Noteworthy Decision Summary

Decision: WCAT-2010- 00781 **Panel:** H. McDonald **Decision Date:** March 17, 2010

Section 151 of the Workers Compensation Act – Discrimination against workers prohibited – Termination of employment for filing compensation claim

This decision considers whether an employer terminated a worker's employment as a shipper-receiver for reasons prohibited under section 151 (*Discrimination against workers prohibited*) of the *Workers Compensation Act* (Act) where the motivation for termination was partly because the worker had made a compensation claim.

In a June 22, 2009 decision a case officer in the Compliance Section, Investigations Division, Workers' Compensation Board (Board) found that the employer had violated section 151 of the Act in terminating the worker's employment. WCAT allowed the employer's appeal, finding that in terminating the worker's employment, the employer did not violate section 151 of the Act.

The panel concluded that the employer's motivation for termination was not for any reason prohibited under section 151 of the Act. The panel found that the employer did not terminate the worker's employment because he had a back impairment preventing him from work, but only because the worker had made a compensation claim alleging that his back injury was caused by work. The panel concluded that section 151 of the Act protects workers when exercising rights or duties under Part 3 of the Act (*Occupational Health and Safety*), whereas filing a compensation claim is a right under section 55 which falls under Part 1 of the Act (*Compensation to Workers and Dependants*). Thus, filing a compensation claim is not a right protected by section 151 of the Act.

Workers' Compensation Appeal Tribunal

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2010-00781
WCAT Decision Date: March 17, 2010
Panel: Heather McDonald, Vice Chair

Introduction

[1] The employer is appealing two decisions by a student intern (case officer) in the Compliance Section, Investigations Division, Workers' Compensation Board (Board)[1]. In a June 22, 2009 decision the case officer found that the employer had violated section 151 of the *Workers Compensation Act* (Act) in terminating the worker's employment. By way of remedy in a September 1, 2009 decision the case officer ordered the employer to provide a reference letter to the worker and to pay the worker $2,505.19 less the usual statutory deductions (Canada Pension Plan, Employment Insurance (EI), and tax) no later than November 30, 2009. He also ordered the employer to post an inspection report (enclosed with the decision) at the workplace until November 30, 2009.

[2] On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer submits that the Board case officer erred in finding that the employer had terminated the worker's employment. In the alternative, if WCAT finds that the employer terminated the worker's employment, the employer submits that the Board case officer erred in finding that the employer's motivation for termination contravened section 151 of the Act. In the further alternative, if WCAT confirms a violation of section 151, the employer challenges one finding of the case officer's remedy, namely the finding that the worker was entitled to wage loss from May 12 through June 18, 2008.

Issue(s)

[3] Did the employer terminate the worker's employment? If so, was the employer motivated in any part for reasons prohibited under section 151 of the Act? If the employer violated section 151 of the Act, what is the appropriate remedy?

Jurisdiction and Procedural Matters

[4] These appeals are brought pursuant to section 240 of the Act, which provides that a determination or an order made under section 153 may be appealed to WCAT. Under section 153(1) of the Act the case officer made a determination in the June 29, 2009 decision that the employer violated section 151 and in the September 1, 2009 decision the case officer issued orders by way of remedy under section 153(2) of the Act.

[1] Operating as WorkSafeBC

[5] 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. 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).

[6] An employers' adviser represented the employer and a workers' adviser represented the worker in these appeal proceedings. The employer initially requested an oral hearing but revised its request to indicate that a process by way of written submissions would be adequate in this case. The employer provided written submissions in support of both its appeals. The worker provided a written submission in response and WCAT received the employer's written rebuttal. The submissions of both parties were thorough and articulate. I have taken those submissions into account as well as the other documents on file, including the case officer's decision and the documents that were before him in those Board proceedings.

[7] I have considered the criteria in item #7.5 of WCAT's *Manual of Rules of Practice and Procedure* 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 in dispute, or other compelling reasons such as where an unrepresented litigant has difficulty communicating in writing. WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based and credibility is not in issue.

[8] In this case I agreed with the employer's choice to proceed by way of written submissions. The basic chronology of events is not in dispute but rather the interpretation of section 151 of the Act as applied to those events is in dispute, which largely involves issues of statutory interpretation. Although there is a dispute about whether the employer intended to terminate the worker's employment and whether in fact an employment termination occurred, this issue as well as others can be resolved by applying the test used in the B.C. Court of Appeal in *Faryna v. Chorny* [1951] 4 W.W.R. (NS) 171, (1952) 2 D.L.R. 354. The Court in that case observed 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." With the background of evidence in the file, 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.

