IN THE MATTER OF: A grievance filed on behalf of R. C. dated August 16, 2019 alleging the grievor was drug tested and disciplined without cause, contrary to the collective agreement.

AND IN THE MATTER OF: An arbitration under the *Labour Relations Code*.

BETWEEN:

VANCOUVER SHIPYARDS CO. LTD,

Employer,

AND

MARINE AND SHIPBUILDERS, LOCAL 506,

Union.

AWARD

Appearances

Chris Leenheer, Counsel for the Employer
Tamara Ramusovic and Daniel McBain, Counsel for the Union

Date and place of hearing

By video conference: January 18, 19, 31; April 25, 2022.
Written submissions: Employer June 10, 2022; Union June 30, 2022;
No Employer Reply.

Arbitrator

Arne Peltz

Date of award

October 24, 2022

Introduction

1. The Employer (also referred to as "the Company") is part of the Seaspan ULC group of companies and operates a shipyard in Vancouver where it repairs, maintains and constructs marine vessels. The work site is a safety sensitive environment. On May 30, 2019, there was a collision between a modular transporter and a set of scaffold stairs at the edge of the dock adjacent to a barge. The grievor was serving as the spotter while another employee drove the transporter. There was only nominal property damage and no personal injury. In accordance with its 2018 Substance Use Policy ("the Policy" or "the 2018 Policy", Ex. 4-2), the Employer demanded that the grievor submit to drug and alcohol testing (breathalyzer, urine and oral fluid).

2. The grievor agreed and the urine test was positive for cannabis metabolite (1,623 ng/mL). The oral fluid (swab) test was deemed negative because the Policy does not set an oral fluid threshold, although the laboratory reported the test as positive (9 ng/mL). The breathalyzer reading was zero.

3. The positive urine test constituted a breach of the Policy. During a post-incident interview, the grievor readily admitted to his supervisor that he smoked marijuana at 8 pm the night prior to his shift.

4. The Policy does not prohibit the use of marijuana during off hours and provides no cut-off time for use of alcohol or cannabis before beginning a shift.

5. Because of the positive test, the grievor was required by the Employer to undergo an Independent Medical Evaluation ("IME") and agree to random substance testing for a period of 12 months. In keeping with standard practice, he was also suspended for 10 days without pay.

6. The IME issued on June 25, 2019 reported that the grievor was a regular marijuana user but concluded he did not have a Substance Use Disorder. No opinion was stated whether the grievor was impaired on the day of the incident. No treatment was recommended. However, the IME declared the grievor was not fit for duty due to the continued presence of cannabis metabolite in his biological sample. He returned to work on July 26, 2019, once the metabolite substantially cleared his system. The grievor stopped smoking marijuana and successfully completed the monitoring program.

7. The Union grieved on August 16, 2019. By agreement, the issues were bifurcated and Phase 1 of the hearing was held in October 2020. In an interim award issued on December 29, 2020, I held that the Employer was justified in requiring a substance test because "impairment was a reasonable line of inquiry on the present facts": [2020] B.C.C.A.A.A. No. 149 (at para. 142) (hereafter "the *Interim Award*").

8. The hearing resumed in January 2022 to determine the remaining issues, namely, whether the Employer was justified in requiring an IME and random testing as a condition for return to work. Also at issue was justification for the 10-day suspension.

9. At the Phase 2 hearing, the Employer defended both the IME and random monitoring as elements of a reasonable risk management regime in a safety sensitive work environment. It was never alleged that the grievor was impaired while at work. The science is unsettled and currently there is no accepted chemical test for marijuana impairment. The best approach at this stage, said the Employer, is to test for exposure. In effect, this requires employees to limit their use of drugs. The Employer insisted its practice was necessary to reduce the *risk* of employee impairment on the job due to proximate use of impairing substances. Great care was

taken to protect employee privacy and confidentiality as much as possible in the process.

10. Ultimately, the Employer conceded that an automatic 10-day suspension was not sustainable under the arbitral jurisprudence, but it argued that 10 days should still be upheld based on the grievor's individual circumstances.

11. For its part, the Union said that the positive urine test proved nothing except the use of cannabis sometime in the previous weeks or months. This amounted to lifestyle monitoring with no workplace nexus. It could not be the foundation for a sensible risk management regime. Further, the Employer's rigid approach in demanding an IME and a burdensome monitoring program for a full year could not be justified. In requiring an IME, employers must exercise case by case discretion and adopt the least restrictive means of obtaining necessary personal information. There were alternatives the Employer could have pursued to assure itself that the grievor was fit for work and did not pose a safety risk in the workplace. In sum, the Employer failed to respect the grievor's privacy rights.

12. Concerning the disciplinary penalty, a 10-day suspension was excessive, according to the Union. At most the grievor should have received a warning. Moreover, the Employer never notified the grievor of its policies and the relevant testing threshold, rendering them unenforceable pursuant to *KVP* principles.

13. The Union asked that the grievor be made whole, including an award of damages for breach of privacy rights.

Phase 2 evidence

Witnesses

14. The Employer called five witnesses during Phase 2. Jerry Dardengo ("Dardengo") is the Manager of Employee Relations based in Victoria and has 20 years of service with Seaspan. Diane Richards ("Richards") joined Seaspan in 2015 as Director of Employee Relations and retired in August 2021. Dardengo and Richards explained the Employer's rationale for drug testing under the Policy and its approach to the use of IME's, random monitoring and discipline. Tina Craig ("Craig") is the Manager of Employee Wellness and Ability Management with five years at the Company and prior experience in disability management. She arranged the grievor's IME and described how the Employer handles personal information and return to work.

15. Dr. Máire Durnin-Goodman ("Durnin-Goodman") holds a medical degree (University of Calgary, 1991) and practiced family medicine until 2008. Since then, she has worked full time in addiction medicine and holds related certifications and memberships. She is a clinical instructor at the University of British Columbia. In addition, she is a director of Precision Monitoring Services, which offers employment related urine drug screen monitoring for individuals with addiction disorders. At the request of the Employer, Durnin-Goodman examined the grievor in June 2019 and prepared an IME. She was not proffered as an expert witness but testified as to her methodology and responded to criticism from the Union's expert.

16. Dr. Melissa Snider-Adler ("Snider-Adler") holds a medical degree (University of Western Ontario, 1997) and since then has practiced as a family physician and addiction treatment physician. She is recognized by the American Board of Addiction Medicine and the Canadian College of Family Physicians (Certification

of Competency in Addiction Medicine), and also as a medical review officer. She has provided expert opinions and testimony before arbitration boards and courts in a variety of industries.

17. Currently she practices in addiction treatment at an Oshawa, Ontario clinic. She is also the Chief Medical Review Officer at DriverCheck Inc., a Company that provides alcohol and drug testing services, case management and staff training for employers. She is an Assistant Professor in the Department of Family Medicine, Queen's University.

18. Snider-Adler prepared a report dated December 16, 2021 (Ex. 12, Tab 1) on substance use in safety sensitive workplaces. She also presented a Reply Report dated December 27, 2021 (Ex. 12, Tab 2) after reviewing the Union's expert evidence. She testified for the Employer as an expert witness without objection, subject to argument and weight.

19. The Union called two witnesses – the grievor and Dr. Evan Wood ("Wood"), Professor of Medicine, University of British Columbia.

20. Wood holds a medical degree (University of Calgary, 2007) and a PhD in Clinical Epidemiology (University of British Columbia, 2003). He undertook a post-doctoral fellowship focussing on substance use and addiction treatment for HIV/AIDS patients. He is certified to practice in British Columbia (Internal Medicine) and is also a Fellow of the American Board of Addiction Medicine. From 2014-2017, he was Medical Director for Addiction Services at Vancouver Coastal Health. From 2017-2020, he was director of the British Columbia Centre on Substance Abuse.

21. Currently Wood holds a Tier 1 Canada Research Chair in Addiction Medicine. He has published over 500 peer-reviewed scientific articles on substance use (lead author on 96 publications) and is recognized as an international authority in this area. He regularly serves as a peer reviewer for scholarly work in his field. As part of his clinical practice, he routinely conducts independent medical evaluations (about 30 per year for both unions and employers), exclusively in safety sensitive occupations. He also works one week out of four in a 24-bed Vancouver Coastal Health detox centre.

22. Wood prepared a report dated December 16, 2021 (Ex. 11, Tab 1) on the significance of marijuana metabolites in biological fluid and reviewed the IME submitted by Durnin-Goodman. He also prepared a Supplemental Report dated January 18, 2021 (Ex. 11, Tab 3) correcting some of the assumed facts but confirming his original opinion. He testified as an expert witness without objection, subject to argument and weight.

23. The factual narrative was essentially undisputed except as may be noted. The IME recommendations were contested by the Union. The expert witnesses expressed diametrically opposed opinions on much of the subject matter covered in their evidence, in particular the question of residual cognitive impairment due to cannabis use. However, there were some areas of concurrence in the expert testimony.

The Substance Use Policy

24. The Policy was adopted effective September 17, 2018 and applies to all Seaspan employees and service providers. The stated purposes of the Policy (Section 1.0) include the following: provide employees with a workplace free of drugs and alcohol, provide guidance to employees who seek help with a dependency

problem, establish procedures for testing and monitoring employees in safety sensitive positions, and provide guidance when violations are suspected and validated.

25. For purposes of the Policy, an IME is defined as "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 evaluation must be unbiased, accurate and medically sound.

26. An Addictions Medicine Expert (AME) is defined as "a licensed physician who has received training specific to substance abuse disorders and addictions disease. He or she has knowledge of and clinical experience in the diagnosis and treatment of substance abuse-related disorders and has an understanding of the safety implications of substance use and abuse."

27. Under the Policy, a Positive Test Result is defined as a drug or alcohol concentration level equal to or in excess of that set out in Section 3.7.4 and includes a refusal to be tested.

28. Section 3.2 states as follows:

> 3.2 POLICY STATEMENT
>
> 3.2.1 The possession, use, consumption, manufacturing, offering for sale, sale, or distribution of Alcohol or Drugs, including cannabis, on Company premises (including vessels) or during working hours, is prohibited. The use of prescription drugs prescribed by a qualified medical practitioner is permissible provided that the Employee's ability to perform his/her duties is not impaired and that the dosage instructions and cautions are adhered to.
>
> 3.2.2 No Employee … shall report to, return to, or engage in any work for the Company under the influence of or affected by the use of Alcohol or Drugs.

> 3.2.3 Any employee whose performance may be impaired for any reason, including ingestion of prescription Drugs, must notify their Supervisor prior to breaching this Policy.
>
> 3.2.4 All Employees … shall cooperate with an investigation into any violation of this Policy, which includes any request to participate in Substance Testing and evaluation for substance use/abuse/dependence when it is required under the terms of this Policy. …

29. The Policy requires that, as a condition of employment, an employee who has or suspects they may have an alcohol or drug dependency problem must disclose it to a designated medical authority. This includes dependency problems in the past six years. Disclosure must be made before breaching the Policy (Section 3.4). Alcohol and drug dependencies are recognized as treatable illnesses (Section 3.5).

30. Section 3.7 of the Policy deals with testing results. Under section 3.7.1 (Privacy of Records), substance test results must not be circulated beyond the testing monitor, the AME and the testing service. If there is a relapse or other non-compliance, the Manager, Employee Wellness & Ability Management will be notified so the employee may be removed from safety sensitive service. Specimens will be collected "with concern for each Employee's personal privacy, dignity and confidentiality" (Section 3.7.3). Drug testing will be administered by urine testing and saliva (oral fluid) testing and analysis.

31. In each instance of drug testing, there is an initial Screening Test to determine the possible presence of drugs and a subsequent Confirmation Test to verify the positive screening results. Section 3.7.4 provides that for Marijuana/Cannabis Metabolites, the Screening concentration level is 50 ng/mL. The Confirmation Test level for a positive test result is 15 ng/mL or above. As written, the Screening and Confirmation concentration chart does not reference levels of THC as measured by oral fluid testing. The evidence indicated that different scales are used for urine and oral fluid testing.

32. The Policy allows for discipline in the event of a violation (Section 3.7.5.1): "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."

33. If an employee receives a positive test result, they may be prohibited from returning to work until a number of conditions are satisfied (Section 3.7.5.2), including: (a) attending for an IME (absence with pay until the IME is complete), (b) certification by the AME that the employee can safely return to duty, (c) the employee agrees in writing to continue any treatment, counselling or rehabilitation as prescribed by the AME, and (d) any disciplinary measures imposed on the employee are fulfilled.

34. In addition, Section 3.7.5.3 provides as follows:

> Other Conditions of Continuing Employment
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> Where an Employee has violated this Policy, in appropriate circumstances, the Company may impose conditions on the future employment of such Employee, including but not limited to:
>
> (a) monitoring (including body fluid/breath Substance Testing) by a qualified Relapse Prevention Monitor for a period of time.
>
> (b) successful completion of an IME, completion of the Treatment Program determined from the IME, and signed agreement to participate in a Relapse Prevention Monitoring Program.

35. The Policy defines a Relapse Prevention Monitoring Agreement as "An agreement to support the continued recovery of an Employee with a substance use/abuse disorder" (Section 3.1).

36. Section 3.8 of the Policy obligates supervisors to direct substance testing if they have reasonable cause to believe an employee may be impaired or their performance may be affected by drugs or alcohol. A supervisor must not knowingly permit such an employee to remain in the workplace (Section 3.8).

The Employer's Privacy Policy

37. The purpose of the Privacy Policy (April 1, 2017) (Ex. 4-5) is to comply with legislative requirements and to protect the privacy of personal information in the Company's custody and control. The Company will collect, use and disclose employee personal information that is reasonably required for purposes related to establishing, managing and terminating an employment relationship with Seaspan (Section 3.2.2.1). Internal access to personal information by staff is permitted only on a need to know basis and is limited to staff members who reasonably require such access to perform their authorized duties (Section 3.2.5.2).

Employer evidence

Jerry Dardengo

38. Dardengo testified that the Employer is now considering options regarding safe return to work after testing. This was precipitated by an arbitration award in another case between the parties (the *P.Q. Grievance*, *infra*). At the time of the present grievance, employees were sent home with pay after a non-negative test. If the lab confirmed a positive test result (the Confirmation Test), employees were referred for an IME in every case. Upon receipt of the IME report, Craig would advise whether or not there were addiction or substance use concerns, and whether treatment was recommended. The Company would follow the IME recommendations including with respect to monitoring.

39. As for discipline, Dardengo said that the Employer viewed a positive test result as a serious violation and typically imposed a 10-day suspension. No employee was ever terminated solely for a breach of the Policy. In the present case, the grievor was required to undergo monitoring to ensure there were no further breaches. The intent was to keep everyone safe. Dardengo said he personally had no involvement in the handling of this matter although it may have been discussed at the weekly meeting.

40. Dardengo confirmed that the grievor signed a form on November 2, 2016 (Confirmation of Understanding of the Seaspan ULC Substance Use Policy, Ex. 4-7) acknowledging he received and read the Seaspan Substance Use Policy. The form has a space to enter the date of the Policy but on the grievor's form, the Policy is undated and the space is blank. The form states that failure to abide by the terms of the Policy may result in disciplinary action. Dardengo was unsure but testified that probably the February 2012 version of Policy was the one received by the grievor upon hiring in 2016 (Ex. 4-3). The 2012 Policy included Screening and Confirmation Concentration levels for marijuana metabolites of 50 ng/mL and 15 ng/mL, the same as the 2018 Policy. It also provided that the Employer may require an IME and monitoring after a violation.

41. Like the current Policy, the 2012 version prohibited the use or possession of marijuana on Company premises and prohibited working under the influence. He could not say whether there was another revision before November 2016. There was no reference to off-hours use or cut-off times. The 2012 Policy included the same Marijuana Metabolite threshold levels for Screening (50 ng/mL) and Confirmation (15 ng/mL) as the 2018 Policy. Discipline was indicated for a violation depending on the circumstances of each case. Attendance for an IME and body fluid monitoring were both listed as possible conditions for return to work after a violation.

42. Dardengo confirmed that the Seaspan Vancouver Shipyards Orientation Booklet (Ex. 4-4, revised June 2015, "the Orientation Booklet") was mostly about health and safety issues. On reflection, he stated, probably *this* was the document provided to the grievor when he was hired in 2016. There was a Substance Use Policy included in the orientation booklet (at p. 55) with a section entitled "Evaluation for Substance Use/Abuse/Dependence" (at p. 57). However, there was no reference to testing threshold levels, only the following:

> Where circumstances suggest that an employee has reported to work impaired by alcohol or drugs or where an accident, a near miss or a report of an employee's dangerous behaviour suggests the possibility that the involved employee was impaired by alcohol or drugs, a confidential independent medical evaluation including body fluid and breath test may be conducted as soon as is reasonably practicable.

43. Dardengo was not aware of any orientation booklet containing the 2018 Policy. He personally has not been trained on the different testing thresholds or the distinction between urine and oral fluid thresholds in drug testing. However, he said the Employer is constantly providing supervisors with information, training and checklists to identify signs of impairment in the workplace. He agreed that the Employer does not prohibit recreational cannabis use unless it affects performance in the workplace. There are no temporal cut-offs for off-hours use of marijuana although Dardengo said he was aware that some industries do impose cut-offs.

