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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/15  
 LAST UPDATED 3/18/14

SPONSOR Roch/Cervantes HB 238/aHJC/AHBEC/aSJC

SHORT TITLE Workers' Comp Benefits & Intoxication SB \_\_\_\_\_

ANALYST Klundt

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI				

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workers' Compensation Administration (WCA)  
 Administrative Office of the Courts (AOC)

#### Responses Not Received From

General Services Department (GSD)

### SUMMARY

#### Synopsis of SJC amendment

This amendment inserts an additional section which increases the compensation benefits payable to a worker who was intoxicated at the time of their injury if their employer knew or should have known of the employee's intoxication prior to the injury.

#### Synopsis of HBEC amendment

This amendment changes the minimum reduction of benefits due and payable from an employer to ten percent but no more than ninety percent and adds language stating that the reduction or denial of benefits in this bill shall not affect payments of benefits to the dependents of a deceased worker.

#### Synopsis of HJC amendment

This amendment seeks to protect benefit payments to the surviving dependent of a deceased worker whose intoxication or influence contributed to the workplace accident resulting in

worker's death. Prior to the HJC amendments, Section 52-1-11 sought to clarify that injuries willfully caused by a worker would be barred, whereas proposed amendments to Section 52-1-12.1 sought to provide for a reduction of benefits when a worker's intoxication or influence contributed to the work place injury. Both Sections 52-1-11 and 52-1-12.1(B) now reference benefit payments "to the worker" only.

#### Synopsis of Original Bill

House Bill 238 would repeal Section 52-1-12 and amend Sections 52-1-11 and 52-1-12.1 NMSA 1978 of the Workers' Compensation Act. Section 52-1-11 NMSA 1978 would continue to provide that a worker who willfully or intentionally causes his or her injury is not entitled to workers' compensation benefits. Section 52-1-12.1 would be amended to provide that indemnity benefits of an intoxicated worker will be reduced between 35 percent and 85 percent based on the degree the worker's intoxication or influence of drugs contributes to the accident. The percentage of reduction will be decided by a workers' compensation judge if the parties do not otherwise agree. The bill does not affect a worker's right to have medical benefits covered by the worker's employer. A reduction in benefits is not allowed if an employer does not have a written drug and alcohol workplace policy. Similarly, a worker will not be entitled to benefits should the worker refuse testing requested by the employer. This bill requires the Workers' Compensation Administration to promulgate rules to govern testing and cutoff levels.

#### **FISCAL IMPLICATIONS**

No fiscal implications have been identified by the Workers' Compensation Administration.

#### **SIGNIFICANT ISSUES**

##### HJC amendment Significant Issues

The WCA believes that prior to the amendment, Section 52-1-11 was clear that a worker who willfully caused his or her injury was not entitled to benefits under the Act. Willful behavior includes intentional acts and fraudulent acts, such knowing or intentional self-harm. By adding the language "to the worker", Section 52-1-11 may allow for payment of benefits to a deceased worker's surviving dependents even where a worker willfully caused the accident. The agency indicated that the amendment may be problematic since this was not the original intention of the bill. Additionally, the WCA indicated that the WCA Advisory Council does not support the proposed amendment.

The amendment to the language in Section 52-1-12.1(B) restricts the reduction in benefits provision only to those benefits payable to the worker whose intoxication or influence contributed to the work injury. By adding the language to 52-1-12.1, benefit payments to a deceased worker's surviving dependents would not be subject to the reduction in benefits provided for in Section 52-1-12.1(B). The WCA's Advisory Council also stated it is not opposed to this amendment.

##### Bill Significant Issues

HB 238 attempts to clarify address language identified by the NM Court of Appeals in *Villa v. City of Las Cruces*, 2010-NMCA-099 as problematic. New Mexico's statutes currently provide

for a complete bar to all benefits when a worker's injury is "occasioned by" intoxication (Section 52-1-11) or when "occasioned solely by" impairment due to drugs (Section 52-1-12). A separate section provides for a 10 percent reduction of compensation benefits when a worker's intoxication or impairment by drugs was a "contributing cause" of the injury (Section 52-1-12.1).

In *Villa*, the Court stated "[t]he Legislature has left the law in a bit of a lurch." When interpreting the statutes, the Court stated it felt "forced" to "choose between two undesirable results" (i.e., a complete bar or a 10 percent reduction even though a worker's intoxication was 99 percent the cause of the accident) and stated further "[w]e think it unfortunate that the Legislature created a span of a complete bar on the one hand and a 90 percent recovery on the other hand, while leaving the language in the two statutes ambiguous."

The NM Supreme Court's interpretation of the "occasioned solely by" language in *Ortiz v. Overland Express*, 2010-NMSC-021, also justifies clarification of the statutory language. In *Ortiz*, the worker died in an auto accident and an autopsy revealed that Worker had methamphetamine and amphetamine present in his blood. The Court stated "[i]n the absence of evidence that Worker was a 'binge' or habitual user of methamphetamine, who had been using methamphetamine in the days leading up to the accident, the record is insufficient to support a conclusion that Worker's drug use caused his fatigue. There was insufficient evidence that Worker's use of drugs was the sole cause of the accident to the exclusion of other contributing cause, such as Worker's fatigue". *Ortiz* interpreted the statute in a way that work place injuries caused by a worker's drug use are not barred unless an employer can prove there were no other possible contributing causes to the accident, an extreme standard of proof. After *Ortiz*, an injured worker's indemnity benefits will only be reduced by 10 percent even if a worker's intoxication or influence of drugs was 99 percent of the cause of the accident.

Additionally, the Administrative Office of the Courts (AOC) states HB 238 apportions responsibility with benefit reductions that would replace the system decried in *Villa*, the agency believes this bill is appropriately deals with the issue of intoxication or substance use in the workplace. AOC also states this bill would assist worker's compensation judges in apportioning responsibility according to the evidence. Apportionment of responsibility is a common factual issue within many legal frameworks.

## **PERFORMANCE IMPLICATIONS**

This bill provides that testing to be performed by a certified laboratory, correcting a provision that requires testing by the Department of Transportation (DOT) certified laboratories, which are not abundantly available. DOT standards for cutoff levels are most commonly applied.

## **ADMINISTRATIVE IMPLICATIONS**

HB 238 includes definitions of "intoxication," "influence," "drug," and "controlled substance," which will assist workers' compensation judges in applying the newly amended provisions. It will also eliminate the complete bar to benefits when impairment was the sole cause of an accident, a standard which the Workers' Compensation Administration believes is nearly impossible to prove after the New Mexico Supreme Court's decision in *Ortiz*. Workers' compensation judges would have the discretion to choose from a range to fit the facts of the cases that come before them in cases where intoxication or influence contributed to the worker's accident.

This bill also requires the Workers' Compensation Administration to promulgate rules for testing and cutoff levels for intoxication or influence.

**OTHER SUBSTANTIVE ISSUES**

The Advisory Council on Workers' Compensation and Occupational Disease has endorsed this bill by a majority vote of 5-1.

KK/bb/je