

AWARD

These grievances involve two questions about drug testing: if and when it is appropriate for an Employer to demand that an employee submit to drug and alcohol testing following a workplace incident; and the manner in which it is appropriate that such tests be conducted.

Weyerhaeuser Company Ltd. runs an oriented strand board mill in Edson, Alberta. Mill employees are represented by Local 447 of the Communication, Energy and Paperworkers Union of Canada. The two cases involve the first instances of post incident testing under a new "Substance" section introduced into Weyerhaeuser's Health and Safety Standards. The Employer introduced the standard unilaterally. While discussed with the Union before implementation, the policy has no Union approval. The terms "standard" and "policy" are used interchangeably and refer to the same document.

Each grievor was subjected to a test following an incident at work. Ms. Phyllis Roberto was unloading a tanker car when she slipped causing a valve to release spraying her with a concentrated resin. Mr. Len Brown was tested after a garage door closed, damaging a truck. Neither test proved positive so neither employee was subjected to any direct consequence under the policy as a result of being tested. It is the manner in which Ms. Roberto and to a lesser degree Mr. Brown were subjected to testing that gives rise to the second aspect of this case.

Ms. Roberto and Mr. Brown each grieved and the wording of their grievances are the same; Ms. Roberto's dated February 7, 2003 and Mr. Brown's on March 11, 2003.

Nature of Grievance: Individual and Policy grievance: In violation of the collective agreement – Articles 4:01/5:01/24 and any other articles that may apply.

Settlement desired: 1. Test to be destroyed. 2. No record of test. 3. Personal file purged. 4. Compensation for humiliation and loss of dignity. 5. Compensation for lost wages and benefits. 6. She be made whole in all respects. 7. Declaration that the collective agreement has been breached and an order amending the policy as appropriate according to law.

The introduction of the policy

This plant is one of a number of oriented strand board plants in Weyerhaeuser's North American operations. Its Canadian operation is headquartered in Vancouver, B.C., and the head office is near Tacoma, Washington State, USA.

Mr. Rob Guy is the plant's unit general manager. He has been involved in the development of the drug and alcohol policy "since day 1." One of the reasons he was brought into Edson in 2001 was to deal with the unduly high number of injuries in the mill.

Soon after his arrival Mr. Guy spoke to employees one on one. Many, he says, spoke about concerns over drug use and related concerns about plant safety. He responded by trying to get the message out that, while the company did not care what employees did at home, drugs had to be kept out of the workplace. He reinforced this message with a letter sent to all employees on September 17, 2001:

It has come to my attention that there are people who choose to use illegal substances in this workplace, thereby jeopardizing their health and safety as well as that of their workmates.

Let me make myself clear on this subject. I will not tolerate the use of illegal drugs or alcohol on this worksite. If you make a decision to use an illegal drug or consume alcohol while at work, you are making a decision to risk your employment with Weyerhaeuser.

Mr. Guy attended crew meetings and spoke on the topic. The results of a survey in December 2001 indicated many employees, although not a majority, felt substance abuse was a significant problem in their work area.

He had several general discussions with the Union, including those at labour-management meetings, when the questions of substance abuse and testing were raised.

Weyerhaeuser decided to develop a national approach to drug testing. To that end, they retained a contractor, Denning Health Group, to help develop a drug and alcohol component to the Company's safety policy, and to train company staff in the content and application of that policy. Denning and its principal, Mr. Tom Yearwood, helped introduce the new policy in the Edson Plant. Once the policy was in place, Denning contracted to provide on-call testing services, and to have samples analyzed by a laboratory in the United States.

The policy ultimately put in place in Edson in February 2003 went through several drafts. Significant changes were made between drafts, one of which, relating to the circumstances under which post-incident testing might be undertaken, is of particular significance to this case. The specific changes are reviewed later. In preparation for the introduction of this policy in Edson management met and reviewed the draft policies and provided feedback. They also had discussions with the Union and invited them to express their concerns.

During 2002, the Employer had Denning conduct three introductory meetings on the policy. One meeting involved four hours with the Union executive. During this time Mr. Yearwood explained where the samples went for analysis and the breathalyzer and drug testing processes. There was also an evening meeting for union members but few attended, partly due to shift schedules. At a further meeting the next morning the Union executive was able to ask Mr. Yearwood questions, although the meeting was cut short when Mr. Yearwood's plane had to leave early. Mr. Yearwood told the meetings that the tests were going to be conducted at either the hospital or a medical centre and that he "was still trying to work that out."

Mr. Don DeVuyst, the president of Local 447, described the interaction between the Company and the Union over the introduction of the new policy. The Company told him they were going to introduce a policy and he told them that the Union did not approve of such testing policies, particularly because, in its view, drug testing was incapable of proving impairment. The Union was not inclined to get co-opted in the introduction of the new policy.

On October 31, 2002 Mr. Guy wrote to all plant employees telling them that the Company had adopted the new substance abuse standard:

Effective January 1, 2003, testing employees for the use of alcohol or drugs will be conducted where reasonable cause exists to test. Examples include:

- Significant near miss (where there was high potential to cause injury or property damage such as a near collision between a person and rolling stock or a lock out violation)
- Behavioral characteristics where an employee is observed behaving or performing in a clearly unusual manner that reasonably indicates that drugs or alcohol may be a contributing factor.
- Accident or incident resulting in injury (recordable incident)

Where an employee has tested positive, he/she will be referred to a substance abuse professional (SAP) to determine if a treatment plan is appropriate. The employee must adhere with all terms and conditions of a Return to Work Agreement including treatment plans and follow up testing. The goal is rehabilitation.

This letter attached another from the Washington head office, announcing this same initiative in all OSB Mills. It read, in part:

All OSB mills will be implementing a revised **For-Cause** testing process in 2003. In many mills testing will be automatic after significant property damage and recordable incidents. At all mills, leadership will be diligent in asking questions and probing the need to conduct a test for reasonable cause. Protocol for all OSB mill testing will be coordinated by national contract testing vendors to ensure confidentiality and reliability.

During 2002, Weyerhaeuser Human Resource representatives updated both the Canadian and United States substance policies. The OSB business has adopted these policies and added some specific definitions that can guide managers and team leaders in making a determination on when to test.

Also attached was a sheet setting out "For Cause Testing Criteria", which at that point, for post-accident testing, read:

Post Accident and Significant Near Miss*

- In all injury/accident cases immediate medical treatment will be provided before an employee is tested.
- A test will be conducted of employees involved in a recordable incident or a significant near miss (incl. Property damage), unless a supervisor/team leader makes a specific finding not to test. The supervisor/team leader must get approval from the mill manager not to test.
- In the interest of employee safety and confidentiality, when a decision is made to test, the employee will not be allowed to continue working and the test will be conducted as soon as practical. If the test is negative, the employee will be paid for any scheduled time missed (this also applies to behavioral cause testing below).
- In the case of late reporting or unreported injuries/significant safety issues, testing may be conducted if the incident would have warranted testing at the time of the incident.

On or before December 5, 2002 the Company gave the Union a new draft of the policy. It invited the Union to forward any questions but the Union decided not to because they were still suspicious they were being indirectly co-opted into supporting the program. The executive sought legal advice and discussed the policy briefly with the members at the next Union meeting.

The gist of the changes were described to the Union's executive. One of the changes that bothered them concerned the post-incident or accident testing criteria. They were not told what the changes were intended to achieve. Initially the new policy was to take effect January 1st, 2003. However, Mr. DeVuyst insisted that the Union members were entitled to know the changes in advance and to have a full copy of the policy, not just the letter.

On January 31, 2003 the Company posted a notice in the plant saying:

Please note that the substance impairment standard will come into effect February 1, 2003.

The standard itself, Mr. DeVuyst says, was only given to the members in their mail slots on February 7th. Ms. Roberto says she had not received the revised final policy prior to her incident on February 6th. My conclusion is that the company implemented the policy as of February 1, 2003 but did not in fact send

copies to employees until February 7th, probably triggered by the incident involving Ms. Roberto that happened the day before.

The incident involving Ms. Phyllis Roberto

Ms. Roberto works as a back-up lab technician. One of the duties she is occasionally required to perform involves unloading a rail tanker full of a resin used in Weyerhaeuser's OSB manufacturing process. These cars come in about once per week. As a result, the various lab technicians and back-up lab technicians do not have to perform this task very often.

The unloading is done after the contents of the rail car are steam heated to a temperature that allows the liquid to flow freely. Rail cars have a ball valve at the top of the tank. The exact configuration of these valves varies from car to car, but they all accept a universal hose coupler. In Weyerhaeuser's operation the tank car is parked in an enclosed bay inside the plant. A heavy metal clad hose with a coupler on the end runs from the bay, through the main plant and a pumping mechanism, to a storage tank located at the far end of the plant. A control room near the rail car bay contains monitors to show the liquid flow in the pipeline.

The tester's job is to go to the top of the rail car once the contents have been heated and connect the hose pipe by coupling it to the ball valve at the top of the tank, open the ball valve, and then start the pump. Once the tank empties, and the hose and monitors show that the product has been unloaded, the employee then reverses the flow for a moment to blow any residue product in the line back into the rail car. It was while Ms. Roberto performed this last step that the accident occurred. She was on top of the tank and had uncoupled the hose and put it to one side. As she bent over she slipped and her knee knocked the ball valve on the top of the rail car. It was unexpectedly loose and as a result opened, causing the product that remained in the rail car to blow out of the valve, covering her face and the top of her body.

She had difficulty seeing. The force of the blow back pushed up her glasses and hardhat and the product was burning her eyes. Nonetheless she fumbled around and closed the valve. She then got down, tried to remove her outer garments and called for help.

She went to the prep house room for eye-wash solution, but could not make the dispenser work. She then decided to try the emergency shower, but the water in the shower smelt foul. Mr. Parker, the back-

up foreman, arrived. He helped her get to the first aid room on the second floor, where others helped her flush her eyes for 15 minutes. Her eyes were burning throughout and she couldn't really see. Next, a female employee on the incoming shift helped her into the ladies locker room where she was able to shower and shampoo her hair and put on a clean set of clothes.

After that Tony Alstead took her to the local hospital in the company van. The plant nurse phoned ahead to tell them the name of the chemical involved. The nurse at the hospital gave her soothing eye drops. Once the doctor arrived he tested her for cornea burns but found none. He said she was free to go back to work. This did not seem reasonable to Ms. Roberto since she still had difficulty seeing and just wanted to go home. At that point Mr. Peter Sikora showed up at the hospital to organize getting people back to work.

Mr. Tony Alstead is a manager at the plant with whom Ms. Roberto also had a personal relationship. Since she lived out of town, he took her to his home in Edson to rest. He then went back to the plant. At about 9:30 a.m. he called to see how she was doing. At 11:30 a.m. he called to tell her the company wanted her to take a drug test. She was upset by this and asked him why and he replied it was due to the "new policy" and the incident. She asked him what would happen if she refused. He told her if she submitted to the test she would be suspended with pay until the results came back. If she refused she would be suspended without pay until the company decided what to do.

She asked to speak to Mr. DeVuyst from the Union since he had been dealing with this new policy. Mr. Alstead found Mr. DeVuyst and asked him to give her a call. Ms. Roberto asked Mr. DeVuyst if he knew why they wanted to test her to which he replied no but he would go and find out. She asked if she had to do it and he said he could not advise her on that but would support her in her decision. Ms. Roberto had not seen the policy prior to this incident.

Mr. DeVuyst recalls being called on the morning of Ms. Roberto's accident and asked about the new testing policy. He says she wanted to know why she was being required to take a test so he went to pull his copy of the policy. His copy (in retrospect probably draft 2) spoke of a need for cause. He went to see Ms. Donna Peeke in human resources. She told him that Ms. Roberto was going for a test and they were not going to debate the issue. Mr. Rob Guy came by and Mr. DeVuyst argued the issue with him. It became clear that Mr. DeVuyst's copy of the policy was the earlier draft so he was given Mr. Guy's updated copy. Mr. DeVuyst says Ms. Peeke did not have the latest version. He then called Ms. Roberto and arranged to meet her at the hotel where the testing was to take place.

Ms. Roberto says that Mr. Dave Appelt, the team leader for C-Crew, and Mr. Alstead arrived at Mr. Alstead's house in a company crew cab. Mr. DeVuyst called her back and told her that earlier he had been quoting from an old policy draft but that he had obtained the new version which she could read. He said it was debatable whether a Union representative could go with her. He told her management had told him they were going to do a test and that they were not going to entertain any argument about it. At that point she had to leave for the test which was scheduled for 12:30 p.m. – 20 minutes away. She asked Mr. DeVuyst, on the phone, where they were taking her and he said to the Summerland Inn. She asked him the address and he read it from the paper Ms. Peeke had given him. She said "that's the Edson Motor Hotel – I thought we were going to a lab." Mr. DeVuyst said he would meet them at the hotel.

Testing Ms. Roberto

Ms. Roberto was then escorted to the company van and put in the back seat. It had child-proof locks so that she could not get out. She heard the locks click and says that, to her, it felt too much like being taken away by the police. When they got to the hotel she was escorted into the lobby. She felt extremely self-conscious because her eyes were still swollen and looked as if she had been beaten up and been crying. Mr. DeVuyst had not yet arrived. The desk clerk directed them to Room 101.

Ms. Roberto's recollections of what took place once she arrived at the room are that, when the door opened, she smelt a waft of stale beer and urine. She saw an elderly man sitting in the corner at a round table. She described him as shaking like a leaf. It was learnt later that the gentleman had a medical condition that made him shake. Ms. Roberto was not mocking his condition, but clearly this feature added to her overall unease about what was happening to her. She described the environment as "more like you were there to make a drug deal than go for an official test." She says the man introduced himself and perhaps showed her his credentials as he had her fill out some papers. While they were doing that, Union President DeVuyst arrived and she was given a couple of minutes to talk to him. After that the man gave her a breathalyzer test, the two of them sitting at the table while the other three men present (Tony, Dave and now Don) sat on the bed. He had to administer the breathalyzer twice. After that he handed Ms. Roberto a cup and told her to go into the bathroom and fill it.

Ms. Roberto said "it could take a while" to which the tester replied "we've got four hours." Ms. Roberto went into the bathroom, distressed by the whole situation. She worried about the state of the bathroom "the kind where my mother would have told me not to sit on the toilet seat." The tap in the tub was

dripping. There was no blue dye in the toilet. She worried about being in a bathroom where the four men in the room could hear every noise she made. Her eyes were still hurting and she had had no sleep for 24 hours. She found herself asking what she had done to deserve being treated in this way. Eventually she partially filled the jar and went back into the room and gave it to the tester. He had to split it into two vials but had difficulty doing so because of his shaking.

Mr. DeVuyst described the scene at the hotel when he got there. Ms. Roberto was there talking to the tester. Mr. DeVuyst asked for and was afforded an opportunity to speak to her. She asked what would happen if she refused and he replied that it would be taken as a positive test. He said the Union couldn't advise her what to do but would support her either way. They returned to the room and Ms. Roberto and the tester dealt with the breathalyzer. While this was happening Mr. DeVuyst read over the policy section dealing with the drug testing procedure, checking to see if the tester was doing things correctly. Mr. DeVuyst walked into the bathroom and noted that none of the preliminary steps had been taken. He waited for the tester to go into the bathroom for this purpose but it never happened. Instead, when the breathalyzer test was done the tester gave Ms. Roberto the cup and told her not to wash her hands. Mr. DeVuyst said she was in the bathroom for quite a while to the point where he became worried about her. He tried to make conversation during that time in an effort to make her feel more comfortable.

Ms. Roberto came out, saying it is not as much as you wanted, but it's the best I can do. The tester did not take the sample's temperature. With Ms. Roberto's help he divided up the sample and sealed the vials, telling her where they were going to go and getting her to sign papers. After the testing was done Mr. DeVuyst had a brief conversation with Ms. Roberto outside the room. He felt she was coping surprisingly well. Her face and eyes were quite swollen and she could hardly look at him. She then went home with Tony and Dave.

Mr. DeVuyst described the hotel's reputation in a somewhat self-deprecating way, saying "it's the hotel I used to hang out in;" "it didn't look like a new place 25 years ago" and "If you've got a hole in your pants you fit right in."

The aftermath of Ms. Roberto's testing

Ms. Roberto was not allowed to go back to work for the next few days until the test results came back negative. During that time she spoke to co-workers who she says were outraged by what had happened to her. They raised their concerns on her behalf at a safety meeting. Ms. Peeke called her from human

resources to say that the results were taking longer than expected and that she should not expect to hear anything before the weekend was over. It was the next Tuesday when the results came back negative. She arranged to return to work on the Thursday.

