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Opinion No. 12-47

Drug Testing Workers' Compensation Recipients/Retroactive Laws

QUESTIONS

1. Does the provision of Senate Bill 3315/House Bill 3372, 107th General Assembly, 2nd Sess. (2012), as amended by Senate Commerce, Labor and Agriculture Committee Amendment No. 1 (also designated as SA1024), (hereinafter "SB3315") requiring workers' compensation recipients receiving pain management treatment to agree in writing to submit to random drug testing violate federal or Tennessee law?

2. If SB3315 is further amended so that its provisions regarding pain management treatment apply to recipients injured prior to the enactment of SB3315, would this retrospective application violate Article 1, § 20 of the Tennessee Constitution or any other provision of the Tennessee or United States Constitution?

OPINIONS

1. A court would most likely find the drug testing provision of SB3315 constitutionally suspect under the Fourth Amendment of the United States Constitution and Article 1, Section 7 of the Tennessee Constitution.

2. Except as stated in response to Question 1, SB3315 may apply its changes in the process by which workers' compensation recipients receive pain management treatment retrospectively to recipients injured prior to the enactment of SB3315. These changes in the process for obtaining pain management treatment are remedial in nature; thus SB3315 would not violate the federal and Tennessee Constitutions' prohibitions against laws that impair vested rights.

ANALYSIS

SB3315 would impose additional requirements on workers' compensation recipients who receive pain management treatment in order "to ensure the availability of quality medical care services for injured and disabled employees and to manage medical costs in workers' compensation matters by eradicating prescription drug abuse." SB3315, § 2. Among other things, SB3315 details the process by which a recipient receives pain management treatment, does not permit a second opinion on the initial impairment, diagnosis or prescribed treatment relating to pain management, and allows a recipient one opportunity to seek utilization review if

the recipient believes the prescribed pain management does not meet medically accepted standards. SB3315, § 3. SB3315 also would require the recipient, as a condition for receiving pain management, to sign an agreement with the treating physician stating the recipient will "submit to at least annual random drug testing at a certified laboratory for the purpose of identifying abuse or diversion of such substances." *Id.* If the recipient fails to sign the agreement or violates the agreement, then the recipient's right to receive pain management treatment would be terminated. *Id.* The recipient's actions also would be deemed to be misconduct for purposes of Tenn. Code Ann. § 50-6-241(d) and could impact the recipient's entitlement to permanent total disability benefits under Tenn. Code Ann. § 50-6-207(4).

1. Turning to the first question presented, the Fourth Amendment to the United States Constitution provides in pertinent part that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated." U.S. Const. Amend. IV. This provision of the Fourth Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Tennessee Constitution contains similar protections, stating "that the people shall be secure in their persons . . . from unreasonable searches and seizures." Tenn. Const. Art. I, § 7. The Tennessee Supreme Court has recognized that these provisions of the Tennessee Constitution are "identical in intent and purpose with the Fourth Amendment [of the United States Constitution]" and that federal cases applying the Fourth Amendment should be regarded as particularly persuasive. *Sneed v. State*, 221 Tenn. 6, 423 S.W.2d 857, 860 (1968). *See also State v. Hubbard*, No. W2010-02493-CCA-R3-CD, 2011 WL 5420819 at *4 (Tenn. Crim. App. November 9, 2011). The Tennessee Supreme Court may, however, interpret the Tennessee Constitution to afford greater rights than the United States Constitution, even when the provisions are identical. *See State v. Richards* 286 S.W.3d 873, 877-78 (Tenn. 2009). This Office has no reason to believe that Tennessee courts would differ from federal courts in their application of search and seizure requirements to the drug testing provision of SB3315.

It is well established that a drug test by the government is considered a search under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). As the United States Supreme Court observed in *Skinner*, the "collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," and accordingly "these intrusions must be deemed searches under the Fourth Amendment." *Skinner*, 489 U.S. at 617.

The United States Supreme Court thus has recognized that the Fourth Amendment protects individuals from unreasonable drug testing conducted or sanctioned by the government, even when the government acts as an employer. *Skinner,* 489 U.S. at 614-16; *Von Raab*, 489 U.S. at 665. Accordingly, any such drug tests generally must be supported by a warrant based upon probable cause or an individualized suspicion of illegal activity. *Chandler v. Miller,* 520 U.S. 305, 313 (1997); *Von Raab,* 489 U.S. at 665; *Smith County Educ. Ass'n v. Smith County Bd. of Educ.*, 781 F.Supp.2d 604, 614-15 (M.D. Tenn. 2011) However, the United States Supreme Court has recognized a limited exception if the drug testing serves a "special governmental need, beyond the normal need for law enforcement." *Von Raab*, 489 U.S. at 665. To determine whether a search meets a "special" governmental need it is "necessary to balance the individual's privacy expectations against the government's interest to determine if it is impractical to require

a warrant or some level of individualized suspicion in the particular context." *Id.* (citing *Skinner* 489 U.S. at 616-18). For example, a special need may exist when a government employee holds a "safety sensitive" position, meaning that the employees' duties are so "fraught with . . . risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner,* 489 U.S. at 628.

