Noteworthy Decision Summary

Decision: WCAT-2006-00583 **Panel**: Herb Morton **Decision Date:** February 6, 2006

Application to stay Workers' Compensation Board decision – Section 244 of the Workers Compensation Act – Policy item #5.40 of WCAT's Manual of Rules of Practice and Procedure

This decision is noteworthy as an example of the factors considered when a party appealing to WCAT requests a stay of a decision of the Workers' Compensation Board (Board).

The Board found the employer had infringed section 151 of the *Workers Compensation Act* (Act) by taking discriminatory action against the worker. The Board ordered the employer to pay the worker two weeks wage loss following his dismissal as well as an additional amount for hours lost prior to his dismissal. In a supplemental decision the Board ordered the employer to pay the worker $315.65 within 28 days. The employer appealed to the Workers' Compensation Appeal Tribunal (WCAT) and requested a stay of the order pending the outcome of the appeal.

The panel noted that WCAT has the discretion to grant a stay under section 244 of the Act. The panel further noted that policy item #5.40 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) provides a non-exhaustive list of factors for panels to consider in deciding whether to issue a stay.

The panel noted, as an aside, that although the employer had 90 days to appeal the Board's decision, and had the right to apply for a stay pending the outcome of an appeal, the Board had required the employer to pay the worker $315.65 within 28 days. This put the employer in the position of non-compliance with the Board order simply by exercising its statutory rights. The panel noted that, although the Board may not in practice pursue enforcement while a stay application is pending, the discrepancy may have the effect of undermining respect for Board orders. Thus, the panel did not consider the 28 day deadline for payment and the employer's non-compliance with it, as relevant to the appeal.

The panel examined the criteria outlined in MRPP item #5.40, with a focus on the second and third criteria. The panel found that, given the relatively small monetary amount involved, the employer would not suffer serious irreparable harm if the stay were not granted. The panel also noted the worker was earning $9.00 an hour, plus tips. Thus, the panel considered the worker would suffer greater harm or prejudice if WCAT granted a stay than the employer would if the stay were denied.

The employer's application for a stay was denied.

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WCAT Decision Number: WCAT-2006-00583
WCAT Decision Date: February 06, 2006
Panel: Herb Morton, Vice Chair

Introduction

The employer seeks a "stay", in relation to its appeal to the Workers' Compensation Appeal Tribunal (WCAT). By decision dated November 16, 2005, a case officer, Compliance Section, Investigations Division, of the Workers' Compensation Board (Board) found that the employer had taken discriminatory action against a worker, in contravention of section 151 of the *Workers Compensation Act* (Act). The employer was ordered to pay the worker two weeks wage loss following his dismissal on April 10, 2004, as well as an additional amount for the hours lost on April 8, 2004. In a supplemental decision dated December 2, 2005, the case officer ordered the employer to pay the worker the amount of $315.65 ("plus usual benefits, subject to statutory deductions"), by December 30, 2005. It appears that enforcement of that order has been held in abeyance, pending the outcome of this stay application.

The employer provided a written submission concerning its stay application on December 28, 2005. The worker provided a submission dated January 25, 2006, and the employer provided rebuttal on February 2, 2006.

The employer did not request an oral hearing in relation to its appeal. Item #5.40 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) explains that "An application for a stay will generally be dealt with as a preliminary matter on the basis of written submissions." I find that this stay application can be appropriately considered on the basis of written submissions without an oral hearing.

Issues(s)

Should the employer be granted a stay, pending the outcome of its appeal?

Jurisdiction

WCAT has a discretion under section 244 of the Act to issue a stay.

WCAT Practice and Procedure

MRPP item #5.40 provides:

> **5.40 Stay of Decision under Section 244**
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> Unless WCAT orders otherwise, an appeal to WCAT does not operate as a stay or affect the operation of that decision or order [s. 244]. Panels will consider the following factors in determining whether to issue a stay:
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> (a) whether the appeal, on its face, appears to have merit;
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> (b) whether the applicant would suffer serious irreparable harm if the stay were not granted (for example, loss of a business);
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> (c) which party would suffer greater harm or prejudice from granting or denying a stay; and,
>
> (d) in the context of occupational health and safety, whether granting a stay would endanger worker safety.
>
> This list is not exhaustive, and other factors may be taken into account….

Prior WCAT Decisions

WCAT decisions are accessible on the WCAT website. WCAT decisions concerning stay applications by employers, in the context of appeals to WCAT from decisions finding that the employer had discriminated against a worker in contravention of section 151 of the Act, include the following.

WCAT Decision #2003-00697 dated May 28, 2003 (listed as a "noteworthy decision" on WCAT's website), granted the employer's request for a stay. The employer had been ordered to pay the worker approximately ten months' wages. The WCAT panel concluded:

> 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;

(4) 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 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.