Ms. Roberto was interviewed by telephone about the incident itself and sent in a typed report once she was able to do so. Ms. Peeke called her because she had heard Ms. Roberto “had some feedback” on her experience at the hotel. Ms. Roberto says Ms. Peeke said to her that “she could not have done it.”

A grievance was filed. On her return on the Thursday Ms. Roberto, along with Mr. Mike Meek from the Union, went into a grievance meeting with Mr. Guy. Mr. Guy told her that he had made the decision to have her tested and he stood by that decision. He said something to the effect that he distanced himself from the decision. This comment struck Ms. Roberto as particularly insensitive since, in her view, she had no way to distance herself from the events. She had expected Mr. Guy to talk about the event, but he would not. She says this lack of any expression of human concern changed her previously enthusiastic attitude to her job into one of not caring. She says the incident started to affect her at home. She suffered nightmares and anxiety at the thought of going to work. Minor incidents began putting her into an emotional turmoil.

Ms. Roberto says that for her “the final straw” in this incident came when she was again on night shift. Mr. Parker asked her if she would unload the tanker car and she replied that she did not want to do so. He said that was fine. However, later it was said that she had refused to perform her job. She went to the lab manager to discuss this and he told her the unloading procedure was a part of her job. She arranged to discuss it with Mr. Guy. This appears to have been an emotional interview for her. The bottom line message Mr. Guy gave her was that if she was not willing to off-load the product she would have to give up her position because the duty to accommodate did not apply in her circumstances.

Ms. Roberto went to see a psychologist. She explained to him how she was feeling about work and how this incident and its aftermath were affecting her life. He told her to take some time away from work, and she applied for short term disability leave. She went to see a doctor for help the next week. As time past she says matters just got worse. She saw a counselor weekly until July and then every two weeks during August and September.

Ms. Roberto returned to work for two weeks in August, then took some vacation and returned full-time on September 17th. Her claim for short term disability insurance was refused in June for all absences after

May 11th. Rather than fight Maritime Life's refusal and return to work, Ms. Roberto says she followed her doctor and her psychologist's advice and stayed off work.

Ms. Roberto discussed her options with her doctors, first Dr. Govender and then Dr. Walker. She says they initially recommended medication but she was reluctant to "mask the problem" and chose psychotherapy instead. She also took steps at home to try to come to grips with what was bothering her by meditation and by journalizing events as they unfolded, trying to identify what caused her to overreact. Her refusal of medication was one reason cited for Maritime Life's refusal of her disability insurance claim. Another was their view that it took an excessive time for her reactions to surface after the incident.

Ms. Roberto described several situations at work that triggered her anxiety. She found herself trying to avoid people by eating lunch in the locker room and going up back stairs. Several times she almost left to go home in the middle of a shift. Even after returning to work, Ms. Roberto continued to feel that she had been treated as if she was not a person. It left her feeling uncaring towards her job in a way that contrasted sharply with the way she felt before. In her view, the incident hurt her reputation in the community and this had an affect on her children. She was known in town as the person who had been drug tested. She says her children had a hard time "seeing their mother being a basket case."

The incident itself was more difficult for her because of Mr. Alstead's involvement. He is a manager and she is a bargaining unit employee. His being involved deprived her of the opportunity to discuss her circumstances with him as her "significant other".

Dr. Malcolm Walker saw Ms. Roberto for the difficulties she experienced following this incident. He provided an opinion on the matter which reads, in part:

Ms. Roberto, as I understand was apparently involved in a work related accident, which subsequently led to her allegedly being subjected to a very unorthodox drug screen. This apparently occurred at a local hotel in Edson, after she had been removed from a friend's home, where she had been visiting. This apparently took place in the presence of an ex-RCMP officer, amongst others. No medical person was in attendance at the time, as far as the history was conveyed to me.

The RCMP and any medical doctor will confirm that if this indeed happened, it can be construed as nothing short of harassment and abuse. This should never have happened and should be prevented from happening again.

Ms. Roberto exhibited many signs of Anxiety and Post Traumatic Stress, which was confirmed by her psychologist. These symptoms, although clearly subjective, were clearly not only as a result of the accident, but more so as a result of the apparent humiliation which followed it.

Dr. Walker testified, with the parties consent, by telephone. He confirmed his view that Ms. Roberto was suffering from anxiety, stress and depression following her experiences. In his view this was attributable more to the testing events than to the accident itself. He expressed the opinion that, in post-traumatic stress cases, it is not unusual for people to take some significant time before they are willing and ready to discuss the issue. He says that when he was initially consulted and when he saw Ms. Roberto over her insurance forms he had assumed that her after effects were simply a result of the explosion on the tank. It was not until April 22nd that he learnt more about the incident. At that time Ms. Roberto had been seeing her psychologist, Dr. Gary Last. Dr. Walker says he received a report from Dr. Last and “put two and two together.” Dr. Last’s report was prepared in support of an insurance claim for Ms. Roberto. He believes the combined signs of depression and anxiety point back to the testing incident. Dr. Walker’s opinion is based on what he learnt from Mr. Last’s report, what Ms. Roberto told him, and his own observations of her. He last saw her in July of 2003.

Dr. Walker confirmed the opinion he expressed in his letter, that substance abuse testing carried out without either police or professional health care involvement was highly unorthodox and had none of the indicia of reliability he felt necessary and appropriate.

The incident involving Mr. Len Brown

Mr. Brown works in Weyerhaeuser’s shipping department. Some of Weyerhaeuser’s OSB product is shipped out by truck, although more goes by rail. The shipping area is just a part of the large open plan floor of the plant. The truck entrance consists of a 24’ x 16’ overhead door operated at the time by a button in the shipper-receiver’s office located right next to the door, separated only by a glass window.

On the day in question, Mr. Brown recalls it being “crisp” at minus 38°. The door, when opened, let in a lot of cold air and it was difficult to keep the place warm. A truck arrived to offload some material. Mr. Brown was in the shipper-receiver’s office. He opened the door and the truck backed in. What happened is documented in a Safety Incident Investigation Report prepared by Vernon Banfield (the out-of-scope team leader) that same day:

Truck offloading Material struck overhead door

Truck driver pulled up to normal position to back up through overhead door at shipping. The Shipping staff member opened the overhead door when the trucker was in position and the trucker waited until the door was completely open prior to backing into the door opening with the truck and 2 trailers.

The trucker backed into the mill angling 6 feet different from front to back. He opened the door on the truck and stepped down to check his load position as the darkness in the warehouse prevented good visibility. He then got back into the truck and started to drive outside to try to straighten his load out by backing into the warehouse in a straighter position. At the same time he returned to the cab and started forward the shipping operator pushed the close overhead door button located inside shipping office. The truck driver pulled ahead and the truck exhaust stacks, lights, and horn struck the overhead door, pushing it outwards.

The shipping operator noticed this happening and tried to stop the door.

The pictures attached to the report show that, from the viewpoint of a driver backing in, the end of the trailer is difficult to see because of the angle and the difference in lighting. The lines on the floor are worn off. The door, as it closed, damaged the equipment on the top of the truck's cab; the smoke stacks, horn and emergency beacons.

Mr. Brown's recollection is that the truck driver drove the unit in and stopped. He got out of the cab and waived at Mr. Brown who was standing in the office. Mr. Brown, assuming this meant he was done, pressed the button to close the door. Later, the trucker told Mr. Brown that the reason he got out of his truck is because the windows were frosted up and he could not see. Mr. Brown was speaking to another worker in the office at the time. A moment later he heard a crash, turned around and saw people trying to stop the door. One of the people in the office (perhaps Mr. Brown) hit the button to stop the door.

Mr. Don Pape was standing next to Mr. Brown in the shipping office when the incident happened. He recalls the truck arriving with its load, backing into the bay and stopping. The driver got out of his truck. There was nothing unusual he observed about Mr. Brown hitting the down button. It was -38° to -40° outside so they tried to shut the door quickly. He said there was nothing he would have done differently had he been the one closest to the button.

Mr. Vern Banfield called upstairs. They were concerned with how to close the door because of the cold. Mr. Harry Quinn, the maintenance supervisor, came down and he and Mr. Banfield held a brief meeting. Then, Production Manager Sikora came down. After 10-15 minutes Mr. Brown was called into the office where they told him they felt it was a significant enough incident to warrant a drug test. They did not examine the truck nor did they ask any questions of Mr. Brown before making that decision. All Mr. Brown learnt from them of their reasons was that it was going to cost a lot of money. Mr. Brown was sent upstairs for a coffee while those remaining tarped over the door. Mr. Sikora told Mr. Brown that the truck driver was also being sent for a drug test.

Mr. Eric Richards was the job steward on the day shift that day. He works as a shipper-receiver. Mr. Richards talked to Mr. Brown about what happened and made notes of Mr. Brown's statement. His notes, made 3 or 4 hours later that day, but taken from an earlier set of notes, read:

At 8:45 a.m. bay door at shipping department was open and board truck was backed into the loading area. Lenord went into shipping office to talk with Don Pape. While in office the trucker (who was now out of truck) signaled to Lenord to close the door. Lenord then pushed button to shut bay door. After he pushed the button he turned to talk with Don. At that time the other people in the office started to shout to reopen door (Vern, Marge & Don). As Lenord turned to the button he saw the truck moving and door coming down on the truck.

Mr. Richards did not participate in any way in management's investigation. He says Mr. Bulmer and Mr. Sikora said "he is going for testing no matter what – that's the way it is." Mr. Richards accompanied Mr. Brown and the truck driver to the Super 8 motel.

Mr. Brown says Mr. Richards told him that if he refused the test it would be taken as if it were a positive test.

Mr. Brown confirms that, since this incident, the policy has changed and the drivers shut the door themselves. Prior to the incident Mr. Brown says the employees suggested the company install "eyes" on the door to prevent it moving when any obstruction is in the way. This did not happen. They also suggested getting an amber flashing light installed to show when the door is moving. These suggestions were made to the safety committee but generated no response.

Testing Mr. Brown

Mr. Brown and Mr. Richards were taken by company van to the Super 8 motel. They sat in the lobby for 5 or 10 minutes while Mr. Sikora booked a room.

The truck driver went for his test first which took 30-45 minutes. Mr. Brown stayed in the hotel lobby. People were going in and out but Mr. Brown was not paying much attention to them. The trucker came down and told Mr. Brown it was his turn. He went to the room alone where he met an elderly man who introduced himself and explained he was going to do a breathalyzer test. Mr. Brown blew into the machine twice and registered zero but the operator was unable to get the machine to print a report, so he just wrote on the tape. The man then explained the drug test portion. Mr. Brown was given a container, told to use the washroom, and told not to use the water while he was in there. Mr. Brown entered the

bathroom and produced a sample. Mr. Brown recalls that nothing was done to secure the bathroom and no bluing agent was used in the toilet.

Mr. Brown set the sample down on the sink and the tester then, with some difficulty due to his shaking, separated the sample and sealed it into two vials which he placed in a courier bag. Mr. Brown signed some papers and then returned to the lobby. At this point the tester noted that they had missed one test for the truck driver and that he had to return to the room.

The aftermath of Mr. Brown's testing

Once the testing was over Mr. Brown was dropped off at home and told Company officials would deliver his truck to him later. This left Mr. Brown sitting at home with no vehicle wondering what was going on and, as he put it, "trying to explain to two teenage kids why their dad was getting drug tested."

Later that afternoon a person from the plant delivered Mr. Brown's truck to his home. He told Mr. Brown that the company would let him know when it was alright for him to report back to work. This person also told Mr. Brown that Mr. Sikora had told him that Mr. Brown had tested zero on the breathalyzer test. Mr. Brown agrees he told Mr. Sikora that fact at the hotel. On Tuesday night the company phoned to say that the drug test had come back negative and that he should return to work the next morning, which he did. Mr. Brown is concerned about the impact of this incident on his reputation and that of his family. His wife works in the Catholic School system. He has two teenage children who he has always counseled to avoid drug use. He asked for a copy of his results but was never given them.

Testing arrangements

Mr. Yearwood told the Union the year before that testing would be at the hospital or a lab but that he was still looking into the arrangements.

Mr. Guy's understanding was that Denning Health Group was to look after all the testing protocols, arranging labs, follow-ups on all positive tests and so on. He says there were discussions about having testing done at the mill, but they had limited private spaces and only four washroom areas, so they did not think it was suitable. He only had minor involvement with arranging alternative locations. He recalls that he wrote a request to use the hospital and says Denning's representative was going to check into that. He heard nothing back. The medical clinics, he understood, were not open 24 hours per day.

Mr. George VanderKracht is the individual involved in administering the tests to both Ms. Roberto and Mr. Brown. He is a retired RCMP officer with 37 years police experience. He was retained on a per-incident basis by Denning Management Services to administer drug and alcohol tests. He was hired after he replied to an advertisement in the local newspaper. He was the person who suggested to Denning that they use the Summerland Hotel since he had used that hotel for testing truckers under a contract with another agency and knew they rented out rooms by the hour. That may be a useful test for economy but the fact that a hotel rents rooms by the hour is a dubious consideration for ensuring it provides an environment sensitive to an employee's privacy and dignity.

No one from Denning was called to elaborate on why the original plans for testing in a hospital or lab could not be achieved.

The legal issues that arise in this case

The Employer's position is that it had cause to test, and therefore a right to demand that Ms. Roberto and Mr. Brown submit to drug and alcohol tests, under the policy it had recently introduced. That policy, it maintains, is a reasonable policy which it was entitled to introduce unilaterally as part of its right to manage. It relies upon the post-incident testing aspects of the policy that it says were reasonably applied in these circumstances and supported testing the grievors.

The Union argues that the policy is not reasonable in the way it purports to justify post-incident testing and omits from its terms important limitations designed to ensure any given request for a test is reasonable in the circumstances. Further it argues the demand for a test in each of these circumstances was unreasonable; primarily for lack of sufficiently serious incidents, lack of any sufficient investigation and as a result a lack of any cause to pursue testing as "a reasonable line of inquiry."

In addition, the Union argues, the manner in which these demands were made and the tests were carried out was also unreasonable and amounted to a serious affront to the personal dignity and privacy rights of the two employees. This breach of rights, the Union argues, justifies an award of damages because of the harm done by the Employer's unjustified actions.

The Union argues that the law on non-consensual drug and alcohol testing for employees has developed based on the proposition that an Employer's interest in testing must be balanced with an employee's right

to dignity and privacy. Policies, to be justified, must pass the KVP tests for reasonableness and be contract and statute law compliant. In addition, they must be reasonable in their application. The Union argues that, in assessing the reasonableness of a policy or its application, arbitrators should pay heed to the values inherent in the Canadian Charter of Rights and Freedoms to the extent those values support and reinforce the importance of individual dignity and privacy.

The Employer argues that its policy on post-incident testing comports with the case law as it has developed. The Union answers that some of the cases, as well as this policy specifically, go too far. The thresholds necessary to justify testing have been reduced or eliminated. The requirement for a reasonable inquiry, leading to an objective, supportable conclusion that drug or alcohol impairment is a reasonable line of inquiry has been reduced down to a meaningless checklist, devoid of protections for the employee. The Union supports these answers by referring to some of the seminal cases that first outlined the circumstances in which testing could be justified. It contrasts the circumstances they allude to with those in the case at hand.

Even if testing is justified, the Union argues, it must still be done with proper attention to the dignity and privacy of the individuals and according to proper standards. Indeed, the company's policy says as much. The manner of testing in this case failed to meet that objective, even if testing was justified. It argues that, when an employer forces testing but fails to justify the testing or fails to carry out the testing in a manner respectful of the employee's dignity and privacy rights, then the employee should have a remedy in damages. It is insufficient to say, since the tests were negative in each case and no discipline was involved, that "no harm's done."

The Union refers to one of the earliest reported awards on employee drug testing in Canada:

Re Canadian Pacific Ltd. and United Transportation Union (1987) 31 L.A.C. (3d) 179 (M. Picher)

Arbitrator Picher made a general statement at p. 186 that the Union draws upon because of its relevance to both when testing is justified and how it ought to be carried out.

It appears to the arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of

establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

The Union emphasizes the references to the need for “reasonable justification,” “reasonable grounds” or “good and sufficient grounds for administering a drug test.” This element, it argues, has been unduly watered down in this Employer’s approach to post-incident testing and in some of the more recent reported cases.

