IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *LABOUR RELATIONS CODE,* R.S.B.C. 1996 c. 244

BETWEEN:

VANCOUVER SHIPYARDS CO. LTD.

(the "Employer")

AND:

CMAW, LOCAL 506 MARINE AND SHIPBUILDERS

(the "Union")

Chester Saret Grievance

AWARD

ARBITRATOR: Randall J Noonan

APPEARANCES: Chris Leenheer and Virginie Vigeant, for the Employer

Daniel McBain and Afifa Hashimi, for the Union

HEARING DATES: February 3 and 4, and March 31, 2022

DATE OF AWARD: June 6, 2022

I. INTRODUCTION

1. The Union challenges the Employer's decision of May 8, 2019, to order Chester Sarett (the "Grievor") to undergo three tests for potential substance abuse – an oral swab, a breathalyzer, and a urine test. The Union claims that the tests were physically invasive and amounted to an unreasonable invasion of the Grievor's privacy rights. It says that the testing was not justified under the Employer's Substance Abuse Policy. Each of the test results came back negative indicating no use of any substances that could have impaired the Grievor. No discipline was imposed on the Grievor, so the grievance relates only to the propriety of the testing.

2. The Employer operates a shipyard on the North Shore of the Burrard Inlet in North Vancouver, BC. It does ship repair, maintenance, and constructs new vessels. In carrying out those tasks, very large pieces of machinery are used and the potential consequences of mistakes makes it a highly safety-sensitive environment.

3. Given the safety-sensitive nature of the work, the Employer has developed a Substance Abuse Policy ("SAP" or the "Policy") and a checklist (the "Checklist") to assist managers with its use.

4. The Grievor is a highly trained and reliable steel fabricator/welder who has been employed by the Employer since 2003. He has been a member of the bargaining unit since, except for a period in an excluded position from 2015 to March 2018. No disciplinary history was alleged.

5. The Employer called four witnesses at the hearing: Chase Wright (Field Advisor – Safety), Bryan Hayden (Manager of Services at Vancouver Shipyards), Simon Kersey (General Supervisor at SOC 80 at the time of the incident), and Chad Forrest (Electronic Trades Manager). The Grievor was the only witness called by the Union.

II. THE FACTS

<u>The Incident</u>

6. There is little or no dispute about the salient facts that gave rise to the Employer's decision to order the Grievor to undergo the substance abuse tests. There were no factual disputes requiring the preference of one witness' testimony over that of another.

7. On May 8, 2020, the Grievor worked the day shift starting at 6:15 a.m. His job was to weld the shell of a ship that was 90 to 95 feet off the ground. To reach that height, he used a Mobile Elevating Work Platform, also known as an Aerial Work Platform ("AWP") and colloquially referred to as a "Man Lift." I will call hereafter refer to it as an "AWP" for convenience. It is a large machine. There were other smaller AWPs on the property, but because of the height of the job he was to do that day, the Grievor had to use the large AWP.

8. The AWP was parked in the work yard in a tight location only a few feet away from a machine called the Equalizer. The Equalizer is a huge machine and is a very important piece of equipment in the Employer's operations. The purpose of the Equalizer is to equalize the weight of large loads being moved from one workstation to another.

9. Before operating the AWP, the Grievor filled out a form known as POWSEA, which is a hazard assessment form. He walked around the machine to check for obstacles or other employees being present in the area. There were none.

10. The Grievor had to maneuver the AWP away from its parked location to another part of the yard. The AWP is operated from a basket which was located in the part of the AWP that was furthest away from the Equalizer so that the Grievor could not see the far end of the AWP as he moved it.

11. The Grievor moved the AWP at the rate of one kilometre per hour or less. At one point, he thought that the far end of the AWP was getting too close to the Equalizer, so he stopped the machine and got out to check. He may have heard a "click" although he did not remember hearing that click when he testified. However, it appears from answers that he provided on that day that he did hear a click. At any rate, his uncontradicted testimony was that he did not feel any impact. When he got out to check, he saw that the far end of the AWP had actually come into contact with the Equalizer.

12. No other workers were present in the area, so no one witnessed the incident.

13. The Grievor then, even by the Employer's account, did everything that he was supposed to do in the circumstances. He shut down the AWP and reported the incident to Supervisor Corey Lutes who, in turn, reported it to Simon Kersey, who was, at the time, the General Supervisor for that area of the shipyard and the Grievor's supervisor.

The Investigation

14. Mr. Kersey went out into the yard to examine the scene of the incident. He moved the Grievor away from the scene and into the lunchroom. Mr. Kersey then called Chad Forrest, the Electrical Trades Manager. Mr. Forrest had been involved in many investigations over the years and was trained on the use and application of the Checklist associated with the Employer's SAP. Mr. Kersey also called Chase Wright, the Field Advisor on Safety. Mr. Wright also attended at the scene of the incident.

