This decision has been the subject of a BC Supreme Court decision on application for judicial review. See 2010 BCSC 1769.

WCAT Decision Number: WCAT-2008-03840
WCAT Decision Date: December 19, 2008
Panel: Joanne Kembel, Vice Chair

Introduction

[1] Both the employer and the worker have appealed a November 6, 2007 decision of a case officer in the Compliance Section, Investigations Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). The case officer concluded the employer discriminated against the worker by placing the worker on a short-term illness and injury plan (STIIP) in April 2005; by placing the worker on leave without pay from August 17 through October 2, 2005; by intimidating the worker in January 2006; by intimidating the worker in a letter dated March 27, 2006; and, by placing the worker on leave without pay for four days in March 2006 and for two days in June 2006.

[2] The case officer determined the evidence supported a conclusion that the employer's actions were all connected, at least in part, to the worker carrying out a duty under the *Occupational Health and Safety Regulation* (Regulation) or to his having given information to his employer about potential adverse health consequences and his need for alternate respiratory protection.

[3] By way of background, in 2003, the worker had informed the employer that he wished to wear a full beard in order to prevent skin irritation caused by frequent shaving. He requested that he be provided with an alternative to the respirator (N95 mask) the employer provided to its employees. Specifically, he requested that he be permitted to use a powered air purifying respirator (PAPR) which he stated would provide protection superior to the N95 mask and could be worn over his beard. In 2005, the issue arose again, and the employer requested verification of the worker's skin condition from a medical practitioner. The worker submitted a copy of a note from his family physician from 2003 and, at the employer's request, a second note, signed by a locum for his family physician in 2005. I will provide further details of the various interactions later in this decision. However, I believe it is fair to say that, thereafter, the parties could not agree as to the extent of medical verification required. The employer requested further medical documentation, which the worker eventually declined to provide. The employer considered the worker's refusal as insubordinate and disciplined the worker. The worker complained the employer took action that adversely affected him with respect to conditions of his employment including suspension, layoff, coercion and intimidation, reduction in wages, imposition of discipline, reprimand and other penalties. He contended the employer took these actions because he was exercising his rights in accordance with Part 3 of the *Workers Compensation Act* (Act) and the Regulation and because he gave information regarding conditions affecting the occupational health and

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

safety of workers to other workers as well as to the union and the Board. He contended the employer took discriminatory action against him and failed to pay wages as required by the Act and Regulation.

[4] The case officer concluded she could not separate the worker's alleged insubordination from the disputed issue, which related to his safety concerns about respiratory protection. She ordered the employer to reimburse the worker only for losses related to the STIIP but not for any other absences or expenses. She declined his request for an order of an administrative penalty against the employer.

Issue(s)

[5] Did the employer contravene section 151 of the Act by placing the worker on STIIP in April 2005?

[6] Did the employer contravene section 151 of the Act by placing the worker on leave without pay from August 17 through October 2, 2005?

[7] Did the employer contravene section 151 of the Act by intimidating the worker in a letter dated January 4, 2006 and at a meeting on January 20, 2006?

[8] Did the employer contravene section 151 of the Act in a letter dated March 27, 2006, by placing the worker on leave without pay for four days in March 2006 and for two days in June 2006?

[9] If so, what is the appropriate remedy?

Jurisdiction

[10] This appeal is brought pursuant to section 240 of the Act, which provides that a determination, an order, a refusal to make an order, or a cancellation of an order made under section 153, may be appealed to the Workers' Compensation Appeal Tribunal (WCAT).

[11] WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act). This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Procedure

[12] The employer initially requested an oral hearing, while the worker requested this matter be determined on the basis of a read and review of written submissions and further

evidence. At a pre-hearing oral telephone conference, counsel for the employer withdrew its request, and confirmed the employer no longer requested an oral hearing. Counsel indicated the employer would present the facts through submissions and affidavit evidence along with an expert medical report from a dermatologist.

[13] The worker indicated he would not likely require an opportunity to examine the employer's witnesses.

[14] The WCAT *Manual of Rules of Practice and Procedure,* item #8.90, provides that WCAT may conduct an appeal in the manner it considers necessary. It provides a rule that WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility. An oral hearing may also be granted where there are significant factual issues to be determined; multiple appeals of a complex nature; complex issues with important implications for the compensation system; or other compelling reasons for convening an oral hearing.

[15] Item #8.90 states that WCAT will normally conduct an appeal on a read and review basis where the issues are largely medical, legal, or policy-based and credibility is not at issue.

[16] Although there are differences in the interpretation of the events in this appeal, I find there are no significant factual issues to be determined. The events are well-described in the file and for the most part they are documented in letters or transcriptions of meetings. This appeal does not involve complex issues with important implications for the compensation system, although it of course has important implications for the worker and the employer. The appeal involves multiple appeals of a complex nature, but I find an oral hearing would not assist me in resolving these and the outcome of these issues will depend almost entirely on the documented evidence.

[17] The worker has provided articulate written submissions identifying the issues and explaining his interpretation and understanding of the events. It is readily apparent that he has no difficulty expressing himself in writing. Similarly, the employer has presented copies of letters and documents which set out its position and evidence clearly and articulately. The employer is also represented by counsel.

[18] Although there are elements of credibility in this instance, I find these are not significant to the outcome of the appeal. The parties do not dispute most of the relevant background facts and there are no factual issues significant to the decision. I cannot find any other compelling reasons for convening an oral hearing.

[19] After I indicated this to the parties, they each provided written submissions. Having reviewed these, I remain satisfied that an oral hearing is not necessary and I can consider this matter fully and fairly on a read and review basis. The issues are largely legal or policy-based. Counsel offered to present oral argument if I felt it was necessary

or might be helpful in understanding their positions or if I had questions. However, I find this is not necessary. Their submissions were complete, I am satisfied that I understand fully their positions and I have no outstanding questions or need for clarification.

[20] I find I can consider this matter fully and fairly on a read and review basis.

Relevant Statutory and Regulatory Background

[21] Section 151 of the Act has a summary title "Discrimination against workers prohibited" and states as follows:

> An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the Coroners Act on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
>
> i) an employer or person acting on behalf of an employer,
> ii) another worker or a union representing a worker, or
> iii) an officer or any other person concerned with the administration of this Part
>
> [All quotations in this decision are reproduced as written, save for changes noted.]

[22] Section 150 of the Act defines "discriminatory action" as follows:

> 1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.

2) Without restricting subsection (1), discriminatory action includes
(a) suspension, lay-off or dismissal,
(b) demotion or loss of opportunity for promotion,
(c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,
(d) coercion or intimidation,
(e) imposition of any discipline, reprimand or other penalty, and
(f) the discontinuation or elimination of the job of the worker.

[23] Section 152(3) of the Act provides that the burden of proving that there has been no contravention of section 151 is on the employer.

[24] Section 187 of the Act provides the following:

(1) The Board may make orders for the carrying out of any matter or thing regulated, controlled or required by this Part or the regulations, and may require that the order be carried out immediately or within the time specified in the order.

(2) Without limiting subsection (1), the authority under that subsection includes authority to make orders as follows:

(a) establishing standards that must be met and means and requirements that must be adopted in any work or workplace for the prevention of work related accidents, injuries and illnesses;

[25] The Regulation provides, in part, the following:

8.2 Responsibility to provide

(1) A worker is responsible for providing
(a) clothing needed for protection against the natural elements,
(b) general purpose work gloves and appropriate footwear including safety footwear, and
(c) safety headgear.

(2) An employer is responsible for providing, at no cost to the worker, all other items of personal protective equipment required by this Regulation.

(3) If the personal protective equipment provided by the employer causes allergenic or other adverse health effects, the employer must provide appropriate alternate equipment or safe measures.

8.3 Selection, use and maintenance

(1) Personal protective equipment must

(a) be selected and used in accordance with recognized standards, and provide effective protection,

(b) not in itself create a hazard to the wearer,

(c) be compatible, so that one item of personal protective equipment does not make another item ineffective, and

(d) be maintained in good working order and in a sanitary condition.

(2) If the use of personal protective equipment creates hazards equal to or greater than those its use is intended to prevent, alternative personal protective equipment must be used or other appropriate measures must be taken.

8.4 Workplace Evaluation

If an evaluation of workplace conditions is required to determine appropriate personal protective equipment, the evaluation, where practicable, must be done in consultation with the joint committee or the worker health and safety representative, as applicable, and with the worker who will use the equipment.

8.39 Face seal

(1) Except for specialty eyewear approved by the Board for use with positive pressure full facepiece respirators, nothing is permitted which intrudes between the facepiece and the face, or which interferes with the face seal of the facepiece.

(2) A worker required to wear a respirator which requires an effective seal with the face for proper functioning must be clean shaven where the respirator seals with the face.

8.42 Medical assessment

If a worker is required to use a respirator and there is doubt about the worker's ability to use a respirator for medical reasons, the worker must be examined by a physician, and the examining physician must be provided with sufficient information to allow the physician to advise the employer of the ability of the worker to wear a respirator.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[26] With respect to remedy, section 153(2) of the Act states as follows:

> If the Board determines that the contravention occurred, the Board may make an order requiring one or more of the following:
>
> (a) that the employer or union cease the discriminatory action;
>
> (b) that the employer reinstate the worker to his or her former employment under the same terms and conditions under which the worker was formerly employed;
>
> (c) that the employer pay, by a specified date, the wages required to be paid by this Part or the regulations;
>
> (d) that the union reinstate the membership of the worker in the union;
>
> (e) that any reprimand or other references to the matter in the employer's or union's records on the worker be removed;
>
> (f) that the employer or the union pay the reasonable out of pocket expenses incurred by the worker by reason of the discriminatory action;
>
> (g) that the employer or the union do any other thing that the Board considers necessary to secure compliance with this Part and the regulations.

