Can Employer Fire Miner After Multiple Failed Drug Tests?



SITUATION

A miner tests positive for cocaine after co-workers report that he appeared impaired at work. The miner gets treatment and his employer allows him to return to work’if he agrees to random drug testing, among other conditions. After he returns, he fails yet another drug test. So the employer removes him from underground duties for one month. The miner then disappears from work for four days and leaves a disturbing message on his supervisor’s voicemail, which causes the police to be called to the miner’s home. When he eventually returns to work, he exhibits suspicious behavior at a meeting, including slurred speech, bloodshot eyes, a confused manner and inability to concentrate. Two managers agree that there’s reasonable cause to require him to submit to a drug test as permitted by company policy. The miner tests positive for cocaine and the employer fires him, citing the safety sensitive nature of the work environment, its drug policy and the miner’s multiple failed drug tests.

QUESTION

Was the employer justified in firing the miner’

A. Yes, because he violated the terms of his return to work.

B. Yes, because he tested positive for cocaine, an illegal drug.

C. No, because the employer had no cause to ask for the last drug test.

D. No, because an employer may only ask a worker to take a drug or alcohol test after a safety incident occurs.

ANSWER

A. The miner violated the terms of his return to work by failing the drug test and therefore his termination is justified.

EXPLANATION

This hypothetical is based on a Manitoba arbitration decision in which the arbitrator ruled in favor of a mine that fired a worker who failed multiple drug tests. The miner had previously tested positive for cocaine use, received drug treatment and been allowed to return to work, subject to random drug testing and other conditions. He later failed another drug test administered after a meeting in which he displayed signs of drug use, including slurred speech, blood shot eyes and an inability to concentrate. The union challenged the termination, arguing that there wasn't reasonable cause for the drug test administered just prior to termination. Whether there was reasonable cause to ask the miner to take that final drug test at the time of that meeting was irrelevant according to the arbitrator, because he'd agreed to random testing as a condition of his return to work. Additionally, the miner worked in 'a safety sensitive environment amidst an array of serious hazards.' And every employee in this setting must be 'mentally alert and physically fit for the duties of the job,' added the arbitrator. Therefore, his termination was justified.

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because testing positive for an illegal drug isn't by itself automatically grounds for termination. First, a

positive drug test, unlike a positive alcohol test, doesn't mean a worker is currently impaired at the time of the test and thus a potential safety risk on the job, but rather that the worker took drugs at some point before the test. Additionally, a positive drug test could be an indication the worker is addicted, which may need to be accommodated by the employer. Finally, even if the employer has a zero tolerance drug and alcohol policy, all the circumstances would need to be considered in determining the proper response to a positive cocaine test. In this case, those circumstances included two positive drug tests, which violated the conditions of the miner's return to work. In addition, he disappeared from work for days, left a disturbing message on his supervisor's voicemail and behaved oddly at a meeting. It's all of those circumstances'not the positive test on its own or the fact that the drug was an illegal substance'that warrant his termination.

C is wrong because the employer didn't need cause in this case to request the drug test. The miner agreed to random drug testing as a condition of his return to work after treatment for drug use. Therefore, the employer didn't need reasonable cause to ask him to submit to a drug test. However, the employer may indeed have had cause based on the suspicious behaviour the miner exhibited at the meeting plus his prior disappearance for four days and the message he left his supervisor. That conduct together with his prior history of positive drug testing was likely sufficient cause to request the test.

D is wrong because although the occurrence of a safety incident is perhaps the strongest grounds for requesting a drug or alcohol test, it isn't the only reason that can support such a request. If the employer can demonstrate the testing is a bona fide occupational requirement, such testing could be required when there hasn't been an incident. For example, truck drivers who drive outside Canada, into the US,

could be subject to random drug testing by law. In addition, if a worker is showing signs of impairment on the job, such as slurred speech, stumbling gait, smell of alcohol on his breath, etc., especially in a safety-sensitive workplace, an employer may not need to wait for an incident to occur before being justified in requesting a drug or alcohol test. A safety incident isn't required in this case because the miner agreed to random testing as a condition of his return to work after prior positive drug tests.

***Insider* Says:** For more information on the current leading case in Canada addressing drug and alcohol testing, see 'Alert: Supreme Court of Canada Overturns Random Alcohol Testing Policy.'

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Vale Canada Ltd. (Manitoba Operations) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 6166 (Unjust Termination Grievance), [2015] M.G.A.D. No. 8, Nov. 20, 2015