

# Is Termination Justified When Worker Refuses Post-Incident Drug/Alcohol Test?



## SITUATION

An electrician working in a safety sensitive workplace backs a work vehicle into another parked vehicle while attempting to park. The parked vehicle suffers minor damage. He didn't turn around to check behind his vehicle before backing up because he has a herniated disk. He also didn't follow company protocol by asking someone to spot him while backing into the parking spot. Additionally, he was wearing safety goggles over his prescription glasses at the time and earplugs so he didn't hear or see a co-worker calling to him or waving at him to warn him about the parked vehicle behind him. The electrician participates in the subsequent investigation and admits he was careless in operating the vehicle. Witnesses agree the electrician showed no visible signs of impairment. In fact, he's allowed to drive himself home after the incident. He has an exemplary work history with no prior incidents and no evidence of alcohol or drug usage. But a manager exercises discretion under company policy to order the electrician to take a urine drug test and a breathalyzer test. When the electrician refuses to take the tests, the employer terminates him, citing its drug and alcohol policy, which warns termination is a potential consequence for failing to take required tests.

## QUESTION

**Is termination justified for the electrician's refusing to take the drug and alcohol tests'**

- A. No, because it was only a careless car accident with minor damage and the electrician showed no signs of impairment.
- B. No, because it's disability discrimination to fire a worker for refusing to take a drug or alcohol test.
- C. Yes, because it's a safety sensitive workplace, so the employer can require workers to submit to even *random* drug or alcohol testing at any time (much less post-incident tests).
- D. Yes, because after any safety incident or near miss, drug and alcohol tests may be required.

## ANSWER

**A. There was a reasonable explanation for the minor incident and the electrician showed no signs of impairment, so his refusal isn't grounds for termination.**

## EXPLANATION

This hypothetical is based on an Ontario labor arbitration decision, which held that there was a reasonable explanation for the car accident—namely, the electrician's admitted carelessness. He failed to follow usual policy and use a spotter or turn around to check behind his vehicle, and his senses were hampered by the safety goggles and earplugs. He displayed no signs of impairment, was permitted to drive away after the incident and had no history of drug or alcohol abuse. The arbitrator explained that an incident or near miss in a safety sensitive workplace may justify an employer imposing a drug or alcohol test *if* there was no reasonable explanation for the worker's conduct. Here, however, because the electrician admitted he was careless in his operation of the vehicle, there *is* an explanation for the incident. So

infringing on his privacy rights by mandating the drug and alcohol tests and terminating him for his refusal wasn't warranted, concluded the arbitrator.

### **WHY THE WRONG ANSWERS ARE WRONG**

**B is wrong** because firing a worker for refusing to submit to drug and alcohol testing isn't automatically discriminatory. It's true that imposing drug or alcohol testing may be discriminatory in some circumstances. For example, it's discriminatory to treat a worker differently than other workers because he has a drug or alcohol addiction or the employer thinks the worker is an addict. However, here, there was no indication the electrician had a drug or alcohol problem or that the employer believed he had an addiction. So there's no actual or perceived disability in this case and therefore no disability discrimination.

**C is wrong** because random testing isn't always permissible, even in safety sensitive workplaces. Although *alcohol* testing may be imposed on a random basis in safety sensitive workplaces, random *drug* testing usually isn't permissible, with some exceptions. Positive alcohol tests indicate potential *current* impairment, but because drugs can be found in a person's system even after they're no longer impaired, drug tests don't always indicate current impairment. In contrast, courts have been more open to allowing post-incident drug and alcohol testing, especially for workers in safety-sensitive positions and/or workplaces. Here, the drug/alcohol testing in question is post-incident, not random. And there are insufficient facts to determine whether the employer would've been entitled to randomly test this electrician.

**D is wrong** because drug or alcohol testing can be, but isn't always, permissible after an incident or near miss. The incident must be significant and there must be reason to believe drugs or alcohol may be a factor in its cause. For example, say a worker trips and falls over an extension cord

strewn across a walkway in the workplace, bruising his leg. Unless he reeked of alcohol or had bloodshot eyes at the time, it's unlikely the employer would be allowed to require post-incident testing. In this case, the incident involved very minor damage to a vehicle and the electrician showed no signs of impairment. So a post-incident test wasn't warranted.

**Insider Says:** For more information about the limits of drug and alcohol testing, see '[Drugs & Alcohol Testing, Part 1: What are the Legal Limits on Testing Policies](#)'

## **SHOW YOUR LAWYER**

[\*Jacobs Industrial v. International Brotherhood of Electrical Workers, Local 353\*](#), [2016] CanLII 198 (ON LA), Jan. 7, 2016