[Indexed as: **Calgary (City) and CUPE, Local 37 (Hanmore), Re**]

In the Matter of an Arbitration between The City of Calgary, (hereinafter the "Employer") and Canadian Union of Public Employees (Cupe 37), (hereinafter the "Union")

Alberta Arbitration

Docket: None given.

Tom Hodges Chair, William J. Armstrong, Julien Landry Members

Heard: June 23-24, 2014; October 7, 2014

Judgment: August 5, 2015

Discrimination —— Disability —— Medical marijuana user removed from safety sensitive work — Grievor had government permit to possess medical marijuana for purpose of relieving chronic pain — Employer allowed grievor to operate heavy equipment for two years after learning of medical marijuana use — Alleged unresolved dependency problem unsupported by any evidence — Honest, good faith belief component of Meiorin test not met — Bona fide occupational requirement not established — Grievor unjustifiably held out of safety sensitive service.

Disability —— Medical examinations —— Medical marijuana user removed from safety sensitive work — Grievor continued to operate heavy equipment for two years after he informed supervisors of medical marijuana use — Independent medical examiner given inaccurate and unfounded information while grievor's own doctor belatedly consulted — No evidence of substance abuse or dependency — No indication of impairment while on duty — Grievor unjustifiably held out of safety sensitive service.

Disability —— Return to work —— Medical marijuana user removed from safety sensitive work — Supervisors allowed grievor to continue operating heavy equipment for two years after he advised them of medical marijuana use — Independent medical examination unduly influenced by unfounded information from employer — No evidence of substance abuse problem or impairment while on duty — Grievor conditionally returned to safety sensitive position.

[See *Brown & Beatty*, 3:5120; 7:6120; 7:6142; 8:3340]

Cases considered by *Tom Hodges Chair, Julien Landry Member*:

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (1999), 1999 CarswellBC 1907, 1999 CarswellBC 1908, [1999] S.C.J. No. 46, (sub nom. *British Columbia Government & Service Employees' Union v. Public Service Employee Relations Commission)* 99 C.L.L.C. 230-028, [1999] 10 W.W.R. 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 176 D.L.R. (4th) 1, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 244 N.R. 145, 66 B.C.L.R. (3d) 253, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 127 B.C.A.C. 161, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 207 W.A.C. 161, 46 C.C.E.L. (2d) 206, 35 C.H.R.R. D/257, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 68 C.R.R. (2d) 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* [1999] 3 S.C.R. 3, 7 B.H.R.C. 437 (S.C.C.) — followed

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (1999), 1999 CarswellBC 1907, 1999 CarswellBC 1908, [1999] S.C.J. No. 46, (sub nom. *British Columbia Government & Service Employees' Union v. Public Service Employee Relations Commission)* 99 C.L.L.C. 230-028, [1999] 10 W.W.R. 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 176 D.L.R. (4th) 1, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 244 N.R. 145, 66 B.C.L.R. (3d) 253, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 127 B.C.A.C. 161, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 207 W.A.C. 161, 46 C.C.E.L. (2d) 206, 35 C.H.R.R. D/257, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 68 C.R.R. (2d) 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* [1999] 3 S.C.R. 3, 7 B.H.R.C. 437 (S.C.C.) — referred to

Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990), 33 C.C.E.L. 1, [1990] 2 S.C.R. 489, 113 N.R. 161, 12 C.H.R.R. D/417, [1990] 6 W.W.R. 193, 90 C.L.L.C. 17,025, 76 Alta. L.R. (2d) 97, 72 D.L.R. (4th) 417, 111 A.R. 241, 1990 CarswellAlta 149, 1990 CarswellAlta 656, EYB 1990-66937, [1990] S.C.J. No. 80 (S.C.C.) — referred to

Monarch Fine Foods Co. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647 (1978), 20 L.A.C. (2d) 419, 1978 Carswell-Ont 931, [1978] O.L.A.A. No. 8 (Ont. Arb.) — referred to

St. John's (City) v. Newfoundland & Labrador (Human Rights Commission) (2011), 2011 NLTD(G) 83, 2011 CarswellNfld 187, 2011 C.L.L.C. 230-028, (sub nom. *CUPE v. Human Rights Commission (Nfld. & Lab.))* 958 A.P.R. 292, (sub nom. *CUPE, Local 569 v. Human Rights Commission (Nfld. & Lab.))* 308 Nfld. & P.E.I.R. 292, 73 C.H.R.R. D/106, [2011] N.J. No. 193 (N.L. T.D.) — referred to

Trimac Transportation Services - Bulk Systems v. T.C.U. (1999), [2000] L.V.I. 3090-2, 1999 CarswellNat 2995, 88 L.A.C. (4th) 237, [1999] C.L.A.D. No. 750 (Can. Arb.) — referred to

Cases considered by *William J. Armstrong Member* (dissenting):

Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, 1951 CarswellBC 133, [1951] B.C.J. No. 152, [1952] 4 W.W.R. 171 (B.C. C.A.) — considered in a minority or dissenting opinion

Statutes considered:

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5
s. 7(3) — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Occupational Health and Safety Act, R.S.A. 2000, c. O-2
Generally — referred to

Words and phrases considered:

Cesamet

. . . a synthetic cannabinoid.

UNION GRIEVANCE concerning employer's decision to remove grievor from his heavy equipment driving privileges.

Rebecca Andersen, for Employer
Linda Huebscher, for Union

***Tom Hodges Chair, Julien Landry Member*:**

Introduction

1 This Arbitration Board was granted by the parties the authority, as Chairperson and appointees in compliance with Clause 3.09(4) of the collective agreement, to consider argument on the dispute submitted for adjudication, and render a decision accordingly.

2 As stated by the employer at the outset its written submission, "This case is not about whether an employer could ever accommodate an employee using medicinal marijuana in safety sensitive work. Indeed, there

could very well be a case whereby an employee is using medicinal marijuana on his off hours and, after conducting its due diligence, the employer is satisfied that the employee is fit to perform safety sensitive work".

3 The circumstances of the instant dispute, however, were determined by the employer to be something other than such a case.

Background

4 Extensive documentation and evidence was provided by witnesses during the course of the three day hearing and form the basis of this chronological background.

5 On June 4, 1984 the grievor, Mr. Chuck Hanmore, commenced employment with the Roads Department of the City of Calgary. He eventually worked his way up to Equipment Operator 7, and between 1990 and 2010 operated graders, tandem loaders, sanders and street sweepers. Sometime in 1992, he suffered a workplace injury that resulted in degenerative neck disease. He has evidently endured chronic pain from 2000 onwards. Circa 1995, a Functional Capacity Evaluation (FCE) of the grievor was conducted by the employer.

6 In June of 2009, the grievor purportedly obtained lasting relief from his pain through a doctor's prescription of Cesamet, a synthetic cannabinoid. However, he sensed that its effects were somewhat overwhelming, and asked his personal physician if medicinal marijuana might be more effective instead. The doctor agreed, and provided the medical declaration necessary for Mr. Hanmore to obtain a permit from Health Canada to possess dried marijuana for a medical purpose pursuant to the Medical Marijuana Access Regulations in October of 2009. Following receipt of the authorization, the grievor notified two supervisors, regarding his use of medical marijuana. The grievor continued to operate heavy equipment in safety sensitive service. The grievor performed his operator duties as required without incident, without being observed or reported for displaying any cognitive impairment, changes in speech, job performance or physical appearance.

7 On March 21, 2011, other management personnel became aware of the grievor's usage, and he was immediately removed from his safety sensitive duties pending investigation and assessment. He was directed to drive his grader, alone, through city traffic and back to the yard of the Roads Department of the City of Calgary. He was also subsequently allowed to drive himself home, contrary to employer policy in cases of

suspected impairment or assessment as unfit for duty. He was not observed or asked to submit to a drug test to confirm if he was unfit for duty. The grievor was subsequently accommodated in a non-safety sensitive capacity.

8 An investigative interview was conducted on March 28, 2011 by Human Resources Advisor Evelyn Peirce with city managers Pamela Gouw, Brennan MacDougall, CUPE Local 37 union representative Toni Miotti and Mr. Hanmore. During that meeting the grievor advised management that his marijuana usage was limited to just a few puffs at night before bed, and that he had never operated equipment while under the influence.

9 On March 30, 2011, during a subsequent one on one telephone conversation with Human Resources Advisor Evelyn Peirce, the grievor allegedly offered up the unsolicited admission that "I have been smoking for 15 years. Why is this an issue now? I've never had an accident". Ms. Peirce recorded this information in her notebook. On the same day, the employer directed the grievor to report his medical marijuana usage to Alberta Transportation in order for that body to determine any impact on his current class 3 license. Approximately a week later, Alberta Transportation confirmed that the grievor's class 3 license for motor vehicle operation was still valid, despite his use of medical marijuana, but that continued authorization in that respect would be subject to annual medical clearance. However, one day later, Ms. Peirce contacted the Alberta Drivers Fitness and Monitoring Department directly and was told that they would "never allow a person to keep a class 3 license and use medical marijuana". She advised union officer Tony Miotti of this development, and commissioned a follow-up to this declaration. She further advised Mr. Miotti that due to this conflict, the employer could not at this time consider reinstatement of the grievor to the driving of heavy equipment.

10 On May 2, 2011, Ms. Peirce wrote to Labour Relations Business Partner Miriam Van Essen advising that Alberta Transportation had pronounced the grievor fit to retain his class 3 driving license, but at the same time had not specifically directed the employer to return him to his safety sensitive position. The approving individual at Alberta Transportation had strongly advised the employer to file an appeal to the initial finding, and Ms. Peirce began to search for grounds for such action.

11 On May 16, 2011, Mr. Miotti advised Ms. Peirce that the union would not be complying with the employer request to send the grievor

for an Independent Medical Evaluation (IME) with one Dr. Hajela, or any other specialist, for substance use assessment, citing the information already provided to both the grievor's personal physician and Alberta Transportation as more than sufficient to resolve the matter. The employer then wrote to the grievor on June 13, 2011 requesting that he reconsider the request.

12 On June 28, 2011, Ms. Noella Stordy, RN, Corporate Health Consultant for the employer advised that the grievor had indeed agreed to attend the Independent Medical Evaluation. The next day, Ms. Stordy telephoned the grievor to explain the process and obtain necessary information. During that conversation, he allegedly told her that he had smoked marijuana for 15 years. She also took notes of the conversation, and testified that she was unaware of the previous similar revelation from the grievor to Ms. Peirce.

