IN THE MATTER OF AN ARBITRATION

BETWEEN

VANCOUVER DRYDOCK CO. LTD.

(the “Employer”)

AND

MARINE WORKERS AND BOILERMAKERS INDUSTRIAL UNION, LOCAL 1

(the “Union”)

RE: JE ARBITRATION

Preliminary Issue

APPEARANCES:	Chris E. Leenheer and Carly Stanhope, for the Employer
	Richard L. Edgar and Heather Hoiness, for the Union
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	June 1 and 2, 2020
DATE OF AWARD:	June 8, 2020

I. ISSUE

The Grievor, who will be referred to as "JE" in this Award, was required by the Employer to take a breathalyzer test; and, to provide a urine sample under the Employer's Substance Abuse Policy.

This Preliminary Award addresses whether the Employer had the right to require the urine sample.

II. BACKGROUND

The material facts for the purpose of this Award can be set out briefly.

JE is a painter for the Employer, which is one of the companies in the Seaspan Group, which performs marine repair work. There is no dispute that the workplace is a safety sensitive environment.

The Employer has a robust Substance Abuse Policy. The Scope of the Policy covers "reasonable cause" and "post incident" circumstances. Under Policies and Procedures related to the Policy, in the definition section it is noted that "an Employee's refusal to provide a specimen for Substance Testing will be deemed a Positive Test Result under the Policy".

Section 3.3.1 Reasonable Cause states in part:

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

On February 1, 2019, JE attended a WHMIS training session which occurred at the commencement of the afternoon shift. It was attended by 15 to 20 employees in the large main lunchroom. Due to the day's workload, employees were given the option of leaving work at the end of the training.

There is some dispute whether the WHMIS training was scheduled the day before or on the day in question. I need not reconcile that matter for purposes of my Award. It is not in dispute that when the Employer commenced the investigatory meeting set out below, the Employer knew that JE was not working on the tools after the training as he was opting to leave.

Rob Paterson, Health and Safety Manager, lead the training. He testified that on two occasions when walking around the tables where participants were seated he noticed

an “odd odour” at the table where JE was seated. He believed that JE smelled like alcohol. He also stated that once during the training the table where JE was seated was boisterous and Paterson had to ask them to pay attention. Another painter, Alex Cartwright, sat at the table beside JE and testified that he did not smell alcohol. Another painter, Dany Muise, who is also a Shop Steward, testified that he sat at the same table and did not smell alcohol.

In any event, at the conclusion of the training Paterson advised Wisram Jarmakani, Superintendent of the second shift, and Duncan Ius, Safety Advisor, of the situation. A meeting was scheduled with Jarmakani, Ius, Muise and JE.

Jarmakani conducted the interview even though it was the first interview he had conducted under the Substance Abuse Policy and he had no training on the Policy or conducting interviews related to the Policy. Ius had conducted investigations before. However, in this circumstance he was an observer. He did not take notes.

Ius asserted in testimony that he noticed that JE was shaky, flushed, tired and nervous at the commencement of the interview. The alcohol odour was “distinct”. JE was polite at the start but became angry when he was advised that he was going to be tested.

The Employer has a “Significant Event & Reasonable Cause Testing Package”. Within the package are checklists for the Employer interviewer to complete as he/she conducts the interview. Given the situation, Jarmakani used the “Reasonable Cause Testing” checklist.

Jarmakani testified that during the interview JE acknowledged that he had eight beer and two litres of cider up to 3 a.m. JE said he had not eaten that day. He was not asked when he went to bed. His shift started at 3 p.m.

At the start of the interview Jarmakani asked JE to blow in his face and his breath smelt like alcohol. Jarmakani testified that JE appeared tired at the start of the interview. He also observed JE as fidgety, agitated and red in the face.

Jarmakani decided to require drug and alcohol tests. He believed that the Employer’s policy was to always test for both. JE was advised he was going to be tested. JE and Muise objected to the drug test as the only issue was the smell of alcohol. JE was advised by Jarmakani that if he refused the drug test it would be deemed to be a positive test. JE agreed to take the test under protest.

