IN THE MATTER OF AN ARBITRATION
UNDER THE *BRITISH COLUMBIA LABOUR RELATIONS CODE*

BETWEEN:

VANCOUVER SHIPYARDS CO. LTD.

(the "Employer" or "Company")

AND:

CMAW, LOCAL 506 MARINE AND SHIPBUILDERS

(the "Union")

"P.Q." Grievance
SUPPLEMENTAL AWARD

ARBITRATOR:	David C. McPhillips
COUNSEL FOR THE EMPLOYER:	Chris E. Leenheer and Carly Stanhope
COUNSEL FOR THE UNION:	Tamara Ramusovic, Daniel McBain and Janna Crown
DATES OF HEARING:	October 13, 14, and 25, 2021
DATE OF AWARD:	November 22, 2021

This grievance involves an issue of drug and alcohol testing at Vancouver Shipyards and the parties are in agreement that the Grievor should remain anonymous in this Supplemental Award. This decision follows an earlier Award ("Original Award") which concluded that the Employer had the right, in the particular circumstances that existed, to require the Grievor to take an alcohol and drug test following a "significant event". The issues to be decided in this Supplemental Award are whether discipline imposed on the Grievor should be upheld and whether damages are appropriate for an invasion of the Grievor's privacy for requiring the Grievor to undergo an Independent Medical Examination (IME) as well as the nature and dissemination of the IME Report.

FACTS

Seaspan ULC has a Substance Abuse Policy which applies at all of its operations, including Vancouver Shipyards, Vancouver Drydock, and Victoria Shipyards. The relevant sections of that Policy state:

> **1.0 PURPOSE**
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> The purpose of this Policy is to:
>
> - Provide Employees with a Drug-Free and Alcohol-Free workplace in accordance with the law.
> - Provide guidance for Employees who voluntarily seek help to treat an Alcohol and/or Drug dependency problem.
> - Establish procedures for testing and monitoring Employees in Safety Sensitive positions.
> - Provide guidance when violations of this Policy are suspected and validated.
> - Provide guidance on supervisory responsibilities under this Policy.
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> …
>
> **3.0 POLICY**
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> **3.1 DEFINITIONS**
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> …
>
> **Independent Medical Evaluation (IME)**: As used in this Policy, an IME is a comprehensive biological/social assessment by a licensed physician with training in addictions medicine (i.e., an Addictions Medicine Expert) that will fully assess the scope and severity of an addictions disease in order to develop a comprehensive treatment plan.

The AME will not have previously been involved in the patient's care and will evaluate the patient and provide unbiased, accurate and medically sound information.

…

Negative Test Result: A report that the Employee who provided a specimen for Substance Testing did not have an Alcohol and/or Drug concentration level equal to or in excess of that set out in Section 3.7.4.

Positive Test Result: A report that the Employee who provided a specimen for Substance Testing did have an Alcohol and/or Drug concentration level equal to or in excess of that set out in Section 3.7.4. An Employee's refusal to provide a specimen for Substance Testing will be deemed a Positive Test Result under this Policy.

…

3.3 EVALUATION FOR SUBSTANCE USE/ABUSE/DEPENDENCE

Employees engaged in Safety-Sensitive work are subject to mandatory Drug and Alcohol Substance Testing in the following circumstances:

3.3.1 Reasonable Cause

An Employee may be required to undergo Substance Testing where there is reasonable cause. Without limiting the circumstances which may constitute reasonable cause, an Employee may be required to undergo Substance Testing in the following circumstances:

(a) The Company reasonably believes that the Employee's work performance may be affected by the use of Alcohol or Drugs based on the unusual behaviour or circumstances, which includes but is not limited to any one or more of, slurred speech, smelling of Alcohol or Drugs, changes in personality, being argumentative, or mood swings.

(b) The Employee is engaged in the use, possession, manufacture, cultivation, offering for sale, sale or distribution of Alcohol or Drugs or Drug Paraphernalia while on duty or on Company Premises; or

(c) The Employee is engaged in, or is charged with an offence arising from, the use, possession, manufacture, cultivation, offering for sale, sale or distribution of a Drug, while not on duty or on Company Premises, and the Company reasonably believes that the Drug was intended for use while on duty or on Company Premises or that the Employee's work performance has been or may be adversely affected.

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;

(d) Significant environmental damage and/or unusual circumstances leading to environmental damage or near miss of environmental damage.

…

3.4 MANDATORY DISCLOSURE

It is a condition of employment that where Employees have or suspect they may have an Alcohol or Drug dependency problem, Employees must disclose to a designated medical authority current Alcohol or Drug dependency problems, as well as past dependency problems involving Alcohol or Drugs within the past six years. If an Employee self discloses, they may be referred to an Addictions Medicine Expert.

…

3.7.5 Policy Violations

1. Employee Discipline

The Company may discipline an Employee who violates this Policy. Discipline may include a variety of reasonable measures, up to and including termination for cause. Determination of the appropriate disciplinary measure will depend on the facts and circumstances of each case.

Violations of this Policy include, but are not limited to, the following:

…

(d) refusal by an employee to submit to Substance Testing and provide a specimen as required under this policy.

…

2. Return to Work Requirements

If an Employee is the subject of a Positive Test Result, and/or the Employee violates any prohibition or requirement under Section 3.2, he/she may be prohibited from returning to work until all of the following conditions are satisfied:

(a) the Employee attends an IME. If the Employee complies with the requirement to attend an IME as soon as possible, he/she may be held out of service with pay until the IME is complete.

