Noteworthy Decision Summary

Decision: WCAT-2009-02609 **Panel:** Heather McDonald **Decision Date:** October 7, 2009

Section 151 of the Workers Compensation Act – Policy item *#D6-153-2 of the Prevention Manual "Discriminatory Actions/ Failure to Pay Wages – Remedies"*

A WCAT panel found that, in determining an appropriate monetary remedy for a worker in circumstances where an employer terminates the worker in violation of section 151 of the *Workers Compensation Act* (Act) (which prohibits discriminatory actions), the fact that a worker had only worked for the employer for a short period of time is irrelevant. The panel also determined that policy item D6-153-2 of the *Prevention Manual* is not patently unreasonable to the extent that it provides that employment insurance benefits received by a worker are not to be considered in measuring a worker's actual loss.

In this case, the worker was employed for less than two months before being terminated by his employer. The Workers' Compensation Board, operating as WorkSafeBC (Board), determined that the employer had terminated the worker's employment in violation of section 151 of the Act. In a subsequent decision, the Board determined that the appropriate remedy was for the employer to reimburse the worker wage loss equivalent to 18 weeks' wages, plus holiday pay, plus interest. This amount was subject to statutory deductions (employment insurance, Canada Pension Plan (CPP) and income tax). The worker began receiving employment insurance benefits six weeks after termination and found alternative employment at a lower wage seven months after termination. Pursuant to section 240 of the Act, the employer appealed the Board's remedy decision directly to WCAT.

WCAT rejected the employer's argument that the remedy was unreasonable given the short length of time that the worker had been employed by the employer, noting that the wage loss remedies under section 153(2) of the Act are based on the same principle guiding the award of wage loss remedies in human rights complaints, namely, to restore a complainant, so far as practicable, to the position he or she would have been in were it not for the employer's discriminatory action. Thus, the *Employment Standards Act*, under which the worker would not be entitled to any pay on termination, does not apply. The panel also found that common law notice period/damages principles are not a proper measure of wage loss in discriminatory action remedies awarded under section 153 of the Act. The panel also rejected the employer's argument that the employment insurance benefits the worker received should be deducted from the amount owing as it results in double recovery for the worker. The panel found that the Board policy setting out that such benefits are not to be deducted is not patently unreasonable and does not result in double recovery as section 46 of the *Employment Insurance Act* independently requires an employer to deduct employment insurance benefits from any award made to the worker and remit it to the Receiver General.

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Panel: Heather McDonald, Vice Chair

Introduction

[1] The employer is appealing a November 4, 2008 decision by a case officer in the Compliance Section, Investigations Division, Workers' Compensation Board (Board)[1]. In that decision, the case officer dealt with the issue of appropriate remedy for the worker who was successful in an earlier decision dated June 4, 2008 by that same case officer in a discriminatory action complaint against the employer.

[2] In the June 4, 2008 decision the case officer found that effective May 24, 2006 the employer had terminated the worker's employment in violation of section 151 of the *Workers Compensation Act* (Act).

[3] In the November 4, 2008 decision, which is the subject of these appeal proceedings to the Workers' Compensation Appeal Tribunal (WCAT), the case officer awarded the worker reimbursement of wage loss equivalent to 18 weeks' wages, plus holiday pay, for a total of $13,478.40, plus interest in the amount of $1,886.98, for a total of $15,365.38. This amount was subject to statutory deductions (employment insurance, Canada Pension Plan (CPP), and income tax).

[4] In *WCAT-2009-00765* (March 17, 2009), the employer was unsuccessful in its attempt to appeal, out of time, the case officer's June 4, 2008 decision that found a violation of section 151 of the Act. However, in *WCAT-2009-00766* (March 17, 2009) WCAT granted a stay of the case officer's November 4, 2008 monetary award to the worker, pending resolution of the employer's appeal of that award.

[5] These appeal proceedings deal only with the case officer's November 4, 2008 monetary award to the worker, as this is the only timely appeal filed by the employer with WCAT. The case officer's June 4, 2008 finding that the employer violated section 151 of the Act in terminating the worker's employment is a final decision that is final and binding.

