



Employees Who Fail Drug Tests Are Not Always Intoxicated

By Scott Kiplinger and Chris Thrutchley
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The Oklahoma Court of Civil Appeals recently ruled that a post-accident drug test confirming an employee's use of marijuana did not prove he was "intoxicated" at the time of the accident. [Rose v. Berry Plastics Corp.](#), 2019 OK CIV APP 55, 2018 WL 9869754. While the decision addresses when marijuana use voids workers' compensation coverage, it also highlights the challenges employers could face when relying on drug tests to show a medical marijuana licensee was "under the influence" while working.

Rose worked for Berry Plastics as a machine operator. While trying to clear an obstruction by hand from a jammed machine, a coworker triggered the "guillotine" machine, crushing Rose's hand and wrist. After his post-accident drug test revealed the presence of marijuana, Rose admitted smoking marijuana the night before. He denied, however, being impaired at the time of the accident, which occurred approximately 10 hours after he had smoked the marijuana.

Rose's claim for benefits was denied by his employer, as smoking marijuana violated both company policy and Oklahoma workers' compensation law. An Administrative Law Judge awarded benefits to Rose, because the employer offered no evidence that Rose was intoxicated at the time of the accident. The Workers' Compensation Commission reversed the ALJ's decision, explaining that the failed drug test served as a "rebuttable presumption" of intoxication and Rose failed to provide sufficient evidence to overcome that presumption.

The appellate court reversed, rejecting the Commission's assessment of the facts and its "underlying inference" that marijuana in the Rose's bloodstream inevitably meant he was intoxicated. The court explained that Rose overcame the presumption of intoxication by showing he woke up at 6 a.m., drove 45 minutes to work, operated the machine without incident for the first two hours of his shift, showed no signs of intoxication to his coworkers, and the employer offered no evidence of intoxication at the time of the accident.

The case did not address whether Rose consumed marijuana for medical or recreational purposes. But it does serve as a warning for employers seeking to determine whether a medical marijuana licensee was working “under the influence” of medical marijuana.

[The Oklahoma Medical Marijuana and Patient Protection Act](#) allows an employer to discipline or discharge a medical marijuana licensee who “consumes or is under the influence of medical marijuana or medical marijuana product while at the place of employment or during the fulfillment of employment obligations” 63 O.S. § 427.8(H)(2)(b). The *Rose* case suggests that a positive drug test doesn’t necessarily prove an employee has consumed or was under the influence while working.

Employers should train supervisors and managers to identify and document all signs of impairment. Absent additional evidence beyond the positive test alone, an employer who takes adverse action against a medical marijuana licensee may face risk of liability.

GableGotwals’ Labor & Employment attorneys are well-versed in recent developments regarding the state-sanctioned marijuana industry and how those developments impact employers. If you need help in any of these areas, please contact any [GableGotwals Labor & Employment attorney](#).



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