

# **GRAMMATICO V. INDUSTRIAL COMMISSION: INVALIDATING STATUTES MAKING ALCOHOL OR DRUG USE A BAR TO WORKERS' COMPENSATION CLAIMS IN ARIZONA**

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## **I. FACTS AND LOWER COURT FINDINGS**

### ***A. The Case of David Grammatico***

David Grammatico (“Grammatico”) fell and broke his right wrist and left knee while working on drywall stilts as an installer of metal trim.<sup>1</sup> Grammatico’s employer, Arok Inc., had a certified drug-testing policy pursuant to Arizona law.<sup>2</sup> Grammatico’s postaccident drug test was positive for marijuana, amphetamine, and methamphetamine.<sup>3</sup> He admitted using marijuana and methamphetamine on the two days prior to the date of his injury, when he had not been required to work.<sup>4</sup>

Article 18, section 8 of the Arizona Constitution mandates workers’ compensation for workers injured in “any accident arising out of and in the course of . . . employment.”<sup>5</sup> However, Arok’s insurer denied Grammatico workers’ compensation benefits on the basis of Arizona Revised Statutes section 23-1021(D).<sup>6</sup> Under that section, if an employee fails a test for use of illegal substances, compensation is denied unless the employee can show that the drug use was not a “contributing cause” of the accident.<sup>7</sup> At Grammatico’s hearing before the Industrial Commission, the administrative law judge found that the claim was indeed noncompensable under section 23-1021(D) because Grammatico was unable to show that drug use “was not even a ‘slight contributing cause’” of his injuries.<sup>8</sup> Grammatico appealed the administrative law judge’s ruling, and a

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1. Grammatico v. Indus. Comm’n, 117 P.3d 786, 787 (Ariz. 2005).
  2. *Id.* at 788.
  3. *Id.* at 787.
  4. *Id.*
  5. ARIZ. CONST. art. 18, § 8.
  6. *Grammatico*, 117 P.3d at 788.
  7. ARIZ. REV. STAT. § 23-1021(D) (2004).
  8. *Grammatico*, 117 P.3d at 788.

panel of the Arizona Court of Appeals set it aside, holding that section 23-1021(D) violated article 18, section 8 of the Arizona Constitution.<sup>9</sup>

***B. The Case of Austin Komalestewa***

Shortly after the start of his shift at Stoneville Pedigree Seed, Austin Komalestewa (“Komalestewa”) was seriously injured trying to fix a jammed conveyor belt—a task he and his coworkers were often required to do.<sup>10</sup> Stoneville’s insurance carrier denied compensation because blood tests taken at the hospital shortly after the accident revealed the presence of alcohol.<sup>11</sup> At a hearing before an administrative law judge at the Industrial Commission, an expert testified that Komalestewa’s blood alcohol level would have been at least 0.176 percent at the time of his accident.<sup>12</sup> Komalestewa admitted having four vodka drinks the previous night, but Komalestewa’s wife, Stoneville’s site-manager, and a coworker all testified that Komalestewa did not appear intoxicated the morning of the accident.<sup>13</sup>

An administrative law judge ultimately determined that Komalestewa’s claim was properly denied under Arizona Revised Statutes section 23-1021(C), which provides that an injury is not compensable “if the impairment of the employee is due to the employee’s use of alcohol . . . and is a substantial contributing cause” of the injury.<sup>14</sup> “Substantial contributing cause,” in turn, is statutorily defined as “anything more than a slight contributing cause.”<sup>15</sup> In affirming the administrative law judge’s decision, another panel of the Arizona Court of Appeals disagreed with the reasoning of the *Grammatico* panel’s majority and held section 23-1021(C) did not violate the Arizona Constitution.<sup>16</sup>

Given the incompatible treatments of the two workers’ compensation sections by different panels of the court of appeals, the Arizona Supreme Court granted review in both cases and consolidated the dispositions in a single opinion.<sup>17</sup> In affirming the court of appeals’ decision in *Grammatico* and reversing the court of appeals’ decision in *Komalestewa*, the Arizona Supreme Court held that both sections 23-1021(D) and 23-1021(C) were in violation of article 18, section 8 of the Arizona Constitution.<sup>18</sup>