15. Mr. Kersey and Mr. Forrest observed the damage done to the equipment. It was negligible. The only sign of contact was a slight exchange of paint between the two machines that were in contact with each other. Mr. Forrest testified that he couldn't tell if there had been any damage and that he was unaware of any repairs needed or any costs incurred to repair the equipment.

16. They also noted that the Grievor showed no signs of impairment. However, they concluded that the incident was a "significant event" and they determined to use the "Significant Event Testing Checklist" related to the SAP to determine whether to require the Grievor to undertake drug and alcohol testing.

17. Mr. Kersey and Mr. Forrest then met with the Grievor and Shop Steward Brad Cruikshank in the Employer's main meeting room.

18. Mr. Kersey took the lead in interviewing the Grievor. He used the Checklist from the SAP to determine what questions to ask. It was the first time that he had used the Checklist. He asked the questions and recorded the Grievor's answers. Mr. Kersey had been trained to ask the questions set out in the Checklist and to limit the questions to those set out in it.

19. After going through the Checklist with the Grievor, Mr. Kersey and Mr. Forrest left the room and had a discussion with Nikita Sanghera from Human Resources, and the three of them determined that the Grievor should undergo drug and alcohol testing.

The Substance Abuse Policy and Checklist

20. The Union took no issue with the SAP, so there is no difference between the parties on the legitimacy of the Policy. Also, the Union did not dispute that the Grievor was involved in "Safety-Sensitive work" as that term is used in the SAP.

21. The Employer's SAP has an effective date of September 17, 2018, and was in force at the time of the incident. Included among the purposes of the Policy is to "Establish procedures for testing and monitoring Employees in Safety Sensitive positions."

22. Section 3.2.2 of the Policy states that:

> No employee or Service Provider shall report to, return to, or engage in any work for the Company under the influence of or affected by the use of Alcohol or Drugs.

23. Section 3.3 of the Policy deals with when employees, who are engaged in Safety-Sensitive work, are subject to drug and alcohol substance use testing. Section 3.3.1 relates to circumstances where there is "Reasonable cause" for testing. The first of those circumstances relates to when an employee exhibits unusual behaviour or signs of impairment such as slurred speech, smelling of alcohol or drugs, changes in personality, being argumentative, or having mood swings. The second is when an employee is engaged in the use, possession, cultivation or sale or distribution of drugs or alcohol while on duty or on the Company premises. The third circumstance under "Reasonable cause" is when an employee has been charged with a drug offence. It is common ground between the parties that Section 3.3.1 had no bearing on the Employer's decision to require the Grievor to undergo drug and alcohol

testing as the Grievor did not exhibit any signs of impairment and there was no "Reasonable cause" for testing under Section 3.3.1.

24. Section 3.3.2 of the Policy is the relevant section for the purposes of this matter and it is that section upon which the Employer relies to justify the testing it required of the Grievor. I will set it out in its entirety:

> 3.3.2 Post Incident
>
> Where an act or omission by an Employee who is on duty or on Company Premises causes or contributes to a Significant Event, the Company as part of the investigation of the cause of the Significant Event may require the Employee to undergo Substance Testing.
>
> "Significant Event" means an incident or accident involving one or more of the following occurrences, or an act or omission by an Employee which causes or contributes to an unusual risk or near miss of such an occurrence:
>
> (a) A fatality or fatalities;
> (b) An injury or near miss of an injury to an Employee or any other person;
> (c) Significant damage and/or unusual circumstances leading to damage or near miss of damage to property of the Company, a customer, a contractor, an Employee, or a member of the public; or
> (d) Significant environmental damage and/or unusual circumstances leading to environmental damage or near miss of environmental damage.

25. The Employer also provides a document called the "Significant Event & Reasonable Cause Testing Package" to assist investigators in determining whether an event falls into the Reasonable Cause line of questioning or the Significant Event Testing or, perhaps, neither. For example, the "Reasonable Cause Testing" section of the document starts with, "Note: If the below applies, please open package." That section of the document then asks the following questions:

> Does the behaviour, physical appearance, or work habits of an Employee provide indications that they are currently under the influence of drugs and/or alcohol while on the worksite? Or do you have a reasonable belief (strong suspicion) that an Employee is in the possession of drugs and/or alcohol while on the premises?

Beside those questions on the form are two check boxes, one for "Yes" and the other for "No." That section of the document concludes with a note that says, "If 'yes' please open the package – If no, please do not open the package." In short, I take that to logically mean that if the answer to the questions is "no," then there are no grounds to pursue the Reasonable Cause testing.

26. The "Significant Event Testing" part of the document seeks more information than does the Reasonable Cause section to determine if it is appropriate to open the Significant Event testing package. That section starts with, "Note: if any of the below apply, please open the package." That is followed by a series of statements and check boxes for either "Yes" or "No" for each statement. The statements appear to emanate from the SAP itself. They are:

    An event resulting in a fatality or fatalities.