[6] On appeal to WCAT the employer submits that a lower monetary amount should be awarded to the worker, taking into consideration the worker's short term of employment with the employer, the fact that the employer would have terminated the worker in any event due to poor performance, the fact that the worker received Employment

[1] Operating as WorkSafeBC

Insurance benefits following his termination, and the lack of evidence supporting the worker's alleged efforts to find immediate employment and thus mitigate his damages.

Issue(s)

[7] Should the monetary remedy awarded the worker by the Board be lowered in consideration of factors such as his short term of employment with the employer; the employer's position that it would have terminated the worker's employment in any event due to poor performance; the worker's receipt of employment insurance benefits; and the lack of proof that the worker reasonably attempted to mitigate his damages?

Jurisdiction

[8] This appeal is brought pursuant to section 240 of the Act, which provides that an order, made under section 153, may be appealed to WCAT.

[9] WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case unless the provisions of section 251(1) apply, in that the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted. In this case, there has been no challenge to the relevant Board policies and nothing in the appeal proceedings has raised a concern with me regarding the legal validity of those policies.

[10] 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).

[11] Both the employer and the worker participated in the appeal proceedings. On its notice of appeal the employer requested a "read and review" process for the appeal proceedings. I considered the criteria in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) regarding when WCAT may decide to convene an oral hearing. WCAT will normally grant a request for an oral hearing where the appeal involves a significant issue of credibility, where there are significant factual issues to be determined, where there are multiple appeals of a complex nature or complex issues with important implications for the compensation system, or other compelling reasons such as where an unrepresented litigant has difficulty communicating in writing. After considering the MRPP criteria, I agreed with the employer's avenue of "read and review" because I decided an oral hearing was unnecessary to decide the remedy

issue. The employer's legal counsel was able to provide a thorough and reasoned case on behalf of the employer by way of affidavit and written submissions. Although self-represented, the worker was also able to present an intelligent and articulate case by written submissions. This appeal does not involve multiple appeals of a complex nature or complex issues with important implications for the workers' compensation system beyond, of course, the importance to the parties in this appeal.

[12] Although the employer and the worker challenge each other's credibility on some points, my assessment of the situation was that those points were not critical to the remedy issue. The case officer's decisions of June 4, 2008 and November 4, 2008 provide a good chronology of relevant events and I have also had the benefit of the documentation on the Board's complaint file. With this background of evidence, together with the parties' submissions about interpretation of events and how to apply the relevant law to those events, I am satisfied that there is no significant factual dispute that would be easier to resolve by way of oral hearing than by an analysis of the documentation and the parties' written submissions. I have kept in mind the comments of the B.C. Court of Appeal in *Faryna v. Chorny* [1951] 4 W.W.R. (NS) 171, (1952) 2 D.L.R. 354, that the test of the credibility of a witness with an interest in the outcome of the case cannot be gauged solely by whether the personal demeanour of the particular witness carried conviction of truth, but that "the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." I have found the *Faryna v. Chorny* test to be helpful because it emphasizes that the task of determining what happened in a situation involving a group of people is not so much a test of determining which witnesses have the appearance of being truthful (although honesty of witnesses is, of course, one element in determining credibility of their versions of a story) as determining what likely happened, considering all the circumstances from a reasonable and objective point of view. I have applied that test in analyzing and assessing the evidence in this appeal, and am satisfied that an oral hearing would not provide any advantage in determining the issues in this appeal.

Relevant Law and Policy

[13] As earlier stated, the employer's liability under section 151 of the Act is not in issue in these appeal proceedings. The only issue is remedy.

[14] Section 153(2) of the Act provides remedies for discriminatory action that include reinstatement to the former employment; payment of wage loss compensation; removal of a reprimand or other references in personnel records; and any other thing that the Board considers necessary to secure compliance with Part 3 of the Act and the *Occupational Health and Safety Regulation*.

[15] Policy item D6-153-2 of the *Prevention Manual* (Manual) provides additional guidance with respect to remedies for discriminatory action. The policy states that the Board's object in exercising its powers under section 153(2) of the Act is, so far as is practicable, to put the worker in the same position as the worker would have been in if the discriminatory action had not occurred. This may involve measuring not only the worker's actual loss, but determining whether there were any measures the worker could have reasonably taken to reduce or eliminate that loss. The policy goes on to state that consideration should be given to any collateral benefits the worker has received from the employer (collateral benefits from a source other than the employer, such as employment insurance and private insurance benefits, are not to be considered) and other circumstances affecting the worker's loss that arise independently of the worker's conduct after the discriminatory action (for example, the closure of the place of employment).

