

## CHAPTER 9

# DRUG-TESTING DISPUTES

## INTRODUCTION

TIA SCHNEIDER DENENBERG\*

It is easy to forget that just a few years ago the most technical jargon likely to be encountered in an arbitration award was a term such as “overtime equalization” or “job classification.” Today, however, one finds liberally sprinkled through the pages of opinions a wholly new argot: nanograms, radioimmunoassay, gas chromatography, and pharmacokinetics are rapidly becoming phrases as familiar as “just cause.” The advent of this arcane vocabulary signifies that arbitration hearings are often science courts in which the adversary system confronts current issues in clinical chemistry. To help us examine the contours of the debate in a less highly charged atmosphere, we have invited a number of persons with experience in the scientific and technical issues that commonly arise in drug-testing disputes.

Let me explain the structure of our program. It is a three-phase event. The first phase is this plenary session, which features the speakers who are with me on the podium now. The second phase consists of a trio of concurrent breakout sessions. These “intimate” groups of 200 are designed for intensive exploration of the issues raised in the plenary presentations. To assist in the breakout sessions, we have brought in reinforcements; each breakout is fully staffed with experts in the subjects under review. They will act as resources for the discussion. The third phase is a field visit to a forensic laboratory, where we will observe the technology and procedures that are at the heart of drug-testing disputes. I am gratified to note that more than 60 persons have already signed up for the bus trip to the laboratory, which means that it ranks second in popularity only to Tijuana among the optional excursions for this annual meeting.

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The speakers for the plenary sessions are Kurt M. Dubowski, Robert M. Tobias, and Rick R. Doering. Kurt M. Dubowski<sup>1</sup> is one of the nation's foremost experts in the laboratory technology of drug testing. He is a Distinguished Professor of Medicine at the University of Oklahoma Health Sciences Center, and the Director of Toxicology Laboratories there. He has been the president of the academy in his field—the American Academy of Forensic Sciences. He also serves as a consultant to all three branches of the federal government and frequently testifies as an expert witness in major alcohol and drug cases. I am reliably informed that no party whose witness he has been has ever lost a case—an enviable record, to be sure. Two of his assignments were acquired just yesterday: advising the Federal Aviation Administration about on-site breath-alcohol testing of commercial transport flight deck crews and helping the National Institute on Drug Abuse update its Laboratory Certification Program and its Laboratory Inspector Training Program. Among Dr. Dubowski's published work are two articles frequently consulted by arbitrators: "Drug Use Testing: Scientific Perspectives,"<sup>2</sup> and "The Role of the Scientist in Litigation Involving Drug-Use Testing."<sup>3</sup> Robert M. Tobias is the National President of the National Treasury Employees Union in Washington, D.C. Under his leadership, the union has played a prominent role in litigation related to workplace drug testing. Rick R. Doering is an Industrial Relations Specialist with Pacific Gas and Electric Company, headquartered in San Francisco, whose facilities include the Diablo Canyon Nuclear Power Plant. He has been in charge of preparing his company's plan for implementing federally mandated testing of employees.

Serving as resource persons for the breakout sessions are the following: Mark Bigelow, Counsel to the Association of Flight Attendants, Rosemont, Illinois; Robert A. Edwards, Chief Counsel, Labor and Employment Law, Westinghouse Electric Corporation, Pittsburgh, Pennsylvania; Lloyd C. Loomis, Senior Corporate Counsel for Employee Relations, Atlantic-Richfield Company, Los Angeles, California; Dennis P. Ritz, Chief Toxicologist of POISONLAB, Inc., San Diego, California (the host for our laboratory visit); Kenneth L. Rogers, Secretary of the

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<sup>1</sup>Dr. Dubowski did not submit a paper for this volume.

<sup>2</sup>11 *Nova L. Rev.* 415 (1987).

<sup>3</sup>34 *Clinical Chemistry* 788 (1988).

Committee of Adjustment, United Transportation Union, Rocklin, California; and Richard F. Shaw, Chief Toxicologist, Office of the Coroner, San Diego, California. The breakouts are chaired by NAA members Edward A. Pereles and Alan R. Krebs, in addition to myself. We trust that you will derive from the combination of lecture, discussion, and observation useful insights into often troublesome questions.

## I. A UNION VIEWPOINT

ROBERT M. TOBIAS\*

The issue of testing urine for drugs seems to have been with us for many years. We have thought about it, debated it, written articles, and many arbitration decisions have been written. But urinalysis drug testing is actually a rather new issue.

It received real impetus in the spring of 1986 when President Ronald Reagan's Commission on Organized Crime issued a report which stated in part, albeit a very small part of the overall report, that the only way to reduce drugs and drug-related crime in America was to reduce the demand for drugs. The Commission suggested that random urinalysis testing be instituted by both public and private sector employers as a method for decreasing the demand for drugs.

After the report issued, it seemed destined for 15 seconds on the nightly news and then to gather dust alongside the thousands of other "Commission" reports. But President Reagan's public polls found that the fear of drugs was the number one concern of Americans. This fact, coupled with the President's goal of keeping the Senate from becoming Democratic during the 1986 off-year election, led him to give a nationwide televised speech on drugs in which he encouraged random urinalysis testing for all employees.

