Noteworthy Decision Summary

Decision: WCAT-2003-00697 **Panel**: Heather McDonald **Decision Date**: May 28, 2003

Stay of Decision or Order under Appeal - Section 244 of the Workers Compensation Act - Section 5.40 of the Manual of Rules, Practices and Procedures

The worker brought a complaint alleging that he was terminated by the employer for informing military police at the work site that he was being threatened by a co-worker. The case officer concluded that the employer had contravened section 151 of the *Workers Compensation Act* (Act) by engaging in discriminatory action against the complainant. The employer was ordered to reinstate the complainant to his former job and compensate the complainant for any loss of income suffered as a result of the discrimination. The employer is appealing that order. This decision deals with the employer's request for a stay of the case officer's order pending a decision on the appeal.

The jurisdiction to grant a stay pending an appeal is provided in section 244 of the Act. The factors to be considered on an application for a stay in a section 153 appeal are set out in section 5.40 of the *Manual of Rules Practices and Procedures.* Applying those criteria and the common law the panel found that a stay should be granted for the following reasons: (a) the appeal did appear to have merit in light of the fact that the employer's claim that the complainant voluntarily terminated his employment, if successful, would be a strong defence to the complaint; (b) statements by the employer that it would be subject to "undue financial hardship" and would have a difficult time recovering damages if successful on appeal were not, without further evidence, sufficient to find that the employer would suffer serious irreparable harm; (c) as between the parties the employer would suffer the greater harm if a stay were denied as, among other reasons, the complainant was receiving other employment income and was not destitute; (d) worker safety and work site safety would not be compromised by granting a stay as the complainant was not working for the employer at present and there was no evidence that the co-worker posed a threat to anyone else; and, (e) the case officer's decision was made without the benefit of evidence from the employer due to procedural difficulties with the delivery of notice of the proceedings to the employer.

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Panel: Heather McDonald, Vice Chair

Introduction

The appellant is a contracting company (hereinafter referred to as the employer) that is appealing a March 11, 2003 decision of a case officer in the Compliance Section, Investigations Department, Prevention Division, Workers' Compensation Board (the Board). In that decision, the case officer found that the employer had violated section 151 of the *Workers Compensation Act* (the Act). Section 151 prohibits discrimination against workers for reasons such as exercising a right or carrying out any duty under Part 3 of the Act, or under the *Occupational Health and Safety Regulation* (the Regulation), or because they gave information regarding health and safety matters. In this case, the complainant had alleged that the employer had terminated his employment because he had provided information that another worker in the workplace was making threats to injure the worker. In the March 11, 2003 decision, the case officer found that the employer had violated section 151 as alleged by the complainant. By way of remedy, under section 152(2) of the Act, the case officer ordered the employer:

1. to reinstate the complainant to his former job within 14 days of the decision, or at such time as the parties could agree upon;

2. within 21 days of the decision, to compensate the complainant for any loss in income suffered as a result of his discrimination from July 31, 2002 to the date of his reinstatement;

The case officer retained jurisdiction to deal with any dispute between the parties arising from an inability to agree on the amount of compensation owed to the complainant for loss of income as a result of the employer's unlawful discrimination. The case officer also advised the employer that if it failed to comply with the case officer's decision by the dates directed, the Board would exercise its powers under section 196 of the Act and deem the employer to have contravened the Act. The case officer stated that this might result in the Board imposing an administrative penalty against the employer.

In its notice of appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer indicated that it was appealing the case officer's March 11, 2003 decision and also that it was requesting WCAT to stay the case officer's decision, pending a decision on the merits of its appeal. The employer also requested that its appeal on the merits be dealt with by way of an oral hearing.

This decision deals with the employer's request for a stay of the case officer's March 11, 2003 decision.

Issue(s)

Should WCAT grant the employer's request for a stay of the case officer's March 11, 2003 decision?