Background and Evidence, Reasons and Findings

[16] Both decisions of the case officer (June 4, 2008 and November 4, 2008) describe in detail the background and evidence in this case and the parties are familiar with all the details so this decision will not repeat them. I will focus on the evidence and arguments that are critical to my decision regarding remedy.

[17] The gist of the situation is that the employer hired the worker on March 27, 2006 at $18.00 per hour with the worker employed on a 40-hour work week basis, earning $720.00 per week. Subsequently, effective May 24, 2006 the employer terminated the worker's employment. The case officer found that in terminating the worker's employment, the employer violated section 151 of the Act. After the six-week waiting period the worker commenced receiving employment insurance benefits. Eventually, on December 15, 2006, the worker obtained employment in a different field of work at a lesser wage rate of $12.00 per hour.

[18] I will address each of the employer's challenges to the Board remedy.

The worker's short term of employment with the employer

[19] The employer referred to the amount of the remedy as unreasonable, given the short length of time the worker had been employed with the employer.

[20] The case officer was aware that the worker had less then two months' service with the employer before his termination, but noted that the *Employment Standards Act* provisions do not apply in discriminatory action remedies under section 153(2) of the Act. I agree with the case officer that Manual policy item D6-153-2 illustrates that wage loss remedies under section 153(2) of the Act are based on the same principle guiding the award of wage loss remedies in human rights complaints, namely, to restore a complainant, so far as practicable, to the position he or she would have been in were it

not for the employer's discriminatory action. Thus, the *Employment Standards Act*, under which the worker would not be entitled to any pay on termination, does not apply in this case.

[21] I also agree with the case officer's reliance on *Dewitter v. Northland Security Guard Services Ltd.*, [1996] B.C.C.H.R.D. No. 27 as well as the WCAT cases approving the "make whole" principle (see *WCAT-2007-01377* and *WCAT-2004-02587*) that the common law notice period/damages principles are not a proper measure of wage loss in discriminatory action remedies awarded under section 153 of the Act. Therefore, the factor of the worker's short duration of employment with the employer is not a relevant factor in this case in determining the appropriate quantum of remedy.

The employer's position that it would have terminated the worker's employment in any event due to poor performance

[22] The case officer's decision indicates that the employer's managing partner (B) had told the Board's investigating officer about the reasons for terminating the worker's employment. B referred to a number of customer complaints about the worker's work; there was no documentation available at the time to substantiate those complaints and B said that the complaint had been verbal. B also mentioned that the worker was not getting along with some other workers and his supervisor A.

[23] There were no personnel records documenting that prior to his employment termination, the employer had spoken to the worker about his poor quality of work. The employer's position was that the worker was well within his three-month probationary period so it did not have any concerns about the lack of documentation of customer complaints or other problems about the worker's quality of work. The employer's position before the Board was that the employer had been planning to terminate the worker's employment on May 11, 2006, but on May 10, 2006 the worker was off work on a workers' compensation claim; thus the employer waited until the worker's return to work on May 24, 2006 to tell him that he was no longer employed.

[24] The evidence is that on May 19, 2006 the worker went to the employer's premises to pick up a pay cheque and told B that he expected to return to work on May 24, 2006; B's response at that time was "OK, we'll see you."

[25] The case officer reviewed all the evidence, noting in part as follows:

> …the employer says its decision to dismiss the worker was based on his unsatisfactory work performance, and his difficulty in getting along with others. Its evidence in this regard warrants closer scrutiny.
>
> I would observe that the employer describes its dissatisfaction with the worker's workmanship as in part relating to a project dating to April 18,

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2006. Documentation has been provided by the employer of the customer complaints about the work done by the employer's workers. On its face, there is no strong temporal cause and effect relationship between the customer complaints on this project (dating to April 20, and 24), and the employer's stated formulation of its decision to dismiss the worker (May 11th) and the worker's actual dismissal by the employer more than one month later.

I would also observe that on the employer's evidence, the worker was but "one of employees who left such a mess." Although the employer's evidence is that other employees were also implicated as being responsible for the mess, there is no evidence than any of the responsible employees were spoken to, or that any of them, other than the worker, were terminated.