President Reagan urged employers to step outside their role of instituting programs and policies based on an analysis of need and cost effectiveness and, instead, to become an instrument of public policy as soldiers in the war on drugs. The President believed reducing the demand for drugs was more important

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\*President, National Treasury Employees Union, Washington, D.C. Dr. Kurt M. Dubowski, Distinguished Professor of Medicine at the University of Oklahoma, also participated in the panel discussion.

than an employee's privacy or fourth amendment rights. In addition, he said that he would make the federal work force the model by randomly testing 1.1 million federal employees.

One of the first agencies to implement a testing program was the U.S. Customs Service. The program required testing of all applicants and those receiving promotions in certain "covered" positions—primarily those who carry weapons and interdict drugs. The National Treasury Employees Union (NTEU) filed a lawsuit claiming that the program constituted an unreasonable search in violation of the fourth amendment of the U.S. Constitution.<sup>1</sup>

Last spring the Supreme Court upheld the constitutionality of the U.S. Customs Service program in a 5 to 4 decision.<sup>2</sup> The decision turned on the nature of the duties of the employees subject to the program, and whether the government must prove that it has a real problem with employees using drugs in the workplace, or whether the problem may be presumed.

The majority stated, "The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service."<sup>3</sup> As a result the Court concluded, "It is readily apparent that the government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."<sup>4</sup>

The dissent, written by Justice Antonin Scalia, stated, "The Court's opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing. . . ."<sup>5</sup> Justice Scalia went on to state that a presumed government interest is not sufficient to justify waiving the fourth amendment requirements:

What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned, dispositively absent—is the recitation of *even a single instance* in which any of the speculated horrors actually occurred: an instance, that is, in which

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<sup>1</sup>The discussion of whether a suspicionless urinalysis test violates an employee's fourth amendment right is limited to federal employees. Private sector employees must look to state constitutions and/or state laws which may have language similar to the fourth amendment and/or protected privacy interests, which are inimical to urinalysis testing.

<sup>2</sup>*National Treasury Employees Union v. Von Raab*, 489 U.S. \_\_\_, 4 IER Cases 246 (1989).

<sup>3</sup>*Id.*, 4 IER Cases at 252.

<sup>4</sup>*Id.* at 252-53.

<sup>5</sup>*Id.* at 257.

the cause of bribe-taking, or poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.<sup>6</sup>

Justice Scalia also abhorred making federal employees a “model”:

I think it is obvious that this justification [the elimination of drugs from society] is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.<sup>7</sup>

The job classifications of federal employees who may be randomly tested are still being defined by the courts, but it appears that if you carry a weapon, interdict drugs, have a top secret security clearance, or work in a highly safety-sensitive job, you are validly subject to random urinalysis testing. It has been estimated that 300,000 federal employees may be subject to random urinalysis testing.

Now that the issue of random testing is sorting itself out, the parties are beginning to litigate reasonable suspicion testing. Executive Order 12564 issued by President Reagan on September 15, 1986, allows testing “when there is reasonable suspicion that any employee uses illegal drugs.”

Each agency created its own set of criteria that trigger “reasonable suspicion testing.” Judge Harold Greene recently evaluated the five criteria established by the Department of Health and Human Services in the *National Treasury Employees Union v. Sullivan*.<sup>8</sup>

He began his analysis by stating that to the extent the five criteria referred to off-duty conduct, they may not be used because the government failed to articulate a specific interest “in policing off-duty drug use which has an impact on an employee’s on-duty performance.”<sup>9</sup> Thus, information which comes into the possession of the employer concerning off-duty drug use may not be the basis for reasonable suspicion testing.<sup>10</sup>

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<sup>6</sup>*Id.* at 258.

<sup>7</sup>*Id.* at 259.

<sup>8</sup>CA 90-204 (D.D.C. Mar. 1, 1990).

<sup>9</sup>*Id.*, slip op. at 24.

<sup>10</sup>Private sector arbitrators have used a slightly different analysis to achieve the same result. In *Pacific Motor Trucking*, 86 LA 497 (D’Spain, 1986) and *Chase Bag Co.*, 88 LA 441 (Strasshofer, 1986), arbitrators D’Spain and Strasshofer ordered employees reinstated who had tested positive because a positive test does not show impairment and there was no evidence they were “under the influence” while at work.

With this modification, the court sustained three criteria for allowing reasonable suspicion testing:

1. Observable phenomena, such as direct observation of drug use and/or physical symptoms of being under the influence of a drug.
2. Information provided either by reliable or credible sources or independently corroborated.
3. Newly discovered evidence that an employee has tampered with a previous drug test.<sup>11</sup>

The court disallowed testing on the basis of "a pattern of abnormal conduct or erratic behavior."<sup>12</sup> Judge Greene determined that the criterion was "unduly broad and ambiguous."<sup>13</sup> In addition, the court disallowed testing on the basis of an employee's arrest or conviction on a drug-related offense. Judge Greene found it to be unconstitutional and overly broad. He felt it allowed testing of "any HHS employee who has *ever been* arrested or convicted for a drug-related crime."<sup>14</sup> This criterion, the court said, appears to be "directed more at punishing people for past criminal conduct than at deterring current drug usage."<sup>15</sup>

Although the construct for analysis of urinalysis testing of federal employees is the fourth amendment, arbitrators are reaching the same result using the analysis of "unreasonableness" and "arbitrary and capricious."

