

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: Is it an abuse of discretion for a trial court to exclude evidence of concern about a failed drug test at trial based upon the argument that said evidence was too prejudicial to the claimant?**

During a trial, there are generally two inquiries to be made when evidence is presented: (1) whether the evidence is admissible, a determination that is governed by the Rules of Evidence; and (2) whether admissible evidence is nonetheless so prejudicial to the person against whom it is offered that the prejudice outweighs any probative value to the trier of fact. *Ohio Evid. R. 403(A)*. Recently, the Ohio Court of Appeals, Fifth Appellate District, was presented with a case involving a claimant who admittedly expressed concerns to fellow employees about taking a drug test, because he knew he would fail the test, and whether these admissions should be admissible in his workers' compensation trial.

*Trent v. Stark Metal Sales, Inc.*, 2015-Ohio-1115, involved a claimant who was injured on June 30, 2011 when a large piece of steel fell on his legs. He was transported to the hospital and told he would be subject to a urine drug screen, but claimed to be unable to produce a sample. Six days later, on July 6, 2011, he was tested and the test showed positive for marijuana metabolites. A workers' compensation claim was filed, which was allowed by the Industrial Commission over the objection of the employer. The matter was appealed to common pleas court, and before trial the claimant filed a motion *in limine* seeking to exclude any mention of the drug test or results. The employer objected, but the Court ultimately granted the motion, stating that while the test may be relevant, its prejudicial nature outweighed its evidentiary value. At trial, the employer sought to introduce testimony from several co-employees that the claimant admitted after the accident that he had used marijuana a "couple of weeks" before the incident, initially refused treatment because he could not pass the urine test, and would fail the drug test. The claimant objected, and the trial court again held that this evidence should be excluded as prejudicial. The claimant prevailed at trial, prompting an appeal to the Fifth District that the trial court committed an abuse of discretion in excluding the evidence from witnesses that the claimant told co-workers that he would not pass a drug test.

The Fifth District disagreed, affirming the trial court's exclusion of evidence as within its discretion. It relied primarily on the fact that the presence of marijuana in the claimant's system six days later did not affect his right to receive compensation, and that the test in question was not a "qualifying chemical test" under R.C. 4123.54 because it was not administered within thirty-two hours. Additionally, there was no proffer of evidence that the admitted violation of a workplace rule was the proximate cause of the injury. The proffered testimony also confirmed that the claimant had not smoked marijuana on the date of the incident, and did not demonstrate he was "under the influence" of marijuana. Therefore, the evidence was properly excluded.

*Trent* has several lessons, the first of which is that if a policy of drug testing is in place, it should be enforced and a sample taken within the thirty-two hour window provided for in the statute. Second, it is difficult to persuade a trial court to admit evidence of drug use in a case in which

the employer is not alleging that the claimant was intoxicated and that the intoxication was the proximate cause of the incident. Notwithstanding this, the evidence was clearly relevant to the proceedings and should have been introduced at trial.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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