On the employer's continuing evidence, the other project on which the worker's workmanship was problematic was project Z dating to May 4, 2006. There is a closer temporal relationship between the worker's unsatisfactory work on this project, and the employer's formulated intention to dismiss the worker, but there is still three week's distance between this work and the worker's actual May 24, 2006 dismissal.

…

I find it particularly odd, given the employer's statement that it had formulated the intention to dismiss the worker by May 11th, that supervisor A's own comments to the worker while he was off – that the worker should "hurry up and get well" given that he had been booked for boarding jobs for the next two weeks – are indicative of A being unaware of the employer's stated intentions. Where the employer was intending to dismiss the worker I would expect that the worker's direct supervisor would be aware of the employer's plans.

With respect the employer's evidence that the worker was not getting along with others, the worker in his initial complaint materials had volunteered that he did have a dispute with his supervisor A, which had been addressed satisfactorily between he and the managing partner. I would observe that the employer's own evidence is consistent with the worker's own impression, that the worker and his supervisor seemed to sort things out and were able to carry on their working relationship.

Otherwise the employer describes one occasion on which the worker had said to his supervisor that he did not like working for project manager C (the brother of managing partner B). This hardly sounds like a

situation involving an irreconcilable workplace relationship breakdown. Interestingly, my read of the evidence is that it was C who was the least receptive to the worker's respiratory protection concerns.

The employer justifies its failure to address these performance issues with the worker on the basis that the worker was well within his three month probation. I do not see any evidence the worker was hired on a probationary basis. I assume the employer's statement here is reflective that an employer has no obligation to pay a worker any severance under the *Employment Standards Act*, where the worker has been employed for less than three months. In other words, the employer did not engage in corrective counseling of the worker for the reason that there would be no immediate financial consequences to it for its summary dismissal of the worker.

…

Even accepting the employer's evidence that it had "formulated" its decision to dismiss the worker by May 11th, but not "communicated" the decision to the worker, it is evident that its formulation of this decision occurred followed immediately on the heels of his having made an issue with the employer of being provided with respiratory PPE.

The facts are that after the worker's May 11, 2006 departure from the workplace, the only new intervening event that occurred prior to the employer's later dismissal of the worker on May 24, 2006 was the worker's filing of his compensation claim.

I do not find the employer's stated rationale for its dismissal of the worker to be convincing. On my assessment its evidence with respect to worker's job performance and his "inability to get along with others" is wanting.

…

Bearing in mind the taint principle, I am not persuaded that the employer's decision to dismiss the worker was not, at least in part, related to the worker's raising concerns about exposure to moulds/chemicals in the workplace, his need for respiratory PPE, and his going off sick and filing a compensation claim. The employer has not provided sufficient evidence or analysis to rebut its burden under section 152(3) of the Act.

[reproduced as written except for italic emphasis]

[26] Having reached the conclusion that the employer's stated rationale for dismissing the worker was unconvincing, in his November 4, 2008 decision the case officer went on to state as follows:

> *I accept that the worker would have continued to work for the employer, at least for the immediate future, in the absence of the discriminatory action. On an appropriate fact pattern, this could require salary continuation, or a "bridge" to the worker's re-employment. That being said, in the context of this remedy proceeding, I am also satisfied, on the employer's evidence, that there were concerns about the quality of work being done by the worker, as reflected in some of the documentary materials originally provided by the employer in response to the worker's complaint.* It is common ground between the worker and the employer that he did not have the taping and mudding skills required to be a finishing drywaller, and that the expectation was that he would acquire those skills.
>
> *Accordingly, I conclude the worker would likely have eventually been terminated by the employer, for unsatisfactory job performance reasons, had the health and safety issues not arisen*.
>
> *As noted above, the worker quantifies his loss at a total of 18 weeks (6 weeks plus 12 weeks). In the absence of any submissions from the employer to the contrary in the context of this remedy preceding, I find this worker assessment to be the appropriate measure of his loss*.
>
> [reproduced as written except for italic emphasis]

[27] After considering the issue of mitigation (which I will deal with later in this decision), the case officer then awarded the worker a full "bridge" remedy of wage loss to the date of his re-employment in December 2006, that is, 18 weeks' wages, plus holiday pay and interest on the back wages.