For example, *National Treasury Employees Union v. Sullivan* also held that a postaccident testing policy for any accident resulting in as little as \$1,000 damage, when there is no indication that the employee is at fault, and the employee is not in a safety-sensitive position, is too invasive of an employee's privacy and, therefore, violates the fourth amendment. Arbitrator Donald Crane in *Tribune Co.*<sup>16</sup> reached the same result. A policy that requires drug testing of an employee involved in a vehicular accident regardless of fault or degree of damages is "blatantly arbitrary and unreasonable in my opinion." Crane ordered the employee reinstated with full back pay.

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<sup>11</sup>*Supra* note 8, slip op. at 23.

<sup>12</sup>*Id.* at 26.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 29.

<sup>15</sup>*Id.* at 30.

<sup>16</sup>93 LA 201, 202 (Crane, 1989); *see also Pepsi Cola Bottling Co.*, 93 LA 520 (Randall, 1989).

Another example of parallel reasoning occurred when Judge Greene held that the employee may not be required to provide a urine sample under direct visual observation unless there is evidence of an attempt to tamper with the urine sample. Without a compelling government interest, Judge Greene stated, the employee's right to privacy must prevail.<sup>17</sup>

Arbitrator Alan M. Wolk in *Gem Industrial Contractors Co.*,<sup>18</sup> ordered an employee reinstated with full back pay who was unable to urinate in the presence of others. The arbitrator found no evidence that the employee used or abused drugs, the employee offered to submit to a blood test, and psychological testimony supported the employee's contention that he had a phobia—"bashful kidney."

There have been very few arbitration cases in the federal sector concerning drug testing because of the many currently pending lawsuits. But now that the fourth amendment outlines are becoming clearer, many of the federal and private sector issues will be developing along a parallel course:

1. What constitutes reasonable suspicion for a drug test? How much objective evidence of impairment is necessary? What training, if any, must the observer possess to validly conclude the described behavior is sufficient to direct an employee to take a drug test?
2. Is a positive drug test sufficient justification for a discharge, or must there be functional impairment on the job to justify disciplinary action? At least two arbitrators have held that a positive drug test is not enough because the drug test shows only off-duty drug use and not necessarily job impact.<sup>19</sup>
3. Has the "chain of possession" of the urine sample been broken?<sup>20</sup>
4. What is the appropriate cutoff value for determining drugs in a person's system? Arbitrator Bruce Boals in *Young Insulation Group*<sup>21</sup> held that the employer's established cutoff score for marijuana was so low that an employee could test positive for passive inhalation and, therefore, ordered the employee reinstated. The arbitrator pointed out that

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<sup>17</sup>*Supra* note 8, slip op. at 32.

<sup>18</sup>89 LA 1087 (Wolk, 1987).

<sup>19</sup>*Union Oil Co. of Cal.*, 88 LA 91 (Weiss, 1986); *Chase Bag Co.*, *supra* note 10.

<sup>20</sup>*Union Oil Co. of Cal.*, 87 LA 297 (Boner, 1985).

<sup>21</sup>*Young Insulation Group of Memphis*, 90 LA 341 (Boals, 1987).

the employer cutoff score was 10 ng/ml while the nationally established standard in the Department of Health and Human Services was 15 ng/ml.

It is clear that we have kept lawyers, administrative law judges, arbitrators, and courts very busy with the issue of drugs and drug testing. We have also provided grist for law review and journal articles, but the federal sector has done very little about creating and fostering a drug-free workplace which, after all, is the alleged goal of the program.

We are still waiting for a viable employee assistance program, a viable training program to assist supervisors in identifying drug users, and an education program for employees. We are still waiting for a concerted effort to remove the drug of choice from the federal workplace—alcohol.

I am afraid we will not have a real program until the president of the United States depoliticizes urinalysis testing of federal employees. As long as he believes he can score political points by making federal employees a "model," there will be no relevant program to achieve a very laudable goal.

## II. A MANAGEMENT VIEWPOINT

RICK R. DOERING\*

The impact of drug use and abuse on the workplace is not a recent phenomenon. The increase in drug testing to detect use or as a method to deter use is a little more recent. Some employers have embraced testing as the panacea to rid themselves of employees using drugs or to minimize the hiring of users. Others have been dragged into the testing forum by the promulgation of regulations by various federal agencies. Whatever the reason for the implementation of drug testing, the testing procedures, including the collection and analysis of specimens, are ripe for creating arguments in grievance procedures and arbitration.

This paper explores scientific and technical issues in drug-testing disputes with emphasis on issues that have already risen in arbitration cases. An attempt has been made to avoid legal and just cause issues in these disputes, except where they have an

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impact on policy interpretations. The information provided addresses procedural and policy issues that employers, unions, and arbitrators must wrestle with in the testing arena, as well as the impact of federal drug-testing regulations on the gas and electric utility industry.