Jarmakani noted that after JE was advised of the testing he became more agitated and began tapping his foot more than before.

The blood alcohol test result, which is immediate, was 0.000. The drug test was “inconclusive” and JE was sent home.

III. ARGUMENT

The Employer argues that it was justified in requiring both tests. The Employer acknowledges that when it decides to test, the policy is to test for both drug and alcohol.

The Employer argues that given the safety sensitive nature of the workplace it met the test of reasonable cause to require the alcohol and drug test: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd*., [2013] S.C.J. No. 34; and, *Canadian National Railway Co.,* [2013] C.L.A.D. No. 248 (*"CNR"*)*; Vancouver Drydock Co. v. Marine Workers and Boilermakers Industrial Union,* [2018] B.C.C.A.A.A. No. 34 ("*Vancouver Drydock – McPhillips*"); *Vale Canada Ltd. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union,* [2015] M.G.A.D. No. 8.

The Employer argues further that consistent across the authorities is the notion that members of management are owed deference in their assessment of the employee's condition, so long as their observations are made in good faith and with reasonable accuracy; and that reasonable cause testing need not be limited to a specific substance: *CNR, supra; Vancouver Drydock – McPhillips; Vale Canada, supra; Vancouver Drydock Co.,* 186 L.A.C. (4th) 405 ("*Vancouver Drydock – Munroe*"); and, *Lafarge Canada Inc v International Brotherhood of Boilermakers, Local Lodge D331,* [2012] AGAA No 4.

The Employer argues that where there are signs of alcohol or drug use it is appropriate to test for both. The Employer cites *Vancouver Drydock – McPhillips,* at para. 24:

> With respect to many, if not most of those factors, it may be impossible to know in a particular situation what is the cause, be it drugs or alcohol or even personal circumstances, so a testing for both drugs and alcohol would clearly be appropriate. The arbitral and judicial authorities establish that where, for example, there is clear evidence of impairment and it is unclear whether that may be caused by alcohol or drugs, it would be reasonable to test for both.
>
> [Emphasis added.]

The Union argues that the Employer did not have reasonable cause to demand a drug test as there was no true safety interest as JE was not working on the tools that day and the Employer did not balance its safety interests and JE's privacy interests.

The Union argues that biological testing in the workplace infringes on the person's constitutionally protected right to privacy: *Irving Pulp & Paper* Ltd. v. CEP Local 30, 2013 CarswellNB 275, 2013 SCC 34**;** and, *Alberta v. A.U.P.E.,* 2012 CarswellAlta 896.

The Union argues further that an employee's interests in privacy and bodily integrity must be understood as equal to the Employer's interest in maintaining a safe workplace: Unifor, Local 707A v. Suncor Energy *Inc*, 2017 ABQB 752 at para. 57, aff'd 2018 ABCA 75. Accordingly, at the beginning of any inquiry into whether an employee should be tested the scale is perfectly balanced. Once an investigation is conducted the employer must then seek to properly balance the competing interests in coming to a decision on whether or not it should demand a biological test.

The Union argues further that the Employer did not have reasonable cause to demand a urine test as there was no objective evidence of impairment: *Weyerhaeuser Co. v. C.E.P., Local 447* (2006), 87 C.L.A.S. 67; *Vancouver Drydock - Munroe;* and*, Vancouver Shipyards,* 2005 CarswellBC 4039 (Hope).

The Union argues further that in a balancing of interests, the Employer must take into account that urine testing does not test present impairment. Furthermore, the Employer failed to exercise reasonable judgment and instead used the interview checklist in a mechanistic way.

The Union argues further that because the Employer did not have the right to demand a urine test, the results of the test are inadmissible.

IV. AWARD

I note at the outset that I conclude that it is not necessary to reconcile when the safety training was scheduled. It is clear that when the Employer commenced the interview with JE, it knew that he was not working on the tools that day. However, I conclude further that the Policy applied to JE even though he was not scheduled to work on the tools.

JE is employed in a safety sensitive position. When he is on the Employer premises during a paid work day, the Policy applies to JE for two reasons. First, he may have had his schedule changed for the afternoon. Second, he should not be under the influence of drugs or alcohol when taking part in safety training. That would be antithetical to the purpose of the training.

