

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PIONEER CONSTRUCTION MATERIALS PTY LTD
APPLICANT

-v-

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL
UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
RESPONDENT

CORAM SENIOR COMMISSIONER A R BEECH
DATE MONDAY, 17 NOVEMBER 2003
FILE NO CR 164 OF 2003
CITATION NO. 2003 WAIRC 10049

Catchwords Industrial dispute – Industrial action – Transport industry - Proposed introduction of drug and alcohol testing – Compulsory conference – Matters referred regarding drug testing by means of urine or saliva sample – costs re employees attending their own doctor - Declaration issued - *Industrial Relations Act 1979* (WA) s 44(9)

Result Declaration issued re urine testing and employer meeting employee's reasonable costs of obtaining medical assessment.

Representation

Applicant Mr T. Caspersz (of counsel) and with him Mr C. Taylor (of counsel)

Respondent Mr N. Hodgson and Mr J. Cain

Reasons for Decision

- 1 Pioneer Construction Materials Pty Ltd ("Pioneer") operates 26 concrete plants and 7 quarries and sand mines in this State. It operates 139 commercial vehicles for travel in total on average 6,830,000 km per annum on public roads and accesses thousands of customer sites over a course of a year. It employs approximately 250 employees the majority of whom operate commercial vehicles. It also engages as many as 50 contractors on any given day.

- 2 Pioneer has introduced a fitness for duty policy as part of a revision of its health and safety program to better address the overall fitness, wellbeing and safety of its employees. During May 2003 industrial action was taken by union members over two days after two employees were stood down for refusing to take a urine drug test. Pioneer then withheld the introduction of random alcohol and drug testing but introduced the balance of its fitness for duty policy whilst three matters are dealt with by the Commission. Those three matters are:
 - (1) The company's right to conduct urine testing (as opposed to saliva testing which the union seeks);
 - (2) The company's requirement that employees declare and provide an appropriate doctor's certificate in respect of any over-the-counter medication which could lead to a positive test; and
 - (3) The requirement that where a health assessment is required by the company and an employee chooses not to attend for assessment with one of the company recommended medical practitioners (at the company's cost) that an employee's attendance at his or her own medical practitioner is at the employee's expense. Employees say the company ought bear the cost.
- 3 Pioneer called evidence from Ms Alyson Vinciguerra, Pioneer's Risk Manager in Western Australia; from Associate Professor David Joyce who is Associate Professor of Pharmacology at the University of Western Australia and Head of the Department of Clinical Pharmacology and Toxicology at Sir Charles Gairdner Hospital; Dr John Lewis who is a Toxicologist, a Visiting Fellow at the National Drug and Alcohol Research Centre at the University of New South Wales and Head of the Department of the Unit of Toxicology at Northern Sydney Health.
- 4 The union called evidence from John Cain, an organiser with the union for some 11 years.

The Evidence

- 5 What follows is a summary of the evidence which I have found to be directly relevant to the issues to be decided. Ms Vinciguerra stated that Pioneer's objective is to create a work environment that encourages employees to achieve and maintain a good level of fitness and health. A safer workplace, and a more productive workforce, will assist Pioneer and its employees in meeting safety obligations imposed by Worksafe Western Australia Regulations, the Department of Industry and Resources Regulations, Occupational Health and Safety Legislation and common law obligations. She stated that National Heavy Vehicle Accreditation Guidelines place strong emphasis on fatigue management and reducing driver impairment.
- 6 Ms Vinciguerra's evidence was that over the last three years she has been aware of Pioneer's employees occasionally being refused opportunities to work on some projects because the customer requires employees to pass a preliminary drug screen. Some employees have requested a delay before submitting to customer testing because there was a potential for them to return a positive drug screen. A number of Pioneer employees have also failed customer drug and alcohol tests.
- 7 Ms Vinciguerra's evidence was that Pioneer Road Services Pty Ltd, a related company, introduced a drug and alcohol policy to its work sites throughout Australia in 2001. A blind random urine drug test at a number of its sites tested 48 employees. Fifteen tested positive to marijuana and 4% tested positive to amphetamines. In 2002, 51 employees at its Hazelmere and Bunbury depots were tested and 18% of those tested positive to marijuana. In September 2002, 64 employees were tested of whom 8% tested positive to marijuana. In September 2003, 37 employees were tested and 11% tested positive to marijuana.
- 8 She stated that in 28 April 2003, after notifying its employees six months in advance, Pioneer conducted blind drug and alcohol testing at its work sites. One hundred and eighty eight employees and contractors voluntarily participated. Nineteen employees refused to participate. The results were that 8% of employees who did provide a urine sample tested positive. THC (the principle active constituent of cannabis) accounted for 43% of the positive results. Additionally, during the rollout of the program certain employees confessed their recreational

