Noteworthy Decision Summary

Decision: WCAT-2008-03843 **Panel:** Herb Morton **Decision Date:** December 19, 2008

Section 244 of the Workers Compensation Act – Item #5.40 Manual of Rules of Practice and Procedure – Stay

This decision is noteworthy as it provides an analysis of the criteria WCAT takes into consideration when determining whether to issue a stay under section 244 of the *Workers Compensation Act* (Act) pending an employer's appeal of a discriminatory action decision.

The worker was employed as a warehouse worker. On March 30, 2006, workers were directed to count stock at the fourth level of some shelving, by standing on a forklift. The worker refused to participate in this task, and his employment was terminated the same day. The Workers' Compensation Board, operating as WorkSafeBC (Board), found the employer took prohibited discriminatory action against the worker when it dismissed him and ordered the employer to pay the worker $7,492.68, to remove and destroy the termination letter, and to post an Inspection Report in the workplace.

The WCAT panel denied the employer's application for a stay of the Board's decision. The panel considered the factors listed in item #5.40 of the *Manual of Rules of Practice and Procedure* for determining whether to issue a stay, and found that: (1) the appeal had merit; (2) the employer had not persuaded the panel that there would be serious irreparable harm if the stay were not granted; (3) greater prejudice would fall to the worker if a stay were granted than to the employer as the evidence did not establish that the worker would be financially unable to repay the employer and the Act provides a mechanism for enforcement should the employer succeed on appeal; and, (4) granting a stay would not endanger worker safety.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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Panel: Herb Morton, Vice Chair

Introduction

[1] The employer requests a stay of the June 20, 2008 decision by the case officer, Compliance Section, Investigations Division, of the Workers' Compensation Board, operating as WorkSafeBC (Board). The case officer found the employer took prohibited discriminatory action against the worker when it dismissed him on March 30, 2006, after he refused to perform an unsafe work task. The case officer ordered the employer to pay the worker $7,492.68 (as lost wages, including interest, less statutory deductions on that amount), to remove and destroy the June 8, 2006 termination letter, and to post an Inspection Report in the workplace until September 30, 2008.

[2] The employer's appeal was initiated by a telephone call to the Workers' Compensation Appeal Tribunal (WCAT) on September 8, 2008 (within the applicable 90-day time period). A completed notice of appeal was provided on September 30, 2008. The employer advised that it was requesting a stay and would provide a written submission in support of its stay application within seven days. A written submission in support of its stay application was provided on October 6, 2008. Although invited to do so, the worker has not provided a submission concerning the employer's stay application.

[3] 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.

Issue(s)

[4] Should the employer be granted a stay of the case officer's decision, pending the outcome of its appeal to WCAT?

Jurisdiction

[5] WCAT has a discretion under section 244 of the *Workers Compensation Act* (Act) to issue a stay.

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WCAT Practice and Procedure

[6] MRPP item #5.40 provides:

> **5.40 Stay of Decision under Section 244**
>
> 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:
>
> (a) whether the appeal, on its face, appears to have merit;
> (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; 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….

[7] WCAT's practice is to provide written decisions on stay applications as soon as practicable, as a preliminary issue, once submissions on the stay application are complete.

[8] A WCAT decision which illustrates the application of the criteria contained in MRPP item #5.40 is *WCAT Decision #2007-00272* dated January 25, 2007. That decision noted:

> The four tests in item #5.40 of the MRPP are similar to those set out in the Supreme Court of Canada decision *RJR-MacDonald Inc. v. Canada (Attorney-General),* [1994] 1 S.C.R. 311, (1994) 111 D.L.R. (4th) 385. The Court emphasized the principle that a stay of proceedings is an extraordinary remedy.

Background and Submissions

[9] The worker was employed as a warehouse worker. On March 30, 2006, workers were directed to count stock at the fourth level of some shelving, by standing on a forklift. The worker refused to participate in this task (either by standing on or operating the forklift), and his employment was terminated the same day. In a follow-up inspection on July 31, 2007, a prevention officer observed a worker standing on a pallet on a forklift to access the top of a stack of boxes. These facts are not in dispute. However, many of the related background facts and the circumstances leading to the termination of the worker's employment, as well as the extent of his efforts to mitigate his loss by

searching for other employment, are in dispute. In her decision, the case officer noted that the worker has confirmed he was out of the country from April 12, 2006 to May 20, 2006. He no longer wants his job back with the employer. He worked in another temporary job from August 6, 2006 to September 6, 2006. He found a new job on January 22, 2007. The worker was awarded 16 weeks of wage loss from May 15, to August 5, 2006 and September 3 to 30, 2006, together with overtime, holiday pay and interest, minus the amount paid by the employer under the *Employment Standards Act*.

