

IN THE MATTER OF AN ARBITRATION CONCERNING
THE GRIEVANCE OF THOMAS ROEDELBRONN (GRIEVOR)

BETWEEN:

UNITED STEEL WORKERS , LOCAL 5890 (Union)

and

EVRAZ INC. NA CANADA (Employer)

ARBITRATOR:

Gary G. W. Semenchuck

ARBITRATION HEARING DATE:

April 22, 2013

COUNSEL AND REPRESENTATIVES:

Greg McGinnis, Counsel for the Employer

Brian Babcock, Senior Human Resources Manager (Employer)

Troy La Londe, Human Resources Manager (Employer)

Sonny Rioux, District 3 Staff Representative for the Union and the Grievor

Thomas Roedelbronn, Grievor

DATE OF AWARD: May 23, 2013

ARBITRATION AWARD

INTRODUCTION AND PRELIMINARY MATTERS

This Arbitration relates to a grievance by Thomas Roedelbronn, the Grievor, arising from the Employer requiring the Grievor to submit to a post incident alcohol and substance test following an incident on January 14, 2013.

The parties agreed that I was properly constituted as the Arbitrator to determine this grievance and that there were no preliminary matters to be considered.

FACTS

There is no material dispute about the facts surrounding this grievance. The Union presented evidence from three witnesses: Corey Liebrecht, President of the Union Local, and an equipment operator in the yard of the Employer; Ryan Padar, Shop Steward and a yard equipment operator with the employer; and Thomas Roedelbronn, the Grievor. The Employer presented evidence from two witnesses: Mike Fink, an Area Supervisor in the Spiral Mills of the Employer; and Graham Melbourne, Safety Manager at the Employer's Plant.

The incident occurred on January 14, 2013, at approximately 4pm on the Bead Miller Platform in Spiral Mill #1 at the Evraz Plant in Regina, SK. The Grievor was working in that area during his shift and was approaching the Bead Miller to replace the bead miller head. He had a new bead miller head in his right hand (gloved). He was stepping up onto the bead miller platform when his foot slipped off the edge of the step. As he fell forward, his right hand, which was holding the new bead miller head, contacted the edge of the bead miller table crushing his fingers between the edge of the steel table and the new bead miller head in his hand. The bead miller head weighs about 8 pounds. When the Grievor removed his glove from his right hand, he found that his ring finger was crushed and bleeding. As a result, he went to the First Aid Station and a First Responder cleaned the finger and suggested stitches would be needed. The Grievor went to the hospital by ambulance and received 6 or 7 stitches in his finger and also found out that the bone at the tip of his finger had been cracked. Mike Fink drove to the hospital in his own car and stayed with the Grievor at Pasqua Hospital for about 4 hours. After the Grievor was discharged, Mike Fink drove him back to the Plant and they went into the boardroom. The Grievor was asked to wait in the boardroom with two night supervisors while Mike Fink got an accident report form and began to complete the report. Mike Fink also gave the Grievor the opportunity to make a written statement, which the Grievor did. Mike Fink also completed the Post Incident Check List and consulted with Graham Melbourne, Keith Marchtaler and Troy LaLonde about conducting a post incident alcohol and substance test. All of them agreed that, in these circumstances, a post incident test should be conducted. Mike Fink advised Ryan Padar, the shop steward, that the Grievor would be required to undergo a post incident test and allowed Mr. Padar to have a confidential consultation with the Grievor. Mr. Padar advised the Grievor that the Employer intended to conduct a post incident test and, if the Grievor refused, he would be subject to disciplinary action. The Grievor indicated he had no concerns

about taking the test. Mike Fink arranged for the testing company to attend and conduct the post incident test, which occurred about 9:30pm on January 14th. The test result was negative. Prior to that test, the Grievor had asked to use the bathroom but was told by Mike Fink that he didn't know if that should be allowed and it was best to wait. The Grievor testified that he was uncomfortable but did not use the bathroom until the test was completed. The Grievor returned to the Employer's plant at 8:30am on January 15, 2013, to assist in the review and completion of the incident investigation. The Grievor was paid for all his time, including overtime, for January 14 and 15.