### **Government Regulations and Contracts**

#### *Interpretation Issues*

Drug testing has been forced on some employers by the promulgation of federal regulations. In the gas and electric utility industry, two regulatory agencies have required testing. The Nuclear Regulatory Commission (NRC) mandates testing for all employees with unescorted access to nuclear power plants,<sup>1</sup> and the Department of Transportation (DOT) requires testing of employees in certain covered classifications with "operating, maintenance, and emergency response functions" on gas pipelines.<sup>2</sup> Both agencies specify five types of testing: pre-employment (including current employees attempting to transfer into covered classifications), reasonable cause, postaccident, random, and postrehabilitation. The drugs tested for are marijuana, phencyclidine (PCP), cocaine, opiates, and amphetamines. In addition, the NRC requires alcohol testing. Those in the industry believe that it is only a matter of time before the DOT includes alcohol in its testing menu.

The ability to implement these regulations requires first the ability to interpret them. In some cases that is a challenge for both employers and unions, and perhaps ultimately, arbitrators. During negotiations on the implementation policies, there are invariably disagreements over what certain sections of the regulations mean or require. The disagreements may be significant enough to prevent settlement and/or end up before an arbitrator for resolution. The seemingly obvious answer of asking the federal agency for an interpretation is not always helpful.

There are two instances that stand out in recent negotiations that Pacific Gas and Electric Company (PG&E) had on one of the federally mandated rules. In one case both the company and union had different interpretations of a key phrase. Both parties

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<sup>1</sup>10 C.F.R. Parts 2 and 26.

<sup>2</sup>49 C.F.R. Part 199.

agreed that the sentence structure left something to be desired but could not agree on what it meant. We did the logical thing and made a phone call to the agency asking for its interpretation. The paraphrased response was, "It means what it says." When a second stumbling block was reached later in the negotiations, we decided to take a different tack and wrote the agency a letter. This time a rather helpful written response was received. However, it concluded with the statement that the agency could not be bound by the interpretation because it had not been approved by the General Counsel. Once again we proceeded at our own risk.

The regulations are also silent in a number of important areas. For example, the NRC tells us that an employee who tests positive once can return to work if released by a medical review officer. The second positive test will result in long-term revocation of unescorted access to the nuclear power plant. However, DOT seemingly would allow unlimited rehabilitation attempts for covered employees testing positive. Substance-abuse treatment professionals are certainly not in agreement over how many shots at rehabilitation it takes for an employee to "make it." While unions try to expand the rehabilitation opportunities (and medical care coverage) employees may have after testing positive on one of the required screens, employers must limit the number. Some employers have adopted the zero-tolerance approach and automatically discharge any employee testing positive. Others, including PG&E, believe there is an obligation to attempt rehabilitation of employees. That obligation ends, we believe, after the employee has had one shot at rehabilitation.

#### *Meshing Regulations With the Contract*

In developing drug-testing policies, it is important that employers try to incorporate existing policies and procedures. Prior to the implementation of drug testing, PG&E had a drug-prevention policy and a negotiated "first time offender" policy. The first-time-offender policy is ancillary to the drug-prevention policy and covers employees who use, are in possession of, or are under the influence of illegal drugs on company time or property. Application of the policy requires that an employee be evaluated by an outside treatment professional from a list previously agreed upon by the union. The treatment professional recommends a course of treatment that must be followed by the

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employee in order to remain employed. Failure to comply with the treatment recommendations, a second violation of the above prohibitions, or a positive result on the policy's prescribed random follow-up testing results in discharge.

This first-time-offender policy, negotiated and executed a few years before formal postemployment drug-testing programs were instituted, is similar to the postpositive test requirements of NRC and DOT regulations. The policy was negotiated to be applicable to any employee who brought drug use to the job either through actual use, possession, or impairment. In developing a policy in compliance with NRC and DOT regulations, it was logical to extend application of the first-time-offender policy to employees who test positive under either of the regulations. Since the first-time-offender policy was negotiated, PG&E unions were not troubled with the application of the policy to employees who were positive on NRC or DOT reasonable cause tests. What created consternation was the application to postaccident and random tests because data do not exist to link drug concentrations in urine samples to levels of intoxication or impairment.

The rules of the game have changed. It is no longer permissible for an employee to take illegal drugs off the job even if, arguably, it has no impact on job performance. Impairment is not the issue. The presence of certain illegal drugs in an employee's urine is the issue. In the PG&E case the rules were changed by the federal government. It was logical, then, to extend and apply an already existing contractual policy to positive drug tests where no on-the-job impairment was evident.