[27] Policy item D6-153-2 of the *Prevention Manual* (Manual) provides that it is the Board's objective in exercising the remedial powers in section 153(2) of the Act to, insofar as it is practicable, put the worker in the same position the worker would have been in if a discriminatory action had not occurred. The policy also provides that the Board may order an employer to pay back wages and perform other incidental acts, with the authority to do so found in section 153(2) of the Act.

Relevant Background and Evidence

[28] I have thoroughly reviewed the entire file and all of the submissions, which are extensive and detailed. The parties have had full disclosure of these documents, and I need not recite them in this decision. I will set out the details of the factual background only as necessary to explain my decision.

[29] As of 2003, the worker, a paramedic, had been employed with the employer's organisation for more than 25 years.

[30] In a July 11, 2003 memorandum to its employees, the employer indicated that, to reduce the risk of contracting infectious disease (including, severe acute respiratory syndrome (SARS)), the employer would be offering additional training to paramedics. Training would include the appropriate use, including fit-testing, of the N95 respirator. The employer noted that having a full beard would present a problem as the respirator-to-face seal would not be achieved, and where fit-tests were not achieved, these would be addressed on a case-by-case basis.

[31] Two days later, the worker filed an occurrence report and informed the employer he wished to wear a full beard to prevent skin irritation caused by frequent shaving. He requested that the employer provide a PAPR as an accommodation for his skin irritation.

[32] On July 24, 2003, the worker's then district superintendent requested from the worker that his physician supply documentation outlining the medical reasons for his "inability" to shave.

[33] On a prescription pad note dated October 16, 2003, the worker's family physician wrote, "Has a skin condition for which shaving is a significant irritant."

[34] The employer may or may not have received this note in October 2003. According to the worker's information to the Board, he continued to work and, in the "fall of 2003 and again mid 2004", he was assured that the employer was considering the matter.

[35] Counsel submitted that in January 2004, the employer issued another memorandum to its employees regarding fit-testing for the N95 respirators in which it stated that having a full beard would present a problem for fit, and that cases of unsuccessful fit-testing would be addressed on a case-by-case basis.

[36] In submissions to WCAT, counsel for the employer stated the employer's records indicated the worker requested STIIP for September 24 and 25, 2004 and October 19, 2004 when he was unable to work because of his skin condition. Counsel stated that, in a letter dated February 14, 2005, a district superintendent (a different person than the superintendent from 2003) had approved the worker's request for these benefits. (Further documents from the district superintendent were authored by this most recently identified district superintendent.)

[37] In his reply to counsel's submissions, the worker stated the STIIP on those occasions had nothing at all to do with his skin condition and that the February 14, 2005 letter dealt with a wholly unrelated matter. He had never been on STIIP for any reason remotely related to a skin condition or beard and he had never made such a request.

[38] Neither party provided a copy of the February 14, 2005 letter.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[39] On April 19, 2005, the employer issued another memorandum to all employees, in which it stated that, as a condition of employment, all paramedics must complete a successful fit-test of the N95 respirator to ensure its effectiveness. This would require a seal that could only be achieved if the paramedic was free of facial hair where the respirator contacted the face. The employer stated each paramedic's "ability to access work will be affected…If, at the beginning of their shift…they are not clean-shaven where the N95 respirator makes contact with the face." The employer also stated that non-compliance issues would be addressed on a case-by-case basis by regional management.

[40] In submissions to the Board, the worker stated the April 19, 2005 memorandum had been referred to as policy which was part of the respiratory protection program (RPP). However, the RPP required policy statements be developed in consultation with a joint committee and, therefore, the April 19, 2005 memorandum was invalid as part of the RPP. Furthermore, the memorandum was contradicted by fit-testing guidelines and by the employer's practice of telling employees to pass calls to another crew if there was a respiratory risk. The worker submitted the memorandum had "no validity in regard to the selection of respirators."

[41] Counsel submitted that, on April 21, 2005, the worker reported to work without being clean-shaven. The employer was aware of the worker's claim that he had a medical condition causing an inability to shave. Consistent with the conditions of employment, the worker was not permitted to access work on April 21, 2005.

[42] In a letter dated April 21, 2005, the district superintendent told the worker he was non-compliant with requirements for N95 respirator fit-testing because he was "claiming…a dermatological condition on your face that disallows your shaving in such a way as to permit a proper N-95 fit at the point of contact with skin." He stated that, pursuant to the April 19, 2005 memorandum, it was not possible for the worker to remain non-compliant and potentially at-risk because he was not appropriately protected. The district superintendent requested documented verification from a competent medical practitioner that the worker suffered from a dermatological condition. The employer had authorised a STIIP claim to be commenced on his behalf pending the necessary medical documentation. The employer stated it had no medical evidence on file and the worker had previously resisted efforts to obtain medical information related to the claimed condition.

[43] In a letter to the employer dated April 26, 2005, the worker stated he had provided medical documentation to the district superintendent in the fall of 2003. He attached a copy of his family physician's note. The worker reiterated his request for a PAPR, and stated it was unfortunate the employer had not yet addressed his 2003 requests. The worker referred to Regulation 8.2 (Responsibility to provide), and proposed that he be

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

returned to work, with a requirement than an alternate crew attend to calls involving a risk of exposure, as had been done with another employee who had not been fit-tested (he named the employee).

[44] The district superintendent responded on April 28, 2005, and stated the prescription pad note from the worker's physician did not provide sufficient information. The employer enclosed a letter to the physician with specific questions to clarify the employer's concerns.

[45] In a letter dated May 4, 2005, the worker provided to the employer, a certificate dated May 3, 2005, signed by a locum for his family physician. The worker also indicated that he had given the employer's contracted health agency (Healthserv) the locum's answers to the questions in the employer's letter.

[46] The worker stated that, as he had indicated in a telephone conversation with the district superintendent on April 28, 2005, he had purchased a PAPR and he was ready to return to work. He had confirmed with a Board officer that the PAPR was an acceptable and desirable alternative to an N95 mask. It provided five times the protection of an N95, could be worn over his beard, and did not require fit-testing on an annual basis. He stated the employer may have underestimated the expenses associated with the required annual fit-testing for the N95 masks. In that same letter, the worker asked to be included in a consultation process with the employer as per Regulation 8.33 (Respiratory Protection – Selection).

[47] On the certificate, the locum physician indicated the worker's diagnosis was "dermatitis" and that he was "to use respirator that does not require shaving." On the employer's questionnaire letter, the locum wrote that the worker continued to suffer from a skin condition that was irritated by shaving; the physician had based his opinion on the worker's self-reported symptoms and on physical examinations; the physician was not aware of any treatment that would allow the worker to shave without significantly irritating his skin; and, it was not likely the worker would benefit from being examined by a dermatologist for the purposes of exploring other possible solutions to his skin condition.

[48] Counsel provided a copy of email correspondence between the employer and Healthserv, in which an employer staff member stated he did not want to permit the use of the PAPR until it was confirmed that the worker had a *bona fide* medical reason for not being clean-shaven. The employer did not know whether the worker had a compelling medical reason for not using an N95 and this may set a bad precedent, generate a fair bit of confusion, and send a mixed message to the rank and file. He and the Healthserv consultant discussed the possibility of assigning duties for the worker while they waited for his family physician to return to the office.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[49] In reply, the Healthserv regional manager stated that the worker was paid 75% through STIIP and would likely file a grievance over this partial loss of salary. She stated, in part,

> Given that we have suggested that the PAPR will be acceptable as an alternate when there is a DTA [duty to accommodate], it seems to me that this would be difficult to defend?

[50] In a letter to the employer dated May 16, 2005, a Healthserv consultant stated an occupational medical specialist had reviewed the file and recommended that more information regarding the medical condition was required. Once adequate medical information was received, Healthserv would provide the employer with a recommendation.

[51] In a letter to the worker dated May 19, 2005, the employer indicated the worker could return to work on May 20, 2005 and use his PAPR as a temporary accommodation until the employer received information from Healthserv respecting his medical claim. The employer stated that if the information confirmed the worker had a medical condition that prevented him from shaving, the employer would look to the Board for direction on permanent accommodation. If the information did not support his claim, the employer expected the worker to shave and be fit-tested with the N95 mask.

[52] The worker returned to work on May 20, 2005. Thereafter, in a complaint form signed on May 26, 2005 and received by the Board on June 8, 2005, the worker filed a complaint for discriminatory action and failure to pay wages from April 21, 2005 through May 16, 2005. He told the Board that the employer suspended him from work on April 21, 2005. This suspension was "facilitated by the fiction that I was on Short Term Disability with the result that my pay was reduced by 25%." He stated he was not allowed to return to work until May 20, 2005. In the meantime, he stated that many of his co-workers had informed him that they had not been successfully fit-tested for various reasons, yet they continued to work.

[53] In submissions to the Board, the worker stated he did not ask Healthserv to provide a recommendation and the employer's criteria for considering and denying his request were entirely arbitrary and changed whenever new information was provided.