drug consumption as being regular and frequent and indicated to Ms Vinciguerra their intention to maintain that lifestyle. About 30 of Pioneer's employees have stated their belief that they were working alongside employees who are possibly affected by drugs or alcohol.

- 9 In relation to its own testing process, Ms Vinciguerra said that Pioneer looked for a testing method that was accurate, verifiable, reliable, repeatable, and consistent in its application. Pioneer considered a range of methods for drug testing including testing blood, hair, saliva and urine. Each had advantages and disadvantages. Pioneer acknowledges that none of those methods can determine whether an employee is actually impaired in the performance of his or her duties. Within those limits Pioneer's objective is to adopt a test that will allow Pioneer to reliably identify those employees who are were at risk of being impaired while performing their duties.
- 10 After a consideration of the alternative testing methods urine testing is regarded by Pioneer to be the most suitable method. Saliva is not considered to be suitable having regard to its lack of accuracy and reliability to test for the various drug types. Pioneer is particularly concerned that it should not adopt a testing technique that might indicate a positive result when the employee being tested has not taken any form of drug. This risk is greater from saliva testing than it is from urine testing. Pioneer concluded that urine testing was more accurate than saliva testing.
- 11 In cross-examination, Ms Vinciguerra gave a commitment that as soon as saliva testing is supported by an Australian Standard, Pioneer will consider it as a testing method. Pioneer regards its review process as ongoing.
- 12 Associate Professor Joyce has direct experience in saliva, urine and blood analytical methodology and interpretation. The laboratory that he directs is equipped to perform confirmatory analyses on urine for all commonly tested drugs of abuse and on saliva for certain drugs. He has carried out research on an instrument designed for on-site workplace saliva testing for drugs. He had toured two of Pioneer's sites to observe the work performed by employees.
- 13 He spoke of Australian Standard 4308 which outlines the recommended practice for the collection, detection and quantification of drugs of abuse in urine. It includes standards for

laboratory practice and “cut off” concentrations for reporting urine samples as positive. He confirmed that urine drug concentrations indicate drug use but do not confirm intoxication or impairment at the time of testing. The person tested may or may not be impaired. The cut off standards in AS 4308 are designed to detect virtually everyone who is at risk of impairment but will also detect some drug users who are not impaired. His evidence is that saliva screening will not detect unimpaired workers but nor will it reliably detect impaired workers.

- 14 Associate Professor Joyce stated there is no Australian Standard governing saliva collection, drug analysis or drug level interpretation. To his knowledge no other standards body or government agency has issued standards for saliva testing. In his opinion, the most important consideration is not any theoretical advantage from saliva testing, it is whether it is possible to practically realise those advantages. He stated that saliva testing as it is carried out with most tests is insensitive to drug use compared to urine testing. In the case of cannabis screening for example urine tests will detect drug use in both impaired and unimpaired workers. Saliva screening will be less likely to detect the unimpaired worker and will fail to detect a proportion or perhaps almost all truly impaired workers.
- 15 Associate Professor Joyce reported on his testing of two saliva drug testing kits. He found them both unsuitable, particularly in detecting cannabis use. In his opinion a system that is ineffective in detecting cannabis use is probably almost useless for workplace screening or driver screening. The overall sensitivity, accuracy and specificity of saliva testing are inadequate for a workplace screening program. Therefore, urine testing is more sensitive for detecting drug use than saliva testing.
- 16 Associate Professor Joyce concluded that if saliva testing methods were technically good enough, saliva would probably be the fluid of choice for drugs of abuse testing. Although Professor Joyce had clients who used saliva screening, those clients use saliva screening on the understanding that it has substantial limitations. The on-site methods are not good enough to realise the potential advantages. The theoretical advantages of broader acceptability and better capacity to distinguish recent opiate use from previous use would be outweighed by the unacceptable cost of likely widespread screening failure.