I note two other points in the award that are important to the analysis in this case. Arbitrator Picher drew on the well established case law that said that an Employer has a right to demand a medical examination to ensure the employee is physically fit to perform their assigned work in a safe manner. He then asked, and answered, the following question at p. 186:

Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary. (*emphasis added*)

The right to demand a drug test arises not as an absolute right of one person to demand a test of another (because no such right exists); it only arises because it is implicit in the contract of employment. I note this (perhaps obvious) point because, within the concept that testing is allowed because it is implicit in the contract of employment, lie the limits upon the permissible interference with human integrity and liberty.

The second point relates to the statement that “any such test must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technicians responsible for it.” This is followed by a comment on the admissibility of the resulting evidence. Tests that fail to meet these rigorous standards may fail as evidence of impairment. However, the invasion of privacy occurs whether or not the results are needed as evidence. Those who test negative care little that they could have challenged the results if they proved positive. In this case, I am asked to explore the

remedy available to an employee faced with a demand that they take tests under what they say are less than rigorous conditions. In his reference to the U.S. Federal Railroad Regulation, arbitrator Picher noted, at p. 184:

The regulation provides for stringent conditions which must exist prior to requiring an employee to submit to a urine test, including procedural safeguards for the maintenance, calibration and administration of testing devices by qualified technicians.

At p. 183 he noted, also from the U.S. experience:

While both urine tests and blood tests employed to detect the presence of drugs cannot claim complete infallibility, it appears that when such tests are administered in keeping with exacting technical and professional standards, they can produce a generally acceptable degree of reliability and have, therefore, become more and more established as a means of fact-finding by certain public authorities. (emphasis added)

The technical and professional standards repeatedly alluded to in the cases are not only important because the results may prove inadmissible if standards are not followed. That is clearly the Employer's direct interest, and in the Employer's long term interest as well if testing is to have credibility. Standards are equally important for employees who are tested. Privacy and dignity issues are not just about being comfortable with the surroundings while being tested. They extend to the assurances the person has that the information obtainable from the samples taken from them are used only for the purposes for which they were taken, and that reliable and enforceable measures are taken to prevent any ulterior use, whether accidental or deliberate and whether now or in the future through unauthorized data banking. When tests are taken by professionals bound by laws enforceable in Alberta, such as in a hospital or clinic, or by a professionally qualified occupational health care employee, the individual has the assurance that the person's professional ethics and practice are subject to regulation by their licensing body. When the testing is by someone less clearly regulated and the results are analyzed beyond the reach of local or even national licensing bodies, the privacy concerns for an individual are higher.

The Employer and the Union agree that the Canadian jurisprudence has proceeded on the basis of a "balancing of interests" approach to testing even though they disagree on where the balance lies. This approach is described and accepted by Arbitrator M. Picher in:

Re Canadian National Railway Co. and Canadian Auto Workers; United Transportation Union
(2000) 95 L.A.C. (4th) 341 at 367

The competing theoretical basis for arbitral consideration of the issue, advanced by the Company, has been described as the "balancing of interests" approach. That perspective, perhaps best represented by the decision of Arbitrator McAlpine in the Esso Petroleum case, and further

reflected in arbitral awards such as *Re Provincial-American Truck Transporters and Re Sarnia Cranes Ltd. and I.U.O.E.*, Loc. 793, [1999] O.L.R.B. Rep. May/June 479 (Shouldice), holds that in determining whether an employer may resort to drug and alcohol testing of its employees, a board of arbitration must endeavour to balance the interests of the employees in the privacy and integrity of their person with the legitimate business and safety concerns of the employer. Within that theoretical framework, neither the employee nor the employer can assert any absolute right. Rather, the analysis focuses on whether, given the nature of the enterprise and the work performed, reasonable limitations on the individual rights of the employees can fairly be implied. If so, then a correlative right may vest in the employer to require a medical examination of the employee, including alcohol or drug testing.

and at p. 369:

Without exception, boards of arbitration, striving to be responsive and pragmatic in the face of workplace realities and genuine concerns for safety, have opted for the balancing of interests approach. In this Arbitrator's view that is the preferable framework for a fair and realistic consideration of the issue of drug and alcohol testing in the workplace generally, most especially in an enterprise which is highly safety sensitive. While the time-honoured concept of the sovereignty of an individual over his or her own body endures as a vital first principle, there can be circumstances in which the interests of the individual must yield to competing interests, albeit only to the degree that is necessary. The balancing of interests has become an imperative of modern society: it is difficult to see upon what basis any individual charged with the responsibilities of monitoring a nuclear plant, piloting a commercial aircraft or operating a train carrying hazardous goods through densely populated areas can challenge the legitimate business interests of his or her employer in verifying the mental and physical fitness of the individual to perform the work assigned. Societal expectations and common sense demand nothing less.

Safety is an undisputably important cause and no tolerance should be afforded personal choices that expose co-workers to the risk of physical harm at work. However, privacy and dignity interests are sometimes too easy to discount just because they are so private and personal. Not every step taken in the name of safety is beyond rational examination. If such action is ineffective, or extracted at an unnecessary cost to human dignity and privacy, then it must remain open to question, and ultimately to a choice, based on an objective balancing of interests. This must include the effectiveness of the tests and the other alternatives that might be available.

Arbitrator Picher in *CN* relied upon the discussion of the employee's privacy interests contained in

Trimac Transportation Services – Bulk Systems and T.C.U. (1999) 88 L.A.C. (4th) 237 (Burkett)

Arbitrator Burkett described privacy interests in the following terms:

The "best" reconciliation of two legitimate but competing interests is achieved by measuring their competing impacts. Accordingly, an assessment of the extent to which mandatory random drug testing furthers the objective of a safe and productive workplace and a corresponding assessment of the extent to which it invades individual privacy is required.

Against this background it is useful to discuss in broad terms the meaning and importance of privacy in the Canadian setting. The right to one's privacy is the right to protection from the unwarranted intrusion of others into one's life. The underlying premise is that in a democratic society, an individual is free to live as he/she pleases without interference or monitoring, so long as there is no adverse impact upon another nor breach of the law. The Canadian acceptance of the right to privacy is traced through legislation, international and constitutional law, scholarly writings and judicial statements by O'Connell in "Drug Testing and Privacy", vol. 2, Can. Lab. L.J. 325. The conclusion there is that privacy, as protected by Section 8 of the Charter, is "an essential value in Canadian society". Specific reference is made to the judgment of the Supreme Court of Canada in *R. v. Dyment*, [1988] 2 S.C.R. 417, a case involving the taking of a blood sample for evidence of impairment. In his judgment, Justice LaForest referred to privacy as "at the heart of liberty in the modern state" and as "grounded in man's physical and moral autonomy (and) . . . as essential for the well-being of the individual . . . (and) for the public order". Although conceding that privacy must be balanced against other societal needs, the court found that "persons are protected not just against the physical search but against the indignity of the search . . .". The court concluded that [at pp. 431-2]:

. . . the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity.

He goes on to note that:

Employer initiated mandatory (i.e. involuntary) random drug testing brings to the fore the question of the extent to which employer business interests may override employee privacy interests. This is so because such testing, while conducted in the interests of safety, not only provides others with access to personal information, but also constitutes a physical invasion.

This is equally true for post-incident testing, although the Employer's justification is stronger than for random testing.

Arbitrator Picher, in the *CN* case from 2000 (*supra*) affirmed a general proposition he advanced in an earlier case.

Re Canadian National Railway and U.T.U. (1989) 6 L.A.C. (4th) 381

... the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously and only with demonstrable justification, based on reasonable and probable grounds.

That statement was generic; it was not made in the context of any specific category of demand for a drug test. It is the overarching principle that the Union alleges is getting lost as cases define more precisely the circumstances that might justify tests following an incident.

The Union argues that Charter of Rights and Freedoms properly has an influence on the development and interpretation of the common law. There is no reason it should have any less of an influence on the

development of the law of the workplace through arbitrated decisions. The Supreme Court of Canada said in:

Hill v. Church of Scientology and Toronto [1995] 2 S.C.R. 1130 at para. 97:

Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.

The Court also said, in:

Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U. Local 558, 208 D.L.R. (4th) 385 (S.C.C.)

The Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.

This Court first considered the relationship between the common law and the Charter in *R.W.D.S.U. v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, where McIntyre J. concluded, at p. 603:

Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.

I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.

The reasons of McIntyre J. emphasize that the common law does not exist in a vacuum. The common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future. As such, it does not grow in isolation from the Charter, but rather with it.

The Charter emphasizes the importance of individual security, dignity, freedom from unjustified interference and similar values which the unbridled insistence on a right to test for alcohol and drugs can infringe. Even if, as Arbitrator Picher suggests in *CN*, neither party's rights are absolute, it is still important to recognize the fundamental nature and importance of the rights involved on the employee's side of the balancing process.

Relevant Collective Agreement Terms

The Employer relies on its management's rights clause to justify its policy.

Article 4 Employer's Rights

4.01 The Union acknowledges that it is the exclusive function and right of the Employer, subject to the terms of this Agreement to:

- (a) operate and manage its business in all aspects,
- (b) maintain order, discipline and efficiency,
- (c) make and alter from time to time the rules and regulations to be observed by the employees, providing such rules and regulations are uniformly and fairly applied to all employees and not in conflict with this Agreement,
- (d) direct the work force,
- (e) determine job content, including methods, processes and means of production and handling,
- (f) select, hire, promote, transfer within its plant, lay off because of lack of work and discharge for just cause.

Article 14 includes a mention of Safety Programs, but the policy does not derive from those provisions:

14.01 Safety Program

The Company shall maintain an Accident Prevention Committee with representatives from the Company and the Union. The make up of this committee will include one member of the Union Executive, one member elected by the membership and one representative from management. Employee and management participation beyond this minimum number is supported by both the Union and Company.

14.02 Unsafe conditions

Employees will not operate with unsafe equipment or unsafe working conditions. All employees are expected to report immediately and document any unsafe equipment or conditions.

The *Alberta Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000 c.H-14 is specifically incorporated into the collective agreement (although by its former name).

Article 24 Individual Rights Protection Act

The Company and the Union agrees to incorporate and abide by the provisions governing discrimination contained in the Alberta Individual's Right Protection Act, its amendments or successor legislation.

Unilaterally introduced policies

Some drug and alcohol testing policies are negotiated with a trade union; others, like this one, are introduced unilaterally, as an exercise of management's rights. The legal issues that arise where such policies are negotiated are significantly different than where they are unilaterally introduced by management. This is because much of the "balancing of rights" has been brokered through the bargaining process and union consent given to the resulting procedures.

Management is not obliged to seek Union consent. The management rights article recognizes specifically the right to make rules so long as they do not conflict with the agreement. An objection to a unilaterally imposed drug and alcohol testing protocol based on lack of union participation was in the most part rejected in:

Re DuPont Canada Inc. and Communication, Energy and Paperworkers Union of Canada, Local 28-0 (2002) 105 L.A.C. (4th) 399 (P. Picher)

The fact that the Company did not consult the Union in the creation of its Policy respecting Drug and Alcohol does not breach any provision of the collective agreement. The Company is entitled to make rules respecting the operation of its business, inclusive of rules in furtherance of its ongoing effort to ensure safety in the workplace. The general limitation on the Company's entitlement to make such rules and policies is that they may not be inconsistent with the terms of the collective agreement; they must abide by the standard of reasonableness, as set out in *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson), and they must also, of course, be consistent with any law of general application, such as the *Human Rights Code*, R.S.O. 1990, c.H.19, of Ontario, as amended, and any related principles such as the duty of reasonable accommodation in respect of disabilities.

Unilaterally introduced policies of this type (i.e. those that impact on basic employee rights or involve discipline, or both) must not be contrary to the collective agreement or statute law and, under the second point in the *KVP* test, they must be reasonable.

In earlier cases, to establish the need for, and thus reasonableness of, a drug and alcohol testing policy, an Employer was required to show that there was a substance abuse problem within the workplace that could not be addressed by less intrusive measures. In a preliminary award in an arbitration involving this Employer and the C.E.P. (reviewed in more detail below) Arbitrator Taylor dealt with whether the Employer had to prove drug and alcohol problems in the plant as a precondition to introducing a policy. He held (at p. 109) that, in inherently safety-sensitive industries, "the Employer does not need to adduce evidence of an actual substance abuse problem in the workplace as a precondition to the introduction of the standard." He did so following a thorough review of how Canada's law on drug and alcohol testing has developed in inherently safety sensitive industries.

Given these conclusions, which I accept, and which I find are binding on these parties, I do not need to canvas the more detailed evidence put forward by the Employer about the dangerous nature of its Edson Plant and the past indicia of drug and alcohol use by employees while working in this plant.

The Weyerhaeuser Policy Itself

The policy in this case is a 21 page document. It begins with the following introduction:

The Company will maintain a healthy and safe work environment by, among other measures, providing a workplace free from the effects of drug and alcohol use. The importance of this standard is underscored by the fact that many of our employees work in situations in which an error in judgment or compromised motor skills could result in injury or death. It is therefore critical that our employees remain free from the effects of drug and alcohol use while on duty.

Notwithstanding Company initiatives to date to reinforce the requirement for employees to attend work free from the effects of substances that cause impaired job performance, there is still evidence that some employees do attend work under the influence of controlled drugs or alcohol.

This Standard reflects the Company's dual objectives of ensuring workplace safety and improving employee health. In order to assist in achieving these two objectives, the Company has adopted this standard which includes testing employees for the use of drugs and alcohol in specified circumstances.

This Standard is just one aspect of our comprehensive approach to workplace health and safety, and augments the efforts and programs already underway in local units, many of which involve local management and trade unions through occupational health and safety committees and programs like our EFAP.

The policy's objectives stated (at page 2), make it clear that the policy includes disciplinary consequences.

While the primary objective of this standard is to improve the health and safety of Weyerhaeuser's employees and while help is provided for those who are affected by drug or alcohol use, failure to comply with this standard may lead to disciplinary action up to and including dismissal, taking into account all relevant factors and circumstances and the principles of just cause.

This disciplinary aspect is reinforced (on page 5) under the heading "Consequences":

Employees failing to comply with this standard will be referred to a Substance Abuse Professional for assessment however, depending upon and with regard to all of the circumstances of each instance, failure to comply with this standard may result in discipline up to and including termination, as determined in accordance with the principles of just cause.

The policy is written to recognize and reflect the Employer's duty to accommodate those with disabilities related to drug or alcohol use:

As intended by the Company, and as required by the human rights laws of the provinces in which it operates, the Company will reasonably accommodate any disability disclosed in the administration of this standard or otherwise communicated to the Company by any employee. Nothing in this standard in any way negatives the duty to accommodate an employee or relieves the Company from ensuring that any discipline, including dismissal, meets any applicable just cause standard.

The policy lists the following circumstances where tests may be required:

Employees will be required to undergo alcohol and or controlled substance testing in five separate scenarios. They are as follows:

- Safety Certification Testing (Drugs only)
- Intervention/For Cause
- Post Accident
- Return to Duty
- Follow up

These grievances deal particularly with the Post-Accident provisions.

The policy deals specifically with refusal to comply:

Refusal to Test: Amplified

After an employee has received notice to report for an alcohol or controlled substance test, that employee will be considered to have refused to submit to a test when he or she:

- A. expressly refuses to test; or,
- B. fails to appear at the test site within a reasonable time frame without a reasonable explanation for the delay; or,
- C. fails to sign step 2 of the breath alcohol testing form; or,
- D. fails to provide an adequate breath sample without a valid medical explanation; or,
- E. fails to sign copy 2 of the Urine Custody and Control Form; or,
- F. fails to provide adequate urine for controlled substance (drug) testing without a valid medical explanation; or
- G. engages in conduct that obstructs or is intended to obstruct, the testing process of urine or breath.

The consequences of refusing to comply are the same as for failing the test. This aspect of the policy, and the Employer's actions in this case, presuppose that when an employee is required by management to submit to a test, the "obey now grieve later" rule applies. This assumption takes no account of whether the test is in fact mandated by the circumstances and the policy, or whether the conditions under which the tests are administered are appropriate.

The following paragraph is significant to the manner of testing.

All testing and test results are confidential and measures are taken to ensure the privacy and dignity of employees involved in the testing process. The details of the testing process are set in a subsequent section of this standard.

The circumstances said to justify post-accident/incident testing are set out at page 12:

Post Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:

- A fatality or significant bodily injury
- Significant damage to Company property or equipment
- Possible exposure to legal action or liability
- Significant environmental damage
- A near miss that in management's opinion may have resulted in any of the above.

The procedures, also set out at p. 12, read:

1. Both drug and alcohol testing will be carried out in circumstances where a post accident test is required. Alcohol testing shall be carried out within eight (8) hours of the accident and drug testing is to be carried out within thirty two (32) hours of the accident.
2. Employees must make themselves available for the purpose of testing.
3. If a Unit has a collective bargaining agreement, the supervisor should comply with the agreement when initiating testing.

