IN THE MATTER OF AN ARBITRATION

BETWEEN

VANCOUVER DRYDOCK CO. LTD.

(the “Employer”)

AND

MARINE WORKERS AND BOILERMAKERS INDUSTRIAL UNION, LOCAL 1

(the “Union”)

RE: JE ARBITRATION

Second Preliminary Issue

APPEARANCES:	Chris E. Leenheer and Carly Stanhope, for the Employer
	Richard L. Edgar, for the Union
ARBITRATOR:	Mark J. Brown
DATE OF HEARING:	July 27, 2020
DATE OF AWARD:	August 4, 2020

I. ISSUE

In an Award dated June 8, 2020, I addressed the first preliminary matter and concluded that the Employer did not have the right to require that JE take a urine test for alleged drug use under the Employer's Substance Abuse Policy.

The parties have agreed to admit that JE tested positive for cocaine on February 1, 2019.

The issue before me now is whether evidence which arose from the decision to test, including the results of the test, and evidence of events that occurred afterwards should be considered in determining an appropriate remedy.

II. EMPLOYER ARGUMENT

The Employer argues that further evidence that flowed from the decision to test, the results of the test and evidence regarding events that occurred after the test must be considered in order to determine an appropriate remedy.

The Employer argues that in cases concerning drug or alcohol use by employees, the safety of the employer's workplace is a primary consideration in determining the appropriate remedy: *Tolko Industries (Lakeview Lumber Division) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-425,* [2017] B.C.C.A.A.A. No. 108.

The Employer argues that when reinstatement is the remedy sought, arbitrators routinely consider whether there is a risk that the employee may attend work while impaired in the future: *Suncor Energy Inc. v. Communications, Energy & Paperworkers Union, Local 707,* [2008] A.G.A.A. No. 11 ("*Suncor*"); and, *Suncor Energy Inc. v. Communications, Energy and Paperworkers Union, Local 707,* [2004] A.G.A.A. No. 35.

The Employer argues that evidence regarding the result of the drug test and the events which occurred thereafter are critical to the risk assessment which must form part of a decision as to remedy. On the evidence available at this time, it is impossible to conclude that JE does not pose a significant risk to the safety of the workplace, or to craft any conditions for reinstatement which might appropriately address any risk that does exist.

With respect to the admissibility of further evidence, the Employer argues that a breach of the collective agreement does not automatically lead to the exclusion of evidence: *White v. Canada Safeway Ltd.,* [1994] A.J. No. 725. The reasoning in this decision was adopted in the above noted *Suncor* case as well.

The Employer notes that following *Suncor,* the arbitration board in *Canadian Energy Workers' Assn. v. ATCO Electric Ltd.,* [2017] A.G.A.A. No. 7 ("*ATCO Electric"*) (aff'd in [2018] A.J. No. 401) held that evidence from an improper substance use test should be admitted in order to enable the employer to comply with its health and safety obligations, so long as there were no improper motives behind the requirement to test. There is no evidence in the case at hand that there was any bad faith in the Employer's decision to test JE. Given the safety sensitive workplace, the Employer is obliged to ensure that employees do not pose a danger to themselves and others.

The Employer argues further that there is no obligation to follow *Vancouver Drydock - McPhillips* in the case at hand and it would be inappropriate to do so. Arbitrators are not strictly bound by prior decisions involving the parties to a grievance: *Western Pulp Limited Partnership (Squamish Operation) v. Pulp, Paper and Woodworkers of Canada, Local 3,* March 21, 2002*,* Diebolt (Unreported).

The Employer argues further that *Vancouver Drydock - McPhillips* is first, limited to the admissibility of the test results, and second, is made without any analysis of factual circumstances which might warrant a different conclusion. The analysis regarding admissibility is purely formalistic. In the case at hand the Employer is seeking to introduce evidence regarding the events which followed the test, as well as the test results. In the Employer's submission, *Vancouver Drydock - McPhillips* is not dispositive of this broader issue.

The Employer argues further that further evidence must be heard in order to give effect to Section 82(2) of the *Labour Relations Code* (the "*Code*"), and in particular, the requirement that an arbitrator "have regard to the real substance of the matters in dispute". The case law makes clear that a decision as to remedy for drug and alcohol use, and in particular, the remedy of reinstatement, is in substance a decision regarding workplace safety. The fact that JE tested positive for cocaine use gives only a glimpse of the context in which the Employer decided that JE could not safely return to work. In the Employer's submission, full evidence as to the factual circumstances which followed the drug and alcohol tests are required to determine a remedy which is consistent with the Employer's obligation to maintain a safe workplace.

