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Arbitrator's Decision re Post-Incident Drug and Alcohol Test Upheld on Judicial Review

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Decision Commented On: *Canadian Energy Workers' Association v ATCO Electric Ltd*, 2018 ABQB 258, (*CEWA*)

Clearly, challenges surrounding drug and alcohol testing policies and procedures take up quite a bit of time and energy of companies, unions, arbitrators and eventually, courts. The factual context is very important in these cases. This leads to the courts often deferring to the fact finding and conclusions drawn by tribunals.

The facts in this case were summarized by Madam Justice Ritu Khullar as follows. Grievors Landon Potter and Nolan Vanderkley ("Potter" and "Vanderkley") were part of a site crew installing transmission towers at a remote location outside of Fort McMurray (*CEWA*, at para 2). The site was accessed by a narrow road with portions that did not permit two-way travel. A Nodwell, a 65,000-pound vehicle that is 25-feet-long and 13-feet-wide, with restricted visibility on the sides, was at the bottom of the hill on the narrow portion of the road and needed to be moved (*CEWA*, at para 2). Vanderkley directed Potter to move the Nodwell into the working area, and unbeknownst to Potter, Vanderkley next backed his company Ford truck to the side of the road, into the blind spot of the Nodwell, in order to allow a third vehicle to pass. Potter decided to back the Nodwell up to go into the worksite instead of driving forward, and Vanderkley spotted the Nodwell at the last moment and moved forward, but was unable to completely avoid being hit by the Nodwell, incurring some damage to the Ford truck (*CEWA*, at para 3). Although Potter had done a circle check to ensure there were no obstructions, he had not used a spotter to help him back up and did not see Vanderkley's truck *(CEWA*, at para 4).

The accident was reported to the supervisor, who decided to have both Potter and Vanderkley tested under ATCO's Fitness for Work (Alcohol and Drug Use) Policy (*CEWA*, at para 5). The Policy includes provisions for post-incident or "for cause" testing. It included both mandatory and discretionary testing provisions. The post-incident tests were ordered under the discretionary portion, which outlines when a supervisor may order a post-incident test. In this case, because there had been a clear *potential* for lost time, serious injury to a worker and property damage greater than $10,000, the testing occurred (*CEWA*, at paras 7 to 9).
The Union (CEWA) argued from the beginning that the tests were being undertaken under protest. Vanderkley's test results were negative for all substances and Potter tested positive for cannabis. He was recommended to attend a substance abuse program and returned to work without incident (*CEWA*, at para 10).

An incident report indicated that the damage to the truck was estimated to be less than $1,000, and the immediate cause of the accident was determined to be "not using a spotter in a congested area" and the employee "used poor judgment of distance to Nodwell" (*CEWA*, at para 11).

At the Arbitration hearing, the application of the Policy, and not the wording or provisions in the Policy, was at issue. The Arbitration Board was asked to determine whether ATCO had justifiably ordered drug and alcohol testing, given the facts and Policy (*CEWA*, at para 12).

In arriving at the conclusion that ATCO's application of the Policy under these circumstances was reasonable, the Arbitration Board dismissed Vanderkley's and Potter's grievances (*CEWA*, at para 13).

Since this case involved post-incident testing, the Arbitration Board relied on the leading case of *Weyerhaeuser Co v Communications, Energy and Paperworker's Union, Local 447 (Roberto Grievance)*, 154 LAC (4th) 3 (*Weyerhaeuser (Roberto Grievance)).* Post-incident based testing involves explaining why an event occurred and what caused the incident and the employee's connection to it; less information about the employee's impairment is required (*CEWA*, at para 13, citing *Weyerhaeuser (Roberto Grievance*) at paras 41-42). On the other hand, reasonable cause testing occurs when the employer has a reasonable basis to believe that an employee is impaired by alcohol or drugs; the focus is on the employee. The Arbitration Board had adopted three considerations from the case of *Weyerhaeuser (Roberto Grievance)* in order to assist in determining when post-incident testing is appropriate (*CEWA*, at para 13):

> 1. The threshold level the incident requires to justify testing;
> 2. The degree of inquiry necessary before the decision to test is made;
> 3. The necessary link between the incident and the employee's situation to justify testing.

First, the Arbitration Board had determined that the accident fell into the criteria for discretionary testing under the "near-miss category" given the size of the Nodwell and the chance that Vanderkley had not seen the Nodwell and moved the Ford truck in time. Thus, the incident had a reasonable potential to result in serious harm and the threshold was met (*CEWA*, at para 17).

