Drug testing in the mining sector

Reconciling human rights and heavy equipment

by Martin Denyes

Let's face it. Many mining industry workers match a profile for drug use and abuse — young, highly paid and far from home. Their jobs, however, require clear minds and a dedication to safety. Many companies, executives and managers[1] consider pre-employment drug testing an effective tool for increasing workplace safety.

Employers have received little support over the years from legislators and adjudicators in metropolitan centres like Ottawa, Toronto and Vancouver. In Canada, pre-employment and random drug tests have been viewed as efforts to weed out drug-addicted applicants and employees. Addiction has been treated, first and foremost, as a disability rather than a safety risk. Leading cases, such as the 2000 Ontario Court of Appeal decision in *Entrop v. Imperial Oil Ltd.,* have reached these conclusions and have further accepted that drug testing provides no evidence of impairment, because drug metabolites linger in the body long after impairment ends.

The recent Alberta Court of Appeal decision in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada)* seems to move in a different direction, recognizing real-world risks in the resource sector. A closer review, however, confirms that neither the law, nor the decision, is straightforward and simple just yet.

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Key facts

John Chiasson applied for a job with KBR, working on a Syncrude oil sands construction project. He was offered a job, conditional on a clean drug test. He tested positive for marijuana use and confirmed he was a casual user who had smoked marijuana five days before the test. He had started the job and his employment was then terminated. He filed a human rights complaint. A human rights panel concluded that, though drug testing discriminated, *per se,* against addicts, Chiasson was not an addict and therefore not protected. The decision was overturned by the Alberta Court of Queen's Bench. On December 28, 2007, the Court of Appeal issued its decision and, from the outset, made it clear it understood the dilemma facing employers on big projects. On page 1 of the decision, the Court described the situation:

"The project was massive. Several thousand workers worked at the site … The work site was a literal anthill of activity … Some of the largest industrial equipment on the planet was in use and the accident risk was high. Consequences of accidents could impact workers, the plant and the environment."

The Court of Appeal went on to reject the Queen's Bench decision and concluded that Chiasson had not faced unlawful discrimination because he was not disabled.

Exercise caution

Employers should be cautious in relying too heavily on KBR:

1. Complainants can argue that even if the casual user is not facing discrimination, testing nonetheless discriminates against addicts. This argument was raised in KBR. The Court of Appeal dismissed it because it had not been raised in pleadings or evidence and not because there was no merit to the argument.
2. Future complainants may be more inclined to claim they are addicts.
3. Privacy laws may rescue casual users. Drug use is, presumably, "personal information." Drug testing is "collection" of such information. If a job applicant testifies that he smoked marijuana five days before a drug test, an adjudicator may well decide that "collection" and use of such information was an unjustified invasion of privacy that does not prove impairment.

One thing is certain — barring a further appeal, there is no risk that Chiasson will be involved in a workplace accident at KBR because of casual drug use. Employers should be cautious, however, about reading anything more into the decision. Pre-employment drug testing will continue to be a contentious legal issue in Canada. CIM

[1] The reference to "companies, executives and managers" is important. Human rights complaints typically name an employer, then go on to name as a party anyone else the complainant believes played a role in discriminating against them. If a project manager requires subcontractors to drug test candidates, the project manager may be named as a party. Executives, supervisors and human resource managers who introduce or administer policies are also typically named as parties.

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