

Noteworthy Decision Summary

Decision: WCAT-2009-03197 **Panel:** H. McDonald **Decision Date:** December 8, 2009

Section 244 of the Workers Compensation Act – Item #5.40 of WCAT's Manual of Rules of Practice and Procedure – Stay or an order to pay a worker

This decision found that a request to WCAT to a stay an order of the Workers' Compensation Board, operating as WorkSafeBC (Board), may be dismissed if the application for the stay is not made until several months after an appeal was filed with WCAT, and sufficient reasons for the delay are not provided.

The employer requested a stay of a May 29, 2009 decision by a case officer of the Board's Compliance Section, Investigations Division. In that decision, the case officer set out that as a remedy for an earlier Board finding that the employer had discriminated against the worker in violation of section 151 of the *Workers Compensation Act* the employer was ordered to pay the worker \$37,977.43, less the usual statutory deductions no later than August 31, 2009. The employer requested a stay of the May 29, 2009 remedy decision.

The WCAT panel denied the employer's request for a stay. The employer did not make its request for a stay at the time it filed its notice of appeal on June 4, 2009 with respect to the May 4, 2009 decision, but rather requested a stay on October 30, 2009, several days after being served with an enforcement order by the Board. At the time the employer made its request for a stay, item #5.40 of WCAT's *Manual of Rules of Practice and Procedure* stated that an applicant would normally be required to provide written submissions in support of a stay application together with the notice of appeal or within a further seven days. If the applicant fails to provide written submissions, WCAT may dismiss the stay application. The employer submitted that the delay in applying for a stay occurred because it relied on an employers' adviser who failed to explain the significance of a stay or that an appeal did not act as a stay of a Board's decision. The WCAT panel, however, noted that the cover letter with the May 29, 2009 Board decision expressly stated that the filing of an appeal does not operate as a stay of a Board order, and in September 2009 a workers' advisor provided the same information to the employer. The WCAT panel dismissed the employer's request for a stay on the preliminary basis that the employer failed to provide sufficient reasons to justify its delay to both request a stay and to file submissions in support of the stay request.

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Panel: Heather McDonald, Vice Chair

Introduction

- [1] The employer requests a stay of a May 29, 2009 decision by a case officer, Compliance Section, Investigations Division, Workers' Compensation Board (Board).¹ In that decision, the case officer was dealing with the issue of remedy for an earlier Board finding on February 4, 2009 that the employer had discriminated against the worker in violation of section 151 of the *Workers Compensation Act* (Act). By way of remedy, the case officer ordered the employer to pay the worker \$37,977.43, less the usual statutory deductions (Canada Pension Plan, Employment Insurance, and income tax) on that amount no later than August 31, 2009. The case officer also ordered the employer to provide the worker with a reference letter no later than August 31, 2009 and to post a specified inspection report in a conspicuous place in the workplace until August 31, 2009. Finally, the case officer ordered the employer to confirm with the Board, in writing, compliance with the foregoing orders.
- [2] The employer has appealed both the February 4, 2009 and the May 29, 2009 decisions to the Workers' Compensation Appeal Tribunal (WCAT), and has requested a stay of the May 29, 2009 remedy decision. This decision deals only with the employer's request for a stay of the financial aspect of the May 29, 2009 decision, that is, the decision to pay money to the worker. The employer is represented by legal counsel. The worker is participating in the appeal proceedings and is represented by a workers' adviser.
- [3] Item #5.40 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP), the version in existence at the time the employer made its request for a stay, provided that WCAT will generally deal with a stay request as a preliminary matter on the basis of written submissions. The MRPP was revised on November 3, 2009 and now a practice directive in item #8.3.1 states the same thing. In this case both parties provided written submissions on the stay issue. The parties had the option of providing affidavit evidence on the stay issue (I note that some of the submissions tendered on the merits of the appeals have attached affidavit evidence) but did not do so. The basic chronology of events and background to the case was straightforward. Neither party requested an oral hearing to deal with the stay request. I decided that there was no

¹ Operating as WorkSafeBC

reason to depart from WCAT's general practice in this case and that the stay request could be dealt with by way of written submissions.

