Disciplining Safety-Sensitive Workers May Require More than a Positive Drug Test

Testing positive for cannabis doesn’t necessarily prove worker was high on the job.

One of the thorniest issues in workplace drug testing law is the probative value of a positive cannabis test. **Explanation**: Testing positive for alcohol is proof of impairment; but cannabis is different. THC, the ingredient that causes the high in cannabis, metabolizes much more slowly and can remain in the system long after the buzz wears off. Unfortunately, current lab tests can detect the presence of THC but can’t reliably indicate whether the test subject was actually impaired at the time of testing.

That’s the science. As for the law, employers have been able to use the lack of a reliable test to their advantage to the extent that they haven’t been challenged to prove current impairment. In other words, a positive test result for cannabis has pretty much been enough to justify disciplining (or refusing to hire) a safety-sensitive worker.

The *Lower Churchill* Case

Perhaps the most significant new case decided since legalization turns that presumption around and places the burden on employers to dig deeper and at least consider

measures to follow-up with workers who test positive to ensure they were actually high at the time of testing. The case involves a safety-sensitive construction worker who admitted to legally vaping 1.5 grams of medical cannabis containing high THC levels after work for Crohn's disease pain. Because Crohn's disease is a disability, the employer had to accommodate the worker. But it contended that hiring him for a safety-sensitive position would be undue hardship.

The arbitrator and lower court agreed. But the Newfound Court of Appeal reversed the ruling and said the employer didn't do enough to accommodate the worker. The lack of a reliable test is too easy an excuse since all employers must do to deny employment to medical cannabis users is show their jobs are safety sensitive. The Court said the standard should be higher. Maybe there are other ways to determine a worker's fitness for duty. Employers should have the burden of proving they considered these alternatives and explaining why they were rejected [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc*., 2020 NLCA 20 (CanLII), June 4, 2020].

The *Bombardier* Case

Technically, the *Lower Churchill* case is binding only in Newfoundland; and it also applies to the narrow question of accommodating medical cannabis use under human rights laws. However, the approach of downplaying the probative value of a safety-sensitive worker's positive cannabis test may catch on in other jurisdictions and other contexts. In fact, it already has'in a federal case that came down just 2 months after the ruling.

At issue was a safety-sensitive railway worker involved in a collision incident who got fired after his post-incident urine test came back positive for cannabis. The worker admitted to smoking pot while off duty the night before but insisted he wasn't high when the incident occurred. But the railway

claimed it had the right to terminate him for failing the drug test to deter others regardless of whether he was actually impaired at the time of testing.

The federal arbitrator disagreed and ordered the company to reinstate the worker. A drug policy allowing for termination merely because of a positive test without requiring proof of impairment is unreasonable even for a safety-sensitive work and operation, the arbitrator concluded [*Bombardier Transportation Canada Inc. v Teamsters Canada Rail Conference*, 2020 CanLII 53040 (CA LA), August 4, 2020].

Takeaway & Compliance Strategy

Historically, a positive drug test has been seen as a smoking gun justifying refusal to hire, demotion, transfer, discipline and even termination of a safety-sensitive worker. That includes cannabis, even though current testing technology isn't capable of reliably detecting current impairment and ruling out the possibility that the worker might simply have used cannabis the night before. But employers'especially those in Newfoundland'need to be aware that this may now be changing. And to ensure compliance under the *Lower Churchill* and *Bombardier* regime, employers will have to make 2 important adjustments when dealing with a safety-sensitive worker who tests positive for cannabis.

Accommodations of Medical Cannabis Use

If the safety-sensitive worker or job uses legally authorized medical cannabis to treat pain, illness or a disability, human rights come into play and you must make accommodations to the point of undue hardship. The punchline is that the fact that the position is safety-sensitive doesn't necessarily get you to the 'undue hardship' finishing line.

While you never have to let any worker do their jobs when they're high, *Lower Churchill* stands for the proposition that

you do have to at least reach out to the worker and union to discuss the possibility of alternative ways to evaluate the particular individual's fitness to do the job, such as performing a functional assessment of the worker before each shift. Although the search for alternatives may ultimately prove fruitless, you must be able to document the steps you took and efforts you made to engage in it. Thus, the employer in *Lower Churchill* was unable to prove undue hardship not because it didn't offer any alternatives but because it didn't bother to even search for them.

Confirmation of Impairment Needed for Discipline

The second adjustment, which is based on the *Bombardier* case, applies to all forms of cannabis use, not just medical cannabis. The railway's contention that a positive test was enough to fire a safety-sensitive worker even without proof of current impairment wasn't a reach but an argument based on literally decades of case litigation. In fact, one of the other cases in our post-legalization **Scorecard** came to the exact same conclusion (in the case called *Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11*, 2019 CanLII 123925 (CA LA), December 23, 2019). The reasoning: Operating railway cars is so safety-sensitive that an employer must be able to wield the hammer for a positive test to deter other workers.

But *Bombardier* rejected that premise and demanded proof of actual impairment at the time of testing. As a result, if it doesn't already, your testing policy should require follow-up testing to confirm the results of a positive drug test, particularly where the substance generating the positive test is cannabis.