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9. *Grammatico v. Indus. Comm’n*, 90 P.3d 211, 217 (Ariz. Ct. App. 2004).  
10. *Grammatico*, 117 P.3d at 788.  
11. *Id.*  
12. *Id.*  
13. *Id.*  
14. ARIZ. REV. STAT. § 23-1021(C) (2004); *Grammatico*, 117 P.3d at 788.  
15. ARIZ. REV. STAT. § 23-1021(H)(2).  
16. *Komalestewa v. Indus. Comm’n*, 99 P.3d 26, 34 (Ariz. Ct. App. 2004).  
17. *Grammatico*, 117 P.3d at 787 n.1, 788.  
18. *Id.* at 791, 794.

## II. BACKGROUND OF ARIZONA CONSTITUTION ARTICLE 18, SECTION 8 AND OF ARIZONA REVISED STATUTES SECTIONS 23- 1021(C) AND (D)

For decades, all fifty states have been under a statutory scheme of workers' compensation.<sup>19</sup> Before these systems were established, injured workers were forced to rely on the traditional tort system.<sup>20</sup> The "unholy trinity" of common law defenses—contributory negligence, assumption of the risk, and the fellow-servant rule—severely inhibited recovery.<sup>21</sup> Even where these defenses could be overcome or had been abolished, employees were still faced with the lengthy, expensive, often insurmountable task of proving that the employer was negligent and that the employer's negligence was the cause of the injury.<sup>22</sup> Workers' compensation systems were implemented to replace the unforgiving tort system with a no-fault, administrative system to compensate workers injured in a dangerous, industrialized working world.<sup>23</sup>

Workers' compensation statutes, establishing no-fault liability systems, have been challenged on various constitutional grounds.<sup>24</sup> While such challenges have by now been thoroughly put to rest, some states amended their state constitutions explicitly to legitimize workers' compensation schemes.<sup>25</sup> In Arizona, workers' compensation was constitutionally grounded from incipient statehood.<sup>26</sup> Employer liability having already been a decades-long debate in the

19. 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION* § 2.08 (2004) ("By 1920 all but eight states had adopted compensation acts, and in 1963, the last state, Hawaii, came under the system.").

20. Sandra A. Day, *How Did We Get Here?: The Development of Arizona's Workers' Compensation Law*, ARIZ. ATT'Y, Apr. 2000, at 10–11.

21. *Grammatico*, 117 P.3d at 789 (citing WILLIAM L. PROSSER, *LAW OF TORTS* § 80, at 526–27 (4th ed. 1971)); *see also* Day, *supra* note 20, at 11.

22. *Grammatico*, 117 P.3d at 789; *see also* Day, *supra* note 20, at 11; DAN B. DOBBS, *THE LAW OF TORTS* § 392 (2000) (noting that in the early days of industrialization, "much work around machinery was unavoidably dangerous, so that injuries occurred often enough even without provable fault").

23. *See* Day, *supra* note 20, at 11; *see also* *Stoecker v. Brush Wellman, Inc.*, 984 P.2d 534, 537 (1999) ("The underlying principle of the [workers'] compensation system is a trade of tort rights for an expeditious, no-fault method by which an employee can receive compensation for accidental injuries sustained in work-related accidents.") (as cited in *Grammatico*, 117 P.3d at 790).

24. 99 C.J.S. *Workers' Compensation* § 39 (2005) ("[W]orkers' compensation statutes have been challenged as violative of particular constitutional provisions including those governing separation of powers, equal protection, due process, right to privacy, bills of attainder, access to courts for the redress of an injury, and the impairment of contract obligations. Other challenges have been based on the unconstitutional elimination of vested rights, unconstitutional special legislation, and an unconstitutional delegation of power to an administrative agency or a private organization.").

25. *Id.* § 36; *see also* DOBBS, *supra* note 22, § 392 (2000) (noting that New York, the first state to enact workers' compensation, had to amend its constitution after its courts held the first statute an unconstitutional taking without due process of law because liability was imposed without fault).

26. *Grammatico*, 117 P.3d at 789; *see also* Day, *supra* note 20, at 11.