(b) The AME [Addictions Medicine Expert] notifies the Designated Employer Representative that, in the professional opinion of the AME, the Employee has met all conditions stipulated by the AME and can safely return to or commence his/her essential duties as an employee.

(c) the Employee agrees in writing to continue any treatment, counselling or rehabilitation as prescribed by the AME.

(d) any disciplinary measures imposed on the Employee (e.g., suspension) are fulfilled.

The Grievor is 54 years of age and has worked as a Flame Plane Operator (Steel Cutter) at Vancouver Shipyards since September 2014. He has a clean discipline record during his time with the Company, there have been no performance issues, and he was made a Charge Hand when the Employer had an afternoon shift in 2016 and 2017. He has been active in the Union and was elected as a Union, Health and Welfare Plan Trustee. Prior to working for Seaspan, the Grievor had very serious drug and alcohol issues, the details of which will be discussed below.

Early on the morning of June 21, 2019, the Grievor was involved in an accident in the workplace and an investigation ensued. The Grievor's two immediate supervisors determined they would not recommend a drug and alcohol test and the Grievor continued to perform his work. Subsequently, Jerry Dardengo, the Employee Relations Manager, Seaspan ULC, and Brian Beasley, the Steel Trades Manager for Vancouver Shipyards, became involved and determined that a drug and alcohol test would be required of the Grievor. They decided to speak with Mr. Walden, one of the Grievor's immediate supervisors, who had decided a test was not necessary.

The Original Award discussed what subsequently occurred, at p. 10:

> Following their decision, Mr. Dardengo and Mr. Beasley requested Mr. Walden to come into the office to review the checklist. In their discussion, they discussed with Mr. Walden that, in making his decision not to require a test, he had confused significant event criteria (ruling out other reasonable explanations and safety issues) with reasonable cause factors (e.g., the Grievor's recovery from past addiction, his participation in the Courage to Care Program, lack of any sign of impairment).
>
> In the result, the Grievor was called into the office around 1:00 pm. Mr. Walden went to find the Grievor who made it clear to Mr. Walden on their walk to the office that he was "not going to piss in a cup". The Grievor also contacted John McKay, the President of Local 506 by telephone and they also picked up Daniel Van Heest, a shop steward, along the way. The Grievor's statement indicates he felt this was a "walk of shame".
>
> There are minor variations in the descriptions of what occurred in the actual 15-20 minute meeting. It appears Mr. Dardengo and the Grievor did most, if not all, of the talking. The meeting essentially involved the assertion of rights by each of them as well as threats to either terminate or quit. The Grievor stated that he had seven (7) years of sobriety and there were no substances in his system and Mr. Dardengo indicated he could not take his or anyone else's word for it. Mr. Dardengo told the Grievor that he was requiring a drug and alcohol test and the Grievor asserted the Company did not have the right to test him and that he was refusing to take one. Mr. Dardengo then told the Grievor that a failure to test would

be considered a "hot test" and that he could lose his job. The meeting concluded and the Grievor was escorted off the premises by Mr. Walden.

As indicated, Mr. Dardengo informed the Grievor at the meeting that he would have to go for a drug and alcohol test and the Grievor immediately responded he would not be taking any test. The Grievor testified in this hearing that, at the time, he felt humiliated and angry and thought that he was being bullied. He testified that he was of the view that the Company's Substance Abuse Policy and the law in general required three things before such a drug and alcohol test could be required: the event had to be significant (the Grievor felt this was not a serious accident); there had to be signs of impairment (which the Employer was not claiming); and there had to be a serious injury to someone (which did not occur in this case).

Following the Grievor's adamant statement that he was refusing to take the test, Mr. Dardengo informed the Grievor that, under the Substance Abuse Policy (Definition Section – Positive Test Result), a refusal to test would be treated as a positive test. The Grievor testified he clearly understood that he had been told by Mr. Dardengo that his job could be in jeopardy.

Mr. Dardengo agreed in his cross-examination that the Grievor was likely frustrated at the time by having been told earlier by his immediate supervisors that, in their opinion, there was no need to test. Mr. Dardengo also testified that there were no inquiries made of the Grievor about his medical history, his treatment by his family doctor, his work performance, or his safety record, either at the meeting itself or any time thereafter.

There was extensive evidence presented at both the initial and the present hearings about the Grievor's past history of drug and alcohol usage. By his own account, prior to 2012 his life had been chaotic and he had been an "absolute mess". He missed work regularly with his previous employer and he would go missing for weeks from his family (wife and three children). Then in 2012, he sought help and went into a rehab program and successfully completed the

requirements. On his release, he joined Alcoholics Anonymous ("A.A.") and has been sober since that time. The Grievor continues to attend A.A. meetings and participate in other events in that organization at least three times a week. He testified that his continuing recovery is "the most important thing" as everything else in his life depends on that.

The Grievor also volunteered in 2019 at Seaspan to be a peer support person (as part of the Courage to Care program) for other employees who are dealing with addiction issues. The Grievor testified that his immediate supervisor and the employees with whom he works at Vancouver Shipyards know about his addiction history.

The Grievor's wife testified that, prior to 2012, life was very difficult given the Grievor's addictive life style but, since the time his recovery commenced, he has been a completely different person and a wonderful husband and father.