The policy goes on to describe more specifically the step-by-step processes to be used in collecting and analyzing samples.

This policy changed through three drafts as it was being prepared for introduction both in Edson and nationally. The changes relating to post-incident testing show that significant modifications were made to

the degree of managerial approval or oversight required and the description of the threshold level of event necessary to justify testing.

Draft 1 provided:

Post Accident testing will be carried out in circumstances in which one or more of the following occur:

- Accidents that result in a citation for a moving violation when an employee is operating a Company vehicle; or
- A fatality; or
- Serious injury occurs in which the injured employee is treated away from the scene of the accident and for which time loss is likely to occur other than on the day of the accident; or,
- Property damage in excess of \$5,000.00; or,
- Any accident or incident in which, having regard to all of the circumstances, a drug/alcohol test is desirable to aid in determining the cause of the accident. Such a decision must be justified and supported.
- NOTE: Except in the case of a fatality, the Unit Manager, or his or her designate, may determine that, having regard to all of the circumstances, a drug/alcohol test is not necessary or required in determining the cause of the accident. Such a decision must be justified and supported.

Testing may include any or all employees directly or indirectly involved in the accident.

In draft 2, the NOTE, giving the unit manager the discretion to decide against testing, is removed. Instead, testing is only to be done with the unit manager's approval. The circumstances are changed, but the third circumstance includes a requirement of some reasonable suspicion of drug or alcohol involvement.

Post Accident interventions will be done with the unit manager's approval in cases where one or more of the following occur:

- Level I or II incidents
- Accidents that result in the employee being charged for a moving violation when an employee is operating a Company vehicle; or
- Any accident or incident in which, having regard to all of the circumstances, it is reasonable to suspect drugs or alcohol is involved. Such a decision must be justified and supported.

The third and final draft implemented as of February 1, 2003 and set out above eliminates this requirement of reasonable cause for suspicion entirely. The manager's approval requirement remains.

Mr. Guy testified that these changes were a result of feedback as the policy was discussed in the plants. More realistically, in my view, it was modified in response to specific arbitration cases involving the *Fording Coal* policy, in particular Arbitrator Love's decision (discussed below) in:

Fording Coal Ltd. v. United Steelworkers of America, Local 7884 (Brennan Grievance) [2002]
B.C.C.A.A.A. 243

The influence of this decision can be seen more particularly in the "Quick Reference Guide" prepared for management's use in applying the policy.

Post-Accident Testing Policies

I now turn to the more recent cases dealing with post-incident testing. I note by way of introduction that while some Unions have negotiated policies, others have challenged their legitimacy on several grounds. The most prominent challenges have involved alleged conflict with human rights obligations not to discriminate based on addictions, privacy concerns and conflict with collective agreement terms, particularly the just cause for discipline provision. Several factors make the resulting case law complex.

First, the seminal cases identify the issues involved as a clash of rights and interests. They resolve such clashes not by giving any one right primacy over any other right (as initially advocated by both labour and management) but by adopting the "balancing of interests" approach. The result is that decisions in each case, both "on the shop floor" and at arbitration must involve the cautious exercise of judgment. It is almost impossible to distill any "bright line" tests to be applied or to give clear cut answers about what ought to be done in hypothetical situations.

Second, some of the case law turns on the interpretation of human rights prohibitions against discrimination based on the disability of addiction. That law is itself complex. Addiction is a disability but casual or recreational use is not. How, and the degree to which, arbitrators should apply human rights rules is also an area where the law has changed over time.

Third, the rules used to scrutinize employer policies – known as the KVP rules - have been for many years the subject of debate about their scope. Some view them as applying primarily as a restraint on allowable discipline. Others give them broader scope, applying to the validity of any employer policy, whether having the potential for disciplinary consequences or not.

Fourth, the arbitral law is less clear than it might be on how to deal with positive, but not expressly contractual, rights possessed by employees. It is easy to say that an employee has a positive right to privacy, or a right not to be subjected to a discriminatory rule or practice. Arbitrators can and do refuse to enforce such rules by declaring policies invalid or by setting aside discipline. However, the basic workplace rule is obey now, grieve later. The case law sets limits on that rule, for example, in cases involving health, safety, personal appearance, or illegal acts. What it does not do is address squarely what, if any, other remedy an employee may have where the rule, and the exercise of an employer's power and authority to enforce the rule, results in a breach of an employee's fundamental rights. Policies may say, as this one does for example, "all testing and test results are confidential and measures are taken to ensure the privacy and dignity of employees ..." However, such policies rarely specify what the employee can do if such expressions of intent are not met.

Fifth, some of the cases involve policy grievances challenging a proposed policy as globally illegal. Others involve individual grievances challenging the application of the policy to an individual set of circumstances. The result in the policy grievance cases is generally not to bless all aspects of the policy, but to defer many of the key issues to be resolved in subsequent "application" cases. The policy grievance cases also, of necessity, focus on a specific employer's written policy. The wording of each policy, and the protections and procedures specific policies adopt, tend to set the framework for the analysis. That same analysis may not be applicable to differently worded policies using similar terms but with different protections, definitions, or working environments.

The Taylor Awards on the validity of this policy

Several of the authorities relied upon by the parties involve policy grievances concerning the validity of entire drug testing policies. The Employer here invited a broad look at this policy; the Union urged a narrower view. This case, the Union argued, is about post-incident testing and the application of the policy in the specific post-incident circumstances involving Ms. Roberto and Mr. Brown. The Union's position is that any comprehensive review of the policy, and its justification, should occur on a national basis through a policy grievance and not in the context of these grievances.

To that end, this same Weyerhaeuser policy was the subject of a broad policy grievance brought by the I.W.A. and heard by Arbitrator Colin Taylor, Q.C., the results of which are reported at;

Weyerhaeuser and Co. and I.W.A. (2004) 127 L.A.C. (4th) 73 (Taylor) (“the Weyerhaeuser preliminary policy decision”)

Industrial, Wood and Allied Workers of Canada v. Weyerhaeuser Co. [2004] BCCA 164 (Taylor) (the “Weyerhaeuser final policy decision”)

Paragraphs 12-15 of the final decision outline the parameters of that policy grievance.

12 The IWA has filed a policy grievance (the “Policy Grievance”) alleging that the implementation of the Standard, in business units where it has collective agreements with Weyerhaeuser, violates the terms of those collective agreements as being discriminatory and unreasonable exercises of management rights.

13 The Policy Grievance has been advanced on behalf of all IWA locals that have collective agreements with Weyerhaeuser in Canada and these are situated in several Canadian provinces.

14 In order to avoid the expense and delay associated with a multiplicity of proceedings on similar issues in various jurisdictions in Canada, the parties have agreed to resolve the issue of the validity of the Standard in one comprehensive arbitration, the results of which will be binding on the parties in each province in which Weyerhaeuser has business units with collective agreements with the IWA.

15 The parties have agreed that the arbitration of the Policy Grievance will proceed on the basis of a general assessment of the validity of the Standard without reference to individual collective agreement terms, or the facts underlying any existing or future grievance concerning the validity of the Standard or its application in any particular set of facts.

I have the benefit of Arbitrator Taylor’s analysis but, as paragraph 15 shows, that analysis is expressly limited in its scope. In reaching his conclusion, and after reviewing many other authorities, Arbitrator Taylor relied particularly on two cases:

CN Rail v. C.A.W. (2000) 95 L.A.C. (4th) 341 (M.G. Picher)

Re Fording Coal Ltd. and U.S.W.A. Local 7884 (2002) 67 C.L.A.S. 234 (Hope)

of which he said at page 100 of the preliminary decision:

In my respectful view, these two decisions best reflect the legal principles that govern the arbitral review of drug and alcohol testing policies and govern the resolution of this dispute.

I have already referred to the *CN* decision. The *Fording Coal* decision is one of several involving that employer and the United Steelworkers. Like the Taylor decision, it involved a policy grievance directed in a general way at the prima facie validity of the policy under the *KVP* test. Several cases involving the application of that *Fording* policy were then decided after the policy grievance. These include:

Fording Coal Ltd. v. United Steelworkers of America, Local 7884 (Brenner Grievance) [2002] B.C.C.A.A. No. 243 (Love)

Fording Coal Ltd. v. U.S.W.A. Local 7884 (Olson Grievance) (2002) 112 L.A.C. (4th) 141 (Glass)

Fording Coal Ltd. v. U.S.W.A. Local 7884 (Cryderman) (2003) 119 L.A.C. (4th) 165 (Devine)

Both Arbitrator Hope in the *Fording* policy grievance and Arbitrator Taylor in the subsequent *Weyerhaeuser* final policy grievance make important observations about the appropriate scope of a policy grievance in assessing the general validity of a policy compared to subsequent cases that deal with the application of that policy to particular circumstances. That analysis needs noting; (a) because this is an application case under the policy addressed by Arbitrator Taylor and (b) because there is a danger of assuming that if a policy has “passed a policy grievance” then its terms can thereafter be applied literally and mechanically. This is not the case as both arbitrators made clear in their reasons. In application cases, the Employer must still justify its specific actions under the policy using a balancing of interests approach. The *Fording* cases, and to a degree Arbitrator Taylor’s analysis of those *Fording* application cases in his *Weyerhaeuser* decisions, go some distance in framing the way that balancing process is to be carried out.

Following the leading authorities, Arbitrator Taylor held that the *Weyerhaeuser* policy, had to meet the *KVP* test.

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

Re KVP Co. and Lumber and Sawmill Workers’ Union, Local 2537 (1965) 16 L.A.C. 73 (Robinson)

In general, and specifically for the task he was assigned, Arbitrator Taylor held that there is a distinction between aspects of a policy that make that policy *void ab initio*, and issues that arise in the application of the policy that make it unenforceable in a particular situation. Of this he said at page 79:

In [*Fording Coal*] Arbitrator Hope observed that the question as to whether a unilaterally imposed rule is to be seen as *void ab initio* is limited to the first two of the six principles identified in *KVP*. The remainder relate to the application of rules including substance abuse policies.

Arbitrator Hope's comments on this are to be found at paragraphs 11-16 of his award and the following observations are particularly relevant:

11 The question arising with respect to those principles is whether they support the proposition that an employer can be prohibited from introducing a rule or discipline code in the first instance or whether challenges should be addressed on facts arising in particular circumstances. That issue arises in this dispute with respect to the question of whether the Policy is to be seen as void ab initio or whether it is within the right of the Employer to introduce the Policy with the question of its validity left to be determined in the context of individual applications.

12 In my view, the answer to that question is contingent upon whether the Policy is unlawful or unreasonable on its face, as opposed to an application of the Policy that may or may not survive the application of the test of just cause. On a careful review of the numerous authorities, I conclude that the question in *KVP* of when a rule is to be seen as void ab initio is limited to the first two "characteristics" identified by Arbitrator Robinson. They are "characteristics" that relate to rules that are contrary to the collective agreement and those that are unreasonable on their face. The remainder of the "characteristics" and the principles relating to the effect of rules on dismissals relate to the application of rules, including drug and alcohol policies. In short, the questions raised in the *KVP* criteria with respect to whether rules or policies are void ab initio are whether they are consistent with the collective agreement and whether they are reasonable on their face.

and at paragraph 15:

On the authorities, the starting point in the resolution of this dispute is to recognize that the Policy serves only to put employees on notice with respect to the Employer's expectations in terms of conduct with respect to alcohol and drug use and some indication of the disciplinary consequences which will flow from actions alleged to be in breach of the Policy.

16 That reality applies even though the testing aspect of the Policy introduces a complicating factor in the sense that mandatory testing is neither a rule of conduct nor a disciplinary consequence. It is an investigative or preventative tool. However, it is clear that the *KVP* and *CGE* reasoning applies with equal force to mandatory testing as it does to rules of conduct and discipline codes. The testing policy must be consistent with the provisions of the collective agreement and must be reasonable on its face.

Arbitrator Taylor used this analysis to define the limits of what should be dealt with in the case before him, saying for example at paragraphs 117-119 of the final award:

117 The Company has adopted a company-wide policy dealing with issues relating to substance impairment in its Canadian workplaces. The IWA has filed a policy grievance alleging that the Standard is *void ab initio* as being discriminatory and unreasonable exercises of management rights.

118 An arbitrator has jurisdiction to declare a unilaterally introduced policy invalid on the basis that it is unreasonable, separate from the application of the policy in particular circumstances.

119 Moreover, that is the limit of my jurisdiction. The parties have expressly limited my jurisdiction to a determination of the validity of the Standard and not its application in any particular set of facts. Thus, the obligation on the Union is to establish that the Standard is void as being unreasonable in the sense contemplated in *KVP* or otherwise unlawful.

Throughout his final award Arbitrator Taylor identified issues which, in his view, went beyond the first two points in the *KVP* test and were matters of application. For example, he said at paragraph 16-18 of the final decision:

16 That procedural agreement, reached by the parties for the conduct of this arbitration, gave rise to certain evidentiary disagreements occasioned by the Union seeking to introduce evidence arising from filed grievances in order to establish factors which the Union contended with to the unreasonableness of the Standard, particularly as it relates to post-incident testing and substance testing procedures which the Union characterized as degrading, humiliating and an unwarranted violation of dignity and privacy.

17 Evidence which demonstrated that individual employees have expressed strong disagreement with the Standard and, in particular, the testing procedures, was permitted as going to reasonableness.

18 The protocol agreement governing the submission of this matter to arbitration limits my jurisdiction to a determination of the validity of the Standard and not its application in any particular set of facts.

At paragraph 126 he noted:

126 The Standard does not serve to create any additional rights in management. The arbitral authorities repose in management, with or without a policy, the right to require employees, where reasonable cause exists, to submit to testing. Thus, as can be seen in the *Fording Coal* line of cases, the validity of the Standard will arise in its application, including issues relating to the testing and collection procedure, qualifications and role of Substance Abuse Professionals and whether or not an employee works in a safety-sensitive position.

Between paragraphs 127 and 140 Arbitrator Taylor identified aspects of the policy which he found were not reasonable and therefore required amendment. Subject to those comments he held, at paragraphs 141-142, that *Weyerhaeuser's* policy *per se* was not *void ab initio*.

141 With those exceptions, it is my view that the Standard has not been shown to be unreasonable in the legal sense or otherwise unlawful. As to the invasion of privacy, the requirement is to submit to testing where there is reasonable cause or where the employee's condition is relevant to the safety related incident. There are no automatic penalties for testing positive or refusing a test. The limitations advanced by the Union, including those attaching to drug testing and the anticipated deficiencies in the testing procedure and Substance Abuse Professional qualifications, arise in the application of the Standard, not its introduction: *Fording Coal*.

142 As Arbitrator Hope noted in *Fording Coal*, this finding that the Standard is not void ab initio is not a determination that its application in any particular circumstances will meet the test of just cause (see the *Fording Coal* line of cases going to the application of the policy). The Standard is a statement of the Company's policy with respect to alcohol and drug use and puts employees on notice as to the Company's expectations and the disciplinary consequences which could arise from a breach thereof as well as notice that employees may be required to submit to testing in certain circumstances. On each and every application of the Standard, the Company will bear the onus of establishing that its actions were justified. (emphasis added)

The Taylor decision arises from a case between these parties pursued specifically to obtain a ruling on the broad legality of the policy before me. This plant too is inherently safety sensitive. I follow that award in this case, because of the parties' agreement as to the decision's general application to each facility. I do so as well because I agree with Arbitrator Taylor's overall approach and his conclusions. I note particularly, however, that some of the items advanced in this case are those same items referred to in paragraph 141 as arising "in the application of the standard not its introduction." I note also that some of the points in issue here relating to the inquiry necessary for post-incident testing arise from that part of the policy he found to be unreasonable.

At the close of his preliminary ruling Arbitrator Taylor noted the clash of interests involved in these issues, saying at p. 109:

I am keenly aware of the competing interests striving for dominance here. The Union seeks protection for the privacy and dignity of individual employees and the right to be free from unreasonable invasion of those strongly held Canadian values. The Company operates in a safety-sensitive environment and seeks to protect the safety and well-being of its employees and operations consistent with its public duty. The Solomonian task is to reconcile those competing interests in the light of established jurisprudence.

I agree entirely with this observation. I would only add three additional points about how this "competition for dominance" is playing out in practice.

