

IN THE MATTER OF AN ARBITRATION

Between

FORTISBC ENERGY INC.

(the "Employer")

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 213

(the "Union")

RE: TD Grievance

APPEARANCES: Charles G. Harrison, for the Employer
Brandon Quinn, for the Union

ARBITRATOR: Mark J. Brown

DATES OF HEARING: August 27, 28, 29, October 8 and 22,
2013

DATE OF AWARD: November 4, 2013

I. ISSUE

1 At the outset I note that even though neither party argued this point, I am exercising my discretion, given that this case involves the testimony of a young teenager, to use initials rather than individuals full names.

2 The grievor, TD, is 50 years old, married with 2 children. He has worked for the Employer since 1983 as a crew leader and welder. His disciplinary record includes a five day suspension in January of 2012 for falsifying time sheets. TD also has his own private welding business which provides approximately 2 weeks of work per year. The Employer was aware of the private business.

3 In March 2013, TD performed some private work at the Sandman Hotel. After completion of the job the Employer became aware that some material used on the job was Employer material. After an investigation, the Employer terminated TD. The termination letter stated in part:

This letter is further to our meetings of June 7 and June 13, 2013 at which you were suspended without pay pending the completion of our investigation.

The outcome of the investigation concluded that your activities, in combination with your denial when confronted, irreparably breached the trust between the Company and yourself.

The seriousness of the dishonesty and breach of trust is compounded by the fact you were suspended without pay for five days in January 2012 for timesheet falsification.

The Company has decided to terminate your employment for dishonesty and breach of trust.

Your final pay and other deductions will be forwarded for our Human Resources Department within the next several days.

If you have any other equipment belonging to the company, please make arrangements with your shop steward to have them returned to the company.

4 The Employer argues that the termination was for just cause. The Union argues that TD was not terminated for just cause and should be reinstated.

II. BACKGROUND

5 On August 4, 2013, KG, the Employer's Regional Manager, was contacted by the BC Safety Authority about a job done at the Sandman Hotel. After investigation, it became clear that the Employer did not perform the house line work in question; but rather TD performed the work under his private company.

6 For purposes of this award it is unnecessary to set out the problems with the job. The concern raised for the Employer was that some of material utilized in the job by TD was Employer material.

7 Through its investigation the Employer determined that TD performed the job on March 23, 2013. He was on vacation at the time. He had accessed the Employer's facility on the evening of March 22nd for approximately 4 hours. The Employer contacted contractors that it utilized, one being Marwest Utility Services, and determined that according to the contractors no pipe had been lent or sold to anyone. During its investigation the Employer was able to see some, but not all, of the pipe used by TD in the job as it was dug up after the fact. Of the 210 metres used on the job, the Employer was able to determine that 78 metres was Employer pipe stored at Marwest; while 22.5 metres was from Western National Gas. Also, some of the risers utilized had Employer markings on them.

8 The Employer decided to interview TD on June 7, 2013. A prepared set of questions was developed. The investigation meeting took approximately one hour.

9 When asked what the scope of the job was at the Sandman Hotel, TD stated his role was a welder and fuser. When he was asked whether he supplied material, he stated that he got the material from Marwest and they had not invoiced him as yet. TD stated that JJ at Marwest gave him pipe, four risers and some elbows. He also borrowed Marwest's pipe trailer. TD stated the weld fittings were purchased from National Oil Well. TD used his own equipment to perform the work. TD stated that he did not know the pipe used belonged to the Employer. He believed it was Marwest's pipe. He did not discuss price with JJ. He left it up to Marwest to price it and invoice him.

10 At the conclusion of the interview, TD was asked to produce receipts for material. He said he would for National Oil Well, but Marwest had not invoiced him yet. TD also stated that he invoiced a lump sum for the Sandman job and that it was probably a handwritten invoice.

11 The Employer then met with Marwest. SB, Marwest General Manager, and AH the Operations Manager were present. JJ, the Foreman, was not in attendance.