[28] In these proceedings the employer has seized upon the conclusion made by the case officer in the November 4, 2008 decision that the worker would likely have been eventually terminated for unsatisfactory job performance reasons had the health and safety issues not been raised by the worker. The employer then provided WCAT with an affidavit from its general manager which reiterates the employer's position that it intended to terminate the worker's employment on May 11, 2006. The general manager says that the delay was because the worker was still on a particular job site before then and the employer did not have anyone to fill in for him, so its intent was to wait until May 11, 2006 when his work at that job site was scheduled to end. Then the worker was off on his workers' compensation claim so that delayed matters further until his return. The employer's submissions in these proceedings essentially reiterate its

position before the Review Division that it would have terminated the worker's employment on May 24, 2006 whether or not he had raised safety issues with the Board.

[29] There are three difficulties with the case officer's November 4, 2008 conclusion about the likelihood of the worker's "eventual" job termination. First, the conclusion seems to contradict his earlier conclusion in the June 4, 2008 decision that: "I do not find the employer's stated rationale for its dismissal of the worker to be convincing. On my assessment its evidence with respect to worker's job performance and his "inability to get along with others" is wanting." It is also apparently inconsistent with the earlier statement in his November 4, 2008 decision that "I accept that the worker would have continued to work for the employer, at least for the immediate future, in the absence of the discriminatory action." Secondly, even if one could interpret the case officer's November 4, 2008 conclusion as that the worker would likely have been terminated (in absence of the safety issues) on some date after May 24, 2006 but before December 15, 2006 when he found another job, then I would have expected the case officer to provide the evidence that supported such a conclusion and the approximate date that such evidence pointed to as the likely time of termination; but the case officer did neither. Thirdly, immediately after reaching the conclusion in his November 4, 2008 decision that the employer would likely have eventually terminated the worker's employment even in the absence of the safety issues, the case officer then proceeded to award the worker loss of wages for the full period between his date of employment termination and the date he found another job. This suggests that the case officer either forgot his earlier statement about eventual termination, or, which I find to be the more tenable interpretation, that the case officer concluded that the eventual termination date by this employer would have been beyond the date in December 2006 when the worker found another job.

[30] In these proceedings I have reviewed the evidence on file, including the evidence before the case officer as well as the new affidavit(s) evidence provided by the employer in these proceedings. Applying the *Faryna v. Chorny* test earlier referred to in this decision, and in agreement with the reasons provided by the case officer in his June 4, 2008 decision, I find that the employer has failed to prove, on a balance of probabilities, that it would have terminated the worker on or about the month of May 2006 even in the absence of the safety issues. I note the evidence that there were customer complaints about other employees' job performance yet their employment was not terminated. I also note the evidence about supervisor A encouraging the worker to get well when the worker was off work – this is not consistent with the employer being displeased with the worker's job performance and planning to terminate his employment in the near future. As well, a planned job termination for May 2006 is inconsistent with B, the employer's managing partner, speaking with the worker on May 19, 2006 at the employer's premises and responding "OK, we'll see you" when the worker indicated his intention to return to work on May 24, 2006. On all the evidence,

the employer's position that it intended to terminate the worker's employment in May 2006 is not persuasive.

[31] With that in mind, in light of the finding of a violation of section 151 of the Act by the employer, and without sufficient evidence on the matter, I also find it speculative to predict if and/or when the employer would have terminated the worker's employment beyond May 24, 2006. I find that the evidence does not support that it is likely such an event would have occurred before December 15, 2006 or indeed, at any time beyond the May 24, 2006 actual termination date. Therefore, having rejected the employer's position that it would have terminated the worker's employment in any event due to poor performance, I find that the employer's position on this point does not support a reduction in the quantum of wage loss awarded by the case officer in his November 4, 2008 decision.