The Interim Report of the incident on January 14, 2013, was completed in handwriting and included three corrective actions: Install Hand Rail on Right Side for 3 point contact; Coat floor area with no-slip compound; and mark step with High Visibility Markings. Those corrective actions were carried out by the Employer. Subsequently, there was a typed Final Report prepared.

The Grievor resigned his employment with the Employer in April for reasons unrelated to the incident and returned to a new opportunity with his former employer.

The Grievor filed a grievance dated January 21, 2013, alleging "that the Company did not have reasonable cause to obtain a sample for drug testing and...the circumstances to which I was subjected prior to the sample being obtained". The Grievance also stated "that the Union may be seeking damages".

ARGUMENT BY THE UNION

The Union argued that the Employer needed some reason to require the test and there was no such reason. There were no signs of impairment and the incident was caused by a wet floor, which was obvious to anyone examining the floor. The Union argued that the injury to the Grievor's finger was not serious enough to require an ambulance and the Employer did not give enough weight to the Grievor's explanation. The Union acknowledged that safety is priority number one and that drug testing is one tool for a safety policy. However, the Union argued that an individual's right to privacy is a cherished right and is not to be interfered with lightly. Under the circumstances of this incident, the Union argued that no test should have been conducted. The Union requested that the Grievance be allowed and that damages of \$5,000 be awarded.

ARGUMENT BY THE EMPLOYER

The Employer argued that the Union was inflating the issues and that the law does not require reasonable cause for post incident testing. There are four categories of testing: pre-employment; reasonable cause; post-incident; and random. Behaviour is not the driving, determining factor for a post-incident test as it is for a random test. The Employer argued that the Post-Incident checklist creates thresholds and, in this case, it was reasonable for the Employer to require the test if the employee goes to the hospital. The application of the policy by the Employer was reasonable and the Grievance should be dismissed. The Employer recognizes that employees have a right to privacy but the post-incident test did not breach that right. Although the arbitrator has jurisdiction to award damages, there is no basis for

such an award here, even if the Grievance is upheld. A declaration would suffice if the Grievance is upheld.

These summaries of arguments are not meant to be exhaustive. Reference to additional facts and argument may be made in the analysis below.

Both parties submitted several arbitral authorities and I have carefully reviewed all of them, in addition to the evidence presented.

ANALYSIS and DECISION

One of the policies of the Employer is the Alcohol and Substance Program EINA Canada which consists of 25 pages. The Policy Statement under General Principles reads in part: "Evrax Inc. NA Canada ("Evrax") is committed to providing a safe and successful workplace and to minimizing health and safety risks associated for employees at work". Further on, it reads: "Evrax is committed to protecting the privacy and personal dignity of its Employees".

Under the heading of ALCOHOL AND SUBSTANCE TESTING on page 10 of 25, Evrax states it will conduct testing in the following circumstances:

- A. Pre-Employment/Pre-Assignment Testing for Safety-Sensitive Positions
- B. Reasonable Cause Testing for Employees in Safety-Sensitive Positions
- C. Post-Incident Testing for Employees in Safety-Sensitive Positions
- D. Testing After a Program Violation
- E. Testing After Formal Treatment
- F. Unable to Test

Under the Post-Incident Testing on pages 12 to 14, there are the following provisions:

i As part of a complete investigation, Alcohol and Substance Testing will be required for all Employees involved in a "significant work-related incident" or "high potential incident" (as defined below), unless there is clear evidence (e.g., structural or mechanical failure) that the acts and omissions of the Employee could not have been a contributing factor. Because post-incident testing is part of an investigative procedure, testing will be required even in the absence of direct evidence to believe Alcohol or Substance abuse was a contributing factor. In addition, management may, at its discretion, require a post-incident test after any other work-related incident or near miss as part of an investigation where there are reasonable grounds to believe that Alcohol or Substance use may have been a contributing factor.