Diane Richards

44. Richards testified that the purpose of the Policy is safety. All Company operations are safety sensitive. The Policy is designed to ensure that employees do not report to work under the influence of or affected by alcohol or drugs. These terms have been in place since 2012 with some updating when cannabis was legalized. There were no changes made between 2012 and 2018. She confirmed that no employee has been terminated for breaching the Policy.

45. In practice, said Richards, an IME was mandatory after a positive test. The report would go to Craig and no one else at the Company. Craig would advise Employee Relations as to the findings and next steps. The main issue was fitness for work. Richards said she was peripheral in the present case. She was notified as events unfolded and reviewed the conditions for return to work. She was not aware of the precise testing numbers. However, the final decision was her responsibility and she stood by it.

46. Asked why monitoring was required in the present case, Richards answered that the grievor was affected by or under the influence of a drug, namely THC. It was necessary to ensure that when he returned to work, he did not continue to use marijuana and be subject to the influence of a drug. In practical terms, this meant he had to test below 15 ng/mL for THC.

47. Similarly, the 10-day suspension was part of a safety policy. Legislation requires the Employer to maintain a safe workplace and the Company takes this obligation seriously. An employee who violates the Policy puts other employees at risk and deserves the 10-day suspension.

48. Under cross examination, Richards retracted the assertion that the grievor was affected by THC while at work. At most, she conceded, the Employer could say that the grievor tested above the Confirmation threshold.

49. Richards also admitted she was unaware of the difference between a result of 15 ng/mL for urine as opposed to oral fluid testing. She was not trained on how long substances remain in the body. She said she was not an expert and employees were not expected to be experts. However, employees were expected to know the thresholds and comply. She agreed that the Policy does not address the timing of an

employee's last use of marijuana prior to a work shift. The Employer did not expect recreational users to have themselves regularly tested.

50. Richards said she has seen the Orientation Booklet and knew it was given to new employees between 2015 and 2021, but she was not familiar with the substance use policy included in the booklet.

51. It was put to Richards that the grievor maintains he never received the 2018 Policy. She responded that it was not distributed to employees. However, it was discussed with the Union prior to implementing it and the Union was aware of the details. A draft copy was provided. There was discussion about it at Union-Management meetings, she said. When discipline was imposed on the grievor, the Employer did not ask whether the grievor knew about the requirements of the Policy. His personnel file was not reviewed but Richards testified she would have Inquired whether the grievor had any prior discipline, which he did not. There was internal correspondence in the grievor's file that was highly complimentary regarding his work performance (Ex. 4-28) but Richards did not see it. "It was a safety violation," she said.

52. Richards had not read the IME and was not aware of the grievor's pattern of marijuana use or the actual test readings. She knew the grievor returned to work and subsequently tested positive again and was permitted to continue working. She explained that the grievor tested slightly above the cut-off so he was told to get another test, and later his levels were below the threshold.

53. Richards confirmed the Employer's Privacy Policy (Ex. 4-5) dated April 1, 2017. It reflects the Employer's legal obligations and she was involved in drafting it.

Tina Craig

54. Craig testified that she receives the results of drug and alcohol testing on behalf of the Employer. DriverCheck does the testing on site. The immediate result shows as either negative or non-negative. If negative, the employee returns to work but if it is non-negative, the employee leaves work and awaits the lab result. Alliance Testing receives the sample and provides the definitive result to Craig.

55. When the Confirmation Test is positive, Craig organizes a meeting with the employee and their supervisor to review the situation. By Company policy, a positive test always means the employee must attend for an IME. Craig makes the arrangements and receives the IME report. She reviews it and gives a summary to Dardengo. However, no one except Craig sees the IME report. The key question is whether the employee has been cleared or has been diagnosed with a disorder.

56. In the case of a diagnosis, she looks at the recommendation for treatment. Even if there is no disorder, what are the recommended restrictions? A period of monitoring is directed when there has been a breach of the Policy. Craig receives monthly reports from the monitor to ensure compliance.

57. In the grievor's case, the on-site test conducted May 30, 2019 (Ex. 4-11) showed zero for alcohol and inconclusive for cannabis. Craig said that typically the Company does not get a copy. The lab report for oral fluid dated June 1, 2019 showed parent drug THC at 9 ng/mL with lab cut-offs stated as 4 ng/mL and 2 ng/mL. The lab reported this as a positive result. The urine test result for marijuana metabolite was 1,623 ng/mL and also positive, with cut-offs stated as 50 ng/mL and 15 ng/mL.

58. Craig immediately booked an IME with one of the physicians on the Company's unilaterally created list of 3-4 addiction specialists. On June 7, 2019, she wrote to Durnin-Goodman (Ex. 4-13) to provide background on the grievor and the transporter accident. Craig made the following request: "The Company would like you to assess [the grievor] and in your professional opinion determine whether he requires residential treatment, or whether he is fit for duty. If [the grievor] is not fit for work in his safety sensitive position at Vancouver Shipyards, would you please outline appropriate treatment recommendations along with a prognosis for return to work." The letter ended by stating: "Ultimately we are looking for assistance in a treatment plan to allow a safe and successful return to work for this employee."

59. The grievor was examined on June 11, 2019, four days later. The IME report dated June 25, 2019 (Ex. 4-17) was sent to Craig on June 27, 2019 confirming there was no addiction but stating the grievor was unfit for work due to the continued presence of metabolites in his system. Craig notified Richards and the HR advisor of these results (Ex. 4-16) but did not share the report itself or any other details, except that the drug in question was marijuana. Only the employee gets a copy of the IME. She added that the grievor had been calling her daily. Craig testified that the grievor didn't understand the on-site results and was trying to do his own research about the effects of marijuana. He told Craig that he had never been trained on any of this.

60. The IME examination lasted about four hours and included a comprehensive history, physical exam, standard addictions interview, interview of a co-worker and a former supervisor of the grievor, a psychosocial interview, PharmaNet profile, lab tests, and self-administered questionnaires and screening tests. The grievor told Durnin-Goodman that he used marijuana the night before the accident but did not

feel impaired at work. He reported consuming marijuana 3-4 times weekly, usually around 8 pm, and usually smoking one joint. He said an ounce would last him almost a month. He has used consistently since age 15. He used marijuana to relax and for social purposes. He never used before work. As part of the IME, the grievor was given a urine drug test and was positive for THC (996 ng/mL, cut-off 10 ng/mL) (at p. 18). He told Durnin-Goodman he had last used marijuana three days before the IME session.

61. The grievor told Durnin-Goodman he was not aware that using marijuana the night before work might result in impairment the next day. However, he now knew that ongoing use of marijuana was not permitted in his job (at p. 13). He said his work was very important to him and he was prepared to stop all use of marijuana if it was a requirement for his safety sensitive position.

62. The IME report included questions on psychiatric and family history. Other highly personal information was discussed or disclosed (none of which was adverse).

63. Among other testing, Durnin-Goodman subjected the grievor to the Substance Abuse Subtle Screening Inventory-4 ("SASSI"), which is intended to identify high or low probability of substance use disorder. The SASSI results indicated a high probability of a substance use disorder and defensiveness as a moderate clinical issue (at p. 15).

64. Durnin-Goodman also applied the Paulhus Deception Scale ("Paulhus"), which is intended to measure impression management and self-deception by the subject, to determine if there was distortion in his responses. The grievor scored very much above average on impression management (14) and average on self-deception. Durnin-Goodman wrote that "the scores are consistent with an individual who is aware of the difficulties but may wish to create a favourable impression. Scores

above 12 on the Impression Management score indicate that the individual's answers in the assessment may be invalid" (at p. 15).

65. In addition, the grievor was given three tests to evaluate his level of impairment. He was classified as having a moderate level of impairment with the following notation: "This designation is offered despite the opinion that maximum medical improvement has not been reached." The notation was not further explained. The scores were stated to be consistent with social and occupational functioning, but Durnin-Goodman found that given ongoing use of marijuana, "there is a disproportionate degree of occupational risk with [the grievor] functioning as a Dock Crew member/Laborer" … His impairment levels are compatible with some, but not all, useful functioning" (at p. 16).

66. Durnin-Goodman stated her opinion in response to the Employer's questions as follows (at p. 6):

> In my opinion, based on a reasonable degree of medical probability, [the grievor] does not meet criteria for a Substance Use Disorder. He did report regular use, but also reported a history of being able to abstain from marijuana use when he needed to without any difficulty.
>
> However, [the grievor] is not fit for duty as a labourer/docking crew member at this time, due to the presence of cannabis metabolite in his biological sample.

67. When the grievor received the IME results and spoke to Craig, he agreed to 12 months of random monitoring for marijuana metabolite, consisting of between 14 and 16 tests, at his cost ($75 per test). The Confirmation Test cut-off was set at 15 ng/mL (Ex. 4-21).

68. Craig testified that because it takes time for the marijuana to leave a person's system, the grievor would not be allowed to come back to work until he tested negative. On July 9, 2019, he was at 24 ng/mL and on July 15, 2019, he tested at 16

ng/mL, just slightly above the cut-off. He was negative on July 22, 2019 and returned to work on July 26, 2019. Then on August 9 and 15, 2019, the grievor tested positive again at 16 ng/mL and 20 ng/mL. However, he was adamant that he was no longer using marijuana.

69. The Employer consulted Durnin-Goodman and decided to take the grievor's word given the test results. He was allowed to continue working. It was determined that some peaks and valleys may be expected in test levels as metabolites leave the body. The Company accepted that it was not due to new cannabis use by the grievor. Eventually the results fell below 15 ng/mL.

70. The Employer met with the grievor and his Union representatives on July 5, 2019 following completion of the IME. Conditions were reviewed for his return to work. The Employer expressed its serious safety concerns arising from the positive drug test, but also noted there were mitigating factors. The grievor was cooperative and accepted the required conditions for return to work. A 10-day suspension was imposed. The Employer's confirming letter stated, "Your violation of the Policy raises concerns for the Company regarding your ability to perform your work safely. The Company cannot allow you to put yourself, your co-workers, the environment, or the public at risk because of drug or alcohol use" (Ex. 4-23).

71. The grievor completed 12 months of random testing and was compliant throughout the period (Ex. 4-25).

72. Under cross examination, Craig confirmed that nowhere has the Employer prohibited the recreational use of marijuana by its employees.

73. She said that in her job, she deals with many different medical conditions and claims. When a question of fitness for work arises, her first step is generally to

obtain information from the employee's family doctor. Depending on what she receives, she may then seek more information or may request a specialist opinion. It is only under the Policy that the Employer automatically demands an IME. Craig said the Employer takes this approach because a positive test result is a breach of the Policy.

74. She conceded that the IME report included more information than just a diagnosis and opinion on fitness for duty. Since 2019, the Employer has requested an abbreviated report without detailed private information. The reports are now limited to lab testing results, a brief history and the IME physician's recommendations. However, in the grievor's case, Craig knew what to expect from the doctor based on past practice and did not seek to limit the scope of the IME report.

75. Craig joined the Company on October 31, 2016 but had no involvement in the grievor's orientation. She could not say whether the grievor received the Orientation Booklet when he was hired. Currently the Company is updating it to be consistent with the 2018 Policy. She did not believe there was any revision to the 2012 Policy until 2018.

76. Present practice is to give each employee the 2018 Policy during their orientation. Craig testified that she highlights the cut-offs during orientation and mentions the 15 ng/mL confirmation level for marijuana in urine testing. She also tells employees it's hard to say what that means. She advises employees that they can fail the urine test a month after using marijuana. She also tells them that "what you do on Friday night can affect you on Monday." She was unable to say what the grievor was told back in 2016.

77. It was put to Craig that the grievor did not receive a copy of the 2018 Policy under which he was disciplined. Her response was that she has nothing to indicate otherwise. She confirmed that after his positive test, the grievor called her several times and asked many questions about the testing thresholds. However, she has not been trained on the meaning of the various thresholds and the relationship between drug usage and test results. She could only repeat to the grievor what was written in the Policy.

78. Craig testified that the Company does provide educational resources to employees on drug use and testing. After the 2018 update of the Policy, there was an educational campaign for all employees on how long marijuana stays in your system. It was covered during toolbox talks and explained in posters that were "plastered everywhere" – lunchrooms, the yard, elevators, health and safety bulletin boards. There were two different posters produced in 2018. The campaign addressed both myths and the facts about marijuana use. However, it did not list the thresholds contained in the Policy.

79. It was suggested to Craig in cross examination that oral fluid testing is better than urine testing. She replied, "Yes, that's the common understanding. The Company uses both but the thresholds are based on urine testing."

Dr. Durnin-Goodman

80. Durnin-Goodman testified that in preparing her IME report, she followed established occupational health guidelines for this type of assessment (Ex. 7). These include (1) *Canadian Railway Medical Rules Handbook*, (April 2019), Railway Association of Canada, Section 4.8 - Substance Use Disorders, Appendix IV, Comprehensive Substance Use Disorders Medical Assessment; (2), *Guidance for the Medical Evaluation of Law Enforcement Officers - Substance Use Disorders,*

American College of Occupational and Environmental Medicine (ACOEM), Appendix E; (3) *Federation of State Physician Health Programs*, Appendix D; (4) *Independent Medical Examinations and Consultations*, ACOEM; (5) *Canadian Model for Providing a Safe Workplace, Alcohol and drug guidelines and work rule*, Construction Owners Association of Alberta (COAA) and Energy Safety Canada, Appendix B, Substance abuse expert assessments. The Railway Guidelines and the Alberta report are employer organization documents. ACOEM is a physicians' association and not an industry group.

81. The IME concluded the grievor did not have a Substance Use Disorder. However, he was not fit for work because he was continuing to smoke marijuana the night before work. This was consistent with the significant level of metabolites in his urine sample.

82. Durnin-Goodman defended the extensive exploration of personal history in the IME as necessary in a substance disorder assessment. The disorder can be subtle. A comprehensive approach is needed. "The employee has to tell me he feels fine, if he wants to keep using, but it may not be so." It is important to consider medical history because there may be past surgeries or pain issues. There may be psychiatric co-morbidities, such as anxiety. Psycho-social and family history is also necessary, as significant life events can lead to using substances. All these things must be teased out, she said.

83. The IME assessment did not address whether the grievor was impaired on the day of the incident. This was not a question put to Durnin-Goodman by the Employer.

84. Durnin-Goodman also clarified her findings under the heading "Impairment Rating" (at p. 16). She maintained this was not a statement that the grievor was

permanently impaired. She adapted a table from the Guides to the Evaluation of Permanent Impairment in order to illustrate the grievor's state on June 11, 2019 when she examined him. The grievor may seem fine on some rating scales but in an occupational safety sense, he may be potentially impaired.

85. Finally, Durnin-Goodman responded to the critique (advanced by Wood, the Union's expert witness, see below) that she used unreliable tests and misused certain tests in conducting the IME. She stated that psychometric testing is advocated by all the organizations she listed at the start of her testimony. It is necessary to triangulate the various sources of information about the subject. Unlike physical conditions, where a high degree of precision measurement can be obtained, in addiction assessment there are no definitive tests.

86. Durnin-Goodman defended her use of SASSI-4. It is a screening tool recognized by the Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services and the Traffic Injury Research Foundation (Canada). It is an accepted tool in the field albeit no tool is perfect. The SASSI results indicated a high probability of substance use disorder (Ex. 4, at p. 207-209) and she gave some weight to this result. The SASSI report (at p. 209) generated a recommendation for treatment including some form of addictions therapy. However, Durnin-Goodman testified that she considered all the factors reviewed in the IME in reaching her conclusion. In her opinion, the grievor did not meet the criteria for a Substance Use Disorder. She did have concerns but did not recommend any treatment.

87. She deemed the grievor unfit for duty at the time because of the level of cannabis metabolite in his urine sample (996 ng/mL on June 11, 2019) and his continuing regular use. The June urine test result was consistent with continuing

use. She did not do an oral fluid test as it is not her practice to do that test in the office. Durnin-Goodman did not address the science on this subject, as did Wood for the Union and Snider-Adler for the Employer, both testifying as experts.

88. Under cross examination, she reiterated that the grievor may be occupationally impaired because of his continuing use of marijuana. This is different than a permanent impairment. Asked to elaborate on this assertion, Durnin-Goodman said she accepted the grievor's self-report that he uses 3-4 times per week at about 8 pm. She relied on a variety of North American guidelines that recommend a ban on cannabis use or restricted consumption for a 24-hour period before work. She said these include the Occupational and Environmental Medical Association of Canada (hereafter "OEMAC"); the National Safety Council (U.S.A.); the Centers for Disease Control (U.S.A.); the National Institutes of Health (U.S.A.); the American Association of Occupational Health Nurses; the Canadian Centre for Occupational Health and Safety; and Health Canada. Nevertheless, it cannot be said the grievor is impaired at any particular time. He is potentially impaired for 24 hours after smoking marijuana.

89. Durnin-Goodman testified that in these circumstances, the precautionary principle should be applied. She conceded the grievor could safely drive a car to work the morning after smoking marijuana. However, in high cognitive load situations, calling for a snap decision or exercise of judgment, his performance ability may be impaired. The cited guidelines address this risk by prohibiting cannabis use for a 24-hour period before safety sensitive work.