[54] In the Board's November 6, 2007 decision, the case officer stated that, according to the employer's *Field Operations Policy and Procedure Manual*, STIIP is to be paid when a worker is unable to work because of illness or non-work-related injury. She concluded the employer's placement of the worker on STIIP, in the absence of medical evidence that he was ill or injured, was tantamount to suspending him with a reduction in pay. She stated the worker had established a *prima facie* case of discriminatory action with respect to the employer's actions in April 2005.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[55] The employer has appealed. Counsel presented extensive submissions which I will address below. At this juncture, I note the employer takes the position that the worker has not presented a *prima facie* case, since the placement on STIIP does not fall into any of the actions listed in section 150 of the Act and the provision of these benefits did not adversely affect the worker. The employer also submits that placing the worker on STIIP was not meant to intimidate him and was in no way retaliation for the worker's inquiries about respiratory protection and the accommodation to which he might be entitled. Rather, it was a measure taken by the employer in good faith to try to balance between the employer's obligation to protect the worker's safety and enforce its protection program and the conditions of employment, and the employer's duty to consider the *bona fides* of the worker's request for accommodation. Counsel submitted the worker's actions did not fall under section 151 of the Act. The worker had refused to shave as required by the Conditions of Employment because of an alleged medical condition. This did not constitute exercising a right, carrying out of a duty under the Act or giving information to anyone regarding conditions affecting occupational health and safety.

[56] Returning to the events of 2005, as I have noted above, the worker continued to report for work after May 20, 2005, with his PAPR available. As the case officer indicated, thereafter, the worker and the employer exchanged letters about the need for further medical information.

[57] In a letter dated July 18, 2005, the worker told the employer that a third visit to a third doctor with a third set of questions would be inappropriate. The worker stated the medical reports from his family physician and the locum were sufficient to establish that he should avoid shaving for health reasons. He questioned whether the employer had the authority to require that he submit to a medical examination. He stated the only remaining issue was to determine who should eventually cover the expense of the PAPR. He stated the outcome of his discriminatory action complaint would likely have a significant impact on what information was needed from any future medical examination and whether there was any need for the employer to make any determination at all regarding his request that the employer provide the PAPR. In the meantime, he was prepared to carry the cost of the PAPR so there was no urgency for the employer to make a final determination on his request. The worker also questioned whether the Board had recommended the use of the N95 masks and whether the employer had adequate records from the fit-testing program. He provided the names of three other employees who had failed fit-tests. He stated that two had been instructed to avoid calls where there is a respiratory risk and a third had heard nothing in the year since she failed the test. The worker stated the employer's Infection Control Plan stated that paramedics were at risk of infection on every call. He concluded,

> As I presently have excellent respiratory protection I hope you agree that deciding who should pay for my respirator is a far lower priority than providing these other employees with protection.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[58] On July 23, 2005, the worker filed a report with the Board and challenged the appropriateness of the N95. He stated that he was not aware of any evidence that the N95 provided adequate protection against more contagious or serious diseases.

[59] On July 26, 2005, the employer replied to the worker's July 18, 2005 letter. The employer directed the worker to attend a meeting on August 9, 2005.

[60] After the August 9, 2005 meeting, the district superintendent wrote to the worker again, and confirmed the understanding that the worker had agreed that he would take to his physician questions that Healthserv had provided. This would assist Healthserv in making a recommendation to the employer on his request for accommodation.

[61] Thereafter, in a note on August 11, 2005, the worker's direct supervisor indicated the worker had asked whether he would be disciplined if he did not provide the medical information to Healthserv. The supervisor stated he had informed the worker that he would not be disciplined for not providing information to Healthserv but that if he did not provide the information the employer would take the position that there was no need for an accommodation. The worker would be treated as were the rest of the paramedics in the service and required to comply with the policy of April 19, 2005.

[62] In a letter dated August 15, 2005, the worker stated he had changed his mind about taking questions from Healthserv to his family physician. He stated he had agreed to this only because he believed he would be disciplined if he did not accommodate the district superintendent's wishes. He listed several bases for his belief in this regard and stated, "I do not feel obliged to stand by an agreement made under these conditions." He stated he had since spoken with Healthserv and sought legal advice and he understood that any provision of medical information was strictly voluntary and that he would not face discipline as a result of a refusal to provide the information. He had cancelled his appointment with his physician as it would be of no value and was inappropriate. He stated he did not expect the employer to make a decision regarding his request for provision of PAPR at that time.

[63] On August 16, 2005, the district superintendent replied. He informed the worker that employees requesting accommodation were required to answer questions and provide information, including information from health care professionals. Given the worker's refusal to cooperate, the employer had concluded that he had not established that he had a medical condition that would entitle him to accommodation. Consequently, the superintendent terminated the temporary agreement which permitted the worker to use his PAPR, and directed the worker to comply with the policy. He was to report to work clean-shaven and could expect to be fit-tested. The employer arranged for the letter to be hand-delivered to the worker.

[64] After reading the letter, the worker invoked section 3.12 of the Regulation (Refusal of Unsafe Work – Procedure for refusal). According to the employer's notes, the worker felt it was not safe for him to work without his PAPR. The employer notified the Board.

[65] On August 18, 2005, the district superintendent wrote to the worker and quoted section 8.42 of the Regulation (Medical assessment). He told the worker that he had repeatedly refused to provide medical verification to support his request and that he was expected to comply with policy and use the N95 respirator. As he had refused to meet this condition, the worker would "no longer have access to work…and are considered relieved of duty." He indicated that for payroll purposes, this was considered a leave without pay.

[66] On September 6, 2005, a Board officer determined the (Regulation section 3.12) case did not involve a specific incident whereby an undue hazard involved the necessity to use a respirator. The officer concluded that, as a result, the circumstances did not fall under section 3.12 of the Regulation.

[67] In submissions to the Board, the worker stated that on September 9, 2005, he left a voice message for the district superintendent in which he indicated he was willing to return to work but not yet willing to disregard medical advice. He stated he would like to return to work with the accommodation already provided to other crew who had worked without tested respiratory protection.

[68] On September 13, 2005, the employer informed the worker that a consultation process had already taken place and had resulted in the N95 respirator being selected as appropriate. The other paramedics the worker had named were shaved and were either fit-tested or appropriate alternate protection had been obtained. One paramedic not yet tested had shaved and was waiting to be tested. The employer stated that unless and until the worker was prepared to comply with the employer's requirement that he shave and be fit-tested, there was no work available for him.

[69] In submissions, the worker stated that, due to lack of income, he began daily shaving. He reported for work on October 3, 2005, and worked that day with the understanding that he should pass to another crew any call that involved a respiratory hazard. The next day, the worker passed a fit-test.

[70] The parties indicated that they explored mediation through the Board in October 2005. According to November 22, 2005 note on the Board's file, the worker withdrew from the mediation process.

[71] In a letter to the worker dated January 4, 2006, the employer stated that the worker had either stalled or outright declined to cooperate with the employer. The employer also stated that around April 2005, the worker informed a regional safety officer that he just did not want to shave.

[72] On January 8, 2006, the employer wrote to the Board and stated the accommodation process was being impeded as the worker had not provided the necessary substantive medical information detailing his limitations and restrictions. The employer had requested substantive medical evidence that the worker had a medical impairment of sufficient severity and extent that it disabled the worker to the extent that it prevented him from complying with a workplace safety rule and, therefore, that he needed to be accommodated to ensure his own safety, that of his partners, and that of the patients he encountered in his job.

[73] The employer wrote to the worker again on January 17, 2006, and documented the history of the process which began in April 2005. The employer reiterated that the worker had informed a safety officer that he "just didn't want to shave" and, in the face of his refusal to provide more medical information, the employer began to suspect he did not have a medical condition that warranted accommodation. The employer was "all the more persuaded" when after shaving for two weeks, no obvious skin condition appeared. The employer accused the worker of "possibly fabricating a medical condition" to support a request for accommodation simply to keep his beard. The employer referred to an October 19, 2005 meeting which was tape recorded and transcribed. In particular, the employer quoted the following:

> [Human resources manager]: "*You have said that you had a medical condition that would cause skin irritation if you were to shave and for that reason you requested the employer accommodate you by providing you with an alternate respirator*."
>
> [Worker]: "*I think you may have misunderstood what I have said. You probably need to read the material I have given you more carefully*."
>
> [Human resources manager]: "*Okay, have you always been able to shave?*"
>
> [Worker]: "*What material are you basing your assertion on, your reference as to what I have said*?"
>
> [Human resources manager]: "*I think the question to [the worker] here today is are you able to, the employer is asking are you able to provide evidence or new medical information that your condition has changed*."
>
> [Worker]: "*No. No I am not able to do that*."
>
> …
>
> [Human resources manager]: "*Okay, so has your condition changed?*"

> [Worker]: "*You have asked me to provide you with information saying that it has. I can't do that.*"
>
> [Human resources manager]: "*Have your circumstances changed such that you are now able to shave whereas before you could not?*"
>
> [Worker]: "*You are making a false assumption in that statement. You are saying I couldn't shave before.*"
>
> …
>
> [Worker]: "*My assertion is that it would have an adverse health effect.*"
>
> …
>
> [Worker]: *"Nothing has changed."*
>
> [Human resources manager]: "*Okay, well…it doesn't appear that there was anything preventing you from shaving before. You are not giving us information that would support that there was something that would prevent that.*"
>
> [Worker]: "*And again you are first not in a position to know and second not qualified to evaluate that.*"

[74] Also in the January 17, 2006 letter, the employer documented that the parties had attended mediation at the Board in November 2005. The worker had informed the mediator that he had scheduled an appointment with a specialist for November 17, 2005 but on November 22, 2005, the worker withdrew from mediation. The employer requested an update on his skin condition and, on November 30, 2005, the worker wrote in reply and stated he continued to experience skin irritation as a result of daily shaving. He considered this to be an adverse health effect. The employer directed the worker to attend a meeting on January 20, 2006.

