IN THE MATTER OF AN ARBITRATION

BETWEEN:

VANCOUVER SHIPYARDS CO. LTD.

(the "Employer")

AND:

CMAW, LOCAL 506 MARINE AND SHIPBUILDERS

(the "Union")

"JS" Grievance

ARBITRATOR:	David C. McPhillips
ON BEHALF OF THE EMPLOYER:	Chris E. Leenheer and Carly Stanhope
ON BEHALF OF THE UNION:	Tamara Ramusovic
DATES OF WRITTEN SUBMISSIONS:	July 29 & 30, 2020
DATE OF AWARD:	August 26, 2020

The parties are agreed that this Board has the jurisdiction to determine this matter. This grievance was filed by the Union protesting the Employer's decision to require the Grievor ("JS") to undergo a drug and alcohol test on July 25, 2019. The parties have asked that this decision only address the threshold question of whether the Employer had the right to require the test of the Grievor on that date. Other issues, should they arise, are to be determined separately.

FACTS:

Vancouver Shipyards operates in North Vancouver and is one of the Seaspan Group of Companies. It is in the business of ship repair/maintenance as well as construction of new vessels. "JS", the Grievor in this matter, has been employed with the Company since December, 2015 and has a clean disciplinary record since that time. Prior to working for the Employer, he had a long career in construction and scaffolding. At Vancouver Shipyards, the Grievor is a "Stager" and is responsible for erecting and dismantling scaffolding around the worksite. In that position, he spends 50% of his time driving a fork lift moving the necessary material around to and from the various locations. He works on the "first shift" which runs from 6:15 a.m. to 2:30 p.m.

The event triggering this dispute occurred shortly before the 11:30 a.m. lunch break on July 25, 2019. JS was instructed to go to the building known as SOC 40 (which refers to 40% Stage of Completion) to pick up some scaffolding material. In order to do so, he drove to the SOC 40 building heading in a southerly direction and then made a right hand turn into the center of the 50 meter opening and entered into the breezeway. It is agreed that he did not use his horn when entering the building which is considered a "best practice". He then proceeded into the building for 20 feet or so and made another right turn to center the fork lift on the material he was to pick up and take back to the scaffolding yard. He testified that throughout this time he was driving very slowly (3 mph).

There was another employee "DW", a Steel Fitter, working in the area grinding large lugs wearing full personal protection equipment (PPE) which included ear covering. It is agreed that the Grievor got the attention of DW by yelling to him "Hey, behind you".

From that point, there are some discrepancies in the recall of the two individuals about what then occurred. DW states that he was working directly on the other side of the load the

Grievor had approached, which DW claims was a blue metal cage which holds smaller scaffolding material (clamps, jacks, collars). However, the Grievor did agree under cross-examination that he could be wrong about the load being a cage. In any event, DW claims there was about 3 feet between the cage and the work bench at which he was working and, as he was directly in the line of the fork lift, that put him in a "pinch point". DW testified that when he was alerted by the Grievor yelling at him it caused him to turn around and he observed that JS had already moved the forks about a half way under the cage. DW states he then moved out of the way. He testified that put him at risk and he became very angry with the Grievor.

The Grievor's version of the incident is that he had stopped the fork lift in front of the load and waited for DW to stop grinding so that he could get his attention. Further, JS stated that it was not a blue metal case he was picking up but rather a rack which is an open frame with long pieces of scaffolding material (ladders, pipes) hanging out from each end. He asserts there was a large yellow tool box directly in line with him (where DW claims he was standing) and that he observed DW who was off to the right at the work bench which was about 3 to 4 feet away from the right end of his load. JS asserts he had not proceeded under the load at this point and that DW was not in a pinch point and was never in any real danger. The Grievor claims that, after alerting DW to his presence, he proceeded to drive under the load and lifted the rack up a very short distance and the backed away slowly as is his normal practice in those situations.

After the Grievor had started to back away with the load, it is agreed DW confronted the Grievor and reprimanded him. Angry words were exchanged, including some profanity. DW asserted that he had been in pinch point and JS responded that it "was not a pinch point but I am sorry for startling you". The Grievor testified DW was very agitated at that moment and was "pretty ugly toward me". JS also testified that he tried to apologize for a second time but DW "did not want any part of it".