Issue(s)

- [4] Should WCAT grant the employer a stay of the case officer's May 29, 2009 order to pay the worker a total award of \$37,977.43, less statutory deductions?

Jurisdiction and Procedural Matters

- [5] WCAT has discretion under section 244 of the Act to issue a stay.

Late Request for a Stay

- [6] A preliminary issue was raised regarding whether WCAT should even consider the employer's stay request because the employer was late in making that request. The employer did not make its request for a stay at the time it filed its notices of appeal with respect to the case officer's two decisions nor within seven days of initiating the appeals. Both of its appeals to WCAT were timely, being filed on April 30, 2009 (with respect to the February 4, 2009 decision) and June 4, 2009 (with respect to the May 4, 2009 decision). But the employer did not request a stay until October 30, 2009, within several days after being served with an enforcement order by the Board.
- [7] As earlier stated, WCAT's MRPP was revised on November 3, 2009. At the time the employer made its request for a stay, MRPP item #5.40 gave WCAT discretion to consider a stay request even if filed beyond the seven-day time frame after filing a notice of appeal. In the former version of the MRPP, the following excerpt from item #5.40 was a practice directive and stated as follows:

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 seven days. If the applicant fails to provide written submissions, WCAT may dismiss the stay of decision application.

- [8] The revised version of the MRPP also has a practice directive on the matter, in MRPP item #8.3.1. That practice directive states:

The applicant is required to provide written submissions in support of the stay application together with the notice of appeal or within seven days from the date WCAT received the notice of appeal....

...

If the applicant fails to provide written submissions in support of their stay application within seven days of the date WCAT received their notice of appeal, or the applicant's submission does not address the stay application, WCAT will deny the stay application and process the appeal as usual.

- [9] I note that section 13 of the *Administrative Tribunals Act* provides that practice directives are not binding.
- [10] A brief summary of the employer's explanation is that it had been relying on advice from an employers' adviser who failed to explain the significance of the meaning of a "stay" to the employer and who failed to advise the employer that it would be necessary to request a stay from WCAT in order to suspend the effect of the Board remedy during appeal proceedings. It was not until the employer received the Board enforcement order that it then sought advice from a law firm (the current firm representing the employer) with the result that the employer then promptly requested WCAT to stay the financial aspect of the case officer's remedy. I note at this point that there is no indication or allegation that the employer's principals have difficulty or have had difficulty understanding the English language.
- [11] Applying the presumption against retroactivity, I have decided that it is the former MRPP provisions which apply in this case. See *Bell Canada v. Canadian Telephone Employees Assn.* [2003] 1 S.C.R. 884.
- [12] The employer explains that it consulted with an employers' adviser for assistance in completing the notices of appeal. The employer says that it received no comment from the employers' adviser about its draft notices of appeal which it sent to him for review, and if necessary, revision. The employer was under the mistaken belief that while the decisions were under appeal it would not be required to comply with the case officer's orders. The employer indicates that at no time did the employers' adviser explain to the employer the meaning of a "stay" or that WCAT would not consider a stay unless an affirmative mark was placed next to Question 5 on the notice of appeal, which inquires whether an appellant is seeking a stay of the decision under appeal.
- [13] If this had been the extent of the evidence, I may well have proceeded to consider the merits of the employer's request for a stay. There was more evidence, however, about the information provided to the employer regarding the need to specifically request WCAT to suspend the operation of the Board remedy pending adjudication of the appeals.

- [14] The worker refers to the cover letter dated May 29, 2009 which was delivered to the employer with the case officer's remedy decision. The penultimate paragraph of the cover letter stated as follows, in bold emphasis:

Please Note:

Section 244 of the Workers' Compensation Act provides that unless WCAT orders otherwise, the filing of your appeal does not operate as a stay or suspend your obligations under the Board decision or order appealed. You are accordingly obliged to comply with the terms of the Board decision or order by the date specified in the decision or order, unless you have requested and obtained a stay of the decision or order from WCAT pending your appeal on the merits. Where you desire a stay, you should telephone WCAT immediately.

