconstitutional testing requirements added by Am. Sub. H.B. 122. As such, this case is properly before this Court in mandamus:

> Although the relators' request is for this court to have the respondent refrain from exercising her statutory responsibility, **the essence of their request is for respondent to abide by a former statute.** In exercising our original jurisdiction we will necessarily have to address the constitutionality of R.C. 5727.15(C) and decide whether to prevent respondent from carrying out the task required under the present apportionment statute; however, these decisions are only ancillary to our consideration of the writ itself on the merits.
>
> State ex rel. Zupancic v. Limbach (1991), 58 Ohio St.3d 130, 133 (emphasis added).

As this Court has recognized in State ex rel. Levin v. Schremp (1995), 73 Ohio St.3d 733, "rights are enforceable in mandamus when the defendant is under a public duty to perform the act demanded." (Levin at 735, quoting Antieau, The Practice of Extraordinary Remedies (1987) 295, Section 2.03).

As this Court has recognized,

> in Ohio **mandamus is a proper proceeding in which to question the constitutionality of legislative enactments.**
>
> It is necessary to consider whether

> Am.Sub.H.B. No. 350 is unconstitutional in order to determine whether respondents have a clear legal duty to follow prior law. Concomitantly, **relators would have a clear legal right to have respondents proceed under preexisting law** if we found Am.Sub.H.B. No. 350 unconstitutional. The fact that relators might be able to seek a declaratory judgment accompanied by an injunctive order would not defeat jurisdiction in this case. The availability of such an action is not an appropriate basis to deny a writ to which relators are otherwise entitled.
>
> Sheward at 509, emphasis added.

Therefore, the constitutional challenge to R.C. 4123.54, as amended, is properly before this Court. The Respondents are under a duty to act according to the constitution when administering the workers' compensation system.

PROPOSITION OF LAW II:

A STATE WORKERS' COMPENSATION STATUTE WHICH REQUIRES INJURED WORKERS TO UNDERGO SUSPICIONLESS DRUG/ALCOHOL TESTING OR FACE THE LOSS OF WORKERS' COMPENSATION BENEFITS CONSTITUTES STATE-COMPELLED SUSPICIONLESS DRUG/ALCOHOL TESTING WHICH VIOLATES THE RIGHT TO PRIVACY AND CONSTITUTES AN UNLAWFUL SEARCH AND SEIZURE.

State-compelled suspicionless drug/alcohol testing of employees, solely because they were injured, is an unprecedented and unconstitutional intrusion on workers' privacy rights.

The testing which an injured worker must submit to under R.C. 4123.54, as amended by Am. Sub. H.B. 122, is suspicionless because it is triggered solely by the fact that an industrial injury occurred. There is no requirement of individualized suspicion that drug/alcohol use was the cause of the injury, or that the injured worker was under the influence of drugs or alcohol at the time of the injury.

Testing without individualized suspicion violates the Fourth Amendment of the United States Constitution, and Oh. Const. Art. I, Sec. 14, which provide that individuals are free from unreasonable searches and seizures and have a constitutional right to privacy:

> The [Fourth] Amendment guarantees the privacy, dignity, and security of persons

> against certain arbitrary and invasive acts by officers of the Government or those acting at their direction . . .
>
> Skinner v. Railway Labor Executives' Assn. (1989), 489 U.S. 602, 613-614 (bracketed material added).

A. A Workers' Compensation Statute Requiring Injured Workers to Submit to Drug/Alcohol Testing Constitutes a Government Compelled "Search."

R.C. 4123.54 is part of the State of Ohio's Workers' Compensation law. The Workers' Compensation system is a benefit system which was created by the State and exists as a result of the Ohio Constitution. [Oh. Const. Art. II, Sec. 35.]

Through R.C. 4123.54, as amended by Am. Sub. H.B. 122, the State is compelling injured workers to undergo suspicionless drug/alcohol testing. The State is threatening injured workers with loss of workers' compensation benefits for the refusal to undergo such testing in order to compel the injured workers to submit to suspicionless drug/alcohol testing. R.C. 4123.54(B)(5).

Injured workers will submit to such drug/alcohol tests due to the compulsion of the State and the fear of losing workers' compensation benefits if they do not comply.

Government compelled taking of blood, urine, and/or breath

tests of injured workers constitutes a search and seizure, and violation of privacy.