JS then drove the material back to the scaffolding yard and informed his charge hand, Dave Zeeder, about what had occurred. He then had lunch from 11:30 a.m. to 12:00 while DW did the same. During his lunch break DW had a discussion with his shop steward, Brad Cruikshank and DW told Mr. Cruikshank he thought this had been a "near miss". Mr. Cruikshank advised DW to speak with his direct supervisor, Mike Bowden, who, at the time, was a General Supervisor and is now the Area Manager.

Immediately after lunch, JS and Mr. Zeeder approached DW, who was with two other employees who were charge hands. JS testified he once again tried to apologize to DW but the latter was still unhappy. DW testified he felt the Grievor's apology was insincere and considered he was being disrespected. He thought he was being mocked as being young and unexperienced and that JS's apology was directed more at DW's reaction to the incident rather than being an apology for the incident itself. JS testified that he never made any reference to DW's age or inexperience but someone else in the group may have made a comment to that effect.

During that discussion after lunch, there was also reference made to an incident which had occurred a couple of years prior when DW felt the Grievor (whom he did not know at the time) had been driving too fast (which the Grievor denies) and the Grievor had been upset because DW was walking in between the buildings while looking at his cellphone (which DW denies). At that time, profanities had been exchanged and DW reported that matter to his supervisor but no further action was taken.

Under cross-examination, DW was asked if his perception of the Grievor's attitude in this meeting after lunch was the "straw that broke the camel's back". He replied "yes, I realized he was not going to change his mind so I would go get the issue resolved". When DW was also asked during his testimony whether, if he had believed at the time that the Grievor's apology was sincere, that would have been the end of the matter, he responded in the affirmative.

After this attempt to calm the waters failed, DW met with Mr. Bowden at the south end of the SOC 40 around 12:20 p.m. DW described to Mr. Bowden what had happened from his point of view, including stating that it was only after JS had put the forks under the load that DW had stepped away. Mr. Bowden testified he observed during the time they were talking that DW still seemed "uneasy". Mr. Bowden thanked DW and indicated he would "take it from there".

Mr. Bowden also had a brief conversation with the Grievor, whom he did not know at all prior to that time. JS expressed to Mr. Bowden what he felt had occurred during the incident with DW. After that discussion, Mr. Bowden stated to JS that everything was alright and "be safe". The Grievor then climbed onto his fork lift and drove off and continued to perform his regular duties until the end of his shift.

Mr. Bowden subsequently had conversations with Andrew Caisley, his Area Manager, Bryan Hayden, the Grievor's Manager, and Jon Campbell, the SOC Manager to whom Mr. Caisley reported. Mr. Bowden testified that during these conversations they collectively came to

the conclusion, after discussing “some prior incidents with fork lift operators and the fact that the Grievor was unapologetic and confrontational”, that this would be considered a “near miss”. That decision was made at approximately 1:30 p.m.

The Seaspan Drug and Alcohol Policy states the following with respect to “reasonable cause” and “post-incident” testing:

> 3.3 Evaluation for Substance Use/Abuse/Dependence
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> 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 constituted reasonable causes, 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
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> 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.

The evidence indicates that Seaspan had also provided its managers with training and investigative tools by way of Checklists to be applied in the relevant circumstances with respect to drug and alcohol testing.

A little later that afternoon and after those consultations, Mr. Bowden called Mr. Heyden and stated they were "going to go down the road of the Checklist". Mr. Bowden then contacted the Grievor's shop steward and requested him to ask JS to meet Mr. Bowden at SOC 40 at the conclusion of his shift. The Grievor and Mr. Bowden met at 2:25 p.m. as scheduled and proceeded to walk to 50 Pemberton Street where the Human Resources offices are located. JS testified that as they exited the yard, all the employees who had finished the first shift and were waiting by the gate to leave, were jeering at him and yelling comments such as "don't tell them anything", which JS stated made him feel very uneasy.

Mr. Bowden and the Grievor then proceeded to the office of Jason Henderson, the Labour Relations Manager. Mr. Bowden had also arranged for Don Diewold, one of the shop stewards on the second shift, to attend and they waited for him to arrive.

Once Mr. Diewold was in attendance, there were a number of questions asked of the Grievor which are set out in the "Post-Incident Checklist". One of those questions asks for a description of the incident itself. Mr. Bowden recorded the Grievor's reply as follows:

> Pulled into SOC 40 to pick up a rack of equipment with his forklift. He pulled up to the rack of equipment in the forklift the rack was close to a work bench where a worker was working. The rack was 3 feet away from the worker and "JS" yelled out to the employee while his forks were not under the load yet just at the start of the load. "JS" said he made eye contact with the worker before starting to pick up the load, "JS" then drove forward picked up the load and started to back out. At this point the worker in the pinch point came out and started to yell at "JS". "JS" said he apologized for making him feel uncomfortable, "JS" has said at no time did he feel the worker was in danger or in harms way. After this "JS" left the SOC with the load and went back to his area of the yard and spoke with his charge hand, and suggested they go back at the end of lunch to talk to the worker again and apologize.

