IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNITED STEELWORKERS LOCAL UNION 5890
TRAVIS HOLTSKOG

UNION/GRIEVOR

AND:

EVRAZ REGINA STEEL (A DIVISION OF EVRAZ INC.
NA CANADA)

EMPLOYER

AWARD

Sole Arbitrator	Kenneth A. Stevenson, Q.C.
Representation:	
Union	Sonny Rioux USW International Representative
Employer	David T. McDonald, Counsel Troy LaLonde, Senior Manager, Human Resources, Regina
Dates of Hearing:	April 29, 2014
Place of Hearing:	Regina, Saskatchewan
Date of Award:	May 26, 2014

AWARD

I. INTRODUCTION

1. At approximately 9:40 a.m. on July 4, 2013, Travis Holtskog ("Grievor"), was reversing a half-ton truck from in front of the Operations Building when the passenger side taillight lense came into contact with a yellow 4x4 tubular steel guardrail. Paint was transferred to the brake lense and the lense was cracked. The Grievor knew that the truck had contacted the guardrail. He did not exit the vehicle; through his passenger-side mirror he observed that there was no damage to the side of the vehicle and no broken glass on the ground.

2. The Grievor reported the incident to his supervisor, Mike Kish who, after discussions with Spencer McFern, Security and Safety Officer – Steel, and the completion of a Post-Incident Testing Checklist ("Checklist"), requested that the Grievor submit to Alcohol and Substance Testing pursuant to the Employer's Alcohol and Substance Program EINA Canada ("Program"). The test results were negative and the Grievor returned to work.

3. The Union filed a grievance on July 4 alleging that the Grievor was subjected to the test without any assessment and without any reasonable reason or suspicion. It seeks damages of $500.

4. The parties agree that I have been properly appointed as sole arbitrator in this matter with jurisdiction to hear and determine the matters raised by the grievance.

II. BACKGROUND AND EVIDENCE

5. The Employer operates a large steel mill in Regina. The plant site is considered to be safety sensitive having regard to the nature and size of equipment used in the yard and the plant. There are a number of train lines within the yard and the Canadian Pacific mainline passes through the yard with approximately eight to ten trains daily.

6. After striking the guard rail the Grievor drove his vehicle for approximately one kilometer to check on a coworker; he then returned to the yard office. In the course of this route he would have encountered six or seven stop signs and a number of rail crossings. The Grievor exited his vehicle and observed the paint transfer onto the lense; he says he didn't see a crack. A security guard drove up and asked the Grievor for his name and department.

7. The Grievor then reported to his supervisor, Mike Kish, that he had backed into the guard rail and there was paint transfer to the lense. The Grievor acknowledged to Mr. Kish that it was "bad judgment" not to report the incident immediately as required by corporate policy known by the Grievor. At the request of Mr. Kish the Grievor wrote a statement:

> Subject: Backed truck into railing at the hilton.
>
> I was backing the yard truck up after dropping off Bryce at the hilton and backed into the yellow railing. It cracked the brake light and transferred yellow paint onto the brake lense.

8. The Grievor then went to the lunch room. Within 10 to15 minutes Mr. Kish called him to his office and asked if he had been "drinking". The Grievor said "no" as he was working. He was told that he needed to go for a drug test, and to wait in the lunch room. In response to inquiries of coworkers, he advised that he was being sent for an alcohol and drug test. He says he was embarrassed and humiliated by these events arising from such a small incident. The test produced negative results. The Grievor was not disciplined in connection with this incident for either striking the guard rail or not reporting immediately. He had not previously been subject to discipline nor to any verbal warnings, nor has he received any suggestions previously that he was impaired while at work.

9. The Grievor agrees that safety and a safe work environment is a priority at the company and the commitment of all employees. The yard is very busy; the operation of a vehicle in the yard is safety sensitive. His position as a Switchman is safety sensitive. He acknowledges that in the operation of a vehicle he is required to have it under control at all times.