Returning to the events on June 21, the Grievor's testimony is that his medical history and the fact that he is a recovering addict had nothing to do with his refusal to take the drug and alcohol test on that date. His decision was based solely on the fact that he concluded the Company did not have the legal right to require a test for an employee in the particular circumstances of that day.

After the conclusion of the meeting on June 21 the Grievor was escorted off the site. On his drive home he telephoned his A.A. sponsor who suggested he get drug and alcohol tests done. The Grievor attempted to contact his doctor (Dr. Ilym Yan) who was unavailable and so he went to a walk-in clinic which sent him to LifeLabs for testing.

His wife testified that when he got home that day he was "pretty worked up" and could not believe "this was happening". The Grievor testified that for the next few days he was

agitated, concerned about his blood pressure, upset, had trouble sleeping, and was in regular contact with his sponsor.

The test results from LifeLabs were provided to Dr. Yan over the next two days and they were negative for all substances. Dr. Yan met with the Grievor and informed him of those results. The Grievor and his wife both testified that during this period he continued to be very angry and upset with the Employer for putting him through this stress and that the Grievor's cigarette smoking increased dramatically, which was particularly concerning because the Grievor had had two heart attacks in 2018.

The Grievor also testified that, if the Company had asked him to provide medical information from Dr. Yan, he would have agreed to do so and that would have resulted in "much less drama and stress." The Grievor was later asked during his cross-examination whether he thought that if he had simply gone for the drug and alcohol test as requested on June 21 there would also have been far less drama. The Grievor replied that that "would have been the case for the Company" but "I had to be true to my feelings." He also agreed with Employer Counsel that, if the Company considered the June 21 incident along with the fact that the Grievor was in addiction recovery, that would have raised "red flags".

There were ongoing discussions among the management team, primarily Mr. Dardengo and Dianne Richards, Director of Employee Relations for Seaspan at the time, but also marginally with Tina Craig, Manager, Employee Wellness and Ability Management. It was determined that, pursuant to the Substance Abuse Policy, the Grievor would be sent for an IME with an Addictions Medicine Expert. Ms. Richards testified that this was when she found out about the Grievor's addictions issues and she felt an IME was the only way to know if he had relapsed. Mr. Dardengo and Ms. Richards also both stated it was Company practice to send

anyone who tested positive (or refused to test) for an IME for safety reasons and to discover if any type of treatment is needed. Mr. Dardengo emphasized in his evidence that, if someone fails or refuses a substance test, the Employer must establish the employee is safe to return to work and it is the Employer's practice that, following a positive test or a refusal, the employee must complete an IME to demonstrate a fitness to return to work.

Ms. Craig immediately made the arrangements for the IME as it can take some time to schedule these examinations. The first available appointment was for July 16 with Dr. Durnin-Goodman, one of the three doctors with whom the Employer normally contracts for these examinations.

A conference call with the Grievor was arranged for June 27 and, during that call, he was informed he would be sent for an IME before he could return to work. The Grievor testified that he was told that if he did not attend the IME he would be "terminated"; Mr. Dardengo testified he simply told the Grievor that he could not come back to work if he did not comply.

Following that conference call on June 27, Ms. Craig informed the Grievor in a subsequent telephone call that his IME was scheduled for July 16. At that point, the Grievor told Ms. Craig "off the record" that he had gone for drug and alcohol testing on June 21 and the test results were negative. Ms. Craig told the Grievor that there would be an issue with "chain of custody" but he should provide those results to the IME doctor. The Grievor testified he told Ms. Craig about the June 21 test results only because he wanted to protect his participation in the Courage to Care program. Ms. Craig testified that the Grievor also told her he wanted to "challenge the Policy" but the Grievor testified he has no recall of making that statement.

In cross-examination, Ms. Craig agreed with Union Counsel that, for some other issues such as injuries and other medical conditions, it is commonplace to consult with the employee's

family physician in determining the ability to return to work or appropriate accommodations and that an IME would “not be the first step in the process”.

Mr. Dardengo testified that Ms. Craig did subsequently make him aware that the Grievor had told her he had gone for testing on his own on June 21. However, he testified he did not follow up on that because the Company had "no control of that process”.

On June 27, Ms. Craig also sent the following email to the Grievor:

> We have scheduled an Independent Medical Evaluation (IME) with an Addiction Specialist Doctor to determine your fitness for work at your safety sensitive role. As a condition of your ability to return to work at Vancouver Shipyards, it is our expectation that you attend and participate in the IME and adhere to the recommendations, if any, for treatment. Seaspan will cover the cost of the IME, however, if you should not attend your scheduled appointment, the full cost of the IME will be your responsibility.
>
> Upon receipt of the report, we will contact you to share the findings.
>
> At Vancouver Shipyards your health and safety are a priority for us. We hope that you will take the necessary steps and adhere to the recommendations laid out in the IME.
>
> The details of your IME are the following:
>
> Date: Tuesday, July 16th at 9am
> Doctor: Dr. Durnin-Goodman
> Location: 200 – 14888 104 Ave, Surrey, BC V3R 1M4
> Please bring: Government issued photo ID
> Phone number: xxx-xxx-xxxx
>
> Please indicate if you will attend the above scheduled IME, and return a signed copy to myself, Tina Craig, Manager, Employee Wellness, via fax xxx-xxx-xxxx or email xxx-xxx-xxxx.
>
> I _____ agree to attend the scheduled IME and will comply with the recommendations set forward by the Addiction Specialist Doctor.