[75] In submissions to WCAT, counsel presented a transcript of the January 20, 2006 meeting, which the employer began by reminding the worker there was a general responsibility to be honest and forthright. In reply, the worker stated that where the employer considered him evasive, he was merely being careful. Also at that meeting, the district superintendent clarified that the Healthserv specialist had indicated the two notes from the worker's family physician's office were not sufficient for him to make a recommendation for an accommodation. The employer told the worker and union representative that if the specialist had concluded the worker required a PAPR, the worker would "have one by now", but that the worker had thwarted that. Three times the worker had agreed to provide further (medical) information and three times he had

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

stepped away from it. The worker clarified that he had requested the employer to provide him with a respirator which did not require a face seal consistent with the recommendation from his doctors. He had declined to shave to use a face seal mask but his doctors had advised that he reduce the extent and frequency of shaving as much as possible.

[76] The employer asked, given the worker's statement that he had not shaved for many years before April 2005, how he had known he would suffer an adverse health effect if he were to shave. The worker replied this was belief and expectation, based upon information he shared with his doctor and which he considered to be personal medical information. He stated,

> …where you wish to receive personal medical information from me, you need to explain the purpose for which you're collecting the information and your legal authority for collecting it.

[77] The worker stated he experienced redness/rash when he shaved under his chin. The union representative stated this would leave the worker open to infection. The employer told the worker that it considered an adverse health effect to be an effect which is harmful or detrimental to his health. The worker had not cooperated with Healthserv in a way that permitted Healthserv to properly evaluate these factors. Based upon the available information, the employer did not consider the extent and severity of the adverse health effect prevented him from complying with the employer's April 19, 2005 memorandum.

[78] In reply, the worker stated the following:

> I could say that this is a string of false statements much moreso than the question. I think I can explain this. You've chosen to ignore advice from two of my doctors who have answered detailed questions provided by you. You have chosen to require that Healthserv provide a recommendation before you provide an accommodation, while at the same time, ignoring what I believe is a fact that the participation of Healthserv, my participation, my involvement of Healthserv is voluntary, optional and not required. The recommendations that you want from Healthserv have been provided by my doctors and if you wish to consult with Healthserv for the purposes of evaluating the information from my doctors. I'm also free to not share the personal medical information that I've shared with my doctor with your doctor. So it seems to me that the reason you've got this impression and found yourself in this position, you're demanding or requiring that I involve Healthserv is when I have no obligation to do so. I would note on several occasions you've indicated that my participation is entirely optional. So that you may consult with them in reviewing the information provided by my doctors. They have

> given you clear opinion on several occasions. I have given you the work related – and confidential information that would not otherwise be entitled to you. The information provided by the doctors has been consistent with what I have said.

[79] The worker stated he did not recall telling another employee that he would not shave just because he wanted to keep his beard. He stated he had no idea whether this took place or not, and asked the employer for documentation. In answer to the employer's further questions, the worker stated he had not falsely claimed a medical condition in his request for accommodation; he had not resigned from the agreement he signed at the Board's mediation; and, he had acted in good faith and been honest and forthright with the employer throughout the process regarding his request for accommodation.

[80] The employer told the worker the following:

> This is your one and only opportunity to convince us that we should not go forward tomorrow with a recommendation…that you be fired? You have stated that you have acted in good faith, that you are being honest, forthright, you made a commitment, signed your name to a legal and binding contract and you walked away, how can we ever again trust your honesty and if we can't trust your honesty, there's no place in the [employer's] service. Now you tell us why we should save your job?

[81] The worker took some time to consider the employer's question and he caucused with the union representative. He returned and read a written statement:

> I ask that you accept my apology for the inconvenience that I may have caused while attempting to exercise my perceived rights. I respectfully request that I be allowed to continue my employment with [the employer] with due consideration to my present and continued compliance with the [April 2005 memorandum].
>
> We have had a good working relationship for over 30 years and I would like to continue that relationship.

[82] The district superintendent wrote to the worker on January 25, 2006 and stated that, as required by the Regulation 8.42, if there is doubt about the worker's ability to use a respirator for medical reasons, the worker must be examined by a physician, and the examining physician must be provided with sufficient information to allow the physician to advise the employer of the ability of the worker to wear a respirator. The district superintendent was not satisfied with the brief and dated medical information the worker provided and sought additional information from a specialist in the condition. The district superintendent quoted from some of the meetings and stated the worker's lack of cooperation in providing the requested medical information, his evasiveness in

responding to questions and the lack of obvious signs of skin irritation from shaving had created the suspicion that he did not have a medical condition that prevented him from complying with the employer's April 19, 2005 memorandum or which warranted accommodation. The district superintendent concluded the worker had falsely claimed to have a medical condition that required accommodation and suspended the worker for one month with an associated loss of seniority for the period commencing the worker's return from vacation on March 8, 2006 until April 7, 2006.

[83] In a letter dated March 27, 2006, the district superintendent told the worker the employer had completed its investigation into the events surrounding his continued insubordination and claim of a medical condition that prevented him from complying with policy. The employer had concluded there never was a medical condition. The district superintendent also stated the worker had been evasive, obstructive and spent time in semantic issues without answering the employer's questions in a direct and forthright manner. The employer had wasted time and resources dealing with the worker's frivolous and vexatious claims surrounding the issue of the N95 mask and the policy and the worker had used the Board's process designed to protect workers in a frivolous manner to further his own agenda. As a result, he was suspended for the period March 28, 2006 to March 31, 2006. The district superintendent told the worker the employer had no more patience for the conduct described and that any recurrence of a similar nature would result in further discipline, which could include a recommendation for dismissal.

[84] In submissions to the Board, the worker stated that on June 24, 2006, as a result of complying with medical advice to reduce frequency and extent of shaving, he reported for work and was not clean-shaven. He could not use a face seal respirator in compliance with the Regulation. He reported this to the duty supervisor, and also stated that most paramedics working in the area had last been fit-tested two years earlier so that few, if any, could use a face seal respirator in compliance with the Regulation. He worked two full days, after which a district superintendent informed him that he was suspended. The worker missed two nights' work and reported for work clean-shaven. He contended the suspension was in all ways equivalent to the prohibited discriminatory action between August 17, 2005 and October 3, 2005.

[85] The worker stated his employer's strategy had "clearly" been to make him shave and see what would happen, and that if his face did not break out, the employer could claim there was never a problem. The employer carried through with this strategy by suspending him from work and forcing him to shave. The disciplinary process was clearly intended to intimidate and coerce. He referred to the district superintendent as a "low level superintendent with no medical qualifications and little information on which to base his medical opinion." Suspensions and threats to recommend termination of employment were discrimination for a prohibited purpose. The worker submitted that the employer could not argue that it acted out of concern regarding the hazards of working without proper respiratory protection. He submitted that many, perhaps all,

paramedics continued to do just that, without apparent concern or action from the employer. (In his extensive submissions, the worker cited occasions during which he, himself, worked for days at a time without having passed a fit-test.) He requested that he be given the same accommodation that they were given and contended he was "targeted" because he was raising questions about the employer's plan and asking for use of an expensive respirator. The worker named some of the employees, and indicated he had asked for access to the employer's fit-testing records. This had been refused.

[86] In submissions to the Board, the worker stated that he was suspended from work between August 17, 2005 and October 3, 2005 "without due process and in an arbitrary manner." He submitted there was no provision in the contract for an employee to be placed on leave without pay in the absence of an application for such leave. None of the appropriate contract language was followed.

[87] The worker also submitted that most paramedics working in the same geographical area had not been tested as required by the Regulation and few, if any, could use a face seal respirator in compliance with the Regulation. He also stated the employer had failed to comply with many other sections of the Regulation (for instance, he stated the fit-tests had not been done annually as required) so that it was not likely that any paramedic in the Province could use a face seal respirator in compliance with the Regulation.

[88] The worker stated the employer forced him to shave, and used a disciplinary process intended to intimidate and coerce. He stated the district superintendent had no medical qualifications. He provided names of several other paramedics who he stated had not been fit-tested. One, in particular, had a full beard when the worker spoke with him in December 2005. The worker stated that the employer suspended him yet his "operational status" was the same as that of many or all of the paramedics who continued to work. He stated he was singled out for special treatment. He referred to sections 8.2, 8.3, 8.4, 8.33, and 8.43 of the Regulation and submitted that the employer's refusal to consider his rights under the Regulation was a part of the coercion and intimidation being practiced by the employer. The worker stated he had learned of a Sikh paramedic for whom the employer had provided a PAPR.

Findings and Reasons

April 2005 STIIP

[89] A discriminatory action is defined broadly in section 150(2) of the Act as any act or omission by an employer that adversely affects a worker with respect to any term or condition of employment, or membership in a union. Included, without restriction, are suspension, layoff, dismissal, demotion, loss of opportunity for promotion, transfer of

duties, change of location, reduction in wages, change in working hours, coercion or intimidation, imposition of any discipline, reprimand or other penalty and the discontinuation or elimination of the worker's job.

[90] I observe that the words, "any act" and "adversely affects" are very broad, and includes many steps an employer might take to encourage a worker to conform to properly imposed workplace standards of behaviour and conduct.