In addition, Section 82(2) of the *Code* emphasizes that an arbitrator "is not bound by a strict legal interpretation of the issue in dispute". While the Employer relies on the above arbitral authorities in support of its legal position, it submits that the full factual circumstances and the Employer's health and safety obligations must also be taken into account. The Employer argues that strict reliance on *Vancouver Drydock - McPhillips* would be contrary to the mandate of an arbitrator under Section 82(2) of the *Code,* and would preclude the fashioning of an appropriate remedy.

The Employer argues further that exclusion of relevant evidence is a breach of natural justice: *Universite du Quebec a Trois-Rivieres v. Larocque,* [1993] 1 S.C.R. 471; and, *Health Employers' Assn. of British Columbia v. Hospital Employees' Union,* [2009] B.C.C.A.A.A. No. 140.

III. UNION ARGUMENT

The Union argues that because the test was not justifiable then any of the evidence resulting from that test is not admissible in this arbitration. That is the principled approach taken by arbitrators in BC, including a decision between these parties: *Vancouver Drydock Co. v. Marine Workers and Boilermakers Industrial Union,* [2018] B.C.C.A.A.A. No. 34 ("*Vancouver Drydock – McPhillips*").

The Union argues that if I condone the unjustified testing, and if the evidence is admitted, there will be no disincentive for the employer to respect employees' constitutionally protected privacy rights. The Employer will be able to do so with impunity.

The Union cites other cases that are consistent with *Vancouver Drydock - McPhillips*: *Rio Tinto and USW. Local 5795 (King), Re* 2017 CarswellNfld 341; and, *Vancouver Shipyards Co. and UA, Local 170 (Moore), Re* 2005 CarswellBC 4039.

The Union argues further that the reasoning found in the arbitral jurisprudence about video surveillance is apposite: *EBCO Metal Finishing Ltd v International Assn of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Shopmens' Local 712,* [2004] BCCAAA No 260; *Crown Packaging Ltd v. Unifor, Local 433*, 2014 CarswellBC 999, 243 L.A.C. (4th) 423.

The Union argues that the demand for a urine test was improper. The Employer did not have reasonable cause to demand it nor did it consider JE's constitutionally protected privacy rights to bodily integrity in order to balance the competing interests or the complete lack of any safety risk before insisting on testing. Either situation, independently, leads to the conclusion that the demand for a urine test was an unauthorized invasion of JE's privacy interests and was not justified. As a result evidence of the results of that test and the subsequent events that depend upon a positive test are not admissible into evidence.

The Union notes that the Employer's policy makes any investigations and/or return to work requirements and conditions contingent on there being a violation of the policy – in this case, the results of the improper drug test. The Employer is asking that I admit the test results, and those subsequent investigations and the evidence they generated into evidence, even though, if they had acted properly, they had no right to force JE to submit to such investigations on pain of losing his job.

In reply to the Employer's argument, the Union argues that the Employer asks that I not follow *Vancouver Drydock - McPhillips* relying primarily on *ATCO Electric.*

On the issue on whether or not the evidence obtained solely as a consequence of a breach of the employee's constitutionally protected privacy rights, in *Vancouver Drydock - McPhillips* it was determined that the evidence must be excluded. The

Employer argues that I should not follow that case , primarily on the basis of the *ATCO Electric* case. However, it has long been accepted that the only reason a subsequent arbitrator should refuse to follow an earlier decision between the same parties is where the subsequent arbitrator believes that the earlier arbitration award was "clearly wrong": *B.F.C.S.D., Local 278C v. Brewers' Warehousing Co.* (1954), 5 L.A.C. 1797; and, *Toronto Transit Commission v. A.T.U., Local 113* (1985), 21 L.A.C. (3d) 346. This approach is not limited to issues involving the interpretation of collective agreements, but has also been used in cases involving video surveillance: *Toronto Transit Commission v ATU Local 113,* 1999 Carswell Ont 1685.