12 At the meeting SB noted that they had given away some obsolete 1 ¼" pipe that the Employer did not want returned. The Employer's 2" pipe is delivered to Marwest for its use on Employer jobs. It stays in the Employer's inventory system. Marwest does buy some pipe for its own use from Western National Gas. SB provided the Employer with a statement from JJ dated June 8, 2013 which stated:

T.D. asked to borrow our pipe trailer I said yes after asking A.H. for permission for him to use it. We have lent the trailer to Fortis in the past when their trailer was being repaired. I never gave permission to anyone to take or use Fortis supplies for personal use. We give supplies to Fortis when they need them and we get supplies from them when we need something we didn't have in stock.

13 The Employer had a second meeting with Marwest with JJ in attendance. JJ stated that he did not agree to give TD any pipe or fittings; only the use of the trailer which had a few laps of pipe on it. He did not help TD load pipe on the trailer. AH and JJ provided a report to the Employer dated June 13, 2013 setting out the various dates and phone calls with TD.

14 The Employer then had a second investigation meeting with TD on June 13th. TD continued to assert that the pipe and fittings were given to him by JJ. He acknowledged that he phoned JJ after the first meeting to get an invoice. TD stated JJ advised him he was not going to tell the Employer he gave him pipe. TD acknowledged calling AH numerous times seeking an invoice. TD produced an invoice from Beaver Manufacturing Ltd. prior to this second meeting. The Employer questioned why TD had referenced National Oil Well in the first interview. TD responded that Beaver gets some of their material from National Oil Well. DB, the Employer's Operations Manager, was sent to Beaver to purchase an item prior to this second meeting. The invoice DB received was one digit different than the invoice produced by TD (i.e. #5228 versus #5229). TD stated that the material was delivered to his house and his wife looks after the invoices. The copy of the invoice he gave the Employer was emailed to him by Beaver. TD could not explain the sequential number of the invoices. During a caucus TD called Beaver. When the meeting reconvened he advised the Employer that Beaver said it was ridiculous that the numbers were sequential. At the conclusion of the meeting TD was suspended pending conclusion of the Employer's investigation.

15 TD was sent the termination letter dated June 19, 2013, but effective June 14, 2013.

16 The Employer asserted that given the job performed by TD at the Sandman the materials would have cost at least \$2,500.00 and other contractors contacted would have charged in excess of the \$3,000.00 that TD invoiced.

17 AH testified that 99% of Marwest's work is performed for the Employer. The Employer's material is delivered from its Burnaby yard to Marwest's yard. It remains

Employer property. AH stated they gave some obsolete 1 1/4" pipe to TD once, and to another person for a water intake valve at a lake. AH also stated that Marwest would not normally use Fortis material for Marwest jobs; however, they did so for a job in the spring of 2013 after they got permission to do so. Marwest ordered material to replace what they used.

18 AH also stated that Marwest has Employer material in the Marwest warehouse, such as risers. They are reused for bypass jobs. Inventory is checked once per year. MP, an Employer Operations Manager, and AH checked the inventory and confirmed that it was correct. Because of the way pipe is used, it is not inventoried like other parts.

19 AH did not recall JJ asking if TD could borrow the pipe trailer in March, but lending it was not unusual.

20 AH was contacted by TD on June 5th or 6th while he was on holiday seeking an invoice for pipe he had used that he believed belonged to Marwest. AH advised TD he could not supply an invoice for Employer pipe but could provide replacement pipe and invoice him for that. AH told TD he would deal with it on Monday. AH then received a call from MP asking if he ever gave Employer pipe to anyone. AH advised no, except for the obsolete 1 1/4" pipe that the Employer did not want returned. TD attempted to call AH numerous times but AH did not answer because he realized there was a problem based on MP's inquiry. On Sunday night TD came to AH's residence. TD asked for an invoice for pipe and fittings. AH advised him again he could not sell Employer pipe but would sell him replacement pipe.

21 AH's evidence with respect to his conversations with JJ and the Employer was consistent with the evidence set out above.

22 JJ testified that TD called to borrow the pipe trailer. JJ checked with AH to see if it was possible to do so. JJ stated there was no discussion about materials.

23 Based on cell phone records there is no dispute that TD called JJ at 3:09 p.m. to pick up the trailer on March 22, 2013.

24 JJ stated that he showed TD which trailer to use and helped him hook it up. There were a few coils or laps of 2" pipe on the trailer. JJ stated that there was no discussion about materials. JJ asserted that he left the Marwest yard before TD.