90. Questioned about cannabis thresholds in the Policy, Durnin-Goodman noted that the urine levels are stated as 50ng/mL (Screening) and 15 ng/mL (Confirmation). Because no levels are stated for oral fluid testing, she assumed the

industry standard applied, which she said was 4 ng/mL (Screening) and 2ng/mL (Confirmation). As authority for the oral fluid standard, she cited the B.C. Construction Labour Relations Association (April 2019).

91. Durnin-Goodman confirmed that she is part-owner of a medical monitoring service, a fact she said is always disclosed to individuals undergoing an IME. She also confirmed that Seaspan regularly retains her and her business partner (another addictions medicine physician) to conduct IME's. She estimated the revenue from Seaspan IME reports to be less than 10% of the annual revenue received by her Company, Precision Medical Monitoring.

92. Asked about the referral letter from the Company, she said she had no concerns in this instance. When she has questions, she calls the referring organization to discuss any issues that may arise. She followed her usual practice and conducted the testing she normally uses. She noted the grievor had no family physician or therapist at the time. His family doctor had passed away (at p. 8).

Dr. Snider-Adler

93. Snider-Adler was asked by the Employer to address a series of questions related to substance use in a safety sensitive workplace, including the impact of substance use, the cut-off levels used in the Policy, the type of tests used by the Employer and the requirement for monitoring when an employee has tested positive but does not have an addiction. Her report was extensively footnoted and full copies of all cited research studies were attached (2,500 pages). In summary, her report was as follows.

94. ***Overview.*** Safety sensitive workplaces such as Vancouver Shipyards are inherently at higher risk for the consequences of drug and alcohol impairment, which can affect fitness for duty. Recent surveys in Canada show an increasing use of

alcohol and cannabis. It is estimated that 17% of adults nationally use cannabis. A higher proportion of working individuals use cannabis as compared to those without work. As a result, mitigating the risk of impairment is a vital component of workplace safety.

95. ***Effect of substances.*** Use of alcohol and drugs elevates the likelihood of an incident due to cognitive deficits caused by the substance. Aside from the cannabis "high" or intoxication, there are residual effects that can last many hours and even days, affecting concentration, memory, focus and executive functioning. This is because active THC metabolites are stored in fatty tissue and can affect the brain for a prolonged period. THC concentration in cannabis products has been increasing and it is now common to see recreational products with up to 30% THC. Concentrates may be much higher. Snider-Adler observed that past studies may underestimate the degree of impairment caused by currently available formulations of cannabis.

96. She cited recent research (Petker, 2019) that found THC metabolite in urine was inversely related to neurocognitive task performance. The authors concluded that certain cognitive abilities "are both acutely impacted by THC during intoxication and subsequently affected while residual levels of THC are present in the body." Other studies finding residual impairment were Crean (2011), Goldsmith (2015) and Dahlgren (2020). Snider-Adler noted there is also research to the contrary but her review of those studies pointed to low doses, infrequent users or less complex tasks as possible explanations. In summary, she characterized the results on residual impairment as mixed but cautioned as follows (at p. 31):

> The body of evidence raises significant concern for prolonged impairment that exceeds acute intoxication (i.e. that lasts longer than 6-12 hours). It is also necessary to note that there is no way to predict who will and who will not have impairment that lasts for hours or days or weeks. There are too many factors that are at play and there is

> currently no test to determine whether an individual will have residual impairment after discontinuation of cannabis use.
>
> However, based on the body of evidence, those who use cannabis more regularly are more likely to experience residual impairment. Residual impairment affects executive functions which play a significant role in maintaining safety and safety-sensitive work duties.

97. ***Drug testing cut-off levels in the Policy.*** Snider-Adler said the levels listed in the Policy are the standard cut-offs for urine drug testing. Although oral fluid testing is also included as an available test under the Policy, the standard cut-offs for that type of test are not stated.

98. A urine point-of-collection test (POCT) is often used as a screening tool, as was done in the present case. A POCT is conducted in the workplace and qualitative results are available almost immediately - 'negative' or 'non-negative'. All non-negative tests are then sent to the laboratory for confirmation testing. A POCT helps employers make an immediate decision on return of the employee to work. However, the available POCT devices have lower accuracy; there are more false negatives and false positives. An employer's policy violation decision should be made by sending the urine sample or an oral fluid sample (or both) to the lab.

99. The oral fluid cut-off levels used by the lab in the present case (4 ng/mL and 2 ng/mL) are the standard levels used by most workplaces in Canada. Oral fluid testing for THC detects the remnants of THC left in the oral cavity after smoking or otherwise consuming cannabis. It does not test for the metabolite of THC. While oral fluid POCT tests are available, they lack sensitivity and specificity, and therefore accuracy. They generate false positives and more seriously, false negatives. As a result, it is very uncommon for companies to utilize oral fluid POCT tests.

100. DriverCheck advised that for 230 client companies using oral fluid testing, 95% use a confirmation cut-off of 2 ng/mL. There are two other options for oral fluid testing levels in Canada: 10 ng/mL and 10 ng/mL; 10 ng/mL and 5 ng/mL (currently used only by nuclear facilities in Canada). Testing devices are pre-calibrated so it is impractical to alter the standard cut-offs.

101. ***Drug testing in Canadian safety-sensitive workplaces***. Snider-Adler said that both urine and oral fluid testing are commonly used across Canada and the world. Blood testing is not generally used as it is deemed too invasive. She was unaware of any Company using blood testing in the workplace.

102. Urine testing is a test for use of cannabis over prior days and weeks. It is not an impairment test. Even with a quantitative lab result for THC metabolite (THCCOOH) in urine, determining the timeframe of use of cannabis is difficult. There is a large potential window for when cannabis may have been used. A urine test will remain positive for 3 to 5 days in occasional cannabis users. Individuals who use cannabis frequently will continue to test positive for the metabolite in urine for 24 to 29 days, and potentially as long as eight weeks (at p. 11). In contrast to this, said Snider-Adler, oral fluid will remain positive for a shorter timeframe. A positive test at 2 ng/mL or above indicates use of cannabis sometime during the 24 hours prior to the test.

103. Since legalization of cannabis, there has been a significant increase in the number of Canadian companies utilizing oral fluid testing as part of their drug testing policies. Snider-Adler listed a number of benefits (at p. 35). Collection does not require a specialized collection facility, secure restroom and a same sex collector. All oral fluid collections are observed, significantly decreasing the likelihood of adulteration or tampering with the sample. For individuals who are unable to

produce urine, oral fluid testing provides an alternative. Oral fluid testing may show the presence of an active drug, which may indicate recent use of the substance. More specifically, oral fluid testing for cannabis tests for the presence of THC. Its presence represents very recent use of THC. Urine drug testing detects metabolites of a substance and as such, it may take time before the substance is metabolized and reaches above the cut off levels in the urine test. Despite these advantages, many companies continue to use urine testing for both POCT and laboratory testing. Snider-Adler said this is due to the slightly longer detection time for some substances in urine.

104. A number of factors affect the length of time it takes to clear THC from the oral cavity (quantity, manner of consumption, history of use, type of test device). Snider-Adler stated that based on the research, with most people, using a cut off-of 2 ng/mL, we would expect to see a positive test for no longer than 24 hours and likely for a shorter period of time for infrequent users. She concluded (at p. 41):

> A positive oral fluid test is indicative of recent use of cannabis. There is a correlation with impairment from cannabis and the positive oral fluid test; it can be concluded that there is a high likelihood of impairment and significant risk in a safety sensitive workplace, when an individual has recently used cannabis.

105. The legalization of cannabis in Canada triggered much consideration of employer policies governing marijuana use by employees in safety sensitive workplaces. Snider-Adler reviewed a series of leading industry statements and policies. The most common position is that safety sensitive tasks should not be performed for 24 hours after cannabis consumption but some abstention periods are longer.

106. The OEMAC stated that more research is needed but as practical guidance, a 24-hour period should be followed, or longer if impairment persists. This view was endorsed by the Canadian Society of Addiction Medicine Canada's largest national

association of physicians and health professionals with an interest in addiction medicine. Alberta Health Services also adopted a 24-hour window for the operation of vehicles and safety sensitive work. The World Health Organization stated that "human performance on complex machinery can be impaired for as long as 24 hours" after a moderate dose of cannabis. Health Canada guidelines for physicians authorizing cannabis for medical purposes state that "depending on the dose, the route of administration and the frequency of use, impairment can last for over 24 hours after last use …".

107. Transport Canada prohibits flight crews and controllers from consuming cannabis for 28 days before being on duty. The stated purpose is to protect aviation and public safety. The Department of National Defense (2007) and the RCMP have taken the same approach.

108. Snider-Adler concluded as follows (at p. 45): "The body of evidence raises serious concerns about the risk of individuals experiencing impairment that exceeds the length of time of intoxication (or the "high"). The highest risk for performing safety sensitive duties appears to be 24 hours after the use of cannabis."

109. ***Monitoring after a positive test.*** Snider-Adler noted that even absent a substance use disorder, the grievor's ongoing cannabis use presented a significant safety concern, considering the totality of the research and information reviewed in her report. Cannabis use should be avoided within 24 hours of performing safety sensitive duties. The grievor acknowledged a pattern of use which would not allow for a 24-hour window. Based on the grievor's positive oral fluid drug test result with a quantitative level of 9 ng/mL, consistent with cannabis use in the previous 24 hours, it can be concluded that he was using cannabis in a way that increased his risk while performing safety sensitive duties.

110. After a drug testing violation, even without a substance use disorder, many companies will require confirmation of adherence to their policy and an assurance that the employee is not continuing to use substances in the same manner that resulted in the previous violation. Random monitoring is commonly required after a violation for a fixed period, generally one to two years. Such unannounced testing has been shown to mitigate workplace risk by reducing employee use of substances.

111. Snider-Adler prepared a written reply after reviewing Wood's report and testified as to areas of agreement and disagreement. Both experts agreed that the grievor was likely not intoxicated at work, based on his self-reported cannabis use and the test results. However, Snider-Adler noted that the human brain takes time to return to normal functioning after drug use. "It does not turn off like a light switch." THC is fat soluble. It remains in active form, stored in fat, and can cause residual impairment over time, despite the absence of any high. Studies have documented ongoing cognitive deficits, she said. Certainly this was true of the grievor in the 24 hour period after he smoked marijuana, she testified.

112. The grievor said he smoked at about 8 pm and his shift the next day began at 7 am (assumed but later corrected to 6:15 am). The accident occurred at 9:45 am. Thus, the grievor started work 11 hours after using cannabis and the incident took place about 13.5 hours after using. The oral fluid sample was collected at 1:25 pm or about 16.5 hours after use. On this basis, Snider-Adler disagreed with Wood and concluded there was a high likelihood of impairment during the incident in the yard. In her analysis, she made assumptions about the quantity of cannabis used by the grievor based on information reported in the IME.

113. To diagnose impairment with precision, it would be necessary to perform a full neuro-cognitive assessment at the moment in question. Since this was not possible,

no definitive conclusion can be drawn in the present case. No expert would dispute there was impairment an hour after smoking. The greatest degree of concern relates to the next 24 hours said Snider-Adler.

114. Both experts discussed whether oral fluid test results can be correlated with blood THC concentration. Both agreed that positive blood THC levels can indicate impairment. Blood levels are used in drug-impaired driving law enforcement. They each reviewed a study on driving under the influence of cannabis by Jin (2018). Snider-Adler noted that while Jin said oral fluid results cannot accurately measure blood THC, positive oral fluid THC was significantly associated with positive blood THC, especially when oral fluid THC was at 5 ng/mL or greater. Other studies also speak to a temporal relationship. She concluded that "when the oral fluid test is positive, there is a high likelihood the blood levels of THC are also positive and that there has been very recent use of cannabis."

115. ***Cross examination.*** Snider-Adler acknowledged she has no academic training and has done no research specific to industrial workplaces. She does not claim expertise on industrial safety policy. Neither is she a researcher by training. However, she has frequently prepared and presented expert testimony involving workplaces, often in the railway sector. She has been qualified in court cases as an expert in addictions and drug test interpretation. She has appeared frequently as an expert in labour arbitrations. Mostly she testifies for employers but not exclusively. She describes herself as a leading expert in recreational and medical cannabis in the workplace. The present report is based on her knowledge and review of the literature, as well as observations and experience in her field.

116. Currently she is an independent contractor with DriverCheck and serves as its Chief Medical Review Officer. She advises on the Company's drug testing service

and prepares occupational medicine reports, though not full IME's. She explains and interprets test results. DriverCheck markets her services to provide expert reports, but she also takes assignments on an independent basis. She had no role in developing the Seaspan Policy.

117. It was put to Snider-Adler that despite the recent increase in cannabis use and positive THC testing, there has been no reported increase in industrial accidents. She responded that to her knowledge there have been no studies on point. There has been evidence of an increase in THC found in injured drivers after motor vehicle accidents since legalization.

118. She was asked about standardized field sobriety tests, which have been used to identify alcohol impaired drivers and considered in research for detection of other impairments. She reiterated her written comment that it has proven difficult even for trained physicians and police to detect impairment from substances. In her practice, she sees impaired people every day, but she cannot always tell if they have just used a highly impairing substance. Detection is a challenge. In this regard, she referenced Bill C46 (2018) which has authorized random roadside alcohol testing in hopes of deterring drunk driving in Canada. In the workplace, it is very difficult for supervisors and managers, even after training, to determine fitness for duty. As a result, many companies have instituted comprehensive alcohol and drug testing programs. They rely on these results along with other pertinent information when determining the risk posed by an individual in a safety sensitive position.

119. She defended the relevance of oral fluid testing in detecting impairment. Admittedly it is not an impairment test *per se*. However, there is a temporal correlation with THC blood levels. It can be an indicator, she insisted. At the 2 ng/mL cut-off, we can say there was use in the past 24 hours, which means there is

significant risk. She conceded it is not a true impairment test. There is no direct test of impairment.

120. Snider-Adler was challenged on her claim that contemporary cannabis products contain significantly higher THC levels, therefore casting doubt on older studies that did not show residual impairment. It was put to her that users self-titrate to achieve their desired effect: Hubbard (2012). In that report, the authors stated that older studies using lower potency likely *do* reflect the effects of currently marketed cannabis (Ex. 12, Tab 66, p. 825-826). She answered that this effect is known and is part of the variability in effects. Sometimes titration is not possible, as with edibles. Moreover, other research does show a higher degree of impairment and risk. Some older studies used 3% THC, which is far weaker than the current product.

121. She was also challenged on citing Petker (2019) as support for the link between residual cognitive impairment and recent cannabis use. That study used metabolite found in urine as the marker for recent use, but there was no way of knowing when the subjects used cannabis. A number of other limitations were expressed by the authors (Ex. 12, Tab 39, at p. 420). Snider-Adler responded that "recent" meant recent enough to yield a positive reading in the urine test. Yes, it could have been weeks earlier but that only emphasizes the risk of residual impairment. She noted Crean (2011), also cited in her report (at p. 25), which found residual effects on executive function from seven hours to 20 days after last use (Ex. 12, Tab 5 at p. 5-6). There are several factors involved, she agreed, but the risk of residual impairment is highly relevant in the workplace. Her report (at p. 25) included Goldsmith (2015), a review (not a research study) that found long lasting neurocognitive impairment and stated it would be reasonable for employers to ban the use of marijuana altogether (Ex. 12, Tab 40, at p. 523). The same review observed that "correlating

impairment with urine levels of parent or metabolite, as is often used in workplace testing, is entirely unreliable" (at p. 523).

122. Snider-Adler agreed there are contrary research findings on residual impairment. She cited a series of such studies (at p. 26-28) to show the complexity of the issue. "There is a difference between what we know and what we think. It's not black and white."

123. Questioned on her review of industry statements and policies, many of which call for a 24-hour window, she concurred that not all safety sensitive work is the same. In some cases, such as aviation, a longer abstinence period is deemed necessary. The tasks and consequences differ. She acknowledged she did not review the duties of a labourer and a dockhand in the Employer's operation.

Union evidence

Dr. Wood

124. Wood was asked by the Union to address a series of questions regarding the significance of marijuana metabolites in biological fluid, and to review the IME of Durnin-Goodman. His report was extensively footnoted and full copies of the cited research studies were attached (850 pages). He stated that he is qualified to assess research and conduct peer reviews because of his academic training at the PhD level in epidemiology. Normally a medical degree alone is not enough. Sadly, he said, a substantial part of reviewing medical research in the current climate involves checking for bias and conflict of interest. Industry affiliated persons have been known to favour their party or their funders. In his view, it is necessary to control for bias in the occupational medicine field as substance testing and monitoring has become a lucrative industry.

125. Wood also explained how hidden social factors may confound the results reported in research studies. As an example, a published study compared two HIV drugs and found the expensive one was superior. However, when compared later in a placebo trial, the cheap drug was better. It turned out that in the initial study, more disadvantaged patients had used the cheaper drug because it was affordable. This skewed the results.

126. In the present case, he said, a rigorous approach should be taken to the research under consideration and to the IME conducted by Durnin-Goodman on the grievor. He also emphasized that "My bias is toward public safety." In summary, his report was as follows.