- 17 In relation to over-the-counter drugs, his evidence is that over-the-counter drugs can confuse screening tests yet low doses of codeine may yield a positive result without posing any threat to safety.
- 18 Dr John Lewis has been involved in conducting workplace drug testing since 1988. He is Chairman of the Standards Australia committee which is responsible for the production of Australian Standard AS 4308. The committee has been asked to investigate the feasibility of producing a standard on saliva testing and he is familiar with the current international status of saliva testing including its advantages, limitations, problems with technology and interpretation.
- 19 In Dr Lewis' opinion, all drugs listed in AS 4308 cause impairment. The cut off levels are set so as to minimise false positives and false negatives. In relation to saliva testing there are no Australian Standards and no on-site devices that are reliable for all drug groups. There are major problems with sensitivity for some drug groups especially marijuana. There are major problems with collection devices and inherent difficulties in measuring exact volumes of saliva.
- 20 He said that for some drugs, where there is an equilibrium between blood and saliva a measurable saliva level would be more indicative of very recent use than a urine level. However, there is no such equilibrium in the case of marijuana. Also, it is particularly difficult to measure sedative drugs (benzodiazepines) in saliva. A person could be impaired by these drugs and have no measurable levels in saliva. There are no saliva testing devices on the market with an ability to produce only true positives and true negatives. None have the required sensitivity to consistently detect recent ingestion of marijuana.
- 21 Dr Lewis' evidence was that, unlike urine testing which has been in existence for over 30 years, saliva testing is in its infancy. Although urine testing has been attacked because it does not measure impairment, neither does saliva testing. However urine testing does reliably identify illicit drug use and it is that use that presents a risk of impairment and subsequent accident or death. Drugs first appear in urine within hours of use and it is within and after this period that acute impairment would occur.

- 22 Dr Lewis did not regard providing a urine sample as invasive. No part of a person's body is touched by another and giving a urine sample at work is no different from providing a urine sample at a doctor's surgery. He acknowledged that it is an emotive issue.
- 23 For the union, Mr Cain's evidence was that the union's members had taken industrial action after two members had been stood down at Harvey. Drug testing has always been an issue throughout the transport industry. It is often divisive. The union does not have any difficulty in attempting to resolve these sorts of divisive issues. The union's members prefer saliva testing. In particular, union members have recently said to him that if the Victorian Government is trialling saliva testing, why not Pioneer? He gave his understanding of the position of the Pioneer companies in the other States of Australia. He understood that urine testing was accepted in Queensland, in New South Wales for the Hymix operation but not in Pioneer, it was not accepted in Victoria, and it was accepted in South Australia. The union agreed to urine testing in construction and on mine sites. Some members had said to him that they did not like to urinate into a bottle. The union has difficulty in not defending a member who is stood down without pay or dismissed because of a "risk" of impairment. He acknowledged that the Pioneer policy provided that it was not until the third occasion of failing a test that termination of employment became an option.
- 24 The union tendered documentary material including a 1999 Workforce Issues Paper on Alcohol and Other Drugs in the Workplace; papers on drug testing and privacy from the American Civil Liberties Union, workplace drug testing from the WA Network of Alcohol and other Drug Agencies and an article on the analysis of Drugs in Saliva. There were also letters from two other trucking companies stating that they have introduced saliva testing and from a third stating an intention to introduce saliva testing. It included joint papers on workplace drug testing by Steven Allsop, then Director Clinical Education and Research of the WA Drug and Alcohol Authority and Mike Phillips, then Senior Lecturer Centre for Advanced Studies in Health Sciences, Curtin University of Technology.