The worker's receipt of employment insurance benefits

[32] The employer submits that the remedy should be lower in amount to take into account the fact that the worker received employment insurance benefits following his termination. Section 250(2) of the Act requires WCAT to apply relevant Board policy unless the provisions of section 251(1) come into play. Manual policy item D6-153-2 expresses that collateral benefits from a source other than the employer, such as employment insurance benefits, are not to be considered in measuring a worker's actual loss as a result of the unlawful discrimination. While the employer protests that the worker's employment insurance benefits should be deducted from any award granted to the worker, I am unable to do this as Board policy is binding on me. I do not find Manual policy item D6-153-2 to be patently unreasonable on this point. I have reviewed the *Employment Insurance Act* S.C. 1996, c. 23 and draw the parties' attention to section 46 of that statute. Section 46 states as follows:

> 46. (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.
>
> (2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including

> damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

[33] Therefore the Board's policy does not result in "double-dipping" or "benefit stacking." The Board policy does not lead to an outcome of the worker being in a better position than if the discriminatory action had not occurred. I disagree with the employer's position that WCAT should reduce the quantum of remedy ordered in the case officer's November 4, 2008 decision by the amount of employment insurance benefits received by the worker before he found another job in December 2006.

Lack of proof that the worker reasonably attempted to mitigate his damages

[34] In the June 4, 2008 decision the case officer asked the worker to describe his efforts to mitigate his loss, including records in support of job applications; the case officer also asked the worker to explain if he did not seek employment or if there was a delay in that regard. The worker responded by stating that he looked for work every day but had difficulty in finding work in his usual field as usually two persons were needed to do the drywalling work, not one, and he did not have a reference from the employer. Therefore he needed to consider alternate employment opportunities. The employer did not participate in the remedy proceedings before the case officer. In the absence of any evidence to the contrary, the case officer accepted the worker's evidence about mitigation efforts.

[35] In these proceedings the employer requests evidence of when and where the worker applied for jobs, records of his applications for work, and records of marketing himself as a sole drywaller. The employer says that information on mitigation efforts is solely within the worker's control to provide. The employer submits that the worker should have looked for other types of work sooner and, in any event, prior to December 2006. The employer says that because the worker had his own drywall company between 2001 and 2005, it would have been reasonable for the worker to pursue work through developing his own company again. The employer also says that the construction business was booming in 2006 with a high demand for qualified drywallers. The employer says that the worker had an obligation to mitigate his losses and should have been able to work on his own as a drywaller to mitigate his losses.

[36] The worker's position is that the proceedings before the case officer were over two years after the worker had made his initial complaint, and by that time he no longer had the information and records about his job search. The worker said that the case officer had no trouble retrieving the worker's income information from Revenue Canada and could have retrieved the worker's job search information from employment insurance contacts, if he needed it. The worker said that his employment dismissal made it impossible for him to obtain work as a drywaller with another firm. He said that he

wanted to work with another firm and not pursue self-employment as a drywaller. Further, he stated that the employer had promised to train him in taping and mudding which is a requirement for drywallers in British Columbia; the worker was trained in another province which does not have those requirements. He said that without those skills and without a reference from the employer, he could not obtain drywalling work in British Columbia. The worker also said that he looked for work consistently but could not find work until December 2006, when he found a job in a different field. The worker said that he did not sit around for six months hoping to win a compensation claim; the worker said that his family has just now begun to recover from his job loss, it was a personal set-back, and he had to ultimately accept a job in a different field earning substantially less than what he had been earning with the employer.

[37] The Board and WCAT, when interpreting and applying section 153(2) of the Act and Manual policy item D6-153-2, have applied the common law principle that the law regarding mitigation requires a worker to make reasonable efforts to find other reasonably comparable alternative employment, and that the burden is on the employer to prove that a worker failed to mitigate his or her loss arising from the employment termination. It is clear from the case law that it is a relatively high standard of proof. See *WCAT-2008-03679* (December 8, 2008). Those principles, in particular the principle that the burden is on the employer to prove that a worker failed to make reasonable mitigation efforts, reflect the leading Canadian case in the Supreme Court of Canada decision *Michaels v. Red Deer College,* [1975] S.C.J. No. 81, 57 D.L.R. (3d) 386 (*Michaels* case). The *Michaels* case addressed not only the issue of who bears the onus of proof in a mitigation defence (the defendant) but also the nature of the evidence required to establish this defence.

