High #4

BEFORE THEODORE K. HIGH, IMPARTIAL ARBITRATOR

In the Matter of Arbitration Between

Employer

and

Employee, Grievant

This case came on for hearing before Theodore K. High, Impartial Arbitrator, on August 1-1, 2000 at City A, State A.

STATEMENT OF THE CASE

The Grievant was employed by the Employer in its Store No. 143 in City B, State A as a Team Leader Trainee at the time of her discharge. On November 3, 1999, the Grievant was working in the back room of her department, straightening the area, lifting boxes of damaged merchandise and pushing carts. While doing this work, the Grievant hurt her back. She continued to work for the balance of her shift and at the end of it told her leader that her back hurt and that she was going to get some rest. She did not indicate that she was going to seek medical treatment and the Employer, therefore, did not send her for any treatment or evaluation of her injury.

The following day she was not scheduled to work, but she did seek medical attention on her own for back pain. She went to a hospital emergency room and was diagnosed as having a lumbar strain. Medications were prescribed and she was given instructions not to work. Thereafter, she called off work for the shifts over the following weekend.

On Monday, November 8, the Grievant went to her store and dropped off a note from her doctor indicating that she could not work. While there she filled out an accident report. In view of her on-the-job injury requiring medical treatment, the Grievant was sent to a HEALTH CLINIC for a post-accident drug screen, pursuant to the Employer's Controlled Substances Testing Policy. At the Clinic, the Grievant gave a urine sample, which was thereafter sent to a laboratory operated by DIAGNOSTIC COMPANY in City C, Michigan. The sample was tested in the laboratory there and the results were sent to a medical doctor in City B, Dr. Person 1, who serves as the Employer's Medical Review Officer, for purposes of reviewing positive drug tests in State A. After reviewing the test results, Dr. Person 1 made several attempts to reach the Grievant, which were unsuccessful. The Store Director finally arranged for the Grievant to be present at the store at a prearranged time and telephone contact was finally made. The Grievant told Dr. Person 1 there was "no way" that the positive test results could be correct. The doctor advised her that if she disputed the results of the lab's test, she could have the specimen retested at a different lab. This the Grievant declined to do. After the telephone conversation was finished, the Store Director of Store No. 143 talked with her and during that conversation, the Grievant again denied using illegal drugs and told the Store Director that the positive test had to be the result of tampering. The Director also told the Grievant that she could have the specimen retested at another lab, and again the Grievant refused.

Subsequently, the Grievant went to the same clinic and gave a different sample which tested negative for marijuana. The Grievant was suspended, pending an investigation on November 22, 1999. On December 3, 1999, the Grievant was discharged, pursuant to the Employer's Controlled Substances Testing Policy. The Grievant has appealed her discharge

through the Employer Termination Appeal Procedure and the undersigned was selected as the Arbitrator. The parties have stipulated that the case is properly before the Arbitrator.

ISSUE

The issue for disposition is whether the Grievant was discharged for just-cause and, if not, what should be the remedy?

DISCUSSION

The Employer's position is that the Grievant was injured while working on the job and it points to evidence which indicates that in some cases the lifting of some boxes which, according to her testimony, she did not in accordance with the lifting instructions for boxes, which require bending at the knees and lifting with the back straight. it therefore says that when the Grievant was injured, it was a case of doing, some of which was done without using the proper lifting instructions. This is of significance because of the "safety net" for cases in which an accident occurs for which the employee has no fault but in which a drug screen is done and the employee is found to have metabolites of drugs in his or her system does not invoke the policy of discharge. In this case, as we have seen, the drug screen indicated the presence of marijuana metabolites in the Grievant's urine above the cut off level. Under the terms of the policy, the Employer contends that the Grievant was properly discharged.

The Employer's position is that: (a) it has a reasonable drug testing policy that must be enforced; (b) the Grievant was in an accident, that she tested positive for marijuana in violation of the Employer policy and that the change of custody of her urine specimen was intact; (c) before discharging the Grievant, the Employer conducted a fair and reasonable review; and, (d) discharge is the appropriate penalty in the case.

