

LEGALLY SPEAKING

By Bob Dunlevey

SUBSTANCE ABUSE TESTING AND WORKPLACE INJURIES

- THE FORGOTTEN STEP -

If an employee tests positive for drugs or alcohol immediately after a workplace injury, that employee won't receive workers' comp benefits, correct? While this seems like a simple question, the answer is so complicated that the Ohio Bureau of Workers' Compensation does not even seem to have a straight answer. The answer is "it depends!" The Bureau's Drug-Free Workplace Program was specifically created to eradicate substance abuse problems at Ohio's workplaces but it does not automatically increase an employer's chances of winning a comp hearing against an abuser. Read on and learn the missing step that will help you win your next case.

Ohio's Drug-Free Workplace Program was designed to lower workers' compensation costs by creating a work environment free from the effects of drug and alcohol abuse and by penalizing employees for abuse. Users are three to four times more likely to have a job accident and five times more likely to file a comp claim. The Program offers state-fund employers various levels of premium discounts for establishing substance abuse programs which include components of education and testing. The Program also helps avoid an employer's high costs associated with accidents and injuries caused by employees under the influence of drugs or alcohol. While participation in the DFWP for most employers is voluntary, construction contractors are required to have a drug-free workplace program to bid on or work a state-administered construction contract/project.

Ohio employers participating in the Program are required to test employees involved in most workplace accidents for drugs and alcohol. After an accident or injury, most employers automatically implement the policy and send an employee for testing. The test occurs simply as a matter of policy. However, many Ohio **employers are skipping a step** which could increase their chances of preventing that undeserving employee from receiving comp benefits.

In order to be entitled to what is known as the “rebuttable presumption,” a presumption that shifts the burden of proof to the employee to prove that the alcohol or drugs in their system was **not** the cause of the injury, employers must also show that “reasonable cause” existed for the test in the first place. “Reasonable cause” is necessary even though the Bureau’s own Drug-Free Workplace Program requires the test. The accident or injury is not sufficient “reasonable cause” by itself. But, if these things are shown, the benefits customarily are denied.

The Bureau’s Guide specifically states that the “quality of documentation of reasonable cause is essential in having [the] rebuttable presumption considered.” The Bureau even requires “reasonable cause” if an employee refuses to take a test after an accident. Therefore, before throwing away your chances of denying workers’ compensation benefits to an employee who abuses drugs or alcohol and causes an accident or injury, make sure you document (after the accident and at the time you request the employee to take the test) the reasons which support your belief that the employee could be under the influence of drugs or alcohol. “Reasonable cause” can include such things as staggering, slurred speech, argumentative or drowsy behavior or bloodshot eyes. Each circumstance can vary greatly and any and all observations which could support “reasonable cause” should be well documented at the time the employee is asked to submit to the test.

For more information regarding the Drug Free Workplace Program, contact Bob Dunlevey at Dunlevey, Mahan & Furry (937) 223-6003 or rtd@dmfdayton.com.