    An event resulting in an injury to Employee or other person.

    An event resulting in a near miss of an injury to an Employee or other person.

    An event resulting in significant environmental damage.

    An event resulting in a near miss of significant environmental damage.

    An event resulting in significant damage to property.

    An event resulting in a near miss of significant damage to property.

27. It appears that this form was not filled out in relation to the incident involving the Grievor. Rather, Mr. Kersey and Mr. Forrest determined that using the Significant Event Testing Checklist was appropriate in the circumstances because of the nature of the incident itself and based their investigation and questioning of the Grievor on that Checklist.

28. The first part of the Checklist is directed to the "Initial Supervisor Responding" and asks for identifying information as to where the incident took place, who was contacted and whether steps were taken to ensure the safety of the worksite, that the supervisor has acquired general information about the incident, instructed employees to remain at the scene to give statements, and that they have contacted an available shop steward. The Checklist then sets out 10 interview questions to be asked of the Employee involved. The following are the questions asked of the Grievor and his responses. Mr. Kersey asked the questions orally and recorded the Grievor's responses:

    Question 1: What did you see or hear in regards to the incident? Please describe from the beginning.

    - Refit sideshell shell on the North end of 080
    - Pre inspection
    - POWSEA complete
    - Machine too close to Equalizer
    - Misjudged extra boom length
    - Struck Equalizer
    - When heard sound stopped right away

- Scratched paint on Equalizer/ no dent visible
- Took rigger in area to call CH/supervisor
- Asked them to contact Simon Kersey
- Safety Investigation
- 135' X 70 is slightly different counterweight
- Wasn't intentional

Question 2: What factors would you consider responsible for the incident?

- Miscalculation of length of machinery
- Parked too close to Equalizer

Question 3: Were you operating equipment at the time of the incident? If so, please describe in detail.

- Was operating
- Was trying to make a turn so he [the Grievor] could enter North/South
- Needed to do a wide turn.

Question 4. What were the environmental or weather conditions at the time of the incident? Did weather/environment contribute to the incident? Please describe in detail.

- Bright well lit area
- Clear weather

(Simon (environment not a concern))

Question 5: Were there any unusual or out of the ordinary circumstances that contributed to the incident? If so, please describe in detail.

- Was the only piece of equipment that could reach that area.

Question 6: Did mechanical issues/technological malfunctions contribute to the incident? If so, how? If not, why not? Please describe in detail.

- No mechanical issue
- Pre-inspection complete everything in order

Question 7: Have you consumed any cannabis or cannabis derivatives (i.e., THC or CBD) in the last 48 hours? If so, what and when?

- No

Question 8: Have you consumed any illegal drugs in the last 48 hours? If so, what and when?

- No

Question 9: Have you consumed any drugs (prescription or non-prescription) in the last 12-24 hours which could inhibit your ability to perform your assigned duties in a safe and productive manner?

- No

Question 10: Have you consumed any alcohol in the last 24 hours? If so, what and when? How many drinks?

- No.

29. The Checklist then continues with an analysis section which lists four "Conditions," each followed by "Yes" and "No" check boxes. Mr. Kersey filled out this section:

Condition 1: Is there a connection between the Employee's area of responsibility and the incident? Yes

Condition 2: Did the actions or omissions of the Employee potentially contribute to or cause the incident? Yes

Condition 3: Is there sufficient information to prove that external factors (mechanical/weather/environment) are the primary cause(s) of the incident? No

Condition 4: Will a substance test assist the investigation by ruling out impairment as a probable cause? Yes

30. Both Mr. Kersey and Mr. Forrest testified that they determined to order the Grievor to undertake drug and alcohol testing based on the Checklist responses.

31. Subsequent to his attending the scene of the incident, Mr. Wright filled out an "Incident Investigation Report" in which he was asked to list the "Primary Cause," "Secondary Cause," and "Root Cause" of the incident. Under Primary Cause, he stated, "Worker hit staged rigging device." Under Secondary cause, he wrote, "Worker could not see around the lift without a spotter." Under the Root cause, he wrote, "Tighter areas while using a lift need spotters and more detailed hazard assessments." In response to questions about future preventative actions and control measures, he wrote, "Tool Box talk about spotters and more detailed POWSEA cards" and "JOSH meeting to look at SOP [Standard Operating Procedure] to include spotters (informal)." Mr. Wright also filled out a "Property Damage Incident Report" in which he cited the suspected cause of the incident was, "Lift was too close to staged rigging equipment, and worker had no spotter."

32. In cross-examination, Mr. Kersey agreed that the use of a spotter would have reduced the chances of the incident occurring.

33. After the incident. both the AWP and the Equalizer were "red flagged," which means they were taken out of service until they were inspected for damage to ensure they remained in good working order.

34. Mr. Forrest testified that he considered the incident to be "significant" because there was damage to an important piece of equipment and a near miss.