13 On July 15 Ms. Stordy wrote to Dr. Samuel Oluwadairo, the expert on addiction and substance use who was evidently satisfactory to all parties concerned, requesting that he consult with the grievor accordingly through Independent Medical Evaluation. She advised therein that the grievor occupied a safety sensitive position, operating a grader on City streets, and that he had a long standing musculoskeletal disorder involving his cervical spine. Ms. Stordy also stated that the grievor had a prescription issued by his physician, receives 90 grams per month of medical marijuana and used three grams per night. She also revealed that the grievor had disclosed to her that he had used marijuana on a regular basis for approximately 15 years prior to it being prescribed to him by his physician. Ms. Stordy then posed a series of particular questions to Dr. Oluwadairo for response. These involved queries regarding limits on the amount of prescribed medical marijuana that the grievor should consume in a given time frame, abstinence from use of prescribed medical marijuana during the working shift or for a set amount of time prior to the shift, and the fitness of the grievor to safely perform his safety sensitive duties over the course of his shift without the aid of prescribed marijuana or other medication. Dr. Oluwadairo was not provided with any information from the grievor's own doctor.

14 During the Independent Medical Evaluation subsequently conducted by Dr. Oluwadairo, the grievor clearly advised him that he had a medical marijuana permit, takes a few puffs a night to relieve his pain and help him relax before bed. The IME report was produced on August 10, 2011, with the opinion that the grievor "has marijuana dependence secondary

to a general medical condition, chronic pain. However, if he had in the past been using marijuana on a regular basis for 15 years approximately prior to medical prescription, marijuana dependence could be a primary disorder". Dr. Oluwadairo further advised that continued use of medical marijuana could affect the grievor's motor skills, and might necessitate reassessment of fitness for safety sensitive employment. He also recommended a retest of driving capacity through Alberta Transportation.

15 Labour Relations Business Partner Miriam Van Essen wrote to Mr. Miotti on August 30, 2011, lamenting the inability of Dr. Oluwadairo to provide clear direction to the parties given the inconsistent information provided by the grievor regarding past history with marijuana usage. She indicated that the contradictory declarations would have to be resolved prior to requesting clarification from Dr. Oluwadairo. Follow up questions in this respect for the grievor to answer were provided.

16 On September 21, 2011, the grievor's personal physician, Dr. Sood, provided a letter indicating that the grievor had been under his care since 2005, and had never been a user of marijuana. The doctor recalled prescribing Cesamet for the grievor in June of 2009, and that the grievor later that summer at times resorted to procurement of street marijuana in order to manage his pain. Dr. Sood maintained that the grievor ingested only a few puffs at night for pain control. The doctor further advised that he indeed signed the requisite forms for medical marijuana and that he had commissioned two such renewals of the permit since 2009. Dr. Sood also reported that he had never witnessed any cognitive impairment on the part of the grievor during office visits.

17 The grievor then wrote to the employer on September 26, 2011, advising that he had experimented with marijuana in his early teens, but had not used it again until sourced for medical reasons in 2009.

18 On September 27, 2011, union officer Miotti provided the employer with the grievor's responses to Ms. Van Essen's August 30 request. The grievor maintained that he had not told either Ms. Peirce or Ms. Stordy that he had smoked marijuana over a 15 year period prior to receiving his medical permit. The grievor also advised that he never experienced severe pain during the day, and that there was as a result no need to ingest his medical marijuana while working his shift, rather only at night prior to bedtime. The grievor also noted that although 90 grams of marijuana is allowed for monthly by his monthly permit, it did tend to last more than just 30 days because of his limited use. Regarding the requested medical documentation of his marijuana orders, he replied that he was

waiting for information in that respect from Health Canada, which he subsequently did provide to the employer for the year 2010.

19 On December 1, 2011, over eight months after commencing its investigation, Ms. Van Essen wrote to employer legal counsel Rebecca Pitts (now Andersen) regarding a potential go forward plan on the matter. She recapped in detail what had occurred to date and noted that there is nothing to clearly state he has a dependence requiring treatment. Further, Ms. Van Essen put forward what she referred to as the best option which included returning the grievor to his safety sensitive position subject to conditions of the IME and Fleet testing.

20 Despite her assertion a month earlier that there was "Nothing to clearly state that he has a dependency requiring treatment", on January 3, 2012, Ms. Van Essen wrote to the grievor advising that a number of statements in the IME "strongly indicate that you have a dependency", and that as a result, his returning to safety sensitive duty would not be forthcoming as it would constitute an unjustifiable risk to him, his co-workers, and the public. The employer further asserted that the grievor had used marijuana on a regular basis for 15 years. The employer then provided the grievor with two options - the continuation of non-safety sensitive work with maintenance of previous basic rate of pay (but not overtime), or consultation with Dr. Hajela for further assessment of substance use dependency.

21 On January 10, 2012, the union submitted a grievance to the employer on behalf of the grievor, requesting that his heavy equipment driving privileges be reinstated, and that he be made whole for any loss in compensation, including overtime lost, as a result of the employer decision to remove him from his grader position in late March of 2011.

The Grievance

22 The basis of the grievance filed by the union, on behalf of the grievor, on January 10, 2012, is as follows:

> The employer is in violation of the following clauses 1.01, 1.02, 2.10 and any other clauses that may be applicable.
>
> The grievance arose as a result of the employer letter, dated January 3, 2012, regarding the Accommodation of Mr. Hanmore in which he continues to have his driving privileges suspended.
>
> The Union requests that Mr. Hanmore have his driving privileges reinstated and that he be made whole, including any overtime that he

may have lost as a result of the employer's decision dating back from March 2011.

The Union respectfully requests to start at step three, given that this issue has been ongoing for a lengthy period of time.

The Collective Agreement

23 The following clauses of this collective agreement are relevant to this dispute:

1.01 Management Rights

The Union recognizes that it is the function of the City to exercise the regular and customary functions of the City and to direct the working forces of the City subject however to the terms of this Collective Agreement, hereinafter referred to as the Agreement.

1.02 Purpose and Coverage

The purpose of this Agreement is to stipulate the hourly pay rates and working conditions of those employees whose bargaining rights are held by the Union in accordance with the provisions of the Alberta Labour Relations Code.

2.10 Discrimination

The City shall not discriminate against any employees on the basis of race, religious beliefs, colour, gender, mental disability, physical disability, marital status, age, ancestry, place of origin of that person, sexual orientation or any other protected grounds set out in the Alberta Human Rights Act. The foregoing does not apply with respect to the provisions, limitations, or defenses set out in any applicable legislation.

The City shall not discriminate against any of its employees on account of political beliefs, nor by reason of their membership or activity in the Union.

Evidence

24 The employer called Ms. Miriam Van Essen as its first witness. She is a Labour Relations Business Partner who has worked with the City for approximately nine years, and is currently its chief negotiator in addition to a wide variety of other labour-related responsibilities with which she is entrusted. Ms. Van Essen was previously employed as Director of Labour Relations at Greyhound Lines, and worked at Kingston Hospital in Ontario for over 20 years prior to that. Her entire career has been served

in a labour relations capacity and she holds the Master of Industrial Relations accreditation from Queen's University.

25 Ms. Van Essen spoke to the employer's Substance Use Policy and in particular its expectation that any given employee must in all instances report to work in a fit and unimpaired state. She referred as well to the Alcohol and Drugs entry of the City's Fleet Operator's Handbook, which states that "It is grounds for dismissal for an employee to operate or have care, custody, or control of a City of Calgary fleet vehicle if the employee is under any degree of influence from intoxicating, hallucinogenic or mind-altering substances".

26 Ms. Van Essen provided a brief description of the various pieces of heavy equipment operated by the grievor up until March of 2011, in particular the 15 ton grader, emphasizing the unsupervised and less than ideal work conditions, the need to maintain 360 degree awareness, and the close proximity to other vehicles and pedestrians.

27 Ms. Van Essen related how she had first become aware of the grievor's medical marijuana usage on March 23, 2011, a situation that she had admittedly never before encountered. She discovered at that time that the grievor had at some point previously advised his supervisor of his medical marijuana permit, who proceeded to contact a Human Resources Advisor for advice. The latter was evidently quite junior in the position and unaware of proper protocol. Nothing further was done at that time, but Ms. Van Essen in late March of 2011 commissioned the removal of the grievor from safety sensitive duty pending investigation, and assessment by the employer's Occupational Health and Safety function.

28 Ms. Van Essen testified that Human Resources Advisor Evelyn Peirce had related to her that, during a March 30, 2011 telephone conversation with the grievor, he had disclosed that he had been using marijuana for 15 years. Given this information, Ms. Van Essen detected a requirement to clarify the validity of the grievor's class 3 driving license. On April 7, 2011 Alberta Transportation confirmed that usage of medical marijuana did not preclude the holding of the class 3 license, subject to annual medical review. However, the following day, the employer received conflicting advice from the Alberta Drivers Fitness and Monitoring Department, and as a result continued to withhold the grievor from his regular safety sensitive duties.

29 Ms. Van Essen recalled one particular employer concern. It became evident that the grievor's medical marijuana permit authorized up to 90

grams of marijuana per month, the equivalent of 270 cigarettes, with no regulation on the administration of single dosage.

30 Ms. Van Essen recounted how the investigation continued in the wake of the conflicting advice received from provincial government authorities. The employer considered appealing the initial finding from Alberta Transportation as one of its representatives had emphatically advised that this course of action was an option. Ms. Van Essen believed that Alberta Transportation had not been made aware of the grievor's alleged 15 year relationship with marijuana.

31 The grievor initially refused the employer request for an Independent Medical Evaluation. However, he eventually changed his stance and in late June of 2011 advised Ms. Noella Stordy in Occupational Health and Safety that he would participate. Ms. Van Essen related how the grievor at this point once again disclosed his 15 year usage of marijuana, this time to Ms. Stordy.

32 Ms. Van Essen recalled that the Independent Medical Evaluation report produced by Dr. Oluwadairo was received on August 10, 2011 and indicated marijuana dependency on the part of the grievor that "could be" a primary disorder, if the allegation of 15 year usage was indeed accurate. The doctor also advised that in such an instance, dependency might spill over into addiction.

33 Ms. Van Essen then turned to an additional basic safety concern of the employer. The operation of heavy equipment involves a significant amount of neck turning, even to use rear view mirrors. Coverage of blind spots requires a substantial shoulder turn. Given the grievor's mobility limitations due to his permanent neck injury, the employer speculated whether the grievor was truly capable of performing his safety sensitive duties, medical marijuana usage notwithstanding.

34 Ms. Van Essen gave evidence regarding her August 30, 2011, letter to CUPE National Representative Tony Miotti, in which she detailed follow-up questions, generated from the Independent Medical Evaluation results, to be forwarded to the grievor for response. Examples cited were the nature of information provided by the grievor's personal physician to procure the medical marijuana permit from Health Canada, the management of pain while at work, and the rationalization of the grievor's stated few puffs per night to alleviate pain against an allotment of 90 grams per month.

35 Not all of the questions submitted by the employer were answered by the grievor, and those submitted were not necessarily consistent with pre-

viously provided responses. However, a summary of his medical marijuana purchases did indicate that he was not placing an order for 90 grams every month, rather more on a quarterly basis, thus alleviating, to a degree, the initial employer concern regarding a 90 gram per month "subscription".

36 Counsel for the employer directed Ms. Van Essen to review the September 21, 2011 letter from the grievor's personal physician, Dr. Sood. The witness testified that the details therein presented a very different tale, and contradicted some of the grievor's previous statements. As an example, she cited the doctor's report of "constant pain" in contrast to the grievor's claim that pain would only truly surface during the evening hours of activity that followed the work shift.