Submissions

- 25 The union stated that it has a strong commitment to pursuing the highest levels of safety for its members. The union actively promotes a drug and alcohol free workplace and recognises that

the employer has a duty of care to all employees to provide a healthy and safe work environment and that employees have a duty of care to look after their health and safety and the health and safety of other employees. The union encourages the development of appropriate policies that are achieved with a great degree of employee consultation and involvement through a recognised occupational health and safety committee.

- 26 In this case, the union does not oppose the introduction of the fitness for duty policy and has agreed to the introduction of random drug and alcohol testing but takes issue with certain aspects of the policy. The union nationally is presently drafting a national policy. The union opposes urine testing but will agree to saliva testing. Further, employees should not be required to provide information on over-the-counter medication. Pioneer should fund visits to the employee's doctor if it requires the employee to have a health assessment.
- 27 The union stated that in its view there is no conclusive evidence as to impairment created by drugs detected in urine and it would be fair to say that an employee is more likely to be impaired by drugs in his bloodstream as opposed to residual drug traces stored in fat cells. As it is unreasonable to perform blood tests the next closest method is saliva testing. The union listed the benefits of saliva testing and the pitfalls of urine testing as the union saw them.
- 28 In relation to the provision of certification for over-the-counter medication the union submitted that readily available over-the-counter medication need only be declared and not certified by a doctor. This will negate the need for employees to make an unnecessary trip to a doctor at the employee's expense and in an employee's own time. Employees should be reimbursed for this time and expense incurred. In situations where a health assessment is forced upon an employee the employee should have the right to choose his or her own medical practitioner at Pioneer's expense.
- 29 The union also submitted that the fitness for duty policy was being introduced by Pioneer in breach of the "no extra claims" clause in each of the agreements it has with Pioneer. Further, the union submitted that the fitness for duty policy compared unfavourably with the random drug testing program reviewed by the Commission in Court Session in the BHP case (*BHP Iron Ore Pty Ltd v Construction Mining Energy Timberyards Sawmills and Woodworkers Union of WA* (1998) 78 WAIG 2593). The union also referred to the Victoria Police force

recently introducing saliva testing as a means of testing whether motorists are under the influence of drugs while driving.

- 30 Pioneer submitted that the ultimate objective of the policy is that an employee be fit for duty for the sake of their own safety as well as the safety of others. Elements of the policy which apply a penalty are to be seen in the context of other elements of the policy such as the education of employees about their health and wellbeing and the provision of support to address any matters, including issues concerning drugs or alcohol, so as to assist employees in maintaining their health and wellbeing. Random testing assists in achieving these overall objectives. The company stressed the unreliability of results obtained from on-site screening of saliva as against on-site screening of urine. The company relied upon the evidence it had brought and highlighted some of the aspects of that evidence.
- 31 Pioneer contended that the EBAs in question were not within term but in any event the no extra claims commitment contained in them does not preclude the company from seeking to implement measures designed to enhance occupational health and safety. Further, the terms of the EBAs have now expired. In relation to over-the-counter medicines, the evidence is that these can have adverse interactions with drugs and it is not unreasonable to require employees to declare those medicines and have a doctor's certificate for them. Pioneer is prepared to pay the employee's reasonable medical costs of obtaining such a certificate.
- 32 Further, Pioneer is prepared to pay the employee's reasonable medical costs of obtaining such an assessment from their own doctor.

Conclusions

- 33 Random drug and alcohol testing has become a common feature in many workplaces throughout the country. Its use in this State was given in-principle endorsement by this Commission in the *BHP* case referred to earlier. On that occasion, the Commission was asked to make an assessment of the complete drug and alcohol testing program which BHP proposed to introduce. It gave approval noting some of the features that were then proposed.

