

MOEMA

The Impact of Michigan's Marijuana
Legalization on Employment and
Worker's Compensation

Presented by:

Leonard M. Hickey, B.S., J.D.

Hickey Combs PLC

www.hickeycombs.com

lhickey@hickeycombs.com

INJURED WORKER'S BURDEN OF PROOF

- Injury
- Work Related
- Impairment/Restrictions/Disability
- Wage Loss
- Attributable to Injury

WAGE LOSS

- MCL 418.301(4)(c) requires proof of a *wage loss*, defined as a connection between the disability and reduced wages
- Wage loss must be attributable to the work injury in order for wage loss benefits to be payable:
 - *Sington v Chrysler Corp.* 467 Mich 144, 160-161, 648 NW2d 624 (2002);
 - *Romero v Burt Moeke Hardwoods, Inc.* 280 Mich App 1, 9, 760 NW2d 586 (2008); and
 - *McMurtrie v Eaton Corp.* 490 Mich 976, 806 NW2d 530 (2011).

WAGE LOSS

In *Adkins v Asama Coldwater Mfg, Inc.*, 2011 ACO #54, the Appellate Commission denied benefits where the employee failed a mandatory drug test following a work injury. The employee had ingested cocaine before his injury. He knew when he did so that he could be terminated if he failed a drug test. Based on those facts, the Commission denied wage loss benefits, holding that the employee's wage loss was related to the failed drug test rather than the work injury.

INTENTIONAL AND WILLFUL MISCONDUCT



MCL 418.305 provides that “[i]f the employee is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this Act”.

INTENTIONAL & WILLFUL MISCONDUCT

- *Marcinak v Norcote, Inc.* 2004 ACO #240. Benefits were denied because the injury resulted from willful misconduct as the employee was found to be under the influence of marijuana at the time of injury, in violation of a strictly enforced safety rule, the injury suffered was a type of injury the drug policy was designed to prevent and the employee's intoxication caused the injury.
- *Marcinak* also makes it clear that, if §305 applies, both wage loss and medical benefits are barred.
- *Bolden v Detroit Newspaper Agency* 2007 ACO #98 (benefits were denied because drug use was found to have caused the employee's injury).

HYPOTHETICAL SCENARIO #1



Jimmy Diamond is 52-years-old. Jimmy has a spotty employment history. He is separated from his wife. He has Friend of the Court obligations for four children. Jimmy obtained employment with Green Day Lawn Care and Snow Plow Service in April. At the outset of his employment, he was trained in the safe use of lawnmowers, weed whippers, trimmers, edgers, blowers, etc.

HYPOTHETICAL SCENARIO #1

After having Wednesday, July 4th, off, Jimmy returned to work at 7:10 am on Thursday, July 5. Jimmy and two coworkers drove out to a commercial job site. Jimmy operated a side-discharge riding lawnmower. While he was mowing, the side-discharge chute became clogged. He reached down with his hand to pull the lawn debris out of the chute. He reached in too far and the rotating blade lacerated the tips of his index and middle finger. Jimmy's coworker called the boss. The boss instructed him to take Jimmy to the nearest Urgent Care. Jimmy received x-rays. There were no fractures. His lacerations were stitched up.

HYPOTHETICAL SCENARIO #1

Urine was drawn for a drug screen.

Jimmy was released to return to work with restrictions.

The drug screen came back positive for THC metabolite.

The employer did not have a written alcohol and drug policy.

The anticipated recovery time for the lacerations was 4-6 weeks.

Green Day Lawn Care could have accommodated the restrictions for that time period.

Green Day terminated Jimmy's employment for misconduct.

ANALYSIS



- Are wage loss benefits payable?
- Are medical benefits payable?
- What “misconduct” led to termination of employment?
 - Testing positive for THC metabolite?
 - Disregarding safety training?
- What was Jimmy’s wage loss attributable to?
- Did Jimmy unreasonably refuse a bona fide offer of reasonable employment by testing positive for THC and being terminated?

ANALYSIS

- Would Jimmy's claim be barred by MCL 418.305, because his injury was caused by his intentional and willful misconduct?
 - Did Green Day have a drug & alcohol policy?
 - Had Jimmy been advised of the policy?
 - Did Jimmy know he would be disciplined for testing positive for THC?
 - Did Jimmy know not to operate dangerous machinery while "high"?
- Did Jimmy's misconduct cause his injuries?
 - Was Jimmy "intoxicated" on THC?
 - Did his intoxication cause the injuries?