Procedural Matters

Legal counsel represented the employer in these proceedings. The worker is acting on his own behalf. The employer provided a written submission in support of its notice of appeal and its request for a stay. That submission was dated April 8, 2003. The employer requested an oral hearing on the merits of the appeal, as it wished to call witnesses regarding the circumstances of the complaint and the alleged discrimination. WCAT provided an opportunity to the worker to respond to the employer's submission, and the worker did so on May 1, 2003.

I have decided that the employer's request for a stay may be decided on the basis of the parties' written submissions and the file documentation. An oral hearing is not necessary to decide the stay issue, although the WCAT panel assigned to deal with the appeal on the merits may decide to convene an oral hearing on the merits of the employer's appeal.

Legal Background

Section 240(1) of the Act provides a right of appeal to WCAT from a decision under Section 153 of the Act regarding a complaint of unlawful discrimination. Sections 241(4) and 242(1) provide that any person directly affected by a decision or order in that regard may appeal the decision or order to WCAT by filing a notice of appeal with WCAT. Section 243 provides that a notice of appeal regarding a Board decision involving unlawful discrimination must be made within 90 days after the decision being appealed was made. In this case, the employer is a party directly affected by the case officer's March 11, 2003 decision, and it filed its notice of appeal to WCAT within ninety days of that decision.

Section 244 of the Act gives the chair of WCAT authority to grant a stay of a Board officer's decision under appeal to WCAT. Section 244 states:

> *Unless the chair directs otherwise*, the filing of a notice of appeal under section 242 does not operate as a stay or affect the operation of the decision or order under appeal.
>
> [italic emphasis added]

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Under *Decision #1* of the chair of WCAT (March 3, 2003), the chair has delegated her authority under section 244 of the Act to grant a stay of a decision or order under appeal to WCAT members. "Member" is defined in *Decision #1* as "all vice chairs, including any senior vice chair, specialized vice chair, and deputy registrar." I am a vice chair of WCAT and accordingly *Decision #1* of the WCAT chair delegates me the authority under section 244 to grant a stay of a decision or order under appeal to WCAT.

Section 5.40 of WCAT's *Manual of Rules, Practices and Procedures* (MRPP) deals with requests for stays of decisions under appeal to WCAT. With respect to the criteria for granting a stay, section 5.40 of the MRPP states as follows:

> The chair will consider the following factors in determining whether to issue a stay:
>
> (a) whether the appeal, on its face, appears to have merit (to ensure the appeal is not frivolous; that is, there is a serious question to be heard);
> (b) whether the applicant would suffer serious irreparable harm if the stay were not granted (for example, loss of a business);
> (c) which party would suffer greater harm or prejudice from granting or denying a stay;
> (d) in the context of occupational health and safety, whether the granting of a stay would endanger worker safety.
>
> This list is not exhaustive, and other factors may be taken into account. An application for a stay will generally be dealt with as a preliminary matter on the basis of written submissions. If no particulars or reasons are provided with the request, the request for a stay will be summarily dismissed.
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> The applicant will normally be required to provide written submissions in support of a stay application together with the notice of appeal or within a further 7 days. WCAT will send the submissions to the other parties who will be given seven days to respond. The requesting party will then have five days to provide rebuttal. The chair will issue a written decision on the stay request as soon as practicable once submissions are complete.

The factors described in section 5.40 of the MRPP to consider in deciding whether it would be appropriate to grant a stay are similar to the common law criteria for issuing a stay outlined by the Supreme Court of Canada in *Manitoba (Attorney-General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, and *RJR Macdonald Inc. v. Canada (Attorney-General)* [1994] 1 S.C.R. 311. The Court in those cases noted that a stay of proceedings and an interlocutory injunction are remedies of the same nature and, in the

absence of statutory language to the contrary, should be governed by the same tests. The Court also affirmed the principle that a stay is an extraordinary remedy.