### **Technology**

Laboratory drug-testing methods have changed dramatically in recent years so that it can now be stated that "technology has improved to the point that only human factors, i.e., positive specimen identification, chain of custody, and contaminated specimens continue to be persistent problems."<sup>3</sup> The fear of "false positive" conclusions is significantly allayed by confirmatory tests performed on presumptively positive samples. It is certainly best that the confirmation be by a different, more

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<sup>3</sup>DeCresce, Lifshitz, Mazura, and Tilson, *Drug Testing in the Workplace* (Washington: BNA Books, 1989), xii.

accurate method. In most cases the method used is the gas chromatography/mass spectrometry (GC/MS) test, referred to by an expert witness in one arbitration case as the "gold standard absolute of analysis."<sup>4</sup> The GC/MS test can control for cross-reactivity with other compounds that may show false positives on an initial, less sensitive screening test.

As rapidly as technology has advanced in the testing arena in the recent past, it will probably continue in the future. Urine and in some cases blood screening are the current methods of choice. However, other methods are here or on the near horizon. Radio-immunoassay analysis on hair is one possibility. Analysis of a strand of hair can provide a historical record of drug use. Although it is arguably a less intrusive method of gathering a sample, there are probably quite a few people more willing to provide their urine or blood than part with some precious strands of hair!

Another method billed as an alternative to drug testing is a video game that measures impairment based on individuals' hand-eye coordination in relation to their own baseline from previous tests. This method has received some positive notice from the American Civil Liberties Union.<sup>5</sup> As these and other methods are developed, arbitrators will continue to be challenged with the task of keeping abreast of technological change.

### Procedures

Procedural issues in drug testing are commonly used by unions as a preferred method of attacking a drug-related discipline case. Keeping a proper chain of custody is clearly fair game. Arbitrators fairly consistently find that discharge is improper where, as in one case, "[t]here were no witnesses or documentary evidence of receipts or other business records as to the chain of custody for each of the samples and tests."<sup>6</sup> One arbitrator went so far as to find a discharge unfair because the chain of custody had been broken when the employee left the urine sample with a technician for five minutes to complete some paperwork. Yet, four blood samples were taken and tested positive for marijuana.<sup>7</sup> There is no denying that a chain of

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<sup>4</sup>*Amoco Oil Co.*, 88 LA 1010 (Weisenberger, 1987).

<sup>5</sup>*Drug Test Alternative Hailed*, San Francisco Examiner, Mar. 14, 1990.

<sup>6</sup>*Day & Zimmermann, Inc.*, 88 LA 1001, 1009 (Heinsz, 1987).

<sup>7</sup>*Roadway Express*, 87 LA 1010 (D'Spain, 1986).

custody is important to ensure that the sample being tested does belong to the person it is ascribed to. However, arbitrators would do well to follow the guidelines adopted in one case where it was stated that:

It is my conviction that the Company exercised all due care, from securing the sample and placing the proper identification on it. Additionally, it was protected with care to the laboratory where it was tested. If a greater requirement were placed on the process of securing and testing samples of this type it might well result in a program wherein the objectives of it would become impossible to carry out.<sup>8</sup>

The admissibility of testing records, including laboratory results, has also been challenged by unions attempting to invalidate the results. Management does have the right to place those records before the arbitrator.<sup>9</sup> It would seem that most unions would want the documents to be admissible in order to have an opportunity to poke holes in them.

The right of employees to their own laboratory test results is not universally agreed upon by arbitrators. One arbitrator found that an employee was entitled to test results in order to counter the evidentiary basis of discharge.<sup>10</sup> Another did not reach the same conclusion “[w]hen note and attention is given to the fact that Company is with a duty to maintain confidentiality with any and all specimens sought and received and that the employer is to assume all costs related to the Program. . . .”<sup>11</sup> It does seem only fair that employees are able to receive the results of tests performed on their own urine or blood.

It does not make sense, however, to allow the results to be disputed by conducting another test. This includes releasing samples to employees to allow testing at a facility of their choice or allowing employees to provide other specimens at a later date. The former opens the door for all kinds of messy disputes between testing facilities, and the latter may serve only to demonstrate that the employee was “clean” at the time that later specimen was provided.

In one case a grievant submitted to a test from her own doctor seven days after testing positive on a postaccident test. In sustaining the discharge, the arbitrator rightfully concluded that

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<sup>8</sup>*Union Oil Co. of Cal.*, 87 LA 297, 298 (Boner, 1985).

<sup>9</sup>*Jim Walter Resources*, 90 LA 367 (Nicholas, 1987).

<sup>10</sup>*Regional Transp. Dist., Denver, Colo.*, 90 LA 27 (Yarowsky, 1987).

<sup>11</sup>*Jim Walter Resources*, 89 LA 147, 151 (Nicholas, 1987).

“[t]he tests taken by the grievant prove only that she had not used drugs for several days after the accident. They do not in any way rebut the clear evidence that she had drugs in her system at the time of the accident.”<sup>12</sup> Another arbitrator gave some consideration to an outside test in the case of an employee who had her own test conducted one month after allegedly being seen smoking marijuana and stated:

[T]he blood and urine tests offered by the Union raise a chain of questions concerning their custody as well as their accuracy and relevancy to the date in question, and therefore their probative value is limited.