In applying this test, the United States Supreme Court has stressed 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 v. Miller*, 520 U.S. at 318. *See also Von Raab*, 489 U.S. at 680-81 (Scalia, J., dissenting) (Justice Scalia observing that the Fourth Amendment should preclude suspicionless drug testing enacted solely in "symbolic opposition to drug use" given that such testing represents an "immolation of privacy and human dignity"). Thus when special needs are alleged in justification of a Fourth Amendment intrusion, "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314.

At least one Court has observed the difficulty in the application of this test to particular factual situations, stating:

> *Von Raab's* balancing test is inherently, and doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others . . . Nonetheless, balance we must.

Willner v. Thornburgh, 928 F.2d 1185, 1187-88 (D.C. Cir. 1991). *See also* Zachary A. Bulthuis, Note, *Suspicionless Drug Testing by Public Actors: How* Chandler v. Miller *Should Change the Standard*, 74 S. Cal. L. Rev. 1549 (Sept. 2001) (discussing the courts' application of this test).

Since the enunciation of this test by the United States Supreme Court, this Office has been asked on several occasions to apply the test to various specific factual situations. *See* Op. Tenn. Att'y Gen. 12-45 (April 3, 2012); Op. Tenn. Att'y Gen. 12-41 (March 20, 2012); Op. Tenn. Att'y Gen. 07-84 (June 1, 2007) (all addressing the limitations on drug testing as a condition of receiving public assistance). *See also* Op. Tenn. Att'y Gen. 08-106 (May 7, 2008) (opining a bill authorizing random drug testing of students participating in voluntary extracurricular activities in the absence of individualized reasonable suspicion under certain defined circumstances was constitutionally defensible); Op. Tenn. Att'y Gen. 07-96 (July 2, 2007) (noting that Tennessee statute did not allow the random drug testing of students unless there was a reasonable indication that the student may have used or may be under the influence of drugs); Op. Tenn. Att'y Gen. 94-030 (March 11, 1994) (opining the Tennessee Public Service Commission could require motor carrier inspectors, railroad safety inspectors, and gas pipe line inspectors to submit to suspicionless random drug tests.); Op. Tenn. Att'y Gen. 90-70 (July 3, 1990) (stating that drug and alcohol testing of job applicants for government employment would violate the Fourth Amendment prohibition against unreasonable searches and seizures unless the job involved public safety); Op. Tenn. Att'y Gen. 89-66 (April 28, 1989) (opining that the blanket authorization for random drug testing of government employees would violate the search

and seizure provisions of the Fourth Amendment, and that the blanket drug testing of job applicants for government employment and the routine drug testing through annual physical examinations of government employees would probably violate the Fourth Amendment).

This opinion request concerns the requirement of SB3315 that a workers' compensation recipient receiving pain management treatment must agree in writing to at least annual random drug testing at a certified laboratory for the purposes of identifying abuse or diversion of pain medication. The refusal of the recipient to sign the agreement or any violation of the agreement results, among other consequences, in the recipient losing the right to any further treatment. Accordingly, the drug testing would be required by law as a condition for receiving pain management treatment under the workers' compensation statutes and thus would implicate the Fourth Amendment given that it would be a search mandated by state government. *See Skinner,* 489 U.S. at 614-16. The question posed then is whether this drug testing requirement by the State of Tennessee is justified by "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impractical." *Lebron v. Wilkins,* No. 6:11-cv-01473-Orl-35DAB, 2011 WL 5040993, at *9 (M.D. Fla. Oct. 24, 2011) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackman, J., concurring)).

In applying this test to SB3315, this Office believes it is unlikely a court would find sufficiently strong public safety or special needs concerns that would override the protections afforded Tennessee citizens under the United States and Tennessee Constitutions prohibiting suspicionless warrantless searches. The workers in question are not as a group involved in inherently dangerous activity, nor does the mere receipt of pain medication for a work-related injury automatically suggest a predilection to substance abuse or the diversion of pain medication to any greater extent than would be found among all patients receiving pain medication. Indeed, the same reasoning that led the United States Sixth Circuit Court of Appeals to find that drug testing of public welfare recipients required some quantum of individualized suspicion would appear equally applicable to the drug testing of recipients of workers' compensation benefits. *See Marchwinski v. Howard*, 60 Fed. Appx. 601 (6th Cir. 2003), *aff'g en banc*, 113 F. Supp. 2d 1134 (E.D. 11 ch. 2000) (affirmed on rehearing by an evenly divided *en banc* panel). *See also Lebron*, 2011 WL. 504 09993 at *7-10; Op. Tenn. Att'y Gen. 12-45, at 3-5.

