

## DRUG AND ALCOHOL TESTING

Drug and alcohol testing is limited, save for the rarest of exceptions in safety-sensitive industries, to three specific instances, namely:

- (i) there is reasonable cause to believe that the employee is impaired while on duty,
- (ii) the employee has been directly involved in a workplace accident or significant incident, or
- (iii) the employee is returning to work after treatment for substance abuse.

“A safety-sensitive job is one in which incapacity due to drug or alcohol impairment could result in **direct and significant risk of injury to the employee, others or the environment.**

Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace and an employee’s direct involvement in a high risk operation.”

In determining when a decision to require a post incident testing is appropriate, an arbitrator will review:

1. The threshold level the incident requires to justify testing;
2. The degree of inquiry necessary before the decision to test is made;
3. The necessary link between the incident and the employee's situation to justify testing.

*(Canadian Energy Workers' Association v. ATCO Electric Ltd., 2018 ABQB 258)*

- Employers will argue Post Incidence Testing is reasonable to rule out operator error as a cause
- Unions argue that Post Incidence Testing is only reasonable when all other causes have been ruled out
- Unions have a right to be involved in accident investigations
- Need to ensure investigations follow a method to identify “root cause”

<b>Causes of any incident can be grouped into 5 categories:</b>	
<b>1. Material</b> (the equipment and materials used.)	<ol style="list-style-type: none"> <li>a. Was there equipment failure? If yes, what caused it?</li> <li>b. Was the machinery poorly designed?</li> <li>c. Were hazardous products involved? Were they clearly identified?</li> <li>d. Was a less hazardous alternative product available?</li> <li>e. Was the raw material substandard in some way?</li> </ol>

	<ul style="list-style-type: none"> <li>f. Should personal protective equipment (PPE) have been used? Was the PPE used? Were users of PPE properly trained?</li> <li>g. If a hazard was allowed to exist, why?</li> </ul>
<b>2. Work Environment</b>	<ul style="list-style-type: none"> <li>a. What were the weather conditions?</li> <li>b. Was poor housekeeping a problem?</li> <li>c. Was it too hot/too cold?</li> <li>d. Was noise a problem?</li> <li>e. Was there adequate light?</li> <li>f. Were toxic or hazardous gases, dusts, or fumes present?</li> <li>g. If a hazard was allowed to exist, why?</li> </ul>
<b>3. Personnel</b> (physical and mental condition of those directly involved and the psychosocial environment they were working within.)	<ul style="list-style-type: none"> <li>a. The purpose is not to establish blame.</li> <li>b. Did the worker follow the safe operating procedures?</li> <li>c. Were workers experienced in the work being done?</li> <li>d. Had they been adequately educated and trained?</li> <li>e. Can they physically do the work?</li> <li>f. Were they tired?</li> <li>g. Was fatigue due to shiftwork an issue?</li> <li>h. Were they under stress?</li> <li>i. Were they suffering from an illness?</li> <li>j. Was there pressure to complete tasks under a deadline, or to bypass safety procedures?</li> <li>k. If an unsafe situation was allowed to exist, why?</li> </ul>
<b>4. Management</b> (Role of managerial staff and role/presence of management systems)	<ul style="list-style-type: none"> <li>a. Were safety rules or safe work procedures communicated to and understood by all employees?</li> <li>b. Were written procedures and orientation available?</li> <li>c. Were safe work procedures being enforced?</li> <li>d. What was the supervision like?</li> <li>e. Were workers educated and trained to do the work?</li> <li>f. Had hazards and risks been previously identified and assessed?</li> </ul>

	<ul style="list-style-type: none"> <li>g. Had procedures been developed to eliminate the hazards or control the risks?</li> <li>h. Were unsafe conditions corrected?</li> <li>i. Was regular maintenance of equipment carried out?</li> <li>j. Were regular safety inspections carried out?</li> <li>k. Had the condition or concern been reported beforehand?</li> <li>l. Was action taken?</li> </ul>
<p><b>5. Task</b> (the work procedure being used at the time of the incident.)</p>	<ul style="list-style-type: none"> <li>a. Was a safe work procedure used?</li> <li>b. Had conditions changed to make the normal procedure unsafe?</li> <li>c. Were appropriate tools and materials available?</li> <li>d. Were they used?</li> <li>e. Were safety devices working properly?</li> <li>f. Was lockout used when necessary?</li> <li>g. For all of the above: If not, why not?</li> </ul>

- A reasonable cause test is a request for an at worksite test in a safety-sensitive worksite to determine whether an employee is impaired
- It is a confirmatory test: a request must be justified based on objective factors that suggest impairment and which are not explained by other reasons
- The goal is to remove immediate safety risks from the worksite by confirming impairment
- Setting out a list of signs or symptoms of impairment is challenging as drugs affect people in different ways and observations can be subjective.
- The best evidence of symptoms is from someone who regularly works with a member/casual and can notice a change or what is different from normal.
- To provide some guidance, the most common symptoms from the Mayo Clinic are set out at: [www.mayoclinic.org](http://www.mayoclinic.org)
  - ✓ A sense of euphoria or feeling "high"
  - ✓ Heightened visual, auditory and taste perception
  - ✓ Increased blood pressure and heart rate
  - ✓ Red eyes
  - ✓ Dry mouth
  - ✓ Decreased coordination