First, as some of the early cases illustrate, many believe the real efficacy of a drug and alcohol policy "on the ground" and in its ability to achieve a change in workplace culture comes not from any finely tuned balancing of rights but from its ability to act as a deterrent. While arbitrators have generally rejected random testing as a practice, and deterrence as a justifying value, it would be naïve to ignore the power the belief in straightforward deterrence still has in the design of policies and more particularly in their day-to-day application.

Second, most policies use the mechanism of treating the refusal to submit to a test as the equivalent of a failed test, or as insubordination, or both. Despite the balancing of fundamental rights the employee is

usually faced with the full force of the “obey now grieve later” rule. In *CN Rail (supra)* at p. 384-85 Arbitrator Picher said:

Given the highly sensitive nature of the Company’s operations as a railway, it is reasonable for the Company to require employees in risk-sensitive positions to undergo drug and alcohol testing in circumstances where it has reasonable grounds to believe that an employee is impaired while on duty, while subject to duty or while on call, including where an employee has been involved in a significant accident or incident, or when an employee seeks promotion or transfer into a risk-sensitive position. While it is true that in all of the foregoing circumstances a positive drug test would not give the employer conclusive proof that an employee was or would have been impaired while at work, or that he or she suffers from an alcohol or drug addiction or dependency, it may nevertheless be a significant or relevant piece of evidence which the employer can legitimately weigh in the balance in considering the merits of discipline, renewed safety measures or additional vigilance in the aftermath of an accident or incident ...

In the result, I am satisfied that those aspects of the drug and alcohol testing policy which would require an employee, under pain of discipline, to undergo drug and alcohol testing on the basis of reasonable grounds, including after a significant accident or incident, or as a precondition to promotion or transfer into a risk-sensitive position, are not, of themselves, unreasonable by the standards of *KVP*, and are not a violation of the collective agreements. Obviously an employee can decline to undergo a drug or alcohol test where it is manifest that there are no reasonable grounds to do so. (emphasis added)

Any such right to decline testing for want of reasonable grounds is not obvious on the face of this policy. Nor was it obvious to the managers or employees involved in this grievance.

Third, drug and alcohol testing has itself become something of an industry, serving an important need but at the same time promoting its own growth and self interest.

These comments are not meant to be critical of these other “competing interests striving for dominance” to use Arbitrator Taylor’s description. However, if these additional forces are glossed over, and the analysis conducted only in the lofty language of employee safety and fundamental rights a cynicism will grow in the workforce that will make it ever more difficult for employers and unions to work collaboratively on these issues.

Arbitrator Taylor found at paragraph 127 of his final award that certain aspects of the standard are not, on their face, reasonable and require revision. The aspects that touch on this case are as follows. Section 11 – Prohibited Conduct purported to prohibit employees from using alcohol within 8 hours of controlled substances within 32 hours of an accident or incident requiring a post-accident or incident test. He held these prohibitions “did not strike the appropriate balance, saying at para. 129-130:

Assuming the Company is justified in requiring a post-accident/incident test, then such testing should occur as quickly as is reasonably possible in all of the circumstances. Alcohol and drug tests are time sensitive.

130 I am mindful of the fact that some of the Company's operations are in small communities and there may be logistical problems in arranging testing, particularly if sample collection must be undertaken in the middle of the night.

131 The Company's requirement to conduct testing which meets the highest standards of accuracy with proper and full regard for the privacy and dignity of those affected must be balanced with the employee's right to use his or her own time without interference by the Company. Prima facie, the time periods stipulated in paragraphs "C" and "D" appear to be arbitrary.

The circumstances in which post-incident testing could be ordered, and the appraisal and investigation required for that appraisal, under the policy in the form put before Arbitrator Taylor read (from paragraph 132):

132 Section III – Post accident/incident testing:

The purpose of Post Accident/Incident testing is to rule out impairment as a potential cause of the incident. Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:

- A significant bodily injury. A recordable incident (defined by OSHA standards) will initiate the decision process to determine if a test is required following an injury. The circumstances of each case must be taken into consideration before making the decision to test.
- Significant damage to Company property or equipment
- Possible exposure to legal action or liability
- Significant environmental damage
- A near miss that in management's opinion may have resulted in any of the above.

This testing policy applies when an employee is involved in a accident while traveling in a company owned or rented vehicle on company business.

I note that the significant bodily injury provision included a rider that is not in the policy in place when the events of this case took place. Of these provisions the arbitrator ruled:

133 It will be observed that post-accident/incident testing is not mandatory. It may be required "with the unit manager's approval." This seems to suggest some sort of investigation to determine if testing is required to rule out impairment as a potential cause of the incident.

134 In respect of the first bullet, there is reference to a process to determine if a test is required and the circumstances of each case must be taken into account before making the decision to test. That process is not stipulated for the remaining four events which might trigger testing.

135 In my view, post-accident/incident testing should only occur where the condition of employees is seen as a reasonable line of inquiry. That requires a connection between the employment and the incident; a determination that the employee's act or omission contributed to the incident and consideration of whether testing will assist in the investigation.

136 The parties are directed to meet and to attempt to reach agreement on a revision of this provision in accordance with these observations ... (emphasis added)

Parties' positions on post-incident testing

The Employer argued before me that its policy on post-incident testing complies with the current state of the law and cited particular the detailed analysis of the area in Arbitrator Hope's policy decision in *Fording* and Arbitrator Love's "application decision" in the *Fording (Brennan)* grievance both cited above. They also cited Arbitrator Beattie's decision in

Re Construction Labour Relations and United Brotherhood of Carpenters and Joiners of America, Locals 1325 and 2103 (2001) 96 L.A.C. (4th) 343 (Beattie)

That decision, however, is based on the application of a policy jointly agreed to by labour and management through collective bargaining. Arbitrator Beattie emphasized the point himself at p. 354 saying:

The Alcohol and Drug Policy is a policy endorsed by the Union and is viewed by both parties, and the industry, as very important in ensuring safety on the work site.

Most of the cases relied upon by the Union involved unilateral policies regarding alcohol and drug use/abuse and whether the "invasive" or "intrusive" test procedure of urinalysis was considered as straying beyond the balance to be achieved between the employer's safety concerns and the employee's privacy rights. Although the cases provide a jurisprudential background, they have, in our view, little application in the present case. The issue in this case is the exercise of discretion by the Employer in applying the agreed upon Policy, ...

and again at p. 356:

The present case must be decided in a context much different than most of the cases cited above, namely the context of a specific policy which, as the Employer points out in its argument, has a bias in favour of alcohol and drug testing, not the converse.

The Union argues that Weyerhaeuser's policy is unduly broad on its face and in its application in the way it purports to allow drug and alcohol testing following an incident. In a general way the Union argues that post-incident testing has been elevated from just one form of reasonable cause testing, where the onus is on the Employer to demonstrate reasonable grounds for demanding a test, to a separate category that allows a test to be demanded solely because of an event or near miss in the workplace without any significant reasons to believe drug or alcohol even might be involved.

At p. 377 of the 2000 *CN* decision, Arbitrator M. Picher refers specifically to post-incident testing. After noting the general acceptance of reasonable cause testing he says:

I am also satisfied that a fair extension of reasonable cause testing is that it applies quite properly in a post-accident or post-incident situation. As the lessons of the Hinton collision and the focus of the Foisy Commission Report made clear, in the aftermath of an accident, which in the railway industry can be of catastrophic proportions, a railway can expect to be held to a standard of intense scrutiny with respect to the due diligence it exercises in ensuring the fitness for duty of its employees. It can expect to be held to a rigorous obligation to gain the widest possible information about factors which may have influenced the unfolding of an incident. This level of obligation was found to be a legitimate basis for reasonable cause drug testing by the Human Rights Board of Inquiry in *Entrop*.

At page 383, Arbitrator Picher addressed the argument that risk avoidance justified random drug testing. He rejected the proposition, in part because it implied that any risk, regardless of degree, trumps an employee's privacy interest. Of this he said:

This cannot be so. Where countervailing privacy interests are at stake, there must be a balancing of impacts such that the degree of risk must meet a threshold sufficient to override the privacy interest.

This comment was made in respect to random testing. However, it is equally applicable to the post-incident testing to which he also refers.

The arbitral law and the policies that have emerged now clearly differentiate between what has become known as "reasonable cause" testing and "post-incident testing." These terse labels unfortunately imply a simplicity that downplays the several protections included within each test.

The two circumstances are not the same. Reasonable cause tests are justified when employee's exhibit, or other evidence points to, impairment sufficient to give the Employer reasonable cause to suspect the employee may be at work impaired by alcohol or drugs. There need to be observations, plus the forming of a reasonable opinion, but there does not need to be an incident of harm to precipitate the demand for a test. The inquiry in post-incident testing is precipitated by an event and the need to inquire into that event to determine its cause. If the possibility emerges that the event might have been caused by a particular employee's impairment and it is reasonable for the Employer to conclude that it is necessary to explore that possibility and, by testing, perhaps rule it out as a cause or significant contributing factor in the incident, then testing may also be justified.

The two circumstances can overlap. The investigation of an incident may itself reveal sufficient evidence to provide reasonable cause to suspect an employee's impairment. However, the tests are not the same. A factor that has led arbitrators to uphold testing in response to a significant incident is an employer's need and obligation to account publicly, often to some external regulatory agency, for the cause of the incident. That factor plays no role in reasonable cause testing.

Both categories, despite their titles, must meet a reasonableness standard. Indeed, this is implicit in that arbitrators assess such unilaterally introduced policies using the *KVP* standard, and reasonableness is one of its basic tenants.

Unions have argued in a number of cases that the level of evidence or suspicion of impairment necessary to justify a reasonable cause test (i.e. where no incident has occurred) should also apply to justify testing to rule out impairment following an incident. The only difference between the two categories, if that argument was accepted, would be in the event that initially attracted the employer's attention. After that, the employer would still need to point to evidence that positively suggested impairment to a sufficient degree to override the employee's privacy interests. In my view, adopting the same test is not justified either in principle or based on the case law. The tests are different because the circumstances and the interests involved are different. Both tests, however, must still involve a balancing of interests, both within the policy itself and at the point of application.

I agree with Arbitrator Devine in the *Fording (Cryderman)* decision when he concludes at p. 188:

It is readily apparent the standards for which 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. The focus must of necessity be on the incident itself, rather than on apparent aberrant behaviour by the employee. Whether the standard for such post-incident testing is lower, as stated by Arbitrators McAlpine and Love, it is undoubtedly a different standard.

On my reading of the subsequent cases the reference to the standard being lower has been taken out of context. There needs to be less evidence to support the employee's impairment than there would need to be to justify a reasonable cause test, but there needs to be other significant information about the event and the employee's connection to or role in the event, that themselves serve to justify testing. Again, the overall standard is not lower it is just different. There still needs to be evidence to suggest that possible impairment is a reasonable line of inquiry.

There are three elements to the post-incident testing discussed in the cases of particular significance here. They are the threshold level of incident needed to justify testing, the degree of inquiry necessary

before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.

The Union observes that the events that heralded the introduction of post-incident testing were of catastrophic proportions, like the Exxon Valdez incident or the Hinton train derailment. Both policies and arbitration awards since then have clearly extended post-incident testing to much less catastrophic events, but they have not, or should not, the Union argues, reduce the threshold for testing down to virtually nothing so that a near miss of some minor damage to property will suffice.

One might say that if a major disaster justifies a test so should a minor incident, since it too might have had greater consequences and is equally deserving of investigation. However, part of the justification for allowing testing is the Employer's duty to account for safety incidents and the related public interest in ensuring serious safety infractions within industry receive public exposure. Such duties involve a threshold level of harm before they arise. In my view, the same threshold concept applies in post-incident testing and it is not appropriate to override privacy interests in all cases, no matter how small the incident or how remote the employee's involvement or the chance that impairment may have played a role. Without thresholds, post-incident testing amounts to little more than an ever present threat of testing, which, while not quite as intrusive as random testing, suffers from many of the same objections.

The Employer relies particularly upon the decision in:

Fording Coal Ltd. v. United Steelworkers of America Local 7884 (Brewer Grievance) [2002]
B.C.C.A.A.A. No. 243 (Love)

"Significant Event" under that policy was defined as follows:

Post Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:

- A fatality or significant bodily injury
- Significant damage to Company property or equipment
- Possible exposure to legal action or liability
- Significant environmental damage
- A near miss that in management's opinion may have resulted in any of the above.

On the question of the degree of significance the event must have, Arbitrator Love rejected the Union's argument, saying at paragraph 41:

41 The Union argued that the accident was minor, causing a minor amount of damage, and could not be viewed as a significant event justifying a urine sample from the Grievor. In my view, the accident in this case constitutes a significant event, because there was some damage to the company property. Further, given the design of the fork-lift, which was operated from a standing position, without any back support or restraining device, there was some risk of injury if Mr. Brewer was ejected from the machine. Fortunately, he was not ejected and he did not suffer any injury. In my view there is no requirement to show a "substantial degree of harm" or "damage beyond a threshold" before a reasonable line of inquiry is established. In my view, there is no need for the Employer to establish "damage to property or person" beyond a threshold risk. The policy clearly states fatalities, injuries to person or property, and significant environmental damage are significant events. Also significant events are actions which contribute to an "unusual risk" of the event occurring.

It appears to me that this passage relies on the policy too literally, and finds, without further consideration, that any damage to company property will suffice. I cannot accept that as an appropriate balance based on the prior jurisprudence. While the Hope award upheld the policy in a general sense, it left much about the policy to be fleshed out in its application. It may be that in the *Fording (Brewer)* case the event was indeed of sufficient significance, but a statement that any property damage will suffice, and that no thresholds apply goes too far and overlooks the concept of a balancing of interests. On this point, this same Weyerhaeuser policy came up for consideration in a New Brunswick case:

Weyerhaeuser Company Ltd. and C.E.P. Local 181 (Scott McKay Grievance) (October 31, 2003 unreported decision B. Bruce, Q.C.)

The grievor, an electrician put his hand in his pocket and cut his finger on a utility knife. It was a small cut, but he went to the hospital and got a couple of stitches for cosmetic reasons. He filed a WCB form as it was a "reportable injury." When he got back to the plant he was told to take a drug and alcohol test. He was given the choice of taking the test in a hotel room or in the plant's kitchen. As is the case here, the grievor felt humiliated by being tested and felt the decision unjustified. He sought damages for injury to his reputation in the community.

The parties agreed at the outset that they would not challenge the validity of the policy itself, only the application of the policy to the facts at hand. While the arbitrator made a number of observations about the policy in general, some aspects of which we refer to below, the key question was whether the grievor's cut to his finger was "a significant bodily injury" as contemplated by the policy. The Employer, with advice from their Tacoma Washington head office, interpreted that phrase to include any "recordable incident" within WCB rules. The arbitrator rejected that approach, holding at para. 50 that:

... a significant bodily injury which is juxtaposed against the term "fatality" in the Substance Impairment Policy document must be seen as an injury that is potentially life threatening or would require the employee to be absent from work for a period of time because of temporary or permanent disability resulting from the injury.

Arbitrator Lanyon took a different view in

Elk Valley Coal Corp. v. United Steelworkers of America Local 7884 [2003] B.C.C.A.A.A. 210

The policy in that case purported to allow testing based on damage to property, with no limiting threshold. The Union objected that the incident was minor. The arbitrator held, at paragraph 26:

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

The *Fording (Cryderman)* decision (*supra*) also considered the sufficiency of the incident. The grievor drove a truck across the floor of an open pit mine and ran over a large rock that tore apart the pickup's rear drive shaft. On this question, Arbitrator Devine reviewed two prior *Fording* grievances; the *Brewer* case (*supra*) and

Re Fording Coal Ltd. and USWA Local 7884 (Olson) (2002) 112 L.A.C. (4th) 141 (Glass)

In the *Olson* decision, the grievor did not contest the direction to take the test, the only issue was the grievor's refusal. Of the *Brewer* decision, he noted that the facts there involved "a mine vehicle goes out of control" which required a report to the Ministry under the *Mines Act*. Arbitrator Devine noted (at p. 188) that Arbitrator Love's three part test (alluded to below) "... leaves open the issue of what is a "significant incident." Love, he noted relied heavily on the analysis in *Esso Petroleum (MacAlpine)* *supra*. This led Arbitrator Devine to examine that case in more detail. He then concluded, at p. 189:

The language, which limits post-incident testing to cases involving a significant event, is in keeping with the jurisprudence. At issue here is whether damage to the property of the Company simpliciter is sufficient to constitute a "significant" event. 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.