With respect to the Employer's reliance on *ATCO Electric* for the proposition that even if there is illegal demand for a drug test the results of that test and the evidence subsequently obtained as a result of that positive test, should be admitted into evidence, the Union argues that the case does no such thing.

In *ATCO Electric* the Union argues that the arbitrator was addressing post incident testing. She found that the accident justified the demand for a drug test, which turned out to be positive. Her decision turns entirely on her conclusion that the drug testing was justified.

That, of course, is not the situation in the case at hand. In *ATCO Electric,* it was only after having concluded that the testing was justified that the arbitrator opined on what she would have done had she found the testing was not justified (ie: admit the results). The comments she makes are therefore clearly *obiter dicta*, in that they do not form part of the basis of the decision nor are they necessary to the decision. The arbitrator's comments are perhaps interesting but, at law, they are no more than unnecessary musings. The Union also asserts that the cases relied upon are fundamentally flawed on this issue.

With respect to the Employer's proposition that exclusion of relevant evidence is a breach of natural justice, the Union argues that to state this proposition is to reject it. If it were correct, relevant evidence would never be ruled to be inadmissible. While it is incontrovertible that relevant evidence may be properly ruled to be inadmissible, this question has been specifically addressed in *BC Hydro and Power Authority and IBEW, 258*, 2017 CarswellBC 1304.

IV. AWARD

At the outset I note that Section 82(2) of the *Code* grants me the jurisdiction to address the real substance of the matter in dispute. The application of this Section of the *Code* is really not in dispute.

In the case at hand I concluded in the first preliminary Award that the Employer's requirement to have JE take a drug test was improper.

It is clear that the Employer's workplace is a safety sensitive workplace. The Employer, the Union and employees are obviously concerned about the safety of all who attend the workplace.

Initially I had some attraction to the comments in *Canadian Energy Workers' Assn. v. ATCO Electric Ltd.,* [2017] A.G.A.A. No. 7 ("*ATCO Electric"*) (aff'd in [2018] A.J. No. 401) (at para. 58):

> But even if the original testing was not justified, with respect to damages arising from Potter's compliance with certain conditions arising from his positive test, we are not inclined to award any such damages. Even if the initial testing was unjustified, the fact is that Potter did test positive and in our respectful view the Employer then had no choice but to deal with what could be viewed as a threat to the health and safety of other workers. Potter was entitled under the Policy to apply Part F of the Employer's Fitness for Work Policy. In such circumstances we agree with Arbitrator Abells at paragraph 94 [sic] of the *Suncor Energy* decision that the evidence of a positive test is not excluded because the testing was carried out in breach of the Policy. To do so would not be in keeping with the Employer's health and safety obligations. We liken this situation to cases where evidence obtained in violation of an accused's Charter rights is not excluded in cases where such exclusion would be detrimental to the administration of justice. Equally to exclude the positive test result as admissible with respect to a breach of the Employer's Policy would adversely affect the performance of the Employer's health and safety obligations. This is particularly the case where employers face enhanced obligations to protect their workers and to provide a safe and healthy workplace through both strengthening of occupational and health safety legislation and criminalization of failures to do so. There is no suggestion in this case that the Employer was motivated by anything other than protecting the health and safety of the workplace. It is clear that if post-incident testing was effectively being used to evade the prohibitions on random testing, the treatment of positive results from that testing might be viewed differently. But that is not the case here. Public policy is strongly on the side of the Employer in cases such as this, where it would not be if there were in fact tainted motives in the requirement to test.

On the one hand, the use of improper tests after the fact gives an employer *carte blanche* to just go ahead and test whenever it wants without concern for repercussions. That is unacceptable.

On the other hand, when there is clearly no improper motive in testing, and the test is positive resulting in a potential safety concern, is there a way to balance the concerns of invasion of privacy and safety issues. For example, does a significant damage award

to the employee who was subjected to the test balance the employer's use of the test to ensure safety?

