Random Alcohol & Drug Testing to Be Reconsidered in Alberta Case

Drug and alcohol testing of workers is a very complicated topic. An employer is most likely to be able to impose some form of testing if the workplace and/or positions to be tested are safety-sensitive. Post-incident testing and reasonable cause testing‘that is, testing a worker when there’s reasonable suspicion that he’s intoxicated, such as if he smells of alcohol and is slurring his speech’are usually upheld. But the threshold for conducting *random* testing of workers is very high. However, an Alberta court recently ruled that the standards an arbitration panel had set for such testing were *too* high. Here’s a look at its decision.

THE CASE

What Happened: An oil and gas company tried to impose a random drug and alcohol testing program on workers in safety-sensitive and specified positions. The union challenged the program and got an injunction delaying its implementation pending the outcome of the grievance. An arbitration panel sided with the union, finding that the harm to worker privacy rights from random testing outweighed the safety benefits to be gained and the imposition of random testing wasn’t justified because the company failed to show sufficient evidence of a problem with alcohol and drugs in its workplace. The company appealed.

What the Court Decided: The Alberta Court of Queen’s Bench ruled that the panel’s decision was unreasonable and ordered a new arbitration panel to rehear the case.

The Court’s Reasoning: The court, relying on the *Irving* decision, which is the leading case in this area, said the arbitration panel made three errors:

1. **Inappropriately raised threshold required to prove a workplace alcohol and drug problem.** In *Irving*, the Supreme Court of Canada held that random drug testing in a hazardous workplace environment may be justified when there’s ‘evidence of a general problem with substance abuse in the workplace.’ But the Alberta court said the arbitration panel imposed a more stringent standard by requiring evidence of a significant, extreme or serious problem. Moreover, the panel had required the company to establish a causal link between alcohol and drug use, and safety incidents in the workplace.

But the *Irving* decision doesn't impose a causal connection requirement, said the court. Instead, it requires a balancing exercise to be undertaken on a case-by-case basis.

2. **Considered only evidence within the bargaining unit.** The court also criticized the arbitration panel for considering evidence concerning alcohol and drug problems among unionized workers only. Although the panel's decision would only be binding on union members, it should still have considered evidence relating to the *entire* workplace, including union, non-union and contract workers. By taking this narrow approach, the panel ignored the company's duty under the OHS laws to ensure a safe workplace for *all* of its employees'not just those in the bargaining unit. 'Workplace safety is an aggregate concept, especially in a dangerous environment,' explained the court.
3. **Didn't properly consider all of the evidence.** Lastly, the court criticized the panel for failing to consider *all* of the relevant evidence. For example, the company had almost 250 positive tests since the introduction of 'for cause' alcohol and drug testing, most of which involved union members. In addition, 2,276 drug and alcohol security incidents occurred over a nine-year period, which the panel minimized. In fact, the dissent to the panel decision noted that the evidence provided by the company regarding the detection of alcohol and drug use in the workplace was 'profound' and 'significantly more compelling than the evidence in any other decision in Canada considering random alcohol and drug testing' [*Suncor Energy Inc. v. Unifor Local 707A*, [2016] ABQB 269 (CanLII), May 18, 2016].

ANALYSIS

Irving set a high threshold for establishing a justified need for random alcohol and drug testing of workers'but not as high as the standard set by the arbitration panel, which would've 'virtually foreclose[d] any possibility of random testing, regardless of circumstances.' In fact, the Supreme Court in *Irving* said, 'If [random testing] represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.' (For more on the *Irving* decision, watch this recorded webinar of the decision's impact on employers.) The court in *Suncor* didn't go so far as to uphold the company's random testing program; instead, a new arbitration panel must reconsider the program. So the jury (so to speak) is still out on whether the company's random testing program will withstand proper scrutiny under the *Irving* standards. We'll keep you posted on any developments in the case.