25 In cross examination it was put to him that TD's son was with TD, TD's son got out of the truck and shook JJ's hand, and JJ helped TD load pipe on the trailer. JJ disagreed with all of this and in fact stated he has never met TD's son.

26 TD returned the trailer on Monday, March 25th. JJ stated he was not in the yard when the trailer was returned. He denied talking to TD about invoicing TD for the material TD used.

27 JJ stated that TD called him in early June. TD said he was "in a bunch of trouble" and needed an invoice for pipe. JJ advised TD he could not invoice or sell material. JJ told TD to talk to AH. Later in the day TD called JJ again. JJ stated that this time TD wanted the invoice for pipe and fittings. TD asked JJ to call AH for him. JJ advised TD that AH was on vacation.

28 The cell phone records show several calls to JJ from TD on June 7th. TD advised JJ he could not reach AH. TD told JJ about the Sandman job and that he was in trouble for using Employer material. JJ told TD he could not help him.

29 TD's 13 year old son testified. During his testimony TD absented himself from the hearing room.

30 On March 22nd in the morning TD and his son were working on the roof of a rental property. TD's son testified that at approximately lunch time TD stated they were going to Marwest as a friend, JJ, was giving TD some pipe.

31 TD's son stated they pulled into the Marwest yard and they both got out of the truck. His father introduced him to JJ and they shook hands. TD's son could not recall what JJ looked like in any way.

32 TD backed the truck up. JJ helped TD hook-up the trailer. JJ helped TD to put pipe on the trailer. TD got back into the truck and drove over to a covered area. JJ and TD went into the covered area. TD's son could not remember whether his father brought anything else back to the truck. He was texting friends. TD's son asserted that JJ was still in the Marwest yard when they left.

33 TD's son testified that they then drove directly to the Sandman work site, stopping once to secure the load of pipe. The drive took five minutes. When they arrived TD asked some workers where he could drop the pipe. TD introduced him to one of the workers but he could not remember who it was.

34 TD's son stated that he found out his father was in trouble sometime in June, prior to the termination. When he and his mother were driving to school she mentioned that the Employer said his father stole pipe. TD's son said he did not as he was there. His mother phoned TD to tell him. His father had forgotten he was there.

35 TD's wife, AD, was also called by the Union. She looks after the records for the private business. She kept all invoices and records in one file.

36 AD stated there were two invoices related to the Sandman job. The National Oil
Well invoice was paid by a credit card, given to her by TD, and she placed it in the file.
It is dated March 22, 2013.

37 The Beaver invoice dated March 15, 2013, was in the mailbox and the supplies
were delivered to their carport. AD asked TD about the invoice. He told her it was to be
paid in cash. She paid it on March 22, 2013. Exhibit 11 introduced at the hearing has a
paid stamp on it. The copy of the invoice emailed to TD, which he gave to the Employer
between the two investigation meetings, is identical but does not include the paid
stamp.

38 AD typed an invoice for the Sandman job on March 23, 2013. It was delivered by
TD.

39 AD stated that while she was driving her son to school or to a swim meet, he
asked for money. She advised him he would have to wait as the Employer thought his
dad stole pipe at Marwest. TD's son said he did not as he was there. AD told TD when
he got home.

40 DY testified on behalf of the Union. He is the first aid attendant on the Sandman
site. He saw TD on the site twice. The first time was in early March when Fortis was
doing some work on site and the second was on March 22, 2013.

41 DY stated that he thought TD arrived at the site on March 22nd between 1 and 3
p.m., definitely before 3:30 p.m. as that is when the site shuts down. TD and his son
were in the truck. TD wanted to drop off pipe for a job he was doing the next day. DY
stated he may have been introduced to T.D.'s son, but did remember acknowledging
with TD how big he was compared to his son.

42 TD called DY in August and asked him to write a letter confirming that he saw TD
and his son at the site on March 22, 2013. The letter is dated August 14, 2013.

43 NP was called by the Union as well. He owns a plumbing company in the city.
He recommended TD to the contractor on the Sandman job. Near the end of March, TD
met with NP to source pricing for the material needed for the Sandman job.

44 TD testified that before taking the Sandman job he advised DB of the job to
ensure there was no conflict from the Employer's perspective. He met with the
contractor at the site and was asked if he could supply material. TD said he would get
back to them.