37 Ms. Van Essen recalled that she wrote to the grievor on January 3, 2012 indicating that based on the City's risk assessment, it would not be possible to return him to safety sensitive service. Also, it was stated that the grievor, based on the balance of probabilities, suffered a dependency on marijuana, in the opinion of the employer. She offered to maintain his operator rate of pay in the accommodated position, or in the alternative, arrange for employer-sponsored treatment of substance use dependency. The grievor and union officer Miotti opted for the former, and advised that the grievor's continued restriction from safety sensitive duty would be progressed through the grievance procedure.

38 Ms. Van Essen admitted that nine months was an extraordinarily long period of time for which to complete an investigation. The delay was not malicious in any way, she attested, citing medical marijuana as a previously unexplored issue, conflicting advice from authorities, an unclear report from the Independent Medical Evaluation, and delays on both sides as contributors.

39 In cross examination, Ms. Van Essen allowed that it was regrettable that the Human Resources Advisor initially involved with the grievor's medical marijuana revelation did not take proper action in the first instance. It was not until a foreman training class on substance use conducted in March of 2011, and a question from a participant regarding medical marijuana, that Human Resources Advisor Evelyn Peirce became aware of the situation. The grievor was removed from his safety sensitive position and placed in non-safety sensitive work soon thereafter.

40 Counsel for the union queried whether any performance or safety concerns had been reported by supervisors during the grievor's fifteen

plus years of operating heavy equipment. Ms. Van Essen responded that she was not aware of any issues in that regard, but that given his disclosure of medical marijuana use, the employer was obligated to determine fitness to work in a safety sensitive capacity.

41 Ms. Van Essen was asked to revisit Dr. Oluwadairo's pronouncement within his report that the grievor should abstain from any consumption of medical marijuana if within four hours of the commencement of his shift. She clarified that the doctor's advice was based on information from the grievor that he consumed only a few puffs before bedtime as opposed to earlier information of a 90 gram allotment per month. Ms. Van Essen furthered explained, however, that the grievor eventually provided an actual history of marijuana purchase that revealed far less than monthly activity in that regard. But with the issue of potential dependency still unresolved, the employer elected to err on the side of caution, and not return the grievor to his former safety sensitive duties.

42 Counsel for the union asked the witness why the employer did not at any time solicit information or clarification from the grievor's personal physician. Ms. Van Essen replied that typically family practitioners are not experts on dependency.

43 Ms. Van Essen confirmed that the union at some point suggested that the grievor submit to a cheek swab test in order to assess any perceived level of impairment while on the job. This was never acted on by the employer, and the witness testified that she was unsure as to who specifically made that decision. She did allow that the employer had other concerns with the grievor beyond just a swab test, and that union officer Miotti was willing to work with the employer in order to get him restored to his safety sensitive position.

44 The next employer witness was Ms. Evelyn Peirce, the Human Resources Advisor who handled the grievor's case file starting on March 21, 2011. She has over 30 years of experience in her field, including 20 years at Canada Post and six years with the City.

45 Ms. Peirce found out about an unidentified employee's medical marijuana permit from a participant at a new foreman course she was facilitating on March 21, 2011. A couple of days later she was able to identify the grievor as the holder of the permit. She contacted his supervisor and arranged for a meeting of the concerned parties. The supervisor was indeed aware of the grievor's medical marijuana permit, and acknowledged not following up in the first place. During the investigative meeting Ms. Peirce asked to see the actual permit but the grievor objected, purport-

edly in protest for having been removed from his safety sensitive position prior to the session.

46 Ms. Peirce provided evidence regarding her email on March 23, 2011 summarizing the situation with the grievor and indicating that Noella Stordy, Corporate Health Consultant would need to contact the doctor and the same process should be used as in the past with employees using other pain medication. She then recalled a subsequent and somewhat agitated conversation with the grievor, on March 30, 2011, during which he provided the unsolicited revelation that he had been "smoking marijuana for 15 years". She took notes of the exchange but did not pass them on, and instead simply filed them away.

47 Ms. Peirce acknowledged her initial communication of a ruling from Alberta Transportation that "they would never allow a person to keep a class 3 licence and use of medical marijuana". Later Ms. Peirce admitted learning that in fact Alberta did not necessarily revoke class 3 driving privileges because of medical marijuana use. Ms. Peirce acknowledged in her March 30, 2011 email that she had expressed doubt if the grievor had complied with Alberta Transportation reporting requirements and commented that if Alberta Transportation would "suspend his licence our job will be so much easier".

48 In a further email Ms. Pierce advised Ms. Van Essen that she was "strongly encouraged by Alberta Transportation to file an appeal so I am reading the package the Alberta Government provided to see if I can find Grounds to appeal it on". The employer considered registering an appeal but elected instead to pursue the commission of an Independent Medical Evaluation of the grievor. Ms. Peirce was not involved in this process and effectively handed off the file to Ms. Van Essen in Labour Relations.

49 Ms. Peirce also gave considerable testimony with respect to the physical requirements of operating heavy equipment and her concern for the limitations of the grievor as the result of his medical condition. She reviewed the posture and cognitive demands associated with operating the various pieces of equipment that the grievor was licenced to operate. She suggested that Mr. Hanmore's neck and spine condition could prevent him from turning when necessary to safely operate a grader. Under cross examination Ms. Pierce acknowledged that her concerns were not as the result of any concerns expressed by his supervisors or any incidents that may have occurred. No supporting evidence was provided by Ms. Pierce from supervisor's or equipment trainers in support of her concerns.

50 Under cross examination, Ms. Peirce also stated that she had not at any point been made aware of any concerns regarding the grievor's performance of his safety sensitive duties, and confirmed the employer protocol of not allowing an employee found to be unfit for service to drive home alone in their own vehicle. Counsel for the union asked Ms. Peirce if there existed any supervisory issues regarding the grievor's fitness for duty on March 28, 2011, the day he was removed from his safety sensitive position. She replied that she was unaware of any such concerns.

51 Counsel for the employer called her final witness, Ms. Noella Stordy. Ms. Stordy is a Registered Nurse with thirty two years of experience. She has been employed with the City of Calgary for twenty-eight years, with the last eight having been served as Corporate Health Consultant. She has dealt with over forty cases in this capacity.

52 Ms. Stordy recounted her conversation with the grievor from late June of 2011, similar to that of Ms. Peirce, during which she alleged he stated that he had "used marijuana for 15 years" without permit or prescription, but that he only consumed it at night time, and never at work. She reiterated that she was certain that the grievor said he had "used marijuana for 15 years" prior to the employer concern being raised.

53 The receipt of the Independent Medical Evaluation report regarding the grievor raised concerns for Ms. Stordy in terms of the conflicting information that it presented, particularly his claim that he had never been a regular user prior to procuring his permit for medicinal application. "A few puffs at night" registered with Ms. Stordy as contradictory, raised concern regarding the safety risk associated with operating heavy equipment, and once again highlighted the issue of dependency potentially spiraling into addiction. When questioned regarding seeking clarification from Dr. Oluwadairo Ms. Stordy suggested that he had a heavy Nigerian accent, that conversations with him were difficult and futile.

54 Ms. Stordy did not believe that there was any way to test the grievor, on an ongoing basis, for substance use and/or potential impairment while at work.

56 In cross examination, Ms. Stordy reaffirmed that the grievor, during their June 29, 2011 conversation, freely expressed the fact that he had "used marijuana for 15 years" prior to obtaining his medical marijuana permit. She testified that the grievor did not offer up how much he smoked during that period, and she did not ask or feel the need to ask. However, she acknowledged that in her letter to Dr. S. Oluwadairo of June 10, 2011 requesting that he assess Mr. Hanmore she advised him

that the grievor has a "prescription" "receives 90 grams per month", "uses 3 grams a night" and that he "*regularly* used marijuana for 15 years".

57 The union called Mr. Tony Miotti, National Representative for CUPE, and the union officer closest to this particular case, as its first witness. Mr. Miotti reaffirmed that the grievor to his knowledge did not consume 90 grams of medical marijuana per month, and that he only smoked a few puffs before bedtime to control his neck pain sufficiently enough to allow him to get a good night's rest.

58 Mr. Miotti expressed the union's concern that Mr. Hanmore had been placed in a labour position during a very protracted investigation. He also advised that the grievor had experienced a significant loss of overtime as noted in the grievance.

59 Regarding the results of the Independent Medical Evaluation report, Mr. Miotti believed that there was nothing in Dr. Oluwadairo's recommendations that would prevent the grievor from returning to his safety sensitive driving duties with the City. The union would have been content with an eight hour governance on abstinence prior to the shift rather than the four hours stipulated by the doctor. The union was also on board with the prospective 10 gram per month limitation on the grievor's medical marijuana permit, and sought in conjunction with the employer clarity on an optimal level of single/daily dosage.

60 Mr. Miotti was involved in discussions with Ms. Van Essen regarding the labour relations post-Independent Medical Evaluation report, exploring various scenarios that might lead to the grievor's reinstatement to safety sensitive driving duties on heavy equipment. He acknowledged that Ms. Van Essen's email of December 1, 2011 was not cast in stone and had to be approved by others. Mr. Miotti felt her email was the basis for settlement of the matter. Ultimately, however, the employer could not overcome its concerns in that respect, and advised Mr. Miotti to progress the matter to arbitration.

61 In cross examination, counsel for the employer queried why the grievor and the union in early January of 2012, rather than grieving the matter, did not accept the offer of employer sponsored treatment for substance dependency. Mr. Miotti countered that the union did not recognize the employer's preferred consulting physician in the field, Dr. Hajela, as expert.

62 The final witness called by counsel for the union was the grievor, Chuck Hanmore. He testified that he had been qualified on the grader for

about 20 years, and has worked that machine for about 90% of his time over that period. His degenerative neck issue has been with him over most of that same duration.

63 The grievor recounted how he had six years ago purchased street marijuana and it had eased his discomfort. He so advised his doctor, who then prescribed Cesamet as a substitution. The grievor found however that the effects were too long lasting, and the physician then filled out the forms necessary to obtain a medical marijuana permit through Health Canada. His unchallenged testimony is that once received, he mentioned the permit to a number of supervisors, none of whom reacted to the circumstance in any significant manner. He continued to work in a safety sensitive capacity. The grievor steadfastly maintained that his consumption was limited to three or four puffs a night and that one gram of medical marijuana lasted three days.

64 The grievor maintained during testimony that, prior to 2009, he had last used marijuana when he was 15 years old, some 40 years previous, and that he had never told anybody in management at any time that he had been smoking it for the last 15 years.

65 The grievor emphasized that he had never worked under the influence, and stated that the employer had never requested that he submit to a substance test in that regard.

66 Under cross examination by employer counsel, the grievor once again testified that he never told either Ms. Peirce or Ms. Stordy that he had smoked marijuana for 15 years prior to obtaining his medical marijuana permit. He reaffirmed as well that his daily consumption was limited to a few puffs before bedtime in order to control his pain.