The language in section 244 of the Act ("unless the chair directs otherwise") is essentially the same as the language afforded the former Appeal Division to grant a stay by section 210 of the Act, before the legislation was amended on March 3, 2003 to replace the Appeal Division by establishing WCAT. The factors described in section 5.40 of the MRPP are also very similar to the factors that were considered by the Appeal Division under *Decision No. 33* [17 W.C.R. D-7] in deciding whether to grant a stay of a decision under appeal. The only substantive difference was that, in the context of occupational health and safety, the Appeal Division was to give paramount consideration to "worker safety" as a factor. In section 5.40 of the MRPP, worker safety is one factor for WCAT to consider in the context of occupational health and safety, but the MRPP guideline does not expressly emphasize it to be the most important consideration. Given, however, that the purpose of Part 3 of the Act is to "benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety," I am satisfied that workplace safety is still a critical consideration in deciding whether or not to grant a stay of a decision appealed to WCAT.

Section 244 of the Act says that unless WCAT directs otherwise, a notice of appeal does not operate as a stay of the decision under appeal. Section 5.40 of the MRPP requires that a party requesting a stay provide a written submission in support of its request and if there are no reasons or particulars to support the request, WCAT will summarily dismiss the request for a stay. I have considered the wording of the section 244, the onus that the MRPP places on the party requesting the stay to provide reasons or risk summary dismissal of its request, and the Supreme Court of Canada's comments in the case law earlier cited. Those considerations indicate that, like the granting of an interlocutory injunction, a stay of proceedings is an extraordinary remedy. WCAT will not grant a stay unless the applicant requesting the stay provides sufficient reasons justifying a special exercise of the tribunal's discretion to temporarily halt, pending the outcome of the merits of an appeal, the lawful effect of a Board decision or order.

Background to the Employer's Request for a Stay

The employer is an Ontario-based firm that hired the complainant to work as a welder on a dry dock project in British Columbia. The complainant started working on the project on July 12, 2002, and his work there ended on July 31, 2002. The complainant's allegation is that the employer terminated his employment. In these appeal proceedings, the employer denies that allegation.

The complainant's evidence is that on July 31, 2002, a co-worker on the project voiced threats to the complainant that he would physically harm him (e.g. "beat his face in").

The complainant says that the threats were made many times and in front of witnesses. The complainant reported one of the threat incidents to the military police on the project. The military police did not proceed with charges against the co-worker. The complainant says that the employer then terminated his employment on July 31, 2002 because he had reported the threat incident to the military police.

The complainant subsequently contacted a Board safety officer about his loss of employment and then, on August 22, 2002, formally filed a discriminatory action complaint against the employer.

In September 2002, both the complainant and the employer signed a written agreement with the Board to participate in a settlement process assisted by a Board settlement officer. The evidence is that although both parties participated in settlement negotiations, ultimately the process failed to conclude an agreement. Therefore the settlement officer referred the matter to adjudication before the case officer in the Compliance Section, Investigations Department of the Board's Prevention Division.

The case officer did not convene an oral hearing. The Board requested written submissions from the parties. The worker provided a written submission within the deadline specified by the Board. The Board sent the employer a letter dated December 4, 2002 to the attention of an individual "X", the manager on the employer's project in British Columbia, requesting that the employer complete and return a "respondent reply form" within 21 days. The letter was sent to X at the British Columbia project site by regular mail delivery. In the Board file, there is a copy of the letter with the envelope, stamped "Return to Addressee" by the post office. It appears that the post office sent the letter and envelope back to the Board, which received it on December 12, 2002. The Board then re-sent the letter on December 16, 2002, to the employer's head office in Ontario, again directing it to the attention of X, the project manager. The re-sent letter specified that the employer's reply was due January 6, 2003. The Board, however, did not receive a response from the employer. Accordingly, the case officer proceeded to adjudicate the complaint based on the information on file, including the complainant's submission.

The case officer concluded that the employer had terminated the complainant's employment on July 31, 2002, and that the employer had not shifted its burden under section 152(3) of the Act to prove that no part of its rationale for dismissing the complainant was due to any of the reasons described in section 151 of the Act. Therefore, the case officer found that the employer had violated section 151 of the Act in engaging in unlawful discriminatory action against the complainant, and the case officer awarded the remedies earlier described in this decision.