The Grievor testified that he never used the term "pinch point" in describing the incident at the meeting as he has never been of the view that DW was ever in a pinch point. Mr. Bowden confirmed in his testimony that this was perhaps his own use of the term "pinch point" rather a recording of the Grievor's actual comment.

When the Grievor was subsequently asked which factors he considered responsible for the incident, the notes indicate that he responded that JS "feels that he scared the worker and this

caused the reaction from him that led to an investigation". There was also a discussion during which the Grievor confirmed there were no mechanical issues with the operating equipment nor were there any environmental or weather factors in play.

Question 5 and the note of the Grievor's answers on the Form indicate the following:

> Question 5: Were there any unusual or out of the ordinary circumstances that contributed to the incident? If so, please describe in detail.
>
> "JS" has said that this was routine work and nothing was out of the ordinary. "JS" did not honk his horn when he entered the building and states that he is confident in his ability to assess a situation and proceed when safe. "JS" said that he would do exactly the same thing again and it was not out of the ordinary.

Question 7 and the Grievor's reply consist of the following:

> Question 7: Have you consumed any alcohol or illegal drugs in the last 48 hours? If so, what and when? Or have you consumed any drug (prescription or otherwise) which would inhibit your ability to perform your assigned duties in a safe and productive manner?
>
> "JS" has answered no/then stated nothing that would affect his ability to drive a forklift.

Mr. Bowden testified that the second part of the Grievor's response to Question 7 concerned him but he agrees that he did not ask JS any follow-up questions in that respect.

Mr. Bowden also completed the "Conditions" section of the Checklist and in response to Condition 1: Is there a connection between the Employee's area of control of responsibility and the incident?, Mr. Bowden checked off the "No" box. He testified he answered the question that way because the event had occurred away from the Grievor's primary work area. Jerry Dardengo, the Employee Relations Manager for Seaspan ULC, stated in his testimony that this was an incorrect answer because the question actually was directed as ascertaining whether JS was the individual using the fork lift at the time of the incident.

After the interview, Mr. Bowden conferred separately with Mr. Henderson. Mr. Bowden testified that they decided the Grievor had placed DW in a pinch point, that this was a serious "near miss", that the Grievor's demeanor was poor, that he had had a confrontational attitude to DW and that, finally, JS was refusing to accept responsibility for his actions. For those reasons, they decided a drug and alcohol test would be the appropriate course of action and they then proceeded to inform the Grievor of that decision.

Mr. Bowden also testified that he felt the Grievor had become agitated during the meeting in Mr. Henderson's office and that he had been pacing the office as the interview

progressed. With regard to that claim, JS asserted that it was not until after the interview had been completed and they were waiting for the testing people to arrive that he became unsettled and got out of his seat and walked around Mr. Henderson's office.

Finally, there was an Intelex Form completed by management as part of the safety protocol concerning the incident. This was done a few days after the incident and it stated in part:

Near Miss Details

Near Miss Type	Injury/Illness
Contact Type	Struck By (Hit by moving object)
Mechanism of Injury	Motor Vehicle Accident
Near Miss Description	A near miss occurred when a forklift entered the SOC 40 breezeway from the east door. The forklift operator did not honk his horn upon entering and proceeded to drive to a rack on the floor that he was to pick up. As he approached the rack he stopped the forklift in front of the rack and yelled out to an employee that was between the forklift, the rack and a work bench. After the operator yelled out the employee turned around and was startled. The operator proceeded to pick up the load before the other worker was clear of the pinch point. The lift and load were around 3 foot from the other worker.
Potential Severity	High
Suspected Cause	Lack of following procedure and inattention, complacency

The Union filed a grievance on behalf of JS with respect to him being required to take an alcohol and drug test on July 25, 2019 and that matter has proceeded to this arbitration.

