

NC Workers' Compensation Update: MGC Prevails in Proving Intoxication Defense

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In [*Diaz v. Spanish Contractors*](#), two MGC attorneys, [Daniel McCullough](#) and [Kevin Pratt](#), prevailed at the North Carolina Court of Appeals in proving that an employee was barred from receiving workers' compensation benefits because he was intoxicated when he fell from a ladder on a construction site. The case was decided on June 7, 2016. This is an important decision because it shows that an intoxication defense may be successful even if the employee has a blood alcohol concentration ("BAC") less than .08.

In *Diaz*, the Defendants proved the employee was intoxicated through expert opinion testimony, even though the employee had a BAC of around .06 at the time of injury. The following evidence supported the conclusion that the Plaintiff was intoxicated: (1) although the Plaintiff's BAC was .045 when the sample was taken, the expert toxicologist stated that the Plaintiff's BAC likely was between .045 and .083 when the accident occurred; (2) the toxicologist stated that there was a "scientific consensus" supporting "significant impairment" at a BAC level of .05 or greater; (3) the expert toxicologist testified that, at a BAC of .05 or greater, the Plaintiff would have experience alterations to his cognitive function and coordination; (4) medical personnel and the attending physician smelled alcohol on the Plaintiff; and (5) the responding law enforcement officer observed multiple discarded alcoholic containers at the jobsite. One expert opined that the Plaintiff's intoxication was a proximate cause of the accident.

The important takeaway from *Diaz* is that an intoxication defense may prevail even when the BAC level of the Claimant is not excessively high. The Plaintiff argued that because his BAC level was less than a .08 – the legal standard for presumptive impairment when operating a motor vehicle in North Carolina – the Industrial Commission could not conclude he was legally impaired at the time of injury. The legal standard for convicting a person of DWI (.08), which is set forth in N.C. Gen. Stat. § 20-138.1, is not the standard for proving that an injured worker was intoxicated pursuant to N.C. Gen. Stat. § 97-12. The Court of Appeals explained that even in a criminal case, the State is not required to establish a blood alcohol level of .08 to convict a person of DWI. The Court of Appeals further explained that opinion testimony is sufficient to show that a criminal defendant was under the influence of alcohol to support a conviction even when the BAC is unknown. Significantly, the Court of Appeals stated that the question is not whether an employee's BAC is at or above .08, but instead whether the employee was intoxicated at the time of the accident. The Court agreed with the Industrial Commission's findings and conclusions that the Plaintiff, under the circumstances, was impaired when he fell from the ladder.

This was a case with significant exposure for benefits. It was stipulated that Plaintiff was disabled due to his catastrophic injuries, and he likely will never return to work.

If you have any questions about the intoxication defense set forth in N.C. Gen. Stat. § 97-12, or whether the defense should be asserted in your case, please contact one of MGC's North Carolina [workers' compensation attorneys](#).

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