67 At the conclusion of the testimony the parties agreed to a process for written submissions and reply.

The Employer Submission

68 As indicated earlier in this award, counsel emphasized, upfront and foremost, that "This case is not about whether an employer could ever accommodate an employee using medicinal marijuana in safety sensitive work. Indeed, there could very well be a case whereby an employee is using medicinal marijuana on his off hours and, after conducting its due diligence, the employer is satisfied that the employee is fit to perform safety sensitive work".

69 The employer argued that it removed the grievor from his safety sensitive driving duties as a direct result of his use of medical marijuana to treat the pain associated with the degenerative disc disease in his cervical spine. However, counsel submitted that a bona fide occupational requirement had been established that justified the action, as medical marijuana is indeed a medication whose usage could adversely impact the ability of an employee to work safely.

70 The employer maintained that the two supervisors who were initially informed of the grievor's usage should have acted, and commissioned the appropriate inquiries. This lapse however did not eliminate the requirement to investigate the matter, and once Ms. Peirce became aware of the situation, even though a year or more later, she acted promptly and in good faith with respect to the required due diligence.

71 Counsel argued that the employer did not discriminate against the grievor because of the medical marijuana factor. The City followed the same process used in all other cases of employees using prescribed medication that might impact on ability to adequately perform safety sensitive duties.

72 The employer acknowledged the extraordinary amount of time that it took to complete the investigation in the current case, and shouldered some of the blame. Primarily, counsel drew attention to its unfamiliarity with the issue in that the employer had never before dealt with a safety sensitive employee using medical marijuana for control of pain. Additionally, there was a delay attributable to the confusion surrounding the approach of Alberta Transportation on the licensing issue, as well as the initial refusals on the part of the grievor and the union to consent to participation in the Independent Medical Evaluation.

73 Counsel further submitted that the employer fulfilled the duty to accommodate the grievor to the point of undue hardship, and that the City had sufficient grounds to conclude that otherwise returning the grievor to his regular duties would have constituted too severe a risk to his safety, that of coworkers, and that of the general public as well.

74 Counsel asserted that a major area of concern was the unresolved issue of the grievor's potential dependency on marijuana. Two City representatives testified before the Board that the grievor declared during separate telephone conversations that he had smoked marijuana for 15 years prior to procuring his medical marijuana permit. However, when interviewed by Dr. Oluwadairo during the Independent Medical Evaluation, the grievor maintained that he had never been a regular user, that he had

only experimented with the substance for a short period of time during his early teens, and that he had never stated to anyone in management that he had used marijuana for a 15 year period. Counsel requested that the Board respectfully accept the testimony of Ms. Peirce and Ms. Stordy, and reject the grievor's evidence as less than truthful in this instance, or at the very least mistaken. Based on this conflict as well as commentary from Dr. Oluwadairo, the employer argued, there existed a real risk that the grievor might have a marijuana dependency as a primary disorder, one that could very well prevent adherence to recommended restrictions on usage.

75 The employer was adamant that it would not allow any employee to perform safety sensitive work where a legitimate concern exists as to whether that individual is suffering from a substance dependency. A clear diagnosis to the contrary would be required prior to consideration of restoration in that regard.

76 The employer has over the course of this dispute maintained the grievor's rate of pay that he was receiving prior to removal from safety sensitive duty. The employer also offered the grievor the option of further assessment by a medical expert to evaluate how best to address his chronic pain management as well as the unresolved issue of his dependency. The grievor declined this opportunity.

77 Counsel affirmed that the employer acted in concert with its legal obligations, by virtue of the Occupational Health and Safety Act, the Criminal Code, the law of tort and negligence, and the law regarding Workers' Compensation, in taking the required steps in this particular case to ensure the safety of employees and the public.

78 The employer requested that the Board dismiss the grievance in its entirety.

79 The employer relied on the following authorities in support of its submission: *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) (Meiorin Grievance), *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.), and *St. John's (City) v. Newfoundland & Labrador (Human Rights Commission)*, [2011] N.J. No. 193 (N.L. T.D.).

The Union Submission

80 The union contended that this dispute was not about the use of medical marijuana by an employee engaged in safety sensitive work. Rather,

it was about the employee's choice of drug to combat chronic pain, in this case, marijuana. Counsel argued that the employer wrongfully removed the grievor from his safety sensitive position, despite no evidence of either performance issues or misuse of a prescribed substance.

81 The union believed as well the employer had more or less manufactured the unresolved dependency concern in order to justify its inappropriate actions in this matter. Counsel submitted that there was no such issue and no basis for the employer to raise it. It was, from the union's standpoint, far too coincidental that the grievor, according to the employer, allegedly made the exact same statement to both Ms. Peirce and Ms. Stordy regarding 15 years of marijuana use prior to obtaining his medically authorized permit. Counsel refuted that allegation, and maintained that the grievor's testimony that he at no time uttered such a statement was the preferred recollection of events.

82 The union reaffirmed that the grievor voluntarily revealed the existence of his medical marijuana permit to the employer. Counsel argued that the grievor has never used his medical marijuana prior to or during a work shift, and that there was no evidence presented that he had ever possessed, distributed, offered or sold marijuana in the workplace.

83 The union argued that the employer's concern for safety rang hollow. It noted that the employer wilfully violated its own Substance Use Policy Guidelines when it directed the grievor to drive his grader through city traffic and back to the yard following his removal from safety sensitive service. The employer further erred in allowing the grievor to subsequently drive himself home in his personal vehicle. There cannot have been, counsel submitted, any true concern on the part of the employer that the grievor was unfit for safety sensitive service.

84 Counsel maintained that the employer virtually ignored the recommendation of Dr. Oluwadairo, from the Independent Medical Evaluation report, that the grievor was capable of operating safety sensitive equipment provided he did not smoke marijuana less than four hours prior to his shift, and that he be subject to periodic supervision while engaged in his duties, to ensure proper fitness to work.

85 Moreover, the union suggested the use of oral swab testing, and the subjecting of the grievor to a series of tests in order to establish a baseline THC level. Both the union and the grievor were fully prepared to cooperate in this manner even though the employer had not at any point initiated drug testing under its policy, as the established criteria for such action had not been met.

86 Counsel for the union argued that the Independent Medical Evaluation conducted in the instant case concluded that the grievor could continue to use medical marijuana for pain control and still be fit for safety sensitive service, subject to a number of conditions. One such restriction was abstinence from smoking marijuana within four hours of the start of a working shift. The union and the grievor were prepared to extend this window to eight hours, similar to that of the airline industry. Still the employer refused to reinstate the grievor to his former job.

87 The union argues that the feasibility of drug testing cited by the employer is not a hardship. The Union had suggested the use of oral swab testing and subjecting Mr. Hanmore to a series of tests in order to establish a baseline of Mr. Hanmore's THC levels. The Union and Mr. Hanmore were prepared to do this even though Mr. Hanmore has never been subjected to drug testing under the City's policies because he has never fallen within any of the criteria where drug testing would be required.

88 The union also submits that the employer did not investigate these suggestions in good faith. The union argues that oral swab testing has been debated in Canadian workplaces for the past decade as a way to determine impairment as opposed to urine testing which has been acknowledged as not indicative of impairment or even recent use when testing for marijuana.

89 The union contends that employer's argument about the physical job demands of operating the grader is unwarranted. The union questions whether the employer's concern is if Mr. Hanmore can operate the equipment safely irrespective of the medical marijuana, or whether Mr. Hanmore can operate safely when using medical marijuana. The union argues that the employer appears to suggest that based on the job demands analysis, Mr. Hanmore could not possibly operate the grader safely and clearly ignores the many years that Mr. Hanmore has been a safe equipment operator. It also ignores that the employer has a trainer that allows for observation and testing of safe operation.

90 The union also argued the employer had full opportunity to make inquiries of Mr. Hanmore's physician about his medical issues and medications. The employer chose not to do so. It maintains that the employer is now attempting to ignore the IME that it agreed to. The fact that Ms. Stordy does not undertake to resolve the dependency issue with Dr. Oluwadairo is not a justification to impose the employer's doctor on Mr. Hanmore.

91 The union recognizes that a person using marijuana should not perform hazardous tasks because of impairment. The Union claims that this is the appropriate standard where the consumption occurs immediately before undertaking tasks. But the issue in a fit for work standard is how long the impairment lasts. The union maintains that the Health Canada document provided as evidence notes that the effects from smoking marijuana are felt within minutes and reach their peak within 0-30 minutes, with a high that can last up to 2 hours. Further that most behavioral and physiological effects return to baseline levels within 3 - 5 hours after drug use. It argues that is in line with Dr. Oluwadairo's conditions that Mr. Hanmore not smoke within four hours of the start of his shift and Mr. Hanmore's disclosure that the effect of his nightly use only lasted an hour.

92 The union submitted that the options presented to the grievor by the employer in its January 3, 2012 letter were not truly optional at all. It was instead a blatant attempt to force the grievor into consultation with its alleged expert on substance use in order to test the veracity of his statements regarding previous consumption of marijuana. It was an entirely unreasonable approach given the dearth of any incidents or issues that might have cast doubt upon the grievor's integrity or job performance.

93 The union requested that the Board allow the grievance accordingly.

94 The union relied on the following authorities in support of its submission: *Monarch Fine Foods Co. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (Ont. Arb.) (Picher), and *Trimac Transportation Services - Bulk Systems v. T.C.U.*, [1999] C.L.A.D. No. 750, 88 L.A.C. (4th) 237 (Can. Arb.) (Burkett). *Suncor Energy Inc. and Unifor, Local 707A (Random Alcohol and Drug Testing Policy), Re*, [2014] A.G.A.A. No. 6, 242 L.A.C. (4th) 1 (Alta. Arb.) (Hodges), *Monarch Fine Foods Co. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (Ont. Arb.) (Picher)

The Employer Reply

95 Counsel for the employer reaffirmed the legal obligation of the employer to investigate the matter at hand by as thorough means as possible.

96 Further, the employer was prudent in contacting Alberta Transportation to determine if holding a medical marijuana permit was compatible with the grievor's class 3 license that was required for the operation of

heavy equipment in safety sensitive service. Had that authority simply revoked the license, the matter would have concluded at that point, and there would have been no basis for the subsequent Independent Medical Evaluation. Alberta Transportation concluded otherwise, but encouraged the employer to register an appeal if it saw fit, and did not mandate the employer to return the grievor to safety sensitive duty. The employer instead commissioned the Independent Medical Evaluation, to which both the grievor and the union ultimately consented.

97 The employer restated its decision to not consult with the grievor's personal physician, and instead proceed directly to an expert in substance abuse, as totally justifiable given the complexities as well as the newness of medical marijuana use. And even if it might be interpreted by some that a step in the process was skipped, the real issue before the Board, it was argued, was whether in January 2012 the employer had legitimate grounds to conclude that the attendant risk was too great to consider returning the grievor to safety sensitive duty.