The United States Supreme Court has "long recognized that a `compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search", Skinner at 616, because:

> it is obvious that **this physical intrusion**, penetrating beneath the skin, **infringes an expectation of privacy** that society is prepared to recognize as reasonable. **The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests**. . . . **Subjecting a person to a breathalyzer test. . . implicates similar concerns** about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search. . .
>
> Skinner at 616-617, emphasis added.

Compelling production of urine samples also constitutes a Fourth Amendment search:

> **chemical analysis of urine**, like that of blood, **can reveal a host of private medical facts** about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that **the process of collecting the sample** to be tested, which may in some cases involve visual or aural

> monitoring of the act of urination, itself **implicates privacy** interests.
>
> Skinner at 617, emphasis added.

B. Suspicionless Testing of Injured Workers is Unconstitutional.

Usually, there must be an "individualized suspicion" in order for the government to conduct a search or seizure. Chandler v. Miller (1997), 520 U.S. 305, 308. However, "particularized exceptions to the main rule are sometimes warranted based on `special needs, beyond the normal need for law enforcement.'" Chandler at 313.

Suspicionless searches are only permissible

> **In limited circumstances**, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.
>
> Skinner at 624 (emphasis added).

The searches at issue in the present case do not fit within the "closely guarded category of constitutionally permissible suspicionless searches." Chandler at 309.

1. Suspicionless Drug/Alcohol Testing Violates Workers' Privacy.

The suspicionless drug/alcohol testing created by Am. Sub.

H.B. 122 severely implicates the privacy interests of workers. Additionally, the present amendment is not constitutional because the government does not have an interest which justifies eliminating the requirement of individualized suspicion.

The U.S. Supreme Court has warned against suspicionless testing, in a case where it upheld drug testing of student-athletes based on the school's supervisory role:

> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts
>
> Vernonia School Dist. 47J v. Acton (1995), 515 U.S. 646, 665.

a. Workers Do Not Have a Diminished Expectation of Privacy, Solely Because They Are Working.

Am. Sub. H.B. 122 is a clear violation of workers' right to privacy. Injured workers are required to submit to blood, urine and/or breath tests after an injury, solely at the whim of the Employer. There are no protections in the statute for information which the Employer, its agents and employees may learn from such tests, which may provide substantial information about a person's private life.

The U.S. Supreme Court has upheld suspicionless drug/alcohol testing only where the facts of the particular case demonstrate

that the individual who is required to undergo testing had a "diminished expectation of privacy":

> 1] Skinner at 627, indicated that "the expectations of privacy of covered employees are diminished by reason of their **participation in an industry** [railroad] **that is regulated pervasively**" (emphasis added);
>
> 2] Treasury Employees v. Von Raab (1989), 489 U.S. 656, 672, indicated that "**Customs employees** who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy" (emphasis added);
>
> 3] Vernonia School Dist. at 657, indicated that "Legitimate privacy expectations are even less with regard to **student athletes** . . . school athletes have a reduced expectation of privacy" (emphasis added).

In contrast to the situations where the U.S. Supreme Court has approved suspicionless testing, the present requirement applies to **all** workers in the state. It is not limited to specific situations where there might be a diminished expectation of privacy. Workers do not have a diminished expectation of privacy just because they are workers.

Even assuming arguendo that **some** employees in Ohio have jobs which would provide them with a "diminished expectation of

privacy", there is no basis for finding that **all** Ohio employees have a "diminished expectation of privacy." Therefore, the suspicionless testing required by Am. Sub. H.B. 122 is unconstitutional.

b. Suspicionless Drug/Alcohol Testing Is Unconstitutional Because it Intrudes on the Privacy of Individual Workers.

The testing requirement is also unconstitutional because of its intrusive nature on the privacy of individual workers. The U.S. Supreme Court has indicated that in order for suspicionless testing to be valid, the testing must be limited and have controls to ensure privacy. For example, Chandler found that a test was not invasive because:

> The State permits a candidate to provide the urine specimen in the office of his or her private physician; and the results of the test are given first to the candidate, who controls further dissemination of the report.
>
> Chandler at 318.

Similarly, Vernonia School Dist. indicated that a test was not invasive because:

> the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used

for any internal disciplinary function.

Vernonia School Dist. at 658.