Nevertheless, I do look favorably upon the fact the Grievant, of her own volition, arranged for the drug testing in an effort to clear herself.<sup>13</sup>

These concerns should not be confused with efforts to secure a reanalysis of an original specimen or the analysis of the “split” portion of a sample, split at the collection site and properly stored. One arbitrator amended an otherwise reasonable drug-testing procedure by allowing for reanalysis of urine samples at another lab with proper chain of custody assurance.<sup>14</sup> Such procedures go a long way toward allaying the fears of employees that false positives may occur in their tests.

### *Bashful Kidneys*

An issue that occasionally arises in drug testing is the inability, or alleged inability, of an employee to urinate in the presence of others. Arbitrators may be convinced through psychiatric testimony or reports that an employee truly has a bashful kidney phobia and that the inability to perform is not due to drug use or unwillingness to cooperate. This is especially true when an employee offers to take a blood test or seeks other alternatives to comply.<sup>15</sup> Arbitrators must consider that a claim of bashful kidney may be merely a dodge for an employee who does not want to take the test for whatever reason, as in a case where the arbitrator found that the grievant was given sufficient time and assistance to give a urine sample and that the failure to do so was a refusal to comply with management’s request.<sup>16</sup>

<sup>12</sup>*Washington Metro. Area Transit Auth.*, 82 LA 150, 152 (Bernhardt, 1983).

<sup>13</sup>*Modine Mfg. Co.*, 90 LA 189, 194 (Goldstein, 1987).

<sup>14</sup>*Arkansas Power & Light Co.*, 88 LA 1065 (Weisbrod, 1987).

<sup>15</sup>*Gem Indus. Contractors Co.*, 89 LA 1087 (Wolk, 1987).

<sup>16</sup>*Jim Walter Resources*, 88 LA 1254 (Nicholas, 1987).

*Passive Inhalation*

Cases in which the presence of marijuana metabolites are found through drug testing are ripe for the claim of passive inhalation. While it is true that a positive result for marijuana can be detected for a lengthy period, the argument that a positive was a result of being too close for too long to someone else who puffed away on a joint generally falls on deaf ears.<sup>17</sup> Arbitrators have concluded that the technical literature on this issue indicates that passive inhalation is most unlikely to result in positive marijuana readings. The literature concludes that even high exposures are unlikely to yield positive results beyond one day.<sup>18</sup> Furthermore, most threshold limits for reporting positives for marijuana are set high enough to discount any possibility that passive inhalation is the only reason for the positive. It is a little like arguing that it must have been the olives in the martinis that caused the hangover.

*Prescriptions*

The abuse of prescription drugs as determined by testing is another area giving rise to disputes in arbitration. Employees have attempted to mask use or abuse through old prescriptions<sup>19</sup> and have been found to be under the influence, impaired, or unfit when the presence of drugs in amounts that constitute abuse show up on drug tests.<sup>20</sup> Use of drugs pursuant to a valid prescription does not constitute illegal use. However, use of drugs by persons other than the one for whom the drug was prescribed, or misuse by failure to follow prescribed dosages should be considered illegal use of the drugs.

**Laboratory Issues**

The improvement in laboratory procedures should make employers, employees, unions, and arbitrators more comfortable with drug-test results. It is interesting to compare early widespread use of commercial testing kits<sup>21</sup> as reliable indicators

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<sup>17</sup>See, e.g., *Amoco Oil Co.*, *supra* note 4; *Young Insulation Group of Memphis*, 90 LA 341 (Boals, 1987).

<sup>18</sup>*Alcan Aluminum Corp.*, 88 LA 386 (Kindig, 1986).

<sup>19</sup>*Boone Energy*, 85 LA 233 (O'Connell, 1985).

<sup>20</sup>*Citgo Petroleum Corp.*, 88 LA 521 (Allen, 1986).

<sup>21</sup>Denenberg and Denenberg, *Alcohol and Drugs: Issues in the Workplace*, (Washington: BNA Books, 1983), 86.

of the presence of drugs with the current National Institute on Drug Abuse (NIDA) and Department of Health and Human Services guidelines for drug testing.<sup>22</sup> The NIDA guidelines have been mandated not only for testing conducted on federal government employees but also for private employees tested under federal regulations. The guidelines are extremely detailed to the point of requiring blue water in the toilet bowl at the location where a sample is taken to aid in the detection of an adulterated, diluted specimen. For any laboratory testing under the NIDA guidelines, a confirmatory test is required on a specimen that initially tests positive. The first is an immunoassay test and the confirmatory method is the more sensitive GC/MS. Perhaps most significantly, the NIDA guidelines set up a certification and review procedure for laboratories.

Employers interested in avoiding scientific and technical issues in drug-testing disputes would do well to ensure that they are using reputable laboratories. If they are not NIDA certified, they should at least follow the principles espoused in the NIDA guidelines. In addition, employers should use "blind samples" that are sent to the laboratory either as blanks (clean) or spiked with known quantities of drugs. This procedure "not only serves as a check on the laboratory, but it also enhances the credibility of the employer's overall procedures."<sup>23</sup>

For employers conducting drug testing, it is probably inevitable that the laboratory results on a specimen will eventually be disputed. Experienced laboratories can provide forensic toxicologists who are able to address arbitrators' concerns regarding the disputed results. If proper protocols have been followed by the laboratory and "tests are run properly, with clean, well-maintained equipment, competent technicians, and properly handled, stored, and treated samples,"<sup>24</sup> the forensic laboratory concerns of arbitrators should be eliminated.