10. The Grievor agrees that on any day approximately 200 workers could use the change room in the Operations Building. He was backing up in a potential high traffic area where employees use the walkway behind the guard rail. At the time of the incident he would not expect there to be many employees in the area; he may have seen one other person in the area. There was nothing mechanically wrong with the truck. The rail was low and difficult to see in the mirror as he was backing and turning. He thought that he had enough distance but he didn't; due to operator error, he bumped into the rail.

11. Ken Inglis and another security officer working in the Operations Building approximately 30 feet from the truck and the guard rail heard a noise apparently caused by the truck's contact with the guard rail. Mr. Inglis observed the truck drive away. The incident was reported to Spencer McFern who asked Security to identify the operator of the vehicle and who the individual worked for as the driver had left the scene without immediately reporting the incident.

Background to the Test

12. Mr. Kish received a call from Security that a truck had backed into a guard rail. The Grievor advised that he had backed into the guard rail. He wrote his statement and was told to wait downstairs in the lunch room.

13. Mr. Kish then called his supervisor Pat Fogarty, Steel Yard Foreman and Spencer McFern to get their input because the Grievor had left the scene. Mr. McFern told him to complete the post-incident Checklist in order to rule out any drug or alcohol contribution to the accident.

14. The Program includes a Post Incident Testing Checklist ("Checklist") which is to be used to determine if a post incident alcohol and substance test for a significant work-related incident or high potential incident is required. The Checklist prepared by Mike Kish is reproduced

below.

EVRAZ EVRAZ INC NA **POST INCIDENT TESTING CHECKLIST**

Employee Involved in Incident:

Name (printed): Travis Holtskog Date: July 4, 2013 Time: 0945 AM

Use the following checklist to determine if a post incident alcohol & substance test for a significant work-related incident or high potential incident is required. Generally, a "significant work-related incident" or "high potential incident" will include all incidents which resulted or could have resulted in:

Injury: A fatality or serious personal injury to an Employee, Contract Worker, Member of the Public, or any Other Individual		
A fatality	Yes ☐	No ☑
The employee receive treatment by a medical professional, that is more complex than first aid? Review list on the next page, if the treatment provided is on that list, it is considered first aid.	Yes ☐	No ☑
Environmental:		
An environmental incident occur with significant implications?	Yes ☐	No ☑
An environmental incident occur that was reportable to a government agency?	Yes ☐	No ☑
Property Damage:		
Loss or damage to property, equipment or vehicles?	Yes ☑	No ☐
Property damage result from an incident involving operation of mobile equipment, overhead cranes, or rail equipment?	Yes ☐	No ☑
Loss of Company Revenues:		
An incident that caused a loss of Company or client revenues?	Yes ☐	No ☑
Near Miss:		
A near miss occur that in the Supervisors opinion may have resulted in any of the above? If yes to this question, please ensure the incident investigation form clearly explains the reason for the test.	Yes ☑	No ☐

If the answer is **YES** to any item above answer the following:

Could the Employee's acts or omissions be a contributing factor?	Yes ☑	No ☐

Why? Please indicate reasons for your conclusion: Travis left the scene of the incident

If the answer to this question is YES, send Employee for a Post Incident Test. If the answer to this question is NO, do not test.

Attach a copy of the incident investigation.

Mr. Kish considered there to be a near miss as the Grievor could have backed into someone. As a reason for his conclusion that the Grievor's acts or omissions were a contributing factor?" he wrote: *"Travis left the scene of the incident"*. Since this question was answered with a 'yes', the Grievor was sent for a post-incident test.

15. Both Mr. Fogarty and Mr. McFern concurred that the test should be administered. Prior to the test, Mr. Kish spoke to Andrea Johnson in Human Resources. They went over the Checklist and Ms. Johnson agreed that it was appropriate to test. Mr. Kish acknowledges that prior to speaking to Ms. Johnson he had already decided to administer the test. Mr. Kish has been involved in the completion of 10-15 post-incident Checklists. Of these, three or four (including the Grievor's) resulted in the administration of an alcohol and substance test.