He recognized that, at times, damage is only one of several factors, but went on to say at p. 190:

There was no apparent safety issue at stake in the investigation. Nor was there a reportable incident under the Mines Act. Absent these considerations, the factual circumstances concerning the damage to company property must be sufficiently egregious to require an explanation from the employee. The determination that the facts are sufficiently egregious so as to focus on the conduct of the employee as the “root cause” requires a careful elimination of other causes. (*emphasis added*)

and at p. 191 he held that:

While the damage to the pickup was an unusual event, that alone is not enough to warrant a demand for a test.

and, in conclusion at p. 191:

If there was a reasonable doubt, the employee should receive the benefit of that doubt. This at a minimum requires a more thorough investigation as part of the application of the Employer’s policy, which at present seems to rely heavily on the fact of property damage alone to justify a demand for a urine test. (*emphasis added*)

8. Summary

Post-incident testing is an acknowledged right of an Employer for those of its employees engaged in safety-sensitive occupations. Post-incident testing will be justified in cases involving damage to Company property provided that sufficient safeguards are observed so that a third party can be satisfied that the request for a test was demonstrably justified by the facts obtained in a thorough investigation, and the demand was not arbitrary or capricious. In this way, the rights of the employee are balanced against the rights of the Company to test when appropriate.

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

The next significant element is the degree of inquiry needed before a post-incident test is required. The reported cases and the facts in this case show a wish to boil the question of whether a test is called for down to a checklist. Arbitrator Devine commented at p. 190 in the *Fording (Cryderman)* case:

... the Employer uses a “logic tree” to work towards a decision to request a urine test. It is appropriate to employ such a device because it contributes to consistency in the application of the

Employer's policies. The tree, however, has a few limbs missing at least in its application in this case.

At paragraphs 46 and 47 of *Fording (Brewer)*, Arbitrator Love developed a three point test for the Employer's duty before it can demand a test in a post-incident situation.

46 The wording of the Employer's policy calls for the exercise of discretion by the Employer in making a decision to demand a sample. This is explicit from the words "may require the employee to undergo testing." The exercise of discretion calls for a "reasoned decision" on the part of the Employer, in the sense that the decision to test cannot be arbitrary. The policy provides no guidance as to when a test will be ordered. Given that the demand for a drug test involves a degree of invasion of privacy, the Employer must consider carefully the "need for the test." Having said that the Employer must carefully consider the need for the test, I recognize that it is not necessary for an Employer to engage in a rights balancing exercise: *Imperial Oil (Parsons Grievance)*.

47 I note that even in *Esso Petroleum*, where the panel determined that mandatory post incident testing was valid, the panel also held that "there must be some objective consideration of the individual case" and the wording of the guideline indicated that "company representatives authorized to order post-incident tests are expected to exercise careful judgement in deciding when to conduct a test and which employees to test." In my view, the Employer must consider the circumstances of the case before requesting the test, and consider:

- Is there a connection between the employee's area of responsibility and the accident?
- Is it necessary to investigate whether the actions or omissions of the employee contributed or caused the incident?
- Will the test assist in the investigation, at the minimum, by negating impairment as a possible cause or contributing factor?

In my view, these are minimum requirements for the condition of the Employee to be a reasonable line of inquiry.

Having authored the decision in *Imperial Oil (Parsons Grievance)*, and noting that in that case the grievor's admission of drug use prior to the test in question altered the situation somewhat, I have difficulty with the proposition that the employer need not engage in any "rights balancing exercise." There can be circumstances so unexplainable by other causes that testing for impairment becomes a reasonable line of inquiry, but the decision to test must still be made recognizing and balancing the employee's privacy interests. The reasons in *Imperial Oil (Parsons)* show a thorough and probing inquiry was conducted which included questions to the grievor before the decision was made. The case was complex since the grievor was dismissed following a random test under a return to work agreement. However, the grievance raised in part the validity of the decision to test the grievor the first time, which followed an "incident", but not one which met the "significant incident" definition in *Imperial Oil's* own unilaterally imposed policy. The board then said, at p. 44:

The policy provides for mandatory testing in two circumstances; after an incident or where reasonable cause exists to suspect drug or alcohol use. The test requisition form gives the basis for the test as "post-incident." The managers involved in the investigation, far from suggesting they had reasonable cause to suspect drug or alcohol impairment say they directed the test to rule out alcohol or drugs as a potential cause. Mr. McMullan's documentation in support of the post-incident alcohol or drug test recites that he reasonably believed the incident may have caused "a spill or abnormal discharge impacting significantly on the environment or on the community." It says of Mr. Parsons that impairment of this employee cannot be ruled out as a potential contributory factor.

The Union maintains that, on the evidence before us, and on the evidence available to the three managers who decided to test Mr. Parsons, there was no "significant incident" within the meaning given that terms in the A & D Policy. We agree with that conclusion. Mr. Fukushima was taken through each of the sub-clauses involved and agreed that none of them fit the definitions in the circumstances.

However, in our view the Union's argument downplays the "near-miss" aspect of the administrative guidelines. The Policy says post-incident testing may be conducted at management's discretion for near misses or lower-level incidents if they are considered to have had significant potential for more serious consequences. The policy places the onus on management to demonstrate its reasoned judgment why that is so, and cautions against arbitrary treatment. However, the policy clearly contemplates tests for incidents that fall short of the "serious incident" definition.

In our view, there was a reasoned basis for the decision to test under the policy even though we find it was not a "serious incident" within the definition. First, the excess amount allowed to flow into the tank was not 40 gallons, it was in excess of 1,900 gallons of product. This puts the degree of inattention in a slightly different perspective. Second, the Employer perceived a pattern of spills, and no evidence was called to suggest this was unfounded or an unreasonable matter to consider. Third, we are not persuaded that the decision was tainted by preconceived notions that Mr. Parsons was a drug user. Some suggestion was made of this in cross-examination, but the participants denied it was so or that it was a factor that influenced the decision. The Employer had eliminated mechanical causes. Mr. Parsons apparently offered no explanation himself and since he was the operator responsible, some explanation at the time was called for, even if it was only something like "I went for a smoke."

We also note that, while it occurred only after the decision to test was made (although before the actual test) Mr. Parsons in fact admitted drug use. At that point the Employer had reasonable cause to test on that ground even if its decision to test on the basis of a near miss significant incident was wrong.

Imperial Oil and C.E.P. Local 777 (Parsons) (2001) Alta. G.A.A. 2001-101 (Sims)

The Union relies on the decision in:

Industrial Contractors Assn. of Alberta and Teamsters Local Union No. 362 (Pliska) (2002) 115 L.A.C. (4th) 419 (Beattie)

There, the grievor parked a truck and got out. Another vehicle operator backed another unit into his vehicle causing \$2,000 to \$3,000 damage. A superintendent, after a cursory review, felt the grievor exercised poor judgment in failing to take preventative action. He demanded a drug test, which the grievor refused to take. The grievor was fired and ultimately reinstated. The reinstatement was based

largely on the words of the Employer's policy which, unlike the policy here, states directly that reasonable grounds are needed for post-incident testing. The policy read:

Muskeg River Constructors may conduct drug and/or alcohol testing under the following circumstances.

...

2) Following an incident, near miss or potentially dangerous incident where there are reasonable grounds.

The policy included a checklist to be used to assess whether reasonable grounds existed. It made mandatory an assessment for reasonable grounds, for employees involved in "Class 1" incidents described as:

- a) Any incident involving costs over \$25,000.00.
- b) All incidents involving lost work days.
- c) All environmental incidents involving costs over \$25,000.00.
- d) A fatality.
- e) All near misses with the potential for serious injury or major equipment damage.

The Arbitrator adopted the Union's argument which included, at p. 430, the following:

3. Mr. Edwards' decision had nothing to do with a consideration of drug and alcohol involvement but simply had to do with the damages. He acknowledged that the Reasonable Cause Checklist (Exhibit 9) gave no indication of any concern about drugs or alcohol. Even the check box for "reasonable cause for alcohol and/or drug testing" was not checked off. The only thing checked off was Mr. Edwards' subsequent check for "poor judgment". He had not even seen the Checklist before making his decision, which is a requirement of the Policy. He also did not consult, as is required, prior to making his decision. There was no evidence of any of the factors to be considered in assessing whether there are reasonable grounds to believe that drugs or alcohol may have been a contributing factor (Exhibit 8, pp. 5, 6). At the least his actions were inconsistent with the Policy, at worst a breach of the Policy. "Damage" is not a criterion in determining if a test should be requested unless it is a "Class 1" incident (damage over \$25,000: Exhibit 8, p. 6). The Policy cannot simply be applied "automatically", in any case involving damage, as appears to be the view of Mr. Edwards.

Returning to the three point checklist in *Fording (Brewer)* which found its way into this Employer's Quick Guide, I agree that anything that assists in achieving consistency is worthwhile. However, as was obviously the case in *Fording (Cryderman)*, and as is the case here with the use of the "Quick Guide", if such a device too readily leads to the attitude that "if we tick off the boxes we can test" it is harmful because it distracts from the judgment that inevitably needs to be exercised based on the entire

circumstances. It is not enough to say “ok – we have enough to test” if important factors have been ignored or avoided. The individual to be tested should, unless the circumstances preclude it, be asked for their explanation. If they are sufficiently close to the incident to justify finding out whether their being impaired might be part of the cause, their explanation of events must also be relevant to the decision as to whether testing is justified.

I agree with another observation made in the *Fording (Cryderman)* case.

While I agree with the Employer that the investigation occurs in “real time” and some deference is to be accorded to the process, the prism of hindsight is the only means by which one can test the application of the Employer’s policies. It cannot be a complete defence to testing without adequate grounds. Otherwise, the “just cause” protection to which the employee is entitled will be vitiated.

In the *Fording (Brewer)* decision and in the *Elk Valley Coal Corp.* decision the arbitrators each spoke of the need for the Employer to be given “substantial latitude” to investigate a safety event. In my view it is important to distinguish between two concepts. Where an Employer has conducted a thorough investigation and come to a conclusion, albeit one upon which right thinking people might differ, it is entirely proper not to second guess the conclusion. However, that principle presupposes a thorough investigation. Respect for a difficult choice is quite a different concept than saying the Employer should not be held to a reasonable investigation process. What is reasonable to investigate must be judged based on the circumstances and what was realistic at that time. However, if the investigation at the time was not reasonable in the circumstances, its inadequacy should not be justified on the basis of giving latitude to the Employer. To do so is simply to favour the Employer’s interest in testing over the employee’s privacy interests, solely on the basis that the Employer chose not to conduct as probing an investigation as they might have done.

Arbitrator Taylor in his policy decision (*supra*) held at para. 133 that the Weyerhaeuser policy itself, by requiring managerial approval, suggested “... some sort of investigation to determine if testing is required to rule out impairment as a potential cause of the accident.” His comments at paragraphs 134-135 reinforce this conclusion. In ruling that way he appears to have favoured (as I do) the analysis of Arbitrator Devine in the *Fording (Cryderman)* case over that of Arbitrator Love in the *Fording (Brewer)* case. Arbitrator Taylor did not expressly opt for the one analysis over the other but he did not need to since he directed the parties to modify their policy in such a way that would ensure an inquiry was conducted in order to determine on the facts of each case “whether the condition of employees is seen as a reasonable line of inquiry.” There must be, he held, within the requirements of the policy, a

determination that the employee's act or omission contributed to the incident and consideration of whether testing will assist in the investigation.

This brings us to the third element, the link between the incident and the employee involved. Obviously this is closely linked to the quality of the investigation and it is what makes the "we've got enough to test" checklist approach inappropriate. Again I agree with the *Fording (Cryderman)* award where the arbitrator said at page 190:

The determination that the facts are sufficiently egregious so as to focus on the conduct of the employee as the "root cause" requires a careful elimination of other causes.

Sufficient care must be taken to exhaust other realistic possibilities. There was no such careful investigation in this case. Wilson did not question the Grievor at all about the incident so as to eliminate environmental causes despite the fact it was apparent the rock just broke the surface of the soil over which the Grievor drove. ... [He then listed other circumstances and continued] ...

None of these circumstances were properly investigated and eliminated before a urine test was demanded.

In my view, absent some statutory obligation to report on a broader basis, the investigation must lead to the conclusion not just that someone might have been impaired, but that the particular employee's role in the event might have been due to impairment. The "reasonable line of inquiry" conclusion thus needs to be employee specific.

The decision to test Ms. Roberto

Mr. Guy testified that he made the decision to test Ms. Roberto with information from Mr. Pete Sikora and Mr. David Appelt. He made no inquiries of his own and relied upon what they told him. They had not interviewed Ms. Roberto and neither did Mr. Guy. Ms. Peeke of Human Resources was not involved in making the decision to test, but may have confirmed for Mr. Guy after the fact that his decision was correct. She also wrote up the Substance Test Incident Report later that day. Mr. Guy says he also called the Washington State head office for confirmation of his decision.

Mr. Guy says he had not thought at all of testing Ms. Roberto until Mr. Sikora and Mr. Appelt approached him and "reminded him we should be doing a substance impairment test."

The standard (draft 3) at that point read as follows:

Post Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:

- A fatality or significant bodily injury;
- Significant damage to Company property or equipment;
- Possible exposure to legal action or liability;
- Significant environmental damage;
- A near miss that in management's opinion may have resulted in any of the above.

He had discussed this with the Union and knew they felt it was inappropriate and virtually authorized random testing. The training taken on the standard generally predated this final wording. Since drafts 1 & 2, the note about approval had changed and so had the description of the degree of severity. Mr. Guy says he went through the analysis in the policy. He pulled out the Quick Guide and used it, asking himself the three questions it posed and answered yes to each of them. This Quick Guide read:

3 questions to ask yourself for post accident testing:

- a) Is there a connection between the employees' employment and the accident?
- b) Is it necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident?
- c) Will the test assist in the investigation, at a minimum by negating impairment as a possible cause or contributing factor?

An injury that meets the definition of a Recordable will normally trigger a test. Other injuries or near injuries require closer review.

These are the three minimum questions extracted from Arbitrator Love's *Fording (Brewer)* decision without the preceding cautionary comments.

Mr. Guy's view of the policy's statement that testing "will be done with the unit manager's approval" was that that did not vest him with any discretion in the matter. Rather, if the answers to the three questions were yes, it required a "business decision" to follow the policy and to test. He says there was no indication that Ms. Roberto might have been impaired by alcohol or drugs, and that that possibility "was no part of his decision to proceed to test."

He says he followed up with Mr. Appelt and Mr. Sikora and determined that there was no known reason for what happened. However, the incident happened when Ms. Roberto was alone, so without their having asked her what happened it is hardly surprising that they did not know. I do not accept as a valid

reason for not asking her any wish not to disturb her following the event since they were fully prepared to disturb her for the testing itself.

The report Ms. Peeke later filled out says, in part:

“This was an incident that could result in a more serious injury”; and

The decision to test was made to negate impairment as a possible cause or contributing factor for this incident.”

Mr. Guy confirmed that the Company’s Safety Report categorized this as a level 3 incident and that under draft 2 of the policy testing would not have occurred since it limited tests to Level 1 and 2 incidents as determined using the Company’s own Incident Investigation process.

The decision to test Mr. Brown

The decision to send Mr. Brown for a test was made by Mr. Harry Quinn. He was the maintenance manager and was filling in for Mr. Guy during his absence. He had received some training in the standard during its development stage. He was part of the leadership team which, he says, was given some background on arbitration decisions and testing procedures. The lead team had also been given the Quick Guide to review. He does not recall privacy ever being a topic of discussion during the training.

He says that, when the incident involving Mr. Brown occurred, he was in a meeting and was called out by Mr. Vern Banfield, the team leader and asked to go down to the shipping area. Mr. Banfield described what had happened and then they went through the standard and the three questions in the Quick Guide. He and Mr. Banfield called down Donna Peeke and the three of them worked through the three questions again. A little later, Mr. Pete Sikora came down and they “bounced their decision off him.” They were not quite clear how they should deal with the issue because it also involved a contractor (the driver). Mr. Banfield had gathered the initial information. Mr. Quinn did not talk to Mr. Brown directly but he thought Mr. Banfield had. Mr. Brown says not. He saw no need to speak to Mr. Brown directly.

In neither Mr. Brown’s case nor the contractor’s did they have any concern that the incident was caused by impairment. They did conclude that acts by both men contributed to the incident; the one by backing-up the truck and the other by pressing the door button.

Mr. Quinn says they went through the five issues in the standard and answered no to everything except “significant damage to company property or equipment.” He calculated the damage quickly in his head at about \$2,000 to the truck and \$4,000 to the overhead door. He had no guidelines or instructions as to what value should be considered significant. He was aware that the earlier draft attached a dollar value limit by referring to Investigation Guide Level I and II incidents. Ultimately, the door was replaced at a cost of about \$8,000, but the old door was damaged and not worth that much.