[9] This case involves an allegation of illegal discriminatory action under section 151 of the Act. Therefore the standard of proof is the balance of probabilities.

Relevant Law and Policy

[10] Section 151 of the Act has a summary title "Discrimination against workers prohibited" and states as follows:

> An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) *for exercising any right or carrying out any duty in accordance with this Part*, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
>
> (i) an employer or person acting on behalf of an employer,
>
> (ii) another worker or a union representing a worker, or
>
> (iii) an officer or any other person concerned with the administration of this Part.
>
> [italic emphasis added]

[11] A complainant worker must establish a basic case (*prima facie* case) under section 151 of the Act. To do so, the worker must establish that a respondent took action that could fall within the meaning of discriminatory action in section 150 of the Act. Section 150 defines "discriminatory action" as follows:

> (1) For the purposes of this Division, **"discriminatory action"** includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

(2) Without restricting subsection (1), discriminatory action includes

(a) suspension, lay-off or dismissal,

(b) demotion or loss of opportunity for promotion,

(c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,

(d) coercion or intimidation,

(e) imposition of any discipline, reprimand or other penalty, and

(f) the discontinuation or elimination of the job of the worker.

[12] The worker must also provide sufficient evidence to establish a *prima facie* case that the discriminatory action was causally linked to the worker's conduct under section 151 of the Act.

[13] If a worker has provided sufficient evidence to establish a *prima facie* case against the respondent, then the respondent bears the burden of showing that their actions were not motivated in any part by unlawful reasons as specified in section 151 of the Act.

[14] This is because section 152(3) of the Act provides that the burden of proving that there has been a violation of section 151 is on the employer or the union, as applicable. Section 153 gives the Board's procedure for dealing with a complaint.

[15] Like the former Appeal Division, WCAT has applied the "taint" principle in appeals involving section 151 complaints. A complainant will establish a case of illegal discrimination even if anti-safety attitude provides only a partial motivation for the employer or union action. The "taint" principle requires that in order to discharge the burden of proof under section 152(3), a respondent must prove that in no part were its actions tainted by anti-safety motivation prohibited under section 151 of the Act.

Background and Evidence, Reasons and Findings

[16] The parties are familiar with the background to this case as well as with the Board case officers' decisions which describe the evidence in detail. Therefore in this decision I will not repeat all the details but rather focus on matters that are critical to resolving the issues in this case.

[17] The general background to this case is that the worker was employed primarily as a shipper-receiver with duties to unload and load heavy boxes and loose sheet metal fittings, placing them into inventory. The worker commenced employment with the

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

employer in December 2003 and apart from a period of several months, he continued working for the employer through to the events of June 2007 which are at issue in this appeal. The evidence is that the worker has a learning disability and therefore sometimes his father communicates on his behalf or otherwise intercedes to assist him. This explains why it was sometimes the worker's father, rather than the worker himself, who had conversations with the employer's principal and the Board officers.

[18] The Board found that on or about June 19, 2007 the worker injured himself on the job while carrying a box upstairs. There is a dispute between the parties about whether the worker reported his injury to the employer around that time, but in any event the last day the worker worked for the employer was June 22, 2007. On June 23, 2007 the worker awoke with severe back pain and attended a physician that day. The worker's physician sent in an electronic form 8 to the Board with a diagnosis of back strain. On or about June 25, 2007 the worker's father telephoned the employer to advise that the worker's back was sore and that he would not be in to work. The employer understood that the absence was only supposed to be for the day but the worker's evidence is that the father explained it would be for "awhile"; in my view, nothing of significance turns on that item of miscommunication.

[19] The worker also visited a chiropractor on June 27, 2007 who diagnosed a similar injury in a report to the Board. As a result of receiving these forms, the Board contacted the employer. The employer then completed a form 7 report of injury on June 29, 2007 and sent it to the Board. On the form 7 the employer challenged acceptance of the claim, observing that the injury had not been reported to the employer. Ultimately, by a form 6 worker's report to the Board signed on July 11, 2007, the worker applied for compensation; he also submitted a Teleclaim application to the Board on July 27, 2007.

