NO DRUG OR ALCOHOL TESTING AFTER EMPLOYEE HITS PARKED CAR

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A recent arbitration award in Ontario addresses post-incident breathalyzer alcohol and urine drug tests in a safety sensitive workplace. In *Jacobs Industrial v International Brotherhood of Electrical Workers, Local 353*, 2016 CanLII 198, the grievor was an electrician working for Jacobs Industries, a maintenance contractor at a Suncor refinery site. The site was highly safety sensitive and there were risks of explosions, electric shocks and release of highly poisonous gases. The grievor's employment with Jacobs was terminated when he refused to undergo a post-incident breathalyzer alcohol test and a urine drug test. His employer said he could return if he underwent the drug and alcohol tests and was cleared to return. The Union challenged Jacobs' drug and alcohol testing policy, and whether it was reasonable to require the grievor to undergo such tests given the facts of the incident.

Jacobs' policy, which was consistent with the refinery owner's own policies, provided for mandatory post-incident testing if external factors were eliminated as a possible cause of the incident. As the steward, the grievor had provided employees with training on the policy, and he was aware that refusing to take the tests would result in termination of employment.

Nevertheless, he refused to undergo alcohol and drug testing after an incident in the refinery parking lot. He was driving a pickup truck owned by the refinery with a box attached to the back by a trailer hitch. He was wearing his safety equipment (hard hat, safety glasses and ear plugs). He did not use a spotter when reversing his truck, and bumped into a parked car in the parking lot. There was an immediate investigation in accordance with the policy and a post incident report was prepared. The grievor said that he did not see the parked car but admitted that the collision was his fault.

The company concluded that the grievor caused the accident, and that it could not rule out the influence of drugs or alcohol. In the company's view, it was out of character for the grievor to drive past other vacant parking spots and attempt to park in an occupied spot without first finding a spotter. It also did not assist the grievor that, immediately following the accident, he drove the truck away from the scene. In accordance with the policy, the grievor was immediately requested to undergo a substance use test to rule out drug or alcohol impairment as a possible cause. The grievor refused. At the arbitration, the Union argued the testing was not reasonable in the circumstances and was an unjustified invasion of the grievor's privacy.

Arbitrator Christopher Albertyn reviewed the existing arbitral jurisprudence on reasonable grounds and post-incident testing and applied the three-part test in *Weyerhaeuser Co. v. CEP, Local 447* (2006), 154 L.A.C. (4th) 3 (Sims):

[…] the threshold level of incident needed to justify testing, the degree of inquiry *necessary before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.*

With respect to the first criterion, whether post-incident testing is justified involves consideration of the harm, Arbitrator Albertyn concluded as follows:

…there must be some substance, some materiality, to the harm caused. If the accident *were trivial, e.g. a cup knocked accidentally from a table, a trip on the stairs, or clearly a* minor incident…, the post-incident route to testing would not be satisfied. There must be *some significance to the accident itself. [at para. 76]*

He further concluded that the standard for post-incident testing means " … that the accident must be a significant one to warrant post-incident testing, provided the overall context suggests the possibility of impairment, just as, in a near miss situation, the proximity of harm must be realistic and the potential harm significant."

On the facts of the case, the harm caused to the parked vehicle was somewhere between $1,000 and $5,000. Arbitrator Albertyn concluded that the damage was not significant and the accident was minor. It therefore did not reach the threshold harm requirement in the first criterion of the *Weyerhauser* test.

The second *Weyerhauser* criterion was met in this case. The company inquired into the cause of the accident, and gave the grievor sufficient opportunity to provide an exonerating explanation that would exclude the need for drug or alcohol testing.

However, the third *Weyerhauser* criterion was not satisfied. Arbitrator Albertyn concluded there was not a sufficient link between the incident and the employee's situation to justify testing. In his view, the company's policy required the investigators to conclude that alcohol or drugs may have caused or contributed to the accident, or that there was no credible explanation for the employee's behaviour, before requiring the drug and alcohol tests. The grievor, however, gave not even the slightest sign of impairment during a half-hour investigation meeting. After he refused the test, the investigators did not provide for alternate transportation and he drove home. This was not consistent with the possibility that he was impaired. Rather, the cause of the accident was obvious – carelessness, impatience, and inattentiveness. He should have asked for a spotter. He should have taken off the safety glasses that covered his regular eyeglasses. He should have used his rear view mirror. On these facts, the company could reasonably have excluded the possibility that impairment caused the grievor to drive into a parked car.

Arbitrator Albertyn allowed the grievance, although he noted that the decision to require testing was not an easy one for the company. He considered it to be a borderline case, and acknowledged there were troubling features to the grievor's behaviour that day.

This case highlights the contextual approach arbitrators will apply to assessing the reasonableness of post-incident testing, even where there is a clear and reasonable policy.

By

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