The Grievor's Testimony

35. The Grievor is a long-term employee of the Employer. He started using "manlift" equipment in 2005 in his shipbuilding duties and has used such equipment about twice a week since then. He has never used a "spotter," that is, another employee to help guide him when using mobile equipment. He has, however, acted as a spotter for other employees, for example, maintenance employees when their equipment was close to power lines. (It is common ground between the parties that there is no Employer policy requiring the use of spotters.)

36. The Grievor was trained on lift equipment in 2005 and that training has been repeated every two years except for the period from 2015-2018 when he occupied a management position. He was retrained on the equipment when he returned to the bargaining unit in March 2019.

37. The Grievor said that it is very common for lift equipment to come into contact with other pieces of machinery or equipment when used for working on that equipment. For example, if he is welding on the side of a ship, the lift will be raised to the spot where the work is required and then it will be slowly inched into position so that it is touching the ship. He admitted, however, that it is rare for such a piece of machinery to come into contact with anything else when it is being moved from one spot to another. It had never happened to him before.

38. The Grievor described the incident in his testimony. He said that he started work on May 8, 2020, at 6 a.m. The day started with a "Tool Box Talk," which was a pre-shift safety meeting, followed by the assignment of tasks by the supervisor. His task was to line up and weld two units together – the work was 90 to 95 feet off the ground. The only lift that would reach that high was the AWP that he used that day. He said the AWP is bigger than other commonly used lift equipment. In retracted position, it is 3-4 feet wider and 10-15 feet longer than other lift equipment.

39. He got to the lift around 7 a.m., did a pre-inspection of the machinery and filled out a hazard assessment form (which he fills out before each task is performed). He saw that the AWP was parked less than five feet from the Equalizer.

40. After he filled out the hazard assessment form, the Grievor said he checked around the machine to ensure that there was nobody nearby and he confirmed that there was not. He said that the AWP was parked within five feet of the Equalizer. He said the AWP is 12 to 15 feet wide and about 70 feet from the back to the front of the machine.

41. The Grievor said that he then started the machine and let it warm up for two or three minutes and lifted the basket (from which he operated the machine) three to four feet off the ground. He started turning the machine to move towards the ship he was assigned to and travelled at a speed of less than one kilometre per hour, a rate of speed similar to that used when he slowly brings an AWP into deliberate contact with a ship side that he would be working on. He said that he saw that the machine was too close to the Equalizer, so he lowered the basket back to the ground and got out to check. He saw that the back of the AWP had come into contact with the Equalizer.

42. The Grievor says that he went back into the basket and moved the machine away from the Equalizer. He then saw that there was scraped paint. He saw "a couple of guys" about 100 feet away. He called to them, told them what had happened and asked them to call the chargehand and supervisor.

43. He recalled being questioned by Mr. Kersey and Mr. Forrest. The Grievor said that he remembered Mr. Forrest asking him what he would do differently next time, to which he replied that he would use a "spotter."

44. After the questioning, the Grievor was told that he would have to be tested and he waited in the meeting room for the tester to arrive. He provided a swab sample, a urine sample, and a breathalyzer. The results of each was negative, that is, the tests indicated no presence of alcohol or drugs in his system.

45. After the negative results, the Grievor said that Mr. Forrest told him that he knew how stressful this was, and he was given the option of returning to work or taking the rest of the day off with pay. He chose the latter.

46. When he returned to work the following Monday (the incident happened on a Friday), he was asked by "one of the White Hats" to fill out a witness statement form to describe the incident. He wrote, "On May 8, 2020 after given a task, I went for a manlift search. The only available lift was the 135/70 manlift. After all the inspection and POWSEA filling up was done, I went to move the machine and on taking sharp turn I accidentally chip the paint of one of the Equalizers of the Big Blue. I stopped the equipment immediately and reported the incident to the Department chargehand and supervisor. I followed the protocol after the incident." The form then asked him to state what he thought caused the incident, to which he responded, "no spotter." It then asked how the incident could have been prevented and he responded, "using a spotter."

III. SUMMARY OF ARGUMENT

47. The Employer argues that it is self-evident that any impairment of a worker by drugs or alcohol creates a significant safety risk in a safety-sensitive workplace such as that operated

by the Employer and that section 3.3.2 of the Policy (set out in its entirety above) is the appropriate tool to use in post-incident circumstances.

48. The Employer says that based upon the investigation of the incident, the only explanation for the two pieces of equipment colliding was human error. It points out that it is unusual for two pieces of machinery to come into contact when they are being moved.

49. The Employer says that Mr. Kersey and Mr. Forrest concluded that there was a connection between the Grievor's area of responsibility and the incident; that the Grievor's actions potentially contributed to the incident; that there was no evidence to show that external factors were the primary cause of the incident; and that a substance test would assist the investigation by ruling out impairment as a possible cause.