98 Counsel refuted the union assertion that the Independent Medical Evaluation categorically stated that the grievor could work in safety sensitive service while consuming medical marijuana, with conditions. Any such pronouncement from Dr. Oluwadairo was predicated on the false response provided by the grievor regarding the alleged 15 years of marijuana use leading up to permit for medical application. The issue of unresolved dependency was not based on the employer's own belief as suggested by the union in its reply. Rather, Dr. Oluwadairo was clear when he submitted that "... if [the grievor] had in the past been using marijuana on a regular basis for approximately 15 years prior to this medical prescription, I will say that the marijuana dependence could be a primary disorder in this patient....".

99 The employer argued that in January of 2012 it had the following information at its disposal. The grievor told two managers in no uncertain terms that he had smoked marijuana regularly for 15 years prior to obtaining his permit for medical marijuana. Such a history with the drug would render adherence to the conditions expressed by Dr. Oluwadairo in the Independent Medical Evaluation a difficult challenge indeed, particularly the prohibition that he smoke only a few puffs per night and abstain entirely within four hours of the start of his shift.

100 Counsel for the employer revisited the union criticism it should have fully explored the option of testing the grievor for level of impairment, asserting that it would constitute undue hardship to require the employer

to allow a potentially drug dependent individual to return to safety sensitive duty without first completing treatment. With that issue unresolved as of January of 2012, it was unreasonable to expect that the employer would freely return the grievor to his previous position, subject to drug testing along with added supervision.

101 The employer concluded that the union's reply basically ignored the substantial legal obligations that the instant case imposed on the employer. The employer in good conscience could not itself skirt this responsibility, and by doing so endanger employees and the public.

102 Counsel reiterated that the grievor's previous rate of pay was protected in his accommodated position, and that he was extended the opportunity for further assessment by an expert in substance use.

103 The employer once again requested that the grievance be dismissed in its entirety.

Decision

104 It may be instructive to once again restate the first paragraph of the overview from the employer's written submission to this Board: "This case is not about whether an employer could ever accommodate an employee using medicinal marijuana in safety sensitive work. Indeed, there could very well be a case whereby an employee is using medicinal marijuana on his off hours and, after conducting its due diligence, the employer is satisfied that the employee is fit to perform safety sensitive work". Although the grievor had advised at least two of his supervisors of his use of medical marijuana in late 2009, Mr. Hanmore was allowed to continue working in his safety sensitive position for over a year. In March of 2011 the grievor was removed from his safety sensitive position while the employer conducted an investigation. The employer argued that the investigation was required due diligence in relation to the grievor's medical condition. The employer determined that the grievor was unfit to perform such safety sensitive duty due to unresolved concerns over dependency.

105 The Employer has acknowledged that Mr. Hanmore has a disability and enjoys protection under this legislation. The grievor suffers from degenerative disc disease in his cervical spine. A *prima facie* case of discrimination is acknowledged by the employer following Mr. Hanmore's removal from driving duties as a direct result of his use of medication to treat the pain associated with his degenerative disc disease. In making this decision the employer relies on Section 7(3) of the *Alberta Human*

Rights Act, *supra.* It submits that it has established a bona fide occupational requirement, justifying the decision to not return Mr. Hanmore to his safety sensitive work in January 2012.

106 The employer claims it has met the test set out in the Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("Meiorin") as follows:

1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
2. The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and,
3. The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing characteristics of the claimant without imposing undue hardship upon the employer.

107 With respect to the first two criteria in the *Meiorin* analysis, the standard in this case is fitness for work for the purpose of ensuring safety and the employer argues that there is no question that this is rationally connected to the performance of his job. On this the Board is in agreement.

108 With respect to the second criteria the employer argues that there is no dispute that it adopted that standard in an honest and good faith belief that it is necessary to the fulfillment of that legitimate work-related purpose, namely the safety of Mr. Hanmore, his fellow employees, and the public at large. The employer submits that there could very well be a case whereby an employee is using medicinal marijuana on his off hours and, after conducting its due diligence, the employer is satisfied that the employee is fit to perform safety sensitive work. However, in this case the employer refuses to allow the grievor to return to his position because of unresolved concerns over dependency.

109 The evaluation whether an employer has acted in an honest and good faith belief reaching conclusions that are reasonable measures is a question of fact that may vary with the individual circumstances of the matter being considered. In considering those circumstances the Board must examine if the decision of the employer has been reached arbitrarily or does not address the employer's legitimate purpose. The assessment of the individual seeking accommodation must be reasonable and the Board may

consider if other means, less intrusive of individual human rights, are available to meet the employer's otherwise legitimate need.

The City of Calgary Policy on Substance Use

110 At the outset of considering a *Meiorin* analysis it is worthwhile to begin with the employer's Policy. The salient portions of its Administrative Policy for Substance Abuse are reproduced below:

> 3.1 All City employees, volunteers and contractors are responsible for:
>
> 3.1.1 Reporting for work and remaining fit for work at all times while on City of Calgary business.
>
> 3.1.2 Informing their supervisor immediately if they are unable to safely and efficiently perform their duties due to the consumption of alcohol or legal or illegal drugs.
>
> 3.1.3 Abstaining from any substance prior to or during a scheduled work shift that could impair their ability to safely and / or efficiently perform their duties.
>
> 3.1.4 Refraining from the possession, distribution, offering or sale of illegal or legal substances at the workplace.
>
> 3.1.5 Assuming responsibility for their substance use problem and seeking professional assistance, including following any recommended treatment and relapse prevention program following treatment.
>
> . . .
>
> 4.4 The City can have the employee submit to alcohol or drug testing in three situations:
>
> 4.4.1 **Reasonable cause**, where an employee exhibits, or evidence points to, behaviour sufficient to give the employer reason to suspect the employee has consumed alcohol or drugs. Observed behaviours may include slurred speech, smelling of alcohol, etc.
>
> 4.4.2 **Post treatment** (random testing for monitoring abstinence), where a medical professional has recommended testing as part of relapse prevention or post treatment regime. In most cases abstinence monitoring is recommended following treatment, to mitigate safety risks, especially when the employee is returning to a safety sensitive position or where supervision is limited. In some cases, abstinence monitoring will be recommended in non-safety sensitive positions to check for and encourage abstinence. Employees will only be tested for the substance or substances as recommended by the Substance Abuse Professional of Occupational Health Physician.

> 4.4.3 **Post incident/Near miss (where reasonable cause exists),** where an event has occurred and there is a need to inquire into that event to determine the cause. This is done only in cases where there is a possibility that the event may have been caused by an employee's substance use.

111 The employer's Substance Use Policy Guidelines further advise that:

> Supervisor's opinions with respect to potential substance use and fitness to work issues are based on their best judgement, given the facts that emerge. Due diligence requires that they act appropriately and responsibly to protect the employee and other employees at work.
>
> It is not the supervisor's role to determine "impairment". The role of a supervisor is to make a decision whether an employee is unfit for work. The decision should be supported by observed facts that would support the reason for being unfit to work. In this case, facts should support an employee being unfit for work due to being under the influences of a substance.

112 The supervisors who were initially informed by the grievor of his medical marijuana permit yet took no further action were of course subject to this guideline, and indeed abided by it. They all quite obviously made a decision, using their best judgment, that the grievor was not unfit for work, or under the influence of marijuana. The Board was not provided with any evidence that the supervisors actions were ever questioned, investigated or that they were disciplined as a result of their actions. They clearly did not consider the simple existence of a medical marijuana permit as prejudicial in any way to the protection of the employee or other employees while in the workplace.

113 Of note is the fact that the applicable provision of the Policy does not specifically address fitness for work in the context of safety sensitive service, instead referring to "All City employees". The grievor was not permitted to work his regular safety sensitive position due to employer concerns over potential impairment, dependency and addiction. However, these same concerns failed to generate any due diligence or investigation in relation to the grievor's accommodated position in a non-safety sensitive capacity.

114 There was no evidence whatsoever presented during the arbitration hearings that the grievor in any way, at any point was in violation of the employer's policy on substance use. Notwithstanding the employer's concerns over unresolved dependency and the safety of employees, the employer has apparently and continually allowed the grievor to simply work, period, in violation of its own policy.

The Grievor

115 Mr. Hanmore is a long service employee. At the time of the investigation he was 57 years old and had been working for the employer since 1984. He has completed a grade nine education and during testimony cannot be described as articulate. He has attained a Class 3 drivers licence and has operated employer heavy equipment without incident or discipline. No evidence was provided regarding any cognitive deficiencies, absenteeism, or physical signs observed which are normally associated with drug dependency. The same can be said in the last fifteen years of his employment, the last year of his employment in a safety sensitive position and the final period of employment in a non-safety sensitive position.

116 The grievor advised at least two supervisors of his use of medical marijuana. At least one other co-worker was also aware. The employer investigation concluded that he had obtained his permit to possess medical marijuana from Health Canada properly and had reported his use to Alberta Transportation in accordance with their regulations. His licence had been renewed by Alberta Transportation and was not appealed by the employer. The Grievor admits to trying marijuana at the age of fourteen or fifteen but denies ever telling Ms. Pierce or Ms. Stordy that he had been using marijuana for fifteen years. The grievors testimony before the Board was never evasive or proven untruthful in any way. The grievor did express frustration that he was removed from his operator position and forced to work as a labourer shoveling asphalt which further aggravated his arthritic neck condition.

The Investigation

117 The employer maintains that it was during the course of its investigation that the employer developed its unresolved concern that the grievor had a marijuana dependency. Ms. Stordy and Ms. Pierce both claim that Mr. Hanmore advised them during one on one conversations that he had been using marijuana for fifteen years. Mr. Hanmore denies this claim and suggests that he may have said he first used marijuana when he was fifteen.

118 Ms. Pierce was a primary part of the investigation. She claims that Mr. Hanmore made the claim of fifteen years of use on March 30, 2011, only nine days after the beginning of an investigation that would last over eight months. On March 23, 2011, Ms. Pierce had set out a twelve point action plan in an email for gathering information. Part of that plan

was that the Grievor would meet with Ms. Stordy and that Ms. Stordy would contact the doctor prior to touching base with Labour Relations. Notwithstanding the immediate plan there is no evidence that Ms. Stordy ever considered seeking any clarification from the grievor's doctor as appears to have been suggested and is normally the case.

119 Ms. Pierce spent considerable time and effort investigating the legality of the grievor's class 3 drivers licence with Alberta Transportation. In a series of emails Ms. Peirce offered a number of developments with Alberta Transportation:

1. On April 8, 2011, Ms. Pierce suggested that she had been told Alberta Transportation would "never allow a person to keep a class 3 licence and use marijuana.
2. On April 14, 2011 Ms. Pierce advised Employer Counsel Rebecca Pitts that Alberta Transportation had provided her their Medical Standards and that the Grievor's Doctor had stated that he is not an addict and "there is nothing else they can do"
3. On May 2, 2011, She advised that an Alberta Transportation contact "strongly encouraged her to file an appeal", that the Federal Government had been contacted and the Police were contacted.