45 TD met with NP, and also phoned a friend, for advice on pricing and to source
material. NP gave him estimated costs but TD did not place an order.

46 Instead he called JJ at Marwest as they had a pipe trailer. TD asked JJ to borrow the trailer and asked if he could supply pipe and fittings. JJ said no problem.

47 TD told JJ he was getting paid for the job so TD would pay Marwest whatever was reasonable. TD stated he advised JJ he was getting paid because he had received free material from Marwest before when he was doing a volunteer job and some personal irrigation work.

48 TD then visited Beaver to obtain steel pipe, weld fittings, nipples, elbows, valves and caps for the Sandman job and two other jobs; an irrigation job and a job for his in-laws.

49 TD saw a 9' piece of pipe that he said he would take and four used valves in a bucket. He set them aside and then left Beaver with a list of other items that he needed. Beaver delivered supplies to his house on March 15th.

50 TD stated that the invoice did not accurately set out the product received. He also noted that he took 4 valves even though he only needed 2 for the Sandman.

51 TD then visited the Sandman site again. The contractor had decided to run two lines instead of one. TD stated he would do the job for \$3,500.00. He cost the materials required to be approximately \$2,400.00. The contractor proposed \$3,000.00. TD accepted as he considered the profit "not bad" and there was a hint of more work in the future.

52 On March 22nd, TD and his son were working the roof of the rental property. During the morning he went to RONA for nails and also went to National Oil Well for more parts for the Sandman job as it now involved 2 lines not one.

53 TD phoned JJ and said he wanted to pick up pipe, the trailer and fittings. JJ said come right away and he would be there.

54 TD arrived at the Marwest yard and JJ pointed to the trailer. TD backed up and they hooked up the trailer. They both lifted pipe onto the trailer. JJ asked what fittings TD needed.

55 TD advised JJ that he needed risers and elbows. JJ instructed him to pull the truck over to the covered area. TD and JJ went into the covered area. TD took plastic pipe fittings and 4 risers and returned to his truck. TD advised JJ he would build an "as built" diagram, bring back the balance of material and JJ could invoice TD for what he used.

56 TD stated he introduced his son to JJ when they pulled into the yard.

57 TD and his son proceeded directly to the Sandman site, stopping once to secure
the load of pipe. When they arrived they met DY, who he introduced to his son. They
dropped off the pipe and went home.

58 In the evening TD prepared for the job and also went to the Employer's yard to
use the bay to work on his truck.

59 On March 25th he returned the trailer to Marwest. He phoned JJ and told him he
used all the material with no returns and told him to bill him accordingly.

60 TD was contacted by DB and advised that some of the material used on the
Sandman job belonged to the Employer. TD felt sick and advised DB he got it from JJ
at Marwest. If he had known it was the Employer's he would not have touched it.

61 TD phoned JJ. JJ stated that it was not a big deal as Marwest had used
Employer pipe before and it was ok as long as it is replaced. JJ said to call AH and
make it happen. Before the first investigation meeting with the Employer, TD stated he
phoned AH. He advised AH he got pipe and fittings from JJ and that JJ said he could
replace the pipe and get an invoice. AH said it should not be a problem.

62 After the first investigation with the Employer where TD was told to get receipts,
he called JJ. He advised JJ he told the Employer the truth. JJ told TD to phone AH to
arrange to pay for pipe and fittings in order to get receipts.

63 TD then started to think about where he got all the fittings. He called Beaver and
got a copy of the invoice emailed to him. He mentioned he thought he got some parts
from National Oil Well. Beaver stated they got their parts from there.

64 TD did not feel well and did not return to work. He tried to phone AH several
times as JJ told him that he was not going to admit giving TD anything. JJ also stated
"SB's a dick - big trouble". TD went to AH's residence Sunday night. TD told AH what
had happened. AH said there was pipe he could replace the Employer's with as they
had ordered five coils of pipe and there was more than enough to replace what JJ had
given him. AH did not know about fittings and risers and said if they were old they were
used for bypass only. AH stated he was meeting with the Employer on Monday and wait
until that happens.