50. The Employer submits that it is well established that employers must be afforded deference in their investigation of workplace safety incidents as they are conducting a time-sensitive inquiry and cannot be held to a standard of perfection. It cites *Vancouver Shipyards Co. and CMAW, Local 506 Marine and Shipbuilders (JS),* (Unreported) August 26, 2020 (McPhillips) to support this proposition.

51. In relation to the Employers SAP, the Employer says that the relevant portions are Sections 3.32.2(b) "an injury or near miss of an injury to an Employee or other person" and (c) "Significant damage…or near miss of damage to property of the Company." The Employer, in argument, concedes that there was no measurable damage but says that there was potential for significant damage, so its focus is on "near miss."

52. The Employer cites several authorities that discuss the issues of "significant event" and "near miss," including *Vancouver Shipyards Co. v. Construction Maintenance and Allied Workers, Local 506 Marine and Shipbuilders (Bohun Grievance),* [2020] BCCAAA No. 66 (McPhillips), Weyerhaeuser *Co. v. Communications, energy and Paperworkers Union, Local 447 (Roberto Grievance)* (2006), 154 L.A.C. (4th) 3 (Sims) and cases cited therein.

53. The Employer argues that the case law reflects that the threshold analysis is centered on the degree of risk that is presented in the circumstances and that while damage to property or persons can be a basis for concluding that an event was significant, it is by no means required. It says that the focus must be on risk and the idea that an employer is not required to wait for a tragedy to occur in order to enact testing procedures.

54. Applying the cited authorities to the facts of this case, the Employer says that "considering that the Grievor could not see well enough to negotiate the turn he was making, a person could have been nearby and could have been struck or crushed between the [AWP] and the Equalizer." That, in the employer's view, constituted a near miss and justified the decision to order the drug and alcohol tests.

55. In relation to the investigation of the incident, the Employer submits that its investigation was thorough and proper and led to the inevitable conclusion that the incident resulted from human error of the Grievor alone and that it was correct in ordering drug and alcohol testing to rule out intoxication as a factor.

56. The Employer submits that if I do find that there were no grounds for ordering the drug and alcohol testing, then any damages awarded should be minimal at most. It contrasts the facts in this case to those in *Edmonton Police Assn. V. Edmonton (City) Police Service,* [2020] A.G.A.A. No. 27 (Smith) in which $7,500 damages were awarded for improper alcohol testing conducted three times a day, and from those in *Vancouver Shipyards Co. Ltd. And CMAW, Local 506 Marine and Shipbuilders (P.Q. Grievance),* unreported, November 22, 2021 (McPhillips) in which $5,000 was awarded to the Grievor who had been ordered to undergo an independent medical examination. The Employer says that the level of intrusion into the Grievor's privacy was much less in the instant case than in either of those cases.

57. The Employer also submitted the following authorities: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.,* [2013] S.C.J. No. 34; *Vancouver Shipyards Co. and Marine and Shipbuilders, Local 506 (R.C. Grievance),* [2020] B .C.C.A.A.A. No. 149 (Peltz); *Tolko Industries Ltd. (Lakeview Lumber Division) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-425 (Lipke Grievance)*, [2017] B.C.C.A.A.A. No. 108 (Bell).

58. The Union, on the other hand, argues that the incident in this case does not rise to the level of a significant event. It submits that there was no significant damage to property or persons and that there was no reasonable risk of either significant damage or injury. It says that the incident did not meet the threshold test required to order post-incident drug and alcohol testing as there was no significant event.

59. The Union also argues that the Employer's investigation was flawed and that possible impairment of the Grievor was not a reasonable line of inquiry.

60. In relation to the investigation, the Union says that both Mr. Kersey and Mr. Forrest acknowledged that they were not experts on assessing any damage that may have occurred and that neither of them asked pertinent questions such as the speed that the AWP was travelling when it contacted the Equalizer or whether anyone was nearby or if there was a reasonable prospect that anyone would have been nearby.

61. The Union argues that the Grievor's explanation for the event, that is that he had misjudged the length of the machine and that a spotter would have resolved the issue, was a reasonable one and that, indeed, the management team acknowledged that, as Mr. Wright's incident report indicated. The Grievor indicated that he would use a spotter next time. The Employer subsequently adjusted its "tool talks" to include considerations of using spotters.

62. The Union says that drug and alcohol testing is a highly invasive procedure and offends privacy rights. It cites *Communications, Energy and Paperworkers Union of Canada, Local 40, v. Irving Pulp & Paper Ltd.,* [2013] 2 S.C.R. 458 for the proposition that coercive biological testing in the workplace infringes on employee's fundamental rights to privacy, impairs their dignity, and involves a loss of autonomy and liberty.

63. The Union submits that, given the slow movement of the AWP, not only was there no significant damage, but there was no significant risk of anyone being injured.

