

# Was Drug/Alcohol Test after Minor Safety Incident Justified?



## SITUATION

A steel mill worker works in a safety sensitive plant site where large, heavy equipment is used. The worker's backing up a truck in the plant's lot when he hits a guardrail, cracking a tail light. He knows that company policy requires an immediate report of the incident. But he leaves the scene and doesn't report the incident to a supervisor until later in the day. The company's testing policy requires a post-incident test after a significant work-related incident or a 'near miss' that could've resulted in a fatality or serious injury, significant environmental consequences or property damage. The supervisor has no reason to believe the worker was impaired at the time of the incident. But the supervisor determines that the incident was a 'near miss' because serious injury or damage could've occurred, say, if a pedestrian had been in the area. So he orders the worker to submit to a drug and alcohol test. The union files a grievance.

## QUESTION

**Is a drug and alcohol test justified in these circumstances'**

- A. Yes, because the worker was in a safety sensitive workplace.
- B. Yes, because post-incident drug and alcohol testing is always permissible.
- C. No, because it was only a minor safety incident and there's no evidence the worker was impaired.
- D. No, because drug and alcohol testing without consent violates a worker's privacy rights.

ANSWER:

**C. Because the incident caused only minimal damage and the facts don't indicate a reason to suspect any impairment, requiring the worker to take a drug and alcohol test wasn't justified.**

## EXPLANATION

This hypothetical is based on a Saskatchewan labour arbitration decision that said a post-incident drug and alcohol test wasn't reasonable for a minor safety incident. The arbitrator acknowledged that the workplace and the worker's job were safety sensitive and found the employer's testing policy to be generally appropriate. However, the arbitrator found that the policy was inappropriately applied to this incident and worker. Whether an incident was a significant work-related event depends on the nature and extent of damage or the safety concern. In this case, the incident was minor and resulted in only minimal property damage. The supervisor assumed the incident was significant without considering the circumstances and the 'trivial nature of the damage,' said the arbitrator. Additionally, it wasn't reasonable or rational to conclude a 'near miss' occurred simply because a pedestrian might have been in the area at the time. Finally, the fact the worker left the scene of the incident and didn't immediately report it also didn't justify drug or alcohol testing. Thus, the arbitrator concluded the facts didn't indicate that the employer's duty to provide a safe workplace outweighed the worker's privacy rights and so testing wasn't justified.

## WHY THE WRONG ANSWERS ARE WRONG

**A is wrong** because the fact that a worker's in a safety sensitive workplace (or position) doesn't automatically justify drug or alcohol testing. Such testing can invade workers' right to privacy, so there must be reasonable grounds to require testing. Impairment can create serious safety hazards. So the testing of workers in safety sensitive jobs and/or workplaces is easier to justify than testing of, say, workers in desk jobs or in an office environment'but it isn't automatic. Here, although the incident happened in a safety sensitive workplace, there's no evidence to suggest impairment, such as the worker smelling of alcohol. And the fact that the worker didn't report it right away and left the scene doesn't indicate impairment.

**Insider Says:** For more information on when it's appropriate to order testing, see 'Drug & Alcohol Testing, Part I: What are the Legal Limits of Testing Policies', July 2010, p 1.

**B is wrong** because post-incident testing is often permitted but not for all incidents. An employer must investigate the facts surrounding the incident and have reason to believe impairment may have been a cause'for example, the conduct was out of character for that worker or the worker had slurred speech'before ordering a drug and/or alcohol test. Here, the only evidence the supervisor relied on in ordering the test was that the worker didn't report it immediately and left the scene. But the facts also indicate the damage was minor and the worker *did* report it, albeit not immediately. So considering all the facts, this incident didn't justify drug and alcohol testing.

**Insider Says:** For two cases in which the reasonableness of post-incident testing was considered, see 'Is It Reasonable to Test Workers for Drugs Because They Got into a Workplace Incident' Jan. 2009, p. 10.

**D is wrong** because although drug and alcohol testing can violate a worker's privacy rights, employers have the right to require such testing without workers' consent under certain circumstances. For example, random alcohol

testing may be permissible when workers have safety sensitive jobs. And as noted, post-incident testing can be required when there's reasonable cause to do so. Here, there were no facts to justify violating this worker's privacy rights by forcing him to submit to drug and alcohol testing.

**SHOW YOUR LAWYER**

*United Steelworkers, Local Union 5890 v. Evraz Regina Steel (Holtskog Grievance)*, [2014] S.L.A.A. No. 9, May 26, 2014