In these proceedings, the employer says that X (residing in British Columbia) did in fact forward the December 4, 2002 letter to the employer's Ontario office after he received it. However, because the letter was still addressed to the attention of X, personnel in

Ontario did not give it their immediate attention. Thus the employer inadvertently failed to file the respondent reply form requested by the letter. The case officer then proceeded to adjudicate the complaint on the basis of the worker's submissions and the file documentation.

I note that also on file there is an envelope containing the case officer's March 11, 2003 decision, sent to the employer's head office in Ontario by registered mail to the attention of X. The post office returned the envelope and letter to the Board, stamping the envelope "unclaimed." The Board received the returned mail on April 14, 2003.

The complainant telephoned the Prevention Division's Compliance Section during the week of March 23, 2003, advising that the employer had not complied with the case officer's decision of March 11, 2003. The case officer telephoned the employer's Ontario head office on March 28, 2003 and an employer representative told the case officer that the employer had not received the March 11, 2003 decision. The representative told the employer that it could not pick up registered mail addressed to X, as only he could pick it up, and he was not in Ontario. The case officer then faxed a copy of the March 11, 2003 decision to the employer. After receiving the decision, the employer promptly advised the case officer that it would be appealing the decision, and the employer immediately engaged legal counsel to act on its behalf. There were some delays, beyond the employer's control, in initiating the appeal process with WCAT. Briefly put, the problems were due to delays within WCAT rather than intransigence by the employer. The case officer then extended the time for compliance, giving the employer until May 30, 2003 to obtain a decision from WCAT on the employer's request for a stay of the case officer's March 11, 2003 decision.

The employer's position is that its evidence on the merits of the appeal will prove that the complainant was not in any physical jeopardy due to the co-worker's statements, and that it did not terminate the complainant's employment. The employer says that it did suggest to the complainant that if he wished to take some time off work, he could do so. The employer says that it fully intended the complainant returning to work, but he made no further contact with the employer after he left the workplace other than to request a record of employment in August of 2002. The employer's position is that the worker voluntarily terminated his employment on the project. The employer also says that the project work was completed after the complainant left the project and that there is no position to which he can be reinstated, and he has no entitlement to back pay.

The employer requests a stay of the case officer's March 11, 2003 decision as "to pay the substantial amount ordered to the complainant and to reinstate the complainant to a position for which there is no work, would cause undue financial hardship to" the employer. The employer says that to pay the complainant as ordered by the case officer would be prejudicial to the employer as the amount would likely be unrecoverable in the event of the employer's successful appeal, and this would result in the employer suffering "undue financial hardship." The employer says that the case

officer ruled in favour of the complainant without having received any written submission from the employer. The employer says that its failure to file the respondent reply form was not "an admittance to or an agreement" by the employer of the complainant's complaint of discrimination.

WCAT sent a copy of the employer's request for a stay to the complainant. The complainant responded with a written submission, disagreeing with the employer's position on the merits of the appeal. With respect to the employer's request for a stay, the complainant has submitted that the employer's reasoning in that regard "looks more like an appeal of the original decision. I don't find any valid reason as to why the employer should not pay back wages. The employer was given ample opportunity to give his side in the previous nine months but chose to ignore the proceedings." The complainant also advised that he has mitigated damages owed to him by the employer because he has been proactive in finding other work as much as possible.

Analysis, Findings and Reasons

In reaching my decision on the employer's application for a stay, I have been guided by the considerations referred to in section 5.40 of the MRPP as well as the Supreme Court of Canada jurisprudence mentioned earlier in this decision.

My assessment of the employer's appeal on the merits of the case is that the appeal is not of a frivolous or vexatious nature. While I am not commenting on the likelihood of the appeal's success, I do note that the employer's position that the complainant voluntarily terminated his employment (that is, the employer did not terminate his employment) would, if proven to be correct, be a strong defense to the complaint of unjust discrimination under section 151 of the Act. Thus, there is a serious issue to be decided on the merits of the employer's appeal.