64. In summary, the Union argues that there were no reasonable grounds for the Employer to order the Grievor to undergo "biological testing" and that in balancing the interests of the Employer against the privacy and bodily integrity rights of the Grievor, the circumstances of this case dictate finding that ordering the testing was a violation of the Grievor's rights.

65. The Union also cited the following authorities: *British Columbia Maritime Employers Assn. and ILWU Canada (Ahmad),* [2020] C.L.A.D. No. 92 (Nichols); *Elk Valley Coal Corp. v. United Steelworkers of America, Local 9346 (Coster Grievance),* [2005] B.C.C.A.A.A. No. 50 (McPhillips); *Interfor Acorn v. United Steelworkers, Local 2009 (Perez Grievance).* [2020] B.C.C.A.A.A. No. 43 (Sims); *Interfor Corporation v. United Steelworkers, Local 1-405 (J. Durkin Grievance),* [2022] CanLii 15915 (Fleming); *Jacobs Industrial v. International Brotherhood of Electrical Workers, Local 353 (Degg Grievance),* [2016] O.L.A.A. No. 7 (Albertyn); *Tolko Industries Ltd. (Lakeview Division) v. United Steelworkers, Local 1-2017 (Brandie Grievance),* [2020] B.C.C.A.A.A. No. 90 (Hall); *United Steelworkers, Local Union 5890 v. Evraz Regina Steel (a Division of Evraz Inc. NA Canada)(Holtskog Grievance),* [2014] S.L.A.A. No. 9 (Stevenson).

IV. ANALYSIS AND CONCLUSION

66. The significance of legal protection for privacy and bodily integrity rights was recognized by the Supreme Court of Canada in *Irving Pulp & Paper* at paragraphs 49 and 50:

> **49** On the other side of the balance was the employee right to privacy. The board accepted that breathalyzer testing "effects a significant inroad" on privacy, involving
>
> > coercion and restriction on movement. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples... . Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy.
>
> **50** That conclusion is unassailable. Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal

> privacy essential to the maintenance of his human dignity" (*R. v. Dyment*, [1988] 2 S.C.R. 417 at pp. 431-32). And in *R. v. Shoker*, [2006] SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements" (para. 23).

67. *Irving* involved the issue of mandatory random drug and alcohol testing, an issue not engaged in the present case. Relevant, however, are not only the court's comments on the importance of protecting the right to privacy and bodily integrity, but also its findings in relation to safety-sensitive workplaces. The court found that the dangerousness of the workplace was a factor to be considered when determining the validity of an employer's random drug and alcohol testing policy, but that dangerousness, in itself, did not justify such testing. Rather, the determination that a workplace is a safety-sensitive environment merely leads to further inquiries.

68. There are usually three types of situations leading to drug and alcohol testing in safety-sensitive workplaces; random testing, reasonable cause testing (based on the condition or demeanor of the person being tested), and post incident testing.

69. The Employer in this case has not claimed the right to randomly test employees. Its SAP calls for testing only when there is reasonable cause or after there has been a significant event.

70. It is common ground between the parties that there was no reasonable cause for testing in this case, as the Grievor did not display any signs of impairment. The justification for the testing, if any, relates to whether there was a "significant event" which could countenance further inquiry related to testing. As set out earlier, the Union also challenges the efficacy of the Employer's investigation and its conclusion that possible impairment was a legitimate line of inquiry. However, if I conclude that the incident itself did not rise to the level of a significant event, there is no need to consider those issues except insofar as they assist in determining the nature of the incident.

71. There is a large and growing body of arbitral jurisprudence relating to the issue of post incident drug and alcohol testing in safety-sensitive workplaces and there is considerable consensus on a number of points. Arbitrator Fleming recently set out a series of key points of consensus in *Interfor Corporation (J. Durkin)* commencing on page 16. He considered many of the same authorities cited to me in this case:

> The first consideration is whether there is a threshold event significant enough to justify proceeding down the possible testing path: *Vancouver Shipyards* para 96.
>
> While an incident need not be catastrophic it must be substantial or significant. As a function of the balancing of interests, post incident testing is generally limited to cases involving a significant event: *Interfor-Acorn* at para 68.

The commonly understood meaning of "significant" is reflected in its synonyms which include "important, considerable, crucial, major, momentous, special, remarkable, notable, consequential, prominent, meaningful, deep, ominous": *Elk Valley (Coster)* at para 46.

As noted in *Elk Valley (Vanschoywen)* there must be an "usual" risk although good luck is not a measure of risk: para 26.

A "near miss" which is an incident that narrowly avoids harm or injury can constitute a significant incident: *Interfor-Acorn* at para 139.

In determining if an incident is significant, it is necessary to consider whether there was a potential for serious injury or damage and whether that risk was proximate: *Vancouver Shipyard (Bohun)* at para 87-88.

The risk factors associated with the incident should be assessed on an objective and realistic basis: *Interfor-Acorn* at para 139.