### *Sample Adulteration*

The technical concerns of arbitrators may not be related merely to employer or laboratory methods. The potential exists

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<sup>22</sup>Alcohol, Drug Abuse and Mental Health Administration, Department of Health and Human Services, *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11970 (1988).

<sup>23</sup>*Supra* note 3, at 142.

<sup>24</sup>*Id.* at 143.

for employees to tamper with or adulterate their samples in order to avoid detection of the presence of drugs.

Adulteration of samples can be accomplished in a number of ways, including but not limited to (1) dilution with water or by physiological means via diuretics; (2) addition of strong acids or bases; and (3) addition of compounds which affect the ionic strength of the urine, such as sodium chloride, bleach, and other oxidizing or reducing agents. The simplest method, however, involves switching specimens among individuals or substituting a prepackaged urine sample for the real specimen.<sup>25</sup>

These concerns are real and have surfaced in a number of arbitration cases.<sup>26</sup> Absent a requirement that the giving of samples be observed, certain procedures are available to reduce the likelihood of adulteration. Upon collection of the specimen, the temperature can be taken to ensure that it is within the normal body temperature range. In addition, the laboratory can measure the pH and specific gravity of the sample to determine whether it falls within acceptable levels. Failure of a sample to meet the standards may result in an observed specimen being obtained to dispel concern over adulteration.

### Test Results

The use of drug-test results to prove or disprove whether an individual was impaired or under the influence is a technical issue that has been the subject of much discussion in arbitration cases. Experts generally agree that urine tests do not determine the amount of a drug ingested or the time of ingestion:

A large dose could have been taken many hours or days prior or a small dose could have been taken very recently. Similarly, the state of hydration of the individual directly affects the concentration of the urine and is a major determinant in concentration of the drug measured. The pH of urine also affects the rate of excretion for many drugs and is another uncontrolled factor which affects concentration. Certain drugs, such as THC, are also affected by duration of use with long-term users excreting the metabolite long after the last use of the substance.<sup>27</sup>

In spite of such problems arbitrators have found ways to agree that the results of drug tests were sufficient for drawing conclu-

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<sup>25</sup>*Id.* at 61.

<sup>26</sup>See, e.g., *Arkansas Power & Light Co.*, *supra* note 14; *Alla Bates Hosp.*, 87 LA 719 (Rothstein, 1986).

<sup>27</sup>*Supra* note 3, at 99.

sions regarding employees' fitness for work. In one case involving a random test conducted after an earlier positive result, it was determined that "[the] dosage found in the urine was more than twice the minimum amount needed for someone to be under the influence [of marijuana]. The grievant, therefore, was not disciplined for merely a trace in his urine, but rather an amount to be concerned about on a second event basis."<sup>28</sup>

In other cases arbitrators have drawn conclusions that the tests demonstrated the presence of drugs in such amounts as to constitute "drug abuse,"<sup>29</sup> and that unusually high levels of marijuana indicated that the marijuana had been smoked after the grievants had reported to work.<sup>30</sup> Impairment has also been found based on a marijuana positive result of 60 ng/ml where an expert witness testified that those levels affect motor skills and judgment and, most significantly, that the individual would not know that judgment had been impaired.<sup>31</sup>

Another arbitrator concluded that a grievant was not intoxicated based on results of a urine test, even though THC metabolites were present. Interestingly, the arbitrator determined that despite the lack of intoxication, the company had the right to take preventive action upon discovering that the grievant was a marijuana user. "For a firm to ignore an employee that is known to use alcohol or drugs is to invite trouble, either with employees welfare or liability for failure to safeguard that welfare."<sup>32</sup>

Other arbitrators have accepted the theory that no level of metabolites can demonstrate that an employee is impaired or under the influence.<sup>33</sup> In one case an employee tested positive for marijuana metabolites at 92 ng/ml, with cocaine metabolites also detected, following an anonymous phone call that the employee was seen smoking a joint during work hours. According to the arbitrator, "[t]he test performed on grievant's urine sample, together with his admission, convincingly demonstrates that he used marijuana. The test results, though, were as consistent with marijuana usage on the job as they were with usage during grievant's off-duty weekend hours."<sup>34</sup>

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<sup>28</sup>*Roadway Express*, 87 LA 224 (Cooper, 1986).

<sup>29</sup>*Cilgo Petroleum Corp.*, *supra* note 20.

<sup>30</sup>*Central Ohio Transit Auth.*, 88 LA 628 (Seinsheimer, 1987).

<sup>31</sup>*Amoco Oil Co.*, 88 LA 1010 (Weisenberger, 1987).

<sup>32</sup>*Boise Cascade Corp.*, 90 LA 105, 109 (Hart, 1987).

<sup>33</sup>*Trailways*, 88 LA 1073 (Goodman, 1987).

<sup>34</sup>*Southern Cal. Gas Co.*, 89 LA 393, 398 (Alleyne, 1987).