The Grievant's position is: (1) the Employer lacks just cause for discharging an employee where the employee suffers an injury which is not her fault and the Employer fails to apply a safety net provision, which applies to injuries where the injury was not the employee's fault; (2) there is no correlation between the drug test and impairment, there is no evidence that drug use caused the accident, and therefore there was not just cause for termination; (3) the Employer policy of testing anyone having an accident requiring medical attention is unreasonable; (4) questions regarding the validity of the drug test demonstrate that the tests could not be relied upon to discharge the Grievant.

The Employer Control Substances Testing Policy provides, in pertinent part, as follows:

> "**Purpose**: to promote a safe, healthful and efficient working environment; to safeguard Employer people, guests and vendors; and to protect Employer property, equipment, assets and operations from the dangers of persons who illegally use controlled substances.
>
> **Policy**: It is Employer, Inc.'s policy to take efforts to provide and maintain a drug-free workplace.
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> All . . . Employer persons may not report for work or to any testing required by this policy with the presence of controlled substances in their bodies.
>
> ... Employer persons are subject to testing for controlled substances as provided in this policy....
>
> "Controlled substances" means marijuana, cocaine, opiates or amphetamines, or any of their respective metabolites, at or above laboratory cut-off levels for detection . . . .
>
> **Testing requirements**:
>
> All Employer people whose conduct is or may be a contributing cause to an accident will be subject to post-accident controlled substances testing.
>
> "Accident" means any event or series of related events that results in unintended personal injury . . . and:
> a. occurs at any Employer location (store . . .);
> b. . . . ; Or

c. involves one or more Employer person engaged in conducting Employer business or acting in the course of employment.

"Personal Injury" means death or bodily injury requiring or appearing to require professional medical evaluation or treatment .. .

The Human resources Department will arrange for collection site, laboratory and medical review officer (MRO) services .. .

Consequences of a Positive Test for Controlled Substances

Employer people who test positive in any . . . post-accident testing will be discharged.

"Positive test", "testing positive" or "test(s) positive" means a determination by Employer's medical review officer that a urine specimen, which has been tested pursuant to this policy, has the presence of controlled substances above the designated cut-off levels without legitimate medical justification.

The Employer argues that when an accident occurs on the job it becomes a triggering event for a drug test because it is an incident in the workplace in which an employee is injured and safety is called into question. The Employer concedes that a urinalysis does not test any impairment on the part of the employee, but argues that an employee taking illegal drugs even if not under the influence of that drug could, nevertheless, be "hung-over" or effected latently by the use of the drugs. It says that the Grievant was involved in an accident, was tested and tested positively for marijuana, which was a violation of the Employer policy and that the chain of custody for the urine specimen was intact. The Employer argues that the discharge is the appropriate remedy in the case because the drug testing policy specifically provides that all employees involved in accidents will be sent for drug tests and that those who test positive will be discharged. It presented evidence that the Employer has consistently enforced the policy in that manner. The Employer further argues that the Arbitrator's authority is to follow and apply the policy of the Employer. It cites the provision in the Termination and Appeal Procedure under the heading "Arbitrator's Authority," which provides as follows:

> "In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures . . . The arbitrator shall have no authority, however to add to, detract from, change, amend or modify any. . . policy or procedures in any respect. . . . **
>
> If the arbitrator finds that the team member violated any lawful Employer rule, policy or procedure established by the Employer has just cause for that determination, and finds that the team member was terminated for violation, the team member's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action."