For a test to be reasonably justified it must be based on a realistic conclusion reached after a thorough investigation that injury or serious damage almost occurred: *Interfor-Acorn* at para 139.

In that context, a significant event is by its nature unusual, outside the normal or ordinary performance of duties.

The requirement for a significant incident and a conclusion testing represents a reasonable line of inquiry are interrelated and the concept of when testing is appropriate has the corollary of when it is not: *Interfor-Acorn* at para 135.

The "near miss" and "proximate" concepts are counterposed to the concepts of "worst case" and "remote possibility", which will not establish an appropriate basis to justify a test. As stated by Arbitrator Sims in *Interfor-Acorn:*

> *"The assessment of risk factors as well as of the actual harm needs to be objective and realistic, not overstated to justify testing. I agree there is no room for "worst case scenario" or "remote possibility" justifications. I remain of the view, expressed in Weyerhaeuser (Roberto), that "any near miss must involve a realistic conclusion that serious damage almost occurred. That same caution applies to any testing justified more by risk of harm than actual harm itself."*

> To allow testing to occur based on worst case scenarios or remote possibilities would justify tests in virtually any situation which would not reflect the required balancing of interests.

72. The Employer's post incident drug testing policy in this case sets out a definition of "Significant Event." The Employer relies on two parts of that definition to justify its conclusion that the incident constituted a significant event – (b) an injury or near miss of an injury to an Employee or any other person, and (c) Significant damage and/or unusual circumstances leading to damage of near miss of damage to property of the Company…"

73. There was no significant damage and there were no injuries to anyone. The sole question then, in relation to whether the incident was a significant event pursuant to the SAP, is whether there was a near miss of an injury of damage to property of the Company.

74. Before he got into or moved the AWP, the Grievor walked around the machinery to check on its condition and to ensure that there was no one in the vicinity of the machine. In argument, the Employer speculated that someone could have walked out into the area and somehow got into the tight space between where the AWP was parked and the Equalizer and somehow remained in that space while the AWP moved at one kilometre per hour or less towards the Equalizer. There certainly was no evidence that anyone normally would have been in that location or that any pedestrian traffic would normally have been in the area.

75. In *Elk Valley,* Arbitrator McPhillips dealt with a similar circumstance and concluded that the incident in that case was not a significant event:

> **48** In our case, there was no loss of control of the vehicle by Ms. Coster and she was driving extremely slowly. This was not a case of a truck sliding 40 feet down an icy slope or a fork lift travelling backwards down a ramp and crashing into a door: *Fording Coal - Brewer*, supra; *Elk Valley Coal - Vanschoywen*, supra. Given the size of the truck Ms. Coster was driving and the weight of the steel cable wheel, she must have been almost stopped to create so little damage to the van. The evidence is these types of minor dents occur frequently at the mine site and so it is difficult to describe this event as significant in the context of this workplace.
>
> **49** Besides the vehicle not being out of control, there was no safety incident or serious safety concern involved here as there was in other cases: *Fording Coal - Olson*, supra; *Fording Coal - Brewer*, supra; *Elk Valley Coal - Vanschoywen*, supra. No one was around that area of the pit other than Mr. Engel who was on the deck of the Tooth Fairy Truck. Ms. Coster was aware there was no one else in the area so the personal safety of others was not a relevant concern. Not only were no injuries sustained in this situation but there was never any potential for injury, unlike in other cases: C.L.R.A., *96 L.A.C. (4th) 343* (Beattie); Fording Coal Ltd. - Brewer, supra.

76. In this case, the Grievor never loss control of the AWP. He moved it very slowly and immediately stopped when he thought the AWP was too close to the Equalizer. Indeed, the Grievor testified that the speed the AWP was moving was about the same speed it would travel at when it was deliberately being placed into position to come into contact with a ship side that he would be working on. There was no one in the area. The Grievor had to call out to workers who were more than 100 feet away to ask them to contact the supervisor. Even if there had been someone in the area, it is virtually inconceivable that they would have somehow stood still in the confined space between the two machines as the back end of the AWP came closer to the Equalizer.

77. I agree particularly with the comments Arbitrator Sims in *Interfor Acorn and* adopted in the decision of Arbitrator Fleming in *Interfor Corporation (J. Durkin)* which I will set out again:

> *"The assessment of risk factors as well as of the actual harm needs to be objective and realistic, not overstated to justify testing. I agree there is no room for "worst case scenario" or "remote possibility" justifications. I remain of the view, expressed in Weyerhaeuser (Roberto), that "any near miss must involve a realistic conclusion that serious damage almost occurred. That same caution applies to any testing justified more by risk of harm than actual harm itself."*

78. I also agree with the conclusion of Arbitrator Fleming that to allow testing to occur based on worst case scenarios or remote possibilities would justify tests in virtually any situation, and that would not reflect the required balancing of interests.