[20] The evidence is that the employer's manager was taken aback when the Board contacted him and that on or about June 29, 2007 he telephoned the worker to ask him about his continued absence from work and what the claim was about. The worker's evidence is that the employer's manager was very angry at him for making a compensation claim and did not believe that the worker's injury was caused by work activities. The worker's father took the telephone away to speak to the employer's manager and after a few words of angry exchange, the father hung up.

[21] The worker remained off work for most of the summer and then his chiropractor cleared him to return to work in a letter dated August 23, 2007. In the letter the chiropractor indicated that the worker was ready to return to work but that for at least one month he should not lift anything heavier than 50 pounds, to avoid re-injuring his back.

[22] The evidence is that the worker arrived at the employer's workplace on the morning of September 4, 2007, but the manager was not there at the time and the assistant manager advised the worker that he no longer had a job there. The worker requested a

letter to that effect and then left the workplace to report the matter to the Board. The worker never received a letter to that effect from the employer.

[23] The employer's position was that it did not lay off or dismiss the worker but that it had to replace the worker when he was away from work for so long. The employer's position is that it had no intention of terminating his employment.

Did the employer terminate the worker's employment?

[24] In the complaint proceedings before the Board case officer, the employer denied firing the worker. The employer submitted that it had completed a record of employment (ROE) for the worker at the request of the EI office. The employer advised that it explained the situation to the EI office as: the worker did not say he had quit, he did not get fired or laid off, but he just did not show up for work. The employer advised that the EI office instructed the employer to use the Code K (other) as the reason for issuing the ROE and to provide the explanation on the ROE.

[25] The case officer noted that the ROE was not submitted in evidence. The information from the Board entitlement officer was that as of September 4, 2007 the employer had yet to issue an ROE for the worker. The Board case officer noted that the worker and the employer did not speak after a telephone conversation on June 29, 2007 and that on August 8, 2007, when contacted by a Board officer to discuss the worker's compensation claim, the employer's manager indicated that the worker had not returned to work nor had he picked up his holiday pay. Although the reasons of the Board case officer are unclear on this point, he concluded that the worker's employment was terminated, without the worker's knowledge, at some point between June 29, 2007 and August 8, 2007.

[26] The review officer noted that when the employer received the Board's report in late June 2007, the employer's manager was then aware of the worker's reason for his absence from work. He was also aware of the reason for the worker's absence when the Board officer contacted him on August 8, 2007 to discuss the worker's claim. Although the employer did not hear anything further from the worker, the review officer found as follows:

> … Without hearing otherwise, the employer should have presumed that the worker was still impaired. If the employer considered replacing the worker temporarily, the employer should have contacted the worker to ascertain when the worker expected he would be able to return to regular duties, thereby determining the term of the temporary worker's employment. Further, I find it odd that at no point after June 29, 2007 did the employer attempt to contact the worker to determine if he was still injured, when he would be returning to work, or even how he was feeling.

> After four years of employment I would expect the employer to do at least that. Rather, I am satisfied that the employer terminated the worker without informing him, in direct retaliation for the worker filing a compensation claim with the Board.

[27] In these appeal proceedings the employer maintains that it never terminated the worker's employment. The employer refers to the following evidence in support of its position:

- the July 27, 2007 Teleclaim report indicates that the employer offered modified duties to the worker;
- on August 8, 2007 the employer told the Board entitlement officer that the worker had not returned to work, indicating that he considered this a possibility;
- the employer described the worker to the Board officers as a good worker and there is no evidence he was ever dissatisfied with the worker's performance;
- the ROE does not show that the worker was terminated; and
- there is no termination event recorded.

[28] The employer's manager says that he was not present when the assistant manager spoke to the worker on September 4, 2007 and as the assistant manager no longer works for the firm, he does not know exactly what she said. He does acknowledge that he was aware that the worker came in that day looking to work. He also acknowledges that during a worksite visit by a Board officer on September 18, 2007, he told the Board officer that he had not heard from the worker for weeks and so had to hire another person. The employer's manager maintains that at no time did he ever say that the worker could not return to work. The manager insists that he would have continued to employ the worker after he recovered from his back injury. The explanation is that because of the communication gap that occurred after the unpleasant telephone call between the employer's manager and the worker's father in late June 2007, neither the manager nor the worker wanted to interact with each other. There was a breakdown in communication. The employer concludes as follows:

> The communication breakdown is unfortunate, but not grounds to support a discriminatory action. That interpersonal relationships soured and communication ceased is not a basis for supporting the claim, retaliatory action is the test. Rather, the hard feelings between the parties explain how it was that the Employer remained open to bring [the worker] back into his employment but failed to pursue the matter.