65 TD did not work the following week. He did provide a copy of the Beaver invoice
to the Employer.

66 TD asserted that he mentioned National Oil Well in the first meeting because he
remembered going there. After the meeting he recalled going to Beaver as well. When
he received the receipt from Beaver and they mentioned they got some product from

National Oil Well he accepted that, and never continued looking for the National Oil Well receipt at that point. The National Oil Well receipt was found in AD's file later.

67 TD forgot that his son was with him on March 22nd. After he was suspended TD went home and was discussing the situation with AD. AD told TD that his son was with him when the pipe was picked up.

III. ARGUMENT

68 I do not intend to set out in detail how Counsel portrayed the evidence to support their argument.

69 In summary, the Employer argues that the evidence about where TD sourced the material is irreconcilable between TD, JJ and AH. TD maintained at the meetings with the Employer and at the hearing that he received pipe, risers and elbows from JJ at Marwest. JJ completely denied it. There is no credible explanation why JJ would lie about it. The Employer argues that the evidence of TD, TD's son, AD and DY is all unreliable.

70 The Employer argues that TD's dishonesty and breach of trust should result in termination.

71 The Employer cites the following cases to support its argument: *Wm. Scott*, [1977] 1 CLRBR 1; BCLRB No. 46/76; *International Forest Products Ltd. (Fraser Mills Division)*, April 19, 2002 (Devine); *Vancouver School District No. 39 (Ken Wai Wu)*, July 25, 2007 (Sullivan); *William Osler Health Centre (Simon)* (2011), 205 LAC (4th) 386 (R. Levinson); *School District No. 79 (Cowichan Valley)* (2011) 205 LAC (4th) 199 (Brown); *FortisBC Energy Inc. (Komant Arbitration)*, August 15, 2011 (McConchie).

72 The Union argues that it is the Employer's onus to demonstrate that TD stole the material and meant to do so. All TD has to do is provide a reasonable explanation.

73 The Union acknowledges that if I conclude TD lied to the Employer and to me at the hearing then TD should remain terminated. If I conclude JJ lied, then TD had no intention to steal and was not dishonest in the investigation and should be reinstated.

74 The Union argues further that barring a deliberate attempt to deceive the Employer, TD cannot be disciplined.

75 The Union cites the following cases to support its argument: *Canada Safeway Ltd. v. United Food and Commercial Workers' Union, Local 247 (Chisholm Grievance)*, [2010] B.C.C.A.A. No. 17; *Re: Fletcher's Fine Foods Limited and United Food and*

Commercial Workers International Union, Local 472, (1988) unreported (Hope); *Canada Safeway Ltd. v. United Food and Commercial Workers' Union, Local 1518 (Mousseau Grievance)*, [2000] B.C.C.A.A.A No. 283; *Snowcrest Packers Ltd. v. United Food & Commercial Workers' Union, Local 1518 (Dhesi Grievance)*, [2004] B.C.C.A.A.A. No. 153; *Tober Enterprises Ltd.*, BCLRB No. 51/1990; *FortisBC Energy Inc. v. International Brotherhood of Electrical Workers, Local 213 (Beer Grievance)*, [2011] B.C.C.A.A.A No. 130; *McKinley v. BCTel*, [2010] S.C.J. No. 40; *Labatt Brewing Co. v. Brewery, Winery & Distillery Workers Union, Local 300 (Pinder Grievance)*, [2004] B.C.C.A.A.A. No. 65; *St. Michael's Centre Hospital Society and British Columbia Nurses' Union (Mendoza Grievance)*, [1997] B.C.C.A.A.A. No. 567.

76 In reply the Employer notes that the termination letter references dishonesty and breach of trust not theft and therefore the Union's focus on onus and proof of theft is wrong.

IV. AWARD

77 The parties do not dispute that an arbitrator's approach with respect to discipline and discharge cases is set out in *Wm. Scott and Co. Ltd. And Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can L.R.B.R. 1 ("*Wm. Scott*"). The arbitrator asks three questions.

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the discharge an excessive response in all the circumstances of the case?
3. Finally, if the discharge is considered excessive, what alternative measure should be substituted as just and equitable?

78 In assessing the appropriateness of the penalty, the arbitrator considers several factors:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.

8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstances which the board should properly take into consideration.