[38] In the *Michaels* case the Supreme Court of Canada expressly stated that the burden of proof is upon the former employer to show that the worker, by the exercise of proper industry in the search, could have found other employment of an approximately similar kind reasonably adapted to the worker's abilities, and that in the absence of such proof the worker is entitled to recover the salary fixed by the contract. This can be a difficult requirement for an employer to overcome. The *Michaels* case has been applied in numerous British Columbia cases, notably *Edge v. Kilborn Engineering (B.C.) Ltd.*, [1988] B.C.J. No. 807 (C.A.) and *Forshaw v. Aluminex Extrusions Ltd.* (1989), 27 C.C.E.L. 208, 39 B.C.L.R. (2d) 140, [1989] B.C.J. No. 807 (C.A.). Further, although an employer need not prove that there were specific jobs available to the worker, the length of the alternate job terms and their specific rates of pay (see *Carlisle-Smith v. Dennison Dodge Chrysler Ltd.* (1997), 33 C.C.E.L. (2d) 280 (B.C.S.C.)), it is nevertheless clear that the burden is on the employer to show that job opportunities existed, reasonably comparable to the position from which the worker was terminated, and that the worker failed to mitigate his or her losses by failing to take reasonable steps to be hired in such positions or to obtain such available work (see *Stuart v. Navigata Communications Ltd.* [2007], B.C.J. No. 662, [2007] 9 W.W.R. 50 (S.C.)).

[39] In this case I find that the employer has failed to discharge the onus of proving, on a balance of probabilities, that the worker failed to take reasonable steps to mitigate his damages by finding other employment during the period before December 15, 2006. Beyond a general assertion that the construction industry was booming in 2006 with a high demand for drywallers, the employer has not provided any substantive evidence to support that assertion. In particular, it has not provided persuasive evidence to support a finding that there were jobs generally available to the worker in British Columbia for which he was reasonably qualified and for which he would likely have been hired if he had applied for them. I accept that given the worker's job search is now approximately three years old, he does not have records of that job search. It is telling, in my view, that the worker ultimately accepted a job in a different field at a substantially lower wage than what he was earning with the employer. It is unlikely, in my view, that the worker would have accepted a lower-paying job in a different field if with reasonable efforts he could have found drywall work at a rate of pay comparable to what he had been earning with the employer. I also accept the worker's evidence as credible that his job loss with the employer was a set-back for the worker and his family and that he diligently tried to find employment to offset that loss. Eventually, after months of an unsuccessful job search, the worker took what he could get, which was work in a different field at a much lesser rate of pay. I note that the worker decided not to pursue his own drywall firm but I accept his evidence that this would have been difficult in any event because of his inability to show work in the British Columbia market as a drywaller and without the skills in taping and mudding in which the employer had promised to train him. For all these reasons, I reject the employer's position that the Board's quantum of remedy should be reduced on the ground of the worker's failure to mitigate.

Interest

[40] The case officer's calculation of the worker's wage loss plus holiday pay amounted to a total loss of $13,478.40 which I confirm as accurate. I also agree with the case officer that pursuant to section 153(2)(g) of the Act, the worker is entitled to interest on that amount as ancillary to an order to pay wages. I agree that section 259(2) of the Act provides guidance on the rate of interest to be used in this case, and that policy item #50.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) indicates that interest should be calculated from the first day of the month following the commencement date of the retroactive benefit and up to the end of the month preceding the decision date. Because of the stay granted by WCAT to the employer in this case, I asked the Board's Actuarial Department to apply the interest rate calculation set out in RSCM II policy item #50.00 to the $13,478.40 wage loss award, with the effective date for interest being June 1, 2006 payable until September 30, 2009. The Actuarial Department has indicated that the total interest payable on $13,478.40 is $2,305.30. Therefore, I am awarding interest of $2,305.30 in addition to the wage loss award of $13,478.40 for a total award of $15,783.70.

Conclusion

[41] I deny the employer's appeal. Because of the passage of time since the Board case officer's decision dated November 4, 2008 and WCAT's decision to grant a stay of the case officer's remedy, I vary the case officer's decision dated November 4, 2008 by requiring the employer to pay the worker the amount of $15,783.70 less statutory deductions (CPP, employment insurance, and income tax) on this amount, by no later than October 30, 2009. I further order the employer to confirm in writing to the Board's Compliance Section, Investigations Division, when it has complied with this order.

[42] There was no request for reimbursement of appeal expenses, none are apparent on the file and therefore none are awarded.

Heather McDonald
Vice Chair

HMcD/hb/gl

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