In the case at hand I conclude not. In reaching that conclusion, I refer to *Vancouver Drydock - McPhillips* at paragraphs 31 to 37:

> Therefore, given the conclusion that the urine test required of the Grievor was not based on reasonable grounds, the final issue is what consequences flow from that finding. That issue has been considered in many authorities and, in some situations, arbitration boards have concluded that for practical reasons or uncertainty about how the testing/ surveillance was conducted and the degree of seriousness of the intrusion, evidence can be admitted and a determination about whether it was properly admissible would be made at the end of the hearing as part of the final decision: *X v Y,* [2002] B.C.C.A.A.A. No. 292 (Taylor); *Vancouver (City),* No. A-060/03 (Sullivan); *Greater Vancouver Regional District,* 57 L.A.C. (4th) 113 (McPhillips); *British Columbia Maritime Employers Association,* [2002] C.L.A.D. No. 310 (Munroe); *Canada Safeway Ltd.*, [1997] B.C.C.A.A.A. No. 708; *Centenary Health Centre,* 77 L.A.C. (4th) 436 (Albertyn); *Crown Packaging Ltd., supra*.
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> In this preliminary matter, there is no disagreement about how the tests were done and so the only issue is the impact of the finding that the testing was unreasonable. The law generally is that if a drug test (or video surveillance) is found to be unreasonable, whether before or after that evidence has been reviewed by an arbitration board, the evidence will not be admissible in the proceedings. As Arbitrator Alcock stated in *Rio Tinto, supra,* "if the tests are null and void, so are the results" (para. 300).
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> In *Ebco Metal Finishing Ltd., supra,* Arbitrator Blasina dealt with the admissibility of inappropriately obtained video surveillance evidence. He stated, at para. 42:
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> > 42 Pursuant to the *PIPA,* all persons in British Columbia, including of course all employees in British Columbia, have an expectation of privacy and an entitlement to privacy, albeit not an expectation or an entitlement which is absolute. It is clear though that an infringement of privacy, done without the consent of the individual, is governed by a standard of reasonableness. Furthermore, the arbitral background in this province provides in effect a reasonable cause requirement to justify surveillance. Were surveillance evidence admissible whenever it had probative value, or to express it differently, were surveillance evidence admissible because it had probative value, the *PIPA* would have no meaning or purpose at the workplace, and the required reasonable cause justification would be nullified. It is the circumstances preceding and at the time of the decision was taken which pertain to the application of the *PIPA*, and to the question of reasonable cause to initiate surveillance. The contents of the videotape may confirm that the earlier decision to conduct surveillance was well-founded but the contents did not exist at the time the decision was taken, and therefore cannot establish the reasonableness of the decision. The contents are relative to the merits, which must be determined on the basis of the properly admitted evidence.

In *Ainsworth Lumber,* [2005] B.C.C.A.A.A. No. 73, Arbitrator Hall, after having reviewed the evidence, stated at paras 43 – 44:

> 43… Regardless of what the surveillance ultimately demonstrated, it cannot be used to retroactively justify a surreptitious initiative that was flawed from the outset.
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> 44 The Union's objection is upheld. For reasons expressed in this award, I find it was not reasonable in all circumstances for the Employer to place the Grievor under surveillance. It follows that none of the evidence obtained through the private investigation firm should be admitted in support of the Employer's decision to terminate his employment.

Finally in that regard, in the first *Vancouver Shipyard Co., supra,* case in which Arbitrator Hope dealt with the individual grievance (No. A213/05), he stated, at para. 42, that because "the Employer failed to establish a reasonable basis for requiring a drug test, the events that followed cannot be relied on …"

Although it is clear that arbitration boards have discretion with respect to evidentiary matters, where a breach of privacy has occurred such as in the situation here, it would be unacceptable to tacitly condone unjustified testing by allowing into evidence the results of that testing.

For all of the above reasons, the results of the urine test given to the Grievor on March 13, 2017 are inadmissible in this proceeding.

In *Vancouver Drydock - McPhillips*, the arbitrator was faced with the same circumstances as the case at hand. He analyzed arbitral law in British Columbia to reach his conclusions.

It is important to create consistency in the law so that parties can plan their approach to issues without the concern of a subsequent arbitrator departing from a previous case. Departing from previous cases would create arbitrator shopping, which is not conducive to a long term stable labour relations environment.

I see no reason to depart from the analysis in *Vancouver Drydock - McPhillips*. The results of the test are inadmissible, and evidence that is a result of the improper test is inadmissible. I am not privy to all the evidence that the Employer intended to rely on. I am unaware of whether there is any evidence that does not flow directly from the improper test. That is an issue that may need to be discussed between the parties.

"Mark J. Brown"

Dated this 4th day of August, 2020.