79. I find that the Employer's speculations that someone could have been injured or there could have been significant damage to property of the Company to be very remote possibilities and worst-case scenarios that cannot justify the decision to require testing. To reiterate, to think that anyone would have placed themselves in a position between the two machines and not got out of the way as the distance between the machines closed at a very slow pace is not realistic. Also, given the speed of travel and the Grievor's immediate reaction when he thought the two pieces of machinery were too close, there was no serious risk of significant damage to property. This was not a case of "dumb luck" being the key factor in avoiding a much more serious incident. I am bolstered in this view by a hypothetical scenario. If, when the Grievor stopped the AWP to check the distance between it and the Equalizer, he had found that the AWP had not actually come into contact with the Equalizer but rather had remained inches away from contact, there would have been no incident to report at all. Yet the theoretical risk of injury posed by the Employer's scenario of someone walking between the two pieces of machinery would have been the same – extremely remote in either circumstance.

80. As noted earlier, both Mr. Forrest and Mr. Kersey determined that the testing was justified based upon the Grievor's responses to the Checklist questions. However, I find that there is nothing in the Grievor's responses that would have rationally led to the conclusion that

impairment played any role in the incident. The reality is that once Mr. Forrest and Mr. Kersey determined that the incident was caused by the Grievor's misjudgment of the length of the AWP, they ordered the testing to be administered solely to rule out the possibility that impairment played a role.

81. In reaching the conclusion that the incident did not rise to the level of a "significant event," I am mindful of the authorities which indicate that employers are entitled to a level of deference when conducting investigations given the on-the-spot and time-sensitive decisions that must be made. When faced with unusual incidents in safety-sensitive workplaces, employers want to be sure that there was no level of impairment involved. That is understandable. Notwithstanding that, however, the decision to order an employee to undergo drug and alcohol testing remains an intrusion on the important privacy and bodily integrity rights of that employee. A testing requirement is not valid when it does not conform to requirements set out in the arbitral authorities and cannot be used when the only justification is ruling out the possibility of impairment.

82. For these reasons, I find and declare that the Employer's decision to order the Grievor to undergo drug and alcohol testing violated the Grievor's privacy and bodily integrity rights.

83. The Union seeks damages for the breach of the Grievor's rights and suggests that $2000 would be appropriate. The Employer suggests that any damages should be "minimal at most" and distinguishes the facts here from those in *Edmonton Police Assn.* and in *Vancouver Shipyards (P.Q. Grievance)*. I agree with the Employer that the facts in those cases resulted in a higher award of damages than is appropriate in this case. In *Edmonton Police*, the grievor had been required to be tested three times per day and total of perhaps more than 300 tests, and the damages award was $7,500. In *Vancouver Shipyards (P.Q.)* the Grievor had been required to undergo an independent medical examination, a more intrusive measure than the tests required of the Grievor in this case, and that resulted in a damages award of $5,000.

84. However, I do not accept that the damages should be "minimal at most," a term which I take to be synonymous with "nominal." I adopt the comments of Arbitrator Hall in *Tolko Industries (Lakeview Division)*, at para. 51:

> I reject the notion that only "nominal" damages are appropriate where an employer has failed to demonstrate reasonable and proper grounds to subject and employee to alcohol and drug testing. The privacy interests at stake have long been recognized as substantive rights by no less an authority than the Supreme Court of Canada. Further, awarding only nominal damages as a matter of routine may not give an employer sufficient incentive to pause and ensure its investigation has indeed been thorough before deciding to test.

85. In relation to the testing of the grievor in the *Tolko* case, Arbitrator Hall found, at para. 52:

> …the Employer's decision to proceed with testing and require the Grievor to remain at the workplace following the end of his shift caused him anxiety and distress beyond mere injury to dignity. It also caused his wife to be very concerned at the time. His fellow employees were aware he was being tested and, when the Grievor returned to work, there was a broad-based rumour that he had been "busted for smoking weed."

86. In those circumstances, Arbitrator Hall ordered the employer to pay damages in the amount of $1750.

87. The circumstances in this case, however, are very different. Here, the Employer did not require the Grievor to remain at the workplace. Mr. Forrest and Mr. Kersey treated the Grievor with respect, acknowledged the stress that the tests put on the Grievor, and once the tests were concluded and the results in, gave the Grievor the option of returning to work or taking the remainder of the shift off with pay.

88. As Arbitrator Hall's case demonstrates, the post-test conduct of the Employer can be a relevant factor in determining the appropriate level of damages. Given the Employer's compassionate manner of dealing with the Grievor after the testing in this case, I find that damages in a lower amount of $1,000 to be appropriate and I so order the Employer to pay that amount to the Grievor as damages. I also order that all records about the demand for testing be removed from the Grievor's personnel file.

89. I reserve jurisdiction in the event that any challenges are encountered in implementing the terms of this award.

DATED and effective at New Westminster, British Columbia on the 6th day of June, 2022.

RANDALL J. NOONAN
Arbitrator