The Grievor responded by email to Ms. Craig that he did not feel the Company was at all concerned with his health.

On July 11, Ms. Craig sent Dr. Durnin-Goodman the following letter with respect to the referral of the Grievor:

> This letter has been compiled in response to your request for information prior to seeing our employee, [the Grievor], on July 16th.

I will provide information as it pertains to how we came to this referral.

1. Summary of background information/history: [The Grievor] is a Flame Plane Operator and has been employed by Vancouver Shipyards since September 2014. This is a unionized safety sensitive position. He normally works Monday to Friday with the opportunity to work overtime as required. He does have the right to decline overtime work.

2. Reason for referral: On June 21st [the Grievor] was involved in a work place accident. His account is the following: while he was moving a large plate using an overhead crane, he noticed a crunch sound on the opposite side of the trailer where he was standing. He discovered he had contacted the Canway portable stairs used to access the trailer. As human error could not be ruled out in this incident, it was determined by the Company to request that [the Grievor] comply with a reasonable cause drug and alcohol test. However, [the Grievor] refused to comply with the testing and though it was explained to him that a refusal, under our Substance Use Policy, equates to a positive test, [the Grievor] chose to leave the worksite. Since that time, he has remained off work pending the outcome of this IME.

3. The company would like you to assess [the Grievor] and in your professional opinion determine whether he meets the criteria for Substance Use Disorder, or whether he is fit for duty. If he does meet the criteria for Substance Use Disorder, please provide treatment recommendations.

Please forward the report in confidence to my attention. Thank you for assisting us in assessing [the Grievor] and providing appropriate treatment recommendations for this worker.

The Grievor attended at the IME on July 16 as scheduled. He testified he had anticipated it would be a short session at which he would provide the test results from June 21 and be asked a few questions. He thought this was not a major event and thought it was "kind of dumb" as he already had his test results. His wife testified the Grievor was "O.K." with going for the IME as he knew it was "part of the process".

However, the Grievor testified that the IME turned into a four to five hour "ordeal" at which the addiction doctor inquired into every aspect of his life. He felt this was a very degrading and "insane" experience and it upset him greatly. He stated that, at the time, he was "emotionally broken" and did not feel at all supported by the Company. The Grievor's wife testified that, following the IME, the Grievor told her that he felt it had been very intrusive (urine and hair samples were taken from him) and it had been a long and exhausting day.

Following the IME examination, Dr. Durnin-Goodman, as she had told the Grievor she would do, contacted the Grievor's wife and sought further information and confirmation from her about certain details. The Doctor also indicated to the Grievor's wife that the Grievor would likely be disciplined by his employer. This greatly upset both the Grievor and his wife. His wife also stated that his adult children were concerned their father might lose his job. As well, on July 26, the Doctor contacted the Grievor's family doctor, Dr. Yan, and inquired about his current medical status. She also informed Dr. Yan that the Grievor was likely to be disciplined.

An IME Report dated July 30 was prepared by Dr. Durnin-Goodman and provided to Ms. Craig on August 2. It is a lengthy report with details of the Grievor's entire medical history including his personal history, romantic and sexual activities, and current medications. Ms. Craig testified this was the same type of report the Company had received in the past with respect to other employees.

The actual "Opinion" section of the Report with respect to the Grievor stated, at pp. 6-7:

> **1. Diagnosis**
>
> Based on the history provided by [the Grievor], the medical examination, review of laboratory data, psychometric testing and collateral information obtained, [the Grievor] meets the diagnostic criteria for:
>
> - Alcohol Dependence (DSM-IV-TR)/Alcohol Use Disorder (DSM-5) Severe, in Sustained Remission
> - Stimulant Dependence (DSM-IV-TR)/Stimulant Use Disorder (DSM-5), Severe, In Sustained Remission
> - Marijuana Dependence (DSM-IV-TR)/Marijuana Use Disorder (DSM-5), Moderate, in sustained remission.
> - Tobacco Dependence (DSM-IV-TR)/Tobacco Use Disorder (DSM-5), Moderate to Severe
>
> **2. Diagnostic assessment**
>
> [The Grievor] presented as a credible historian. He was able to give a consistent account of his history of substance use, his treatment for it, and his continued recovery activities.
>
> He provided a negative urine drug screen, indicating no use of alcohol or drugs in the previous 3-4 days. He provided a negative PEth test, indicating no use in the prior 3-4 weeks. Given the date of his incident (June 21) and his test date of July 16, this is consistent

with absence of use during the period of the incident. He also provided a negative hair test, consistent with no use in the prior three months approximately.

He did also submit a negative urine drug test on the day of the incident through LifeLabs, however this was not a Chain of Custody urine drug test and did not include testing for Ethyl Glucuronide (alcohol metabolite). It was negative for cocaine metabolite.

3. Treatment recommendations

[The Grievor] has attended treatment for his Alcohol and Substance Use Disorder, and has followed up on his after care responsibly and continued to do so. His biological testing supports his assertion of continue abstinence. No further treatment is required.

4. Potential work limitations and restrictions

[The Grievor] has provided a credible account of sustained recovery, supported by collateral information and negative biological testing. No monitoring is recommended. There are no limitations or restrictions with respect to his Alcohol and Substance Use Disorder.

5. Prognosis

[The Grievor's] prognosis is excellent (scale: guarded-poor-fair-good-excellent). He does have a Severe Alcohol and Substance Use Disorder. However, he has engaged in appropriate treatment. He has sustained sobriety on his own accountability and is involved in service work and the assistance of others.