127. ***Does the presence of marijuana metabolites alone indicate impairment or lack of fitness for safety sensitive duty?*** The answer is no. There is no unifying definition of impairment. In the present context, the focus is on cognitive impairment. Sleep deprivation and advancing age both result in such impairment. Alcohol and cannabis can be impairing in this sense.

128. After a person smokes marijuana, the psychoactive component THC contaminates the oral cavity and then enters the bloodstream. In Canada, drug impairment driving laws are based on THC blood concentrations of 5 ng/mL and 2 ng/mL. Neither urine metabolite levels nor oral fluid THC levels are used to measure impairment. The urine test does not speak to proximity of use. Testing can remain positive after 30 days of abstinence. The oral fluid test, while valid for detecting the presence of THC, does not accurately measure THC concentration in blood (Jin, 2018). Moreover, there is tremendous individual variability in the rate of decline of both metabolite excreted in urine and THC found in oral fluid.

129. ***Are the grievor's urine and oral fluid test results consistent with his reported use of marijuana?*** Yes they are consistent, based on the body of research studies. Wood again noted that there is great individual variability in results. One study (Lee, 2011; U.S. National Institute on Drug Abuse) reported oral fluid THC ranging from 0.5 ng/mL to 16.8 ng/mL after 24 hours abstinence by daily users. By comparison, the grievor's oral fluid test was 9 ng/mL when he was tested post-incident 13.5 hours after smoking. In another study from the same Institute (Anizan, 2013), 350 oral fluid specimens were obtained from 24 subjects. Among regular users, after 13.5 hours, all the specimens were still THC positive with a median result of 2.8 mg/mL and a range from 0.8 ng/mL to 18.4 ng/mL, up to double the grievor's level. The range was even greater for occasional users, up to 34.5 ng/mL.

130. ***Do the grievor's urine and oral fluid test results establish that he was impaired while at work?*** Wood said the answer is no. Wood also disagreed with Snider-Adler that there was "a high likelihood" the grievor was impaired.

131. In fact, said Wood, the self-report and the "relatively low" oral fluid level can be interpreted to suggest that the grievor was *not* impaired.

132. Wood cited "Cannabis Crashes: Myths and Truths" (2021), a book written by Dr. Scott MacDonald ("MacDonald"), Scientist Emeritus, Canadian Institute for Substance Use Research, University of Victoria. The focus of the book is performance deficits related to alcohol or cannabis use, and how these deficits increase the risk of traffic crashes. Wood quoted MacDonald as follows: "When smoking cannabis, the maximum period of being under the influence is estimated to be about four hours based on the experimental literature. This timeframe refers to the subjective effects rather than significant measured performance deficits, which are much shorter" (Wood Report, at p. 7). MacDonald considered Fierro (2014), a

roadside study of 3,000 Spanish drivers that tried to identify oral fluid cut-offs that could predict impairment as identified by trained police officers. The study found that no biomarker cut-off was validated for impairment. MacDonald concluded that a valid cut-off for oral fluid would likely have to exceed 100 ng/mL.

133. Wood also asserted, again quoting MacDonald, that the majority of studies implying chronic or prolonged impairment from cannabis use are "highly misleading" due to "confounding variables with cross-sectional research designs." He explained as follows (Wood Report, at p. 8):

> This conclusion is based on the fact that research examining the impairing effects of marijuana has been subjected to major and appropriate criticism for comparing marijuana users to healthy controls largely outside the confines of a randomized or controlled study that would allow for valid assessments of comparable groups of marijuana and non-marijuana users. Specifically, studies of marijuana impairment often involve comparing marijuana using individuals with socio-economic and other characteristics that may correlate with impairment, with healthy volunteers from more privileged backgrounds.

134. Wood acknowledged that MacDonald's book was self-published and not peer reviewed, adding that academics do not have their books peer reviewed in the way that research studies are peer reviewed for publication. Authors self-publish for a variety of reasons. Wood said the critique by MacDonald is more than "just his opinion" because the book analyzes the underlying research in depth. The book was reproduced in full and attached to Wood's report (Ex. 11, Tab 14). In it, MacDonald states (at p. 2) that the interpretation of studies presented in his book is derived from his career as a scientist and professor. He states that he has published over 100 peer reviewed papers, specializing in substance use and injuries. He has appeared as an expert witness in more than 20 court hearings involving drug testing in the workplace.

135. Wood cited Phillips (2011) and Iltis (2009) as reported instances where study participants were recruited from underprivileged populations living near universities. A subsequent bias is commonly observed when these subjects are compared to privileged, mostly white graduate students who do not have equivalent social determinants of health: Bosker (2013). Wood stated that the groups are simply not comparable and the underlying confounders cannot be measured or controlled for statistically. In epidemiology, this is referred to as "residual confounding". Wood agreed with MacDonald that the weight of the evidence does not show meaningful deficits after 24 hours. None of the higher quality studies with randomized designs found deficits after 24 hours. MacDonald maintained it was "a myth" that cannabis can impair performance for 24 hours (at p. 158). He rejected reports by the Government of Canada and the World Health Organization claiming there is performance impairment for 24 hours as unfounded, asserting they are based on a single study (Leirer, 1991) with multiple methodological limitations.

136. Wood cited and supported the findings of several leading independent Canadian research bodies on the duration of cannabis impairment in a motor vehicle context (Wood report, at p. 9). These authorities have concluded that cognitive and motor abilities are impaired for much shorter durations than stated by Snider-Adler:

> In this context, it is noteworthy that there are a range of science-based groups that have examined the literature in this area and drawn relevant conclusions about the duration of cannabis impairment after a period of abstinence including those of the Canadian Centre on Substance Use and Addiction, which concluded "Research studies using laboratory tasks, driving simulators and on-road driving strongly suggest that cannabis can have detrimental effects on a wide range of motor and cognitive skills necessary for the safe operation of a motor vehicle that can last for 2-3 hours after use." Alternatively, Canada's Low Risk Cannabis Use Guidelines developed by an international research team based out of Toronto's Centre for Addiction and Mental Health concluded "It is recommended that users categorically refrain from driving (or operating other machinery or mobility devices) for at least 6 hours after using cannabis." Similarly, the Canadian Public Health Association has concluded "Evidence indicates that cognitive and motor abilities required to drive safely are negatively affected for up to three hours after consuming cannabis." These evidence-

> based sources of information explain how, as is the case with alcohol use, an individual could use cannabis recreationally well outside of working hours and have it be of no relevance to the workplace so long as a period of abstinence (e.g. minimum 8 hours) occur before presenting to work.

137. Wood was highly critical of Snider-Adler's recital and application of the results on residual impairment surveyed in her report. He rejected as untrue her assertion (Ex. 12, at p. 23) that there are no studies on impairment after using THC at concentrations of 20-30% or higher. Chait (1990) (Ex. 12, Tab 46) was not a very low dose study as she claimed. Subjects used a low THC percentage but took many doses. Menetrey (2005) (Ex. 12, Tab 34) used medium and high doses of THC (16.5 mg and 45.7 mg). Wood said that high doses have been researched and there is not a linear increase in impairment. This undermines her argument that older studies using low doses are not relevant to usage of today's high concentration products.

138. Snider-Adler cited Grotenhermen (2003) (Ex. 12, Tab 35), claiming (at p. 23) it reported evidence of acute impairment up to 12 hours even from lower potency doses. Wood pointed to the actual finding (at pp. 339-340) that peak highs decreased to low levels after three hours and to baseline after four hours. Wood observed that "you can't get away with this in any academic setting." Similarly (at p. 23) Snider-Adler cited Spindle (2018) (Ex. 12, Tab 36) as reporting cognitive effects up to 6-8 hours from low doses. There is no such reference in the report, said Wood. In fact, the abstract states that vaporized cannabis in the study did not produce cognitive/psychomotor impairment. Spindle involved CBD (cannabidiol) rated at very low THC (0.39%) (at p. 5).

139. Finally, Wood responded to Goldsmith (2015), cited by Snider-Adler (at p. 25) for the finding that high doses were associated with neurocognitive performance deficits even after 28 days (at p. 521). The study concluded that "It is reasonable and responsible for employers to ban the use of marijuana at any time by employees,

contractors and other workers" (at p. 523). Wood noted that this report appeared in the journal of the American College of Occupational and Environmental Medicine, an industry organization created to provide companies with physician reports. It advocates in favour of drug testing and has been criticized for this reason in peer reviewed literature. Even so, the report stated (at p. 523), "Correlating impairment with urine levels of parent or metabolite, as is often used in workplace testing, is entirely unreliable."

140. Based on all the foregoing, Wood concluded the oral fluid test results do not establish the grievor was impaired at work on the day of the incident. He rejected Snider-Adler's position that oral fluid results can predict blood levels and therefore impairment. Oral fluid and plasma levels are associated but do not prove impairment. "We do not have such a test." He endorsed using the precautionary principle as articulated by Snider-Adler but insisted that an eight-hour abstinence meets that principle.

141. ***Was Durnin-Goodman correct that the grievor was unfit for safety sensitive duty on the day of the IME?*** Wood assumed that Durnin-Goodman reached her conclusion based on her view that the grievor may have been impaired at work. Wood reiterated that based on the valid research, especially considering the Spanish drivers' study, impairment would not be observable below 100 ng/mL. The grievor tested at 9 ng/mL. On this basis, Wood testified the grievor was not unfit for duty. He commented that "thousands of British Columbians used cannabis yesterday and are driving around today".

142. ***Response to Durnin-Goodman's assessment regarding probability for a substance use disorder.*** Wood was critical of the IME methodology on multiple grounds. Durnin-Goodman administered a barrage of mental health disorder tests

even though the grievor reported no mental health issues. His pre-test probability was low and this would tend to generate false positives.

143. Also, she used tools such as the SASSI-4 that are "notorious for commonly resulting in false positive diagnoses of substance use disorder" (at p. 12). She quoted a 94% accuracy rate for SASSI-4 with no citation for the source of this rating. Wood surmised the number came from the provider's promotional materials and noted that SASSI is produced by a for-profit entity. Independent assessments of SASSI have found it has major limitations including false positives. One report said it is "unclear what SASSI is measuring" and found "no scientific basis" for making treatment intensity assignments based on SASSI manuals: Feldstein (2007).

144. Durnin-Goodman also used the American Medical Association guide to permanent impairment and concluded that the grievor had a moderate level of impairment on that scale. Wood said this was clearly an incorrect usage of the AMA guide given that substance use disorders are listed as conditions that are not ratable.

145. Wood concluded as follows (at p. 14): "In summary, based on the information and records in front of me, [the grievor] does not have permanent impairment or a substance use disorder. Rather, invalid screening tools were used to arrive at the above conclusions - though I note that Dr. Durnin- Goodman appears to have ignored the result of the SASSI-4."

146. ***Supplemental report.*** Wood amplified his opinion that there is a range of clear biases in the reported studies, including stigma and racial bias, that contribute to confounding. "Confounding is when statistical associations are established that are not explained by causation" (at p. 2). He cited Solomon, *Racism and Its Effect on Cannabis Research* (2020), a perspective article, which considered the effect of prohibition in the 1937 *Marihuana Tax Act* and the 1970 *Controlled Substance Act*

(U.S.A.), followed by the war on drugs. Government lied about the dangers of marijuana and pursued vicious campaigns aimed at racial minorities, hippies and political dissenters. This inhibited evidence-based research for many years and also limited the availability of cannabis for research purposes (Report, Ex. 11, at Tab 30).

147. Wood stated (at p. 2): "Indeed, from my vantage point as a PhD epidemiologist and a Tier 1 Canada Research Chair, the research suggesting prolonged impairment from cannabis use is fundamentally flawed whereas rigorous research suggests duration of impairment is much shorter (*e.g.* less than 8 hours)", again citing MacDonald.

148. He repeated his conclusion that the grievor's urine and oral swab test results from the day of the incident do not establish that he was impaired at work that day.

149. ***Cross examination.*** Wood was pressed to explain how he could testify definitively that the grievor was not impaired at work when his core thesis is that neither urine nor fluid test results can determine impairment. Yes, he replied, it is necessary to assess the person. True, he could not determine impairment at the time of the accident. However, he was asked the question as an expert witness and on balance, tried to respond based on the data in the IME and his expertise. He also considered comments attributed to collaterals (co-workers) but conceded they were generic observations, not specific to the day in question. He added that these cases tend to come with a host of related information suggesting impairment, but there was none here.

150. He agreed that an extremely high oral fluid test result - say 1,000 ng/mL – implies recent use. In such a case, you may not need more to prove impairment, especially utilizing the precautionary principle. Wood said he disagreed with

Snider-Adler on the oral fluid evidence because the grievor only tested at 9 ng/mL and she tried to imply a blood level reading from that minimal level.

151. If employers are looking for guidance on how to manage this issue, is a blood sample essential? Wood answered that a blood test would be helpful and so would an oral fluid test if the reading is high. Wood said there is a gap at the moment. He expressed sympathy for employers: "What should they do?" He did not answer his own question.

152. Wood was asked again, given the precautionary principle, how an employer should regard an employee using cannabis recreationally. Should it adopt a 6-hour rule or a 24-hour rule or something else? He responded by saying that people everywhere are using cannabis on their own time. Employers should look to actual signs of impairment. If an employee goes to their truck during the workday and smokes marijuana, the effect will be observable. It will also generate a very high oral fluid level test result, which in these circumstances would be meaningful. However, problems arise with the attempt to control usage the previous day or earlier. Alcohol is gone the next day, but cannabis use is detectable for a lengthy period of time. An employer must make a decision. One option is to prohibit use for 24 hours before starting safety sensitive work.

153. Nevertheless, in Wood's opinion, a 12-hour abstinence rule would be reasonable on a precautionary basis. In a safety sensitive industry, use should only occur the day before work. However, even after being locked down, research subjects have tested at 34 ng/mL "so you're chasing your tail here." A better approach is to rely on supervisors and work peers to detect and verify impairment on the job.

154. Wood repeated his critique of Durnin-Goodman's findings on substance use disorder. She concluded there was none. But she also found there was a moderate level of impairment, utilizing a guide to permanent impairment. It was a misdiagnosis on her part. More importantly, Durnin-Goodman determined the grievor was unfit at the date of the IME based on a urine test. She should have known that metabolite results cannot support an inference of impairment, only that cannabis was used at some point in the past.

The grievor

155. The grievor is 48 years of age and worked as a roofer for 20 years before he was hired by Seaspan on November 2, 2016. He changed occupations to get out of a hard trade, he said. He has had no attendance or discipline issues since he joined the Employer. He gets along well with everyone. He has been told he is doing a good job.

156. The grievor was made a Lead Hand within six months of hiring. His supervisor at the time wrote that the grievor "works circles around most others" (Ex. 4-28). In April 2019, he joined the docking crew and his overtime hours doubled. Overtime is paid at double time. He takes overtime when it is offered unless he really can't make it. He stated he likes working and rarely takes vacation.

157. He first tried marijuana when he was 15 years old and has used it pretty much continuously ever since, except for a few periods when he was out of the country or in hospital. Typically, he smokes one or two joints in the evening, four times per week, and never in the morning before work. He does not smoke alone. It is a social activity and usually it is with his girlfriend. He feels marijuana causes impairment for several hours but otherwise there is no impact. He feels relaxed and tired. The grievor does not drink alcohol.

158. No one has suggested to him that his marijuana use causes a problem. He has never been late or had an accident due to his usage, he said.

159. The grievor described the orientation session he attended when he was hired in 2016. Numerous safety and operations items were covered and it lasted several hours. He was required to sign a confirmation of understanding the Seaspan Substance Use Policy (Ex. 4-7) after watching an on-screen presentation but it was not the 2018 Policy. New employees were shown the Orientation Booklet (Ex. 4-4) including section 27 entitled Substance Use Policy, which prohibits employees from engaging in work while impaired by alcohol or drugs. There was reference to reasonable cause and post incident testing. Maybe five minutes was spent on that part of the orientation. Nothing was said about cut-offs, only that drugs and alcohol are not permitted at work.

160. The grievor testified that until the present arbitration, he had never seen the 2018 Policy (Ex. 4-2) under which he was tested and disciplined, nor has he ever seen the 2012 Policy (Ex. 4-3). Based on what he knew, he believed that by limiting his marijuana use to the night before work, he had more than enough time to comply with the rules.

161. The grievor had no family doctor in 2019. He went to a walk-in clinic when he needed a medical note or had other health concerns. He usually saw the same doctor when he went to the clinic.

162. When a drug test was demanded after the May 30, 2019 accident, the grievor didn't think there was a problem. He was not impaired. He had never been drug tested before and had no idea what his metabolites would be in the test. The point of the collection drug test was inconclusive and the alcohol reading was zero. No medical information was requested by the Company at that time. He told his

supervisor he had smoked at 8 pm the previous night. There was no reaction by the supervisor. The grievor felt there was no problem, but he was sent home pending full test results from the lab.

163. Three or four days later, he was called to a meeting and told by the Company that he tested positive and would need an IME to come back to work. He was not given the specific results. He was not asked about his drug use. No one inquired whether he had a family physician or could arrange a specialist referral. His input was not sought on who should conduct the IME. He did not try to give any input. He was asked whether he agreed to an IME and he said yes. He was placed on paid suspension until the IME was done. The IME was scheduled for June 11, 2019. He had never been through an IME and was unsure what was involved.