- [15] When the employer failed to comply with the Board remedy by the August 31, 2009 deadline, the case officer contacted the employer. The employer received by fax a letter dated September 10, 2009 from her. In the case officer's September 10, 2009 letter she stated in part as follows:

[The worker] telephoned the Compliance Section today to advise that my order has not yet been complied with. I also note that you have not written to the Compliance Section to confirm compliance. We contacted WCAT to ensure that a stay had not been requested in relation to your appeal of the remedy decision. One has not. Thus, the employer must comply **immediately** with my order. Please contact Andrew Pendray at the WAO [Workers' Advisers Office] (604-713-0360) to make arrangements for payment to the worker and provision of the letter of reference. If arrangements are not made with him within the next 48 hours, I will arrange to commence enforcement proceedings against the employer.

[bold emphasis in original]

- [16] The employer says that it did not understand even after receiving this letter that it was required to make a separate stay application to WCAT in order to suspend the obligation for prompt compliance with the case officer's remedy.
- [17] The evidence from the worker is that after receiving the September 10, 2009 letter from the case officer, the employer telephoned the Workers' Advisers Office (WAO) and requested a return call. The workers' adviser representing the worker returned the phone call and advised the employer that the filing of an appeal with WCAT would not act as a stay of the case officer's remedy. In its rebuttal submission in these proceedings, the employer did not comment or otherwise respond to this evidence.

- [18] On October 30, 2009, approximately 50 days after the September 10, 2009 letter from the case officer and several days after the Board initiated enforcement proceedings against the employer, the employer then requested WCAT to stay the monetary aspect of the case officer's May 29, 2009 decision.
- [19] After considering the parties' submissions, I have decided to dismiss the employer's request for a stay on a preliminary basis. Item #5.40 of the former MRPP required as a practice directive that an appellant provide written submissions in support of a stay application within seven days of filing a notice of appeal; otherwise WCAT might dismiss the stay request. The seven-day deadline in that practice directive underscored the extraordinary nature of a stay: Board orders are final and binding; parties are required to comply with them unless, with promptness, a party requests and obtains a stay or suspension of a Board order from WCAT pending the result of appeal proceedings. WCAT has discretion to veer from that general practice but only in circumstances which justify a departure from the principle that supports the finality and certainty of Board orders. In my view the circumstances in this case do not support such a departure from the practice directive.
- [20] My first comment is that the employer did not even request a stay from WCAT within seven days of filing its notice of appeal. Item #5.40 of the MRPP refers to the need for written submissions in support of a stay request to be filed within seven days of the notice of appeal, but the expectation is that an appellant will make its stay request at the same time that it files its notice of appeal.
- [21] That point aside, I agree with the worker's submissions that the circumstances in this case do not support that it was reasonable for the employer not to have understood the need to make a separate request to WCAT to suspend the operation of the Board's remedy. The May 29, 2009 cover letter accompanying the case officer's remedy decision contained the paragraph, in bold typeface, advising that filing an appeal to WCAT would not operate "as a stay or suspend your obligations under the Board decision or order appealed." The paragraph did not just use the word "stay" but also clearly used an alternate phrase "suspend your obligations". The rest of the paragraph is also clearly explicit that there was a need to request WCAT to "stay the decision" pending the appeal on the merits.
- [22] The case officer's September 10, 2009 letter was another clear direction to the employer that it needed to comply with the Board order immediately unless the employer requested a stay of the remedy decision from WCAT. Even if the employer was uncertain about the word "stay", it should have known enough to telephone WCAT and ask how to request a stay, or to seek direct advice from the employers' adviser or a legal advisor about the matter.
- [23] Finally, the unchallenged evidence is that the employer did speak to the worker's representative at the WAO and was informed in a telephone call that merely filing an

appeal to WCAT would not stay the operation of the case officer's remedy. I do not accept as reasonable that in that context, given the background to this case, that the employer would not understand the meaning of a "stay" as a suspension of the case officer's remedy and that without a "stay" from WCAT, the employer was required to comply with the case officer's order. Again, at the very least, at that point in time (on or about September 10, 2009) if the employer was taking the Board's orders seriously it should have sought further advice from an employers' adviser, a legal advisor, or the WCAT Registry about the need for further steps to suspend the obligation to comply with the Board's orders.