The testing requirements in this case are completely different. An injured worker may be required to take a test under any circumstances; there are no limitations upon the provision of the substances to be tested.

Furthermore, there are no controls on dissemination of the testing results. The results will be provided to the Employer. The report will be made known to other employees and the Employer's workers' compensation representatives, as part of the defense of the claim. The results will also be made known to non-employees because of its use as a defense in a workers' compensation claim.

An Employer may do anything it wants with the report. It may use the report to discipline or fire the employee; it may provide the report to the police; it may make the results of the report widely known.

By its very nature, the statute provides that there will be a wide dissemination of the report because a positive report will be used to deny a workers' compensation claim. The denial will be known to all in the office of the Employer who make the decision to deny, as well as administratively at the Bureau and

Commission.

The testing is also invasive because of "the information it discloses concerning the state of the subject's body, and the materials [s/]he has ingested." Vernonia School Dist. at 658. As the U.S. Supreme Court has recognized "It is not disputed. . . that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee." Skinner at 617.

Such testing is invasive because

> employees are commonly required to indicate on a form all medications recently taken in order to prevent distortion of the laboratory analysis. **Employees are thereby forced to reveal otherwise confidential information about medication taken** for diabetes, epilepsy, high blood pressure, depression, birth control, and a host of other sensitive medical conditions.
>
> Second, the urinalysis itself can disclose a wide range of substances consumed by the employee within the last several days or weeks. **Urinalysis will reveal** not only exposure to illicit drugs, but can also detect **consumption of legal compounds, thus effectively compelling further disclosure of private medical conditions** and therapy.
>
> The compelled disclosure of medical information confidentially communicated to one's physician invades privacy rights . . . certainly such sensitive and traditionally

> confidential information constitutes private aspects of one's life over which one may legitimately expect to exercise control . . .
>
> Chen, Kim & True "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12:4 Geo. Mason U.L. Rev. 651, 673 (emphasis added).

In Vernonia School Dist., the Court found that the testing was not invasive because of the limitation on what was tested for; the statute at issue in the present case provides no such limitations on what can be tested for. It requires the worker to submit to the required tests and places no limitations on any additional testing.

When collecting blood to be tested, the "physical intrusion, penetrating beneath the skin, infringes an expectation of privacy." Skinner at 616. Additionally, "[s]ubjecting a person to a breathalyzer test. . . implicates similar concerns about bodily integrity." Skinner at 616-617.

The requirement of submission to urine testing also is invasive:

> Urine drug tests are also problematic because they are a particularly intrusive kind of test. Urine drug testing typically invades

an individual's personal privacy.

> Office of the General Counsel "Drug Testing of Physicians" JAMA August 22/29 1990, Vol. 264, no. 8, p. 1039.

Skinner upheld the urine testing because of safeguards in place to insure that the collecting of urine was not unduly intrusive ("While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process" Skinner at 626); such safeguards are not provided by the present statute. As a result, individuals subject to urine testing may be forced to have their privacy invaded:

> Urine drug testing typically invades an individual's personal privacy. To prevent adulteration of the urine sample, the individual being tested is placed under some kind of observation while performing an act that is usually shielded by great privacy.
>
> Office of the General Counsel "Drug Testing of Physicians" JAMA August 22/29 1990, Vol. 264, no. 8, p. 1039.

As the U. S. Supreme Court indicated in Skinner:

> "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a

> function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."
>
> Skinner at 617, quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (1987).

2. There Is No Valid Justification for Suspicionless Testing.

Even if there were not problems with the intrusive nature of the testing, the testing requirement would be unconstitutional because, as the U.S. Supreme Court has indicated:

> where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.
>
> Chandler at 323.

Nothing about the present statutory requirement involves a public safety justification for requiring testing of **all** injured workers — regardless of what their job requires.

The U.S. Supreme Court has indicated:

> Our precedents establish that the proffered special need for drug testing must be substantial--important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.
>
> Chandler at 318.

Von Raab approved testing for a limited category of workers (custom workers) because of the unique nature of their jobs. However, the Supreme Court has recognized that Von Raab was "[h]ardly a decision opening broad vistas for suspicionless searches, [but] must be read in its unique context." Chandler at 321 (bracketed material added).

There is no basis, no interest, sufficient to justify the potential suspicionless testing of **any** worker in the state solely because that worker was injured.

