OHS Case Alert: Smell of Pot in Car ≠ Proof Worker Is High At Work

Now that cannabis is officially legal, OHS managers need to pay close attention to court cases pitting employers against workers who are allegedly high at work. Typically, the principle evidence of impairment is a positive drug test. But that's not always the case. In fact, many companies don't test their workers, even if they perform safety-sensitive jobs. That seems to have been the situation in a recent case from Nova Scotia illustrating just how hard it is for employers to prove workplace impairment.

What Happened

An elevator mechanic with a history of using marijuana got fired for allegedly smoking pot before his work shift. The chief evidence: The project manager smelled marijuana smoke as he walked by the mechanic's jeep in the parking lot before the shift began. But the Nova Scotia arbitrator said that this wasn't enough proof and reinstated the mechanic with no loss of pay (but also subject to the current last chance conditions imposed on him as a result of his unrelated attendance problems).

Why the Employer Couldn't Prove Impairment

While the manager might have *smelled* pot'or at least thought he did'he also acknowledged that it was too dark to *see* anything. And without the eyes, the nose was of limited value. Maybe what he smelled wasn't fresh pot being smoked but the stale aroma of old pot mixed with tobacco smoke, the arbitrator surmised. This explanation would confirm the mechanic's story that he was in the jeep but smoking a cigarette when the manager walked by.

The other big problem was that none of the other witnesses testified to smelling pot from the mechanic once work began. Marijuana smoke clings to clothes and hair and if the mechanic really did smoke pot in his jeep that morning, somebody would have surely smelled it. Nor did anybody claim that they detected any other signs that the mechanic was impaired.

The X Factor

But something about the case *did stink*, at least to the arbitrator. But this odor came not from the mechanic but the company. The company, it seems, had a safety policy banning workers from working while they're impaired. The policy also authorized management to prevent workers from working in an impaired condition. So, while not doubting the sincerity of the manager's suspicion, the arbitrator chided him for allowing the mechanic to proceed to work his safety-sensitive job and then drive home [*Kone Inc. v International Union of Elevator Constructors, Local 125*, 2020 CanLII 2377 (NS LA), Jan. 18, 2020].

Takeaway

Maybe the company in this case didn't have a drug testing policy; or maybe it did have such a policy but the test results were excluded as evidence from the arbitration. In either case, the company learned at just how difficult it is to prove a worker is impaired at work merely via witness testimony. This is especially true when the witness' claims that the worker was impaired is unsupported by any of the other witnesses.