[24] I agree with the worker's submission that:

The Employer has not been diligent in applying for the stay, and in fact has disregarded multiple orders to pay [the worker]. Even in the event that it is accepted that the Employer did not understand that it was required to make a separate stay application at first instance, which, given the above excerpted paragraph from the Cover Letter, [the worker] submits ought not to be accepted; there ought to have been no misunderstanding subsequent to having received the September 10, 2009 letter and speaking to Mr. Pendray of the WAO. Despite this clarification, the Employer continued to disregard the order of WorkSafeBC, and took no steps to apply for a stay in the next month and a half.

[25] As earlier stated, WCAT's MRPP acknowledges the statutory principle that Board orders are final and binding, requiring prompt compliance, and that a stay is an extraordinary remedy, requiring the exercise of WCAT discretion, that departs from that rule. This MRPP acknowledgement takes the form of requiring, as general practice, that an applicant for a stay make its request with supporting submissions within seven days of filing its notice of appeal. While WCAT may depart from this general procedural practice in certain cases, an applicant should provide persuasive and reasonable justification for its failure to comply with the general practice.

[26] The bottom line is that in this case if I were to proceed to waive the MRPP's seven-day procedural deadline and consider the merits of the employer's request for a stay, effectively it would negate any substantive meaning to that seven-day deadline. A message would be sent to parties that the MRPP seven-day deadline means very little. The message would be that parties can ignore Board orders for months and months and rely on their ignorance of the meaning of the word "stay" even after receiving letters from the Board referring to the need for a "stay" to suspend operation of a Board remedy, and even after assistance from and discussions with professional advisors (in this case an employers' adviser and a workers' adviser).

[27] The reality, however, is that parties need to understand that under section 113 of the Act the Board has exclusive jurisdiction to investigate, hear, and determine all matters

arising under Part 3 of the Act (Occupational Health and Safety) with the Board's action or decision on a matter being final and conclusive subject to the effect of an appellate decision under sections 239 and 240 of the Act. That is, an appellate decision may overturn the Board remedy but until such time when the appellate decision is issued, the Board remedy has full legal effect and parties must comply with it. Section 244 of the Act expressly states that unless WCAT orders otherwise, the filing of a notice of appeal under section 244 does not operate as a stay or affect the operation of the decision or order under appeal. The MRPP explains that a stay under section 244 is an extraordinary remedy and the requirements for obtaining a stay from WCAT. It is important that parties who seek to overturn a Board decision take the reasonable steps to familiarize themselves with appellate procedures and requirements.

- [28] In this case I have concluded that in light of the evidence about repeated communications advising the employer that the mere filing of an appeal did not suspend the operation of a Board remedy decision, the employer's continued ignorance of the meaning of a "stay" was not reasonable. Therefore I have decided that this is not an appropriate case for WCAT to depart from the MRPP practice directive that an applicant for a stay must provide, within seven days of filing its appeal, written submissions in support of a stay request.

Conclusion

- [29] For the foregoing reasons, I deny the employer's request for a stay on the preliminary basis that the employer has failed to provide sufficient reasons to justify its delay, months beyond the seven-day deadline specified in the MRPP, to both request a stay and to file submissions in support of a stay request. The evidence in this case does not justify a departure from the seven-day deadline to allow the employer an extension of time to pursue its stay request.
- [30] I understand that the written submission process is underway on the merits of the employer's two appeals, and I return the appeal files to the WCAT Registry to continue administration of the appeals.

Heather McDonald
Vice Chair

HMcD/hb