[29] After considering the evidence and the parties' submissions, I confirm the case officer's finding that the employer terminated the worker's employment by hiring a permanent employee to replace him. The July 27, 2007 Teleclaim report was completed by the worker (or someone on his behalf) and the statement that the employer modified duties was a form statement with a box beside available to be "checked" if appropriate. Indeed there is a check mark in the box beside that statement but the evidence satisfies me that this was in error. The worker's evidence in these proceedings is very clear that the employer never offered the worker modified duties after his back injury in June 2007 and the employer, apart from referring to the statement in the Teleclaim form, does not independently relate the specifics of any such conversation. I am satisfied that no such offer took place.

[30] It is true that before the events in question the employer found the worker to be a good employee and had no complaints about his work performance. However, I find that the evidence also establishes that the employer's principal felt blind-sided by the Board contacting him to advise that the worker had made a compensation claim for a back injury, and that the employer's principal was angry about the matter. After reviewing the evidence on file, I am satisfied that when the worker first went off work he did not report a specific work-related injury to the employer, but rather referred in general terms to a sore back. The worker's evidence on his compensation claim form is inconsistent with the information he provided to the Board officer in a telephone conversation in August 2007. The worker's story in that telephone conversation is more consistent with the evidence provided by the employer's principal and co-workers of the worker who all indicated that between June 19 and 22, 2007, while the worker complained of a sore back before going off work, he did not relate it to a work-related incident or activity. Therefore, I find it credible that the employer's principal was astonished when he was subsequently contacted by the Board in late June 2007 and heard that the worker was relating his back symptoms to work activities.

[31] There is no question that there were heated words between the employer's principal and the worker's father in the telephone conversation on or about June 29, 2007, when the employer's principal telephoned to ask what the compensation claim was all about. Thus the evidence establishes that the employer's principal was angry about the worker claiming workers' compensation benefits and linking the cause of his back injury to the workplace. In other words, there was motivation for the employer not to want to have the worker return to the workplace.

[32] Further, the evidence is clear that the employer's principal knew that the worker had arrived on site on the morning of September 4, 2007 seeking to return to work and knew that he had been turned away from the workplace. With that knowledge the employer did not attempt to contact the worker, either directly or through the Board, to advise that the replacement worker was only a temporary substitute and that the worker could return to work.

[33] Further, the Board officer made the site visit on September 18, 2007 and spoke to the employer who acknowledged that he knew the worker had been in with a note seeking to come back to work. The claim log entry of that date by the Board officer indicates that the employer's principal advised that when he had not heard from the worker for weeks in the summer, he had to hire another employee but had yet to issue a ROE. The implication from that statement is that the ROE was going to be issued in the future. There was no mention by the employer's principal at that time that the replacement worker was only temporary and that the worker's job was still open to him. There was no indication that the employer's principal wanted to have the worker return to work. When a worker attempts to return to work and an employer's representative turns him away, and over the next couple of weeks there is no attempt whatsoever by the employer's principal to contact the worker to make arrangements for the worker's return to work, it is clear that the employer's intention was to permanently replace the worker by the replacement employee. Even though there had been a communication breakdown in the summer between the worker and the employer's principal, the worker had made the first move when he attempted to return to work on September 4, 2007. The employer has not satisfactorily explained why, if it truly did not want to terminate the worker's employment, it did not promptly reciprocate the gesture initiated by the worker.

[34] The ROE form was completed so long after the events in question that I find that it is not reliable evidence regarding the reasons for the worker not returning to the employer's workforce.

[35] For these reasons I find that the employer terminated the worker's employment when he hired the replacement worker and when he did not make prompt efforts to return the worker to his job after the worker went to the workplace in early September 2007 seeking a return to work. Under section 150(2)(a) of the Act, an employment termination constitutes a discriminatory action. Therefore it is necessary to determinate whether the employer's motivation for the employment termination in any part was because the worker acted under section 151(a) through (c) of the Act.

Was the employer motivated in any part for reasons prohibited under section 151 of the Act?