For each individual Mr. Quinn says they answered yes to each of the three questions in the “Quick Guide”. Mr. Banfield completed the necessary form later that day. While Mr. Quinn had no concern about impairment he still felt testing was necessary to rule it out absolutely, relying on the words in the Quick Guide. He agreed that this meant, so long as there was an incident involving sufficient damage and an employee involved, there would always be testing done. He agreed that “if there is enough damage you will test if the employee did something.” He would always answer yes to question (c). He said he did not think \$2,000 damage would be significant but that \$8,000 might be.

Were the decisions to test Ms. Roberto and Mr. Brown reasonable?

My conclusion, based on the evidence adduced before me, the policy and the case law I have now reviewed, lead me to the conclusion that neither demand meets the test of reasonableness.

I agree with Arbitrator Taylor’s observations on the policy itself, set out above. In particular, in my view, the policy, to be reasonable within the meaning of the *KVP* requirement, must mandate a real investigation and a real exercise of judgment by the responsible manager. It must be written in such a way as to make it clear to the responsible person that they are balancing rights and not simply checking off a list. Perhaps the best evidence of the inadequacy of the policy’s current wording is Mr. Guy’s assumption, after reading the policy, that the requirement for his approval was not included to give him any discretion, based on his judgment, as to whether a test should or should not be undertaken in the circumstances.

In my view the policy should also say directly that, unless circumstances make it impossible, the investigation that precedes the decision and thus the conclusion that “testing represents a reasonable line of inquiry” should include obtaining the individual’s account of the event. To exclude the individual without good reason seriously undermines the *bona fides* of the inquiry and the resulting decision. Even

if that is not essential for a reasonable policy then, in my view, it is nonetheless essential for a reasonable application of that policy.

In each case here, the responsible managers concluded quite reasonably in the circumstances, that there was no real suspicion of impairment. In each case, the cause of the injury or damage was relatively obvious or would have been if the individuals involved had been spoken to had been asked what happened. In each case they would have been reminded that the safety committee had previously made a recommendation which, had it been acted upon, would have reduced the likelihood of the event happening. In the case of the door an electronic eye or a pressure sensitive switch of the type used in elevator doors could have prevented the damage. For the tanker car, a counterweight for the pipe had been suggested that would have made it easier to maneuver and probably have avoided Ms. Roberto's experience.

My conclusion in relation to each investigation is that the desire to test was foremost in the decision-makers minds; that rather than doing as full an investigation as time allowed in the circumstances. They believed they could test if they could complete the checklist and did not look beyond that and make reasoned judgment based on all the available information. I can only conclude that they felt the introduction of testing would work as a deterrent in the workplace and they were anxious to see that happen. Certainly the comments made to the Union suggest such an attitude prevailed.

Reasonableness of the testing procedures

Even when an Employer makes a reasonable and justifiable demand for a drug and alcohol test, it is still obliged to carry out that testing in a reasonable manner. Indeed, the Employer's own policy says as much in respect to several of the issues in this case.

If employees are to be made subject to a policy they should be given access to that policy in advance. Point 4 in the *KVP* test says specifically "It must be brought to the attention of the employee affected before the company can act on it." Here, the Employer posted a brief notice on January 31, 2003 announcing that "the substance impairment standard" will come into effect the very next day. However, the Employer had been making significant changes to this standard. These changes went directly to the issue of post-incident testing. I have found that the standard was not distributed to employees until the day after Ms. Roberto's incident. When she sought help and advice her Union advisor was still working from an earlier draft. Even Ms. Peeke did not have the current version. The application of the policy to

Ms. Roberto with inadequate notice of the policy's specific terms was unreasonable. This is not just theoretical. Her first question was "what happens if I refuse?" and because copies had not been provided in advance no clear answer could be given at the point she needed it.

The next concern is over the way Ms. Roberto was "escorted" to the hotel. The Employer's policy says that "employees must make themselves available for the purpose of testing." The section on Refusal to Test speaks of an employee who "fails to appear at the test site within a reasonable timeframe without a reasonable explanation" and who "engages in conduct that obstructs ... the testing process." Ms. Roberto was not at the plant, she was to all intents and purposes at home resting up from a very unpleasant experience.

She was not asked to appear at a test site. Rather two managers came and got her in a van and took her to the test site. I recognize that one of them was Mr. Alstead with whom she had a relationship and at whose house she was resting. However, this wasn't a friend giving her a ride. The conversation going on at the plant and relayed to her by Mr. DeVuyst - "she was going for a test and they were not going to debate the issue" – colour this act of "taking her for a test." It was unsolicited and involuntary. The company offered no explanation as to why it could not just ask her to attend and rely on the policy if she did not show up. It offers no explanation like "she couldn't get there and asked for a ride." Overall my conclusion is that the company officials were going to get Ms. Roberto tested whether she or the Union liked it or not. She was fetched from Mr. Alstead's house for that purpose with no sensitivity as to how she might feel about being treated in this manner. She commented specifically on the locking of the doors. I am sure that was just part of the truck's normal equipment and that there was no effort to lock her in. However, I am equally satisfied that she was left feeling she was being taken away without any real option in the matter. To say this was unreasonable suffers only from understatement.

The next issue is location. This question is closely tied to who should do the testing. If testing is performed by a qualified medical professional, then that person will usually offer, as part of their professional activities, a suitable place from which they conduct their practice. This is not always so, and it is not uncommon, for example, for an Employer to have an occupational health professional working within a plant.

The question of the suitability of location is important because of the diverse and often remote nature of workplaces in many of the industries where testing might be called for. Plants often run 24 hours per day. Hospitals and labs, particularly in remote areas, often have limited hours.

In one of the *Fording Coal* application cases, an employee refused to provide a urine sample in-plant, offering instead to do so through his own doctor. The policy in question gave the company the option of an on-site or off-site test. He was disciplined for insubordination and grieved. The arbitrator upheld the Employer's right to discipline in these circumstances but varied the penalty.

Fording Coal Ltd. and U.S.W.A. Local 7884 (Olson) 112 L.A.C. (4th) 141 (*Glass*)

Arbitrator Hope's *Fording Policy* decision had already upheld the policy itself, and the Union agreed that the circumstances justified the demand for a test under that policy. The case thus focused on the testing process itself. Unlike the situation at hand, all the Employer sought was a urine sample for an express testing process. It involved giving a sample, to be split into two containers. One was tested right away using a dip stick test. If it showed negative, the grievor would return to work and the second vial would be sealed and sent for testing for contaminants. If it showed positive, the grievor would be suspended and the samples sent to a lab for confirmation testing.

The grievor objected to a company employee administering the test at the plant. Rather, he wanted to do it through his doctor and in fact was able to get a local lab to take a sample. The questions were described at page 173. Given the company's express testing procedure, could the company, under threat of discipline; (a) force an employee to submit to urine collection on-site, by a company representative; and (b) force an employee to authorize (i.e. sign a consent) the company's choice [of tester] for testing an employee's bodily fluid?

The Employer's argued that once it was decided (or in that case agreed), that the request to test was valid, the employee's right to privacy was "effectively waived." This argument was described at page 174:

Once that determination is made, all that is left is the procedure to be followed in collecting the sample and getting the test done, both of which must be carried out in a scientifically reliable manner. The company is entitled to establish procedures for collection and testing that will offer reliable results.

The Employer in that case referred to the following quotation from:

C.P. Rail and C.A.W. Local 101 (1991) 22 L.A.C. (4th) (M. Picher) at 167

... it is not appropriate, as a general matter, to expect an employer such as the company, with national operations and its own extensive medical staff and services, to negotiate a testing process acceptable to the individual employee on a case-by-case basis.

After a detailed discussion of the practical problems associated with an employee chosen tester arrangement, the arbitrator upheld the company's right to designate the tester and thus the location of the test. In his conclusions he set out a framework for analysis that I find practical and sensible. He rejected the employer's argument that privacy concerns end once the right to test is established. He held, at pages 187-189:

It is established by the Hope Policy Award that privacy rights at an open pit mine site are outweighed by the employer's interests particularly in relation to safety. These rights are not to be overridden completely, but they are to be infringed to the extent necessary to permit effective testing for drug and alcohol impairment.

If the level of infringement is set too low, the testing may be ineffective. By ineffective, I mean that it may not be received as reliable evidence of drug impairment for a number of reasons. These may include:

- (a) Mistakes in collection by an untrained or inexperienced collector;
- (b) The opportunity for adulteration by a donor;
- (c) Procedural errors;
- (d) Related to the above, chain of custody mistakes.

If the level of infringement is set too high, then the collection and testing procedure may be invalidated as too severe an infringement of privacy rights, going beyond what is necessary to achieve reliable collection and testing.

...

In examining applications of the employer's policy, including the collection and testing process, there continues to be a need for a balancing of interests. This is not just needed for the purpose of determining the validity of a drug-testing policy in the first place.

The balancing of interests operates in a sense on a sliding scale. The extent of infringement of privacy rights is to be weighed against the legitimate interests of the employer, in particular in relation to safety. It will take a higher level of expense and inconvenience and/or a higher level of degradation of the collection and testing procedures, to outweigh a more egregious or severe invasion of privacy. Similarly, it will take a lower level of expense or degradation of the procedures to outweigh a lesser infringement of privacy rights. There is no absolute standard in either case.

Applying the sliding scale of competing interests in this case, what is the result?

Mandatory drug testing at the very minimum requires the provision of a urine sample in controlled conditions, where the employer bears the burden of establishing the reliability of the collection, transport and testing of the specimen. As I have stated earlier, this rules out employees having the right out to choose their own physician or physician's designate as a collector or tester.

...

I agree with the reasoning in CP Rail and C.A.W., Loc. 101 (supra). It is unreasonable to allow for ad hoc personal choices for the employee. I read the Hope Policy Award as establishing a base level of privacy infringement, recognizing the right of the employer to set up clear protocols and workable contractual commitments with respect to collection and testing. If the Hope Policy Award does not go that far, I hereby find that this is indeed a minimum base for testing and for collection procedures. Without it there is no effective policy.

He then turned specifically to whether having an employee do the testing involved a greater infringement of privacy rights than was the case with an outside contractor and if so, did the advantages of mine site collection justify any such increased incursion into privacy rights. He concluded that (at p. 190):

On the whole, collection and testing by another employee is a slightly higher level of infringement of privacy rights, than collection and testing by an outside contractor.

However, the practical advantages of this made the added intrusion worthwhile because it allowed an immediate return to work, avoided a need for escorts, reduced time lapses and overcame the difficulties due to the hours of operation of labs etc. He said also at p. 191:

It should be recalled that both in the case of LCO collection and outside contractor collection, the confirmation portion of the specimen goes anyway to a designated laboratory from which detailed results and findings will be reported to a medical review officer appointed by the employer, and then to the employer. It should also be borne in mind that the fact of a drug test being administered will generally be known amongst the donor employee's fellow workers, regardless of mine site collection or off-site collection of the sample.

He found the demand that the employee provide a urine sample at the plant reasonable, even after balancing the employee's privacy interests, and therefore concluded that a refusal amounted to insubordination. In reducing the 3 day suspension to a written reprimand he took into account that the policy, at the time of enforcement, was only 3 days old and said:

I do not intend to undermine the "work now grieve later" rule, but as the instruction given raised a new and quite sensitive question of personal privacy, it was somewhat more excusable for the grievor to make a stand on the basis of what he (wrongly) thought were his privacy rights.

The issue of location was also addressed, under this Weyerhaeuser policy, in Arbitrator Bruce's decision in the *Scott McKay* grievance, (*supra*). The grievor there was offered the option of taking the test at various locations in the mill, or at a local hotel. He decided "it would be more humiliating if he went to one of the local hotels and was seen by someone who knew him" (para. 10). He was concerned as well that, as he was an active coach and referee in the community, news of his taking alcohol and drug tests might hurt his reputation. The tests were ultimately taken in a kitchen at the mill site. The results were negative. On the location the arbitrator said:

Further, the evidence is that the Employer acted reasonably and fairly in the actual administration of the test. The Grievor had Union representatives available to him and the Employer offered the Grievor the choice of various locations where the test could be taken. Although the kitchen where the Grievor chose to have the test taken was viewable through windows from outside, it must be seen as relatively acceptable location for the test. No doubt some improvements might be made in

terms of blinds on the window which would allow for greater privacy if it is to be used for testing in the future.

In my view testing through a recognized laboratory employing professionals subject to licensure, or through a similar professional employee working within an employer's occupational health and safety department would always be the best solution and the solution best equipped to protect an employee's privacy. However, Canada's diverse worksites and the need for 24 hour a day availability does not make this a practical solution. I accept that there are situations where a hotel room may be a better option than the use of unsuitable locations within a plant, and I am not inclined to rule out the use of the hotel rooms entirely. Indeed, the Super 8 room used for Mr. Brown appears to have been adequate.

I do find, however, with some familiarity with available accommodation in Edson, that the hotel chosen for Ms. Roberto's test was totally inappropriate. No one seriously tried to defend it as a suitable choice. I do not fault the tester for the choice; he was simply retained for \$40 dollars per test to be on call to carry out testing. Rather, given the commitments to dignity and privacy in the policy and in the introductory sessions, I find incredible that such a significant decision was left to the last minute and then delegated with no apparent oversight.

Perhaps it is old fashioned but some people still do draw conclusions from seeing a woman taken by men into certain classes of hotel without baggage in the middle of the day. It is entirely understandable that Ms. Roberto was, as she says, apprehensive and even horrified by what she was being subjected to.

The Employer's policy sets its own standards and substantial compliance with its terms are, in my view, a precondition to a reasonable application of the policy. In general terms the policy says:

All testing and test results are confidential and measures are taken to ensure the privacy and dignity of employees involved in the testing process.

I read are taken to mean must be taken. It sets out detailed testing protocols.

Under Section V – Urine Controlled Substance Testing Procedures it provides, in part, and under the heading "Collection Procedures:"

We have adopted extensive procedures for assuring the integrity of the collection and testing process. The safeguards in place are rigorous and provide several layers of protection to employees by ensuring against the possibility of a switched or mislabeled specimen. Should you ever have a question about any collection procedures, contact your supervisor or ask to speak to the Company's substance abuse testing program administrator.

A. The Collection Site Person (CSP) will secure the collection area against unauthorized access. The CSP must add a bluing agent to the water in the toilet bowl and reservoir and remove any materials that could be used for adulterating a sample at the time of collection. The CSP will "seal" any water faucets in the collection area so that they cannot be used during the collection process. In cases where the above is not applicable, the CSP will take whatever steps are necessary to ensure the integrity of the collection process.

I find that nothing was done with the taps and no bluing agent was used. No explanation was given that would suggest this was a "not applicable" situation; the tester simply chose not to follow the procedure. He said in his evidence that he didn't see the point to sealing the taps. He went on to say "there is a fair amount of trust in the system. They are not going to tamper with the sample. I've no reason to believe they would or did."

The difficulty with this attitude, which is lax vis-à-vis the employee is that it suggests a similar laxity in those conditions designed to protect the employee. It seriously calls into question the rigour of the training he says he received from Denning.

The policy goes on to say:

B. The CSP is expected to treat the employee with respect and preserve, as much as possible, the privacy, modesty and dignity of the employee throughout the collection process.

The tester, along with three other men, were in the small hotel room throughout Ms. Roberto's tests, and in particular while she was in the toilet trying to provide a sample. I cannot accept that as "preserving her privacy, modesty or dignity." It in fact caused her immediate and long term distress.

...

D. The CSP will ask the employee to wash his or her hands and then will give the employee the collection container and direct him or her to the bathroom. The CSP will advise the employee that a specimen of at least 45 ml. is required. After the sample has been provided and the employee has exited the washroom (or other area of collection) the CSP will take the temperature of the urine and must do so within four minutes.

Ms. Roberto was not told to wash her hands. The Union witness testified that the tester did not take the specimen's temperature but I accept his evidence that the containers have temperature indicators built into them so as to make any further test unnecessary.

Under the heading Certified Laboratory the policy says:

The labs that are used by for our testing purposes must comply with and have been approved by, the American Department of Health and Human Services (DHHS) under their National Laboratory Certification Program which was set up in 1988. The purpose of this program was to ensure that only laboratories with the highest standards of accuracy would be certified for drug testing. At present, there are only two laboratories certified to this standard in Canada.

The tests were not sent to one of the two Canadian laboratories. Rather they were couriered to a U.S. lab, which reduces the employee's ability to rely on any protections that might be afforded by accessible Canadian licensure.

Section VI – Breath Alcohol Testing Procedure provides that.