Furthermore, given my conclusions below, it is not necessary to reconcile the dispute over when JE's conditions were assessed and when comments were added to forms and notes.

I have read all the authorities put before me by Counsel. I find the *Vancouver Drydock - McPhillips* case, which involved the parties, very instructive and quote from it extensively.

Commencing at paragraph 11 to 16, the arbitrator stated:

> Therefore, Arbitrator Hope validated the "original" policy in its general form but went on to clearly indicate that each individual case would need to be assessed in the context of its particular circumstances.
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> Subsequently, in *Vancouver Drydock Co.,* 186 L.A.C. (4th) 405, Arbitrator Munroe addressed the Policy and dealt with, in that instance, the requirement for blood- alcohol testing and for the employee to undergo an Independent Medical Exam. He adopted and quoted extensively from Arbitrator Hope's decision in *Vancouver Shipyard Co., supra,* and agreed that each case must be assessed on its own merits. Arbitrator Munroe separated the questions of whether testing was permitted from the consequences which might follow, at paras. 40 – 42:
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> > I refer back to the Policy which, as I said near the outset of this award, is the justification put forward by the employer, on the facts at hand, for demanding that the grievor provide a sample of blood-alcohol testing, and then for demanding that the grievor submit to an IME of the sort described by Dr. Baker in his report and evidence.
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> > Examining the language of the Policy alongside the earlier-cited award by Arbitrator Hope, which the parties accept as authoritative, the principal issues requiring adjudication may be summarized as follows:
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> > > Was it reasonable in the circumstances for the employer to require the grievor to submit to a blood-alcohol test?

> Was it reasonable in the circumstances for the employer to require the grievor to submit to an IME for addiction-assessment, and to suspend the grievor without pay when he declined to comply with that requirement?

It is proper to break the matter down into those two questions, as was similarly done in *Eurocan Pulp & Paper Co* [2009] B.C.C.A.A.A. 12 (Taylor), rather than conflating those questions into a single unitary issue. It seems unlikely that if there is a negative arbitral response to the first question, there could nevertheless be an affirmative response to the second question. On the other hand, while one can posit that where it is reasonable for an employer to demand that the employee provide a test sample, it will often be judged reasonable to also demand an IME for dependency-assessment (as was the case in *Eurocan*), such will not always and automatically be the case.

The next matter is the overall context in which the Policy must be applied. Issues around drug and alcohol testing have been the subject of extensive litigation; many of those cases have reached the Supreme Court of Canada and there also is consensus between these parties with respect to the general law in this area. There is no disagreement that arbitration boards have the jurisdiction to address Charter-like issues of privacy: *Lethbridge Community College v. A.U.P.E.*, [2004] 1 S.C.R. 727 (S.C.C.); *Nor- Man Regional Health Authority Inc. v. M.A.H.C.P., 2011 SCC 59; Government of the Province of Alberta*, 221 L.A.C. (4th) 104 (Sims).

In *Irving Pulp & Paper Ltd. v. CEP, Local 30,* 2013 SCC 34, the Supreme Court addressed random drug testing at the worksite and made a number of general comments concerning the importance of an individual's right to privacy. The decision states, at paras. 49 – 50:

> 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:
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> > 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.
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> That conclusion is unassailable. Early in 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 (S.C.C.), at pp. 431-32). And in *R. v. Shoker,* 2006 SCC 44, [2006] 2 S.C.R. 399 (S.C.), 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).

All of the authorities in this area of the law emphasize that what is required is a balancing of interests between an employee's right to the privacy and the integrity of his or her person with the legitimate business and safety concerns of the company.

There is no challenge here by the Union to the Policy itself. Rather, this dispute centres on whether the Policy was applied appropriately in those particular circumstances. This situation involves "reasonable cause" testing rather than post- incident testing, both of which are covered in the Policy. The Union did submit a number of authorities with respect to post-incident testing which, as has been emphasized, is not the subject of this dispute. Those cases establish that even after an incident has occurred, testing is not automatically justified but still will require the consideration of other matters such as evidence of impairment, lack of alternative explanations or contributing factors for the incident, the employer's employment record and the employee's privacy interests: *Fording Coal Limited,* 119 L.A.C. (4th) 165 (Dorsey); *Weyerhaeuser Company Ltd.,* 2006 CarswellAlta 1859 (Sims); *Weyerhaeuser Company Limited (Kelly Grievance),* 2012 CarswellAlta 2018 (Francis); *Rio Tinto, supra*.