The testing requirements of R.C. 4123.54, as amended, apply to all workers — regardless of whether their job is one which might give rise to safety or drug concerns. Such a broad testing requirement is not within the limited class of justifiable suspicionless searches recognized by the U.S. Supreme Court.

PROPOSITION OF LAW III:

THERE IS NO RELATIONSHIP BETWEEN A POSITIVE DRUG/ALCOHOL TEST, OR THE FAILURE TO TAKE A DRUG/ALCOHOL TEST, AND WHETHER OR NOT THE INJURY OCCURRED DUE TO THE EMPLOYMENT.

Drug/alcohol tests such as those required by Am. Sub. H.B. 122:

> cannot differentiate on-duty impairment from prior drug or alcohol use which has ceased to affect the user's behavior. See 49 CFR 219.309(2) (1987) (urine test may reveal use of drugs or alcohol as much as 60 days prior to sampling)
>
> Skinner v. Railway Labor Executives' Assn. (1989), 489 U.S. 602, 652, Marshall dissenting.

As a result of Am. Sub. H.B. 122, workers' compensation benefits will be improperly denied to workers who suffer industrial injuries due to their employment, because a positive test result bears no relationship to whether or not those injured workers were injured in the course of their employment.

There is no relationship between a positive test result and whether or not the accident was caused by an employee's impairment because:

> Drug testing does not provide any information

> about . . . mental or physical impairments that may result from drug use.
>
> > AMA Policy H-95.985 Drug Screening and Mandatory Drug Testing. [*See, also,* Chen, Kim & True "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12:4 Geo. Mason U.L. Rev. 651, 676: "The most critical deficiency in urine drug tests is that they do not measure current impairment, intoxication or job performance."]

Because drug/alcohol testing does not provide any information about any impairment that may result from the use of drugs or alcohol, there is no justification for using testing results (or a failure to take a test) to determine an injured worker's right to workers' compensation benefits.

As indicated in Chen, Kim & True "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12:4 Geo. Mason U.L. Rev. 651, 677:

> urine tests typically only detect inert metabolites . . . in urine, which are the end products of drugs processed by the body. . . bear no relationship to current impairment . . . drug metabolites and traces are excreted in urine days and even weeks after the parent drug has left the brain and blood stream, and long after any psychoactive effect of the drug has subsided. Thus, urine drug tests are only capable of revealing <u>prior</u> use

(which likely occurred off-duty), and not on-the-job impairment.

> See also, Office of the General Counsel "Drug Testing of Physicians" JAMA August 22/29 1990, Vol. 264, no. 8, p. 1039 ("It is generally not possible to correlate the results of a urine test with physiological effects of the drug . . . Consequently, there may be only a weak correlation between positive urine tests and impairment by drugs").

Any positive test result may be due to substances used before or after work, and which did not impair the worker during their work. Therefore, a positive test result does not indicate that a worker was injured as the result of impairment arising from use of a controlled substance.

The drug tests can be required up to 32 hours after the injury. The alcohol tests can be required up to 8 hours after the injury.

Obviously, a drug/alcohol test conducted 8 or 32 hours after an incident reveals nothing about the individual's status **at the time of the incident.**

The time periods for conducting drug/alcohol tests are unreasonably long and permit testing sufficiently after the event that any substances found may have been ingested after the work accident occurred.

By contrast, R.C. 4511.19 (the statute dealing with tests for driving while under the influence of alcohol or drugs) provides that only drug or alcohol tests from substances withdrawn within 2 hours of the incident can be used as evidence in cases where an individual is charged with driving under the influence. [See R.C. 4511.19(D)(1).]

The lack of relationship between the test result and impairment is further demonstrated by the problem with false negatives:

> . . . drug testing . . . may also suffer from a false aura of infallibility. One statistical study found that "two out of every five workers testing positive truly are drug free." Donald T. Barnum & John M. Gleason, The Credibility of Drug Tests: A Multi-Stage Bayesian Analysis, 47 Indus. & Lab. Rel. Rev. 610, 616 (1994). Drug screens are plagued by the problems of "cross-reactivity" -- namely, the familiar concern that metabolites of benign consumables, like poppy seed muffins, will be confused with metabolites of illicit substances; "impairment detectability," which refers to the fact that the time of ingestion of drugs cannot be determined from normal tests, and the level of judgment and motor impairment cannot be measured; "passive inhalation," -- breathing sidestream smoke of marihuana, for instance, may yield a false positive result; specimen dilution, substitution, or adulteration; improper calibration or

> cleaning of testing equipment; and simple technician error. Rothstein, 5 Harv. J.L. & Tech. at 74-76.
>
> Santiago v. Greyhound Lines, Inc. (1997), 956 F. Supp. 144, 150-151.

