



Guidance from the OSSBA Legal Team: Marijuana, Employee Drug Testing and Worker's Compensation Claims

A post-accident positive drug test may not be enough for employers – including school districts – to deny workers' compensation benefits, according to a new appeals court ruling. Instead, employers must demonstrate that drug or alcohol use caused an accident that preceded a benefits claim.

The Oklahoma Court of Civil Appeals ruling addressed a case involving an employee who sustained a work-related injury and subsequently tested positive for marijuana. The employer denied workers' compensation benefits based on the positive test even though the employee argued he wasn't intoxicated at the time of the injury.

The ruling highlights two important lessons for school districts:

- Corroborating evidence to establish a causal connection between an employee's intoxication and an accident with injury may be needed to prove the presence of a prohibited substance in an employees' blood was a contributing factor.
- School districts that want to conduct drug testing of employees must have a policy authorizing them to do so. The policy should describe the circumstances under which a district would require an employee drug test. For example, school districts should have a policy permitting the drug testing of employees when reasonable suspicion of intoxication exists, based upon the documented observations of an individual trained in making such determinations. (*OSSBA has a sample policy regarding employee drug testing.*)

Examples of corroborating evidence may include testimony regarding the employee's behavior while performing job duties (e.g., irritability, lack of concentration, slurred speech, frequent accidents, etc.), the inability to perform job functions that are normally performed competently, statements from the employee regarding her or his state of mind etc. It is important to note that this case specifically dealt with marijuana, and tests for marijuana cannot determine the specific amount in one's blood. Some tests for prohibited substances can actually measure the amount in the blood, such as for blood alcohol content. If the test can measure the specific amount in the blood, and state law establishes an amount beyond which an individual is legally intoxicated, the test alone may carry more weight.

When a positive drug test is supported by these documented observations, the district will have evidence to support its claim that the employee was intoxicated while at work. It would also be wise to supplement the reasonable suspicion observation with any other evidence that exists, such as statements about the employee's behavior from coworkers and students.

Employee drug testing policies are typically negotiated in districts that engage in collective bargaining.

Case details

In *Rose v. Berry Plastics Corp., Safety National Casualty Corp., and The Workers' Compensation Commission*, an employee's left hand and wrist were crushed by a guillotine machine while working for Berry Plastics. The claimant tested positive for marijuana after the injury and, as a result, the employer denied workers' compensation benefits. The claim was then heard by an Administrative Law Judge. The claimant did not dispute the accuracy of the positive test; rather, he argued that he smoked the marijuana at 11 p.m. the night before the accident, that he was not actually intoxicated at work, and that the previous night's marijuana use was not a contributing factor to the accident. The employee provided specific testimony about his actions at work prior to the accident, including his attendance at a safety meeting, and identified supervisors and coworkers with whom he spoke. He indicated he was "clear-headed" and not under the influence during the workday. There was no evidence that the claimant's supervisor or coworkers observed any behavior indicating that he was intoxicated or under the influence of drugs or alcohol. In fact, the employer provided no evidence to dispute the claimant's argument that his marijuana use did not contribute to the injury. Based on the claimant's testimony, coupled with the lack of contrary evidence, the judge determined that the claimant overcame the presumption that the injury was caused by his use of marijuana, and benefits were allowed.

Although the Workers' Compensation Commission reversed the judge's determination, the court of civil appeals reversed the WCC's decision and reinstated the judge's decision. Importantly, the Court stated that:

[W]e must reject the WCC's underlying inference that the mere presence of marijuana in Claimant's bloodstream inevitably means he was intoxicated. While every intoxicated person will show the presence of an intoxicating substance in their blood, the reverse is not true. The presence of an intoxicating substance in the blood does not automatically mean that person is intoxicated.

The court also said in a footnote that "the critical focus is not whether an intoxicating substance was present in the worker's system, *but rather whether there was a causal connection between the accident and a state of intoxication, from whatever source.*"

School districts must establish that marijuana use caused and other employers need to review their practices A Oklahoma Court of Civil Appeals opinion has provided some clarity on drug use

and workers' compensation benefits, particularly as it . The Oklahoma Administrative Workers' Compensation Act ("the Act") states that an employee cannot obtain workers' compensation benefits when the work-related injury is "caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders." It further states that a positive test for one of the above within twenty-four (24) hours of the injury or report of the injury, or a refusal to undergo a test within that time frame, creates "a rebuttable presumption that the injury was caused by" the use of such substances. An employee can only overcome this presumption if she or he "proves by clear and convincing evidence that his or her state of intoxication had *no causal relationship to the injury.*"

Other considerations for school districts

As mentioned above, this ruling does not apply outside of the workers' compensation context, but it can be used as guidance for how the court may analyze general employment actions based on positive drug tests. In fact, if the employee has a valid Oklahoma medical marijuana license, the new medical marijuana statute already prevents employers from taking action "based solely upon the results of a drug test showing positive for marijuana or its components." Thus, a school district would be well-served to obtain corroborating evidence, such as that described above, before attempting to discipline an employee with a medical marijuana license for on-the-job intoxication.

Even when the incident does not involve workers' compensation or a medical marijuana license holder, school districts would be smart to heed the court's warnings to better support employer actions and limit legal liability.

Questions? Contact the OSSBA legal team at 888.528.3571.