DECISION:

As agreed, this decision will address only the threshold question of whether a drug and alcohol test was appropriate in the circumstances of the present case. In that respect, the parties have submitted a number of authorities for review: *Interfor Acorn,* [2020] BCCAAA No. 43 (Sims); *Communications, Energy and Paperworkers of Canada, Local 30 v Irving Pulp & Paper Ltd.,* [2013] S.C.J. No. 34; *Elk Valley Coal Corp. (Fording River Operations) (Edson Grievance),* [2005] B.C.C.A.A.A. No. 299 (Glass); *Elk Valley Coal Corp.,* [2003] B.C.C.A.A.A. No. 210 (Lanyon); *Tolko Industries Ltd. (Lakeview Lumber Division),* [2012] B.C.C.A.A.A. No. 108 (Bell); *Fording Coal Ltd.,* [2002] B.C.C.A.A.A. No. 243 (Love); *Weyerhaeuser Co. (Roberto Grievance),* [2006] A.G.A.A. No. 48 (Sims); *Weyerhaeuser Co. (Kelly Grievance),*

[2013] A.W.L.D. 727 (Francis) *; Mammoet Canada Eastern Ltd.,* [2019]; *O.L.R.D.,* No. 3641 (OLRB); *ATCO Electric Ltd. (Potter Grievance),* [2017] A.G.A.A. No. 7 (Smith), upheld on appeal in *Canadian Energy Workers' Assn. v. ATCO Electric Ltd.,* [2018] A.J. No. 401 (ACQB); *BC Hydro*, (2017) 131 C.L.A.S. 169 (Hall); *Canadian Pacific Railway Company,* (2014) CanLII 87068 (Schmidt); *Compass Mineral Canada Corp.,* (2016) 127 C.L.A.S. 286 (Surdykowski); *Crown Packaging Ltd.,* [2014] B.C.C.A.A.A. No. 43 (Dorsey); *Ebco Metal Finishing Ltd.,* [2004] B.C.C.A.A.A. No. 260 (Blasina); *Elk Valley Coal Corp. (Coster Grievance),*[2005] B.C.C.A.A.A. No. 50 (McPhillips); *Evraz Regina Steel,* (2014) 118 C.L.A.S. 323 (Stevenson); *Fording Coal Ltd. (Cryderman Grievance),* [2003] B.C.C.A.A.A. No. 189 (Devine); *International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers Association Inc. and Valard Construction LP,* 2016 NLTD (6) 1629; *Jacobs Industrial,* [2016] O.L.A.A. No. 7 (Albertyn); *Rio Tinto,* (2017), 132 C.L.A.S. 173; *Vancouver Drydock Co. (C.L. Grievance),* [2018] B.C.C.A.A.A. No. 34 (McPhillips); *Vancouver Shipyards Co. and UA Local 170 (Moore)*, (2005), 87 C.L.A.S. 241.

A review of these authorities with respect to both "post-incident" and "reasonable cause" testing is contained in my recent decision, issued on August 6, 2020, in a matter between these same parties dealing with a grievance involving another employee, Kevin Bohun, (the "Bohun Award") and that analysis will not be repeated here at any length.

In summary, it states that the rationale for reasonable cause testing and post-incident testing involve distinct elements which must form the focus of the analysis in each situation. With respect to post-incident testing specifically, it was concluded there is not a separate balancing of interest required as that has been accomplished by the elements that have been established. Nonetheless, an employer must, in making the decision to test in a post-incident situation, be cognizant that a drug and alcohol test constitutes a serious invasion of privacy and it must responsibly exercise its discretion in requiring such testing.

Prior to proceeding with a discussion of the appropriateness of a post-incident test in the present case, it is necessary to address the issue of "reasonable cause" testing, which has also been raised by the Employer in this matter. In my view, it is not applicable in the present circumstances for the following reasons. That issue initially arose for Mr. Bowden in respect of the Grievor's response to Question 7 on the Form where JS answered that he had not had used any alcohol or drugs and then added a comment that at least not that would impair his ability to

drive a fork lift. This, along with Mr. Bowden's observations about the Grievor's "agitation" and "pacing" during the interview, caused Mr. Bowden to be concerned. However, if reasonable cause was truly a line of legitimate concern at that time, Mr. Bowden should have followed up with the Grievor as to what he meant (e.g., he had a beer two nights before) and not left the issue hanging in the air. Moreover, if the Employer had wished to establish at the time a basis for inquiring about "reasonable cause", it should have engaged the separate Checklist which is to be used for that line of inquiry. As a result, the present case does not involve "reasonable cause" and this grievance will be viewed solely through the lens of post-incident testing.