164. The grievor said there was a lot of conversation covering his entire life during the IME with Durnin-Goodman. There was a physical examination, questionnaires and blood tests taken at LifeLabs.

165. The grievor said his shift started at 6:15 am on the day of the incident. He believed it was safe to smoke marijuana at 7-8 pm the night before and he shared one joint with his girlfriend. When he attended the IME, he told Durnin-Goodman (Ex. 4-17, at p. 13) that he was now aware ongoing consumption was not permitted in his job. He was prepared to stop as his job was important to him. He would never pass the test if he kept smoking. By then he had done research on marijuana metabolites and realized they stay in your system for a very long time. Until then he knew nothing. While he was off work, he exercised and tried to drink lots of water to get rid of the metabolites. He felt punished for not knowing about testing earlier.

166. The grievor called Craig frequently while waiting for the test results. She was the only one who would talk about his questions and concerns, he said. He stated his opinion to her that the Company had an obligation to educate employees about the Policy. She was good about giving answers where she could. She told him the Employer would only accept the urine test result, not the oral fluid swab.

167. Craig called around June 28, 2019 to say she had the IME report and provided a copy a few days later. He had more questions and asked about the oral fluid test, which was lower. She didn't answer.

168. The grievor met with the Employer team on July 5, 2019 and told them he wanted to return to work. He had to agree to their terms (Ex. 4-23), which were to provide a negative urine test, undergo one year of random drug testing and take a two-week suspension without pay. The suspension was applied from July 2to July 16, 2019. He and the Union agreed under protest. He was paid until the start of the suspension. John McKay, Local Union President, asked why it was necessary to have monitoring when the IME confirmed there was no substance use disorder. The Employer response was that "the boss" (Richards) wants monitoring.

169. The grievor still could not pass the urine test. He began going in for further testing in early July and finally tested negative on July 22, 2019 (Ex. 4-24). He had his first random drug test on August 9, 2019 and tested positive (16 ng/mL). He spoke to his supervisor and Craig, explaining that he was no longer smoking marijuana. They agreed to do another test on August 15, 2019 and the Company paid. Again he tested positive (20 ng/mL). Craig told him she checked with Durnin-Goodman, who looked at the results and said probably the grievor was not smoking, just as he claimed. No oral fluid test was done.

170. The grievor followed his random testing regime and testified he had no stress about it. He was not smoking marijuana. He would receive a text from the monitoring Company and come in the following day for the test, which cost $75 each time. In July 2020, he was on leave in the Maritimes and was called in for testing. He drove four hours from New Brunswick to Halifax for the test. Like the others, it was negative.

171. The grievor no longer smokes marijuana. His relationship with management remains good. No one does any checking in with him about abstention. He has no difficulty abstaining. He added that it has affected his social life in that he stopped associating with some friends to avoid the temptation.

172. The grievor completed his docking crew probation on August 9, 2019 (Ex. 4-29) which triggered an increase of $1.50/hour. He was upgraded to the full pay rate in January 2020 with another increase of $2.45/hour. The General Supervisor wrote that the grievor's work ethic was "unbelievable" and called him "an all-round great worker" (Ex. 4-30).

173. There was no cross examination of the grievor.

Argument, analysis and conclusions

Was the Employer justified in requiring an IME?

Employer argument

174. The Employer briefly reviewed the expert evidence presented by Snider-Adler and Wood. It provides context for the current state of the science on substance testing and standards in safety sensitive workplaces. In her report, Snider-Adler showed that there are risks associated with employees who are casual but regular users of cannabis. She emphasized the position statement issued by the OEMAC

recommending that employees do not consume cannabis within 24 hours of engaging in safety sensitive duties. This position was authored by a group of physicians from Alberta and B.C. and endorsed by the OEMAC board of directors. OEMAC describes itself as the largest national association of physicians with an interest in occupational and environmental medicine. The statement recognizes there is "considerable uncertainty around the extent and duration of impairment". More research is needed. OEMAC recommends a 24-hour cut-off as "practical guidance, until definitive evidence is available".

175. In this context, Snider-Adler advocated application of the precautionary principle in setting policy. A 24-hour cut-off would mean that individuals who choose to use cannabis could not do so during their work week or on the day before their first shift. The Employer noted that impairment may last longer in some situations, according to research cited in Snider-Adler's report.

176. The Employer criticized Wood's report and testimony as irrelevant and unhelpful. Much of it consisted of an attack on Durnin-Goodman's IME methodology, which was not in issue. He erred in thinking she made a finding of impairment at work. The Employer has never made such an assumption or accusation. Its concern is to manage the risk. The Employer recognizes that there is no test that can prove cannabis impairment. Moreover, Wood failed in his duty as an expert witness. He clearly advocated toward a conclusion, namely, that the grievor was *not* impaired at work. Further it was highly inappropriate for Wood to offer a substance use diagnosis of the grievor (at p. 14) without ever meeting him or conducting a personal assessment.

177. Wood accepted that an employer has a right to set a cannabis use cut-off if it is based in science. He gave the opinion that a 12-hour cut-off would be reasonable,

even though this contradicted multiple citations in his report that the duration of impairment is much shorter, especially the MacDonald publication.

178. The Employer submitted that where necessary, the evidence of Snider-Adler and Durnin-Goodman should be preferred to Wood's evidence.

179. Turning to arbitral authority, an earlier version of the Policy (2005) was upheld as lawful, subject to application in specific cases: *Re Vancouver Shipyards Co. and United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, Local 170*, [2006] B.C.C.A.A.A. No. 186 (Hope) (hereafter the "*Local 170 Grievance*"). The substance use policy at the time required an IME and testing after an incident if the circumstances suggested impairment as a possible cause.

180. In *Re Eurocan Pulp & Paper Co. and Communications, Energy and Paperworkers Union of Canada, Local 298 (Brown Grievance)*, [2009] B.C.C.A.A.A. No. 12 (Taylor), an IME was upheld after the grievor, who smelled of alcohol at work and was acting erratically, refused the breathalyzer test. His overall behaviour on the day in question raised a question of fitness for work and therefore justified the employer's demand for an IME.

181. The Employer also referred to *Re Elk Valley Coal Corp. and I.O.U.E., Local 115*, [2004] B.C.C.A.A.A. No. 249 (Lindley Grievance) (Sanderson), ("*Elk Valley Coal")* where the grievor caused an accident and failed to report it. When asked to provide a urine sample, he refused on principle. He admitted to being a long-time marijuana user and said he had smoked at 11 pm the night before his 8 am shift. The employer directed an IME and the grievor refused, leading to his discharge. The grievance was denied, and the arbitrator stated as follows (at paras. 70-71):

> … The grievor's conduct and his pattern of drug usage could not be ignored, under either the policy or the general law. The grievor had earlier revealed himself as an

> employee who was a potential risk to the safety of himself and others at the mine site.
> …
> In my view, the employer's decision to propose the grievor undergo an assessment by a medical specialist in addiction medicine was appropriate and reasonable. The information the employer had received regarding the grievor's drug usage, could be better interpreted and explored with the grievor by a medical person experienced in addiction research who could then provide his views and recommendation to the employer, the union and the grievor.

182. In *Vancouver Shipyards Co. Ltd. and C.M.A.W., Local 506 Marine and Shipbuilders (P.Q. Grievance)*, [2021] B.C.C.A.A.A. No. 219 (McPhillips) (hereafter the *"P.Q. Grievance"*), the grievor was required to take a test after a significant incident and refused. A preliminary arbitral ruling upheld the employer's testing demand. The grievor had a history of alcohol abuse but was in recovery with seven years of sobriety. He arranged for testing on his own and was negative for all substances. Nevertheless, since he had refused the Company test, he breached the Policy and an IME was demanded as per Company practice. The IME confirmed the grievor's Substance Use Disorder, but also verified his treatment and ongoing sobriety. The arbitrator held that the Employer should have made further medical inquiries before ordering an invasive procedure like an IME (at paras. 61-62). In that case, because the Company had some knowledge of the grievor's circumstances, it could have probed further, using less intrusive means to seek confirmation of the employee's fitness for duty. The Employer distinguished the *P.Q. Grievance* on this basis. It argued that in the present case, there was no such indicator to guide the Company and the comprehensiveness of an IME was justified.

183. In the *P.Q. Grievance*, $5,000 was awarded in damages for breach of privacy. The Employer argued that in the absence of demonstrable harm or bad faith, damages in the current case should be modest: *Re Edmonton Police Association and City of Edmonton Police Service (Constable Grievance)*, [2020] A.G.A.A. 27 (Smith) (hereafter "*Edmonton Police*"). The Durnin-Goodman IME was less

extensive than in the *P.Q. Grievance* and the Company took scrupulous care to maintain confidentiality. Craig was the only Employer staff person who viewed the IME. If any damages are to be awarded in this case for requiring the IME, they should be significantly less than $5,000.

Union argument

184. The Union submitted that the Employer's "straight-to-IME" policy and practice as disclosed in the evidence was flawed. When an employee's urine test is confirmed positive by the lab, they must attend an IME with an Employer-assigned addictions specialist as a condition for return to work. The IME is mandatory despite discretionary language in the Policy (Section 3.7.5.2). While recent practice may have changed, at the time of the grievance there was no effort made by the Company to limit the scope of sensitive personal information recorded in the IME. The gravity of the intrusion was known to the Employer when the referral was made.

185. In addition, the Employer failed to provide advance notification of the Policy and the IME provisions, which violates the rules of workplace fairness established in *Re KVP Co. and Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A.A 2 (Robinson) (hereafter "*KVP*"). There was no justification for the IME demand in this case.

186. The only *KVP* notification received by the grievor was the message contained in the Orientation Booklet, which focussed on reporting to work in an impaired condition or involvement in an accident suggestive of impairment (Ex. 4-4). In *Re Vancouver Drydock Co. and Marine Workers and Boilermakers Industrial Union, Local 1 (Barrett Grievance)* [2009] B.C.C.A.A.A. No. 77 (Munroe) (hereafter "*Boilermakers Local 1*"), this language was interpreted as follows (at para. 50):

> … Once again, the message to employees, as conveyed by the Policy, is *not* that the use of alcohol on a scheduled work day, no matter how modest or how far in advance of the scheduled start time, may result in a demand for a blood-alcohol test and an IME, but rather is cast in terms of circumstances suggesting "impairment". (Emphasis in original)

187. The threshold for a positive urine test as stated in the 2018 Policy was not brought to the grievor's attention.

188. More fundamentally, there was no scientific foundation for the Employer's Policy and practice of ordering an IME after every positive test result. The Union was critical of Snider-Adler's expert testimony. It argued that her expertise does not extend beyond interpreting individual test results and diagnosing substance disorders. She lacks the academic qualifications and experience to assess and interpret the body of research reviewed in her report. Similarly, she cannot opine on industrial safety or standards. Her endorsement of a 24-hour cut-off rule was irrelevant since the Employer has no such rule in place.

189. Snider-Adler admitted that urine testing does not demonstrate impairment, but it does capture recreational or lifestyle use of cannabis. She stated that oral fluid test results can indicate a high risk of residual impairment for 12-24 hours. However, in her lengthy review of research studies, she conceded that the data is mixed. Some studies suggest that impairment "lasts for hours to days, and other studies do not find any evidence of residual impairment" (at pp. 27 & 30). The Union argued that her testimony should be rejected: "Respectfully, a careful review of her report and the studies relied on by Dr. Snider Adler amounts to, at best, misunderstanding of the scientific literature, and at worse, mischaracterization and obfuscation of the scientific evidence" (Argument, para. 84).

190. The Union further alleged that Snider-Adler pursued an agenda of exaggerating the evidence for residual impairment, which ultimately results in a financial benefit

to her Company and herself. This violates the duty of an expert to provide fair, objective evidence: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (at paras. 27, 45-48). Adherence to the expert's duty is no less important in a labour arbitration than in other legal proceedings, in particular where it is necessary to ensure a fair hearing: *Re BC Hydro and Power Authority and IBEW, Local 258 (Petersen Termination)*, [2016] B.C.W.L.D. 781 (Moore) (at para. 33).

191. The Union noted that Snider-Adler never addressed whether the grievor was impaired. The closest she came was to say (at p. 45) that "he was using cannabis in a way that increased his risk". She also said that any use creates risk. The Union adopted Wood's withering critique of Snider-Adler's evidence in its totality.

192. On the other hand, Wood is a renowned expert with a PhD in Epidemiology. He based his report on quality research studies, taking into account study design and potential bias. He also relied on established, independent Canadian research bodies and authors as the basis for concluding that cognitive impairment lasts for only 2-6 hours (at p. 9). He asserted that an individual could safely use cannabis recreationally outside work as long as there was an eight-hour period of abstinence. Therefore, he maintained that the grievor was not unfit for duty due to his use of cannabis. On this basis, the Union argued that there was no justification for ordering an IME after every positive urine test result.

193. Section 3.7.5.2 of the Policy provides that an employee "may be prohibited from returning to work" until they attend an IME. The Policy calls for the exercise of a discretion. A discretionary power must be exercised reasonably, as held in the *Local 170 Grievance,* at paras. 28-29. Arbitrator Hope stated, "… every aspect of the Policy and its application is subject to the test of reasonableness …" (at para. 28). This was the basis on which the arbitrator upheld the Policy as it then stood.

The Union clarified that in the present case, it is not challenging the Policy as drafted, but rather its enforceability against the grievor and the reasonableness of its application.

194. Arbitral authority has generally rejected a "straight-to-IME" approach with an employer-selected specialist, said the Union. In *Re Interior Health Authority and Hospital Employees' Union (Substance Use Disorder Policy Grievance)*, [2018] B.C.C.A.A.A. 87 (Hall) (hereafter "*Interior Health*"), involving a safety sensitive workplace, when the employer became aware of a suspected substance use disorder, the employee was placed on leave pending the results of an IME. There was no consideration of individual employee circumstances (at paras. 114, 116).

195. The arbitrator affirmed an employee's "strong right to privacy with respect to their bodily integrity and any medical treatment" (at para. 135), adding the following (at para. 138): "… arbitrators have routinely adopted the least intrusive means approach to any request by an employer for employee medical information." This has typically meant going back to the employee's own physician as the first step, and then to a specialist of the employee's choice, if necessary (at para. 137). Immediate resort to an IME has only been authorized in special circumstances, such as the employee's failure to cooperate or conviction for a drug/alcohol offence (at paras. 149-153). Arbitrator Hall concluded as follows (at paras. 155-156):

> On the evidence before me, I accept the Employer's position that referral to a certified addictions specialist is the desirable standard where there is 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.
>
> 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.

196. The reasoning in *Interior Health* was recently followed and applied even though the grievor in the *P.Q. Grievance* did have a known prior addiction (at paras. 58, 62-64):

> 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.
> …
>
> 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.

197. Regarding the decision reached in the *P.Q. Grievance*, the Union rejected the Employer Argument that the outcome turned on the Company's prior knowledge of the grievor's medical condition. It is evident that the *P.Q. Grievance* applied the relevant established legal principles. In the present case, where the Company knew *even less* about the grievor's situation, it follows that some preliminary inquiries and pursuit of less intrusive means was the obvious starting point.

198. Very recently, it was held once again that a positive urine test alone did not justify immediate resort to an IME with an employer-selected specialist: *Re Vancouver Shipyards Co. Ltd. and International Brotherhood of Electrical Workers, Local 213 (SB and TR Substance Use Testing Grievances)*, [2022] B.C.C.A.A.A. No. 55 (Hall) (hereafter "*the IBEW Grievance*"). In that case, a scissor lift struck a boom lift, and the grievor was given both urine and oral fluid tests. He was negative on the oral swab but positive in the urine test. Again, the Company went straight to an IME. There were a number of problems identified by the arbitrator, among them the fact that "the Employer applied the Policy in rote fashion and in apparent disregard of the discretionary wording found in the applicable terms" (at para. 43). Even if testing was legitimate, it was held that "none of the steps taken by the Employer based on SB's positive urine test result were a reasonable exercise of management rights" (at para. 45).

199. Arbitrator Hall added the following observation (at para. 37):

> It is unnecessary in this proceeding to make a definitive determination regarding the respective reliability of urine and oral fluid drug tests, and I would be hesitant to do so without the benefit of expert testimony at this stage of the developing case law. Nonetheless, the current state of the law is sufficient to at least raise a reasonable doubt over whether a test result from a urine test should be preferred over the result of an oral fluid test. Further, I am prepared to accept the seemingly uncontested view that oral fluid (or saliva) tests are a less intrusive means of determining potential impairment.

200. The Union submitted that substantial damages should be awarded against the Employer for adopting "the most intrusive option" when information was required: *Interior Health* (at para. 155). This was a serious violation of the grievor's privacy rights. In *Re Molson Breweries and Canadian Union of Brewery & General Workers*, [2005] O.L.A.A. No. 515 (Rayner), the employer had reasonable grounds for concern based on threats of workplace violence made by the grievor. However, it was held that less intrusive methods than an IME ought to have been used, namely

contacting the grievor's physician. The employer also failed to safeguard the confidentiality of the report. The arbitrator awarded damages of $5,000. The Union noted that 17 years have passed since that award and argued that the quantum must be adjusted upward to reflect the passage of time.