The Grievant relies upon the so-called "safety net" in the Controlled Substances Testing Policy. It refers to the portion of the Controlled Substances Testing Policy by which an employee who is found not to have been the cause or have contributed to an accident on the job, is not subject to the mandatory discharge. This refers to the provision in the drug testing policy under "Consequences of a Positive Test for Controlled Substances." The third paragraph provides for a requirement that after an accident, the Employer employee be sent for testing. This is done according to that provision before any determination of culpability is to be made. It goes on to provide, "nevertheless, the Employer person must submit to the drug testing. in the event that such a person tests positive and it is subsequently determined that he or she had no blame or fault whatsoever for the accident, the Employer person will be reinstated only if he/she agrees to the following conditions: . . .." The Grievant argues that she was injured by simply doing her job and there is no evidence that she intentionally injured herself. Thus, she says, there is no blame to be attached to her for her injuries. Since, she argues, there was no "blame or fault" on her part for the injury, she must be reinstated pursuant to the policy. The Grievant testified, however, that some of the lifting she did on the day in question was not done in accordance with the lifting requirements. The Employer handbook, which provides for lifting anything between 20 and 50 pounds, the employee should bend the knees and lift with the back straight. When asked at the

hearing whether she followed the lifting practices during the 30 to 60 minutes she testified she was lifting 50 to 100 boxes, she was asked,

Q "Are you saying every time that you lifted you bent your knees and picked items up?

A Yes.

Q Every time?

A While I was at work?

Q Yes.

A Not every time."

It is not possible to determine what, if any, one specific box was the cause of the Grievant's injury since the difficulty with her back did not show up until the end of the day and only got worse in succeeding days.

The Employer argues that this, then, brings the Grievant within the-provision of the testing requirements as follows: "all Employer people whose conduct is or may be a contributing cause to an accident will be subject to post-accident controlled substances testing." (Emphasis supplied). The Employer says that the fact that the Grievant admitted that she did not follow the correct lifting procedures brings her conduct within the "may be a contributing cause" language of the testing procedure, which, when an employee is tested positive above the minimum levels of marijuana metabolites, is to be discharged under the mandatory language of the policy.

The Grievant did testify that she was lifting a box of broken dishes when she felt a pull in her back, but it is not possible from the evidence to determine what, if any, effect lifting other items may have had on her injury. The Grievant testified that when she lifted the box in question, she did so by bending at the knees and putting her arms forward picking up the box and bringing

it as close as possible to her mid-section and lifting. She does not indicate whether she did so with her back straight. She points out that the Safety Team Accident Review Form has a line which is marked "was the accident due to any of the following: (check all that apply)". She points out that the only line checked on the form is "cluttered work environment." The line for misconduct or failure to follow training is not checked.

The Grievant argues that there is no correlation between drug use and impairment. Indeed, there was no evidence offered that the Grievant was impaired at the time of the accident. The drug testing policy, of course, does not require that there be a determination of impairment for it to come into operation. As we have seen, the requirement only is that the employee who is injured might have caused or have contributed to the cause of the accident and, therefore, the test takes place. The purpose of the test is only to determine the presence of metabolites in the system of the employee and this is the only event, not impairment, which triggers the discharge provision of the policy.

The Grievant's third defense is that she is being penalized under an Employer policy requiring anyone having an accident on the job and requiring medical attention to be tested is unreasonable. The first argument is that the work rule is faulty in that merely being engaged in an accident is insufficient basis for suspicion. There is the additional argument that the effect of the rule is to regulate conduct occurring when the employee is off duty. Thus, an employee who while off duty smokes marijuana, then has an accident on duty, and is tested, not for impairment, but for the presence of metabolites above a certain cut off level is in effect a regulation of that person's off duty conduct and is not in any way associated with an appropriate function of regulation of the employee's on duty conduct. The Grievant's second argument is that automatic testing of an employee who is involved in an on-the-job injury is unreasonable simply because it

requires medical attention. The policy does not require any suspicion of any drug use before the testing. The third branch of the Grievant's argument that the Employer's policy is unreasonable is that she alleges that it is an unreasonable violation of her personal privacy. Thus, taking her urine without any suspicion that she may have been under the influence of drugs is very invasive of her personal property and should not be a basis for her discharge.