16. Mr. Kish acknowledges that in his discussions with Messrs. Fogarty and McFern and Ms. Johnson, there was no discussion about the Grievor's previous work record, any alcohol involvement or of the Grievor's right to privacy. Mr. Kish has known the Grievor for two and one-half years. He had no reason to believe that the Grievor would drink at work; he considered him to be a safe worker. He acknowledges that the lense may have been cracked prior to the incident and doesn't know whether the lense was replaced. The Grievor was not disciplined for either backing into the guard rail or leaving the scene without reporting the accident.

17. Mr. McFern is responsible for safety of Steel Operations. Mr. Kish called him and consulted in relation to the Checklist. He was aware of what had happened in the incident and there had been a statement obtained from the Grievor. He never spoke to the Grievor. It did not appear here that there was any mechanical cause; if that had been the case the Grievor would not likely have left the scene. There also did not appear to be an environmental factor such as weather. Mr. McFern's concerns in relation to the post-incident Checklist were: property damage (there is no minimum threshold) and the Grievor's failure to report immediately. He believed that this would lead to the administration of an alcohol and substance test. He said that the Checklist is significant in order to get to the root cause of the accident.

18. Mr. McFern has been involved in the completion of ten post-incident Checklists and not all of these have resulted in the administration of a test. The Checklist reference to whether or not the employee acts or omissions could be a contributing factor is quite broad and could require a subjective answer, He agrees that it is possible to say someone could have been injured anytime there is an incident. From the Employer's perspective the right to privacy is considered to be fundamental and very valuable; only to be violated in special circumstances. He never spoke to Human Resources in respect of the privacy of the Grievor. The Checklist does not include a consideration of an employee's right to privacy and the Decision Tree does not reference an employee's right to privacy.

19. Mr. Kish ultimately completed an Occupational Injury/Near Miss Report (Exhibit 11). In this report he describes the Incident Facts: *Travis was backing the Yard truck out of the parking stalls at the Operations building. When he backed out of the stall he backed into guard railing rubbing paint onto the tail light lense and cracking the tail light lense.* Mr. Kish noted the indirect cause as *"unsafe operation"* and the basic cause *"Travis was not aware of his surroundings"*. The report identified corrective action to include conducting toolbox talks with a focus on the importance of being aware of surroundings while operating any equipment including vehicles; to review company site rules for operating motor vehicles.

20. The Employer promotes a culture of safety with a view that safety is #1 in its workplace. It promotes this by extensive programs including orientation programs, regular toolbox meetings and supervisor observation of employees working. The Employer requires that a near miss report should be completed for nearly all incidents; this is to help in the conduct of an investigation and help managers determine the root cause of an incident so that corrective action can be taken. Post-incident testing is considered to be part of the investigation process.

III. POSITION OF THE PARTIES

Union Position

21. The Union says that the Employer's request for the test in these circumstances was unwarranted; a violation of the Program. It was a violation of the Grievor's right to privacy which was never considered by the Employer. The right to require a drug and alcohol test is not unfettered. It is much more than just the completion of a Checklist resulting in a 'yes' answer to one of the questions. The Union cites the decision of Arbitrator Picher in *Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (2000), 95 L.A.C. (4th) 341 as providing a recognized statement that an employee's privacy is a core workplace value; while it is not absolute, firewalls need to be in place to protect against an employer running roughshod over privacy rights.

22. The Union says that the Program affects the individual rights and liberty of the employees and amounts to using the employee's body without consent to obtain information about him; this represents an invasion of personal privacy essential to the maintenance of human dignity. It points out that refusal to take a drug and alcohol test is equal to a failure and could result in discipline up to and including a dismissal.

23. In these circumstances there is no evidence that management personnel considered the personal privacy of the Grievor. There were no previous concerns with the Grievor's drug and alcohol use; however this was not considered in deciding whether or not to administer a test. The necessary safeguards in respect of privacy were not in place and were not provided here. This resulted in a breach of the Program. This is so particularly having regard to Appendix "G" of the Collective Agreement which provides that the Union and Company will promote a work environment where all employees are treated with respect and dignity.