120 While considerable time and effort was expended gathering information by Ms. Pierce at no time until September 21, 2011 was any clarification information requested or received from Mr. Hanmore's doctor as originally suggested on April 14, 2011. When reviewing these facts and considering the true purpose of the investigation being conducted, Ms. Pierce's comment of March 30, 2011, raise considerable concern when she comments to Ms. Van Essen regarding Alberta Transportation "if they suspend his licence our job will be much easier if they don't we will have a tougher fight on our hands with the union." While the thrust of the investigation conducted by Ms. Pierce raises initial concerns with respect to the fairness and good of the investigation, her comments regarding "our job" also raise concerns with respect to the reliability of her allegations, made much later in the investigation, that Mr. Hanmore had been using Marijuana for 15 years.

121 If the "job" of the investigation was to remove Mr. Hanmore from his position it is little wonder that at no time was the Board provided any evidence from any of Mr. Hanmore's supervisors or co-workers who knew he was using medical marijuana. Nor were any of these individuals called as witnesses to give testimony regarding any cognitive deficien-

cies, safety concerns or absenteeism concerns relating to the grievor in the past 15 years.

Independent Medical Evaluation Report

122 By letter dated June 10, 2011, Noella Stordy, RN, Corporate Health Consultant, on behalf of the City of Calgary requested that Dr. Oluwadairo assess Mr. Hanmore by reviewing a number of documents, answering ten related questions and providing any comments or suggestions. As a preamble to the questions Ms. Stordy provided several paragraphs of background information. Among other information, Ms. Stordy advised that:

1. ...due to the operation of the grader, the nature of the roadways and seat system, there is significant spinal compression, and spinal rotation. He works 12 hour shifts. Mr. Hanmore has a long standing history of musculoskeletal health issues involving his cervical spine.
2. ....his physician has prescribed a medication (medical marijuana) to relieve musculoskeletal pain. He states he receives 90 grams/month and uses 3 grams/night.
3. Mr. Hanmore has disclosed to me that he has used marijuana on a regular basis for approximately 15 years prior to it being prescribed to him by his physician.
4. Ms. Stordy referred to .... "the prescription issued by Mr. Hanmore's physician" and repeatedly referred to the "prescription".

123 The background information provided by Ms. Stordy, a health care professional, is significant. She set the basis for what was intended to be an Independent Medical Examination (IME). Ms. Stordy did not inform Dr. Oluwadairo that Mr. Hanmore had completed two Functional Capacity Evaluations following his injury in 1995 and 1996, or that there had been no concerns since that time. Mr. Hanmore had a Health Canada Permit to possess medical marijuana, not a prescription from his Doctor as she stated. She did not advise Dr. Oluwadairo that the employer had not consulted the grievor's Doctor before giving any of this information.

124 Ms. Stordy's statement that the grievor receives 90 grams a month and uses 3/grams/night was not a factual statement. Mr. Hanmore had a permit to possess 90 grams of medical marijuana. Her statement that Mr. Hanmore disclosed that he had used marijuana "on a regular basis" was

inconsistent with her own notes and testimony. Combined, her unfounded statements all contributed to her final opinion of unresolved dependency.

125 The report regarding the Independent Medical Evaluation of the grievor was issued on August 10, 2011 by Dr. Samuel Oluwadairo, a certified member of the Canadian Society of Addiction Medicine. Therein, the doctor recounted that the grievor had stated during the interview that the smoking of marijuana relaxed him enough to promote sleep at night. The grievor maintained that he never smoked while on the job and never worked under the influence or experienced a "drowsy or floating sensation".

126 Dr. Oluwadairo further reported that the grievor first tried marijuana at age 14, but was never a regular user until 2009 when he purchased some "street" marijuana that helped control his pain. The grievor subsequently approached his personal physician with the documents required to obtain medical marijuana through Authorization to Possess, which was eventually approved and granted by Health Canada. He reported to Dr. Oluwadairo that he had never felt "funny" from its consumption, or experienced a numbness, drowsiness, or loss of control.

127 Dr. Oluwadairo assessed the grievor as calm and cooperative during the interview, with no evidence of drowsiness or slurring of speech. The doctor did not observe any formal thought disorder and the grievor was seemingly well-oriented in time, place and person. He was attentive and displayed insight regarding the issues surrounding his current work situation. The grievor understood the connection between marijuana and potential impairment, and possible impact on safety.

128 Dr. Oluwadairo diagnosed the grievor with marijuana dependence, secondary to his general medical condition of chronic pain. He opined further, however, that *if* the grievor in the past had been using marijuana *on a regular basis for approximately 15 years* prior to obtaining his medical marijuana permit, as alleged by the employer, the marijuana dependence could very well be elevated to a primary disorder. This secondary opinion clearly resulted from the unfactual information provided by Ms. Stordy.

129 The doctor pronounced that there were no set limits, as per the grievor's medical marijuana permit, on the amount that he could smoke each night. The doctor related that the grievor firmly denied using up to three grams per night, and that average consumption on any given night was more in the realm of one-third of one gram. Even though the

grievor's permit calls for 90 grams, he told Dr. Oluwadairo that he simply stored whatever excess he has in a safe place for future use. The doctor recommended that he apply to Health Canada to have his monthly stipend reduced to just 10 grams.

130 Dr. Oluwadairo confirmed that use of three grams of marijuana per night would most definitely render the grievor unfit to perform his safety sensitive duties. The doctor further advised that, for the grievor to continue working in such a capacity, a minimal [for example perhaps the one-third of one gram daily that the grievor purportedly used] dose of marijuana would have to be established for him. Dr. Oluwadairo also recommended that the grievor be observed in the performance of his duties for a period of time, that his THC level be monitored, and that he refrain from any ingestion of marijuana within four hours of the start of his working shift. The doctor also suggested regular supervision of the grievor to ensure that he not arrive for work in an impaired state.

131 Dr. Oluwadairo advised that continued use of even a limited amount of medical marijuana might eventually erode motor skills, and could necessitate reconsideration on the part of the grievor as to his ability to perform safety sensitive work. A reaffirmation of medical fitness though Alberta Transportation was also mandated.

132 Throughout Dr. Oluwadairo assessment he continually balanced his findings with *the allegations of 15 years of regular use and 3 grams/daily as suggested by Ms. Stordy*. Dr. Oluwadairo found, the grievor to be without any thought disorder; he was cognitively well orientated in time, place and person with concentration and attention good. He recommended that he be allowed to return to his former work subject to the following:

1. Repeat of medical fitness for driving through Alberta Transportation
2. The City ensure supervision
3. Refrain from using medical marijuana 4 hours prior to his shift
4. Observation performing his duties
5. Follow Health Canada recommendations not to operate machinery while under the effects of marijuana

133 Dr. Oluwadairo was not provided with any information from Mr. Hanmore's physician Dr. Sood. He was provided with unfactual information from Ms. Stordy which resulted in a flawed IME. Combined with the comments and testimony of Ms. Pierce regarding the "job" of the

investigation, the actions of Ms. Stordy in influencing the IME establish a clear lack of fairness and reasonableness throughout the process. Notwithstanding the undue influence, Dr. Oluwadairo's evaluation of August 10, 2011 recommended a return of Mr. Hanmore to his original duties.

The Labour Relations Perspective as of December 1, 2011

134 On August 30, 2011, following Dr. Oluwadairo's assessment and discussions with the grievor's union representative Toni Miotti, Ms. Van Essen requested, that Mr. Hanmore provide answers to a number of follow-up questions to the IME. Those questions focused on clarifying the issues raised of:

1. The level of pain resulting from his musculoskeletal health issues
2. His authorization for possession of 90 grams/month and his stated use of 1/3 grams/night
3. Mr. Hanmore's alleged disclosed to Ms. Stordy and Ms. Pierce that he has used marijuana on a regular basis for approximately 15 years prior to it being prescribed to him by his physician in contrast to his position that he first used marijuana when he was 14 or 15 years old

135 Mr. Miotti provided answers to Ms. Van Essen's follow-up questions on September 27, 2011 reaffirming Mr. Hanmore's claims that he was not a regular user of marijuana since he was 15 and that he only used about 1/3 of a gm a night which could be substantiated by his Health Canada record of purchases. Mr. Hanmore also provided a letter from his physician, Dr. B.K. Sood who outlined:

1. His existing condition and confirming X-rays
2. His previous medications
3. His attempt to address his pain with physiotherapy
4. The fact that Mr. Hanmore was never a user of marijuana
5. That at no time did he *prescribe* marijuana
6. That he signed the Health Canada forms necessary to possess marijuana for medical purposes
7. That he had seen Mr. Hanmore in his office a number of times and no time found him to be high or under the influence of the drug

136 Health Canada documentation provided to Ms. Van Essen, subsequently confirmed that the grievor was not using 90 grams per month. It

appeared that he had obtained 90 grams of marijuana on only two separate occasions in 2010.

137 Miss Van Essen, reaffirmed that the grievor was authorized to deploy both his general operator and heavy equipment operator licenses while authorized to possess medical marijuana, but qualified their finding with the statement that it was the employer responsibility to evaluate whether the grievor could safely operate heavy equipment.

138 That said, Ms. Van Essen concluded at that point that the employer had no evidence that clearly supported a grievor dependency requiring treatment, nor any indication whatsoever that he had performed his work in an unsafe manner during the approximately 12 months he continued to operate heavy equipment concurrent with his use of medical marijuana. There was no suggestion that he was unfit for duty or constituted a safety risk. She summarized her three page email to Ms. Pitts, employer counsel by emphasising that there was:

- Nothing to clearly state he has a dependency requiring treatment
- Nothing to support that he performed unsafely during almost 12 months he was operating while on marijuana
- Nothing to clearly state he would be unfit for duty and or a safety risk
- Nothing to support that he has operated his own vehicle off duty in an unsafe manner
- The employee had disclosed his medical marijuana use, Management and HR were aware and he was allowed to continue to work in safety sensitive work after the disclosure
- Clear concern from management about safety risks and/or liability and/ or risk to the public if we allow him to return to driving on city streets

139 Ms. Van Essen delineated two options requiring agreement with the grievor:

- Dump the (adjoint) Human Rights complaint
- Put the grievor back to safety sensitive work subject to the conditions detailed in the Independent Medical Evaluation report, plus passing Fleet testing

140 Absent agreement with the grievor Ms. Van Essen suggested:

- Fight the Human Rights complaint and/or let the Tribunal make a public decision/declaration that The City has to allow employees

to operate heavy equipment on public streets when in possession of medical marijuana permits

The Employer Decision of January 3, 2012

141 Five weeks later, however, on January 3, 2012, Ms. Van Essen wrote to the grievor advising that the City had determined that it was unwilling to accept the safety risk associated with the use of medical marijuana in conjunction with the operation of heavy equipment. Reference was made to the substantial discrepancies in statements regarding his history with marijuana, and the employer declared that, on the balance of probabilities, the grievor was a long term regular smoker. It was also stated that, whether the grievor's dependency was classified as primary or secondary, it remained an unresolved issue. The City also expressed concern regarding the advisory issued by both Health Canada and Dr. Oluwadairo that continued use of medical marijuana may have an adverse effect on motor skills. At the time of this decision the employer knew or ought to have known that the information provided by Ms. Stordy to Dr. Oluwadairo was not factual.