Arizona Territory, delegates to the Constitutional Convention created various measures to aid Arizona workers.<sup>27</sup> In addition to abolishing the fellow-servant doctrine and seriously weakening the other “unholy trinity” defenses, the Convention adopted article 18, section 8, which required the legislature to establish a workers’ compensation system.<sup>28</sup> The constitutional provision reads, in relevant part:

The Legislature shall enact a Workmen’s Compensation Law applicable to workmen engaged in [defined employment] . . . by which compensation shall be required to be paid . . . if in the course of such employment personal injury or death . . . from any accident arising out of and in the course of such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof . . .<sup>29</sup>

In response to this mandate, the first session of the Arizona Legislature enacted a “Compulsory Compensation Law,” the present version of which is found in the Arizona Revised Statutes sections 23-901 through 23-1091.<sup>30</sup>

Article 18, section 6 of the Arizona Constitution still preserves the right to pursue a traditional tort suit, but the option to sue rather than to accept workers’ compensation is entirely at the employee’s own choosing.<sup>31</sup> An early Arizona Supreme Court opinion held that a *preinjury* election of suit over workers’ compensation was unconstitutional.<sup>32</sup> This situation was altered by an amendment to section 8, specifically permitting such a preinjury choice.<sup>33</sup> Nonetheless, as the Arizona Supreme Court points out in *Grammatico*, in Arizona, “absent an employee’s express rejection of workers’ compensation, a no-fault system has replaced the prior fault-based system.”<sup>34</sup>

Across the fifty states, workers’ compensation statutes provide various treatments of worker intoxication or other drug use at the time of injury.<sup>35</sup> Texas employs the strictest bar to recovery, requiring only a showing that a worker was intoxicated at the time of injury and holding that causation between intoxication and injury is irrelevant.<sup>36</sup> In an intermediate group of states, intoxication must have proximately caused the accident for the injury to be noncompensable.<sup>37</sup> In a

27. *Grammatico*, 117 P.3d at 789; *see also* Day, *supra* note 20, at 11.

28. *Grammatico*, 117 P.3d at 789; *see also* Day, *supra* note 20, at 11.

29. ARIZ. CONST. art 18, § 8.

30. *Grammatico*, 117 P.3d at 789.

31. ARIZ. CONST. art 18, § 6; *Grammatico*, 117 P.3d at 790.

32. *Indus. Comm’n v. Crisman*, 199 P. 390, 392 (Ariz. 1921).

33. *Grammatico*, 117 P.3d at 790.

34. *Id.*

35. *See* 99 C.J.S., *supra* note 24, § 481 (2005); *see also* LARSON & LARSON, *supra* note 19, § 36.03 (laying out all the categories of state worker-intoxication defenses).

36. TEX. LABOR CODE ANN. § 406.032(1)(A) (Vernon 1996); *see also* LARSON & LARSON, *supra* note 19, § 36.03.

37. LARSON & LARSON, *supra* note 19, § 36.03. In one subset of this scheme, any showing of intoxication creates a rebuttable presumption that intoxication proximately caused the accident. *E.g.*, ARK. CODE ANN. § 11-9-102(4)(B)(iv)(4) (West 2005) (using

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scheme that makes the defense harder to apply, intoxication must be the primary cause of injury.<sup>38</sup> At the opposite extreme from Texas, then, are states like New York, where recovery is precluded only where intoxication is shown to be the *sole* cause of injury.<sup>39</sup>

In Arizona, worker intoxication or other drug use at the time of injury is dealt with in Arizona Revised Statutes sections 23-1021(C) and (D). Tracking the “arising out of” and “in the course of” language of the Constitutional mandate and of the primary statutory provision of compensation at section 23-1021(A), section 23-1021(C) states:

[An] employee’s injury . . . shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable . . . if the impairment of the employee is due to the employee’s use of alcohol . . . and is a substantial contributing cause of the employee’s personal injury.

Section 23-1021(D) contains similar language, deeming injuries noncompensable where an employee fails to pass a drug test for unlawful use of any controlled substance, unless the employee proves that the drug use “was not a contributing cause” of the injury.