In that respect, in *Weyerhaeuser Co. (Roberto Grievance), supra,* Arbitrator Sims identified the appropriate elements to consider in "post-incident" testing as follows:

1. The threshold level of the incident;
2. The degree of inquiry necessary;
3. The necessary link between the incident and the employee's situation.

In this present situation, it is the first and second elements which are at issue. It should be noted at the outset that the jurisprudence is clear that in addressing these types of issues, deference must be afforded management's decisions as they are the ones who must make these decisions often in complex and very time sensitive situations: *Interfor Acorn, supra; Elk Valley Edson, supra; Fording Coal, supra; Weyerhaeuser (Roberto), supra; Elk Valley Coal Ltd., supra; Vancouver Drydock Company Ltd.,* 186 L.A.C. (4th) 405 (Munroe); *Tolko Industries Ltd., supra; Vancouver Shipyards (Bohun), supra; Vancouver Drydock Ltd. (C.L. Grievance), supra; Vancouver Drydock (JE Grievance),*June 8, 2020 (Brown). That principle will be applied in the present circumstances.

With respect to the first substantive issue, that is, whether the incident was serious enough to justify testing, there have been a long line of authorities that have addressed what comprises a significant event. A number of those cases were reviewed in the *Bohun Award* issued last month between these parties. That decision summarizes those decisions as follows: at pp. 32 – 34:

> In ATCO Electric Ltd., supra, Arbitrator Smith stated, at paras. 50 and 52:
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> > 50 Turning to the threshold event requirement, the incident at issue in these proceedings did not meet the criteria for mandatory testing. Instead it was directed pursuant to the permissive portion of the Policy. That portion of the Policy allows testing in circumstances that had the potential to meet the

criteria permitting mandatory testing. Management concluded that the circumstances of this can case fell into that category. Mr. Mclaren described his reasoning in some detail in that regard. This accident involved incidental contact between a 65,000 pound large unwieldy vehicle with severely restricted visibility and a company truck as the result of backing up movement with no spotter. He confirmed on cross examination that what he remembered being told was that it was a congested area, the Nodwell needed to be moved, and the truck moved into its blind spot. Mclaren's view was that there was potential in the circumstances for there to be much more serious consequences. The panel agrees with his conclusion. While he may have been in error with respect to where the Nodwell was, there is no doubt the area was congested which is why the truck moved to where it did which put it into the Nodwell's blind spot – it was moving to allow another vehicle to pass on the narrow access road. The Nodwell is clearly an extremely large vehicle with limited visibility capable of inflicting extreme damage and injury if not moved safely. The fact that it did not in this case was more good luck then good planning. This incident fits into the Employer's description of near misses in the *"Welcome Back 2015 Safety Campaign"* brochure handed out to employees when they returned to work early in 2015. While this in the result was a small incident, it had a reasonable potential to result in serious harm. It meets the threshold contemplated in the Policy to permit testing.

…

52 On balance, we have concluded that the circumstances of this accident take it out of the trivial category. While the actual damage was minimal and no injuries occurred, it involved two company vehicles, one of which was large, unwieldy, with severely restricted visibility.

As a further example, in *Weyerhaeuser I, supra,* Arbitrator Sims stated, at para. 176:

> 176 I agree with this approach. In my view the amount of the damage or the magnitude of the incident must remain a factor to be weighed in determining whether there is sufficient cause to justify overriding the employee's privacy rights through mandatory testing. This can include the near miss concept which, almost by definition, involves no damage, but there still has to be a sufficient gravity to the event. Any near miss must involve a realistic conclusion after a thorough investigation that serious damage almost occurred.

Similarly, in *Elk Valley Coal, supra,* Arbitrator Lanyon observed at para. 26:

> 26 Nevertheless, as stated by Weiss, an incident does not have to involve a dangerous occurrence in order to raise a safety concern. Both Arbitrators Hope, Q.C. and Love state that an employee's condition is relevant in the investigation of a "safety related incident" or in the investigation of a "safety event". The definition of a "significant event" also includes the "unusual risk of such an occurrence". This only makes common sense. Good fortune or good luck as in the case of a "near miss" should not be the measure of any policy concerning safety.

