Urinalysis is used to detect drugs. PHOTO: THINKSTOCK

DRUGS and ALCOHOL

ALBERTA COURT OPENS THE DOOR TO RANDOM TESTING

Pending a Unifor appeal, it may become easier for an employer to introduce a valid testing policy.

BY ANDREW EBEJER

In June 2013, a 6-3 majority of the Supreme Court of Canada struck down as unreasonable a program of random breathalyzer alcohol testing for safety sensitive positions at Irving Pulp and Paper Ltd. *(CEP, Local 30 v Irving Pulp and Paper, 2013 SCC 34 [Irving])*. It found a dangerous workplace was not an automatic justification for random testing. Such testing would only be justified if an employer could show there was a "general problem with substance abuse in the workplace."

The question the Supreme Court didn't answer was: What constitutes a workplace problem and how significant or widespread a problem must there be before random testing will be permitted?

Recently, the Alberta Court of Queen's Bench examined a random drug and alcohol-testing program adopted by Suncor Energy Inc., clarifying the extent of a workplace problem required to justify such testing for safety-sensitive positions.

Suncor's Alberta oil sands operations are, by their nature, dangerous. Heavy equipment, high voltage power lines, chemicals, radiation sources, explosives, and flammable liquids and gases are all prominent characteristics of the work environment.

For years, Suncor had concerns about the safety hazards posed by alcohol and drug use at its operations. To address these concerns, it adopted a comprehensive strategy that covered employee and supervisor training, post-incident and reasonable cause testing, treatment for employees with dependencies and an alcohol-free lodging policy.

In June 2012, Suncor announced additional measures that included a Canada-wide alcohol and drug policy with random drug (urinalysis) and alcohol (breathalyser) testing of employees in safety-sensitive position – the same processes used by Suncor since 2003 following a workplace incident or near miss.

One month later, Unifor (the union representing some of Suncor's employees) filed a policy grievance alleging the random testing unreasonably interfered with the privacy interests of its member-employees.

Unifor's grievance advanced to arbitration and was heard by a three-person panel over 23 days in 2013. Ultimately, a 2-1 majority of the panel found in favour of Unifor and ordered Suncor's random testing program not be implemented.

Privacy issue

The majority noted breathalyzer testing "effects a significant inroad" on employee privacy. Suncor did not demonstrate a "significant" or "serious" alcohol problem within the bargaining unit and a causal connection between alcohol use and the bargaining unit's accident, injury and near miss history. The majority was not persuaded by the 2,276 alcohol and drug related incidents identified by Suncor during the arbitration, noting it was unclear whether those incidents involved members of the Unifor bargaining unit or other Suncor employees and contractors. Throughout the entire arbitration, the majority remained focused exclusively on the bargaining unit – 3,383 of the 10,000 employees and contractors on site – and not the broader Suncor workplace.

The majority also criticized the inability of urinalysis to demonstrate current impairment by drugs since it only shows a drug is present in the body, which could be a trace amount from several days or weeks prior, with no impairing effect. In light of the limited use of this information, and the absence of specific data regarding a "serious drug issue among employees in the bargaining unit", the majority concluded random drug testing was an unreasonable interference with employee privacy interests and could not be implemented.

A breathalyzer, used to detect alcohol. PHOTO: SHUTTERSTOCK

In a judgment released earlier this year, the Alberta Court of Queen's Bench overturned the arbitration decision, finding the majority had incorrectly applied the legal test set out in Irving and failed to consider relevant evidence.

First, the court found the majority added more difficult requirements than those set out by the Supreme Court. While the Supreme Court indicated random testing might be justifiable where there was evidence of a "general problem with substance abuse in the workplace", the majority incorrectly elevated this standard by requiring evidence

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of a "significant" or "serious" problem.

The majority also made the legal test more difficult by requiring Suncor to prove a "causal connection" to the bargaining unit's accident, injury or near-miss history. The Alberta court held that this too was an incorrect applicable of the Irving test, and no general requirement to prove a causal connection existed.

Second, the Alberta court found the majority erred when it only took into account evidence tied directly to Unifor's bargaining unit members. The Irving test related to a workplace problem of alcohol or drug use, and was not limited to specific evidence of a problem within any particular bargaining unit. The majority should have considered workplace safety more broadly, instead of narrowly focusing on the members of the Unifor bargaining unit.

Third, the court concluded the majority failed to carefully consider all the evidence. For example, the majority minimized the significance of the 2,276 drug and alcohol incidents raised by Suncor was because it was unclear how many of those incidents involved bargaining unit members. With such a narrow focus, the majority ignored relevant evidence pertaining to two-thirds of the workers at the energy company's operations.

In the end, the Alberta court held the majority acted unreasonably and overturned the arbitration decision. However, it did not make an ultimate determination on whether Suncor's random testing standard was permissible. Instead, it sent the case back to a new arbitration panel for a fresh look and decision.

In overturning the arbitration award the Alberta court may have made it a little easier for an employer to introduce a valid random testing policy. In clarifying and restating the Irving test, the court set out two clear requirements: the workplace must be dangerous; and there must be a general problem with drug or alcohol use in that workplace.

However, before employers get too excited about this judgment, know that immediately following the court's decision, Unifor announced its intention to appeal. As such, the issues raised may still be unresolved.

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