Arizona Revised Statutes sections 23-1021(C) & (D) are therefore unexceptional in that most states, as noted above, make intoxication the basis of a defense to recovery of workers’ compensation, or at least make it a ground for reduction in the amount of the award.<sup>40</sup> However, Arizona’s Constitution is unique in that it does not merely authorize the legislature to implement a scheme of workers’ compensation, as some do, but actually mandates the creation of such a system in specific language—effectively establishing the *right* of workers’

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“substantially occasioned” language); GA. CODE ANN. § 34-9-17(b) (West 2005); NEV. REV. STAT. ANN. § 616C.230(1)(c) (West 2001). In another subset, statutorily defined levels of intoxication create such a presumption. *E.g.*, OHIO REV. CODE ANN. § 4123.54(A)(2) (West 2004). In yet other states, statutorily defined levels of alcohol or other drugs in the system either conclusively or presumptively establish intoxication, but proximate cause is a separate, determining factor. *E.g.*, KAN. STAT. ANN. § 44-501(d)(2) (2005) (defined levels conclusively prove intoxication); N.C. GEN. STAT. ANN. § 92-12 (West 2005) (generally accepted tests create a rebuttable presumption of intoxication).

38. See FLA. STAT. ANN. § 440.09(3) (West 2003).

39. N.Y. WORKER’S COMPENSATION LAW § 10(1) (McKinney 2002); see also *Warner v. Vanco Mfg. Co.*, 690 A.2d 1126, 1129 (N.J. Super. Ct. App. Div. 1997) (“New Jersey decisional law interprets [its workers’ compensation statute] to require an employer to demonstrate by the greater weight of the evidence that the employee’s injury was produced solely by his intoxication if the employer is to defeat a compensation award.” (internal quotation omitted)).

40. See LARSON & LARSON, *supra* note 19, § 36.03. For an example of intoxication resulting in a reduction of the award, see WIS. STAT. ANN. § 102.58 (West 2004) (15% reduction). See also *Komalestewa v. Indus. Comm’n*, 99 P.3d 26, 33 (Ariz. Ct. App. 2004) (noting that “the majority of states have statutes similar to A.R.S. § 23-1021(C)”).

compensation in Arizona.<sup>41</sup> The Constitutional language therefore circumscribes the type of workers' compensation statutes that may be enacted.<sup>42</sup>

### III. HOLDINGS AND ANALYSIS OF THE ARIZONA SUPREME COURT

The court began its analysis in *Grammatico* by pointing out that claimants for workers' compensation must still prove medical (actual) and legal causation.<sup>43</sup> No language of the Arizona Constitution limits the legislature's ability to establish guidelines of sufficient medical causation: for example, factors to be considered in whether a particular occupational disease is in fact caused by industrial exposure.<sup>44</sup> However, according to the court, Arizona Revised Statutes sections 23-1021(C) and (D) are improper attempts to define *legal* causation in a way that conflicts with article 18, section 8 of the Arizona Constitution.<sup>45</sup>

The language of article 18 establishes three parts to *legal* causation in workers' compensation claims. The worker must be acting "in the course of . . . employment"; the worker must be injured by an accident "arising out of . . . and in the course of such employment"; and finally, the accident must be "caused in whole, or in part, or [be] contributed to, by a necessary risk or danger of such employment."<sup>46</sup> The court keyed in on this final requirement, by which a worker need only show that the accident was caused *in part* by a risk or danger of employment. Meanwhile, section 23-1021(C) denies compensation unless a worker can prove that intoxication was not even a slight contributing cause—that is, unless the worker can show that a necessary risk or danger of employment *all but entirely* caused the accident.<sup>47</sup> Similarly, 23-1021(D) denies compensation unless a worker who tests positive for illegal drugs can show that a necessary risk or danger "*wholly* caused the accident."<sup>48</sup>

The court held that sections 23-1021(C) and (D) contradict the language and spirit of article 18. Requiring workers to prove that intoxication was not at all a cause of injury is tantamount to requiring them to show no fault, thereby resurrecting the doctrine of contributory negligence.<sup>49</sup> After briefly reciting the history of workers' compensation in Arizona, the court approvingly noted that

41. See, e.g., N.Y. CONST. art. I, § 18; ARK. CONST. OF 1874 art. V, § 32, amended by ARK. CONST. amend. 26; see also *Huffstetler v. Lion Oil Co.*, 208 F.2d 549, 554 (8th Cir. 1954) (explaining that "it would seem that the express purpose of Amendment 26 to the Arkansas Constitution was to grant to the Legislature the right to adopt a Workmen's Compensation Act").