201. In the *P.Q. Grievance,* a recent decision, $5,000 was awarded for privacy damages despite a finding that the grievor bore "considerable responsibility for what transpired" (at para. 71). There were no such considerations in the present case. Contrary to the Employer's argument, the IME in the *PQ Grievance* was not more extensive than the report prepared by Durnin-Goodman, which inquired into completely irrelevant personal matters.

202. The Union requested an award of $15,000 in damages for both the unnecessary IME and the random testing (discussed below).

Decision on the justification for referral to an IME

Arbitral principles

203. The Union argued that the Employer's unilateral practice under the Policy requiring mandatory referral to an IME after a positive urine drug test was never brought to the grievor's attention and therefore cannot be enforced against him under *KVP* principles. Weighing the evidence, I find this position is well founded and I accept it. The grievor testified that he never received the 2018 Policy and Employer witnesses conceded they were unable to say otherwise. Richards testified that the 2018 Policy was not distributed to employees.

204. I acknowledge Craig's evidence that when the Policy was updated in 2018, there was an educational campaign for all employees, including toolbox talks and posters placed in multiple locations in the workplace. It is significant that the

campaign addressed the question of how long marijuana stays in a person's body. However, the Confirmation Threshold was not covered and neither were the provisions for referral to an IME after a positive test.

205. A fulsome *KVP* notification would have included the discretionary terms of the Policy on referral to an IME and also the Company's operating rule that it would go straight-to-IME as a condition for return to work. The nature of the practice would not be apparent on the face of the Policy, even if it had been provided to the grievor.

206. Richards also testified that the 2018 Policy was discussed with the Union prior to implementation and a draft copy was provided. The Union was informed about the details, she said. This was commendable but did not displace the *KVP* obligation to notify employees of a rule that could result in interruption or even loss of their employment. The board's explanation in *KVP* for its award is apposite (at para. 31): "That a plant rule must be brought to the attention of an employee before the Company can act upon it as a basis for taking disciplinary action would appear to be only common sense …".

207. In this regard, it is striking that present practice is to give each new employee the 2018 Policy during their orientation, according to Craig. She highlights the 15 ng/mL Confirmation Threshold during her presentation. She also tells them that "What do you do on Friday night can affect you on Monday." She was unable to say what the grievor was told when he was hired in 2016.

208. The grievor testified that he received the 2015 Orientation Booklet when he was a new hire. Dardengo was not certain but said that probably this was correct. The Orientation Booklet did contain a Substance Use Policy and it did make reference to the potential for an IME, but in different terms than the 2018 Policy. The 2015 version conflated testing and independent medical evaluation. It did not

provide for an IME as an automatic result of a positive test. As held by Arbitrator Munroe in *Boilermakers Local 1*, dealing with the same language (at para. 50), the message to employees was, "Don't report for work in a seemingly impaired condition, and if you do report for work in such condition you will be tested and sent for an IME." On the matter of notification, the arbitrator continued (at paras. 50-51):

> … Once again, the message to employees, as conveyed by the Policy, is not that the use of alcohol on a scheduled work day, no matter how modest or how far in advance of the scheduled start time, may result in a demand for a blood-alcohol test and an IME, but rather is cast in terms of circumstances suggesting "impairment".
>
> How, then, could an employee like the grievor stand forewarned that having a beer with his lunch, a lawful activity in itself, some 3-4 hours prior to his scheduled start time, could or would result in a demand for a blood-alcohol test and a requirement that he submit to an IME of the lengthy, comprehensive and invasive sort described by Dr. Baker in his evidence?

209. By analogy, how could the present grievor stand forewarned that smoking a marijuana cigarette in the evening before work, a lawful activity, could or would result in a demand for an invasive IME?

210. Based on the foregoing, I find that the straight-to-IME rule was not enforceable in the present case because the Employer failed to provide full and fair advance notification to the grievor. This ruling is specific to the grievor's circumstances. However, the grievance raises broader workplace safety and privacy issues, which the parties addressed in voluminous evidence and detailed argument. These are important ongoing issues for the parties. As a result, I will consider and answer the broader questions to the extent possible.

211. I agree with the Union that the application of the Policy to the grievor was unreasonable. The Policy required an exercise of discretion, suited to the individual circumstances, but the Employer ordered an IME automatically based on a positive

urine test result. This too violates *KVP* standards. As noted in the *P.Q. Grievance*, by Arbitrator McPhillips (at para. 62):

> 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.

212. Moreover, arbitral authority, as outlined in *Interior Health*, and subsequent awards, emphasizes the need to safeguard an employee's right to privacy when personal and medical information is demanded by an employer. The need for an IME must be properly established and reasonably necessary. Resorting to a unilaterally selected physician "is the most intrusive option" (at para. 155), but that was the Employer's standard approach. No effort was made in the present case to invite information from the grievor's family physician or another health professional, a specialist suggested by the grievor or a mutually acceptable specialist. It turns out that the grievor had no family doctor at the time and utilized walk-in clinics (like many British Columbians), but the Employer did not go straight-to-IME on that basis. The grievor was not given an opportunity to suggest less intrusive options.

213. During the post-incident interview conducted by Bryan Hayden, Manager of Services for the Employer, the grievor disclosed that he had smoked marijuana the previous night. Does this help to justify direct referral to an IME? The disclosure was mentioned by Craig in her referral letter to Durnin-Goodman. Arbitrators have noted that when there are grounds to suggest a possible addiction issue, a specialist may be preferrable to the family physician, on grounds of expertise and independence: *Elk Valley Coal,* (at paras. 70-71); *Interior Health,* (at para. 156). Again however, the Employer never turned its attention to any of these considerations. If anything, the grievor's candor and cooperative attitude after the

accident should have weighed in favour of allowing him to supply information to the Company or arrange for his own medical report. He was known to be an excellent worker and impairment-related issues had never arisen in the past. This distinguishes the authorities cited in argument by the Employer.

214. In sum, the Company should have offered the grievor the option of arranging to provide the necessary information himself, at least as the first step, before demanding the IME as it did. This may have included presenting an informative report by a suitably qualified health professional.

215. I note in passing that the Employer was able to react swiftly when it received the positive test result, utilizing its roster of substance use specialists. An IME appointment was booked for June 11, 2019, only 10 days after the lab results were received. On their own, or working with a family physician, an employee would be hard pressed to match this pace. I endorse the comment in *Interior Health* (at para. 156) that it would be helpful if the Union and the Employer could jointly establish a roster of mutually acceptable addiction specialists. This would reduce the usual delay in finding a specialist *ad hoc*.

The science on testing

216. A more substantive issue is whether the fact of a positive urine test alone establishes that an IME is reasonably necessary. Wood testified on behalf of the Union that the presence of marijuana metabolites alone does not prove impairment or unfitness for duty. For the Employer, Snider-Adler agreed: "It is not a test of impairment" (at p. 10). She explained:

> Even with a quantitative laboratory result for [THC] in the urine, determining the timeframe of use of cannabis is difficult, as there is a large potential window for when the cannabis may have been used. A urine test will remain positive for 3 to 5 days after use for infrequent users of cannabis, but may remain positive for many weeks after

> discontinuation of cannabis use in those with a long history of more regular use of cannabis. In contrast to this, oral fluid will remain positive for a much shorter timeframe. A positive test at 2 ng/mL or above indicates use of cannabis sometime during the 24 hours prior to the test.

217. Proof that an employee was impaired at work would establish a breach of Section 3.2.1 of the Policy, a core provision that prohibits work under the influence of alcohol or drugs. This would surely justify asking the questions posed to Durnin-Goodman in this case (Ex. 4-13), namely whether the grievor was fit for duty or whether he required residential treatment. However, the urine test result only established that the grievor had used cannabis sometime in the past several weeks.

218. In the present case, prior use was hardly in issue, given the grievor's forthright statement to Bryan Hayden that he smoked a marijuana joint at 8 pm before bed (Exs. 4-8). Without proof or some indicia of impairment, it was a long leap from this to conducting a sweeping, invasive examination of the grievor's personal life including his physical and mental health. I affirm that due diligence required the Company to follow up after the positive test, but as discussed above, intermediate inquiries should have been made. It is the role of arbitrators resolving disputes in this context to ensure a reasonable balance between employer and employee interests: *Interim Award*, (at paras. 131, 135). Presumptive resort to an IME was not a balanced approach and violated the grievor's right to privacy and dignity.

219. These findings are based on the Employer's practice of ordering an IME for every positive urine test. Oral fluid testing raises a host of further considerations and must be left for another day. The Employer takes an oral swab but the Policy does not currently prescribe confirmation levels for that test. Both experts said that an oral fluid test measures much more recent use compared to a urine test. In the *IBEW Grievance*, where no expert evidence was adduced, Arbitrator Hall observed there was at least reasonable doubt about whether a urine test result should be

preferred over an oral fluid result (at para. 37). The present record now answers that question. The oral fluid test is preferable for a number of reasons, as reviewed by Snider-Adler in her evidence. There are benefits for both employers and employees. Asked under cross examination whether oral fluid testing is better than urine testing, Craig answered, "Yes, that's the common understanding."

220. Even if practice evolves toward the use of oral fluid testing, issues will remain. Snider-Adler asserted that "there is a high likelihood of impairment and significant risk in a safety sensitive workplace, when an individual has recently used cannabis" (at p. 41). Wood disagreed unless the oral test levels are very high. In this case, the lab reported a positive oral fluid test for the grievor based on a Confirmation Threshold set by the lab itself (2 ng/mL). Despite some common ground, the experts disagreed sharply on whether oral fluid results correlate with blood test results. Blood testing has been described as "the gold standard" for assessing cannabis impairment: MacDonald (2021, cited in Wood Report, Tab 14, at p. 60). As Snider-Adler testified, however, it is not a method currently being used by employers.

221. To reiterate, this award is limited to the justification for an IME and monitoring based on urine testing.

222. While Snider-Adler conceded the urine test did not *prove* impairment, she insisted there was a likelihood of residual cognitive impairment for 24 hours or longer after using cannabis. She framed the issue as follows (at p. 31):

> The body of evidence raises significant concern for prolonged impairment that exceeds acute intoxication (i.e. that lasts longer than 6-12 hours). It is also necessary to note that there is no way to predict who will and who will not have impairment that lasts for hours or days or weeks. There are too many factors that are at play and there is currently no test to determine whether an individual will have residual impairment after discontinuation of cannabis use.

223. As a result, Snider-Adler urged adoption of a 24-hour abstinence policy and quoted a number of Canadian health and employment authorities that have taken such a position. However, she acknowledged that no conclusive finding of impairment can be made without a proper cognitive assessment of the individual at the time in question. The assertion of likely residual impairment was a contested issue on the evidence before me. Wood maintained that residual cannabis impairment (after acute intoxication or the initial "high") was simply a myth. He said safety sensitive work was permissible after eight hours of abstinence and recommended 12 hours on a precautionary basis.

224. These recommendations from the experts (24 hours and 12 hours) are notable but it is not my role in this case to pronounce on a revised Policy for the Employer. The Company is aware that a period of abstinence is a policy option but thus far has chosen not to prohibit or limit use of cannabis during off hours.

225. Still, if Snider-Adler is correct that there is a real risk of residual (*ie*, ongoing) neurocognitive impairment after cannabis use, arguably the Employer's rigid IME practice approach is justified, or at least more defensible. The Employer could say that it was not just responding to cannabis usage at some uncertain time in the past several weeks, but rather it was investigating an employee who might be coming to work with some degree of cognitive impairment. That would be the definition of a workplace safety risk calling for a response by management.

226. In essence, this was the Employer's simple point. There is no definitive test for marijuana impairment so it is reasonable to minimize the safety risk by testing for exposure and limiting the prospect that cognitively impaired employees will report for work.

227. Snider-Adler prepared a lengthy report with voluminous research citations on the subject of residual impairment, but in the end, she stated that the scientific evidence on point is mixed. This was not a concession extracted from her under cross examination. She listed studies pro and con in her report. She was forceful in arguing that residual impairment is real and constitutes a workplace safety risk. But she concluded by saying, "There is a difference between what we know and what we think. It's not black and white." She discussed Goldsmith (2015), which reported neurocognitive deficits 28 days after heavy use. The authors suggested that it would be "reasonable and responsible" for employers to ban marijuana use by employees and contractors (at p. 523). In fairness, Snider-Adler also highlighted the following statement in Goldsmith (at p. 523): "Correlating impairment with urine levels of parent or metabolite, as is often used in workplace testing, is entirely unreliable."

228. The robust criticism of residual impairment by Wood and others is set forth above and need not be repeated here. The integrity of some results reviewed in Snider-Adler's report is under challenge on grounds of bias and conflict of interest. The outstanding research issues are myriad. To highlight only one of them, the experts in this case both stressed the high degree of individual variability in responses to cannabis use. Snider-Adler stated (at p. 9):

> The variability seen in studies regarding prolonged impairment after the acute intoxication wears off, is due to the fact the different studies look at different outcomes, with different complexities of the task, use different THC strengths, and test different cohorts of individuals.
>
> Impairment from cannabis is variable from person to person and use to use. There are many factors that play a role in determining the length of time one is impaired, the extent of the impairment and risks when performing safety-sensitive and safety-critical duties. There is no way to accurately predict who will have impairment that lasts for hours or for days/weeks.

229. It is also clear that the relevance of finding residual impairment depends on the specific work duties at hand. Snider-Adler did not seek to apply the research findings to the grievor's job or shipyard workplaces in general, beyond noting the safety sensitive designation. She was directed to several misstatements in her report and corrected or clarified them. Notwithstanding her impressive qualifications, she claims no deep expertise in the critical assessment of research literature. Overall, I find Snider-Adler's conclusions do not provide a reliable basis for assuming that employees who have used cannabis (as indicated by a positive urine test) are likely working under a residual impairment. Future research may or may not change that assessment.

230. If the Employer was not entitled to make such an assumption, it follows that going straight-to-IME was unjustified. The precautionary principle certainly applies and dictates some follow-up to the urine test, but the Employer should have been more balanced and respectful of the grievor's privacy when it reacted to the result.

231. For his part, Wood was unequivocal in saying the research on residual impairment from cannabis is fundamentally flawed. His authorities varied in their estimates of the actual period of impairment (two to six hours) but they were all short time periods. Wood cited Bosker (2013) as one of the reported studies where the user group had socio-economic and other characteristics that may correlate with impairment, whereas the control group was drawn from healthy volunteers with more privileged backgrounds (at p. 8). Bosker noted this fact in their discussion of potential study limitations and said (at p. 6): "Between group differences … need to be interpreted with caution …". The authors wrote that "comparisons between healthy, non-drug users and drug users may also be biased since differences in neuropsychological function may have already pre-existed in drug users and prompted their drug use". The study tried to avoid this bias by selecting a control

group that also had a history of occasional drug use but was negative for any drugs at the time testing.

232. The reported result in Bosker was "prolonged impairment of psychomotor function in chronic cannabis smokers that only partially recovered over three weeks of continuously monitored abstinence" (at p. 5). In other words, there was some evidence of residual impairment, but the results must be read with caution, for reasons set forth by the authors themselves.

233. MacDonald (2021) reviewed the research evidence for long-term cognitive deficits due to heavy cannabis use (Wood Report, Tab 14, at pp. 108-111). He stated that residual deficits are possible but the research "is not conclusive due to other methodological flaws in the study designs and mixed findings" (at p. 108). As Wood explained, it is necessary for researchers to control for potential confounding variables. MacDonald cited Pope (2002), which did not find significant differences for most deficit comparisons after three weeks, but those authors concluded that "… we must still live with uncertainty on the question of whether long-term cannabis use may produce cumulative neurotoxicity". Also cited was Crean (2011), which was relied upon by Snider-Adler. Crean was a review based mainly on Verdejo-Garcia (2005), which MacDonald noted had no control group and no distinct group that used only cannabis, such that no valid conclusion of impaired decision-making can be drawn.

234. Kalant (2004), another review discussed by MacDonald (at p. 109), stated "there is no suitable evidence yet available to permit a decision as to whether long-lasting or permanent functional losses can result from chronic heavy use in adults". This and other studies were criticized by MacDonald on methodological grounds. He characterized Lovell (2020) as the most credible summary of the literature, albeit

with limitations (at p. 110). Lovell was a meta-analysis that excluded 115 studies based on their criteria and analyzed 30 studies of cognitive deficits related to long-term cannabis use.

235. Lovell concluded that "regular cannabis use is associated with small to moderate deficits in some cognitive domains" (at p. 471). These included small deficits in global cognition, learning, memory and executive functioning, and moderate deficits in decision making. No effects were found for information processing, attention and working memory. MacDonald noted there is no way to properly assess these findings in terms of safety risk (traffic safety) and urged that they not be used for policy development that includes punishment (at p. 111). His summary comment was that while major cognitive deficits can result from long-term heavy use of alcohol, "the research evidence for cognitive deficits from cannabis is weak" (at p. 111). He ends his book with a call for more research (at p. 173).

236. Wood attributes zero evidentiary value to studies that report a residual cannabis impairment. This may go too far. MacDonald called the evidence weak. Weak evidence is some evidence, albeit caution must be exercised due to possible bias and confounding factors.