In *WCAT Decision #2003-00819* dated June 5, 2003, the employer's request for a stay was also granted. The employer had been ordered to pay $6,163.43 to the worker. The panel reasoned:

> It is clear from the parties' submissions in these appeal proceedings before WCAT that they are close to an agreement resolving the discriminatory action complaint. The worker has indicated that he accepts the $296.76 daily rate proposed by the employer. The worker also indicates that he accepts the number of days (13) to which the employer says he would be entitled, during the December 12, 2002 to January 5, 2003 period of unemployment, to the daily sum of $296.76 as a remedy for his financial loss as a result of the employer's unlawful discrimination.

> In my view, where the parties are near to a settlement of the remedies appropriate in the case, there would be no useful purpose served in requiring the employer at this time to comply with the case officer's remedy to pay a higher sum than the parties have agreed. As well, the employer has noted the problem of subsequently recovering an overpayment from the worker. In these unlawful discrimination cases, there are enforcement measures in the Act to assist a complainant in obtaining a remedy, as 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. But there are no equivalent provisions in 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 or revised by WCAT on appeal.

In *WCAT Decision #2003-02684* dated September 25, 2003, the employer's request for a stay was denied. The employer had been ordered to pay three months' wages to the worker. The panel reasoned, in part:

> After considering all the relevant criteria, in this case I have decided not to grant the appellant's request for a stay of the Board's February 28, 2003 decision. The evidence falls far short of satisfying me that the appellant will suffer "serious irreparable harm" if it pays the financial aspect of the remedy previously ordered by the Board. I am not satisfied that the appellant has made a case that X will not reimburse the appellant if it succeeds on appeal, and I am not satisfied that the loss of three months' wages, even with interest, would constitute serious irreparable harm to the appellant within the meaning of section 5.40 of the MRPP. As earlier stated, I also do not accept that the requirement to accept the dispatch of X as a worker for suitable camp positions, would constitute serious irreparable harm to the appellant.
>
> I am also satisfied that there would be greater prejudice to X if I granted the stay, than there would be to the appellant in not granting its request for a stay….

Background and Submissions

Some background to this stay application is contained in the following WCAT decisions involving this employer and worker:

- *WCAT Decision #2005-04198*, August 10, 2005
- *WCAT Decision #2005-06063*, November 14, 2005
- *WCAT Decision #2005-06065*, November 14, 2005

- *WCAT Decision #2006-00233*; January 19, 2006

In the employer's notice of appeal, it listed eight reasons as to why it considered the decision was incorrect or should be changed. These submissions concern the merits of its appeal. The employer further stated:

> 1. We the respondents request a stay on the order from the WCAT pending the merits of the appeal.
> 2. We the respondents request the case to be dismissed because there no discriminatory action against the complainant [name].
> 3. We the respondents would like the monetary figure (sum determined by WCAT) broken down so that the hours and wage calculation regarding the lost wages is clearly evident.

In the employer's further submission of December 28, 2005, the employer listed eight reasons as to why it did not agree with the case officer's decision and as to why a stay should be granted.

The worker questions why the employer has not complied with the order to pay him by December 30, 2005. He requests full disclosure, and a subsequent additional seven days to make submissions on the stay application. He objects to the employer having had more than seven days to make submissions, following the filing of its appeal (contrary to the statement on the notice of appeal form that the employer is required to provide its submissions concerning the stay request within seven days). The worker submits that the non-payment by the employer has been in contravention of the case officer's order. He submits there is little merit to the employer's appeal.

On page 6 of his submission, the worker submits that the employer would not suffer serious irreparable harm if the stay were not granted, "because the ordered amount is only around $400…." The worker submits that he would suffer greater harm and prejudice from the granting of a stay. He notes, in this regard, that "the payable due date has been past about 4 weeks ago…."

In rebuttal, the employer points out that it had 90 days to appeal the case officer's decision. (This time period is contained in section 243(2) of the Act.) The employer submits it had until March 2, 2006 to file its appeal to WCAT. The employer points out that it made telephone inquiries to WCAT concerning its stay application on December 16, 2005, and filed its notice of appeal and stay application on December 19, 2005. After a week of no response, it further inquired as to the status of its stay application. The employer submits it has complied with all deadlines. The employer states that the worker is sending letters directly to the employer demanding payment, in relation to a matter that is still in the process of appeal, and that this constitutes a form of harassment. The employer submits that they are honest, hardworking individuals who respect the law and are genuinely concerned for the well

being and safety of employees. The employer points that the worker did not suffer any workplace injury, as shown by *WCAT Decision #2006-00233* dated January 19, 2006.