Finally, in *Fording Coal Ltd., supra,* Arbitrator Love stated, at paras. 41 – 42:

> 41 The Union argued that the accident was minor, causing a minor amount of damage, and could not be viewed as a significant event justifying a urine sample from the Grievor. In my view, the accident in this case constitutes a significant event, because there was some damage to the company

> property. Further, given the design of the forklift, which was operated from a standing position, without any back support or restraining device, there was some risk of injury if Mr. Brewer was ejected from the machine. Fortunately, he was not ejected and he did not suffer any injury. In my view there is no requirement to show a "substantial degree of harm" or "damage beyond a threshold" before a reasonable line of inquiry is established. In my view, there is no need for the Employer to establish "damage to property or person" beyond a threshold risk. The policy clearly states fatalities, injuries to person or property, and significant environmental damage are significant events. Also significant events are actions which contribute to an "unusual risk" of the event occurring.
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> 42 For the reasons expressed above, this incident falls within the definition of significant event in the policy. In my view, separate and apart from the definition in the policy this was a significant event or a "critical incident". A piece of equipment used in a mine operation, which goes out of control in an environment where the operator could be injured or other workers could be present and injured is significant. The degree of harm caused in this particular incident was to the lower end of the scale as there was no personal injury. There was, however, a potential for injury. The event could have been more significant if a personal injury or fatality ensued. I do not read the cases on significant event as requiring a "tragedy" before the right to test an employee is engaged.

Very helpfully for the present dispute, subsequent to the *Bohun* grievance being argued, Arbitrator Sims issued a decision in *Interfor Acorn, supra,* and in that Award he undertakes a lengthy analysis of the legal development of what constitutes a significant event (paragraphs 63 – 91). He cites, with approval, the *Elk Valley (Coster)* decision in which it was held that the term "significant event" requires more than just an incident occurring which needs to be investigated but that there must also be a level of some consequence in order to justify a drug and alcohol test which constitutes a serious invasion of privacy.

After a lengthy review of a number of the other authorities, Arbitrator Sims noted the requirement that there be a significant event, as opposed to a minor occurrence, is a consequence of the need to balance an individual's right to privacy with the need for a safe work environment for all employees. Arbitrator Sims observed, at para. 81, that "there is a "need for some threshold level of risk or harm or both to ensure proportionality". He also concluded, at para. 144, that "the incident must be special, remarkable, consequential, important. It needs not be catastrophic, but it needs to be substantial. This is a test significantly above 'not trivial' or 'inconsequential'".

In my view, this requirement for the event to be a serious one is to avoid the result that testing would become commonplace and always could be justified once any safety incident had

occurred. That would lead to testing for even trivial incidents and completely eliminate the requirement of a true balancing of interest between individual privacy rights and the need for safety. As has been observed in other authorities, it would inevitably lead to testing in every case.

With regard to what does constitute a "Significant Event", the Seaspan Policy states the following in Section 3.3.2:

> "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.

Here, it is subsection (b) which applies and, therefore, it must be determined whether there was a "near miss" of appropriate significance on July 25, 2019 such that there was with significant potential for more serious consequences.

In *Interfor Acorn, supra,* Arbitrator Sims addressed the concept of "near miss" as follows, at paras. 117 – 121:

> Near Miss
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> 117 It is well established that incidents must be looked at, and decisions to test made, on a case by case basis. Using actual damage, assessed for its dollar value alone, can be too restrictive. In assessing an incident, management is entitled, reasonably and objectively, to assess the degree of risk involved.
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> 118 Arbitrator Stevenson, in *Evraz, supra* addressed the question of a near miss:
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>> 56 In my opinion it was not reasonable for Mr. Kish to have concluded that there was a "near miss" in these circumstances based on his suggestion that there might have been a pedestrian in the area who could have been injured. I agree with Arbitrator Sims that "… any near miss must involve a realistic conclusion that serious damage almost occurred". *Weyerhaeuser (Roberto Grievance), supra.* There is no evidence in the circumstances of this matter (backed onto the rail cracking the tail light with no other persons present) that could reasonably or rationally cause me to conclude that there was a "near miss" such as to be a "significant work related incident" which would reasonably require that the Employer's obligation to provide a safe workplace ought to outweigh the Grievor's right to privacy. It was inappropriate and unreasonable to request the test on the basis that there was a "near miss". *Evraz, (supra),* para. 54-56