79 There is obviously conflict in some of the testimony. In order to reconcile this conflict, I must determine the version of events that I accept based on the principles set out in *Faryna v. Chorny*, [1951] 4 W.W.R. (NS) 171, 2 DLR 354 (B.C.C.A.). My task is to piece together a version of events based on the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (page 357). That does not mean that I must accept a person's testimony in its totality in preference to that of another witness. Certain aspects of various witness' testimony may in fact reflect the probable sequence of events.

80 In my experience the vast majority of witnesses do not lie under oath. Their version of events may differ because of fading memories, miscommunication, different perceptions, cultural issues, or other factors that lead witnesses to different stories based on honestly held beliefs. In a small minority of cases some witnesses are not forthright under oath.

81 This is one of those rare cases where some testimony is at polar opposites. The credibility of the testimony of several witnesses is critical to my deliberations. Because of the many areas that must be reconciled, this is a difficult case.

82 It is such a difficult case that I considered the possibility of following the approach taken by Arbitrator Donald R. Munroe, Q.C. in *Canadian Heating Products LTD and International Union of Operating Engineers, Local No. 115* (Ministry No. A-425/95), dated December 14, 1995; upheld in BCLRB No. B297/96. In that case the arbitrator determined that he was not prepared to "brand one or the other of the two protagonists as a liar in relation to the crucial facts" and instead fell back on the onus to decide the case. Because the arbitrator was unable to resolve which of the two witnesses was more credible, he concluded that the employer had not discharged its burden to establish that there was just cause to discipline and he granted the grievance.

83 In the case at hand, after careful thought, I have determined that I can proceed in the normal manner. The standard I must apply in reconciling the evidence is the balance of probabilities, as discussed in *F.H. v. McDougall*, 2008 SCC 53.

84 It is clear that at least some of the pipe, risers and elbows used by TD in the Sandman job were the Employer's property. The Employer is not citing exactly where the property came from. TD had access to the Marwest yard and was at the Employer's yard for several hours on March 22nd, the night before the work was completed. There was no pipe inventory put into evidence to show any shortage anywhere. The riser

inventory at Marwest was accurate according to the Employer. If TD's version of events is preferred that aspect is problematic as one would think the inventory would show four risers short.

85 The Beaver invoice is not troubling due to the nature of items purchased as TD provided an explanation for that. There are however two troubling aspects. First, TD stated that the transaction was on a cash basis but the invoice references "terms net 30". Second, the sequential numbering of TD's invoice in March and the Employer's in June is not explained. While TD offered an explanation that was hearsay in nature and cannot be used to prove a crucial fact, the Employer did not call a witness from Beaver to explain the problematic numbering.

86 However, I find other potentially troubling aspects of the case can be reconciled with TD's version of events.

87 The Employer asserts that TD was dishonest in the interviews with respect to his role or scope of work at the Sandman job. I do not find that to be the case. The two questions cited by the Employer to emphasize this point in the first interview were posed only minutes apart. TD's answers when you consider the responses in total were not dishonest.

88 With respect to the production of the National Oil Well and Beaver invoices, it is clear that TD's private business is not very busy. Two weeks of work per year is not much work. It is also clear that AD's record keeping is rudimentary as everything is kept in one file. Given the stress of the first interview, it is not surprising that TD referenced National Oil Well as he visited that supplier last and in very close proximity to the job (i.e., the day before). Upon reflection he remembered Beaver and immediately contacted them for a copy of the invoice. I conclude that any confusion over this is not a factor in my deliberations.

89 I do not consider the Employer's emphasis on the invoice price charged by TD to be helpful in my analysis either. The Employer asserts that the materials cost over \$2,500.00. It argues that it is not credible that TD priced the material with NP and then made arrangements with JJ at Marwest to purchase material from them without even determining a price. The Employer argues further that the price of the job was low because some of the material was not purchased.

90 TD priced the material with NP. If I conclude TD's story is accurate with respect to the interaction with JJ, I do not find it unreasonable for him to assume that Marwest's price would be competitive. The fact he charged a low price for the job for the potential of future work is not out of the ordinary.

91 If I do not accept TD's version of events of his interaction with JJ then the above is irrelevant.

92 The Employer argues that I should prefer JJ's and AH's evidence. They have no reason to lie. There is no credible explanation for them to do so.