[10] The employer submits that if the amount in question is paid to the worker and the employer is subsequently successful in its appeal, "the payment given to [the worker] will definitely not be recovered or returned from [the worker]." The worker has not expressed any position concerning the employer's stay application.

Reasons and Findings

[11] I have considered the submissions of the parties with reference to the criteria set out in MRPP item #5.40.

(a) Apparent merit

[12] I accept that the applicant's appeal has merit in the limited sense that it is not a frivolous or vexatious application, but is made with a serious intent and reliance on appropriate law and policy. I find this criterion is met.

(b) Serious irreparable harm

[13] In the *RJR-MacDonald Inc.* decision, the Supreme Court of Canada reasoned:

> **58** At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> **59** "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not

> automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[14] Prior WCAT decisions have considered the effect of the requirement for "serious irreparable harm," in connection with an application for the extraordinary remedy of a stay. In *WCAT Decision #2005-00527*, summarized as noteworthy on the WCAT website, the panel reasoned:

> Turning to the second consideration, the MRPP refers to "loss of a business" as the type of harm envisioned in terms of "serious irreparable harm" if a stay were not granted. In this case the employer has stated that its cash flow is low, there are not sufficient funds in its bank account to pay the penalty, and that paying the penalty would "all but wipe out" the employer's corporate existence. The employer's assertions are not supported by financial statements or other documentary evidence. Its assertions are not, in my view, sufficient to establish irreparable harm. The employer has been in business for eleven years. The evidence does not satisfy me that it will be unable to obtain adequate operating credit such that it would be unable to pay the Board penalty as well as other financial obligations. It is important for employers to appreciate that the granting of a stay is an extraordinary remedy that will require evidence beyond assertions of financial hardship or harm if WCAT does not grant a stay.

[15] I am not persuaded that the employer has shown evidence of serious irreparable harm, apart from its expression of concern regarding potential difficulties in collecting repayment from the worker in the event its appeal is successful. This factor is addressed further below.

(c) Greater harm or prejudice

[16] The employer has not provided evidence to support its assertion that the worker, if the employer were to succeed on appeal, would be unable or unwilling to reimburse the employer the money awarded in the case officer's remedy. The worker obtained new employment in January 2007, and is participating in this appeal. The evidence does not establish that worker would be financially unable to repay the employer should the employer succeed on appeal.

[17] Further, the Act was amended effective December 3, 2004. Subsections 255(4) and (5) 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.

[18] With these statutory provisions an employer, if successful on an appeal of a section 151 finding of unlawful discrimination, may file a certified copy of WCAT's decision with the Supreme Court of British Columbia, and the decision will be enforceable as if it were a judgment of the Court. Thus, even if the situation arose in which the employer succeeded on appeal and the worker failed to pay back the remedy awarded by the case officer, the employer would not be without a mechanism to enforce its successful appeal.

[19] Considering the insufficiency of evidence indicating the worker would fail to reimburse the money if the employer were successful on appeal, and the Act's provision for enforcement if the employer were to succeed on appeal, I have decided that in this case the greater prejudice would fall to the worker if a stay were granted to the employer.

[20] The employer has not expressly requested a stay of the second and third orders by the case officer regarding the destruction of the June 8, 2006 termination letter and the posting of an Inspection Report. I note the reasoning provided in *WCAT Decision #2008-02051* regarding a stay request in relation to similar orders. In this case, however, the employer's submission regarding this stay application only expresses concern regarding potential difficulty in recovering any funds paid to the worker pursuant to the case officer's decision. As the employer has not provided any submission in support of a stay in relation to the second and third orders, I need not consider those orders in this decision.

(d) Occupational health and safety

[21] This criterion requires consideration as to whether, in the context of occupational health and safety, granting a stay would endanger worker safety. The worker is no longer employed with the employer. I do not consider that the granting of a stay as an interim measure, pending the outcome of the employer's appeals, would constrain other workers of the employer in bringing forward occupational health and safety issues.

[22] In summary, after consideration of the employer's submission in light of the MRPP criteria as discussed above, and considering the relevant law and practice relating to the granting of a stay, I have decided that this case is not one in which it is appropriate to grant the extraordinary remedy of a stay.

[23] There was no request for reimbursement of expenses related to this stay application and none are awarded.

Conclusion

[24] I deny the employer's application for a stay of the June 20, 2008 Board case officer's decision. The WCAT Registry will proceed with the handling of the employer's appeals.

Herb Morton
Vice Chair

HM/gw