Nor is there any relationship between refusal to take a test and the work-relatedness of the injury.

There are valid reasons to refuse to take a drug/alcohol test. Workers may not want to be tested even if they have not used drugs or alcohol.

Workers may not want to take a drug/alcohol test because they do not want their privacy violated. They may not want the Employer (or others) to know about other health problems or prescribed medications they are taking.

Refusal to take a drug/alcohol test does not indicate that an injured worker was "impaired" when injured, and does not justify the denial of workers' compensation benefits.

Because drug/alcohol tests bear no relationship to any legitimate question relating to the injured worker's entitlement to workers' compensation benefits, and provide no information about whether or not the injured worker was injured as a result of being under the influence of a controlled substance, the requirements of Am. Sub. H.B. 122 violate Due Process (as

discussed below under Proposition of Law IV, Heading A) and Oh. Const. Art. II, Sec. 35 (as discussed below under Proposition of Law VI, Heading A).

PROPOSITION OF LAW IV:

AM. SUB. H.B. 122 VIOLATES DUE PROCESS BECAUSE THERE IS NO RELATIONSHIP BETWEEN THE TESTING RESULTS AND THE CAUSE OF THE INJURY AND THE AMENDMENT PLACES AN UNFAIR BURDEN ON WORKERS TO PROVE A NEGATIVE.

A. Due Process Is Violated Because There Is No Relationship Between Testing Results and the Cause of the Injury.

Due Process prohibits government action which is arbitrary and capricious in nature. State, ex rel. Squire v. The National City Bank of Cleveland (1936), 56 Ohio App. 401.

As is discussed above, in Proposition of Law III, the drug/alcohol testing required by R.C. 4123.54, as amended, does not demonstrate whether or not an accident was caused by a worker being impaired. There is no relationship between test results (or failure to take a test) and impairment.

Therefore, conditioning workers' compensation benefits upon the results of these tests violates Due Process because it is arbitrary and capricious to condition workers' compensation benefits upon testing results which bear no relationship to the cause of the injury.

B. Am. Sub. H.B. 122 Violates Due Process Because it Requires the Injured Worker to Prove a Negative.

R.C. 4123.54, as amended, creates a "presumption" that the

injured worker was intoxicated or under the influence where a test is "failed", or where the individual refuses to take a drug/alcohol test.

The presumption is supposedly "rebuttable." Yet, in order to rebut the presumption, the injured worker would be required to prove that they were not under the influence -- this is a requirement that an injured worker prove a negative.

"Proof of a negative is almost always impossible." Bright v. Ford Motor Co. (Ohio App. 2 Dist. 1990), 63 Ohio App.3d 256, 261 (Grady, J., concurring in judgment only). How can an injured worker be placed under the burden of proving the impossible in order to be eligible for workers' compensation benefits? This question is especially relevant in light of the fact that, as discussed above, there is no relationship between test results (or failure to take a test) and impairment.

Requiring an injured worker to meet such an unfair burden to be eligible for workers' compensation benefits violates Due Process.

PROPOSITION OF LAW V:

WHEN THE DECISION WHETHER OR NOT TO TEST EMPLOYEES IS LEFT UP TO THE WHIM OF THE EMPLOYER, DUE PROCESS AND EQUAL PROTECTION ARE VIOLATED. DUE PROCESS AND EQUAL PROTECTION ARE VIOLATED BY THE LACK OF STANDARDS WHICH PERMIT A LABORATORY TO DETERMINE TESTING LEVELS.

A. Leaving the Decision Whether to Test to the Whim of the Employer Results in Testing Which Is Arbitrary and Capricious and Violates Due Process.

The statute, as amended, leaves it completely at the Employer's whim whether or not to require testing. This improperly results in "rule by whim rather than law." Akron v. Rowland (1993),67 Ohio St.3d 374, 384, quoting Timmons v. Montgomery (M.D.Ala.1987), 658 F.Supp. 1086, 1089.