[36] There is no question that the employer was angry about the worker filing a compensation claim with the Board and I find that at least in part this was a reason for the termination of the worker's employment. In *Appeal Division Decision #2002-2505* (September 26, 2002) I found that the filing of a compensation claim was a right under section 55 of the Act, which conduct fell within sections 151(a) and (c)(iii). That is, I found that the filing of a compensation claim with the Board constituted the exercise of a right or duty under Part 3 of the Act, the regulations or an applicable order (see section 151(a) of the Act), or that it constituted giving information about workplace occupational health and safety conditions to a Board officer or other person concerned

with the administration of Part 3 of the Act. In that context I also referred to section 177 of the Act which prohibits an employer from trying to prevent a worker from reporting a work-related injury to the Board.

[37] Since then doubt has been cast on the correctness of my reasoning in *Appeal Division Decision #2002-2505*. This is because a worker's right to file a claim is a right under Part 1 of the Act, not Part 3 of the Act, and the section 151 references are to rights and duties under Part 3 of the Act. The case officer in the decision under appeal in this case observed that the Compliance Section is not entirely persuaded that the mere presence of section 177 turns a Part 1 right into a right under Part 3 of the Act. See also *WCAT-2004-04669* (September 2, 2004) in which the panel stated in part as follows:

> The [review officers] both concluded that the discriminatory action provisions of the Act do not extend to actions taken by the employer in relation to the making or pursuing of a workers' compensation claim. I agree, with the exception that the worker's activities relating to safety, as they may arise in the context of or as a result of his claim, are relevant. The discriminatory action provisions do not encompass "retaliation" by an employer based on the worker making a claim, or activities such as discouraging legitimate compensation claims. Other sections of the Act and regulations address those matters. In that regard, I note in particular that section 251 [*sic* – reference intended to be section 151] of the Act, set out below, refers to 'this Part' of the Act, which does not include the provisions of the Act relating to claims for workers' compensation.

[38] After considering the issue, I have decided that I erred in my reasoning in *Appeal Division Decision #2002-2505* that the mere filing of a compensation claim by a worker constituted an action bringing the worker within section 151 of the Act. I have considered the worker's submissions in this case that it is difficult to see how the legislature would have made it an offence under section 177 of the Act for an employer to hinder a worker from reporting an injury to the Board, yet not intended the filing of a compensation claim to be a right or duty contemplated under section 151 as protected from retaliatory discriminatory action. While I understand the worker's logic, applying the basic principles of statutory interpretation, I am unable to stretch the wording of section 151, which expressly confines itself to rights and obligations under Part 3 of the Act, to include a right or duty under Part 1 of the Act.

[39] The worker also submitted that in filing a compensation claim he was acting under section 116(1)(a) of the Act (found in Part 3 of the Act) which requires every worker to "take reasonable care to protect the worker's health and safety and the health and safety of other persons who may be affected by the worker's acts or omissions at work." I do not agree with that characterization of the worker's filing of his compensation claim. I would agree the worker taking time off work to recover from his injury might be

interpreted as acting under section 116(1)(a) of the Act, as this would be taking reasonable care to protect his health and safety. But I find that the filing of a compensation claim in and of itself did not protect the worker's health and safety in this case.

[40] In this case, I find that the employer did not retaliate against the worker by terminating his employment because he took time off work for the back injury. This is because the evidence was that the employer knew the worker was off work for a back injury and contacted the worker after a few days to inquire about his return to work. This was when the employer believed that the worker's injury related to off-work activities such as working on his car. I am satisfied that the employer was not angry at the worker for taking time off work to rest his back, but rather the employer became angry later on when he discovered from the Board that the worker had filed a compensation claim about the back injury. Therefore the worker, acting under section 116(1)(a) of the Act in taking time off work to recover from his back injury, while it might establish an act under section 151(a) of the Act, does not assist the worker because on the evidence I find that the employer has proven that it did not terminate the worker's employment, even in part, because he took time off work for a back injury. The prohibited motivation on the employer's part arose only when the employer's principal discovered that the worker had filed a compensation claim with the Board about the back injury. This is because of the employer's sincerely held belief (albeit that the Board subsequently disagreed with that belief) that the worker's injury had nothing to do with the work activities.

[41] The case officer referred to section 4.19 of the *Occupational Health and Safety Regulation* (Regulation) which states in part that:

> A worker with a physical or mental impairment which may affect the worker's ability to safely perform assigned work must inform his or her supervisor or employer of the impairment, and must not knowingly do work where the impairment may create an undue risk to the worker or anyone else.