Ms. Craig, who is the only employee of Seaspan who sees these IME Reports, sent copies of the Report on August 6 by email to the Union President and to the Grievor. Ms. Craig testified the Grievor had requested that, when she received the Report, a copy should be provided to the Union. The Grievor testified he intended for Ms. Craig to give the Report to the Union to be provided to him but not for the Union to get its own copy. Further, he testified that, at the time he gave that instruction to Ms. Craig, he had not anticipated the Report would be as intrusive as it was. The Grievor and his wife both testified how upset they were with the amount of medical details (including family details from his childhood) contained in the Report which they felt should not have been provided to the Company. The Grievor testified he was "shocked and embarrassed" by the contents of the IME Report.

The Grievor also stated that before these events he was very happy to go to work, was proud of his job, and worked very hard. After these events he says he felt that he was no longer

wanted by Seaspan and that he himself "no longer trusts the Company". His wife testified the Grievor was incredulous he had been treated with such disrespect and that he now "hates his job". The Grievor testified that, after he returned to work, he "felt different, was nervous and embarrassed, and my locker had been moved." He stated some employees were supportive but he felt others did not wish to talk to him.

Ms. Craig testified that, following subsequent discussions with the Union, the Company's instruction letter to the addiction specialists who are performing the IMEs for Seaspan now contains a further paragraph indicating the Company only wishes to receive the conclusion as to whether the employee can be returned to work and the nature of treatment or accommodation required.

After receipt of the Grievor's IME Report, the Company returned him to work. There was some confusion about whether he had been paid for certain periods and that had to be sorted out. The upshot, however, is that the Grievor was paid for the time he was off work waiting for the IME itself and for the Report, except for a period of ten (10) days which was the discipline imposed for his refusal to take a drug and alcohol test on June 21.

Mr. Dardengo testified the suspension was for a violation of the Substance Abuse Policy and a positive test or a refusal to test is considered to be a serious violation. In his cross-examination, he stated that, in his view, a ten (10) day suspension should be the minimum penalty and, in some cases, more serious discipline would be appropriate.

Ms. Richards testified that the suspension was warranted because a positive test (or refusal) potentially meant the employee had placed him/herself and others in jeopardy. She stated that all employees of Seaspan who previously have tested positive (or refused to take the test which is considered a positive) have, without exception, been given ten (10) day suspensions.

Finally, the Company's Privacy Policy was also placed into evidence. It includes the following sections:

3.2 PRIVACY PRINCIPLES

3.2.1 Principle 1 - Accountability

1. Seaspan is responsible for Personal Information in its custody or control. We have designated Privacy Officers to be accountable for the organization's compliance with the following principles. Contact information for the Privacy Officers is set out below.

2. Seaspan views the unauthorized collection, use, and/or disclosure of the Personal Information of our customers or employees as a serious matter. Employees are informed of Seaspan's policies and procedures concerning the security of Personal Information and the Company's expectation that they perform their duties in compliance with these policies and procedures.

3.2.2.1 Principle 2 – Identifying the Purposes for Collecting Personal Information

1. Seaspan will identify and provide notice to the individual of the purpose for which Personal Information is collected, except as otherwise authorized by applicable privacy legislation.

2. Depending on the specific circumstances, we may collect customer Personal Information for the following purposes:

    a. to establish and maintain commercial relationships with customers and prospective customers;

    b. to bill and maintain accounting records for these services;

    c. to meet legal and regulatory requirements; and,

    d. marketing and advertising.

3. We collect, use and disclose employee Personal Information that is reasonably required for purposes related to establishing, managing and terminating an employment relationship with Seaspan. Employee Personal Information may include, for example, the name, home address, home telephone number, identification number, educational qualifications, social insurance number, past and current employment history and other relevant information depending on individual circumstances. Employee Personal Information is collected and used for purposes that include:

    a. reviewing prospective candidates and selecting employees;

    b. maintaining records to ensure accurate pay and benefits administration and employment documentation required by law;

    c. maintaining such records as are necessary and reasonably appropriate for managing Seaspan's business and operations;

d. for other purposes relating to managing and administering the employment relationship, including performance and conduct management;

e. to comply with legal and regulatory requirements that apply to the employment relationship; and,

f. for purposes related to planning, evaluating and improving employment and hiring policies and practices.

Seaspan will not collect, use or disclose Personal Information for other purposes not authorized under applicable Personal Information protection laws without providing appropriate notices and/or obtaining necessary consents.

…

3.2.4.1.1 Principle 4 – Identifying the Purposes for Collecting Personal Information

1. We collect Personal Information by fair and lawful means.

2. Seaspan limits the amount and type of Personal Information we collect to that which is necessary for the purposes we identify and as permitted by law, including under applicable Personal Information protection legislation.

3. Where practical, we gather Personal Information directly from the individual to whom the information pertains. When necessary or reasonable, we collect employee Personal Information from other sources as permitted by law including applicable Personal Information protection legislation.

AWARD

The first point to note is that the present matter involves an individual grievance on behalf of the Grievor and is not a policy grievance challenging the Substance Abuse Policy itself. Therefore, that defines the specific jurisdiction within which this Board will operate: Westfair Foods Ltd., 29 L.A.C. (4th) 222 (Steel); Tolko Industries Ltd., 283 L.A.C. (4th) 134 (Bell). While there may necessarily be comments made in this Award about some aspects of the application of the Policy, it is the situation with respect to this Grievor which is the focus of this decision.