An Employer may test — or not test — employees based on how they feel about the employee, and whether or not they are looking for an excuse to discipline or fire an employee.

There are no controls or standards to determine when such tests may be required. This violates Due Process (U.S. Const. Am. XIV, Oh. Const. Art. I, Sec. 16):

> "if arbitrary and discriminatory enforcement

> is to be prevented, laws must provide explicit standards for those who apply them."
>
> Complaint Against Harper, In re, (1996), 77 Ohio St.3d 211, 221, citing Coates v. Cincinnati (1971), 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214; Gregory v. Chicago (1969), 394 U.S. 111, 117-118, 89 S.Ct. 946, 950, 22 L.Ed.2d 134, 139-140 (Black and Douglas, JJ., concurring).

For example, a worker can be tested by an Employer after an injury even if the worker's actions were completely irrelevant to the occurrence of the injury (such as someone who is injured while working in a warehouse when another worker drops a box which lands on the worker).

Because there are no standards to indicate when testing should occur, employees are subjected to arbitrary and capricious decisions about testing, which violates Due Process. State, ex rel. Squire v. The National City Bank of Cleveland (1936), 56 Ohio App. 401.

B. Leaving the Decision Whether to Test to the Whim of the Employer Results in Similarly Situated Employees Being Treated Differently, which Violates Equal Protection.

As discussed above, testing is subject to the whim of the Employer. There are no standards to govern when testing is to occur.

As a result, some employees will be tested and some will not. An Employer may test some of its employees but not others; some Employers may test some or all of their employees, some may test none.

This means that workers suffering identical injury may or may not be subject to the intrusive requirement that they undergo blood/urine/breath testing — depending solely upon the whim of their Employer.

Therefore, individuals are not treated in a similar manner to others in like circumstances. This violates Equal Protection (U.S. Const. Am. XIV, Oh. Const. Art. I, Sec. 2). Equal Protection

> require[s] that all similarly situated individuals be treated in a similar manner. State ex rel. Doersam v. Indus. Comm. (1989), 45 Ohio St.3d 115, 119, 543 N.E.2d 1169, 1173. In other words, laws are to operate equally upon persons who are identified in the same class.
>
> State ex rel. Patterson v. Indus. Comm. (1996), 77 Ohio St.3d 201, 204.

Equal protection "require[s] the existence of reasonable grounds for making a distinction between those within and those outside a designated class." Kinney v. Kaiser Aluminum Corp. (1975), 41 Ohio St.2d 120, 123.

Under this statute, injured workers are not treated in a similar manner. Injured workers will be treated differently, when the only difference is whether or not their Employer wants to subject them to testing. There is

> no reasonable justification for such disparate treatment . . .
>
> Patterson at 207.

C. Due Process and Equal Protection are Violated Where Laboratories are Permitted to Determine Testing Levels.

The amended statute also violates Due Process because it improperly delegates to the laboratory the right to determine what levels will result in the presumption applying. This is because, as a result of the amendment, R.C. 4123.54(B)(4) provides that the presumption applies where:

> the employee, through a chemical test administered within thirty-two hours of an injury, is determined to have barbiturates, benzodiazepines, methadone, or propoxyphene in the employee's system **that tests above levels established by laboratories** certified by the United States department of health And human services.
>
> (Emphasis added.)

This means that the legislature has improperly delegated authority for determining what levels will result in the presumption applying. It is also arbitrary because different

laboratories may apply different levels, or the same laboratory may apply different levels to different employees.

Equal Protection is also violated by the provision of R.C. 4123.54(B)(4), which permits individual laboratories to determine the level which will result in the presumption applying. Two individuals could have the same level, but because different laboratories determine to apply different levels, the presumption may apply to one, but not the other.

PROPOSITION OF LAW VI:

REQUIRING SUSPICIONLESS DRUG/ALCOHOL TESTING OF INJURED WORKERS VIOLATES OH. CONST. ART. II, SEC. 35 BECAUSE THERE IS NO RELATIONSHIP BETWEEN TESTING RESULTS AND WHETHER OR NOT AN INJURY OCCURRED IN THE COURSE OF EMPLOYMENT. SUSPICIONLESS DRUG/ALCOHOL TESTING OF INJURED WORKERS ALSO VIOLATES OH. CONST. ART. II, SEC. 35 BECAUSE IT DISCOURAGES FILING OF WORKERS' COMPENSATION CLAIMS.