[42] The case officer said that when the worker reported an injury to the employer on or about June 19, 2007, this constituted carrying out the duty referred to in section 4.19 of the Regulation and therefore the necessary act under section 151(a) of the Act was established. As an alternative, the case officer also referred to the telephone conversation on June 25, 2007 between the worker's father (acting on the worker's behalf) and the employer's principal as sufficient to establish that the worker had carried out the duty contemplated by section 4.19 of the Regulation and that this in turn established the link with section 151(a) of the Act which refers to a worker carrying out a duty under the regulations.

[43] I agree with the case officer that when the worker told the employer about his back injury on June 19, 2007 or when the worker's father reported the injury on his behalf to

the employer on or about June 25, 2007, those reports could be interpreted as the worker acting under section 4.19 of the Regulation in reporting a physical impairment to the employer. However, although those reports would establish acts under section 151(a) of the Act, for reasons similar to those I gave regarding an interpretation of the worker's conduct as constituting the carrying out of a duty under section 116(1)(a) of the Act, the evidence persuades me that the employer did not terminate the worker's employment because he had a back impairment preventing him from work. It was only when the employer understood from the Board that the worker had made a compensation claim alleging that his back injury was caused by work that the employer became angry and the motivation first arose for terminating the worker's employment.

[44] The case officer, as a further alternative, found that when the Board advised the employer about the worker's claim that this indirectly constituted the worker informing the employer about his impairment from work, thus carrying out the duty under section 4.19 of the Regulation and bringing the worker within section 151(a) of the Act. I find that I am unable to make that leap of interpretation because section 4.19 of the Regulation requires a *worker t*o report his or her physical impairment to their supervisor or employer. This is a duty on the worker to perform. While in this case it is reasonable to treat the worker's father as his agent in reporting his impairment to the employer's principal, I do not find it reasonable to find that a worker complies with section 4.19 of the Regulation by simply leaving it up to the Board to report the physical impairment to the employer. Such an interpretation would effectively negate the meaning of section 4.19 of the Regulation because it would mean that in each and every case a worker could simply walk off a worksite without advising a supervisor or employer about the physical impairment, then file a compensation claim some time later and leave it to the Board to relay the necessary information to the employer. This would not, in my view, constitute a worker complying with section 4.19 of the Regulation.

[45] In any event, even if I am wrong on that point, the employer in this case already knew about the worker's physical impairment from work and thus the Board reporting the impairment was not new information for the employer. Rather, the new information from the Board that made the employer angry was the news that the worker had filed a compensation claim relating to that physical impairment, alleging that it was work related. That information motivated the employer to anger and formed the motivation for the subsequent termination of the worker's employment. In other words, it was the filing of the compensation claim with the Board that was the motivational nexus with the discriminatory action of employment termination. But as I have already found, the filing of a compensation claim, in and of itself, is not an action protected under section 151 of the Act.

[46] Therefore my conclusion in this case is that the employer did not violate the provisions of section 151 of the Act because its motivation for terminating the worker's employment was not even, in part, for reasons prohibited under section 151. That is,

the worker's conduct which caused the employer to retaliate by terminating his employment was not conduct referred to in section 151(a), (b), or (c) of the Act.

[47] I recognize the worker's concern that if the filing of a compensation claim does not amount to the exercise of a right protected under section 151 of the Act, then workers do not have adequate (or arguably, any) protection from an employer who takes discriminatory action against them for that reason. In my view, this result may well be the result of an error or oversight in legislative drafting. I recommend that the Board consider this if and when it makes recommendations to the legislature for considering revisions to the Act. The Office of the Workers' Advisers may also wish to consider recommendations to the legislature for revisions to section 151 of the Act.

Conclusion

[48] For the foregoing reasons, I allow the employer's appeals and vary the case officer's decision dated June 22, 2009 by finding that the employer, in terminating the worker's employment, did not violate section 151 of the Act. I also vary the case officer's decision dated September 1, 2009 by finding that no remedy should be ordered in this case, given the finding of a lack of a violation of section 151 by the employer.

[49] There were no requests for reimbursement of appeal expenses, none are apparent from the file, and therefore I make no order in that regard.

Heather McDonald
Vice Chair

HMcD/hb

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898