The next consideration is whether the employer would suffer "serious irreparable harm" if the stay were not granted. In this regard, the MRPP gives the example of the loss of a business. In this case, the employer refers to "undue financial hardship" if it were required to pay the complainant financial damages of approximately ten months' wages, and to reinstate the complainant to a job that no longer exists. The employer also refers to the prospect of it being unable to recover those damages from the complainant if the employer succeeded in its appeal.

I acknowledge that the employer and the complainant in this case are not in the typical employer/employee relationship where the employer, if a stay were not granted and it succeeded in its appeal on the merits, could simply deduct the monies from the complainant's future pay cheques. However, I am not satisfied that simply alleging the potential for a complainant to refuse to reimburse an employer satisfies the criterion for "serious and irreparable harm." The employer in this case has not produced any evidence that the complainant would be unwilling or unable to reimburse the employer if

it were successful on appeal. If that scenario were to arise, it might well be difficult, time-consuming, and perhaps costly for the employer to pursue civil remedies to force the complainant to reimburse the monies. But the evidence falls short, in my view, of proving that the employer would suffer "serious irreparable harm" by the denial of a stay because of an unsubstantiated concern that the complainant might not reimburse the employer if it were to succeed on the merits of its appeal. The evidence in this case does not refer to anything near the degree of harm as in the loss of business example referred to in section 5.40 of the MRPP.

Another consideration is to assess which party would suffer greater harm or prejudice from granting or denying a stay. Apart from considering the public interest in upholding the Act's discrimination provisions, there is the complainant as an individual to consider. A stay of the case officer's decision in this case would involve a stay of the remedy. This means that the complainant would lose the opportunity of the use of the back wages awarded by the case officer. This is an immediate loss that would not be rectified by a subsequent decision on appeal that merely confirmed the case officer's decision. Only if the employer paid interest on the financial aspect of the award to the complainant, from the date of the case officer's decision to the date of the WCAT decision (if WCAT were to uphold the award but vary the decision to include a provision for interest on the award), could the loss of opportunity to use the back wages be "repaired." I do note that in this case, the complainant is mitigating damages by obtaining, as much as possible, work with other employers.

I also recognize that if the employer is denied a stay, but subsequently succeeds on its appeal on the merits of the case, then even if the complainant reimburses the employer the amount awarded by the case officer, the employer will have lost the opportunity to use those monies during the period before reimbursement. Section 196(6) of the Act provides that if an administrative penalty is reduced or cancelled on an appeal to WCAT, the Board must refund the penalty to the employer out of the accident fund, and also pay interest on that amount calculated in accordance with Board published policies. Section 259(2) of the Act also refers to the requirement for the Board to refund, with interest, an employer who has successfully appealed a matter within section 96.2(1)(b) of the Act, monies it had paid to the Board pursuant to an appealed decision involving assessment or classification matters, a monetary penalty or a payment under sections 47(2), 54(8) or 73(1) of the Act. Section 96.2 of the Act expressly excludes, however, decisions involving unlawful discrimination under section 153 of the Act. Thus section 259(2) of the Act does not apply to the case at hand.

Similarly, the *Prevention Policy Manual* (the Manual) refers to the payment of interest only in the context of the Board paying interest on returning amounts to an employer that an employer has paid to the Board by way of administrative penalty, which penalty has been cancelled in appeal proceedings.