- 34 The situation before the Commission on this occasion is somewhat different. While the Commission has been provided with the detail of the overall fitness for duty policy, it is not being asked to endorse the policy overall. On this occasion there is broad agreement between the union and Pioneer regarding the policy. The Commission on this occasion is being asked to decide only three matters.
- 35 The Commission recognises, however, that random testing for drugs, in particular, is a controversial issue. It is a controversial issue in this case notwithstanding the broad agreement between the union and Pioneer regarding the fitness for duty policy. The controversy arises for a number of reasons. One of those is that testing for the presence of drugs in an employee's urine does not establish whether or not that employee is impaired in the performance of their work. An employer is not interested in whether or not an employee is taking illicit drugs as such. The interest of the employer is to ensure that the employee is fit for work and not in danger of injuring themselves or others. Accordingly, penalising an employee for having tested positive for the presence of drugs in their urine will always leave open the argument that even though the employee has tested positive for drugs, the employee has not been thereby shown to have been impaired and the penalty is unfair.
- 36 There is therefore much to be said for the development of a reliable test for detecting drug related impairment in preference to testing for the presence of a drug. However there is no suggestion in the evidence before me that such impairment tests presently exist. In the *BHP* case Associate Professor Allsop (the joint author previously referred to in these Reasons) was quoted as saying that such tests are in their infancy.
- 37 It is agreed that the use of saliva testing of itself will not test whether or not a person is impaired. Like impairment testing, saliva testing, too, is in its infancy as Dr Lewis has stated. With saliva testing, at least there has been a greater development of saliva testing kits and steps are being taken to develop an Australian Standard for saliva testing. There is evidence that two trucking companies have introduced saliva testing. Another intends to do so. The information that the Victorian Police have commenced a trial of saliva testing of motorists for drugs is significant. These developments suggest that the present limitations of saliva testing shown in the evidence before me may well be eventually addressed.

38 However, the evidence before the Commission on this occasion is that:

39 (1) There is no standard in Australia to detect the presence of drugs in saliva but there is to
detect the presence of drugs in urine.

40 (2) There is no saliva testing kit currently available that reliably detects the classes of drugs
which are more reliably detectable using the Australian Standard for urine testing.

41 (3) In particular, saliva testing kits do not accurately measure the presence of cannabis in
any meaningful way. This is most significant given Ms Vinciguerra's evidence that
43% of the positive results from its blind drug and alcohol testing at Pioneer in April
2003 were for cannabis.

42 (4) At present, saliva drug testing presents a greater chance of an employee who does not
have a drug in their system returning a positive saliva test, suggesting they do have a
drug in their system, than there is with urine testing. It should be of concern to all
employees that they may falsely be accused of having taken drugs.

43 (5) The opposite also is true: there is a greater chance that saliva drug testing may show
that an employee does not have a drug in their system when in fact they do. This
increases the likelihood of not detecting an employee who is likely to be impaired by
drugs at work and who poses a risk to themselves and fellow employees.

44 (6) The chance of being falsely accused of having taken drugs is significantly less with
urine testing because of the Australian Standard.

45 (7) The Australian Standard cut off levels for testing in urine have been mathematically
designed as a reporting level. It is neither a low level nor a high level. It is set so as to
minimise false positives and false negatives. It is devised to get a very good correlation
between on-site results and confirmation of those results in a laboratory.