24. The Union relies extensively on the decision of Arbitrator Francis in *Weyerhaeuser Company Limited and Communications, Energy and Paperworkers Union of Canada, Local 447 (Kelly Grievance)* (2012), CanLII 77353 (AB GAA). It says that the reasoning and rationale of Arbitrator Francis is particularly applicable in this matter. Arbitrator Francis recognized that in the case of post-incident testing, less evidence of impairment is needed but there still must be evidence which provides a reasonable basis for the test. There needs to be significant information about the event and the employee's connection to or role in that event that justifies testing. While post-incident testing is different than just cause testing, you still require evidence that possible impairment is a reasonable line of inquiry. Arbitrator Francis agreed that six conditions asserted by the company need to be met in order to establish a reasonable request to test. One of the factors is that the incident must be a significant event. It was determined that the grievor was not involved in a significant event and as such, testing for drug and alcohol use was not a reasonable line of inquiry.

25. The Union asks that I compare the factual circumstances in *Weyerhaeuser* where the grievor drove his forklift away from a propane filling station without first detaching the filling

hose from the tank on his forklift ripping the hose in two. Here, where there was the least severe of an incident: taillight received paint and was cracked, but was never changed. Arbitrator Francis recognized the need for a balancing of the interests, the privacy of the employee and the company's legitimate safety concerns. The Employer never considered the Grievor's rights to privacy. Mr. Rioux says that neither the Employer's Alcohol and Substance Testing – Decision Tree – Post-Incident ("Decision Tree") nor the Checklist recognize the employee's privacy interest during an investigation. This violates the Employer's agreement not to intrude on an employee's private life and its undertaking to protect the privacy and personal dignity of its employees as contained in the General Principles of the Program.

26. Mr. Rioux responds to the Employer's reliance on the decision of Arbitrator Semenchuk in *United Steelworkers, Local 5890 and Evraz Inc. NA CANADA (Roedelbronn Grievance)* (May 23, 2013 unreported) by pointing out that in that matter there was a "significant event"; here there is no significant event. While the guideline asks if the employees' acts or omissions could be a contributing factor, it is likely that in almost every circumstance it could be said that an employee's actions contributed to the incident and that a drug and alcohol test would be required notwithstanding the employee's privacy rights. The Checklist directs that if the answer to the employee contribution question is 'yes', the employee is sent for a post-incident test. The stated reason for the Grievor's acts or omissions being a contributing factor is "Travis left the scene of the incident". The Union points out that the Grievor was not disciplined for driving away and not reporting the incident and that he explained that he did so as a result of bad judgment which was a spur of the moment human error.

27. The Union asks that I conclude that the requirement for a drug and alcohol test is not unfettered and is not simply a matter of completing the Checklist. In these circumstances the company failed to take into account the Grievor's privacy. The Union asks that the grievance be allowed and that damages of $500.00 be awarded for the embarrassment and humiliation the Grievor experienced as a result of being sent to the lunch room on two occasions and no steps were taken to protect or recognize his privacy.

Employer Position

28. The Employer says that the testing was done in accordance with its Program which was properly applied to the Grievor as a Post-Incident testing. It says that as an individual grievance, the grievance does not challenge the validity/enforceability of the Program. The grievance only challenges the application of the Program to the Grievor, as such there ought to be less of an examination of privacy rights where, as here, post-incident testing was used as part of the investigation. The Program recognizes that privacy is important and privacy is protected in the application of the Program and was done in these circumstances.

29. The Employer relies extensively on the *Roedelbronn* decision of Arbitrator Semenchuk, supra. There the union made the same arguments as to the need for a significant event, the rights to privacy and the need for signs of impairment. It says that where the Checklist does not eliminate impairment, that as part of the investigation it is proper to conduct a drug and alcohol test.

30. Counsel says that Arbitrator Semenchuk properly addressed the balancing of interests between an individual employee's right to privacy and the Employer's authority to require substance testing to maintain a safe working environment. He recognized that post-incident testing is a legitimate exercise of management's authority in a safety-sensitive workplace but that it cannot be random. The standard for post-incident testing is different from the standard of reasonable cause; the standard cannot be arbitrary or capricious; the policy should alert the supervisor to the limits to be applied to the exercise of the company's discretion so that the decision to test does not amount to an excessive or an improper abuse of managerial authority.