A. Art. II, Sec. 35 is Violated Because there is no Relationship Between Testing Results and The Cause of the Injury.

R.C. 4123.54, as amended by Am. Sub. H.B. 122, disregards the question of whether or not the injury occurred in the course of employment by focusing on test results (or failure to take a test) which, as discussed above, bear no relationship to whether or not the injury occurred due to the worker's impairment.

Injured workers are entitled to workers' compensation benefits under Oh. Const. Art. II, Sec. 35 if they were injured in the course and scope of their employment.

The amendment to R.C. 4123.54 "frustrates the purpose of the Act, which is to compensate workers who are injured as a result of the requirements of their employment. See Section 35, Article II of the Ohio Constitution." Village v. General Motors Corp. (1984), 15 Ohio St.3d 129, 133.

Oh. Const. Art. II, Sec. 35 exists for "the purpose of

compensating employees and dependents" for industrial injuries. Oh. Const. Art. II, Sec. 35; State ex rel. Patterson v. Indus. Comm. (1996), 77 Ohio St.3d 201, 207.

Instead of being concerned with whether or not a compensable injury was suffered, the amendment to R.C. 4123.54 focuses on test results which have no relationship to whether or not a compensable injury occurred.

Therefore, Am. Sub. H.B. 122 will result in the denial of workers' compensation benefits to workers who have suffered industrial injuries as a result of their employment, contrary to Oh. Const. Art. II, Sec. 35.

B. R.C. 4123.54, as Amended, Discourages Injured Workers from Filing Workers' Compensation Claims.

R.C. 4123.54, as amended, violates Art. II, Sec. 35 because it discourages injured workers from filing workers' compensation claims.

An Employer may use the drug/alcohol testing provisions of R.C. 4123.54, as amended, as a means of pressuring injured employees who wish to maintain their privacy to drop (or not even file) workers' compensation claims.

Injured workers who want to protect their privacy by refusing to submit to a test will have been informed that

refusing the test has affected their eligibility for workers' compensation benefits. [R.C. 4123.54(B).] As a result, they will be discouraged from filing for workers' compensation benefits.

Additionally, injured workers who test positive, but were not impaired at work (and their injury had nothing to do with use of a controlled substance) will be discouraged from filing a workers' compensation claim because filing a claim will result in the results of the test being filed with the Bureau and/or Commission.

A statute which discourages injured workers from filing workers' compensation claims is contrary to Art. II, Sec. 35.

III. CONCLUSION

This case involves an unprecedented attempt by the legislature to subject the working population of the State of Ohio to suspicionless invasive drug/alcohol testing. Any worker in the State of Ohio is potentially subject to such tests solely because they are working in the State of Ohio. If the worker is injured, the Employer may require a drug/alcohol test.

This unprecedented invasion of the privacy of the injured workers of this state is invalid and unconstitutional. It violates the right to privacy, and the right to be free from unreasonable searches and seizures, provided by U.S. Const. Am. XIV and Oh. Const. Art. I, Sec. 14.

Additionally, there is absolutely no relationship between a test result (or failure to take a test) and whether or not the injured worker suffered a compensable injury. A positive test result may show substances taken before (or even after) the employee was working – and shows absolutely nothing about whether or not the employee was injured as a result of being impaired by a controlled substance.

The lack of a relationship between test results and the cause of the injury violates both Due Process and Art. II, Sec. 35.

Due Process is also violated by the fact that there are no standards to govern what situations require an injured worker to be tested. The decision is left totally to the arbitrary whims of the employer. These arbitrary decisions and classes of employees tested also violate equal protection.

The requirement that an injured worker prove a negative also violates Due Process.

The amended statute also violates Art. II, Sec. 35 because it will discourage injured workers from filing workers' compensation claims. Workers who wish to maintain their privacy be refusing a test will have been informed that this decision will affect their rights to workers' compensation. Workers who test positive (but were not impaired on the job) and wish to avoid having this information spread around will also be discouraged from filing a workers' compensation claim.

For the reasons set forth above, the Court should grant the requested writ of mandamus and order Respondents to apply the version of R.C. 4123.54 as it existed before the unconstitutional amendments of Am. Sub. H.B. 122.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served by depositing a copy in the U.S. Mail, postage prepaid, this day of , 2001, addressed to the following:

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