42. See *Grammatico*, 117 P.3d at 791 (pointing out that "the legislature 'cannot enact laws which will supersede constitutional provisions adopted by the people.'" (quoting *Kilpatrick v. Super. Ct.*, 466 P.2d 18, 20–21 (Ariz. 1970))).

43. *Id.* at 790 (citing *Deschaaf v. Indus. Comm'n*, 686 P.2d 1288, 1290 (Ariz. App. 1984) (citing 1B ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 38.83 (1992))).

44. *Id.* at 790–91 (citing *Ford v. Indus. Comm'n*, 703 P.2d 453, 462 (Ariz. 1985)).

45. *Id.* at 791.

46. ARIZ. CONST. art. 18, § 8; *Grammatico*, 117 P.3d at 790.

47. *Grammatico*, 117 P.3d at 791.

48. *Id.*

49. *Id.*

Arizona workers have now obtained “no-fault protection,” where “[neither] the employer’s nor anyone else’s fault is relevant.”<sup>50</sup>

At the court of appeals, the dissent in *Grammatico* and the majority panel in *Komalestewa* decided that sections 23-1021(D) and (C), respectively, represented the legislature’s permissible definition of article 18’s “necessary risk or danger” language to exclude instances of worker intoxication generally.<sup>51</sup> The Arizona Supreme Court sided with the *Grammatico* majority, however, in holding that such a definition, if permitted, would inject fault into a no-fault system.<sup>52</sup> If allowed such freedom, the court reasoned, the legislature could define “necessary risk or danger” to exclude many varieties of accident where the employee was essentially contributorily negligent.<sup>53</sup>

The court pointedly disagreed with Judge Barker who dissented in *Grammatico* and likened an accident while under the influence to intentional self-inflicted injury.<sup>54</sup> The Supreme Court acknowledged that self-inflicted injuries are indeed not compensable under workers’ compensation schemes, but disapproved of the analogy.<sup>55</sup> Intoxication or other “fault”—say, failure to follow regulations—on the part of a worker can increase the likelihood of accident, but a self-inflicted injury is not to be considered an accident at all.<sup>56</sup> The court cited its own precedent of *L.B. Price Mercantile*, where a worker who was injured crossing a road in violation of traffic violations was not barred from workers’ compensation because such a violation merely established contributory negligence.<sup>57</sup> While crossing the road illegally was dangerous, no one suggested the plaintiff did so intending to be hit and injured.<sup>58</sup> Similarly, it cannot be said that either *Grammatico* or *Komalestewa* worked in an intoxicated condition with the intent to injure himself.<sup>59</sup>

Lastly, the court was not persuaded by the suggestion of the *Komalestewa* majority (also hinted at by Judge Barker) that an employee under the influence of

50. *Id.* (quoting ARIZONA WORKERS’ COMPENSATION HANDBOOK pt. I, at I-1 (Ray J. Davis et al. eds., 1992)).

51. *Grammatico v. Indus. Comm’n*, 90 P.3d 211, 217 (Ariz. Ct. App. 2004) (Barker, J., dissenting) (“[T]he legislature could justifiably determine that it is appropriate to look at the entirety of the risk when shown that the necessary element of the risk (being on stilts) cannot be factually separated from the unnecessary element of the risk (being on stilts while under the influence of illegal drugs).”); *Komalestewa v. Indus. Comm’n*, 99 P.3d 26, 33 (Ariz. Ct. App. 2004).

52. *Grammatico*, 117 P.3d at 792. *But see Komalestewa*, 99 P.3d at 34 (“[W]e consider the problem of intoxication not in the narrow perspective of ‘fault’ per se, but more accurately in terms of causation.”).

53. *Grammatico*, 117 P.3d at 792 (“The legislature, for example, could preclude recovery for injured employees whose injuries were caused, in part, by talking on cell phones while driving, by taking cold medication, or even by being tired on the job.” (footnotes omitted)).