31. Arbitrator Semenchuk determined that the Program, including the Checklist and the Decision Tree, are designed to guide the supervisor through the process of determining whether tests should be conducted and remove any arbitrariness in the process. The Program related to post-incident testing and was found to be a carefully considered procedure which did not amount to an abuse of managerial authority. Arbitrator Semenchuk addressed the balancing of the individual's right to privacy versus the legitimate business interest of the Employer to investigate

any incident which involves workplace safety. He concluded that there was no evidence that the Employer abused its authority, misused the Program or targeted the grievor by conducting the post-incident test. The testing did not intrude on the privacy rights of an employee; it was a limited intrusion and a necessary one to reduce risk and promote workplace safety.

32. In these circumstances there is no explanation by the Grievor for why he backed into the rail or why he left the scene. He recognizes that leaving the scene was bad judgment but there had been no prior evidence that the Grievor lacked judgment. The Employer reasonably used the test as part of its investigation to eliminate drug and alcohol use which was a reasonable line of inquiry. Within the context of the Program, there was loss or damage to a company vehicle; the Grievor admits in his statement that he cracked the taillight.

33. Mr. McDonald says that it is not just the Checklist answers which leads to the test; management must justify its conclusion. The Grievor left the scene; for this reason drug and alcohol use could be a factor in the absence of any explanation as to why he left.

34. There is no violation of the Grievor's privacy rights. The company acknowledges that there was no discussion between the managers regarding how the test might affect his privacy rights. There was no need for this discussion as it is already contained within the Program where it is taken into account by how it is applied. Messrs. McFern and Kish both indicated involvement in a number of previous post-incident matters where no drug or alcohol test was administered. They only sent the employee when the employee's act or omission could be a factor in the incident. Privacy rights are important and the company recognizes this in matters such as requiring serious injuries or significant events before the Checklist is utilized or drug or alcohol testing is completed. The Grievor's complaint is that he was embarrassed as a result of having backed into the rail and that he was made to sit in the lunchroom where other employees suspected there might be a drug and alcohol test. One has to remember that the Grievor gave both a verbal and written statement and makes no challenge to the testing process.

35. The Employer refers to the decision of Arbitrator Devine in *Fording and Coal Limited v. United Steelworkers of America, Local 7884* (2003), 119 L.A.C. (4th) 165 which was referenced by Arbitrator Semenchuk, supra, in respect of the standards for post-incident testing. It was concluded that post-incident testing was justified in cases involving damage to company property provided sufficient safeguards were observed. Where there is no employee explanation, conducting of the drug and alcohol testing is a reasonable part of the investigation.

36. Mr. McDonald says that the *Weyerhaeuser (Kelly Grievance)* was decided on its own facts and the company policy. He notes that Arbitrator Semenchuk made comments on the reasonableness and protections provided by the Program including a recognition of the balancing of the competing interests having regard to the fact that testing is a tool in an environment where safety is number one to all.

37. Mr. McDonald suggests that my role will be to determine whether the Program's application to the circumstances was reasonable. He says it is not for me to write in to the Program a required minimum amount of damage. While it is appropriate to review the steps taken by management, and whether the Program was followed, the conclusion ought to be like that reached by Arbitrator Semenchuk. While the Grievor did not receive any discipline as a result of the action report the proposed action was to conduct toolbox talks to remind employees to be aware of their surroundings and the rules in respect of operation of motor vehicles.

38. He concludes by saying that damages are an extra-ordinary remedy and in these circumstances, should the grievance be allowed, a simple declaration to that effect would be sufficient. Damages are only appropriate where there is willful breach of the collective agreement, bad faith or a pattern of misconduct. None of these are present here.

IV. ANALYSIS AND DECISION

39. The issue to be determined in this application grievance is whether or not the Employer's demand for the test on July 4, 2013 reasonably complied with the post-incident provisions of the

Program. The Union does not challenge the enforceability of the Program, rather, it grieves the validity of its application to the Grievor in these circumstances.