And at paragraphs 18 to 21, the arbitrator stated:

The authorities establish that the "reasonable cause" test requires that there be some basis on which alcohol and/or drug testing can be justified. As the Supreme Court noted in *Irving Pulp and Paper v. CEP, Local 30, supra,* where the employer proceeds unilaterally with a drug and alcohol policy "it must comply with time-honoured requirement of showing reasonable cause before subjecting employees to potential disciplinary consequences" (para. 53).

It is important to note at this juncture that some degree of deference must be afforded to members of management who are making decisions within a very limited time frame and without the training of medical professionals. In that respect, in *Canadian National Railway Co.,* [2013] C.L.A.D. No. 248, Arbitrator M. Picher stated, at para. 14:

> 14 I consider it important to recognize that the determination of whether there is or is not reasonable cause to require an employee to undergo a drug test is one that will inevitably involve a degree of subjectivity and that each case must turn on its own particular facts. Reasonable persons may or may not agree on what conclusions should or might be drawn from an individual's outward appearance or other surrounding facts. However, in a highly safety sensitive work place, some degree of deference must be given to supervisors who exercise that judgment. It is obviously not necessary that they be proved correct as to their concern. In my view it is sufficient that they or a delegate have sufficiently observed the individual employee, have directed their mind to the person's physical appearance, including such factors as their speech or gait, have weighed any other relevant information at their disposal and ultimately have exercised their judgment in good faith.

In the same vein, in *Vancouver Drydock Company Ltd., supra,* Arbitrator Munroe noted, at para. 61:

> 61 There can be no doubt that employers must be given ample scope to properly address alcohol and drug use by employees who work in safety sensitive positions and industries. Alcohol and drug use by employees in such positions and industries can present very substantial dangers to the employees themselves; to their co-workers; and to the legitimate property and liability-related interests of their employers. Arbitrators must be careful not to parse too finely the judgments made by employers in their attempts to address the potential for such dangers, which are a very real and substantial concern.

The Union has also submitted authorities related to the standards placed on police officers in determining whether breath samples can be taken from motorists: *R. v. Waters*, 2010 ABQB 607; *R. v. Rohrich*, 2006 ONCI 150. These authorities canvas in considerable detail the obligations of law enforcement officers dealing with potential Criminal Code charges. As well, the Union asserts that, although the invasion of privacy is less serious in video surveillance cases than it is in alcohol or drug testing, the standard of reasonableness exercised in those cases are instructive: *Ebco Metal Finishing Ltd.,* 134 L.A.C. (4th) 372 (Blasina); *Crown Packaging Limited,* 243 L.A.C. (4th) 423 (Dorsey).

And lastly, at paragraphs 24 to 30, the arbitrator stated:

With respect to many, if not most of those factors, it may be impossible to know in a particular situation what is the cause, be it drugs or alcohol or even personal circumstances, so a testing for both drugs and alcohol would clearly be appropriate. The arbitral and judicial authorities establish that where, for example, there is clear evidence of impairment and it is unclear whether that may be caused by alcohol or drugs, it would be reasonable to test for both.

However, in the case of "C.L.", the only trigger identified by the Employer was the odour of alcohol. In my view, it is appropriate in that circumstance to distinguish between drug and alcohol testing. There is a significant difference in the level of intrusiveness between the two tests and it is apparent that involuntary biological testing is far more invasive of personal autonomy than a breathalyzer test. As Arbitrator Munroe noted in *Vancouver Drydock Company Ltd.* "testing, by its nature, is invasive in varying degrees according to the nature of the test" (para. 55).