54. *Id.*; *Grammatico*, 90 P.3d at 217–18 (Barker, J., dissenting).

55. *Grammatico*, 117 P.3d at 792.

56. *Id.* at 793.

57. *Id.*; *L.B. Price Mercantile Co. v. Indus. Comm’n*, 30 P.2d 491 (Ariz. 1934).

58. *L.B. Price Mercantile*, 30 P.2d at 495.

59. *Grammatico*, 117 P.3d at 793.

alcohol or illegal drugs is no longer acting in the scope of employment.<sup>60</sup> The Supreme Court stated that abandonment is properly shown where an employee “is not doing anything connected with his employment.”<sup>61</sup> Neither administrative law judge, the court pointed out, found that the claimants had abandoned their employment.<sup>62</sup>

#### IV. THE COURT ACKNOWLEDGES THE POLICY BEHIND THE STATUTES

Although holding that intoxication or drug use as a contributing cause of injury could not bar workers’ compensation, the Arizona Supreme Court recognized the legislature’s legitimate goal of discouraging the use of alcohol and other drugs in the workplace.<sup>63</sup> To this end, the Arizona legislature has enacted various other measures permitting employee drug testing, employer protection from litigation, and adverse employment action on the basis of failed tests.<sup>64</sup>

The court agreed with the court of appeals in *Grammatico* in holding that if the legislature wishes to continue with workers’ compensation policies like those embodied in sections 23-1021(C) and (D), a constitutional amendment is in order.<sup>65</sup> The court noted that in 2005, an Arizona legislator actually introduced into the House a resolution that would have amended article 18, section 8 of the Arizona Constitution to preclude workers’ compensation “if an accident [was] caused in whole or in part by a workers’ use of alcohol or a controlled substance,” but no further action was taken after it passed the House Commerce and Judiciary Committees.<sup>66</sup> Given the Arizona Supreme Court’s holding in *Grammatico*, until such an amendment is passed, Arizona is aligned with states like New York; intoxication will be a defense to workers’ compensation claims only where an inherent risk or danger of the job played *no part* in the injury.

#### V. CONCLUSION

In *Grammatico*, the Arizona Supreme Court invalidated two Arizona workers’ compensation statutes: section 23-1021(C), which required an employee who was under the influence of alcohol at the time of injury to prove the alcohol was not even a slight contributing cause of injury; and section 23-1021(D), which

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60. *Id.*; *Komalestewa v. Indus. Comm’n*, 99 P.3d 26, 33 (Ariz. Ct. App. 2004) (analogizing *Komalestewa*’s behavior to an employee walking on stilts blindfolded “in a moment of tomfoolery”); *Grammatico v. Indus. Comm’n*, 90 P.3d 211, 219 (Ariz. Ct. App. 2004) (Barker, J., dissenting) (noting that “certain employee conduct is not compensable even though occurring at work,” and citing *Anderson Clayton & Co. v. Indus. Comm’n*, 607 P.2d 22, 25 (Ariz. Ct. App. 1979) (holding that “horseplay” at work is a substantial deviation from employment and bars compensation)).

61. *Grammatico*, 117 P.3d at 793 n.9.

62. *Id.* Judge Barker, however, might suggest that working on drywall stilts under the influence of illegal drugs is not doing anything connected with the work of a metal trim installer.

63. *Id.* at 793–94.

64. *Id.* at 794.

65. *Id.* (citing *Grammatico*, 90 P.3d at 216).

66. *Id.* at 794.



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required an employee who fails a postaccident drug test for use of an illegal substance to prove the drug use did not at all contribute to injury. These statutes, reasoned the court, go against the letter and spirit of Arizona Constitution article 18, section 8, which provides compensation for workers injured in accidents that are caused, even only *in part*, by necessary risks or dangers of employment. By requiring a showing that an accident was minimally, or not at all, caused by intoxication—that is, by the worker’s own *fault*—the statutes inject fault in a system where fault should play no part; or, seen another way, resurrect the long-abolished doctrine of contributory negligence. The Arizona Supreme Court was particularly sensitive to the possibility of resurrecting the fault element and traditional common law defenses that historically restricted recovery for injured workers’ and necessitated the implementation of the workers’ compensation scheme at the beginning of Arizona statehood.