

# alert

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## **MARIJUANA INTOXICATION DOES NOT BAR RECOVERY FOR WORKERS' COMPENSATION BENEFITS**

Lennie Szarek, a 21 year old apprentice carpenter, was framing the exterior walls on the second floor of a new house when he fell through a nine foot by nine foot stairwell opening in the center of the floor. The claimant suffered paraplegia when, while constructing a house, he fell two stories through a stairway opening in the center of the floor. An orange line had been painted around the opening, but no guard rails had been erected. At about 9:00 a.m., claimant "had snapped a chalk line and was reeling in the line when he fell into the floor opening." His journeyman carpenter and his supervisor testified that in their judgment the claimant was not intoxicated or impaired. Claimant testified that he had taken no drugs on the day before or on the day of the accident.

Testifying for the employer was Dr. Jerrold Leikin, a medical toxicologist and certified medical review officer. At the hospital, the claimant was given a urinalysis test. Dr. Leikin, interpreting the findings, testified as follows:

1. Urinalysis revealed over 18 times the cannabinoids considered "positive" for quantitative screening;
2. He tested positive for cocaine as well;
3. Results were consistent with impairment due to marijuana and indicated "proximal use" marijuana use on the day of the accident;
4. The marijuana impairment resulted in "visual acuity deficits" which would impair the ability to judge distance;
5. Claimant might or could have mistakenly stepped into the opening due to an impaired visual or cognitive response caused by marijuana intoxication; and
6. The doctor considered claimant's intoxication significant but could neither quantify it nor state that claimant's intoxication was the only causal factor in the

accident.

The arbitrator awarded permanent total disability benefits and penalties and attorney's fees which the Illinois Workers' Compensation Commission affirmed. Interestingly, neither the arbitrator nor the Commission relied on the claimant's expert pharmacologist. The appellate court affirmed the award and denied the employer's claim that recovery should be denied if scientific evidence establishes marijuana impairment. Even if marijuana use was a contributing factor in the accident, it was not the sole cause – the existence of the hole constituted a work-related risk as well.

Last, the court reversed the award for penalties and fees on the basis that the urine test results and past intoxication cases permitted the employer to reasonably believe that claimant's injuries were not related to his work. The previous cases involved alcohol and the court distinguished these, but noted that it had not made such a distinction in the past. Therefore, the award for penalties and fees was reversed.

The court placed its stamp of approval on the Commission's denial of the fundamental right to cross examine claimant on the degree of his marijuana use by stating:

*Leikin testified that claimant used marijuana within the previous 1.5 days prior to the accident, and he could not state that marijuana intoxication was the sole cause of the accident. Moreover, the observations of (the fellow employees)*

*refute the notion that claimant was so intoxicated as to have abandoned his employment, even if respondent could establish claimant used marijuana on the previous day. Additionally, even if he had used marijuana on the day of the accident, no evidence in the record establishes that such use, if it happened, would have been the sole cause of the accident. Further, to the extent that Leikin testified to the time frame of claimant's alleged usage, such cross-examination would have been cumulative as well. In short, we see no reasonable probability that, had respondent established the point it here seeks to make or had it undermined claimant's testimony to the contrary, a different result would have followed.*

*Respondent also argues that it should have been allowed to question claimant generally on his admitted past marijuana use to establish whether he was sufficiently familiar with the drug's effects to testify that he was not intoxicated at the time of the accident. It is undisputed that respondent was engaged in his job (winding in a chalk line). It is not apparent to us how, if we assume claimant was intoxicated, that would alter*

*the result of the case in light of Leikin's failure to opine marijuana use was the sole cause of the accident.*

*Respondent had to demonstrate not only that claimant was intoxicated, but that marijuana use was the sole cause of the accident or that claimant departed from the scope of his employment. In other words, we see no prejudice to respondent here.*

*Finally, respondent complains that it was denied the opportunity to cross-examine (the hospital pharmacologist) regarding a statement claimant's attorney made to (the pharmacologist) regarding claimant using marijuana on the afternoon before the accident. We fail to see the relevance of this testimony. Even if true, nothing exists in the record to support the proposition that such usage could have been the sole cause of the accident or that it would have rendered claimant so intoxicated that he had abandoned his employment.*

**EDITOR'S NOTE:** Deprivation of the right to cross-examine is obviously a rare occurrence. Who can say with certainty that the claimant might not admit facts sufficient to establish the proof that the court felt was necessary. Is there any doubt that if the claimant had been driving a motor vehicle and after a traffic accident exhibited the findings described by Dr. Leikin, that the

claimant would have been found to be legally intoxicated? Would that not be true if the intoxication was not the sole cause of the accident?

In refusing to equate significant marijuana intoxication, 18 times the threshold for positive, with the .08 it takes to be considered legally intoxicated, the court has taken a virtual "hands off" approach to intoxication other than by alcohol. The court provides no guidance for what it will take to establish intoxication of a "sufficient degree" to take a worker out of the course of employment. It will take legislative action to adopt standards of intoxication for marijuana and other illegal substances to resolve the public policy issues presented by this case. For now, it is clear that an employer must prove marijuana intoxication the sole cause of injury to defend this type of case successfully. And the next litigant who relies on the alcohol intoxication cases to deny benefits for marijuana intoxication may be facing a penalty award.

*Szarek v. The Workers' Compensation Commission*, No. 03-08-0530WC,  
decided October 20, 2009

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