The Grievant also argues that the drug test in question raises sufficient questions as to demonstrate that it should not be relied upon for her discharge. It is for this argument the Grievant argues that she consistently denied use of marijuana and upon being informed of the positive test took another test which came out to be negative. This, of course, was done several days after the testing of her original specimen. The Employer points out the metabolites found in the original specimen might well have passed through her system by the time that test was taken. The Grievant, as we have seen, did refuse to have a second test at a different lab performed on the original specimen.

The Grievant argues that there has been a broken chain of custody with respect to the original specimen because after she gave the sample, she left the room and the Grievant had her back to the sample for a period of time. She argues that this meant that the chain of custody was not satisfied since the specimen was out of her sight before the specimen was labeled and initialed. In addition, the initialing of the seal, does not bare her initials, causing additional doubt as to the validity of the test. Thus, she argues, the validity of the test is in doubt, giving further reason to find that her discharge was inappropriate.

This is not a case arising out of a Collective Bargaining Agreement between the Employer and a union. Instead, it arises under the Employer's unilaterally promulgated Termination and Appeal Procedure. That procedure, under the paragraph headed "Arbitrator's

Authority," while limiting the role of the Arbitrator in deciding claims, specifically gives the Arbitrator the authority to determine whether the Employer had just cause for termination. It further provides that in reaching-a decision, the Arbitrator "shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by applicable federal, state or local law." The Employer has based its use of the policy on post-accident testing, on its assertion that it is lawful for a private employer like the Employer to have such a policy, although it provides no authority for this assertion of lawfulness. It also asserts that it is a common form of drug testing found in a multitude of work places throughout the country. This also is argued without the benefit of any evidence on the point. As noted the Employer agrees that the testing in question will not determine impairment at the time of the accident. In this connection, the fact that the test took place several days after the accident is not the Employer's fault, since it immediately arranged for the testing to be done upon learning that an accident had taken place which caused the Grievant's injuries. The Employer's argues that if an employee is not impaired at the time of the accident, but has metabolites in his or her system indicating drug use, that person might be "hung over" or otherwise latently affected by its use. This also was asserted without any evidence in the record to support it. While it is certainly true that safety issues in the work place are a legitimate Employer concern, it is not clear from the evidence how the automatic testing after an accident relates to the vindication of that interest on the part of the Employer. As the Grievant points out, a urinalysis is a significant invasion of a person's privacy, which is the reason why arbitrators and courts have rejected random drug testing in the absence of extraordinary circumstances. The Employer has not shown any individualized suspicion of the Grievant's being under the influence of drugs at the time of the accident and it is clear that they

had no reason to think, prior to receiving the results of the test, that the Grievant had the presence of marijuana metabolites in her system.

Accordingly, I am unable to find on the record before me a nexus having been established between the policy requiring automatic testing for drugs upon a person having an accident which causes an injury and a legitimate Employer interest which would justify causing such an invasion of the Grievant's privacy by requiring testing. Therefore, I must find that on the facts of this case the application of the substance abuse policy to the Grievant is unreasonable and that her discharge was, therefore, without just cause. It follows that the Grievance should be granted and that the Grievant should be reinstated with full back pay and restoration of any benefits.

AWARD

The Grievance is granted. In view of the evidence at the hearing that, as of that time, the Grievant was unable to return to work, the award of reinstatement shall begin at such time as the Grievant presents evidence satisfactory to the Employer that she is physically able to perform her job duties. The award of back pay shall begin as of the time of reinstatement or such earlier time as she was physically able to perform her job duties. The Employer may rely on its own physician to determine the Grievant's physical condition and, in the event that the physician's medical opinion differs from that of the Grievant's physician, the two physicians shall appoint a third physician to examine Grievant. The third physician's opinion shall be controlling as to Grievant's ability to return to work. Back pay may be reduced by the amount of any interim earnings and unemployment compensation benefits not restored by the Grievant to the appropriate governmental agency.

Under the terms of the Termination and Appeal Procedure, jurisdiction is retained for 14 days from receipt of this Award to request a monetary award in lieu of reinstatement.

Theodore K. High, Impartial

Arbitrator

Dated: November 12, 2000