Second, the Arbitration Board had found that while the investigation was not lengthy, it was as complete as possible, and allowed ATCO to conclude that the incident was "caused by human error caused by poor judgment" (*CEWA*, at para 18).

Third, the Arbitration Board had found that both Potter and Vanderkley should have been aware of the need for a spotter based on the training that had occurred previously at the worksite. An earlier incident with the Nodwell had caused ATCO to emphasize the safety requirements for moving the Nodwell. Both knew there was limited visibility in operating the Nodwell. Thus, the poor judgment or mistaken assumptions of Vanderkley and Potter entitled ATCO to administer the alcohol and drug test to rule out the possibility of impairment (*CEWA*, at para 19).

Justice Khullar and the parties agreed that the appropriate standard of review of the Arbitration Board's decision was reasonableness (*CEWA*, at para 25).

The relevant legal principles applicable to the judicial review were not in dispute. The leading case on random drug and alcohol testing in the workplace was decided by the Supreme Court of Canada (SCC): *Communications, Energy and Paperworker's Union of Canada, Local 30 v Irving Pulp & Paper, ltd*, 2013 SCC 34 ("*Irving*"). At para 5, the SCC held that an employer can require drug and alcohol testing of an individual employee "if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment." In addition, the leading Alberta case on post-incident testing is *Weyerhaeuser (Roberto Grievance)* (as cited above). Justice Khullar held that in post-incident testing, "the investigation must lead to the conclusion that the particular employee's role in the event might have been due to impairment" (*CEWA*, at para 34).

Each side had argued that the Arbitration Award had changed the law, but Justice Khullar disagreed (*CEWA*, at para 37). CEWA argued that the finding of the Arbitration Board should have led to the conclusion that there was no reason to test Potter and Vanderkley when it had stated (at para 8):

> The testing was not directed because of any suspicions about impairment by drugs or alcohol on the part of either Grievor, but as part of the investigative activity in determining the cause of the accident.

CEWA argued that before testing post-incident, an employer must have some kind of basis to believe that the employee's impairment was relevant to the cause of the accident. CEWA argued that the decision of the Arbitration Board set the standard too low for post-incident testing, as it will happen almost automatically—accidents usually involve some kind of human error or poor judgment (*CEWA*, at para 39). Justice Khullar disagreed. She held that the Arbitration Board had found that there was human error under the Policy and that post-incident testing was used to rule out whether alcohol or drugs possibly contributed to the incident (*CEWA*, at para 39). The Arbitration Board had ruled based on the fact that there had been evidence of safety training on the Nodwell (*CEWA*, at para 39). The Arbitration Board's statement (quoted above) merely points out that testing was not for reasonable cause (the standard for random drug testing not post-incident testing) (*CEWA*, at para 39).

At the same time, Justice Khullar rejected ATCO's argument that the proposition should be that an employer can test an employee for drugs and alcohol whenever there is evidence of poor judgment (*CEWA*, at para 40). Justice Khullar noted that the Arbitration Board had evidence of more than just poor judgment (i.e., safety training on the Nodwell). Further, the *Weyerhaeuser (Roberto Grievance)* case stands for the proposition that an employer must consider all of the circumstances; not just whether there was human error or poor judgment (*CEWA*, at para 40).

Justice Khullar emphasized that the balancing of workplace safety and worker privacy "is a nuanced and very fact specific exercise" (*CEWA*, at para 43). Thus, the cases apply the same legal principles to very specific factual contexts (*CEWA*, at para 43). Justice Khullar went on to note that the SCC reminded in *Irving* that courts should show deference to administrative

tribunals, in particular labour arbitrators in the context of grievance arbitrations. Justice Khullar sitting as an arbitrator may or may not have come to the same conclusion as the Arbitration Board, but that is irrelevant. The Arbitration Board had applied well-established legal principles and the challenge was not based on the policy or its reasonableness. Further, the Arbitration Board had provided fulsome reasons that allowed a reader to follow its analysis and see how it arrived at its conclusion. The conclusion falls within a range of reasonable outcomes (*CEWA*, at para 44).

Justice Khullar also emphasized that the decision of the Arbitration Board had not changed the law or created a precedent. She then dismissed the application for Judicial Review (*CEWA*, at para 44).

This post may be cited as: Linda Mckay-Panos "Arbitrator's Decision re Post-Incident Drug and Alcohol Test Upheld on Judicial Review" (May 14, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/05/Blog_LMP_Canadian_Energy_Workers_Association.pdf