142 Ms. Van Essen concluded by offering the grievor two options - continue to be accommodated in a non-safety sensitive position that does not involve the operation of heavy equipment, or agree to attend an assessment with Dr. Hajela to determine how best to manage his chronic pain and resolve the matter of his related substance use dependency.

The Investigation Process

143 An elapsed period of nine months was an unnecessary amount of time to complete an investigation, despite the collective unfamiliarity with medical marijuana. The union and the employee were responsible for a portion of the delay, but the majority of the failure must rest with the employer. In addition, the investigation was regularly tainted by the actions and omissions of various members of management.

144 Ms. Stordy undermined the fairness, and reasonableness of the process when she erred in providing information to Dr. Oluwadairo in preparation for the Independent Medical Evaluation. The information she provided unduly influence the Independent Medical Exam.

145 Finally, the observations of the supervisors who had been initially informed of the grievor's medical marijuana permit, but detected no adverse effects on the grievor's performance nor any sensory signs of impairment, and therefore willingly allowed operations to carry on as usual,

were effectively never made part of the investigation. If they were at all, it was not revealed to the Board.

Summary

146 Once again quoting from the employer submission, "This case is not about whether an employer could ever accommodate an employee using medicinal marijuana in safety sensitive work. Indeed, there could very well be a case whereby an employee is using medicinal marijuana on his off hours and, after conducting its due diligence, the employer is satisfied that the employee is fit to perform safety sensitive work". The matter to be determined by the Board is whether, the employer's the decision not to allow the grievor to perform those duties because of unresolved dependency issues was reached fairly, reasonably and in good faith.

147 The evidence before the Board does not give rise to any suspicion that the grievor may have been either untruthful, or mistaken, in his denial of the alleged revelations to Ms. Peirce and Ms. Stordy. There was no evidence presented during the arbitration hearings that the grievor's use of marijuana for medical purposes had any impact on his ability to perform his safety sensitive duties in a safe manner. There was also no evidence presented during the arbitration hearings that the grievor had at any time exhibited signs of impairment while on duty. Certainly those supervisors who were informed of the grievor's medical marijuana permit were not concerned in that regard sufficient to remove him from his duties. It is also compelling that these supervisors were not called by employer counsel as witnesses during the arbitration hearings.

148 The Board finds that employer fundamentally created the "dependency" issue. The argument has no merit. The employer did not provide any expert toxicological testimony or evidence to support the concern of dependency.

149 The employer failed to fully meet the criteria delineated in the analysis of *Meiorin*, *supra* relating to actions in good faith, honest and reasonable. The background information provided by Ms. Stordy, a health care professional, is significant in assessment of such criteria. She set the basis for what was intended to be an Independent Medical Examination (IME). Ms. Stordy did not inform Dr. Oluwadairo that Mr. Hanmore had completed two Functional Capacity Evaluations following his injury in 1995 and 1996, or that there had been no concerns since that time. Mr. Hanmore had a Health Canada Permit to possess medical marijuana, not a prescription from his Doctor as she stated. She did not advise Dr.

Oluwadairo that the employer had not consulted the grievor's Doctor before giving any of this information. Her statement that the grievor receives 90 grams a month and uses 3/grams/night was not a factual statement. Mr. Hanmore had a permit to possess 90 grams of medical marijuana. Her statement that Mr. Hanmore disclosed that he had used marijuana "on a regular basis" was inconsistent with her own notes and testimony. The credibility of Ms. Stordy's testimony that she heard Mr. Hanmore say he used marijuana for over 15 years during her phone conversation with him is questionable as a result of her later modification of that statement. As a medical professional, Ms. Story knew or ought to have known that her statement to Dr. Oluwadairo of marijuana use adding "on a regular basis" as well as making the unsubstantiated claim that the grievor receives" 90 grams a month" and "uses 3 grams/night" would give rise to the issue of dependency. Combined, her unfounded statements all contributed to her final opinion of unresolved dependency and made their way into the employer's ultimate decision.

150 The employer ultimately argued the Independent Medical Evaluation from August of 2011, from an expert, Dr. Oluwadairo, stipulated that if the grievor had been smoking marijuana on a regular basis for 15, years, marijuana dependency would be a primary disorder. What the doctor actually stated was "....*if* [the grievor] had in the past been using marijuana on a regular basis for approximately 15 years prior to this medical prescription, I will say that the marijuana dependence could be a primary disorder in this patient". His response was clearly based on unfounded information provided by Ms. Stordy.

151 After careful consideration all of the evidence and submissions in this matter the Board finds that the investigation and IME used by the employer to reach their decision that there was an unresolved dependency issue preventing the return of the grievor from returning to his safety sensitive position was flawed.

152 The Board finds that the portion of the employer's investigation conducted Ms. Pierce did in fact see the "job" as looking for ways to prevent the grievor from returning to work rather than establishing the facts. Her primary focus was on having Alberta Transportation suspend his class 3 licence. She did not provide any investigation of how the grievor had reported his use of medical marijuana over a year earlier to at least two supervisors and was allowed to work without incident. No investigative information was provided that was gathered from the supervisors, coworkers or work records to support the employer's position of un-

resolved dependency issues. Unfortunately, Ms. Pierce's comment that if Alberta Transportation would "suspend his licence our job will be so much easier" rings true in summarizing the focus of her efforts.

153 The grievor reported his use of medical marijuana to his supervisors, in accordance with employer policy and was allowed to work. He worked without incident and no reported signs of dependency in that period or his entire working career as revealed by Ms. Pierce in her investigation. He was not provided with the provisions of the Policy with respect to any evidence that his work performance was observed as part of the employer's investigation. The employer has not established any legitimate reason to question the grievor's conduct or credibility of his testimony.

154 The employer would have been well-served had it followed the December 1, 2011 guidance of its Business Partner in Labour Relations. In the final analysis, no degree of substance abuse or dependency, nor any indication of impairment while on duty, on the part of the grievor, was at any point established by the employer. The employer's investigation was flawed, at best. The grievor's own doctor was not consulted until after the IME. The information provided by Ms. Stordy to Dr. Oluwadairo regarding the grievor's use of marijuana was unfounded and served to inappropriately substantiate the employer's concern regarding dependency.

155 However, the serious consequences of operating the employer's equipment while under the influence of drugs cannot be overlooked. The employer is entitled to conduct a fair and proper investigation upon which to base decisions. Such an investigation may require obtaining and considering medical information from the employee's doctor. It may also include consideration of an Independent Medical Exam.

156 In this case the employer maintains that it is possible to have an employee with a medical marijuana permit work in a safety sensitive position. Clearly the grievor did so for over one year without incident. However, the employer maintains that it could not allow the grievor to continue working in his safety sensitive position because of unresolved dependency concerns. The evidence before the Board clearly established that the investigation was flawed. The IME was unduly influenced by Ms. Stordy while not being provided with any information from grievor's doctor.

157 In view of all of the forgoing it is clear to the Board that the grievor has been unjustifiably held out of safety sensitive service for a period

that is now approaching four years. The grievance is therefore allowed in part.

158 The employer is directed to reinstate the grievor to his former position in accordance with the following:

- The grievor will provide proof that he has properly maintained his class 3 licence with Alberta Transportation,
- The grievor will be compensated for all lost wages, overtime and any accompanying pension benefits,
- He will be subject to random substance testing to measure influence or recent use of marijuana, and will be subject to appropriate discipline for any violation,
- He will be subject to random work performance monitoring in accordance with the employer's Policy,
- The grievor, if he has not already done so, will arrange, in concert with his personal physician, for the reduction of his monthly medical marijuana, as allowed for by his Health Canada permit to ten grams per month, or effectively 0.3 grams per day, as recommended by Dr. Oluwadairo.
- After review of the findings of this Board and the reinstatement provisions set out above, if the employer remains concerned with the issue of dependency, it may be resubmitted to Dr. Oluwadairo for review. The request for review should be accompanied by:
    - A copy of this award
    - A report from the grievor's doctor regarding his current observations and medical information
    - Any observations of supervisors or fellow employees pursuant to the employer's Policy

159 This Board remains seized in the event of any dispute with regard to any aspect of the interpretation, enforcement or implementation of this award.

***William J. Armstrong Member*, Dissent:**

1. I dissent from the conclusion of the majority. My reasons follow.

Credibility

2. In my view, the reasons of the majority turn on a finding of credibility but there is virtually no analysis for that finding. In brief, where evidence of the grievor and any other witness is in conflict, the evidence of the grievor is accepted and the contrary evidence is labelled as in error. This is clearest on the question of whether the grievor had smoked marijuana for 15 years or had simply tried it at age 14 or 15 and not used thereafter for many years until 2009.

3. The majority, even in reciting the evidence, consistently favours the evidence of the grievor. When the majority review the evidence of Ms. Peirce or Ms. Stordy, words like "allegedly" are used (the numbers are the relevant paragraphs in the majority award)

- 9: "the grievor allegedly offered up the unsolicited admission" regarding Ms. Peirce's evidence.
- 12: "the grievor allegedly told her" regarding the evidence of Ms. Stordy.
- 20: "the employer further asserted that ..." regarding the content of Tab 19 of Exhibit 4, the letter of Ms. Stordy requesting the Independent Medical Examination ("IME").
- 30: "the grievor's alleged 15 year relationship with marijuana." regarding Ms. Van Essen's evidence
- 52: "she alleged that ..." regarding Ms. Stordy's evidence

4. By contrast, the evidence of the grievor is recorded in positive words:

- 14: "the grievor clearly advised".
- 18: "the grievor maintained".
- 64: "the grievor maintained".
- 66: "the grievor testified".

5. This issue of credibility on this point was clearly put to the board by both counsel: see paragraphs 74, 81 and 98. However, the only "analysis" of the majority is contained in two brief and separated sentences:

- 116: "The grievors [sic: grievor's] testimony before the Board was never evasive or proven untruthful in any way."
- 147: "The evidence before the Board does not give rise to any suspicion that the grievor may have been either untruthful, or mistaken, in his denial of the alleged revelations to Ms. Peirce and Ms. Stordy."

6. The second part of the first quote and the second quote are circular reasoning. It amounts to saying "We believe the grievor over Ms. Peirce and Ms. Stordy because he has not been proven untruthful or mistaken and he has not been proven untruthful or mistaken because we believe the grievor over Ms. Peirce and Ms. Stordy."

7. This leaves only that he was never evasive before the Board as the rationale for making a credibility finding. The classic statement on assessing the credibility of witnesses is *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 (B.C. C.A.)*:*

> If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enters into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen or heard, as well as other factors combine to produce what is called credibility....
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truths," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

8. While it would not be necessary for the majority to quote this case, it was necessary for them to consider more than whether he appeared to be evasive or not. Ms. Peirce and Ms. Stordy did not appear evasive either, but given the clear conflict between their evidence and the grievor's, the

majority ought to have considered and expressed reasons for their finding on credibility. The majority has done exactly what the British Columbia Court of Appeal warned against.