237. Caution is advisable from every perspective in this debate. There are a number of industry associations and health bodies that have adopted a 24-hour rule in safety sensitive environments. Some (for example, OEMAC, representing Canadian occupational and environmental physicians) have acknowledged explicitly that this is intended as practical guidance, given that the duration of cannabis impairment is variable and more research is still needed. Transport Canada has applied a 28-day rule to flight crews and air traffic controllers. The Department of National Defence and the RCMP have done the same. In time, Wood's critique may be broadly

accepted or the research flaws he has identified may be remedied in new studies, with results to be determined. On the record before me, and while recognizing Wood's eminence in his field, I am not prepared to rule on his position because it is not necessary to do so in resolving this grievance.

238. I also decline to rule on Snider-Adler's qualification and independence pursuant to the test in *White Burgess Langille, supra*, as urged by the Union. I would not disqualify an expert in a labour arbitration solely because she provides drug testing services and opinions to employers, as long as she provides a transparent opinion that can be assessed for validity and reliability. That was done here. Snider-Adler was exhaustively and effectively cross examined.

239. I agree with the Union that Wood is better qualified to assess the body of research that was discussed by both experts. He also holds strong views on testing and residual impairment. He is an aggressive skeptic on the subject. Wood probably should have declined to give a diagnosis of the grievor without an in-person examination, but this was not disqualifying as suggested by the Employer. Wood was responding to questions from counsel. His opinion was transparent and amenable to review for validity and reliability.

240. In my view, both experts honestly attempted to provide objective opinion evidence based on the science as they understood it. The arbitration process is better served by encouraging a full range of evidence on difficult issues like residual impairment, rather than seeking to strike out testimony as in a court of law. This was not like *B.C. Hydro Power, supra*, where a proposed expert was deceitful in hiding an obvious predisposition against one of the participants (at para. 28). I endorse Arbitrator Moore's approach in *B.C. Hydro* that the discretion to admit

evidence under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, should be exercised in a manner consistent with a fair hearing (at para. 33).

Damages for the IME referral

241. Based on the foregoing, the grievor is entitled to damages for violation of his privacy rights in respect of the IME referral.

242. The grievor's testimony does not indicate that the impact was egregious, but I find that it was significant. The grievor presented as somewhat stoic in the face of an unsettling course of events. He did not raise a hue and a cry. He was restrained and compliant. Nevertheless, similar to the facts in the *P.Q. Grievance*, he was forced to disclose many personal matters to a health professional he did not choose. To him, this was both puzzling and disturbing. His private information was documented in an extensive report and provided to Craig for review on behalf of the Company.

243. The Employer has now changed its practice and requests an abbreviated, more conclusory form of IME report. This is positive for the future but does underline that the past practice allowed a significant, unnecessary intrusion into employees' personal lives.

244. In *Molson Breweries*, *supra* and the *P.Q. Grievance*, $5,000 in damages was awarded to grievors who bore considerable responsibility for triggering an IME demand. By contrast, the present grievor was entirely cooperative. The evidence suggests that a more balanced approach would probably have been fruitful in this case.

245. As to mitigating factors, the Employer acted in good faith albeit erroneously. It was careful in restricting the distribution of the grievor's personal information

within the Company. The Company has an appropriate privacy policy and seems generally aware of its obligations.

246. I award $7,500 in damages.

Was random drug testing justified?

Employer argument

247. Random testing was upheld for a casual marijuana user without an addiction in *Re Suncor Energy Inc. and CEP, Local 707 (Woods Grievance)*, [2008] A.G.A.A. No. 11 (Abells) (hereafter "*Suncor Energy*"), as part of a reasonable risk management regime. The grievor was involved in an accident, was required to take a urine test for THC metabolites and failed the test (66.5 ng/mL, confirmation threshold 15 ng/mL). The next day, he voluntarily attended for a drug assessment and completed a screening questionnaire. The counsellor reported that the grievor did not meet the diagnostic criteria for cannabis dependence and did not require treatment. The grievor stated he could easily stop using drugs. His job was more important to him than smoking marijuana (at paras. 32-34). As part of a Last Chance Agreement, random testing was required for three years, which was approved by the arbitrator (at para. 114) as follows:

> The first issue requiring resolution is the reasonableness of the Employer's demand that the Grievor submit to random tests. This tribunal is of the view that a requirement that the Grievor submit to random tests for a period of time is a reasonable response to the positive post-incident test of July 8, 2004. This tribunal recognizes that the July 8, 2004 test did not, in the absence of any other evidence, establish that the Grievor was impaired while at work. Nevertheless, the policy reasonably prohibits concentration of drug metabolites in the blood while at work in excess of a threshold concentration and provides for post-incident testing. The Union does not contest this policy in this grievance. For the purposes of this grievance these rules are considered part of a reasonable risk management regime intended to reduce the risk of impairment at the workplace. Given the reasonableness of these rules logic dictates that a consequence of a breach must be a requirement that an employee satisfy the Employer that he or she is prepared to abide by the rules in future. In the absence of random tests for a period of time the Employer would have no way of enforcing the work rule or of

> knowing whether the Employee was abiding by the policy. It is the view of this tribunal that the Employer should not have to wait for the next accident to test an Employee who has already tested positive to a post-accident drug test. Random tests in these circumstances permit the Employer to manage the risk of impairment at the worksite, the reason for the implementation of the rule in the first place.

248. The Employer referenced a similar rationale and result in *Re Imperial Oil Ltd. and Communications, Energy and Paperworkers Union of Canada, Local 777*, [2001] A.G.A.A. No. 102 (Sims) (hereafter "*Imperial Oil*"). The grievor failed a post-incident drug test and was subjected to a two-year term of random testing. The board recognized that such tests would not establish impairment, but it would show use prior to working hours (at paras. 238, 240):

> An employee who has never shown irresponsibility in coming to work under the influence of drugs is entitled to a higher level of respect for his or her private conduct than an employee who has failed to exercise responsible judgment in that area. This is just the "workplace experience factor" applied to the individual. In our view, it is not unreasonable to say in light of such an event, and in lieu of termination, "we will keep you on if you agree to limit your pre-work time consumption so that you never have a confirmatory level of drugs in your system at work. Furthermore, we will test this, and try to deter you from breaking this condition by random testing." To say such testing is inappropriate because it does not reveal at work impairment would be to say the employee should be free to nonetheless use drugs proximate to his working time provided he does not show-up impaired. However, that is a serious workplace offence even without a policy, and it is an offence the employee has committed already. The probation period or condition of continued employment can reasonably, in our view, extract a higher even if more invasive standard. …
>
> We find that the fact the tests do not prove impairment, in this circumstance, does not create an unreasonableness defence. The tests do serve as a deterrent against previously exhibited conduct that caused a problem. They also, while not proving impairment, establish use prior to working time, although not with any ability to distill the factors of amount, time and impairing effect. Such tests, *vis a vis* a previous offender, still bear a rational relationship to the Employer's objective, which is preventing the continuation of a risk that has already come to fruition once.

249. The Employer also cited *Re Fording Coal Ltd. and United Steelworkers of America, Local 7884 (Shypitka Grievance)*, [2001] B.C.C.A.A.A. No. 24 (Hope) (hereafter "*Fording Coal*"), a case where the grievor was an habitual user and was terminated for possessing marijuana at work. A two-year period of random testing

was required as a condition of reinstatement. Again, ongoing testing was upheld. The issue was not proof of impairment. The arbitrator reasoned that a negative test would assure the Company that the employee was not reporting with the drug in their system. "Conversely, a positive test will alert the employer to the fact that an employee continues to use the drug and thus put the employer in a position to react in defence of the safety of the workplace" (at para. 41). At that point, employer options would include removal from the workplace for discipline, referral to employee assistance or ongoing testing to ensure the individual remains drug free at work.

250. If a privacy breach is found in the present case, damages should be modest, said the Employer. In *Edmonton Police,* alcohol testing occurred three times every workday, in the workplace, which was embarrassing to the grievor. There were 235 tests and the award was $7,500. In the present case, there were only 16 tests ordered, all outside the workplace. Recent authorities have awarded $1,000 for a post-incident drug and alcohol test that breached employee privacy: *Re Vancouver Shipyards Co. Ltd., Local 506 Marine and Shipbuilders (Saret Grievance)*, [2022] B.C.C.A.A.A. No. 52 (Noonan), citing employer compassion and respect among other factors (at paras. 87-88); *Re Interfor Corp. and USW, Local 1-405 (Durkin Grievance)*, [2022] B.C.C.A.A.A. No. 21 (Fleming), where a range from $500 to $1,750 was cited. Based on the general level of awards, said the Employer, it is clear that monitoring as in the present case would not warrant multiples of a basic $1,000 award.

Union argument

251. As an initial position, the Union submitted the grievor was never warned that random monitoring could result from a positive drug test alone. *KVP* principles preclude enforcement of the rule.

252. The Orientation Booklet, which the grievor received upon hiring, provided for testing in response to impairment, not a test score. The terms of the 2018 Policy do not assist the Employer either, even if notice had been given to the grievor. Section 3.7.5.2(c) states that the employee may be required to "continue any treatment, counselling or rehabilitation as prescribed by the AME". None was prescribed here. Section 3.7.5.3(a) allows for monitoring "in appropriate circumstances" by a Relapse Prevention Monitor, defined as a specialist in substance use/abuse and addictions disease. No addiction or substance abuse was found by Durnin-Goodman. The test of reasonableness applies. Random drug testing based on "risk of impairment" is a notion that "has been universally rejected in Canada": *IBEW Grievance* (at para. 17, footnote 3).

253. Secondly, the Union said that there must be a workplace nexus before random testing is justified, given the interference in an employee's private life. Arbitrators have held that employers "generally do not have the right to interfere in the private lives of their employees" and are only entitled to impose discipline for off-duty conduct where they can establish "a nexus to the employment relationship in that it affects a substantial and legitimate business interest of the employer": *Re Canadian Forest Products Company and USWA, Local 1-424 (Skerratt Grievance)*, [2005] B.C.C.A.A.A. No. 271 (McPhillips) (at paras. 14-15). The Union also cited *Re Millhaven Fibres Ltd. and Oil, Chemical and Atomic Workers International Union, Local 9–670 (Mattis Grievance)*, [1967] O.L.A.A. No. 4 (Anderson). In Brown &

Beatty, *Canadian Labour Arbitration* (at para. 7:3010), it was stated that employers must "undertake a meaningful investigation of how seriously the employee's personal activities will affect their interests, and not rely on unsubstantiated supposition and speculation". A positive urine test alone does not establish a nexus.

254. In *Re Hamilton Street Railway and ATU, Local 127 (Haines Grievance)*, [2002] O.L.A.A. No. 1040 (Rayner), the grievor was a bus driver who used marijuana recreationally but never appeared at work impaired. He was terminated and required to sign a Last Chance Agreement that included random drug testing. The grievance was allowed and the arbitrator stated as follows (at paras. 25, 33):

> … Certainly a mandatory test may be included in a "last chance agreement" if the parties consent to it. However in the present case the grievor did not consent to it. I agree with the Company that given the limitations of the test, if the test is to be meaningful, a "zero tolerance" level would have to be demanded. However I do not agree with the Company that given the grievor's position and his admission that he used marijuana that it now becomes reasonable to demand zero tolerance based on an increased risk factor. I believe that reasoning is subject to the same fatal flaw that I have referred to earlier and that was set out in the *CNR* decision. I also believe that it runs counter to my analysis of *Entrop* which I have already enunciated. Mere possession or use does not equal impairment and does not justify the demand of the Company. …
>
> The agreement that the grievor was asked to sign also suffers from the flaw in logic set out in *CNR*. Use does not equate to abuse and it does not follow that because the grievor may use infrequently he will one day arrive at work impaired. …

255. Automatic imposition of monitoring after a positive test was rejected in *Re Dupont Canada Inc. and Communications, Energy Paperworkers Union of Canada, Local 28-0 (Drug and Alcohol Policy Grievance)*, [2002] O.L.A.A. No. 156 (P.C. Picher) (at paras. 50-52):

> The Policy stipulates that random testing will be imposed on any employee who has a positive result from a reasonable cause drug or alcohol test. This provision is too broad.
>
> …

> … The Board concludes, therefore, that the appropriate balance between employee privacy and workplace safety is that random testing does not follow automatically from the existence of a positive result from a reasonable cause test.
>
> Rather, random drug and alcohol testing may be reasonably imposed, in cooperation with the Union, for a two year period, in circumstances where an employee has recently manifested a drug or alcohol addiction or dependency or, even if not addicted or dependent, has, or recently has had, a drug or alcohol abuse problem affecting the workplace or is in a drug or alcohol rehabilitation process.

256. The Union rejected the Employer argument that monitoring was justified to manage the risk created by the grievor's marijuana use. Employer witnesses testified that the sole basis for random monitoring was the grievor's positive urine test. Management had no information about the grievor's pattern of use or any actual assessment of risk. In the IME, Durnin-Goodman was not asked to determine whether the grievor was impaired when the accident occurred. On the day of the IME, she gave the grievor another urine test, but as both experts testified, that test does not address impairment.

257. The effect of the Employer's position is to require total cannabis abstinence by the grievor. This is demanded even though the grievor has been a recreational user for decades without any issue ever arising in the workplace.

258. Responding to the Employer's authorities, the Union described *Suncor Energy*, as an outlier case that should not be followed. *Fording Coal,* is distinguishable because there the grievor was caught with cannabis in the workplace (at para. 1). *Imperial Oil*, is also distinguishable because there the arbitrator found on the evidence that the grievor's use of marijuana on the day of the incident in question "impaired his cognitive abilities while he was at work and were a contributing factor in the overflow that occurred" (at para. 212). Random testing was necessary to assure the Company that the grievor would not be using drugs and would not repeat the offence of working while impaired (at para. 216):

> We find it was reasonable for the Employer to conclude from the incident, the subsequent test score and from the absence of any explanation from Mr. Parsons that Mr. Parson's abilities at that time were impaired due to marijuana consumption. The gravity of the offence is not just his being impaired at work. The underlying seriousness is the employee's willingness to attend at work when not in an appropriate condition to do so. It is the lack of judgment and reliability; the undermining of the trust that the employee, when he finds himself impaired for whatever reason, will stay away that is worrisome. …

259. As for the IME recommendations, the Union emphasized that Durnin-Goodman was not presented as an expert witness. The only relevance of her evidence was to understand the Employer's decision-making. Otherwise, her opinion carries no weight. In addition, Durnin-Goodman's methodology was heavily criticized by Wood. In her report, she found no Substance Use Disorder but still declared the grievor unfit for work based on a urine test she administered, which did not establish impairment.

260. The Union therefore submitted that random testing was unjustified and infringed the grievor's privacy rights in a significant way. Damages should be awarded. The relevant considerations were reviewed in *Jones v. Tsige*, 2012 ONCA 32 (hereafter "*Jones*"), a court decision which was analyzed in *Re Seaspan ULC and Canadian Merchant Service Guild (Drug and Alcohol Testing Policy)* (2017), 274 L.A.C. (4th) 406 (McEwen) (hereafter "*Seaspan*"). In *Seaspan*, the Company required certain officers to undergo annual drug and alcohol testing, a policy it adopted to satisfy the requirements of one of its significant customers. It was held that the policy was unreasonable and violated the privacy rights of 17 officers. The arbitrator indicated that removal of bodily fluids through urine testing was a highly invasive search (at para. 160). Other factors relevant to the quantum of damages were that the Company knew or ought to have known the policy was unreasonable, there were serious consequences to refusing a test, the trust element in an employment relationship, absence of any apology or admission of wrongdoing, and

the impact on employees' sense of well-being and security. "These factors, taken together, point to a significant damage award" (at para. 161).

261. Each officer was awarded $3,000 in *Seaspan* and the officer who was held out of service for a lengthy period was awarded $7,000. None of the grievors were subjected to the kind of invasive IME and repetitive testing that the present grievor experienced, said the Union.

262. In *Re Tolko Industries (Lakeview Division) and United Steelworkers, Local 1–2017 (Mark Brandle Discipline & Drug Testing Grievance)*, [2020] B.C.C.A.A.A. No. 90 (Hall), where a one-day suspension was upheld for failure to lock out, the employer's demand for a drug and alcohol test was found to be unreasonable. The union sought $2,500 and the employer argued that damages should be nominal. The arbitrator stated as follows (at paras. 51-53):

> I reject the notion that only "nominal" damages are appropriate where an employer has failed to demonstrate reasonable and proper grounds to subject an employee to alcohol and drug testing. The privacy interests at stake have been long recognized as substantive rights by no less an authority than the Supreme Court of Canada. Further, awarding only nominal damages as a matter of routine may not give an employer sufficient incentive to pause and ensure its investigation has indeed been thorough before deciding to test.
>
> In this case, the Employer's decision to proceed with testing and require the Grievor to remain at the workplace following the end of his shift caused him anxiety and distress beyond mere injury to dignity. It also caused his wife to be very concerned at the time. His fellow employees were aware he was being tested and, when the Grievor returned to work, there was a broad-based rumour that he had been "busted for smoking weed". The Grievor suffered continued anxiety and uncertainty over his employment status from September 24 until October 3 while he awaited the results of the second test. Although the Employer says it did not control the testing procedure, it was responsible for invoking the process.
>
> In my view, these negative impacts flow directly from the Employer's breach of the Grievor's privacy rights and the manner in which the testing investigation was conducted. They amply support damages in the amount of $1750.00 and it is so awarded. The figure might have been higher if there was evidence before me of similar privacy violations in the past.