ii The following procedures will apply to all post-incident testing:

a) Generally, a "significant work-related incident" or "high potential incident" will include all incidents which resulted or could have resulted in:

- *a fatality or serious personal injury to an Employee, contract worker, member of the public or any other individual;
- *an environmental incident with significant implications;
- *loss or damage to property, equipment or vehicles;
- *loss of Company or client revenues; or
- *a near miss that in the Supervisor's opinion may have resulted in any of the above.

iii The reasons for a decision to conduct a test or not to conduct a test should be documented as part of the preliminary investigation as soon as reasonably practical after the triggering event;

iv The decision to refer someone, or a group of individuals, for a test must only be made by a trained Supervisor investigating the incident, in conjunction with a second trained person (preferably Site Medical Personnel, Human Resources, or if none of these individuals are available, another trained Supervisor) wherever possible; Post-incident testing must be conducted as soon as reasonably practicable following the incident although, if an Alcohol test cannot be conducted within 8 hours of the incident and/or a Substance test cannot be conducted within 32 hours of the incident, attempts to obtain a sample will cease and the Supervisor investigating the incident must provide Human Resources with a valid reason why the test could not be completed;

v As noted above, a test will not be necessary if there is clear evidence that the acts or omissions of Employees could not have been a contributing factor (e.g. structural or mechanical failure);

vi Employees referred for a test will only be those who had a reasonable possibility of being directly involved in the chain of acts or omissions leading up to the incident;

This Program states at page 15 of 25 that refusal to submit to an alcohol/substance test is a violation of the Program and is grounds for disciplinary action.

The Employer also has an Alcohol & Substance Testing-Decision Tree-Post Incident document which provides a step by step procedure to be followed. That Decision Tree poses the question: "Could the Employee's acts or omissions be a contributing factor" and has arrows to follow depending on a "No" or "Yes" answer. If the answer is yes, the alcohol and substance testing protocol is to be followed.

The Employer has another document called the POST INCIDENT TESTING CHECKLIST which is to be used to determine if a post incident alcohol & substance test is required. It consists of a number of questions/statements with a yes and no box beside each one. The final question is to be answered only if there is at least one yes answer to the series of questions above the final one. The final question is "Could the Employee's acts or omissions be a contributing factor?" If the answer is yes, then the employee is to be sent for a Post Incident Test. The document also provides space to indicate reasons for that answer.

Mike Fink testified that he decided to use the Decision Tree pretty well as soon as he got back to the Plant from the hospital and he completed the Post Incident Testing Checklist then, as well. He marked

two yes boxes on that Checklist. The first yes was beside the statement that the employee received treatment by a medical professional that is more complex than first aid. That Checklist has a list of what is to be considered first aid and that list indicates that sutures or staples or other wound closing devices are considered medical treatment and not first aid. The second yes was beside the final question about whether the employee's acts or omissions could be a contributing factor. The reasons for that conclusion were "Regular duties being performed with no previous incidents in the area. Testing being done to remove or confirm substance as a possible contributing factor". In his testimony, Mr. Fink stated that there were no witnesses to the incident and he did not know if the physical surroundings were the cause of the injury. He also consulted with the Safety Manager, the Human Resources Manager and another Supervisor to confirm that a post incident test should be conducted. On that basis, Mr. Fink advised the Grievor that he would be required to submit to a post incident test. As described above, the test was conducted and the result was negative.

This case involves the balancing of interests between an individual's right to privacy and an employer's authority to require substance testing to maintain a safe working environment. Arbitral jurisprudence has recognized that an employer can require post incident testing as a legitimate exercise of management's authority in a safety sensitive workplace. However, that requirement for a post incident test cannot be random. In this case, both the Employer and the Union recognize that safety is a paramount consideration in this Plant. The Alcohol and Substance Program instituted by the Employer states that the Employer "is committed to providing a safe and successful workplace and to minimizing health and safety risks associated for employees at work". That Program also states: "In addition to achieving an Alcohol and Substance-free workplace, Evraz is committed to protecting the privacy and personal dignity of its Employees".