[91] In this instance, counsel confirmed that the worker was "not permitted to access work on April 21, 2005" but submitted that, rather than completely deny the worker access to work and compensation, it considered there may be a *bona fide* medical condition that prevented him complying with the conditions of employment. The employer placed the worker on STIIP as had been requested by the worker on previous absences. Counsel has submitted that the employer had no reason to disbelieve the worker's assertion that he was suffering from a legitimate medical condition that prevented him from abiding by the conditions of employment. As such, he was eligible for STIIP. The worker disagrees, and has submitted that he was neither ill nor injured.

[92] I do not have the information necessary and nor is it within my jurisdiction to determine whether the worker qualified for STIIP. I observe that the parties agree the worker received such benefits and I am satisfied that, as of April 2005, the worker did not suffer from a symptomatic medical condition that prevented him from working. Rather, from his statement at the January 20, 2006 meeting, the worker believed, from his previous experience, that he would suffer an adverse health effect if he were to shave.

[93] I consider the limitations in "access" to work as contemplated in more than one term in section 150(1) of the Act, including suspension, lay-off, transfer of duties, change of location of workplace, reduction in wages and change in working hours. I find the most accurate depiction of the restriction in the worker's "ability to access work" is a "suspension" as contemplated by the Act section 150 of the Act.

[94] I acknowledge there is a dispute as to whether the worker previously took STIIP for reasons related to respiratory protection, but I find this dispute is not significant since, in any event, there is no doubt that the worker did not initially request STIIP for his absence from work in April 2005. Rather, I am satisfied that on that occasion, STIIP was not voluntary, but was imposed upon him by the employer when the district superintendent decided the worker should not be permitted to access work.

[95] Counsel submitted that the worker could not establish a *prima facie* case in relation to the employer's actions in April 2005. She submitted that to determine otherwise would be contrary to the caution set out in *WCAT Decision #2004-04688*.

[96] A *prima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. (See *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R. 536, at p. 558.)

[97] In *WCAT Decision #2004-04688,* the panel considered two separate actions found to constitute coercion or intimidation, which were discriminatory actions defined by the Act. The panel determined that one of those actions – disciplinary action imposed on the worker after he refused certain work – was not a discriminatory action. In that case, employer attempted a temporary assignment to alternative work until the worker's Regulation section 3.12 issue was resolved. The panel found this was not a discriminatory action, because section 3.13 of the Regulation provided that temporary assignment to alternative work at no loss in pay to the worker until the matter in section 3.12 is resolved is deemed not to constitute discriminatory action.

[98] I find the circumstances in this instance are sufficiently different. First, the worker did not invoke the Regulation section 3.12 in April 2005. Furthermore, even if his information to the employer could be construed as an application of that section, the employer did not assign the worker to alternative work.

[99] Counsel submitted that that although STIIP did not pay 100% of the worker's wages, this did not automatically fall under section 150 of the Act. The employer honestly perceived STIIP as a solution favourable to the worker under the circumstances. The worker's request for medical condition requiring accommodation ought not to bring this matter under section 151 of the Act. However, I disagree. I find the April 2005 STIIP was essentially a suspension as contemplated by section 150 of the Act (it could also be considered a layoff, a change in hours or a reduction in pay). The benefits the worker received from STIIP essentially reduced his financial losses, but the worker suffered a financial loss when the employer suspended him from working in April 2005.

[100] Nevertheless, a discriminatory action in and of itself is not sufficient to establish a contravention of the Act. It simply means that the employer has acted in a manner that adversely affected the worker's terms and conditions of employment.

[101] Counsel submitted that, in the alternative, the worker's actions that gave rise to placement on STIIP did not fall under section 151 of the Act. The worker had refused to shave as required by the conditions of employment because of an alleged medical condition, and this did not constitute the exercise of a right or carrying out a duty under the Act, nor was it in the nature of giving information to anyone regarding conditions affecting occupational health and safety.

[102] I have found the employer effectively suspended the worker in April 2005, which is defined in section 150 of the Act as a discriminatory action. Section 151 of the Act prohibits discriminatory action under certain circumstances including, in part, exercising any right in accordance with the Regulation.

[103] Various sections of the Regulation set out responsibilities for employers and for workers. I am satisfied that the worker's request for alternative equipment is contemplated in section 8.2(2) of the Regulation, which provides the employer is responsible for providing, at no cost to the worker, all other items of personal protective equipment required by the Regulation. In other words, I am satisfied that when he approached the employer on April 20, 2005, the worker was exercising a right under the Regulation. The worker complained that the employer placed him on STIIP because he exercised this right.

[104] I find the worker made believable allegations which, in the absence of an answer from the respondent, were complete and sufficient to justify a finding in his favour. I find the worker has presented a *prima facie* case of discriminatory action for the April 2005 suspension.

[105] Thus, the inquiry turns to whether the discriminatory action was in contravention of section 152 of the Act, as described by section 152(3), the onus shifts to the employer to show there was no such contravention.

[106] I understand that the employer considered its April 19, 2005 memorandum to be a communication of conditions of employment with consequences for failure to comply with the conditions. However, while the memorandum was clear that non-compliance would affect access to work, it also told the paramedics that non-compliance issues would be addressed on a case-by-case basis by regional management. Thus, the memorandum itself provided for exceptions to the identified conditions of employment.

[107] Counsel referred to *WCAT Decision #2004-02065*, in which she stated an employer wrote to a worker regarding her behaviour. In that case, the worker was so passionate about various occupational health and safety matters to the point where her co-workers felt harassed by her. The employer sent letters indicating that her ongoing behaviour was in breach of employer policy and code of conduct. In that case, the panel had determined that although the context of the alleged improper behaviour was the realm of occupational health and safety, she was satisfied that the employer's motivation was not to discriminate against the worker because she had acted within her rights, but the evidence was clear the employer was dealing with the worker's apparent insubordination and contravention of workplace policies. In that case, the panel concluded the employer had met the burden and satisfied the panel that its actions were in no part motivated by the worker having raised safety concerns. I find the

circumstances in this case are not sufficiently similar to those described in *WCAT Decision #2004-02065.* I will return to this case below, when considering the worker's allegations regarding time away from work in August 2005 and later.

[108] Counsel also submitted there was no evidence that the employer was motivated in any way by the worker's actions under section 151 of the Act, even though the request for accommodation for a skin condition may have been within the realm of occupational health and safety.

[109] However, the April 19, 2005 memorandum must be considered in the context in which the worker was operating at that time. The employer did not deny the worker's statement that, in 2003 and again in 2004, he followed up on his request from 2003. The employer has not provided sufficient information to explain the mechanism which permitted the worker to work during those years without proper protection per the PPR. However, from the evidence in this case, I am satisfied that the employer knew about the worker's 2003 application when it issued the April 19, 2005 memorandum and that it knew the worker was working with his beard and, thus, without adequate protection per the PPR. In other words, regardless of whether the employer had ever received or retained the October 2003 prescription pad note from the worker's family physician, the worker had already requested accommodation for his skin condition. The employer did not notify the worker of a change in his particular circumstances prior to or at the time it issued the April 2005 memorandum and, thus, I am satisfied that it had not yet decided the matter of the worker's 2003 request for accommodation.

[110] Under such circumstances, the worker acted diligently when, upon receipt of the memorandum, he notified his supervisor of his ongoing issue with respect to respiratory protection. Given his previous request, it was reasonable for the worker to have expected, at least temporarily, to be exempted from the conditions of employment until such time as the employer presented its response to his earlier request. In addition, the worker ought to have expected his circumstances to be "addressed on a "case-by-case basis" as promised in the memorandum itself.

[111] Counsel has submitted that all of the employer's impugned actions were taken in a *bona fide* effort to balance its duty to accommodate the worker individually if he had a medical condition requiring such accommodation, and its obligation to implement and apply its RPP consistently to all employees *unless they had an established need for accommodation*. The employer's actions were governed and motivated by pro-safety concerns, its effort to discharge its duty to accommodate and its obligation to enforce workplace rules even-handedly. I acknowledge the employer has the responsibility to its employees and that it also had responsibilities to all employees under the Act and Regulations. However, I have emphasised counsel's wording above to stress the importance of the circumstances in this case. While the worker had not yet established the need for accommodation, he had presented a request which had not yet been

answered. Under such circumstances, I find the employer's actions were at least in part motivated by the worker's request for accommodation only one day prior to what I have determined was a suspension.

[112] WCAT, like the former Appeal Division, has applied the "taint" principle in appeals involving section 151 complaints. This principle originated in Ontario jurisprudence which requires that in health and safety matters, employers must disprove any "anti-safety animus" in order to overcome a finding that they have contravened anti-discrimination legislation. Illegal discrimination is established even if anti-safety animus provides only a partial motivation for the employer action. That principle requires that in order to discharge the burden of proof under section 152(3) of the Act, a respondent must prove that in no part were its actions tainted by "anti-safety" motivation prohibited under section 151 of the Act. The Appeal Division commented as follows on the "taint principle" in *Appeal Division Decision #2002-0458* (February 21, 2002):

> There is no doubt that the taint theory makes it more difficult for the employer to discharge its burden under Section 152(3). The employer must demonstrate that its reasons for taking action against the worker were not related to any of the prohibited grounds in Section 151. This means that the employer cannot shield itself by pointing to proper cause, or what may be a valid business reason for the impugned conduct, where there is also evidence of a prohibited action.
>
> The taint theory stands for the proposition that safety considerations need not be the only or dominant reason for the employer's action, but rather, it is sufficient if it is one of the reasons for the employer's action under review.

[113] I find the evidence supports a conclusion the employer's decision to suspend the worker in April 2005 was at least in part motivated by the information he provided to the employer on April 20, 2005 which directly related to his request under the Regulation section 8.2. I find the employer has not met the onus in section 152(3) of the Act of proving that it did not suspend the worker contrary to section 151 of the Act. I find the employer unlawfully discriminated against the worker in April and May 2005 by suspending him from employment.