46 These conclusions arise from the evidence before me and I accept that evidence.

- 47 It is said that saliva testing will address other aspects of the drug testing program that are controversial. Those aspects include the embarrassment of providing a urine sample. I acknowledge that those embarrassments may exist according to the individual employee's circumstances. However, this has to be balanced against the fact that a urine test is not of itself "invasive" and also that the only conclusion available on the evidence before me on this occasion is that at this point in time testing for the presence of drugs by way of a urine test is the more reliable and accurate method of assessing likely impairment than testing for drugs by the use of saliva.
- 48 It is therefore not without significance that the indirect evidence before me about the Victorian Police introducing saliva testing for drivers suggests that it is a trial. If the union wished to rely on this in support of its case, direct and reliable evidence of what in fact is occurring would have been necessary. There is a significant difference between trialling a testing method and actually adopting that method. The fact of a trial does not counter the direct expert evidence before me regarding the limitations of saliva testing however the outcome of the trial may be of relevance in the future.
- 49 I therefore record and endorse the quite proper evidence from Pioneer that as soon as saliva testing is supported by an Australian Standard, Pioneer will consider it as a testing method. In the context of its drivers' attitude, it may well be appropriate for that fact to be recorded in the fitness for duty policy. Pioneer states that its review of its fitness for duty policy does not have a timeframe and is "ongoing". There is no reason why the union and Pioneer could not agree to meet regularly in order to ensure that developments in saliva testing are regularly reviewed as they occur.
- 50 Although there have been recent developments in the testing for drugs by saliva testing, the expert evidence before the Commission shows that there are still practical limitations to its use. Those same practical limitations also mean that it is not practicable to have on-site saliva testing followed by a confirmatory urine test if the saliva test is positive. Therefore, the company's intention of introducing urine testing is not unreasonable at this point in time. This conclusion is not inconsistent with the position in Pioneer's Queensland and South Australian operations, although not in Victoria, and in Hymix in New South Wales.

- 51 The Commission does not discount the evidence before it that Pioneer's drivers are opposed to urine testing. That evidence means that Pioneer now has the task in front of it to inform its drivers regarding the advantages to them of urine testing and the present limitations of saliva testing. After this decision, the union too has a role to play in this with its membership.
- 52 Further, the evidence that the Victorian Police may be trialling saliva testing motorists for drugs suggests that more information will become available in the relatively near future once the outcome of the trial is known. Pioneer's commitment to an ongoing review process should mean that as the outcome of this trial, and perhaps trials elsewhere or in other States, become available the practicability of saliva testing in Pioneer's operations will be able to be re-visited by Pioneer and the union, with recourse to the Commission if necessary.
- 53 I do not regard the provisions of the EBA no extra claims clauses as preventing the introduction of the fitness for duty policy. This is at least because those clauses refer to no extra claims for the life of the agreement. The life of an agreement is set by its term. I am informed that the terms of the EBAs have expired. Section 41(6) of the *Industrial Relations Act, 1979* keeps an EBA in force after its term has expired but that does not alter the fact that the terms has expired.
- 54 In relation to over-the-counter medicines, the evidence shows that the use of over-the-counter medicines, particularly where the correct dosage is not followed, may have an impact on an employee's drug test result. In that event, that part of the policy which requires the employee to declare the use of those drugs and the provision of a medical certificate to that effect is not, in general, unreasonable. I have paid particular attention to the privacy requirements of the policy as described in Ms Vinciguerra's evidence and have no reason to believe that these will not be strictly observed. I regard the Pioneer proposal that the company meet the reasonable costs incurred by the employee to be reasonable and find accordingly.
- 55 I also find Pioneer's preparedness to pay the employee's reasonable medical costs of obtaining a health assessment from their own doctor to be reasonable and find accordingly.

56 The Commission believes the most appropriate method of determining these issues is by
issuing a declaration:

57 (1) That the proposal to conduct urine testing as part of the fitness for duty policy is
reasonable.

58 (2) That urine testing for drugs is able to be re-visited in the future in accordance with
Pioneer's ongoing review of its fitness for duty policy.

59 (3) That it is reasonable that employees declare and provide an appropriate doctor's
certificate in respect of any over-the-counter medication which could lead to a positive
test provided that Pioneer pay the employees' reasonable medical costs of obtaining a
certificate from their own doctor.

60 (4) That it is reasonable that Pioneer pay the employees' reasonable medical costs of
obtaining a health assessment from their own doctor for the purposes of the fitness for
duty policy.

61 The minute of that declaration now issues.