That Program outlines six circumstances when Alcohol and Substance Testing will be conducted and describes the requirements and procedures for each of these six:

1. Pre-Employment/Pre-Assignment Testing for Safety-Sensitive Positions.
2. Reasonable Cause Testing for Employees in Safety-Sensitive Positions.
3. Post-Incident Testing for Employees in Safety-Sensitive Positions.
4. Testing After a Program Violation.
5. Testing After Formal Treatment.
6. Unable to Test.

In this case, we are concerned only with Post Incident Testing. In that regard, I agree with the following statements that the standard for post incident testing is different from the standards for reasonable cause testing and the standard cannot be arbitrary or capricious. In *Fording Coal Limited v. United Steel Workers of America, Local 7884* (2003) 119 L.A.C. (4th) 165, at paragraph 121, Arbitrator Devine states: "It is readily apparent the standards for what I will call "post-incident" testing (which includes accidents, near misses and "serious" incidents) must be different from the standards that apply to "reasonable

cause” testing.” In paragraph 122, he goes on to state: “On the other hand, post-incident testing is part of an investigative process to which different rules apply.” In *Weyerhaeuser Company Limited and Communications, Energy and Paperworkers Union of Canada, Local 447*, 2012 CanLII 77353 (AB GAA), Arbitrator Francis adopts the statement by Arbitrator Devine (paragraph 121 of *Fording* above).

I also agree with the following statement by the arbitration board (Picher, Chair) in *Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 900* (2006) 157 L.A.C. (4th) 225 at paragraph 132:

“The Company is responsible for administering a highly safety sensitive working environment. Arbitral jurisprudence recognizes that it can legitimately utilize drug testing in post-accident or post-incident situations, as a means of investigating what may have occurred. In our view the guideline reproduced above does not represent an excessive or improper abuse of that managerial authority. On the contrary, it is written in a fashion which alerts the supervisor to the limits which should be applied to the exercise of the Company’s discretion and expressly directs managers to avoid treating employees arbitrarily, or in such a manner as to discourage employees from reporting incidents. In our view the evidence does not support any record of abuse of the authority of management to conduct post-incident drug and alcohol tests, and we can therefore see no basis upon which we should grant this aspect of the grievance. “

In my view, the Alcohol and Substance Program instituted by the Employer in this case details the circumstances in which testing will be conducted and explains how testing will be required as part of a complete investigation into a workplace incident. The Post Incident Testing Checklist and the Decision Tree are designed to guide the supervisor through the process of determining whether a test should be conducted and to remove any arbitrariness in that process. In my view, the Program, as it relates to Post Incident Testing, is a carefully considered procedure and does not amount to any abuse of managerial authority.

The Union relied heavily on the Grievor’s right to privacy and integrity of his person and argued that testing was not reasonable in these circumstances. The Union suggested the cause of the incident was obvious, namely that there was water on the platform and the Grievor slipped on the watery surface. The Union argued strenuously that there was no reasonable cause for the Employer to conduct a post incident test of the Grievor. In my view, supported by the authorities, reasonable cause is not a prerequisite to requiring an employee to undergo a post incident test. An individual’s right to privacy and integrity of his/her body is a cherished value not to be lightly disregarded. However, that right must be balanced against the legitimate business interest of an employer to investigate any incident which involves the safety of the workplace and to conduct testing as part of that investigative process. In this case, there were no witnesses to the incident and there had been no prior incidents relating to water on the platform. In fact, it was known to the Grievor that water was common in that area because of the nature of the work being performed. It was simply not obvious that the cause of the incident was the water on the platform, as urged by the Union. After utilizing the Decision Tree and Post Incident Testing Checklist and after consulting with the Safety Manager, Human Resources Manager and other supervisors, the decision was made to conduct a post incident test in order to eliminate impairment as a

potential contributing cause. There is no evidence that the Employer abused its authority or misused the Program or targeted the Grievor by conducting the post incident test. The Union argued that the Employer's refusal to allow the Grievor to use the washroom prior to the test was objectionable conduct. However, the Grievor had used the washroom at the hospital and he indicated he was uncomfortable but was able to wait until the test was conducted. In my view, the conduct of the management personnel was not offensive or objectionable and the Grievor acknowledged in cross-examination that there had been no discourtesy during the test and he understood the reason for not using the bathroom until the examiner arrived to perform the test.