There are two principal issues to be determined. The first is the appropriateness of the ten (10) day suspension imposed on the Grievor for his failure to comply with the Company's request for a drug and alcohol test on June 21, 2019. The second is the claim for damages for breach of privacy which relate to both the requirement for the Grievor to undergo an Independent Medical Examination and the contents and dissemination of the IME Report itself.

Turning first to the issue of discipline, an arbitration board is required to address the three questions set out in Wm. Scott and Co. Ltd., [1977] 1 Can L.R.B.R. 1 (B.C.L.R.B.):

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the discipline imposed an excessive response in all of the circumstances of the case?
3. Finally, if the discipline is considered excessive, what alternative measure should be substituted as just and equitable?

In this case, the Union concedes that the Employer had just and reasonable cause for discipline and, thus, the first question is answered in the affirmative.

Turning to the second and third questions, the Union claims the ten (10) day suspension was excessive and that a verbal warning would have been the proper response. The Employer asserts that the ten (10) day suspension was appropriate and should not be altered by this Board.

The jurisprudence is clear that such determinations about disciplinary penalties should be made on an individual basis taking into account the particular circumstances of each case: Dupont Canada Inc., [2002] O.L.A.A. No. 156 (Picher); Yellow Cab Company, [1998] B.C.C.A.A.A. No. 417 (Thorne); Fording Coal Ltd., 112 L.A.C. (4th) 141 (Glass). That principle is also reflected in this Employer's own "Plant and Safety Rules".

As well, the Employer's Substance Abuse Policy specifically adopts just such an approach:

> **1. Employee Discipline**
>
> The Company may discipline an Employee who violates this Policy. Discipline may include a variety of reasonable measures, up to and including termination for cause. Determination of the appropriate disciplinary measure will depend on the facts and circumstances of each case.
>
> Violations of this Policy include, but are not limited to, the following:
>
> …
>
> (e) refusal by an employee to submit to Substance Testing and provide a specimen as required under this Policy.
>
> (emphasis added)

It is also generally accepted that discipline is not meant to be punitive and should be the minimum amount sufficient to correct the behaviour: Yellow Cab Company, supra; Fording Coal Ltd., supra.

In considering the penalty in each individual case, a list of factors that may be taken into account is contained in the Steel Equipment Co. Ltd. case which is referred to in Wm. Scott and Co. Ltd., supra:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result, disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration, e.g.,
    (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so;
    (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance;
    (c) failure of the company to permit the grievor to explain or deny the alleged offence.

There are a number of these factors which apply in the present circumstance. First, at the time of this incident, the Grievor had been with Seaspan for about four and one-half years and there is no evidence of any work performance issues. Further, for a period, he acted as a Charge Hand on the afternoon shift. The Grievor also has a clean disciplinary record during that period.

As well, the Grievor's refusal to comply with instructions to undergo a drug and alcohol test on June 21, 2019 was an isolated act in his employment history. The action was also a "spur of the moment" event, rather than being premeditated, as the Grievor was certainly not

anticipating the request from Mr. Dardengo that afternoon. Indeed, the request was probably very surprising to him as two supervisors had already indicated a test was not needed and they had permitted the Grievor to continue to work throughout the morning of June 21.

However, a number of considerations operate to the Grievor's detriment. For one, there is no evidence of any remorse or regret on his part. On his own evidence, his addiction recovery did not factor into his decision to refuse to take the drug and alcohol test; rather, it is clear he had a specific view of the law with respect to significant events, evidence of impairment, and the need for injury, and it also appears he was intent on challenging the Company's Substance Abuse Policy. Additionally, he was combative rather than cooperative at the June 21 meeting as well as during the June 27 conference call, although that might also be said of Mr. Dardengo. Even at the second hearing, after it had been found that the Company had the right to test, the Grievor, albeit very politely, appeared to maintain his view that he should not have had to test that day.

Moreover, there is the critical issue of the seriousness of the Grievor's refusal to comply with the Employer's request for a drug and alcohol test. There are a number of aspects to this concern. Substance abuse that affects the workplace is a very significant matter, particularly in safety sensitive operations. It potentially endangers the employee's own safety as well as that of other employees: Tolko Industries Ltd., supra. Additionally, it places the employer in jeopardy with respect to its statutory obligations to provide a safe work place: Worker's Compensation Act, RSBC 2019, c.1.

In my view, and contrary to the Union's suggestion, a failure to comply with drug and alcohol testing requests is not an action where the normal rules of progressive discipline apply and simply merits a "verbal warning" as a first step. Importantly, there is the deterrence aspect to consider here: Stewart v. Elk Valley Coal Corp., (2017) SCC 30 (S.C.C.); Fraser Surrey Docks,

147 C.L.A.S. 37 (Sullivan). If only very minor discipline was imposed in a situation such as this, an employee with a clean record (as was the case with the Grievor) or even an acceptable disciplinary history, who actually was impaired at work and was involved in a significant incident, could simply refuse to take a test and incur "a slap on the wrist" rather than submit to the test and potentially get a positive result with all that might follow. That approach would have the practical effect of destroying the purpose of many sections of drug and alcohol policies. It would also undermine both the need for timely compliance with a demand for a test and the importance of following the "comply now – grieve later" principle in drug and alcohol cases. Therefore, discipline with respect to violations of a drug and alcohol policy are somewhat unique and should be treated accordingly.

