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## FISCAL IMPACT REPORT

**SPONSOR** Candelaria **ORIGINAL DATE** 2/1/16 **LAST UPDATED** 2/9/16 **HB** \_\_\_\_\_

**SHORT TITLE** Workers' Comp Benefits and Intoxication **SB** 214/a SCORC

**ANALYST** Klundt

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

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate But Possible Increased Costs	Indeterminate But Possible Increased Costs		Recurring	Worker's Compensation Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates House Bill 63

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workers' Compensation Administration (WCA)  
 General Services Department (GSD)  
 Attorney General's Office (AGO)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of SCORC Amendment

The amendment adds a provision that prohibits employers from claiming a reduction in an intoxicated worker's indemnity benefits if the employer had actual or constructive knowledge of the workers' intoxication and had a reasonable opportunity to take corrective action prior to the accident but failed to do so.

#### Synopsis of Original Bill

Senate Bill 214 repeals section 52-1-12 NMSA 1978 and amends sections 52-1-11 and 52-1-12.1 NMSA 1978 of the Workers' Compensation Act. Section 52-1-11 NMSA 1978 would provide that workers who willfully or intentionally cause 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 10 percent and 90 percent based on the degree the

worker's intoxication or influence of drugs contributes to the accident. A reduction in benefits is not allowed if an employer does not have a written drug and alcohol workplace policy. However, a worker will not be entitled to benefits should the worker refuse testing requested by the employer. The bill provides that the Workers' Compensation Administration promulgate rules to govern testing and cutoff levels.

## **FISCAL IMPLICATIONS**

There is no appropriation included in SB 214; no additional impact on the operating budgets for the WCA was reported.

The AOC reports there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the increased disputed claims for worker's compensation benefits and the appropriate amount of reduction of said benefits when intoxication is not the only contributing cause of the injury or death. The proposed language sets out specific guidelines for reduction of compensation due to intoxication and makes technical changes more specifically defining intoxication or influence, as well as accepted testing procedures. These changes may result in an increase or a decrease of total claims filed depending on each factual situation. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources. AOC is currently working on possible parameters to measure resulting case increase.

## **SIGNIFICANT ISSUES**

The SCORC amendment clarifies that an employer does not get the benefit of the reduction in paragraph B if the employer had actual or constructive knowledge of worker's intoxication and a reasonable opportunity to address the situation. WCA reported concerns that "Constructive knowledge" is may be vague language and difficult to enforce.

SB 214 addresses language identified as confusing and unworkable by the NM Court of Appeals in *Villa v. City of Las Cruces*, 2010-NMCA-099. 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) 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. 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 a significant contribution to the cause of the accident.

WCA reports the advisory council on Workers' Compensation and Occupational Disease has endorsed this bill by a majority vote of 4-1.

### **TECHNICAL ISSUES**

The Attorney General's Office reports SB 214 is noticed as amending the workers compensation act relating to injuries contributed by a worker's intoxication. However, Section one of the bill separates the willful or intentional injuries from injuries contributed by intoxication. Therefore, the AGO believes section 1 of the bill relates only to willful or intentional acts, and section 2 now relates only to injuries contributed by intoxication.

### **OTHER SUBSTANTIVE ISSUES**

This bill also provides for testing to be performed by a laboratory certified to perform testing, correcting a provision that requires testing by DOT certified laboratories, which WCA reports are not abundantly available. DOT standards for cutoff levels are most commonly applied.

SB 214 includes definitions of "intoxication," "influence," "drug," and "controlled substance," which the WCA believes will assist workers' compensation judges (WCJ) in applying the newly amended provisions. This bill also eliminates the complete bar to benefits when impairment was the sole cause of an accident, a standard which is nearly impossible to prove after the New Mexico Supreme Court's decision in *Ortiz*. The WCA reports that WCJs 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.

The Attorney General's Office noted this bill needs to ensure the legal procedure and other rights of a worker are protected when submitting them to mandatory tests regarding intoxication. Section 2 (F) says that the test results cannot be used in a criminal proceeding against the worker, but the department must be mindful of other procedural rights of the worker in civil claims against the department or another entity.

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