40. The logical start point in this analysis is the Program; it consists of 25 pages. The Policy Statement under General Principles reads, in part:

> Evraz Inc. NA Canada ("Evraz") is committed to providing a safe and successful workplace and to minimizing health and safety risks associated for employees at work.
>
> - and –
>
> Evraz is committed to protecting the privacy and personal dignity of its Employees.

The Program provides for post-incident testing for employees in safety-sensitive positions in the following language:

> **C. Post-Incident Testing for Employees in Safety-Sensitive Positions**
>
> 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;

viii. Failure to report a significant work-related incident or high potential incident is a violation of this program and will constitute grounds for discipline.

A refusal to submit to alcohol and substance testing is a violation of the Program and is grounds for disciplinary action, up to and including termination.

41. The Program includes the Decision Tree which provides a roadmap for supervisors to follow in the event a workplace incident has occurred. The Decision Tree poses the question: *Could the Employee's acts or omissions be a contributing factor? If the answer is 'yes', the alcohol and substance testing protocol is to be followed.*

42. The Employer relies on the May 23, 2013 award of Arbitrator Gary Semenchuk in the *Thomas Roedelbronn* grievance. The grievor was approaching the Bead Miller carrying a new bead miller head in his gloved right hand. As he was stepping up onto the Bead Miller Platform his foot slipped off the edge of the step; he fell forward; his right hand contacted the bead miller table crushing his fingers between the edge of the steel table and the new bead miller head. His ring finger was crushed and bleeding. First aid and a first responder cleaned the finger and

suggested stitches. The grievor was taken by ambulance to the hospital and received six or seven stitches in his finger and found out that the bone at the top of his finger had been cracked. After his discharge from hospital the grievor was requested to complete a report; the supervisors completed a Checklist and they agreed that in the circumstances a post-incident test should be conducted. The test result was negative.

43. Arbitrator Semenchuk addressed issues related to the application of the post-incident testing under the Program. I agree with his conclusion that the standard for post-incident testing is different from the standard for reasonable cause testing and that the standard cannot be arbitrary or capricious. He quotes Arbitrator Devine in *Fording Coal Limited*, supra, at para 121: *"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 reaching his conclusion Arbitrator Semenchuk expressed his views in respect of the Program as follows at pp 7-8:

> 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 carefully considered procedure and does not amount to any abuse of managerial authority.
>
> 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 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 of an employee but it is a limited intrusion and a necessary one to reduce risk and promote workplace safety.

44. Arbitrator Semenchuk concluded that the six conditions enumerated by Arbitrator Francis in the *Weyerhaeuser (Kelly Grievance)*, supra, provided some assistance in determining when to conduct a post-incident test:

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 negativing 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.

45. Arbitrator Semenchuk reviewed each of these conditions in light of the evidence. He concluded that the term "significant event" is open to interpretation and needed to be clearly defined. The employer had added more clarity to the "serious personal injury" example requiring that medical treatment be more complex than first aid and listed examples of first aid treatments. He concluded that the grievor required six or seven stitches which was considered to be medical treatment; had the grievor needed only a bandage there would not have been a post-incident test. In his 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'"*. The incident was a "significant event". He concluded that the Employer had met each of the enumerated conditions and had applied the procedures outlined in the Program in a reasonable and appropriate manner. He dismissed the grievance.

46. I agree with Arbitrator Semenchuk's conclusion that the six conditions outlined by Arbitrator Francis in *Weyerhaeuser*, supra, provide some assistance in determining when to conduct a post-incident test. I concur in Arbitrator Francis's view that these six conditions must be met in order to establish a reasonable request for a post incident alcohol and drug test; these conditions provide a reasonable line of inquiry and reasonably balance the competing interests of

employee privacy and employer safety obligations and the need to pursue testing as part of its investigation. The conditions are not an exhaustive list of matters which may provide assistance.

47. In assessing the evidence as against these six conditions, I have no difficulty concluding: the Grievor was connected to the accident; it was necessary to investigate whether his actions or omissions were a contributing cause of the incident; drug and alcohol testing would, at a minimum, negate impairment as a possible cause and contributing factor; the investigation incorporated the Grievor's explanation of the incident.