The parties referred to a number of authorities with respect to the appropriate level of discipline involving employees who had positive drug and alcohol tests or refused to take a test at all: Fording Coal Ltd.; supra, Suncor Energy Inc., [2008] A.G.A.A No. 11 (Abells); Fraser Surrey Docks, supra; Tolko Industries Ltd., supra; Toronto Hydro, [1998] O.L.A.A. No. 341 (Randall); Elk Valley Coal Corp., [2004] B.C.C.A.A.A. No. 249 (Sanderson). Many of these authorities express the view that lengthy suspensions are an appropriate disciplinary response to a breach of a drug and alcohol policy.

In my view, a ten (10) day suspension imposed in this case might have come within the reasonable range of potential penalties, as argued by the Employer, and not attract interference from an arbitration board: West Vancouver (District) (Transit Division), [1998] B.C.C.A.A.A. No. 14 (Devine); Volvo Canada Ltd., 12 L.A.C. (4th) 129 (Outhouse); Coast Capri Hotel, [2000] B.C.A.A.A. No. 113 (Larson).

However, as noted above, the suspension here was arrived at on the basis of a general

practice without any individual assessment of this Grievor's situation. While it is certainly commonplace for employers to have guideposts or guidelines for certain types of infractions, there must still be consideration of the individual in every case. Unfortunately, that was not done here. As a result, while deference normally may be accorded to an employer as long as the penalty is within an acceptable range, that principle does not apply in the circumstances of this case.

Therefore, having considered all of the above factors with respect to the particular case of this Grievor, it is my conclusion that a six (6) day suspension is appropriate and the Grievor's discipline record should be amended and the Grievor appropriately compensated.

The second matter to be addressed is the Union's claim for breach of privacy damages with respect to both the Employer's requirement that he attend at an Independent Medical Examination and the nature and dissemination of the subsequent IME Report. In that regard, the Union seeks damages in the amount of fifteen thousand dollars ($15,000).

Turning first to the requirement that the Grievor attend the IME, the parties cited a number of authorities which deal with either the requirement to undergo a drug and alcohol test or an individual having to attend at an IME. Many of those cases involve union policy grievances challenging various employer drug and alcohol policies: West Vancouver (District), [2012] B.C.C.A.A.A. No. 166 (Hall); Telus Communications Co., 192 L.A.C. (4th) 240 (Lanyon); British Columbia Teachers' Federation, [2004] B.C.C.A.A.A. No. 177 (Taylor); Interior Health Authority, [2018] B.C.C.A.A.A. No. 87 (Hall); Vancouver Shipyards Co., 156 L.A.C. (4th) 229 (Hope); Eurocan Pulp & Paper Co., [2006] B.C.C.A.A.A. No. 12 (Taylor); Elk Valley Coal Corp., supra; Manitoba, 42 L.A.C. (4th) 86 (Teskey); Canada (Attorney General) v. Hislop, (2007) SCC 10 (S.C.C.); Edmonton (City) Police Service, [2020] A.G.A.A. No. (Smith); Rio

Tinto Alcan, [2016] B.C.C.A.A.A. No. 44 (Lanyon); Molson Breweries, 142 L.A.C. (4th) 84 (Rayner).

This jurisprudence is clear that requests for drug and alcohol tests, as well as for IMEs, can involve very serious breaches of one's privacy. The cases also emphasize that an IME is an extremely invasive intrusion and should be the subject of particular scrutiny. As well, the law requires that before such processes are initiated, consideration must be given to the "least intrusive method" possible of obtaining the required information.

In Interior Health Authority, supra, a case cited at the hearing by both parties, Arbitrator Hall dealt with a union policy grievance and stated, at paras. 155-156:

> **155** On the evidence before me, I accept the Employer's position that referral to a certified additions specialist is the desirable standard where there are cause/reasonable grounds to suspect a substance dependency problem. Those professionals are better suited to the role than family physicians because of their additional expertise and the conflict concerns identified by Dr. Els. However, the need for an IME must be properly established, and resort to a unilaterally selected medical professional is the most intrusive option.
>
> **156** The intervening steps should include obtaining information from the family physician and/or other health professional(s) who may have been involved in the employee's care and, should that be insufficient, considering a mutually acceptable specialist. One seemingly desirable option would be for the Employer and the Union to jointly establish a roster of addictions specialists. Among other attributes, this would avoid delays associated with selecting specialists on an ad hoc basis.

In the present case, the Employer was well within its rights to establish that the Grievor could be safely returned to the workplace: Molson Breweries, supra; Eurocan Pulp & Paper Co., supra. Certainly, in the very unique circumstances with respect to the Grievor's addiction background, it was reasonable that the Employer was particularly concerned.

Mr. Dardengo had been informed by the Grievor in the June 21 meeting of his addiction recovery; further, he and Ms. Richards were also somewhat aware of the Grievor's history to the extent that the Employee Wellness and Ability Management department had certain information prior to that date and Ms. Craig shared some of her understanding of the Grievor's background

with them after the incident occurred and while the IME was being considered.

It may be that ultimately, as the Grievor was in "recovery" from his addiction, the Employer would have concluded an IME was required; on the other hand, the fact that he had been in recovery for seven years may have influenced them the other way. In any event, it is my view that some inquiries should have been made about the Grievor's individual medical circumstances at the time. There may also have been further medical history of the Grievor available to the Company which could have been reviewed. The Employer could have sought permission from the Grievor to have access to that information. At the very least, some discussions along those lines should have occurred and consideration given to less intrusive means to obtain the required confirmation of the Grievor's ability to safely return to work.