ANALYSIS



- Is Jimmy's claim barred by his failure to follow his safety training by reaching into the discharge chute without disengaging the cutting blades and/or turning the mower off?
- Was his failure misconduct?
- Was his failure intentional?
- Does a Michigan employer need a reason to terminate employment (at will employment)?
- What was Jimmy's wage loss attributable to?

HYPOTHETICAL SCENARIO #2

Greta VanFleet worked as an over-the-road truck driver for Almost Safe Trucking Company. Greta is 39 years old. Her husband works at a marijuana farm. She has a good work and safety record. She has never been disciplined. She has never had an accident.

On the Monday following her husband's holiday work party, Greta was assigned to drive her 18 wheeler, with a full load, to Nashville. She started at 4:00 a.m. At 11:00 a.m., she was involved in an accident, where she lost control of the tractor trailer, it jackknifed, and the trailer flipped over. The total damages, including trailer and contents, exceeded \$120,000.

HYPOTHETICAL SCENARIO #2

Greta was immediately transported by ambulance to the emergency room. She gave a history that a deer had run across the highway and startled her. She took evasive maneuvers and lost control of her rig. She complained of back, neck, and shoulder pain.

Blood drawn 90 minutes after the accident, was positive for THC metabolite.

Greta had received training in Almost Safe's alcohol and drug policy. She knew that any positive drug test would result in immediate suspension and possible termination, pending treatment with a substance abuse professional and successful completion of the "return-to-duty" process.

HYPOTHETICAL SCENARIO #2

The police investigation included 2 eyewitness statements. Both witnesses were driving behind Greta's truck at the time of the accident. They stated that the truck's speed seemed to be inconsistent and that once before and again at the time of the accident, the truck veered off onto the shoulder of the road. Neither witness observed brake lights being illuminated prior to or at the time of the accident.

A post-injury MRI showed a disc herniation at C6-C7 on the left. Greta was restricted from driving an 18 wheeler but was allowed to drive a box truck or van with lifting restrictions.

ANALYSIS

- Should Almost Safe Trucking Company discipline or terminate Greta under FMCSA?
- Should wage loss and medical benefits be paid?
- Did Greta's intentional and willful misconduct cause the accident?
- If her intentional and willful misconduct caused the accident, what benefits should be disputed?
- What difference, if any, does it make if Greta claims she did not intentionally inhale or ingest THC, but that she may have mistakenly ingested THC that was in a brownie at her husband's company party?

ANALYSIS

- Later, a third witness came forward. The third witness was driving toward Greta on the separated interstate and saw a deer run in front of Greta's truck immediately before the accident. What difference does that make?
- Did the THC in Greta's system cause the accident?
- What caused Greta's wage loss?
- If the police eventually found that Greta was not at fault and the employer would then have accommodated her restrictions, would wage loss benefits be payable?
- What if Greta had refused to take a drug test at the hospital? FMCSA?

TAKE-AWAYS

POTENTIAL DEFENSES:

- The employee has the burden to prove, by a preponderance of the evidence, injury, impairment, disability, and wage loss
- Intentional and willful misconduct causing injury bars wage loss and medical benefits. MCL 418.305.
- If wage loss is not attributable to the injury, but attributable to the consequences of a positive drug test it is not compensable.

TAKE-AWAYS

POTENTIAL EMPLOYEE RESPONSES:

- Ingestion/inhalation was not recent, on a work day
- I was not intoxicated by THC at the time of the injury
- The positive drug test was used as a pretext to terminate me in retaliation for pursuing a workers' compensation claim
- I was using medical marijuana to treat another health condition
- I was using medical marijuana to treat a work-related injury
- The employer did not follow its progressive discipline and terminated me instead of agreeing to a last chance agreement.

TAKE-AWAYS

- Impairment/intoxication will need to be proved by circumstantial evidence:
 - Employee admissions
 - Slurred speech
 - Unusual/erratic behavior
 - Odor
 - Delayed reaction times
 - Red eyes?
 - Inattentiveness, carelessness, clumsiness, inability to follow directions, etc.
 - Accident video
 - Accident reconstruction; electronic speed logs