263. The Union noted that it is seeking a much higher quantum of privacy damages than in *Tolko*, *supra,* based on the extended course of random testing and the greater intrusion on privacy suffered by the grievor.

264. Finally, the Union pointed to the award made in *Edmonton Police,* where random testing was upheld but the number of breathalyzer tests (three times per day, for 24 months) was determined to be inappropriate and excessive. The arbitrator found no bad faith or deliberate misconduct by the employer (at para. 200). Also, she was "mindful of the caution expressed by the courts that in the absence of bad faith or demonstrable evidence of physical or economic harm, … a relatively modest damage award is appropriate" (at para. 203). In the result, $7,500 was awarded.

265. The Union requested an award of $15,000 in damages for both the unnecessary IME (submission on damages reviewed above) and random drug monitoring.

Decision on justification for random drug testing

266. The grievor was never warned that random monitoring would be imposed if he violated the Policy by testing positive for marijuana metabolites. I accept the Union's primary argument that the *KVP* notification principle precludes the Employer from enforcing such a unilateral rule. Craig was clear in her evidence that while the Company considers the IME report and any recommendations for treatment, in practice a period of monitoring is always required, even when no disorder has been found. Monitoring flows from a breach of the Policy to wit, a positive urine test.

267. The rule also fails for unreasonableness because there is no individualized exercise of discretion. As the Union pointed out, Section 3.7.5.3(a) of the Policy provides that "in appropriate circumstances" the Company may require monitoring,

including body fluid testing, for a period. The only circumstance considered in the present case was the grievor's urine test result. It was telling that Richards justified monitoring on the basis that the grievor was affected by or under the influence of a drug while at work. She retracted this statement under cross examination. At most, she conceded, the Employer could say that the grievor tested above the confirmation threshold. In other words, he had used marijuana. Yet the Policy does not ban recreational cannabis use after hours. As held in *Hamilton Street Railway, supra* (at para. 25), "Mere possession or use does not equal impairment and does not justify the demand of the Company." As succinctly stated in *Dupont Canada, supra* (at para. 50), if a policy imposes random testing for any employee with a positive test result, "This provision is too broad." It does not achieve the appropriate balance between employee privacy and workplace safety (at para. 51).

268. I further agree with the Union that the Employer's authorities are not persuasive. In *Fording Coal,* the grievor was caught with cannabis in the workplace, an act of grave misconduct. In *Imperial Oil,* it was found as a fact that the grievor was impaired by marijuana when the accident happened at work. In those cases, the nexus with workplace safety was unequivocal and the employers were justified in seeking reassurance by way of random testing. Both decisions are distinguishable.

269. By contrast, in *Suncor Energy,* the facts were more similar to the present case in that there was a significant incident, a positive test and a return to work subject to random testing and other conditions under a Last Chance Agreement. The union did not contest the Company's alcohol and drug policy, for purposes of the grievance, and on that basis the arbitrator adopted the following assumption (at para. 114): "For the purposes of this grievance these rules are considered part of a reasonable risk management regime intended to reduce the risk of impairment at the workplace." No such assumption has been accepted by the Union in the present case.

270. The arbitrator in *Suncor Energy* then reasoned that the employer must be able to assure itself of compliance in future. It should not have to wait for the next accident before it can test the grievor. "Random tests in these circumstances permit the employer to manage the risk of impairment at the worksite, the reason for the implementation of the rule in the first place" (at para. 114).

271. The Union characterized the *Suncor* award as an outlier. This argument is supported by the discussion in *IBEW Grievance*. In *IBEW*, after an incident, the grievor tested positive in a urine test, resulting in an IME and random monitoring. Arbitrator Hall noted that the third prerequisite for a test after a significant incident is evidence establishing impairment as a reasonable line of inquiry. "The focus on risk reflects the notion that an employer is not obliged to await a serious outcome before testing will be justified. Thus, the potential for harm often forms an important element of the analysis …" (at para. 17). Importantly, the arbitrator added the following qualifier (at footnote 3):

> At the same time, the Employer's reliance on "risk" is not without its limits. It argued, for instance, that the Grievor's monitoring was justified in part due to "the risk of impairment". Similar submissions have been universally rejected in Canada as a basis for random drug testing.

272. On this basis, I agree that the rationale for random testing put forward in *Suncor Energy* (to manage the risk of impairment) should not be followed here. More is required.

273. Returning to the present facts, what about Durnin-Goodman's IME recommendations? While the IME report did investigate the grievor's circumstances in great detail and did recommend a year of monitoring, I would be hesitant to place reliance on it in the present case. As held earlier in these reasons, the Employer was not justified in going straight-to-IME. The grievor's privacy rights were violated in the process. Arguably the IME should be excluded. The Union submitted that

Durnin-Goodman's evidence should be given no weight, beyond illustrating the Company's procedures. On the other hand, when the context is impairment in a safety sensitive workplace, arguably technical arguments should be avoided under the precautionary principle. Did the IME provide a reasonable basis for ordering a year of random urine testing? Even if the IME is admissible and deserves weight, the answer is no.

274. For a number of reasons, monitoring cannot be justified by the IME findings and recommendations. Durnin-Goodman's methodology was challenged by Wood. She responded by citing established occupational health guidelines and affirming that her practice conforms with these sources. Wood was especially critical of the SASSI-4 screening tool and Durnin-Goodman appeared to acknowledge that there is controversy in this respect. She said she considered the full range of assessment tools and came to a considered opinion. The SASSI results indicated a high probability of substance use disorder. SASSI generated a recommendation for treatment including addictions therapy. On the Paulhus Deception Scale, the grievor's impression management score indicated his answers in the assessment may be invalid. Yet Durnin-Goodman rejected all these data in finding no substance use disorder and no need for treatment. Presumably paper testing results must be tempered by the exercise of professional judgment.

275. It appears from the IME that Durnin-Goodman considered the grievor to have a moderate permanent impairment after applying the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Class 3) (at p. 16). She also wrote: "This designation is offered despite the opinion that maximum medical improvement has not been reached." No explanation of this cryptic comment was provided. AMA Class 3 Impairment is defined as "Impairment levels are compatible with some, but not all, useful functioning" (at p. 25).

276. Wood claimed this Class 3 designation was an erroneous use of the AMA Guides given that substance use disorders are not ratable conditions. Wood testified this was a misdiagnosis. He stated that the grievor did not have a substance use disorder and did not have an impairment. At the hearing, Durnin-Goodman clarified that she meant to say the grievor may be impaired in an occupational safety sense, but he is not permanently impaired. She said she adapted the AMA Guides in an effort to illustrate the grievor's condition on June 11, 2019, when she conducted the IME. Her basis for saying he was unfit for duty was the urine test result from that date and his continuing marijuana use. She did not take an oral fluid test or a blood test.

277. It is common ground in this case that a positive urine test result does not establish impairment, only use of cannabis. For this reason, the ultimate conclusion stated in the IME does not support a course of random monitoring. The reasoning is circular. The grievor was sent directly for an IME because of a positive urine test, In the IME report, based on another urine test, further urine testing for a year was recommended, with potentially serious employment consequences.

278. Under cross examination, Durnin-Goodman fell back on the fact of the grievor's recreational use of marijuana and the 24-hour abstinence rule urged by a number of health authorities. The Employer has not adopted any such rule. She also emphasized the importance of the precautionary principle, as did both Snider-Adler and Wood. The precautionary principle might justify an abstinence rule or cut-off times as new Employer policies. No doubt the Company is aware of the options.

279. Snider-Adler endorsed a 24-hour rule, based on research evidence that cannabis produces residual impairment, buttressed by the precautionary principle. Earlier in these reasons (at para. 230), I found that Snider-Adler's conclusions do not provide

a reliable basis for assuming employees who have used cannabis (as indicated by a positive urine test) are likely working under a residual impairment. I noted that future research may or may not change that assessment. I also recognized Wood's critique of the research studies relied upon by Snider-Adler. I indicated that this critique may be broadly accepted over time or research flaws he identified may be remedied, with results to be determined.

280. In the meantime, the evidence discloses no reasonable basis for ordering the grievor to undergo a year of random drug testing. The grievor's privacy rights were violated again and additional damages should be awarded.

281. In these circumstances, damages must be more than nominal because the grievor was subjected to a protracted series of tests involving removal of bodily fluids as well as interference with his personal life and activities of daily living. Arbitrator Smith in *Edmonton Police,* referencing *Jones,* and *Seaspan,* acknowledged a caution from the courts that "in the absence of bad faith or demonstrable evidence of physical or economic harm, a relatively modest damage award is appropriate" (at para. 203).

282. The grievance in *Edmonton Police* alleged "an unreasonable level of testing" under a return-to-work agreement (at para. 171) after an eight-week outpatient alcohol treatment program. The grievor had to submit three random samples per work-shift using a handheld breathalyzer device, totalling 235 tests, plus weekly urine samples. The total time spent getting to and from test sites was an hour and half over the duration of the program (at para. 21). Testing was found to be justified but the number of breathalyzer tests was held to be excessive. In that case, the arbitrator found no bad faith or economic consequences, but the invasion of privacy

was not minimal, and the trust component of the employment relationship was diminished (at para. 202). The sum of $7,500 was awarded.

283. The cautionary judicial signal in *Jones* was given in the course of recognizing a "right of action for intrusion upon seclusion." The context was informational privacy in bank records. The parties were strangers. The court stated (at para. 71):

> …proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

284. The court judgment (10 years ago) set a range of non-pecuniary damages capped at $20,000 and awarded $10,000 for breach of informational privacy.

285. The present facts involve more than an intangible interest in privacy as between strangers. Random testing required the grievor to respond promptly to each notification by attending a facility designated as a suitable lab site. On one occasion, he was on leave in the Maritimes and was forced to drive four hours (one way) to take a test. He did comply fully with the monitoring program and testified he was not anxious, because he had decided to stop using marijuana. Nevertheless, the burden and the affront to personal dignity was significant. He realized it was no longer possible to be a recreational user and keep working for the Company. He ended some friendships to avoid the marijuana social setting. Moreover, as stated by Arbitrator McEwen in *Seaspan*, (at para. 160), removal of bodily fluids is a highly invasive form of search.

286. In mitigation, I repeat my earlier finding (regarding the IME) that the Employer acted in good faith albeit erroneously. The issues around testing are complex and the science is unsettled. It is challenging for employers to navigate in this environment. Even so, remedies under the collective agreement should be

meaningful because the parties are never strangers, and they have a mutual interest in sustaining the employment relationship.

287. In all the circumstances, I award $7,500 in damages.

Justification for discipline

Employer argument

288. The Employer submitted that there was just cause for discipline and that a 10-day suspension was not excessive in the particular circumstances: *Re Wm. Scott & Co. Ltd.*, [1976] BCLRBD No. 98. It has been recognized for many years that the science on proof of cannabis impairment is unsettled, but employers are allowed to manage the risk by prohibiting a breach of drug policy and testing for exposure to drugs: *Suncor Energy*.

289. A lengthy suspension is appropriate for breach of a drug and alcohol policy: *Re Fraser Surrey Docks LT and ILWU Canada*, (2020) 147 C.L.A.S. 37 (Sullivan) (45 day suspension for positive test and refusal to attend assessment); *Re Tolko Industries Ltd. (Lakeview Lumber Division) and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-425*, [2017] B.C.C.A.A.A. 108 (Bell) (5 day suspension and two year prohibition from operating mobile equipment for positive marijuana test after an accident); *Toronto Electric Commissioners and CUPE, Local 1 (Bourne Grievance)*, [1998] O.L.A.A. No. 341 (Randall) (10 day suspension for breach of zero tolerance policy by drinking a beer at lunch).

290. In the *P.Q. Grievance*, dealing with the same policy as in the present case, a 6-day suspension was ordered where the grievor refused the test but later obtained his

own test results. Arbitrator McPhillips emphasized the need for deterrence in maintaining a safe, drug free workplace, as follows (at paras. 49- 54):

> 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* …
>
> 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. …*; *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. …
>
> 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.

291. The Employer emphasized that breach of the Policy is a serious matter and there must be a disciplinary response that effectively deters employees from using impairing substances in a proximate timeframe. The present case is more serious than the *P.Q. Grievance* because the grievor was using cannabis multiple times per week, contravening the Policy. Therefore the 10-day suspension was justified taking into account the particular circumstances.

Union argument

292. The Union submitted there was no cause for discipline, and in the alternative, only a written warning should have been issued. The 6-day suspension allowed in the *P.Q. Grievance* was based on unique features of that case, including lack of remorse and combative behaviour on the grievor's part, distinguishing *PQ* from the present case.

293. The sole basis for discipline here was the positive urine test. Arbitral authority holds that the presence of a drug in the employee's system "does not establish, standing alone, the requisite just cause because it cannot prove work related impairment": *Dupont Canada, supra*, at para. 26. Such a policy is "unreasonable on its face as there is no nexus between a positive drug test, standing alone, and impairment while on duty. So construed the rule would purport to regulate the private morality of employees, without reference to any clearly demonstrated legitimate employer interest": *Re Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada)*, [2000] C.L.A.D. No. 465 (M.G. Picher) at para. 202. These legal principles were described as "extremely well settled" in *Re Canadian Pacific*

Railway Company and Teamsters Canada Rail Conference Maintenance of Way Employee Division, 2013 CanLII 88312 (M.G. Picher) (at p. 3). The railway industry has long been recognized as safety sensitive. To the same effect, the Union referenced *Re Canadian National Railway Company and United Steelworkers, Local 2004*, 2021 CanLII 30111 (Schmidt) (at paras. 50-54).

294. In addition, the Union argued that the Employer failed to bring its disciplinary policy to the grievor's attention. The only prohibition made known to the grievor was that he must not attend work impaired. He was not disciplined for working in an impaired condition, only for the positive urine test. As a result, the Employer cannot rely on the test result to impose discipline.

295. The Union responded to the Employer's submission that since there is no chemical test that proves cannabis impairment, it was reasonable to prohibit the presence of metabolites. This ignores the reality that misconduct can still be established through the normal categories of evidence. A positive test combined with other cogent evidence may prove the point, as in *Imperial Oil* (at paras. 215-206). In the present case, Employer witnesses were clear that the sole basis for alleging a breach of the Policy was the urine test result.

296. In the alternative, there are numerous mitigating factors that justify reducing the penalty to a written warning: the impropriety of an automatic 10-day suspension; absence of any supporting evidence of impairment; no prior discipline; no evidence of intent to violate the Policy; and a cooperative approach by the grievor throughout the process. The Union said that a warning would be sufficient to correct the behaviour and the facts confirm that. The grievor has ceased smoking marijuana because he is now aware that the Policy *de facto* precludes recreational use. Progressive discipline principles should apply: *Re Yellow Cab Company Ltd. and*

Teamsters Local Union No. 213 (Ford Grievance), [1998] B.C.C.A.A.A. No. 417 (Thorne) (at para. 30).

Decision on discipline

297. There are problematic elements in the submissions of both parties. The Employer maintained that the present case is serious because the grievor used marijuana multiple times per week, in violation of the Policy. However, the Policy does not prohibit off-hours use of marijuana and does not create a cut-off time to guide employees. According to the expert evidence, there are reasonable options for abstinence periods that employers may utilize, recognizing the uncertain state of the science on residual impairment and the importance of the precautionary principle. Snider-Adler recommended 24 hours. Wood suggested eight or 12 hours but testified that 24 hours was another policy open to employers. Nothing in the voluminous record herein supported the efficacy of a positive urine test, standing alone, as reasonable risk management.

298. Oral fluid testing would be a better choice because it is less intrusive and signifies recent use. The Employer's intent to manage cannabis use proximate to working time is legitimate. Selecting an appropriate confirmation level for oral fluid testing could still be contentious. However, if combined with a cut-off policy, whether 12 hours or 24 hours or some other period, at least employees would have rational and fair notice by which to govern their personal lives and limit their recreational drug use. In turn, this should reduce the risk of impairment on the job, which was the Company's safety objective. As it stated in argument, "… the Employer need not demonstrate impairment at work to justify discipline; use of impairing substances in a proximate timeframe to work creates risk that the

Employer must be able to manage, including through disciplinary sanctions" (at para. 61).

299. In its discipline argument, the Union stood on the arbitral case law that a positive urine test alone does not prove impairment, rendering the Policy unreasonable. However, the Union accepted the Policy for purposes of the present dispute and only challenged the application of the Policy to the grievor. In that regard, I find that the Employer failed to notify the grievor of the disciplinary rule and cannot enforce a suspension for that reason.

300. The discipline is set aside.

Award and Order

301. The grievor's privacy rights were violated (a) by the direct referral to an IME with a Company-selected specialist physician, and (b) by the imposition of one year of random drug monitoring. I award damages of $15,000.

302. Records and documents in the Employer's possession relating to the IME and random drug monitoring will be destroyed.

303. The 10-day suspension is set aside.

304. The grievor will be made whole for lost wages and overtime, and for expenses incurred as a result of his participation in random drug monitoring.

305. Jurisdiction is retained to implement this award as may be necessary.

ISSUED at Victoria, B.C. on October 24, 2022.

ARNE PELTZ, Arbitrator