Did the employer contravene section 151 of the Act by placing the worker on leave without pay from August 17 through October 2, 2005?

[114] For similar reasons as those I have discussed above, I find the worker presented a *prima facie* case of discriminatory action for the employer's suspension for the period August 17 through October 2, 2005. Since I have discussed the principles in detail above, I will be brief at this juncture. There is no dispute that the employer placed the worker on leave without pay for this period. There is no dispute that this resulted at

least in part from the worker's request from April 20, 2005. Thus, the employer's actions again qualify as a suspension from employment, which is described in section 150 as a discriminatory action and the worker has presented a *prima facie* case that the action was at least in part due to the fact that he exercised a right in accordance with the Regulation. Again, the onus shifts to the employer to show there was no such contravention.

[115] At first glance, the employer's actions appear to be a contravention of section 151 of the Act, since it suspended the worker after he stated outright that he considered he was exercising a right to accommodation (in accordance with the Regulation). But despite the worker's depiction of the facts in such a fashion, I must review the actions of both parties in greater detail to determine whether the employer has shown there was no contravention. At the outset, I observe that the issue of deciding what motivates a person to take any action is a difficult task, and this is particularly true in this case.

[116] I agree with the case officer that the worker's manner of dealing with the respiratory protection issue was what set the wheels in motion for the employer to suspend him. As she stated, it may be that the insubordinate behaviour was so inextricably linked with the worker's safety activities that the two cannot be separated. Indeed, based upon the information available to the case officer, it would have been very difficult to separate the issues. However, I now have the benefit of extensive submissions from the employer's legal counsel as well as further submissions from the worker, and this new information is significant to the outcome of this appeal. I will explain.

[117] Although I have found that the employer discriminated against the worker in April and May 2005, I find the employer acted appropriately when, in May 2005, it permitted the worker to return to work under a temporary accommodation. Furthermore, I observe that in its May 19, 2005 letter to the worker, the employer was clear in its position that this was to be a temporary accommodation until the employer received information from Healthserv respecting his medical claim.

[118] I have stated above that there are no significant issues with respect to credibility in this case. To be clear, although I acknowledge that he had not shaved his face for many years, I accept that the worker honestly believed that he ought to be accommodated for the skin condition he anticipated he would suffer if he shaved.

[119] I also accept that the employer offered to the worker its commitment that if the medical information confirmed he had a medical condition that prevented him from shaving, the employer would either "look to the Board" for direction on permanent accommodation or it would, as per the district superintendent's statement at the January 2006 meeting, provide the PAPR.

[120] I have considered the remainder of this appeal within the context of these findings with respect to credibility.

[121] Returning to the period in August 2005, I note the employer told the worker that it had chosen to rely upon advice from Healthserv. The worker believed this was inappropriate but I find the information upon which the employer would base its decision was the employer's prerogative.

[122] Although WCAT's jurisdiction does not extend to "labour relations" matters outside the scope of the discriminatory action provisions of the Act, in considering whether the employer has discharged its onus, I have found the following excerpt from a decision of the British Columbia Court of Appeal, *Stein v. British Columbia (Housing Management Commission)*, (1992) 65 B.C.L.R. (2d) 181 (C.A.) helpful. Southin, J.A. said, at page 185:

> I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
>
> It is not an answer for the employee to say: "I know you have laid down a rule about this that or the other, but I did not think that it was important so I ignored it."

[123] As is reflected in Madame Justice Southin's comments about safety, the discriminatory action provisions of the Act create additional rights and responsibilities for the parties to an employment relationship. They clearly prohibit the employer from taking discriminatory action against a worker for exercising any right or carrying out any duty in accordance with the occupational health and safety provisions of the Act. They also prohibit the employer from taking discriminatory action against a worker *for the reason* that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment to an employer or person acting on behalf of an employer, another worker or a union representing a worker, or an officer or any other person concerned with the administration of the occupational health and safety provisions in the Act. But the employer remains vested with the right to manage the workplace, and to supervise and direct workers.

[124] The worker has submitted that the employer acted without due process. I disagree. The worker has not disputed the supervisor's statement that on August 11, 2005 he informed the worker of the consequences of a decision not to comply with the employer's request. Furthermore, on August 16, 2005, the district superintendent set out the employer's decision regarding his request for accommodation, and told the worker he had not established that he had a medical condition that would entitle him to accommodation. In other words, at this juncture, the employer had issued a decision. While there remains the question as to whether the employer's decision was supportable under either the Regulation or under the *Human Rights Code*, neither of these are issues before me in this appeal. I consider that the employer had notified the worker of its decision and of the consequences of his failure to comply with the conditions of employment.

[125] The worker believed this was inappropriate and, while he initially agreed to cooperate with Healthserv, he eventually decided to withdraw his agreement. In his submissions to WCAT, he explained that he initially cooperated fully with the employer's requests for medical information. However, after presenting the two medical documents, he asked for the criteria which would be applied to his request. The employer told him that he would not be given any information and the employer would not answer his questions until after he had complied with their demands for further information. The worker felt he had "good reason" to suspect the employer was not being truthful and that the managers had already decided he would not be allowed to continue to use his PAPR, and that their request for further information would be used to justify their decision.

[126] The worker's conclusions regarding the employer's truthfulness and his decision to act upon his suspicions were his prerogative. He considered the employer's demands inappropriate, given its continued refusal to provide any information on the process and criteria and its refusal to identify the problem with the information he had already provided. Again, it was open to the worker to choose his path and he did so.

[127] I understand the worker's position in this regard and I acknowledge the worker felt the employer ought to have simply accepted the notes from his physicians. By all accounts, these were fully qualified medical practitioners licensed to practice medicine in the province. Thus, I understand the worker considered he had provided sufficient medical evidence to support his request. However, the matter of whether he is correct in this conclusion or even whether he was entitled to accommodation in the form of a PAPR is not at issue. Rather, the question in this matter is whether the employer discriminated against the worker in August 2005 by suspending him from employment.

[128] I find the employer did not. Rather, it had duly warned the worker of the consequences of his failure to participate with Healthserv and it followed through on its warning. I will discuss this in greater detail.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[129] First, as an aside, I consider the employer's request for further medical information was reasonable. The employer has the responsibility to assess its duty to accommodate any disability the worker may have. From the submissions from both parties, I am satisfied that the purchase of a PAPR was an expensive endeavour and one which the employer believed should be assessed once full medical details were received. I also accept that the workplace circumstances were such that respiratory protection was not, historically, required frequently but that a paramedic might at any time and without notice encounter a situation in which such protection was necessary. While it is not germane to the issues in this appeal, I observe that under these circumstances, even with regular fit-testing, the use of the disposable N95 masks would likely be less expensive than would be the purchase of a PAPR along with its cleaning requirements. I understand the worker may wish to debate that point. However, even if I am wrong in my impression, I see it as the background upon which the employer asked the worker for further information regarding his medical condition.

[130] Furthermore, despite the worker's firmly held belief that the two notes from his physicians should have been sufficient to establish his claim for accommodation, I accept the hearsay evidence from the Healthserv consultant that an occupational medical specialist had reviewed the file and recommended that more information regarding the medical condition was required. I say this because I find the worker did not sufficiently challenge this information and I see it as likely accurate, since the note from the worker's treating physician was brief, as were the locum's responses to the employer's questionnaire. Furthermore, the locum stated he based his opinion in part on the worker's self-reports and in part on his physical examination of the worker at a time when the worker indicated he was not symptomatic (he had not shaved his face for several years). I understand that in the locum's judgment, the worker's condition was sufficient to warrant accommodation. However, under such circumstances, I consider it open to the employer to explore its responsibilities and to request either further information from a physician or perhaps an opinion from a specialist.

[131] The Regulation section 8.42 provides that the examining physician must be provided with sufficient information to allow the physician to advise the employer of the ability of the worker to wear a respirator. Given the brevity of the locum's responses, I accept it was likely that the occupational specialist wanted more medical information before it could advise the employer regarding respiratory protection. I acknowledge that this finding could be controversial. However, even without this finding, I am satisfied that the employer was motivated to obtain more medical information from the worker because of advice it received from Healthserv that the medical information the worker had presented was not sufficient.

[132] The employer informed the worker that the notes from his physicians were not sufficient. Contrary to the worker's conclusions regarding the employer's sincerity, as noted above, on at least two occasions, the employer told the worker that if the medical

 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

information confirmed he had a medical condition that prevented him from shaving, the employer would either "look to the Board" for direction on permanent accommodation or it would provide the PAPR.

[133] Whether the worker was correct in his conclusions is not significant to the issue before me in this appeal. The worker has submitted that later, after the employer received the dermatologist's report, the employer refused to allow him to use his PAPR and suspended him for a further two weeks because the employer falsely concluded he had failed to prove his earlier claims. However, the extent to which the employer has a responsibility to the worker to accommodate his medical condition is not at issue. Rather, this case involves the employer's request to the worker for more information which would help to decide the employer's duty. The worker has also initiated a complaint under the *Human Rights Code*, and I observe this was the proper approach to resolve the question of his entitlement to accommodation.

[134] For its part, the employer told the worker that his participation with Healthserv was voluntary, and that he would not be disciplined if he chose not to cooperate with Healthserv. Consistent with this, the employer did not discipline the worker when he withdrew from his previous agreement to participate with Healthserv. But the employer also clearly told the worker, and his supervisor reiterated that, without the Healthserv recommendation, it would take the position that the evidence did not support his claim, and the employer expected the worker to shave and be fit-tested with the N95 mask. The worker's direct supervisor reiterated this information to the worker in August 2005.

