BC Arbitrator Upholds Random Drug Testing

The reason mandatory drug testing is so controversial is that it requires a balancing of two compelling interests: the employer's interest in maintaining a safe workplace and the employee's interest in privacy. Although each case is different, the courts have largely allowed *post-incident* testing but drawn the line at *random* testing. But in upholding a random drug testing policy, a new BC ruling departs from this consensus. Here's a look at the case and what it may portend for the future of random drug testing.

The Case

What Happened: In 2002, after a long legal battle with the union, a BC coal mine won the right to perform post-incident, reasonable cause drug and alcohol testing on safety-sensitive employees. In 2012, the mine extended the policy to require *random* testing. The unions filed a privacy grievance and asked the arbitrator to "stay," i.e., prevent the mine from enforcing the testing policy until the Labour Board decided the case.

What the Arbitrator Decided: The BC Arbitrator refused to grant the stay.

How the Arbitrator Justified His Decision: Courts and arbitrators can issue stays only to prevent irreparable harm. The union claimed that staying random testing *would* prevent irreparable harm to employees' privacy rights; but the arbitrator ruled that the mine could end up suffering irreparable harm if it *wasn't allowed to* implement random testing.

The arbitrator agreed that the mine's operations were "inherently dangerous," and that employees had to be fully sober to operate heavy equipment in terrible weather and constantly shifting rock and soil conditions. But, the arbitrator added, the mine couldn't prove that random testing was an essential safety measure for its own operations, citing the mine's strong safety record and lack of history of accidents involving impaired employees.

What *was* certain was the damage random testing would do to employees' privacy. Unlike post-incident testing, random testing is carried out even without cause to suspect impairment—it's designed to deter rather than detect drug/alcohol use.

Had the arbitrator gone the route of other courts, it would have found that the employees' privacy trumped the mine's safety concerns and stayed the policy. But that's not what happened.

Yes, there were holes in the mine's safety argument, the arbitrator continued; but there was enough evidence to suggest that the mine might also be right about random testing preventing an accident. And as regrettable as the privacy violations would be, allowing an accident that could have been prevented to happen would be much worse, the arbitrator concluded in refusing to stay the policy.

Teck Coal Ltd. v. United Steelworkers Locals 9346 and 7884, File CT3289, May 9, 2013 (Arb. Colin Taylor, Q.C.)

What It Means to You

To say that *Teck Coal* has opened the door to random drug testing would be a premature exaggeration. First and foremost, the ruling does not go to the merits of the case. All the arbitrator decided was that at this point in the litigation there was enough evidence of the policy's importance to safety to warrant not staying it. Ultimately, the Labour Board will have the final say on whether the policy is a valid safety measure or an unwarranted intrusion of privacy.

But while the case is a long way from over, this appears to be the first time a Canadian court or arbitrator has upheld *random drug* testing as a safety measure. In essence, the headline is not that random drug testing won but that it didn't lose in the first round.

Is the Pendulum Shifting on Drug/Alcohol Testing

Courts have, in fact, been giving employers in inherently dangerous operations more leeway in *alcohol* testing of safety-sensitive employees. As long as the nature of the work is dangerous, employers can perform random testing even if there were no prior incidents at their own operations, according to recent cases. For example, in 2011, a New Brunswick court upheld random *alcohol* testing of employees at a paper mill even though it hadn't actually experienced any accidents involving impaired employees [*Irving Pulp,* 2011 NBCA 58].

Teck Coal not only cites but extends these cases. According to the arbitrator, employees in highly dangerous operations know what they're getting into and have "lesser expectations of privacy" than workers who do other jobs. (The arbitrator took that language not from a Canadian case but from the U.S. Supreme Court.)

More importantly, *Teck Coal* is the first case to apply this logic to random *drug* testing. Historically, drug testing has been subject to higher privacy barriers than alcohol testing because:

- Drug testing methods themselves are more intrusive; and
- Unlike alcohol testing, drug testing doesn't detect *current* impairment. The effects of drug use linger in the body longer. So, just because an employee fails a drug test doesn't prove he was high at the time of testing.

So while it's limited in scope and far from certain to survive when the case goes to the Labour Board for decision on the merits, *Teck Coal* is still a noteworthy case that could potentially change the landscape of random drug testing in Canada.