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Court Upholds Decision to Allow Post-Incident Drug and Alcohol Testing After Near-Miss



By **[Evie Thorne](#)**

The Court dismissed an application for judicial review of an Arbitration award upholding an employee's decision to submit two employees to drug and alcohol testing after an accident occurred at work.

Background

Two employees were involved in a near miss accident just outside Fort McMurray. One of the employees performed a walk-around of a very large truck called a Nodwell. He did not do another circle check or use someone to help back him up when he started to move 5 minutes later. A collision resulted with another vehicle, with damage caused to the smaller truck.

The accident was reported to their supervisor who decided to have the 2 employees tested for drug and alcohol pursuant to ATCO's Fitness for Work (Alcohol and Drug Use) Policy. The Policy allowed for post-incident or "for-cause" testing and had both mandatory and discretionary testing provisions. In this case, the tests were carried out under the discretionary provision due to the potential severity of the accident. One of the employees was found to have cannabis in his system and later completed a program. The Union grieved the testing requirement.

A vehicle incident report showed that the damage to the truck was less than \$1,000 and that the immediate cause of the accident was due to human error and poor judgment.

The grievance challenged the application of the Policy to the two employees. The Arbitration Board was asked to determine whether ATCO had justifiably ordered drug and alcohol testing, given the facts and Policy.

The Arbitration Board reviewed jurisprudence regarding testing, and adopted the leading case in Alberta, *Weyerhaeuser Co v Communications, Energy and Paperworkers Union, Local 447 (Roberto Grievance)* ("Weyerhaeuser (Roberto Grievance)"), 154 LAC (4th) 3. Reasonable testing focuses on the employee - an employer must have a reasonable basis to suspect that an employee is impaired. Post-incident testing looks to investigate and explain why an event occurred, and to take steps to prevent that reoccurrence. There are differing standards for each, with

post incident testing requiring less evidence of impairment of the employee, but a nexus between the event and the employee to justify testing.

Three considerations were adopted from the case in order to assist in determining when post-incident testing was appropriate:

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

The Arbitration Board found that the incident was serious enough to justify testing due to the size of the Nodwell and reasonable potential of serious harm. Secondly, it found that the investigation was reasonable; it was as complete as possible with the employer concluding the incident was caused by human error and poor judgment. Thirdly, it determined there was a possibility that impairment of either grievor could have contributed to the accident. Because the mistakes made were so obvious, the employer was entitled to the testing. The Grievances were dismissed.

On judicial review, the Union argued that the decision was unreasonable as the accident was minor and the employer's investigation into the accident was superficial. There was not enough evidence a nexus between possible impairment and the accident and without that, the Employer was essentially engaging in mandatory testing after every accident.

The Employer's position was that considering all the facts, it was reasonable for the employer to use drug and alcohol testing to rule out impairment as a cause of the accident.

The Court discussed the balancing an employer's interests and an employee's privacy rights to determine when the scale will tip in either direction, and ensuring it was in a reasonable manner. The Supreme Court of Canada decision *Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 was referenced recognizing that employee in a dangerous workplace can be tested, "if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse". The Court stated that in post-incident testing, "the investigation must lead to the conclusion that the particular employee's role in the event might have been due to impairment".

The Court found that the Board's decision was intelligent, rational and reasonable. The Court disagreed with the both parties' position that the award changed the law, stating that "it is clear that the balancing of an employer's interest in safety with employees' privacy rights in their bodily integrity is a nuanced and very fact specific exercise."

The delicate balance between rights was highlighted by the Court; while there is no evidential requirement an employee was impaired to allow for testing, an employee's poor judgment alone will not be enough. An employer must consider all circumstances of the situation, not just human error. It was reiterated that courts should show deference to administrative tribunals, especially labour arbitrators. Here, the Court recognized the Board applied well established principles from *Weyerhaeuser (Roberto Grievance)*.

Employers should note that not every incident or event will justify a drug

test. While this grievance was very fact specific, the law is well developed and the analysis discussed here should be consistently applied.

Employment Standards Code Update

It has been confirmed that as of January 1, 2019, the Labour Relations Board will be designated as the appeal body for the purposes of the *Employment Standards Code*.

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