I have reviewed the Act and the Manual, and can find no provision that expressly provides a process for the employer to be appropriately compensated with interest if a stay is not granted in a section 153 appeal, yet the employer is successful on appeal, becoming entitled to a reimbursement of the monetary award made by the case officer. In my view, this is likely because the Act's provisions with respect to interest involve the Board reimbursing, with interest, an employer that has paid the Board monies required under the Act and ordered to be paid by an appealed decision. An employer in violation of section 151 of the Act, however, does not pay the Board any damages, as a remedy is awarded to the complainant; therefore the Act and the Manual do not refer to any interest requirement. The board of directors, as the Board's governing body, may wish to review this issue and give explicit direction in the Manual regarding the authority to award interest as ancillary to an order under section 153 of the Act. The jurisdiction to do so might be found in the general wording of section 153(2)(g), or as ancillary to an order to pay "wages" under section 153(2)(c). Alternatively, authority might be found in the broad purposes of Part 3 of the Act, which would justify a remedial purpose in placing a party in the position the party would have been in but for the discrimination, or for the discriminatory complaint and subsequent proceedings.

One way to safeguard the employer's interests would be to grant the employer's request for a stay under section 244 of the Act and, in so doing, also impose a condition requiring the employer, if unsuccessful on its appeal on the merits, to pay the worker interest on any monies awarded as remedy by WCAT.

Prior to the March 3, 2003 amendments to the Act, there was an express provision in section 210(2) of the Act that said the Appeal Division could make a stay of a decision under appeal subject to any conditions it specified. Section 244 of the Act does not contain such an express provision with respect to WCAT's authority to grant a stay of a decision under appeal. Arguably, the wording of section 244 "unless the chair directs otherwise" is sufficiently broad to encompass an authority to grant a stay with conditions. However, I am not certain on that point.

Thus, whether I grant or deny the application for a stay, either the employer (if the stay is denied) or the complainant (if the stay is granted) would, if the successful party on the appeal of the merits, have lost the opportunity for some period of time of using the monies awarded by the case officer as the remedy in the discrimination decision.

I emphasize that it will be within the jurisdiction of the WCAT panel hearing the merits of the employer's appeal to decide on appropriate remedies and, as well, its jurisdiction to award interest as part of a remedy. In surveying the options to rectify such a loss of opportunity, I am not finally deciding the matter, but rather canvassing the options in the context of assessing the potential for both the employer and the complainant to suffer harm or prejudice from granting or denying a stay.

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Having said that, the most legally certain option, in my view, would be the authority of the WCAT panel hearing the appeal under section 253(1) of the Act to direct the successful party to reimburse the other party with interest. As I earlier mentioned, if the successful party were the complainant, and the employer had been granted a stay of the case officer's decision, the WCAT panel might decide to vary the case officer's decision by upholding it, and might decide that it had jurisdiction to also award interest on the payment of the back wages. Or, if the employer were the successful party and no stay of the case officer's decision had been granted to the employer, the WCAT panel hearing the appeal might direct the complainant to reimburse the employer, with appropriate interest, as compensation for the employer having complied with the cancelled remedy. The problem with the latter scenario, however, is that if indeed the complainant refused to promptly comply, or had difficulty in complying with the WCAT order, the employer would have the inconvenience and expense of pursuing the collections route. There is no provision in the Act to assist an employer in such a situation.

I note that in Appeal Division *Decision #2003-0089* (January 15, 2003), the panel ordered an employer to pay interest on back wages to a complainant under section 153(2)(g) of the Act, viewing the interest as "ancillary to an order to pay wages." Again, I am not finally deciding the issue in this case, but merely reviewing the available options and potential for prejudice to either the employer or the complainant.

On balance, I have decided that the employer would have the greater prospect of prejudice if I did not grant its request for a stay, than would the complainant if I did choose to grant the employer's request for a stay of the case officer's decision. I am satisfied that the complainant is not destitute at the present time, but is obtaining other employment income. I am also satisfied that the WCAT panel hearing the merits of the appeal might well have the statutory authority to adequately compensate the complainant if a stay were granted. As well, there are certainly enforcement measures in the Act in that regard that were alluded to in the case officer's decision. The Board is able to motivate compliance by assessing an administrative penalty against an employer who fails to comply with an order imposing a remedy under section 153(2) of the Act. There are no equivalent provisions under the Act to motivate a complainant to reimburse an employer who has earlier complied with a decision under section 153(2) that is subsequently cancelled by WCAT on appeal.