It should also be observed that the Employer's Substance Abuse Policy itself states that an IME "may be required" before the employee can return to work (Article 3.7.5(3)). There is no expectation expressed in this Policy that an IME request will be automatic in every case.

Taking into account all of these considerations, it is concluded that damages should be awarded for the referral of the Grievor for an Independent Medical Examination.

The other aspect to the claim for breach of privacy damages relates to the nature and dissemination of the IME Report itself. The authorities are unanimous that there is extreme importance to be attached to the sensitivity of medical information: British Columbia Teachers' Federation, supra; Telus Communications Inc., supra; Interior Health Authority, supra. As well, the Employer is obviously aware of the significance of such breaches as it has a Privacy Policy which contains privacy protections in sections 3.2.2 and 3.2.4. The law is clear that the type and scope of the medical information that an employer is entitled to access must be reasonably necessary in the particular context and stage of the inquiry.

In this case, the nature of the IME itself is not in dispute; rather, it is the Report resulting from the IME that was the focus of the submissions. That Report was provided to Ms. Craig on August 2, 2019. It was extensive and discussed virtually all aspects of the Grievor's life, much of which was completely irrelevant to the Company's ultimate decision about whether the Grievor could be safely returned to work at Vancouver Shipyards.

Of importance, Ms. Craig testified the Employer had received similar IME reports with respect to other employees in the past and, yet, at the time of the Grievor's referral, the Company had done nothing to limit the scope of the information it received. To be fair, once the Union raised its concerns with the Employer following the present grievance, Seaspan now includes directions to the addiction experts to limit the information in their reports to the Company to factors which are relevant to the issue of whether the individual can be safely returned to work and under what conditions. However, at the time of the case with this Grievor, that direction was not in place.

The other concern with respect to this IME Report was to whom it was disseminated. It is true that the Grievor had told the Employer to provide a copy of the Report to the Union which would then be passed on to him. Therefore, at one level, the Employer was acting in accordance with explicit instructions from the Grievor. However, that instruction occurred before the Grievor had any idea that the IME would be as extensive as it was and that the Report itself would contain extremely personal and sensitive information. In my opinion, the Employer should have informed the Grievor of the extensive nature of these reports, either at the time he made the request for it to be given to the Union and/or certainly once this particular Report was provided to Ms. Craig. Moreover, the Report was then emailed to the Union and the Grievor at the same time. Unfortunately, this created an electronic copy over which the Grievor did not have personal

control and was potentially available to individuals who should not have access.

As a result, privacy damages are also appropriate with respect to the nature and dissemination of the Report itself.

There have been discussions in some of the individual grievance cases cited above about the amount of appropriate damages: Edmonton Police Association, supra; Jones v. Tsige, [2012] ONCA 32 (Ont. C.A.); Molson Breweries, supra; Tolko Industries (Lakeview Division), [2020] B.C.C.A.A.A. No. 90 (Hall). I also take into account that this is an evolving area of the law and much has changed in the case law since these events transpired in 2019: Canada (Attorney General) v. Hislop, supra.

However, in this situation the Grievor also bears considerable responsibility for what transpired. First, it was his decision to not submit to a drug and alcohol test, not on any grounds related to his addiction recovery, but rather on the basis of his mistaken view of the law and his apparent desire to challenge the Substance Abuse Policy itself. As the Grievor admitted under cross-examination, there would have been considerably less drama if he had simply gone for the test which he could have been certain at the time would result in a negative result.

As well, as noted above, the Grievor's reaction at the meetings on June 21 and 27 was one of anger and resentment rather than problem solving. For example, he told Ms. Craig "off the record" about having obtained a drug and alcohol test on his own on June 21 in order to protect his participation in the Courage to Care Program; however, the Grievor was not willing to share that information "on the record" with Mr. Dardengo and it is not clear why if he had been truly concerned about the stress and embarrassment which occurred.

Moreover, the Grievor stated in his evidence that, if requested, he would have given permission to the Employer to contact Dr. Yan. There are two difficulties with that assertion.

First, he could have made that offer himself to Mr. Dardengo in the meeting on June 27 but he chose not to. Second, given that he was unwilling to formally share the existence of his June 21 negative test results with the Employer, it is hard to conclude he would have given permission for the Employer to speak directly to his own physician.

Therefore, in assessing the appropriate damages for breach of the Grievor's privacy to be awarded in this case, I have taken into account: the intrusive nature of the IME; the uncertainty which existed for the Grievor which extended over a period of almost six weeks; the distress, discomfort and personal embarrassment; and the impact on his self-identity. I have also considered the Grievor's contribution to this state of affairs.

In the result, damages in the amount of five thousand dollars ($5,000.00) are ordered for breaches of the Grievor's right to privacy.

AWARD

For all of the reasons set out above, the grievance with respect to the ten (10) day suspension imposed on the Grievor is partially upheld. A six (6) day suspension is substituted and the Grievor should be appropriately compensated.

The claim for breach of privacy damages is upheld and the Grievor is awarded five thousand dollars ($5,000).

It is so Ordered.

I retain jurisdiction to deal with any matters arising from the interpretation or implementation of the terms of this Supplemental Award.

Dated this 22nd day of November, 2021.

"David C. McPhillips"
David C. McPhillips, Arbitrator