- ✓ Difficulty concentrating or remembering
- ✓ Increased appetite
- ✓ Slowed reaction time
- ✓ Paranoid thinking
- ✓ Feeling of exhilaration and excess confidence
- ✓ Increased alertness
- ✓ Increased energy and restlessness
- ✓ Behavior changes or aggression
- ✓ Rapid or rambling speech
- ✓ Dilated pupils
- ✓ Delusions and hallucinations
- ✓ Irritability or changes in mood
- ✓ Changes in heart rate and blood pressure
- ✓ Nausea or vomiting with weight loss
- ✓ Impaired judgment
- ✓ Nasal congestion and damage to the mucous membrane of the nose (if snorting drugs)
- ✓ Insomnia
- ✓ Paranoia
- ✓ Depression as the drug wears off
- ✓ Euphoria or feeling "high"
- ✓ Reduced sense of pain
- ✓ Drowsiness or sedation
- ✓ Slurred speech
- ✓ Problems with attention and memory
- ✓ Constricted pupils
- ✓ Lack of awareness or inattention to surrounding people and things
- ✓ Problems with coordination
- ✓ Depression
- ✓ Confusion
- ✓ Sweaty, clammy skin
- ✓ Constipation
- ✓ Runny nose or nose sores (if snorting drugs)
- ✓ Needle marks (if injecting drugs)

- Most arbitrators find that the possession of drugs and drug paraphernalia at the worksite gives reasonable cause to test
- There may be an exception if the items are in a vehicle and there is evidence the member is not using at work (eg. it is someone else's)
- Employers do not have the right to conduct searches for drugs on workers or their lockers or vehicles based on mere suspicion
- The smell of drugs in the workplace is not sufficient to require an employee to undergo a drug test if there is no direct observation of consumption by the member
- The smell of alcohol on an individual's breath is sufficient for an alcohol test but is not sufficient grounds on its own to require a drug test

- When an employee tests positive on a reasonable cause or post incident test, they often have an addiction
- A drug policy that automatically terminates employees who use drugs, *prima facie* discriminates against individuals burdened by drug dependence
- This triggers the duty to accommodate which requires the employer to allow the employee to return to work
- It is not an undue hardship for an employer to allow an addicted employee in treatment to return to work
- Treatment of addiction requires abstinence
- Following detox, people with addictions need support to stay drug or alcohol free
- A substance abuse professional (SAP) will likely impose random testing as part of a treatment plan
- Reasonable for employers to require a RTW agreement signed by union and employee
- Should have strict consequences for failure to follow treatment plan
- But also recognize that lapses occur
- Employee can lapse, but still be recovering if SAP is satisfied employee is on treatment plan
- Agreements should not exceed 2 years
- An employer should not be doing the testing or setting the testing parameters
- Employers are entitled to know:
  1. employee has an addiction which must be accommodated;
  2. employee is following a treatment plan by a SAP which includes monitoring;  
and
  3. If the employee stops following the treatment plan
- A high value would be consistent with recent use, such as within the last 2 days.
- More specific details from the individual regarding how long he had used marijuana, how much he normally used, how much he had used recently, etc. would aid in the further interpretation of the results

*(Fording Coal v. USW 7884, [2000] B.C.C.A.A.A. No. 393, para 77)*

- Decongestants (ephedrine), certain anti-depressants and sleep medications have been implicated in causing false positives for amphetamines.

- The body metabolizes codeine to morphine and both substances may be found upon testing Hemp based body products can cause false positives, as can anti-inflammatory and acid reflux medications.
- New variants of synthetic drugs (e.g. meth) can trigger strip test but are not confirmed by GC-MS tests if the metabolites are different.
- Second hand marijuana smoke is almost never sufficient to create a positive test
- Other medical conditions can create false positives
- Errors in administering the test can also lead to false positives (mixed up samples, etc.)
- THC is absorbed in the blood and remains active for 3-6 hours. It then is metabolized into TCH-acid, an inactive metabolite that does not affect brain function like THC, and stored in fatty tissues. THC-acid can remain in the system for days, weeks or longer depending on the user and pattern of use.
- Frequent users can develop behavioural tolerance to THC impairment.
- Testing metabolite presence has no correlation to impairment.
- Threshold levels do not denote impairment.
- Development of buccal swab and blood testing.
- “However, the difficulty is that urinalysis, the testing method adopted by Teck Coal and most other employers, does not test for the active components of these illegal drugs. Instead, it tests for their inactive metabolites. **The presence of these metabolites only establishes prior use, not present impairment.** Further, these metabolites can continue to be found in urine well after the psychoactive, acute elements of the drug have disappeared from the employee's system. Thus, **an employee can test positive for marijuana, cannabis use on a urine test and not be under its influence or impaired by it at all.**” Arbitrator Kinzie, *Teck Coal Ltd. and USW, Local 7884, Re* (2018), 134 C.L.A.S. 126, para. 376

***Tolko Industries Ltd. and USW, Local 1-425 (Lipke), Re*, [2017] B.C.W.L.D. 7203**

- ✓ Grievor dismissed after breaching drug and alcohol policy
- ✓ Tested positive for marijuana after workplace accident
- ✓ Held: not sufficient evidence before arbitrator to link positive test for marijuana metabolites with working under the influence
- ✓ Grievor reinstated

**Marijuana – casual user (once/ week)**

**1-7 days**

Marijuana – chronic user (daily)	1-2 months
Cocaine	2-4 days
PCP	8-14 days
Opiates (heroin)	2-3 days
Methamphetamines	2 days