48. However, with respect to the remaining factors, I am unable to conclude that the incident was a significant event or that the decision to test was based on a connection between the incident and the employee to be tested. I agree with Arbitrator Semenchuk that what is a significant event is open to a great deal of interpretation. I am satisfied that on a reasonable interpretation of this condition, the incident was not a significant event.

49. The Program mandates that post incident testing *"... will be required for all employees involved in "significant work-related incident"* or *"high potential incident"* which, by definition, *"generally"* will include *"... all incidents which resulted, or could have resulted in... loss or damage to property, equipment or vehicles; a near miss that in the Supervisor's opinion may have resulted in any of the above."* At issue here is whether the damage to the Employer's vehicle is sufficient to constitute a "significant work-related incident". I agree with the comments of Arbitrator Devine made in the context of a similar post incident testing policy which required a "significant event" including an incident involving damage to property:

> ... There is no initial threshold specified on what constitutes property damage. If it is to apply as the only initiating event, there must by definition be something more at stake than trivial damage absent other issues such as an injury or a serious safety concern. Fording Coal Limited, supra at para 121.

50. "Generally" typically means usually or for the most part. Its use introduces an element of judgment or discretion to be applied by the supervisor in the context of deciding whether or not the circumstances of the incident are of such a nature that it may properly be considered a significant incident requiring the conducting of a test as part of the investigation. Among the

circumstances to be considered should be the nature of the incident and its significance assessed against a background of the Employer's obligation to provide a safe and productive workplace.

51. It seems reasonable that one of the circumstances to be considered in determining if an incident was a significant work-related one would be the severity of the incident, including the nature and extent of any loss, damage or safety concern. The Program does not include a threshold or amount of loss or damage, however, a reasonable administration of the Program ought to consider the severity and the significance of the incident prior to embarking on investigative steps that ultimately result in an infringement of an employee's privacy. In the context of his determination that there was a "significant event", Arbitrator Semenchuk noted that in relation to the "serious personal injury" example of a "significant incident" the Program provided more clarity. The Checklist required medical treatment more complex than the enumerated examples of first aid which included wound coverings such as bandages.

52. The Program does not provide any similar clarity or examples of what ought to be considered as "first aid" in relation to damage to property, equipment or vehicles. It is my conclusion that this incident is akin to the one which requires first aid or a bandage rather than medical treatment. The supervisors were left to exercise their judgment and discretion in relation to whether or not the incident was significant and of such a nature that their need for further investigation properly over-rode the Grievor's right to privacy and reasonably required the physical invasion of his body to obtain the test sample. I agree with the Union that employee privacy is a core workplace value, the Employer recognizes this in the General Principles – Policy Statement of the Program: *"Evraz is committed to protecting the privacy and personal dignity of its employees"*. Such commitment requires a balancing of the competing interests of privacy and the need to provide a safe workplace.

53. There is no evidence that Mr. Kish or Mr. McFern considered or exercised any discretion in relation to the decision to proceed with the Checklist or in the ultimate decision to test. They proceeded on a process-focused approach on the assumption that it was a significant work related incident without consideration of the circumstances surrounding the incident and whether it was

in fact "significant". Mr. Kish proceeded to complete the Checklist as instructed by Mr. McFern. In the entry of 'yes' to property damage and to his decision to require a test, Mr. Kish had no regard to the nature or the significance of the incident or the trivial nature of the damage and whether the incident ought reasonably be considered to be a "significant work-related incident."

54. Mr. McFern was of the opinion that because there was damage to the truck and no express minimum amount of damage as a prerequisite to testing that the test was a virtual certainty. With respect that view does not conform with arbitral jurisprudence or the principles associated with post-incident testing. In my opinion the decision to infringe on an employee's privacy and require the employee to submit to the physical intrusion the testing requires, the Employer must act judiciously, only with demonstrable justification based on a reasonable application of the Program in all the circumstances. This is the appropriate balance of the Employee's privacy interests with the Employer's business interests in taking necessary steps to provide a safe and productive work environment.