[135] I find the preponderance of the evidence at this juncture supports a conclusion that the employer had issued a decision that it would not grant the worker's request and that it suspended the worker because he failed to adhere to the conditions of employment. The employer set out clearly its requirements and the consequences of the worker's actions should he decide not to cooperate in the employer's efforts to obtain those requirements and the worker made his decision. He also refused to work, and the matter of his refusal was the subject of a Board decision which is not before me in this appeal.

[136] From the worker's submissions, I understand that he felt the employer was intimidating and coercing him. The worker believed this was to force him to shave so that the employer could prove him wrong in his claim for accommodation. I find this position internally inconsistent, since one might expect that to prove his own position, the worker need only shave and allow the employer to view for itself the irritation this caused the worker's skin. Nevertheless, while I accept that the worker *felt* intimidated and coerced into shaving, I observe there was another path he could have chosen – he could have agreed to obtain the medical information which I have found it was reasonable for the employer to have requested.

[137] As noted, the worker has characterised the employer's approach as intimidation and coercion under section 151 of the Act. These two terms have been discussed in various other decisions, including those cited by counsel for the employer.

[138] The panel in *WCAT Decision #2004-04688* (September 3, 2004) stated as follows:

> "Coercion" and "intimidation" require some definition. In that respect, I note that it is not necessarily "coercion or intimidation" every time an employer says something that a worker does not like or that causes a negative emotional reaction.
>
> Coercion can be defined generally as using force to compel something, or the act of compelling by force or authority.
>
> Intimidation is a broader term. It includes the act of intimidating a weaker person to make them do something, the feeling of discouragement in the fact of another person's superior status, the feeling of being intimidated, or made to feel afraid or timid, and a communication that makes a person afraid to try something. Synonyms for intimidation include bullying, determent and deterrence. The *New Lexicon Webster's Dictionary of the English Language, Encyclopaedic Edition*, defines "intimidate" as "to frighten, especially to influence by threats".
>
> …
>
> The discriminatory action provisions of the Act impart significant responsibilities on employers and unions, and provide workers with a significant array of remedies. The application of the provisions can have serious consequences for an employer, both financial and otherwise. The provisions contain a "reverse onus" and have been interpreted to include the "taint" principles developed in the context of unfair labour practices. As such, I consider it very important that the behaviours described as "discriminatory actions" be interpreted carefully. I do not suggest that they should be interpreted "narrowly." Rather, they should be given their plain, clear and usual meaning, and their interpretation must include the nuances of that meaning. The use of the words "coercion" and "intimidation" is not meant to capture any and all exchanges between a worker and a supervisor that the worker objects to, or feels is "harassment" by the employer. Coercion and intimidation both imply an aspect of threat or abuse of authority.

[139] On balance, I do not consider the employer's actions in August through October 2005 to have constituted an aspect of threat or an abuse of its authority. On the contrary, I consider the employer's requests in July and August 2005 were reasonable and

appropriate so that it could determine the extent of its duty to accommodate the worker's medical condition. I find the employer communicated to the worker clearly and consistently the consequences to his failure to cooperate with Healthserv. Consistent with the employer's stated purposes, I observe that when the worker agreed to participate, the employer cooperated with him by allowing the temporary accommodation. When the worker chose to withdraw from that agreement, the employer acted as it indicated it would.

[140] The panel in *WCAT Decision #2004-04688* went on to refer to the use of the words coercion and intimidation in labour relations jurisprudence:

> Generally speaking, Canadian labour relations boards have defined intimidation as, at a minimum, acts that deprive an individual of his or her free choice in exercising rights under the applicable statute. This may include acts or threats which are physical or economic. The legislation is interpreted to prohibit pressure or force that removes an individual's right to choose. See, for example, *Words & Phrases Judicially Defined in Canadian Courts and Tribunals*, Volume 4, Carswell (1993), "Intimidation and Coercion."
>
> I agree generally with that approach to interpretation of the words coercion and intimidation. The prohibition in the Act is intended to focus on acts which deprive an individual of his or her rights under the Act.

[141] In this instance, the employer did not deny that the worker had rights under the Act or Regulation and it provided the worker with an opportunity to participate in the process. It could be said that the worker preferred to shave rather than to see a physician. I believe it was more likely that the worker failed to recognise the employer's authority to request further information. In any event, I do not consider the employer's actions deprived the worker of the opportunity to pursue his rights under the Act and Regulation nor were they intended to deprive the worker of that opportunity.

[142] In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Supreme Court of Canada stated:

> The search for accommodation is a multi-party inquiry. The complainant also has a duty to assist in securing an appropriate accommodation and his or her conduct must therefore be considered in determining whether the duty to accommodate has been fulfilled. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil [*sic*] the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If the complainant fails to take reasonable steps and causes the proposal to founder, the complaint will be dismissed. The

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

> complainant is also obligated to accept reasonable accommodation and the employer's duty is discharged if a proposal that would be reasonable in all the circumstances is turned down.

[143] Although the dispute between the parties arose as a result of occupational health and safety issues, I am satisfied that the employer's actions in August through October 2005 were in no way motivated by anti-safety animus or because the worker exercised a right in accordance with the legislation. I find the employer had demonstrated willingness to consider further the worker's request for accommodation when it met with the worker, when it informed the worker that it required further information and when it allowed the worker to use his PAPR in the interim. I find the employer suspended the worker in August 2005 because having refused to cooperate with the employer to this end and having decided not to shave, he was not in compliance with the conditions of his employment. On balance, I find the employer has proven that it did not contravene section 151 of the Act in August through October 2005.

Did the employer contravene section 151 of the Act by intimidating the worker in a letter dated January 4, 2006 and at a meeting on January 20, 2006?

[144] The circumstances in January 2006 were different than those from August 2005 in that, prior to January 2006, the employer was attempting to obtain further information from the worker to ascertain the extent of its duty to him. However, unlike the earlier dates, after the October 2005 meeting and the November 2005 failed mediation attempts, in 2006 the employer initiated the next step in the process and questioned the worker with respect to the veracity of his initial request for accommodation. There is no doubt that the employer used more serious language in its communications to the worker in the January 2006 letter when it accused the worker of "possibly fabricating" a medical condition simply to keep his beard, at the January 20, 2006 meeting when it threatened to recommend the worker's employment be terminated over this issue.

[145] The worker has submitted that other workers who did not make requests for accommodation were treated differently; some were allowed to maintain facial hair and were not forced to use the N95 masks. The employer submitted little on this point, although it did state that, but for an exemption for religious reasons, all other paramedics had been fit-tested. Regardless of this, the evidence supports a conclusion that the employer treated the worker differently than it treated other workers. I find it understandable that the worker felt he had been singled out and, since this was in his mind tied to his request for accommodation, and that he felt this was a discriminatory action. Based upon the worker's allegations regarding other paramedics and the employer's responses to these allegations, I find the worker was treated in a manner that had an adverse effect on the terms and conditions of his employment, and that this treatment was, on its face, related to health and safety issues in the workplace. In the

absence of information from the employer to disprove this, the worker's claim would succeed. Thus, I find the worker has presented a *prima facie* case of discriminatory actions in January 2006.

[146] Again, the onus shifts to the employer to establish that the discriminatory action was neither wholly or in part based on the worker exercising a right or carrying out a duty under the Act or the Regulation, or for raising occupational health and safety or occupational environmental concerns.

[147] I find the preponderance of the evidence supports a conclusion that, had the worker cooperated with the employer's request for accommodation, the employer would have taken a different approach with him.

[148] There is no dispute that the entire process resulted from the worker's initial request for accommodation. The worker had the right to make his initial request and the employer likely had a duty to explore this with him further or it could be argued that the employer simply had a duty to accommodate the worker's request. But by January 2006, the worker was following the conditions of employment set out by the employer. He was shaving and had passed fit-testing for the N95 mask.

[149] I acknowledge the employer's statement in the January 2006 letter, that its motive at that time was related to the worker's responses to the employer's efforts to establish the veracity of his request, but I find this was not consistent with the fact that by that time, the employer had already indicated to the worker that he had not established that he had a medical condition that would entitle him to accommodation. Having decided this in August 2005, the employer did not need to pursue further information from the worker.

[150] The employer also seeks to discharge its onus by showing that the actions it took were in response to the worker's continued failure to follow properly established process and procedure, and for what it considered frivolous and vexations abuse of the Board's processes. I accept this as consistent with the facts established by the documents. There can be no doubt that the focus of the worker's activities is "safety." He clearly takes his responsibilities in that regard very seriously and these extend to protection of safety for his co-workers. However, the worker responded to the employer's requests by arguing over semantics and some of his answers in meetings left an impression that he was being evasive. The worker presented submissions which indicated he had some concerns with respect to the efficacy of the N95 masks and he made allegations that the employer did not follow proper procedures in fit-testing. He submitted that his employer failed to exercise due diligence province-wide for respiratory hazards of the type which killed two of his co-workers at a mine. He submitted the employer's negligence was typical of the way in which his employer dealt with aspects of respiratory protection in the workplace. With respect, there are other avenues by which the worker can pursue his concerns with respect to the general safety of the respiratory

protection the employer has provided, and avenues for the Board, the union and other workers to pursue in the event of incidents. There are other avenues for the worker to pursue his concerns that the employer did not enforce its procedures consistently or appropriately. I find it was not appropriate for the worker to include his responses to the employer's request for information regarding his medical condition to more general safety issues. The worker has further challenged the employer's conditions of employment, and submitted that the employer "cannot suggest that being clean shaven is a condition of employment as I had worked continuously with a beard for the previous 15 or so years and some of my co-workers continue to work with beards…."