> 119 This is the type of "risk assessment" referred to by Arbitrator Tettensor, where one worker holding a heavy piece of equipment fell 8 or 9 feet onto another who was working at the bottom of a trench.
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> > 13 A Health and Safety – Injury/Illness Detail Report (Exhibit 28) was prepared by a Health and Safety Advisor as part of a process to determine root causes of incidents and prevent further accidents. It was approved by Witwicki. It describes the severity of the incident as "minor". Witwicki said this was because there was no injury. The "risk rank" is IV, the highest ranking, because the consequences could have been severe.
> > *Epcor Utilities, supra* at para. 13
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> 120 However, it is too easy to paint an "it could have happened" picture and by doing so justify testing in virtually any situation. I agree with the following observation of Arbitrator Francis:
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> > Similarly, "worst case scenario" or "remote possibility" considerations will rarely have any place in the inquiry which must be undertaken. Otherwise it all too easily becomes testing in every case by another name.
> > *Weyerhaeuser (Kelly)* at p. 62.
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> 121 See also: *Compass Minerals, supra* at p. 65.

With respect to the present incident involving JS and DW, there are some details of the incident which were agreed upon. For instance, it is accepted that the Grievor did not honk his horn as he entered the SOC 40 building, although it must be noted that there is nothing mandatory with respect to that requirement, albeit it is considered a "best practice". As well, there is no evidence here of excessive speed or careless maneuvering and/or loss of control of the fork lift on the part of the Grievor. It is also generally agreed that DW was within 3 to 5 feet of the load at the time DW became aware of the fork lift being in the area. Finally, it is common ground that the Grievor did yell to DW "hey, behind you" to alert him to his presence.

There is, however, disagreement on other important aspects of the incident. The first involves the location where DW was standing at the time. JS and DW adamantly disagree on whether DW was in the direct line of the fork lift or whether the work bench on which he was working was off to the right and slightly in a recess. The second disagreement relates to whether there was a yellow tool box directly in front of the fork lift, at the location where DW claims he was actually standing. The final important discrepancy is whether the Grievor had started to actually engage with the load before DW had moved away. DW testified that the forks were under the load before the Grievor yelled to him; the Grievor claims he yelled to DW before he went under the load. (It should be observed that the Grievor's account seems to be confirmed in the Intelex Form completed by management a few days later.)

Obviously, these events occurred just over a year ago and it is very difficult to tell whether these differences result from a genuine failure of recall on the part of the Grievor and DW or from an attempt to mislead. Obviously, the Grievor is not a disinterested individual and has something to lose in the circumstances. However, it is also clear from the evidence that there was some prior animosity between the two individuals and DW had been genuinely startled when the Grievor first called out to him. It is not readily apparent from the evidence whether it was that sudden surprise or an actual feeling of danger that made DW angry and caused him to directly confront the Grievor. In any event, the discussion between them that followed deteriorated quickly and further served to elevate the level of animosity between them.

As well, it is apparent that DW was particularly offended by the Grievor's perceived lack of remorse and his failure to offer what DW considered a sincere apology. Indeed, the evidence of DW is that, if the Grievor had apologized properly either at 11:20 a.m. or 12:00 after lunch when others were present, this would have been the end of the matter. That response indicates that it may not have been the seriousness of the incident itself which was DW's primary concern but rather the Grievor's dismissive attitude toward him. That, of course, bring into question the degree of severity DW actually perceived the incident to be.

Some of these issues could have been resolved by a more thorough investigation, of which more will also be said later. For example, it is very unfortunate that Mr. Bowden did not visit the scene itself when he was made aware of the incident around 12:20 p.m. This was within the hour of the event and he could have met with each of the employees separately or together and had them describe in detail what had occurred. At the hearing, both DW and JS provided drawings of what they recalled about the scene and it would have been appropriate for them to have been asked to do so at that time. If that had occurred, the investigation could have been focused on a more detailed recall of the participants rather than relying on a general discussion in the yard about what had transpired. Moreover, pictures could have been taken at the scene, in which case at least the issues of where the work bench at which DW had been standing and where the yellow tool box was located would have been definitively established.

This information would have allowed the Employer to make a more objective and informed assessment at the time of the actual risk inherent in the incident. It is also evident from the testimony of Mr. Bowden and the Grievor that DW's version of the events was never put

directly to the Grievor so that he had an opportunity to address the specifics of the nature of the complaint against him. At the time he was simply asked to offer his own version of events.

A final consideration related to whether this was believed to be such a “significant event” that it would lead to a proper demand for a drug and alcohol test, is that Mr. Bowden appears to have not been at all concerned with the Grievor’s ability to continue to drive the fork lift in that he permitted JS to continue to operate the equipment for two additional hours between 12:30 p.m. and the end of his shift at 2:30 p.m.