55. The supervisors ought to have had regard to the Grievor's privacy rights along with the Employer's need to proceed with a Checklist and testing as part of its investigation in order to fulfill its obligations to provide a safe workplace. In my opinion this failure was a breach of the Employer's obligation to safeguard the Grievor's right to privacy and to show that the test was justified having regard to the severity and significance of the incident in relation to the Employer's obligation to provide a safe workplace. Nothing in the Checklist or Decision Tree specifically alerts the supervisors to limits which should be applied in the exercise of their discretion nor which directs the supervisor not to treat employees arbitrarily or in such a manner as to discourage employees from reporting incidents. Arbitrator Semenchuk noted his agreement with Arbitrator Picher in *Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900* (2006), 157 L.A.C. (4th) 225 at paragraph 132 that such language should be present. In my opinion such language would prompt supervisors to exercise discretion in assessing the need for an alcohol or drug test.

56. In my opinion it was not reasonable for Mr. Kish to have concluded that there was a "near miss" in these circumstances based on his suggestion that there might have been a pedestrian in the area who could have been injured. I agree with Arbitrator Sims that *"... any near miss must involve a realistic conclusion that serious damage almost occurred." Weyerhaeuser (Roberto Grievance)*, supra. There is no evidence in the circumstances of this matter (backed onto the rail cracking the tail light with no other persons present) that could reasonably or rationally cause me to conclude that there was a "near miss" such as to be a "significant work related incident" which would reasonably require that the Employer's obligation to provide a safe workplace ought to outweigh the Grievor's right to privacy. It was inappropriate and unreasonable to request the test on the basis that there was a "near miss".

57. The Program anticipates that a supervisor involved in the investigation will make a decision *"... to conduct a test or not to conduct a test..."* and to document the "reasons" as part of the preliminary investigation as soon as reasonably practicable. Mr. Kish followed the Checklist. He was obliged to answer whether the "employee's acts or omissions could be a contributing factor?" He answered "yes" with the reason for his conclusion being "Travis left the scene of the incident."

58. With respect to Mr. Kish's conclusion, I cannot conclude that because the Grievor left the scene without reporting the incident was an act or omission which could be a "contributing factor" to the damage to the truck or to any "near miss". The incident which gave rise to the conclusion that there was damage to the truck and a "near miss" was the truck coming into contact with the guard rail not the Grievor's leaving the scene.

59. It is my conclusion that the answer to the sixth condition must be 'no.' The decision to test was not connected between the incident (hit the rail) and the stated reason for the conclusion that the Grievor's acts or omissions (leaving the scene) could be a contributing factor to the damage or near miss. Mr. Kish's conclusion that the employee's conduct could be a contributing factor, resulted in him being directed to send the Grievor for the test. However, the reason for that answer and the basis for requesting the test was not reasonable and could not form the basis

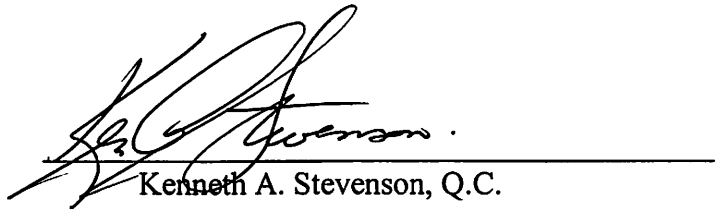
for subjecting the Grievor to the test. In my opinion directing the test on this improper basis was an arbitrary action. The Grievor leaving the scene of the incident is not an act or an omission which could be a contributing factor to a "significant work related incident" which, in this case, must either have been damage to the vehicle or a near miss. I have concluded that there was no near miss.

60. It is my conclusion that the incident was neither a significant work-related incident, nor a near miss. As such, the Program was not reasonably applied to the Grievor when the Employer required him to provide a sample for testing.

61. It would not be appropriate, in these circumstances, to award damages. I agree with the Employer that damages ought to be awarded where there is a willful breach of the Collective Agreement, bad faith or a pattern of misconduct. None of these are present in this matter.

62. The grievance is allowed to the extent noted above.

DATED at Saskatoon, Saskatchewan this 26th day of May, 2014.



Kenneth A. Stevenson, Q.C.