The final consideration referred to in section 5.40 of the MRPP is whether the granting of a stay would endanger worker safety. In this case, the evidence on file satisfies me that worker safety is not a critical factor. The evidence is that the military police did not proceed with charges against the complainant's co-worker. As well, the Board safety officer did not cite the employer for any infractions of the Regulation in regard to the alleged threats by the co-worker against the complainant. There is no evidence that the co-worker posed a threat to anyone else on the project, or that there were general concerns about a violent workplace, and the complainant is not, at present, working for

the employer. Thus I do not find that granting the employer a stay in this case would endanger the safety of workers or anyone else at the employer's work sites in British Columbia.

Section 5.40 of the MRPP states that the four criteria it mentions are not exhaustive, and that other factors may be taken into account in deciding whether or not to grant a request for a stay of a decision appealed to WCAT. In this case, I have also taken into consideration that the case officer's decision was made without the benefit of evidence from the employer, due to a mix-up in the Board sending notice of the case officer's proceedings to the attention of an individual who did not work at the employer's head office. This caused a delay in adequate notice to the employer of an opportunity to participate in the proceedings, and the case officer (not knowing of the problem) wrongly assumed the employer did not wish to participate and hence proceeded to issue a decision. The evidence in this case is that the employer did participate in the mediation proceedings with a different Board officer, and I am satisfied that it had every intention of participating in the adjudicative proceedings before the case officer. Thus, the fact that the decision on appeal was issued without benefit of equal participation of both parties is a factor in favour of granting the employer's request for a stay in this case.

In this case, I have decided to grant the employer's request for a stay. I emphasize that the facts of this case are unusual, in that:

(1) I am satisfied that worker safety and work site safety will not be compromised by the granting of a stay of the case officer's March 11, 2003 decision;

(2) There was a procedural problem in the proceedings before the case officer with the result that, unintended by the employer or the Board, the employer failed to participate in the proceedings before the case officer. Thus the case officer did not have the benefit of all the evidence in reaching her March 11, 2003 decision;

(3) The employer's case on appeal is not frivolous or vexatious; rather, there is a serious issue to be heard on appeal;

The evidence does not support that refusing to grant a stay would result in serious, irreparable harm to the employer. Nevertheless, the balance of convenience lies in granting the employer's request for a stay, as the employer has the prospect of suffering greater prejudice if no stay were granted, than would the complainant if a stay were granted. The evidence does not establish that the complainant lacks employment income at the present time. If the case officer's decision is upheld by the WCAT panel hearing the

(5) merits of the appeal, the panel may well decide to vary the remedies in the case officer's decision by awarding interest to the complainant on any financial damages awarded to the complainant. Such a remedy could also be enforced against the employer by the Board pursuing the Act's administrative penalty provisions, if the employer failed to comply with the remedies ordered by the WCAT panel. I have been unable to find similar safeguards in the legislation to assist the employer were it to be successful on appeal, no stay were granted in this case, and the complainant was unable or unwilling to reimburse the employer with the financial award and/or interest if ordered to do so by the WCAT panel hearing the merits of the appeal.

Conclusion

For the foregoing reasons, under section 244 of the Act, I grant the employer's request for a stay of the case officer's March 11, 2003 decision. I remit this file to the WCAT registry to assign a panel to hear the merits of the complainant's appeal. I also caution the parties that their discussions in the unsuccessful mediation proceedings with the Board settlement officer are confidential and not admissible in the appeal proceedings before WCAT. Thus the parties should not refer to the substance of those discussions in any written submissions to WCAT. If an oral hearing is convened by the WCAT panel hearing the merits of the employer's appeal, I will leave it to that panel to rule on procedure in the oral hearing.

I also suggest that the board of directors, with the assistance of the Board's Policy Bureau, may wish to consider providing explicit policy guidance on the remedy provisions of section 153 of the Act, in particular, the authority to award interest in a remedial effort to "make whole" a party.

Heather McDonald
Vice Chair

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