Furthermore, in the context of workers' compensation benefits, a similar conclusion was reached by the Ohio Supreme Court in addressing Ohio's statutory requirement that private employers must conduct warrantless drug and alcohol testing of injured workers without any individualized suspicion of drug or alcohol use.[1] While Ohio's drug testing requirement swept more broadly than the provisions of SB3315, the Ohio Supreme Court reasoning is still instructive:

[1] The Ohio Legislature's mandate to impose drug testing implicated the Fourth Amendment since Ohio by law was requiring employers to drug test. *See Skinner*, 489 U.S. at 614-16. The Fourth Amendment however only concerns government action and does not prohibit a private employer from requiring drug testing as a condition of employment. Op. Tenn. Att'y Gen. 89-66, at 2-3.

In the cases where the court [United States Supreme Court] has allowed the suspicionless drug testing, the targeted individuals either have a demonstrated history of abuse, e.g., *Skinner* . . . hold a unique position, e.g., *Von Raab,* or have the potential for creating risks of catastrophe if under the influence of a mind-altering substance, e.g., *Von Raab* and *Skinner.* The overriding idea is that the situations and targeted groups are unique and discrete.

H.B. 122 [the Ohio statute] does not fit within the parameters of what the court has found to be the "closely guarded" category of constitutionally permissible suspicionless searches. H.B. 122 does not target a group of people with a documented drug and alcohol problem. It is not directed at a segment of the population with drug use known to be greater than that of the general population—its target group *is* the general population. It does not target a segment of industry where safety issues are more profound than in other industries. It does not target certain job categories where drug or alcohol use would cause a substantial danger to workers, co-workers, or the general public.

. . . .

We do not mean to state that drug and alcohol use in the workplace is not a problem, just as we do realize that it is also a problem outside the workplace. The problem by its nature is a general one, spread out across all socioeconomic levels, throughout all levels of the workforce. Substance abuse can be a problem for anyone. But suspicionless testing, the court instructs, is not a solution for just anyone. Suspicionless testing can be applicable to certain carved-out categories of workers, but not to all workers.

Even if there were special needs successfully asserted by the state, the expectation of privacy of Ohio's workers would outweigh them. The vast majority of Ohio workers are not subject to the "operational realities" cited by the court in *Von Raab.* . . . Most employees do not work in industries as highly regulated as that in *Skinner.* Most do not operate inherently dangerous machinery that can cause catastrophic damage to the public.

. . . .

Moreover, in Ohio, workers have an additional expectation of privacy when it comes to workers' compensation. The workers' compensation system is designed to avoid the adversarial character of the civil justice system, allowing workers to recover for injuries they suffer on the job without having to undertake the risk and expense of a civil trial. In return, employers are protected from large civil damage awards. . . .

. . . .

Under such a system of compromise for mutual benefit, a worker would not expect to face the indignity of drug and alcohol testing without any suspicion of

> wrongdoing. Workers would not anticipate that their sobriety would be called into question merely for suffering an industrial accident.

State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp., 97 Ohio St.3d 504, 780 N.E.2d 981, 989-91 (2002).

Accordingly, this Office's opinion is that a court would most likely find the drug testing component of SB3315 to be constitutionally suspect.

Finally, this Office would note that a state cannot require a person to consent to an otherwise unconstitutional drug test as a condition for obtaining workers' compensation benefits. As observed in Op. Tenn. Att'y Gen. 12-45, a state's "exaction of consent to an otherwise unconstitutional search" to obtain government benefits "would violate the doctrine of unconstitutional conditions." Op. Tenn. Att'y Gen. 12-45, at 6 (quoting *Lebron*, 2011 WL 5040993 at *9 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

2. The second question concerns the retrospective application of the remaining provisions of SB3315. These provisions do not impact the actual benefits awarded to recipients but rather change the process by which pain management treatment is delivered in order to ensure the appropriate utilization of pain medication. Thus such changes are remedial in nature, and retrospective application of this process to recipients injured prior to any enactment of SB3315 should not violate the provisions of the United States and Tennessee Constitutions prohibiting the impairment of vested rights (U.S. Const., Art. I, § 10, cl. 1; Tenn. Const. Art. I, § 20). *See In re D.A.H.*, 142 S.W.3d 267, 273 (Tenn. 2004); *Caudill v. Foley,* 21 S.W.3d 203, 208 (Tenn. Ct. App. 1999) (citing *Doe v. Sundquist*, 943 F.Supp. 886, 893 (M.D. Tenn. 1996), *aff'd*, 106 F.3d 702 (6th Cir. 1997), *cert. denied*, 522 U.S. 810 (1997)); *Morford v. Yong Kyun Cho*, 732 S.W.2d 617, 620 (Tenn. Ct. App. 1997) (holding remedial legislation is permissible when providing the means or method by which a cause of action may be effectuated, wrongs redressed and relief obtained).

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