On that basis of the above, it can be concluded that DW may have been right to be concerned about the proximity of the fork lift to him and the Employer for being concerned that the Grievor was complacent about his fork lift driving skills. However, it has not been demonstrated that this incident was serious enough to raise it to the level of such a significant event that it justified an invasion of the Grievor’s privacy. Based on the evidence that is available, the Employer has not established, on a balance of probabilities, that this event created a major risk of injury and met the requirement for constituting a “significant event” under Seaspan’s Drug and Alcohol Policy.

However, even if that threshold requirement of this being a “significant event” had been made out in this case, there also would have been further difficulties with the Employer’s decision to proceed with a drug and alcohol test. As indicated above, another consideration in cases of post-incident testing is whether the Employer’s degree of inquiry was sufficient in the circumstances. The jurisprudence is clear that the requirement for an objective and thorough investigation leading to a reasoned decision to test is a critical component in the balancing of the competing interests of and individual’s privacy and safety in the workplace: *Interfor Acorn, supra; Compass Minerals Canada Corp., supra.*

In the present case, there are a number of concerns with respect to the investigation, which may be somewhat understandable as this was, for Mr. Bowden, one of the first cases under the Seaspan Policy. First, as has already been canvassed, there was a failure here, during the initial investigation, to establish certain facts at the scene which would have greatly aided in the determination of whether this incident was a significant enough one to warrant drug and alcohol testing.

Moreover, there is a concern about the content of the discussions among Mr. Bowden and the other managers in the early afternoon of July 25 and then later between Mr. Bowden and Mr.

Henderson after the Checklist had been completed. In both cases, there appears to have been consideration of extraneous factors, such as previous incidents involving the Grievor's driving of the fork lift, the fact that JS was "unapologetic and confrontational" and the perception that JS had refused to accept responsibility. Based on the testimony at the hearing, these clearly formed part of the conclusion that this incident would be characterized as a "near miss". In my view, that was not appropriate because, while it may be that there was a valid basis to discuss those issues in the context of whether discipline was appropriate and/or further training was needed, these are not constituent elements of an assessment of the severity of a particular incident and whether that incident constituted a "near miss".

Finally, there are concerns with the application of the Checklist during the investigation. The first, and minor issue, is that Mr. Bowden misunderstood the application of one of the questions themselves and recorded an incorrect conclusion with respect to Condition #1.

Second, there was apparently some error in at least one of the recordings of the Grievor's responses. Specifically, the notes indicate in the Grievor's response to Question 5 that he stated there had been a "pinch point" but JS testified he has never used that term in regard to this incident and Mr. Bowden agreed in his testimony that might very well have been the case.

Third, there was a failure to appropriately follow up and ask for clarification of some of the responses from the Grievor in order to be certain the Employer had a complete understanding of the Grievor's view of the events. For example, in his response to Question 5, the Grievor stated that he would do "exactly the same thing again and it was not out of the ordinary". That issue was not pursued by Mr. Bowden with respect to what precisely JS thought were the proper protocols to be observed. If that had been done, it might have uncovered misconceptions on the part of JS of what was expected and indicate whether there was a need for further training for the Grievor.

That failure to inquire becomes even more problematic with respect to Question 7 where the Grievor's added comment about not consuming any alcohol or drugs that "would affect his ability to drive a fork lift" caused justifiable concern on the part of Mr. Bowden. However, the Grievor was not offered an opportunity to offer a more complete explanation of what he meant by that remark. Yet, that response formed one of the reasons, from the perspective of Mr. Bowden and Mr. Henderson, to justify a drug and alcohol test.

As a result of those factors, it is concluded the investigation undertaken by the Employer here was not sufficient to establish a drug and alcohol test as being a reasonable line of inquiry.

In summary then, it has been concluded, on the evidence presented, that it has not been established in the present case that there was a "significant event" and, further, the investigation undertaken by the Employer in this situation was flawed.

AWARD:

For all of the above reasons, the threshold question of whether the drug and alcohol test requested of the Grievor on July 25, 2019 was appropriate is answered in the negative. To that extent, the grievance of the Union is upheld.

I will remain seized to deal with any matters arising from the interpretation or implementation of the terms of this Award. As well, the parties can determine whether further issues need to be adjudicated and if so, further hearing dates will be set.

Dated this 26th day of August, 2020.

"David C. McPhillips"

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David C. McPhillips
Arbitrator