Alcohol testing may only be carried out in privacy where the results of the test can neither be seen or heard by persons other than those involved in the testing process.

...

No one either than the BAT and the employee are allowed to be present during the test unless the employee is accompanied by a predetermined employee representative who can verify his or her identity a such.

...

The confirmation test is considered to be the final result even if it is lower than the screening test. The employee will receive a copy of the test results at the time that the test is taken and the results will be communicated to the Company in a confidential manner.

No attention seems to have been paid to this provision in Ms. Roberto's case, although Mr. Brown was tested in private.

When a breath test is taken, the employee is to be given a form with the machine's reading. In Mr. Brown's case, the tester could not get the machine to print the result. This did not concern him too much since it was a zero result. He just hand wrote the result on Mr. Brown's copy of the form. However, when he sent the form in to Denning he attached what purported to be a test record printed by the machine showing the time as 11:56. He explained that, after Mr. Brown had gone, he was able to get the machine to print up a slip since it stored test records in memory. However, he did nothing on the form to show this was a record printed after the fact. Rather, it is sent in as the official record as if it had been completed at the time. The tester simply took a "no harm's done" view of the matter.

Once again this calls into question the degree of training and oversight provided for this testing. I found the Employer's policy was not implemented either reasonably or according to its own terms in either of these cases.

The option to refuse

The Employer here maintains it was entitled to test and, while admitting some unfortunate aspects in respect to Ms. Roberto's test experience, defends the reasonableness of its testing process. It resists liability for damages. This leads me to ask, before turning to damages, whether the employees involved had any other credible option but to participate in the process as directed by the Employer. In Ms. Roberto's case she asked at every turn "what happens if I refuse?" Mr. Brown said, albeit belatedly, that he participated "under protest."

The policy set out above treats any refusal in the same way as a positive test. It makes no provision to allow the employee to challenge the validity of the decision to test, or any step in the test process that is either unreasonable or fails to comply with the Employer's own policy.

Schedule A attached to the policy, which Ms. Roberto did not sign because the standard had not even been sent out, but which all employees were required to sign, says in part:

I also understand that if I test positive for a controlled substance or refuse to submit to a test (as defined in the standard) that I will be immediately removed from duty and, subject to my execution of a Commencement of/Return to Duty Agreement as set out in Schedule "B", I will be referred to a Substance Abuse Professional (SAP) for an assessment. I understand and agree that I may refuse to sign the Commencement of/Return to Duty Agreement or see a Substance Abuse Professional but that refusing to do either will have the same effect as resigning any position without further compensation from the Company.

One option the employee thus has is to refuse to participate. However, if they do so they are immediately suspended from work and must submit to an assessment by a Substance Abuse Professional. That may be appropriate where the refusal is indicative of avoiding a drug test, but it is, itself, an invasion of privacy and in my view unjustified where a valid objection is based on an unreasonable demand, or on a non-compliant or unreasonable testing procedure. Refusal to see a Substance Abuse Professional and provide the information that person would demand to complete an assessment would involve a deemed resignation.

Even if an objecting employee took that route and attended before a Substance Abuse Professional, that employee would still not be reinstated until they signed a “Commencement of/Return to Duty Agreement.” They would have to agree with the following terms:

Commencement of/Return to Duty Agreement

My signature below confirms that I have read and agree to the terms set out in this agreement.

1. I acknowledge that I have tested positive for a controlled substance or have refused to submit to a test as defined by Weyerhaeuser’s Health and Safety Standard – Substance Abuse (the “Standard”) and that as a condition of my employment or contract with Weyerhaeuser (the “Company”) I am executing this Commencement of/Return to Duty Agreement and promise to abide by its terms.
2. I agree to meet with a Substance Abuse Professional (SAP) as directed by the Company and to adhere to any conditions of treatment determined by the SAP.
3. I acknowledge and agree that I may, subject to the specific circumstances, be terminated immediately, without further notice or compensation if I:
 - a) engage in Prohibited Conduct within two years of the date indicated below; or
 - b) fail to meet with the SAP as directed; or
 - c) do not comply with the treatment program determined by the SAP; or
 - d) refuse to test for controlled substances as set out in the Standard or,
 - e) refuse to test for controlled substances as determined necessary by the SAP.
4. I understand that I will not be considered for reinstatement until the Company has received written confirmation from the SAP that I am fit for duty.
5. I give permission to the Company to contact the SAP and to inquire as to my treatment with regard to the length of time that I will be off work (if any) and whether or not I am or have complied with my treatment.

In my view 2, 3(a)(d)(e) and 5 are all unacceptable invasions of an employee’s rights where their refusal to test is based not on hiding their own drug use but on the Employer’s own unreasonable conduct.

In ordinary matters of workplace administration an employee’s obligation, on pain of discipline for insubordination, is summed up in the “work first – grieve later” rule, normally described using the following quotation:

... an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.

Ford Motor Co., 3 L.A.C. 779 (Shulman) quoted with approval in *Lake Ontario Steel Co.* (1968) 19 L.A.C. 103 (Weiler) at 108.

There are exceptions to this rule. As Brown and Beattie, *Canadian Labour Arbitration*, note at 7:3610:

“... arbitrators have consistently held that employees are not bound by the principle when adequate redress cannot be secured through the grievance and arbitration process.

The *Fording* policy award (*supra*) suggests that this is one of those exceptions:

17 In terms of the application of the testing provisions of the Policy, where employees refuse to submit to testing, employers are required, as a condition of imposing discipline, to prove facts in each case that support a finding that they had just cause to require testing. Despite the Policy, employees retain the right recognized by Arbitrator Picher on p. 385 “[to] decline to undergo a drug or alcohol test where it is manifest that there are no reasonable grounds to do so.” It is important to recognize at the outset that the issue of just cause will arise in every case.

Where what the Employer purports to do involves an invasion of fundamental privacy rights, the exception to the work (or obey) now grieve later rule should apply. However, the efficacy of such an exception arises as a defense to discipline for insubordination, which rarely involves termination or an indefinite suspension. Here, while the company has reserved its disciplinary options in the policy, it has in effect tried to avoid its use by obliging the employee to go through the Substance Abuse Counselor or be deemed to have resigned. In so doing they have made refusal such an unpalatable option that the employee is left little choice but to go along with the testing or face an extended period without work or pay. The Employer here cannot say to an employee with any credibility - you have a reasonable remedy if we force you to test when it is unreasonable for us to do so, or when the testing process we use does not meet a standard of reasonableness or even the standards we have set for ourselves. In my view this supports the conclusion that damages are the only viable remedy when such a breach occurs.

The question of damages

The Employer concedes that an arbitrator under a collective agreement may award damages but argues the circumstances where they are appropriate are limited and do not apply in this case. It begins by referring to:

Re Ontario Hydro and Canadian Union of Public Employees Local 1000 (1990) 16 L.A.C. (4th) 264 (Kates)

That case involved an analysis of the impact the then recent Supreme Court of Canada case in *Vorvis* had on the ability of arbitrators to award damages.

Vorvis v. Ins. Corp. of British Columbia (1989) 58 D.L.R. (4th) 193 [1989] 1 S.C.R. 1085

Vorvis was a common law wrongful dismissal action in which the Plaintiff sought aggravated and punitive damages for mental suffering and anguish as a result of the Employer's allegedly punitive treatment in carrying out the discharge. The arbitrator in *Ontario Hydro* noted that *Vorvis* clarified three significant aspects of the right, at common law, to claim such damages. First, such a claim is jurisdictionally available at common law without an express contract clause to that effect. Second, there is a distinction between aggravated and punitive damages, the former being used to compensate and the latter to deter. The two types of damages are distinct from one another and ought not be blended into one concept. That distinction is set out in *Vorvis* at page 202:

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

The third point concerned the circumstances when such an award might be appropriate which arbitrator Kates described as (at p. 269) raising:

... an almost insurmountable obstacle in the way of awarding either aggravated or punitive damages in wrongful dismissal cases.

They described the test, again at p. 269 as follows:

... the impugned employer actions that triggered the request for these extraordinary remedies on account of the victim's mental suffering would have to be capable of being made the subject-matter of "an independent cause of action." That is to say, it will not suffice for the aggrieved employee to rely simply on the principal cause of action, namely, breach of "the reasonable notice period" in support of such claim for aggravated and punitive damages. Rather, in order to succeed the aggrieved employee would have to demonstrate that the untoward employer action that resulted in the aggrieved employee's mental suffering is capable of being clothed in a separate and identifiable (i.e., independent) cause of action apart from the principal cause of action.

It suggested that such claims for relief would be restricted to the rarest of circumstances, a point the Employer in this case emphasizes. This is not however, a case of dismissal.

In the Supreme Court's rationale for such a restrictive approach it emphasized the fact that an employee's loss when employment is terminated is restricted to damages for lost notice. However, it excepted from

this, in parenthesis “in the absence of collective agreements which involve consideration of the modern labour law regime.” This comment led the arbitrator in *Ontario Hydro* to analyze whether the just cause provision in collective agreements freed those seeking aggravated or punitive damages of the need to establish a independent actionable course of conduct. He concluded it did not. Translating this requirement to a collective agreement claim, the arbitrator suggested aggravated or punitive damages would not arise from a lack of just cause alone, but might from the breach for example, of a clause guaranteeing union representation where its absence aggravated the employee’s grief or where the dismissal violated an anti-discrimination clause. This conclusion is summed up at p. 274 of *Ontario Hydro*:

What is the important and overriding condition to awarding such extraordinary relief is whether the employer failed to follow the procedures prescribed in the collective agreement in effecting the discharge or compounded the mistaken decision to discharge by violating another substantive provision of the collective agreement that would warrant, apart from the just cause provision, a separate grievance complaint. Accordingly, where the collective agreement mandatorily prescribes conditions under which discipline may be taken or proscribes employer conduct that in itself would constitute a violation of the collective agreement then the employer will thereby render itself liable to incur these extraordinary remedies. In other words where the employer either could have avoided or alleviated the victim's mental suffering or has aggravated the suffering that has already been inflicted as a result of its omission to adhere to the collective agreement then the employer may very well be vulnerable to a claim for extraordinary relief.

The board restricted the notion of independent actionable wrong to wrongs arising out of the collective agreement (since the case was decided long before *Weber*, see: below) saying at p. 276:

Nor do we accept the trade union's alternative argument that the breach to Mr. Winnitoy's personal reputation in his community (in the light of the employer's unsubstantiated allegations) would constitute any such independent cause of action. Firstly, we are of the opinion that the independent cause of action that is referred to by the S.C.C. must mean, in the collective bargaining context, an infraction of the collective agreement that gives rise to a grievance for which we would be jurisdictionally covered. We do not hold that the S.C.C. intended that arbitration boards should be seized of a "defamation" case as an adjunct to our remedial powers in directing aggravated and punitive damages. In any event, nothing we say herein is intended to restrict Mr. Winnitoy from pursuing such relief on those grounds by commencing an appropriate civil action.

Arbitrator Knopf awarded damages for mental distress to an employee who suffered discrimination due to her race and country of origin.

Re Clarke Institute of Psychiatry and Ontario Nurses' Association (2001) 95 L.A.C. (4th) 154

The case is of assistance in terms of the approach to damages, but not in terms of their appropriateness under a collective agreement alone. In Ontario, where the events took place, arbitrators are given the specific statutory authority to apply the Ontario Human Rights legislation and the damage award was

made expressly under the authority of section 40(1) of the Ontario Human Rights Code. The two complainants in that case were each awarded \$6,000 for their mental anguish and other losses.

In a British Columbia's decision the arbitrator awarded damages for a breach of the collective agreement's anti-discrimination provision and the tort of intentional infliction of emotional suffering. Addressing her authority over the tort aspect of the case, arbitrator McEwen said, at p. 273:

In support of its second head of damages, that flowing from the tort of the intentional infliction of emotional suffering, the Union cited two cases, namely *Re Tyee Village Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Loc. 40 (Prudhomme)* (1999), 81 L.A.C. (4th) 365 (Albertini), and *Re CVC Services and I.W.A.-Canada, Loc. 1-71 (Jackson)* (1997), 65 L.A.C. (4th) 54 (Lanyon). Those cases stand for the propositions (1) that arbitrators have jurisdiction to deal with the tort (see *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.)), and (2) that the elements required to prove the tort are: (a) flagrant and extreme conduct; (b) it is reasonably foreseeable that the conduct would cause distress or suffering; and (c) the conduct must have caused actual harm.

Re Bear Creek Lodge and Hospital Employees Union (2002) 106 L.A.C. (4th) 254 (McEwen)

She addressed the appropriate remedy at p. 288:

What remedy is appropriate in the circumstances? Consistent with the approach taken by Arbitrator Lanyon in the CVC Services case, I have determined that the Employer is liable for damages representing (a) as compensation for the personal harassment against her, an amount representing the Grievor's lost wages from her last day of employment (October 1, 2001) until the date of this Award, and (b) compensation in the amount of a further six month's pay (subject to a deduction for mitigation in the event that she receives employment income in the interim) for the subject tort.

I have also considered the general principles of damages, and their application in arbitration, usefully set out in:

Canada Safeway Ltd. v. United Food and Commercial Workers, Local 401 (Return to Work Grievance) [1999] A.G.A.A. 88 (Taylor)

The Supreme Court of Canada's decision:

Weber v. Ontario Hydro (1995) 125 D.L.R. (4th) 583

makes it clear that all issues properly arising out of the collective agreement fall within the exclusive jurisdiction of arbitration. In my view all the issues in this case fall within that category. Everything that happened was as a result of the employment relationship and the exercise or purported exercise of rights

that are rooted in the employment relationship and the collective agreement, including of course the management rights article said to justify this policy.

I find this is a case where damages are appropriate. In Mr. Brown's case, I find his damages are limited. He was taken for testing from work, not home, and the test site circumstances were far less offensive than those to which Ms. Roberto was subjected. While Mr. Brown feels that his reputation may have been hurt there is very little evidence of that beyond his having to explain his situation to his daughters. I have a concern about the way the company dealt with his car which, in the absence of evidence of impairment, they had no business touching at all. He was, however, subjected to testing in circumstances that were not appropriately justified under the policy, and that were carried out in a way that in several respects were unreasonable. I direct that he be awarded \$500.00 for the personal indignities and mental suffering to which he was unjustifiably exposed.

I find Ms. Roberto's damages were far more profound. In my view the cumulative effect of the way she was treated was deplorable. Her feelings at the time; of being treated as if she was being "taken away by the police" were not far off the mark. She was at home not at work. I see no justification for her being picked up and escorted in the way she was when a simple direction to report at a location was all that was needed and was what the policy allowed. The comments made to Mr. DeVuyst suggest to me the company was bound and determined to have Ms. Roberto tested and their determination to exercise what they perceived as their authority seems to have numbed any sensitivity to her dignity and her right to liberty. They subjected her to testing conducted on their behalf with inadequate oversight.

I accept Ms. Roberto's description of what took place at the hotel. In my view it was a wholly unsuitable location. No one in authority had exercised any judgment in making these arrangements. Ms. Roberto's description of feeling totally distraught sitting in the washroom with four men on the other side of the door able to hear everything going on was totally understandable. Despite the comforting words of the policy, nothing at all was done to protect her privacy and dignity. Company representatives were present and could very easily have said "this is not appropriate" but sat by and did nothing. Mr. DeVuyst checked for compliance with the policy but the company representative appears to have been unconcerned.

I accept Ms. Roberto's own evidence and her physician's evidence that this incident was the primary cause of her anxiety and stress following the event and the reason why she was unable to work for an extended period of time. I do so accepting that she had some prior medical conditions but this had not prevented her from productive and meritorious employment up to that point. After the incident Ms. Roberto sought assistance from the employee assistance program as well as from her personal

physician. She attended for counseling with a psychologist on eight occurrences up to August 7, 2003 and then every two weeks from then to September 25th. She returned to work on August 5th and after taking holidays went back to her regular shift on September 17th. I find that she took appropriate steps to mitigate the effects of the incident.

I award Ms. Roberto damages for these indignities and her mental suffering in the sum of \$10,000.00. In addition, she will be made whole for the monies she lost from being off work. The Employer may deduct from this any monies Ms. Roberto received from disability insurance plans.

In both cases all records of the grievors' being tested and the results of those tests will be removed from the grievors' files. For these reasons I find these tests were not reasonably justified and were in any event carried out in a way that was unreasonable and contrary to the Employer's own, unilaterally introduced, policies. They violated each employee's right to privacy. I allow both grievances.

DATED at Edmonton, Alberta this 10th day of August, 2006.

ANDREW C.L. SIMS, Q.C.