93 The Union argues that I should prefer TD's evidence. If I do not, it means that TD convinced his son to lie, they both duped AD into believing they were both at Marwest or convinced her to lie about how she found out they were both there, and TD convinced DY to lie.

94 This is the most troubling aspect of the case. As I noted above, this is one of those rare cases where some critical evidence is at polar opposites and cannot be easily reconciled as miscommunication or different perceptions of the same conversation. TD says that JJ gave him pipe, helped him load it on the trailer, gave him other fittings, met his son and forgot to invoice TD for the material. JJ says he helped TD hook up the trailer but denies giving him any material and never met his son.

95 Both TD and JJ were not shaken on cross examination and their testimony remained internally consistent. I turn therefore to the question of whether their evidence is consistent with other witnesses and what fits within the preponderance of probabilities.

96 DY testified that he met TD and his son in the afternoon of March 22nd when TD was at the job site to unload pipe. Other than some confusion over the exact time that this occurred, DY's evidence is reliable. It places TD's son in the vehicle that day, and places the pipe being delivered to the job site in the afternoon, before TD went to the Employer's yard that evening to work on his truck.

97 TD's son and AD provided evidence that corroborates TD's version of events. They were also not shaken in cross examination. Their evidence is consistent with respect to how they realized that TD's son was with him that day, with the exception of how TD was informed. TD's son said AD called TD. AD said she discussed the matter with TD when he got home.

98 There is no dispute that at least some of the pipe used by TD belonged to the Employer. However, it is not easily identified as such. Also, although Marwest is not in the business of selling its pipe, it has given pipe to people in the past, and did in fact offer to sell pipe to TD after the fact. In these circumstances, I conclude that it is possible to accept that TD did not know that the pipe was Employer property until DB contacted him. TD's reaction of feeling sick about it is consistent with this finding.

99 After the phone call from DB, and the first investigation meeting, TD takes steps to get paperwork to prove he did not take Employer property. The Employer argues that his attempts to gather the receipts are further evidence of his lack of credibility because he provides different answers as to who sold him material and also provides an invoice with a very suspicious date due to the sequential numbering with the Employer

purchase from the same supplier. TD is not an experienced self- employed business person as he only secures enough business for two weeks a year. AD's record keeping is rudimentary. Therefore, other than the evidence as it relates to JJ, TD's evidence with respect to material procurement can be accepted.

100 If I accept the evidence of JJ, then TD attended at the Marwest yard to obtain the trailer, and after JJ left took over 200 metres of pipe and other supplies. When he was then confronted months later, TD conspired with his wife and son to lie about JJ giving him the pipe and fabricated the invoice from Beaver. While I acknowledge TD has been disciplined for falsifying time sheets, this is much more severe and involves securing false support from others.

101 The Union asserts that it does not have to suggest a possible motivation for JJ to deny giving TD the material. I accept that there is no onus on the Union to do so. However, in the circumstances of this case, with a very difficult credibility determination, I have turned my mind to possible motivations or circumstances that would make sense.

102 It has not been asserted by any party, and I find it extremely unlikely, that JJ and TD were both stealing from their employers and doing a cash deal between them. The only other possible explanation that would be a motivation for JJ to deny TD's version of events is that he made a mistake and gave TD the Employer's property and then forgot to invoice TD. When he realized the mistake, he decided not to invoice TD for the material and instead denied giving it to him.

103 As I have noted more than once, this is a difficult case. If I accept JJ's evidence I must find that TD lied and conspired with his son and wife to lie at the hearing. I find this unlikely. On the balance of probabilities, I conclude that it is more likely than not that JJ provided TD with the material, forgot to invoice him and then tried to cover up the mistake by denying ever giving him the material. TD's evidence is corroborated by the credible evidence of his son and wife. Although the invoicing sequence and inventory check is troubling, I find that it does not persuade me to conclude that TD was lying when all the facts and testimony of all the witnesses is considered.

104 Accordingly, I conclude that there was no just cause to terminate TD. He is to be reinstated and made whole subject to any mitigation issues which I leave to the parties to sort out. If they cannot, I remain seized of that issue.

"Mark J. Brown"

Dated this 4th day of November, 2013.