The Union also took exception with the need for the Grievor to be transported by ambulance, suggesting that the wound was so minor that he could have driven himself to the hospital. The Employer's response was that its policy is to send any injured person to the hospital by ambulance. In this case, it was a non-emergency transport by ambulance. In my view, having an injured employee transported by ambulance is a reasonable and appropriate policy rather than making an employee drive himself/herself to the hospital.

In my view, the Employer has detailed a reasonable and appropriate procedure for conducting a post incident test for employees in safety sensitive positions. In this case, the First Responder determined that the Grievor needed more than just first aid treatment and sent him to the hospital where 6 or 7 stitches were needed to close his wound. Granted that is not a life threatening situation but it is a serious injury, in my view, and the treatment was appropriate and necessary. The Employer has a legitimate interest in investigating incidents which cause injury and jeopardize the safety of employees in order to determine the cause of the incident and to take corrective action to prevent such incidents. Such an investigation may require a post incident test to rule out impairment as a contributing cause. Post incident testing does intrude on the privacy rights of an employee but it is a limited intrusion and a necessary one to reduce risk and promote workplace safety.

Arbitrator Francis in the *Weyerhaeuser* decision, *supra* (2012), proposed the following six conditions to be met in order to pursue post incident testing:

1. There must be a connection between the employee's area of responsibility and the accident.
2. It is necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident.
3. The test must assist in the investigation, at the minimum, by negating (sic) impairment as a possible cause or contributing factor.
4. The incident must be a significant event.
5. The investigation must incorporate the employee's explanation of the incident.
6. The decision to test must be based on a connection between the incident and the employee to be tested.

Whether or not these six conditions should be the ultimate guide, they do provide some assistance in determining when to conduct a post incident test. On that basis, I will review each of them in light of the evidence in this case.

1. There is clearly a connection between the Grievor's responsibility, namely, changing the bead miller head, and the accident which occurred during that procedure.
2. There was no clear evidence that the acts or omissions of the Grievor could not have contributed or caused the accident. There were no witnesses and no mechanical or structural failure and it could not be concluded that water was the only cause of the accident. Therefore, it was necessary to investigate whether the actions or omissions of the Grievor contributed to or caused the accident.
3. It is beyond dispute that the test did assist in the investigation by ruling out impairment as a possible cause or contributing factor.
4. What is a "significant event"? That term is open to a great deal of interpretation and needs to be more clearly defined. In this case, the Alcohol and Substance Program does offer examples of what is to be considered a "significant work-related incident" or a "high potential incident". One of those examples is "...serious personal injury to an Employee...". The Employer adds more clarity to this personal injury example in the Post Incident Testing Checklist by stating that the medical treatment must be more complex than first aid and lists examples of first aid treatments. First aid includes wound coverings such as bandages but does not include sutures or staples which are considered medical treatment. In this case, the Grievor did require 6 or 7 stitches which was considered medical treatment. Had the Grievor needed only a bandage, there would not have been a post incident test. In my view, the Employer has set out a reasonable method of deciding what is to be considered a serious injury and what amounts to a "significant event" and this 4th condition has been met.
5. The investigation in this case did incorporate the Grievor's explanation of the incident and his explanation was included in both the Interim and Final Accident Reports.
6. This condition seems to be similar to the first condition and, in this case, there is no doubt that there is a connection between the Grievor and the incident.

The Employer has met these conditions and has applied the procedures outlined in its Alcohol and Substance Program in a reasonable and appropriate manner.

After considering all the evidence and arguments of the parties, as well as the authorities cited by the parties, it is my view that the Grievance must be and is hereby dismissed.