Findings that drug tests do not determine impairment do not seem to bother some arbitrators. One agreed that “[company’s] proof established, without question, that Grievant tested positive for marijuana. It did not establish when or where Grievant used marijuana or whether he was under its influence while working for the Company.”<sup>35</sup> However, according to the arbitrator, the fact that the grievant was now a known drug user meant that the company could take action against him because he could unduly influence other employees in dangerous and addictive practices.

Being “under the influence of drugs” does not have a precise scientific meaning but is derived from the contract, one arbitrator determined.<sup>36</sup> The employer in this case had bargained for the right to request that employees take a medical test to determine whether they were under the influence. The arbitrator agreed that the test showing 39 ng/ml of marijuana metabolites was not scientific proof of impairment. It was, however, sufficient evidence, given the current scientific capabilities and the contractual right to use a test as the determining factor.

### **Drug Policies**

Many of the disputes concerning test results may be avoided by the way drug policies are structured. Often it is these policies to which arbitrators must reconcile positive test results in determining whether employers have taken appropriate actions. Typically, arbitrators “do not believe that requiring an employer to clearly state the conduct it intends to discipline and then to detail how it intends to go about doing so is an inordinate burden.”<sup>37</sup> Where employers have a policy against being under the influence at work but no language concerning consumption of illegal drugs off work or concerning appearing for work without evident impairment, some arbitrators have been reluctant to sustain discipline.

Arbitrators’ views on the issue of off-duty drug use and its potential effects on the job were summed up nicely as follows:

The arbitrators who hold on the job impairment must be proven do so on the theory that what an employee does on his own time is none

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<sup>35</sup>*Ashland Oil*, 89 LA 795, 798 (Flannagan, 1987).

<sup>36</sup>*Roadway Express*, *supra* note 28.

<sup>37</sup>*Union Oil Co.*, 88 LA 91, 95 (Weiss, 1986).

of the employer's business. The arbitrators who hold otherwise recognize the overriding need for an employer to prevent drug impairment on the job. That in many cases it is impossible to show actual impaired job performance.<sup>38</sup>

The residual effects of drugs that may be used only while off the job should not be ignored by arbitrators. These residual effects may be present after the specific psychoactive effect of the drug has subsided. As one arbitrator aptly put it, "[a]nyone who has experienced a hangover would be willing to confirm this reality."<sup>39</sup>

Employers have an obligation to provide a safe work environment for employees. The fact that a positive test result may not show where or when an illegal drug was used should not interfere with employers' efforts to meet that obligation. This is especially true for employers whose actions are carefully scrutinized by the public or regulatory agencies. Cases from two oil refineries summarize this approach. In the first the arbitrator found:

The effects of our Grievant's off the job indulgence in marijuana was to introduce Cannabinoid Metabolites into his system which were retained over a period of time and remained as a detectible level of drugs while *on the job*. . . . [T]he presence of drugs on the job must be recognized as a potential cause for serious emergency and cannot be ignored. Therefore, this type of off the job behavior is *not beyond the control of the Company*.<sup>40</sup>

In the second case the decision was equally blunt. "If the Grievant were in another line of work, perhaps packing shoe boxes, his off-duty use of marijuana might not matter. . . . But here, given the Company's product, safety is the critical factor that cannot be ignored."<sup>41</sup>

Employers establishing drug-use policies who wish to include off-duty prohibitions would be well served to steer clear of impairment or under-the-influence terms and instead to address unacceptable or prohibited drug metabolite levels. Such policies have been found to be reasonable. In fact, in one case the arbitrator appeared to find that type of policy preferable because of the social stigma attached to a finding of impairment or under the influence.<sup>42</sup>

<sup>38</sup>*Amoco Oil Co.*, *supra* note 31, at 1018.

<sup>39</sup>*Sacramento Mun. Util. Dist.* (Kelly, 1990) (unpublished).

<sup>40</sup>*Texas City Ref.*, 89 LA 1159, 1163 (Milentz, 1987).

<sup>41</sup>*Marathon Petroleum Co.*, 89 LA 716, 723 (Grimes, 1987).

<sup>42</sup>*Hopeman Bros.*, 88 LA 373 (Rothschild, 1986).

### **Conclusion**

A primary objective of employers and unions in drug-testing disputes should be to avoid letting them get before an arbitrator. To that end the bargaining table is the best forum for short-stopping as many issues as possible. Agreements reached between the parties can foreclose future arguments over specific areas of drug testing.

It makes abundant sense for certified laboratories to be used to conduct drug tests and for detailed procedures for specimen collection and laboratory procedures to be spelled out in advance. It is often a misperception that only unions have concerns for their members' privacy and confidentiality. Most employers have those same concerns for their employees. The irony in the establishment of detailed rules and procedures for drug testing and analysis is that employers are put at the most risk of challenge. Any slight deviation can and will be pounced upon by unions or employees looking for a way to invalidate a test, thereby in their view rendering any action taken by the employer improper. Arbitrators adjudicating such disputes should remember that it is not always best to allow technical problems to cloud the underlying issue of serious drug problems in the workplace that should be dealt with, either by treating the problem or removing it, but certainly not by ignoring it.