Indeed, in that case before Arbitrator Munroe, the only test given to that employee was for the purpose of determining blood-alcohol content; in that situation, the employee was not required to undergo a drug test. Arbitrator Munroe noted, at para. 53, that there was an odor of alcohol but apart from that, "there was a complete absence of any hint of impairment". Based on the Agreed Statement of Facts in the present case that is precisely the situation here with "C.L.". Therefore, such a distinction between an alcohol and drug test has already been acknowledged under this very Policy.

It is interesting to consider the case of *Lafarge Canada Inc.,* [2012] A.G.A.A. No. 4 (Beattie), an authority submitted by the Employer and which the Union asserts did not properly apply the principles which have been established by the Supreme Court of Canada. In any event, in that case there was clear evidence of impairment and there had been insubordination (threat of physical harm) on the part of the employee. Arbitrator Beattie concluded, at para. 148, that there was "no way of telling whether the Grievor's impairment was caused by alcohol alone or a combination of drugs or alcohol". In my view, it is implicit

in that statement Arbitrator Beattie was of the view that where the facts indicate it is possible to distinguish between drug and alcohol concerns, the requirement for alcohol and drug tests should be differentiated.

In *Canadian National Railway, supra,* Arbitrator M. Picher concluded that there were sufficient grounds for the Employer to form a reasonable concern as to whether the employee might be under the influence of either drugs or alcohol. In our case, however, there was no evidence of impairment on the part of the Grievor which is the ultimate concern for an employer: *Canadian National Railway Co., supra; Weyerhaeuser Company Ltd.,* 2006 CarswellAlta 1859 (Sims). Moreover, there were no other factors, such as observations of impairment e.g. appearance, gait or speech, which would lead to a conclusion that drugs may in some way have been a cause for concern.

The Employer also referred this Board to *Vancouver Shipyards Co. (Gilbertson Grievance),* [2008] B.C.C.A.A.A. No. 127 (Blasina). However, that "expedited award" resulted from a mediation-arbitration process, in which Arbitrator Blasina discussed Arbitrator Hope's second decision in *Vancouver Shipyards Co., supra,* and then made an order for both drug and alcohol monitoring of the employee. This was clearly a practical solution to a very specific problem and does not contain any legal analysis of why that was ordered.

I agree with the arbitrator's analysis and conclusions.

I agree that the Employer's management staff who are conducting the investigative interviews must be given some deference as they are not medical professionals. However, they should be given some training into how to conduct the interviews and how to assess the employee's wellness.

In the case at hand Jarmakani had no training. It may have been more appropriate to have Ius conduct the interview as he had done so previously.

I conclude that the Employer should be considering whether to conduct either the breathalyzer test, or the drug test, or both. It is not automatic, given the difference in the tests with respect to employee privacy, that both tests are conducted. The assessment of which test(s) to conduct need not be done at the same time. Such an assessment could be made at any time during the investigation process.

In the case at hand, Jarmakani automatically decided to conduct both tests as he believed it was Employer policy to do so. He did not assess whether both tests were warranted.

There was no sign of actual impairment. JE took part in the training and Paterson's only concern was the smell of alcohol. Jarmakani and Ius both noticed the smell of alcohol as well.

While Jarmakani and Ius noticed that JE was shaky, flushed, tired and tapping his foot, they did not ask any probing questions to ascertain possible explanations. Someone who consumes the amount of alcohol that JE admitted to, up to 3 am, without eating

for the day and presumably not getting enough sleep, may very well exhibit these conditions.

JE became more agitated during the interview, which may be understandable given that he and the Union disagreed with the requirement to be tested.

I acknowledge that it is difficult in many circumstances to differentiate whether an alcohol or drug test, or both, should be conducted. In cases where impairment exists, both tests are more likely than not required.

However, in the case at hand, impairment was not demonstrated. The Employer concluded that alcohol was an issue, and because of the Policy, tested for both alcohol and drugs. There was no independent assessment as to whether both tests were appropriate.

Accordingly, I conclude that the urine test should not have been conducted.

I am not reaching a conclusion as to its admissibility as I did not hear all the evidence relating to subsequent events.

I remain seized of outstanding matters if any exist.

"*Mark J. Brown"*

Dated this 8th day of June, 2020.