Reasons and Findings

WCAT Decisions #2005-02106 and *#2005-002107* (both dated April 25, 2005) similarly concerned situations in which a case officer ordered an employer to provide payments to workers within 30 days, notwithstanding the existence of a 90-day statutory time frame for appealing. Those decisions granted interim stays, for the purpose of permitting the employer to properly present a stay application by way of written submissions. *WCAT Decision #2005-02106* reasoned, in this regard:

> The circumstances raised by these applications give rise to a concern with respect to whether the employer's rights under the Act have been respected. It was the decision of the legislature to extend the time for appealing a discriminatory action decision from 30 to 90 days. However, the case officer required the employer to pay the amounts ordered within 21 days. Subtracting the eight days permitted for service of case officer's decisions (pursuant to section 221) means the time period specified for the employer's compliance was only 13 days.
>
> In effect, the case officer's orders required the employer to waive its rights under the Act (to consider whether appeals should be filed within 90 days, and if so, whether to make applications for stays of the case officer's decisions), or be in breach of a Board order. The case officer's decision put the employer on notice of the consequences which might flow from such a violation.
>
> To my mind, this involved a lack of fairness to the employer. An employer should not be put in the position of having to waive the opportunity to exercise their rights of appeal under the Act (and right to have a stay application considered by WCAT), within the time specified by the legislature, or be in breach of the Board order for payment by April 25, 2005. The case manager purported, in effect, to limit the employer's opportunity to exercise its rights under the Act.

The concerns expressed in these decisions dated April 25, 2005 appear to have been disregarded by the December 2, 2005 decision by the case officer to order the employer to make its payment to the worker by December 30, 2005. The unfortunate consequence of these procedures is that the employer is forced into the position of being in non-compliance with a Board order, simply by reason of attempting to exercise its statutory rights. While the Prevention Division may have a practice of not pursuing enforcement of such orders while a stay application is pending, this may have an unintended consequence of undermining respect for Board orders.

In the circumstances, I will treat the December 30, 2005 deadline for payment, and the employer's non-compliance with this, as not being relevant to this application. I will consider all of the submissions as though they were provided at the time of the employer's initial stay application, which was made prior to the December 30, 2005 deadline.

I have considered the four criteria outlined in MRPP item #5.40 as follows:

A. Whether the appeal, on its face, appears to have merit

It is apparent from the submissions of the worker and the employer that the evidence regarding the merits of the employer's appeal is in dispute. For the purpose of this summary application, I will not attempt to assess that evidence. I will proceed with my decision on an assumption that there is apparent merit to the employer's appeal, if the employer's version of events were established.

B. Whether the applicant would suffer serious irreparable harm if the stay were not granted (for example, loss of a business)

The employer has been ordered to pay the worker the amount of $315.65 ("**plus usual benefits, subject to statutory deductions**"). [Emphasis in original.] The worker submits that the criterion of serious irreparable harm is not met.

The November 16, 2005 and December 2, 2005 decisions by the case officer were copied to the employers' adviser. It would appear that the employer has access to advice and assistance. The submissions by the employer do not address the criteria set out in MRPP item #5.40. In particular, the employer has not provided any submissions as to how payment of the amount ordered to the worker would cause serious irreparable harm. The employer did not reply to the worker's submission on this point.

I find that this criterion is not met. Given the relatively small amount which is involved, it is difficult to imagine what reasons the employer could have provided which would meet this criterion in the circumstances of this case.

C. Which party would suffer greater harm or prejudice from granting or denying a stay

Prior decisions have noted the lack of any safeguards in the legislation to assist the employer, were it to be successful on appeal, no stay were granted, and the worker was unable or unwilling to reimburse the employer. However, the Act was amended effective December 3, 2004. Subsections 255(4) and (5) now provide:

(4) A party in whose favour the appeal tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the Supreme Court.

(5) A final decision filed under subsection (4) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

Accordingly, the legislation does offer a measure of protection for an employer (although I appreciate this avenue may be impracticable in some cases).

The worker was reportedly earning $9.00 an hour, plus tips. Given the relatively small amount involved in this appeal, I consider that this amount would have greater significance to the individual worker than to the employer's business operation. I consider that the worker would suffer greater harm or prejudice if a stay were granted.

D. In the context of occupational health and safety, whether granting a stay would endanger worker safety

This criterion does not apply in the circumstances of this case.

These criteria are not exhaustive, and others may be considered. The employer submits:

> The employee is unreasonable and there has been no discriminatory action taken against him. His demands are not valid and his complaints are causing stress and undue economic and emotional hardship on the business and family members.
>
> The employee initiated the time off work and voluntarily quit his employment at [the restaurant] because he had another job.

The employer's submissions are largely concerned with the merits of its appeal, rather than addressing the criteria of MRPP item #5.40. I do not find the employer's arguments in support of its stay application to be persuasive. Having particular regard to the second and third criteria of MRPP item #5.40, I find that grounds for granting a stay have not been established. I find that the reasoning provided in *WCAT Decision #2003-02684* dated September 25, 2003 (which denied the employer's request for a stay in a case where the employer had been ordered to pay three months' wages to the worker), similarly applies in the circumstances of this case.

Conclusion

The employer's application for a stay is denied. The employer's appeal is returned to the WCAT registry for further handling.

Herb Morton
Vice Chair

HM/gw

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