9. Ms. Peirce testified about the 15 years comment in the context of her interview[1] of the grievor on March 28, 2011 and a subsequent phone call between them two days later. This interview occurred just one week after the use of medical marijuana by the grievor came to her attention and 5 days after her initial discussions with Ms. Van Essen on March 23. During this interview, he said that he smoked every night and had access to 90 grams of marijuana nightly or 3 grams per day.[2]

10. The March 30 telephone call[3] was a follow up to the interview regarding reporting to Alberta Transportation. Her notes clearly state: "Have been smoking for 15 years. Why an issue now. Never had an accident. Feel like being picked on."

11. The majority notes (para. 28) that Ms. Peirce told this to Ms. Van Essen sometime prior to April 7. The majority later incorrectly states (para. 120) that "her comments regarding 'our job' also raise concerns with respect to the reliability of her allegations, *made much later in the investigation*, that Mr. Hanmore had been using Marijuana for 15 years." (Emphasis added) In fact, the "allegation" by Ms. Peirce was recorded in her notes 9 days after the matter came to her attention and was conveyed to Ms. Van Essen shortly thereafter. This early recording and reporting to Ms. Van Essen are factors which favour the credibility of her evidence. The statement by the majority about her having made the allegations much later is simply wrong.

12. The "alleged" comment on the 15 years to Ms. Stordy came during a telephone conversation with the grievor on June 29, 2011. She had be-

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[1] Ms. Peirce's notes of the interview were in evidence as tab 2 of Exhibit 4.

[2] This was eventually confirmed the following September when the Union provided the Health Canada documents to the City. Those documents include the statement: "the proposed daily amount of dried marihuana is less than or equalto three grams." The Health Canada documents also show he purchased marijuana three times in 2010, not twice as stated by the majority at para. 136. This indicates a consumption of 180 grams in 8 months or somewhat less than one gram a day. The evidence was that each gram roduces about 3 joints, which suggests about 2 joints a day compared to the grievor's evidence of a few puffs daily.

[3] Ms. Peirce's notes of the call were in evidence as tab 3 of Exhibit 4.

come involved earlier in June when the grievor and the Union had agreed to an IME.

13. Nurses routinely maintain chronological notes with respect to interactions with people and Ms. Stordy's notes of her interactions with the grievor were in evidence.[4] Those notes state (in part):

- "States 'Ihave used THC for 15 years prior to getting it prescribed.'"
- "He states that he applies to Health Canada and receives 90 grams/month but only uses 3 grams/night."

14. These notes, part of the routine actions of a nurse and contemporaneous with the events, lend credibility to her oral evidence to the same effect. Furthermore, Ms. Peirce testified she never told Ms. Stordy about the 15 years comment made to her; Ms. Van Essen testified that she never told Ms. Stordy about the comment to Ms. Peirce and Ms. Stordy testified that the source of her information regarding his use for 15 years was from the June 29 phone call. She also testified that this was huge red flag for her.

15. By contrast, the first recording of the grievor's version of trying at age 14 and not using again until 2009 is in the IME report.[5] Mr. Miotti testified about a comment of 2-3 puffs per night made during the March 28, 2011 interview but no other witness confirmed that and he may have mixed later statements with that particular meeting. The grievor in his testimony said he used 3-4 puffs per night and had done so every night since 2009 when he obtained marijuana off the street and found it aided in pain control. He subsequently was prescribed Cesamet in June 2009 and then obtained medical marijuana in the fall of 2009.

16. He denies he said anything to Ms. Peirce about his history with marijuana and thinks it likely that Ms. Stordy was confused.

17. Ms. Stordy included in her letter to Dr. Oluwadairo[6] the statement "he used marijuana on a regular basis for approximately 15 year prior to it being prescribed to him by his physician." This is entirely consistent with her own notes of June 29.

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[4] Exhibit 8

[5] Tab 20 of Exhibit 4

[6] Tab 19 of Exhibit 4

18. The majority does not note that this letter was given to the union on July 15 as noted on the face of the letter and confirmed by the evidence of Ms. Van Essen. Ms. Van Essen testified that the Union did not raise any objections to the content of the letter.

19. The griever was seeking both compensation and reinstatement to driving. It was to his benefit to minimize his past and current use of marijuana, to avoid any issue of addiction. In short, he had a reason to change his story from what he had told City officials now that he was proceeding to an IME (something which he had previously refused to do earlier in 2011).

20. By contrast, one would have to hypothesize several things to reject the evidence of Ms. Peirce and Stordy on this point:

- The statement that he had been using for 15 years was manufactured by Ms. Peirce no later than March 30, 2011 (i.e. within 9 days of her becoming involved), and
- Ms. Peirce, either directly or via Ms. Van Essen, had conveyed that statement to Ms. Stordy, and
- Ms. Stordy falsely placed that same information in her nursing notes of the June 29 phone call and later in the letter to Dr. Oluwadairo.

21. The evidence is clear that the focus of Ms. Peirce around March 30 was the status of the grievor's Class 3 licence with Alberta Transportation. Indeed, that was the purpose of the March 30 call, to tell the grievor that he had to report his medical marijuana to Alberta Transportation and to provide them with medical information. It is not credible to think that Ms. Peirce concocted a false statement about his prior marijuana use that early in the process.

22. The majority makes much[7] of Ms. Peirce's comment in a March 30 email[8] that if Alberta Transportation suspends the grievor's licence it would make the City's job much easier whereas if they did not, "we could have a tougher fight on our hands with the Union." As Ms. Peirce testified, if his licence was suspended, there would be no need for the City to make a decision.

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[7] Paras.120 and 152

[8] Tab 4 of Exhibit 4

23. The majority sees this as evidence that the investigation was tainted from the outset and her job was to essentially get rid of the grievor. If that was her mindset on March 30, 2011, then her mode of accomplishing that was to have Alberta Transportation suspend his licence and not manufacture a statement about his past use of marijuana. As well, it was obvious by that point that the Union was advocating for the grievor and the suspension of the grievor's licence would shift the object of that advocacy from the City to Alberta Transportation.

24. Likewise, it is not credible to believe that Ms. Stordy, a nurse by profession, would include a false statement in her nursing notes saying that the grievor had made a statement when he had not done so.

25. The conclusion that best meets the "preponderance of the probabilities" is that the grievor did indeed make such statements in March to Ms. Peirce and in June to Ms. Stordy and then began to downplay the prior use by the time of the IME in August. The evidence does not justify the harsh conclusions the majority draw regarding Ms. Stordy and Ms. Peirce.

The letter requesting the IME

26. The significance of the foregoing credibility discussion is that it relates to the statement in the letter requesting the IME that he had regularly used marijuana for 15 years. The majority label statements in the letter as "unfounded"[9], "unfactual"[10] and an attempt "to unduly influence" the IME[11]. The majority conclude the IME was "flawed"[12] as a result (even though the majority relies on Dr. Oluwardio's IME to both determine that it is safe to allow the grievor to drive City equipment and to set the conditions under which he can do so in light of his use of medical marijuana).

27. Aside from the discussion above, there are a number of other points regarding this letter:

28. The majority criticise the failure to reference the Functional Capacity Evaluations in 1995 and 1996. These FCEs were not in evidence, but presumably relate to the grievor's accident which led to his neck/back

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9 Paras. 124 and 149

10 Paras. 128 and 133

11 Para. 144

12 Para. 133

pain. Since on the majority's view of the evidence, he was not using marijuana at the time, it is difficult to understand what these FCEs would have added to the process and why it was a failure to advise Dr. Oluwardio of them. The City was not contesting that he had degenerative disc disease or that he suffered from chronic pain. Indeed, it was the concern for his chronic pain that influenced the City to be concerned about use of medical marijuana beyond what he reported at the IME.

29. The majority also criticise the failure to advise that they had not obtained information from his family doctor. First, the City's evidence was that on issues of addiction, the City typically relied on specialist assessment and not on family doctors. Second, the City did not have such information and could not therefore tell Dr. Oluwardio any such information. Third, it is again difficult to see how this would have added to the IME process since Dr. Oluwardio took his own history from the grievor.

Drawing an adverse inference

30. As noted in the majority award, the grievor reported his receipt of medical marijuana soon after he was approved in the fall of 2009 and was allowed to continue driving. The majority draw an adverse inference[13] from the fact that those supervisors who were aware of his medical marijuana at that time were not called to testify. At para. 147, the majority says:

31. "It is compelling that these supervisors were not called by employer counsel as witnesses during the arbitration hearing."

32. It should be noted that union counsel did not argue for this adverse inference. Nor did the union call these supervisors if they thought their testimony would be helpful to the grievor.

33. The test for drawing an adverse inference is:

> In civil cases, an unfavourable inference can be drawn when, in the absence of explanation, a party litigant ... fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party.[14]

34. The only evidence about these supervisors and what occurred was from Ms. Peirce. She testified that the human resources person involved

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[13] At paras 112, 145 and 147

[14] Sopinka, Lederman and Bryant, The Law of Evidence in Canada (4h ed.), 2014, at s.6.450

at that time was inexperienced. There was no cross-examination on this point.

35. The majority[15] conclude that "quite obviously" that those supervisors concluded that the grievor was fit to work and not under the influence. With respect, it is not obvious at all. Given the evidence that the human resources person was inexperienced, it is equally possible that they thought that since it was approved by Health Canada, there was nothing the City could do. In any event, knowing why they acted as they did adds nothing to the analysis of whether he should now be driving. Still less useful would be knowing what actions in terms of discipline or counseling were taken against the supervisors. There is no basis for the majority to jump from the fact he was allowed to continue driving to the thinking of those supervisors at that time.

Remedies

36. One of the conditions of reinstatement set by the majority award[16] is that he be subject to random substance testing "to measure influence or recent use" of marijuana. There was no evidence that, given his nightly consumption of marijuana, such testing is even scientifically possible. Ms. Stordy did testify that testing was not done since he would always test positive. It is at best wishful thinking on the part of the majority that there is some method of testing, while he is at work, which could differentiate between his nightly consumption of marijuana and any use more recent than the night before. Ms. Stordy also testified that testing cannot measure impairment.

37. Ms. Stordy was the only witness with medical training and experience in addictions who testified. While Mr. Miotti in his evidence and union counsel in argument suggested that there be testing to establish "base-line levels", there was again no evidence that such testing is scientifically possible.

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15 At para. 112

16 At para. 158

38. The majority also provide that if the City continues to be concerned about dependency, it could return to Dr. Oluwardio under certain conditions.[17] This seems inconsistent with the majority's comments[18] that:

> "The Board finds that employer fundamentally created the 'dependency' issue. The argument has no merit."

If the argument has no merit, then why would the majority permit the City to raise the issue again?

Conclusion

39. I would have dismissed the grievance.

Grievance allowed in part.

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[17] At para. 158

[18] At para. 148