[151] I acknowledge that the very fact that "safety" and hazard identification were the focus of a worker's activities does not immunise the worker from his obligations to comply with proper standards of behaviour, nor does it excuse the worker from following the employer's established procedures.

[152] However, I agree with the case officer and I find that I cannot separate the worker's alleged insubordination from the disputed issue, which related to his safety concerns about respiratory protection. I will explain this in more detail.

[153] The employer's January 2006 letter clearly stated that the employer took issue with the worker's actions over the preceding months. I find the employer's actions over those months support a conclusion that the employer considered seriously its duty to the worker regarding his actual request surrounding his medical condition (even though it questioned the extent of the medical condition). I am satisfied that the employer attempted to give full consideration to the worker's request, and that its actions in January 2006 were motivated primarily by the worker's steadfast refusal to cooperate with the process the employer established and his ongoing challenges to the employer's authority to manage its workplace.

[154] However, I also agree with the worker that he had the right to present his claim for accommodation. Since the employer had already stated its position in August 2005, there is no doubt that the discussions in October 2005 and November 2005 related to his discriminatory action complaint to the Board.

[155] As stated above, the discriminatory action provisions of the Act, and in particular the prohibition against coercion and intimidation, are intended to focus on acts that deprive an individual of his rights under the Act. It is reasonable and necessary that the employer have processes and procedures in place for the identification and resolution of occupational health and safety issues. There are specific statutory and regulatory provisions, such as the refusal of unsafe work, that vest workers with the ability to take further steps. It is not unreasonable, nor a breach of the discriminatory action provisions, to ask a worker to comply with proper procedures.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[156] However, I find that in its January meeting and letter, the employer went beyond simply asking the worker to comply with proper procedures. By all accounts, the worker was at that time in compliance with the conditions of employment as he continued to challenge the employer's policies and its approach to his initial request for accommodation.

[157] I find the employer has failed to discharge its onus of proving that its actions with respect to the worker were not tainted by an "anti-safety" animus.

Did the employer contravene section 151 of the Act in a letter dated March 27, 2006, by placing the worker on leave without pay for four days in March 2006 and for two days in June 2006?

[158] As with the January 2006 correspondence, the employer wrote the March 27, 2006 letter at a time when the worker was shaving and reporting for work (although he continued to complain of related facial irritation).

[159] In the letter, the district superintendent stated the worker's claims surrounding the issue of the N95 mask and the policy were frivolous and vexatious and the worker had used the Board's process designed to protect workers in a frivolous manner to further his own agenda. Any recurrence of a similar nature would result in further discipline, which could include a recommendation for dismissal. The employer suspended the worker for the period March 28, 2006 to March 31, 2006.

[160] For the same reasons as provided regarding the January 2006 and March 2006 letters and the January 2006, I again find the worker has presented a *prima facie* case of discriminatory action, and that the onus shifts to the employer to disprove the allegations.

[161] There can be no doubt that part of the employer's motivation for writing this letter related to the worker's request for accommodation. The employer's March 2006 letter also serves to preclude the worker from filing a similar claim in future. I find that, applying the taint principle, it is impossible for the employer to discharge its onus. I understand that the employer had issues with respect to the worker's honesty, with respect to what it considered insubordination, and with the processes by which he pursued his requests to the Board. I acknowledge the employer was frustrated by what it considered to be a frivolous claim and abuse of the Board's processes.

[162] I have read and considered all of counsel's submissions in this regard and I have reviewed the various cases to which she referred. I understand counsel's submission that the employer did not act with anti-safety animus. However, I disagree that the entire course of events at issue in this appeal resulted from the employer's effort to determine accommodation of the worker's skin condition. Whereas on previous occasions the employer was attempting to obtain further information from the worker, and to have him directly answer questions relating to the *bona fides* of his request, I find

the employer March 2006 letter was of a significantly different nature. Given the employer's stated purpose in the body of the letter, I find it is impossible to separate the employer's action in March 2006 from the worker's request under the Regulation which I have previously found was his right to request.

[163] I find the employer has not discharged its onus for writing the March 2006 letter and for suspending the worker for the period March 28, 2006 to March 31, 2006 which was clearly a disciplinary suspension.

[164] The worker reported for work on June 24, 2006 and stated that, as a result of complying with medical advice to reduce frequency and extent of shaving, he was not clean-shaven. He could not use a face seal respirator in compliance with the Regulation. He reported this to the duty supervisor, and also stated that most paramedics working in the area had last been fit-tested two years earlier so that few, if any, could use a face seal respirator in compliance with the Regulation. He worked two full days, after which a district superintendent informed him that he was suspended. The worker missed two nights' work and reported for work clean-shaven.

[165] I find this situation is indistinguishable from the worker's actions in August through October 2005, except it would appear that the worker intended to bring the matter "to a head". As in August 2005, although the dispute between the parties arose as a result of occupational health and safety issues, I am satisfied that the employer's actions were in no way motivated by anti-safety animus or because the worker exercised a right in accordance with the legislation. I find the employer had demonstrated willingness to consider further the worker's request for accommodation and suspended the worker in June 2006 because the worker refused to cooperate with the employer to this end. On balance, I find the employer has proven that it did not contravene section 151 of the Act in June 2006.

Remedy

[166] I agree with and adopt the entirety of the case officer's findings with respect to remedy for the April/May 2005 suspension.

[167] In January 2006, the district superintendent suspended the worker for one month with an associated loss of seniority. Since the worker was on vacation for the beginning of the period in question, the suspension covered the one-month period March 8, 2006 through April 7, 2006.

[168] I acknowledge that the worker could have provided the medical information to avoid the suspension, but the employer had also indicated that he would not suffer disciplinary action if he refused. He had been told that to maintain "access" to work, he had to follow the conditions of employment. In January 2006, the worker was shaving and ought to have had access to work.

[169] I understand the employer considered the suspension from work to be an alternative to terminating the worker's employment at least partly because of lack of trust. Nevertheless, having found it impossible to separate the worker's approach to the issues from his original request and the discriminatory action complaint, I find he must be "made whole".

[170] I find that, as described in policy item D6-153-2 of the Manual, the worker must be restored to the same position the worker would have been in if the discriminatory action had not occurred. Under section 153(2) of the Act, I find the employer must pay to the worker wages, seniority and any other benefits lost as a result of the suspension from work from March 8, 2006 through April 7, 2006.

[171] I find the worker did not suffer loss as a result of the employer's discriminatory action of suspending the worker for the period March 28, 2006 to March 31, 2006. As a result, I make no order for further remedy. However, to be clear, this means that any lost benefits or seniority as a result of this discriminatory action must be restored.

[172] With respect to the worker's other requested remedies, I agree with the case officer that she could not order the employer to cease and desist for its future actions and that it goes without saying that in future the employer must follow the requirements of legislation. I agree. I also agree with the case officer's determination regarding administrative fines against the employer.

[173] The worker also requested an order that he be allowed to use his own PAPR, that the employer provide him with a PAPR, or that he be exempted from any requirement that perform work that may require use of a respirator. However, I decline to do so. I consider this matter more appropriately addressed either with the assistance of Board occupational hygiene officers or perhaps through the worker's human rights complaint. I agree with the case officer's conclusion regarding his request for reimbursement for the PAPR as an expense associated with the discriminatory action complaint.

[174] The worker also requested that the employer be required to post and deliver inspection reports and orders; post minutes of meetings; provide details regarding safety standards and other related information to documents regarding exposure to airborne pathogens and the efficacy of certain respirators; to comply with PPR requirements of the Regulation; and, to perform other related tasks such as saving archived copies of the reports on its website. I do not consider these remedies as sufficiently related to the issues currently under appeal and I decline to order these remedies. Should the Board issue orders in future, it will determine requirements, if any, for communication or posting of such orders. The worker may wish to explore other avenues to obtain the requested information/orders.

 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[175] I consider the worker's request for involving safety representatives in investigations and remedies related to fit-testing as separate and apart from the issues in these appeals. I make no order for these.

[176] The worker made further allegations under section 117 of the Act and with respect to confidentiality of medical information. He requested remedies related to a 2001 order regarding safety representation; time to be provided for safety duties; an order related to workplace monitoring and choice of respirators; committee representation; and, interpretation of fit-test requirements. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the Act). I do not consider these allegations to be matters that fall within the issues in the current appeals nor are they required to be determined in these appeals.

Conclusion

[177] I allow the appeals in part, and thus vary in part the case officer's decision.

[178] Specifically, I find the employer unlawfully discriminated against the worker by suspending him from employment in April and May 2005, January 2006 and March 2006. I confirm the case officer's decisions on these issues.

[179] I find the employer has proven that it did not contravene section 151 of the Act in August through October 2005 and in June 2006.

[180] I vary the case officer's determinations with respect to remedies. I find the order for remedy for the discriminatory action in April and May 2005 should remain as per the November 6, 2007 decision. In addition, I order the employer to pay to the worker lost wages, seniority and any other benefits lost as a result of the suspension from work from March 8, 2006 through April 7, 2006.

[181] There are no requests before me for reimbursement of expenses associated with these appeals, and no reimbursable expenses within the meaning of section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02* are apparent to me following my review.

Joanne Kembel
Vice Chair

JK/ml