Noteworthy Decision Summary

Decision: WCAT-2011-00503 **Panel:** H. McDonald **Decision Date:** February 24, 2011

Occupational Health and Safety – Discriminatory actions – Section 151 of the Workers Compensation Act – Physical or mental impairment – Refusal of unsafe work – Sections 3.9, 3.10, 3.12, 3.13, and 4.19 of the Occupational Health and Safety Regulation

There is a difference between an employer's obligations when dealing with a generally unsafe workplace and one that is unsafe to a particular worker only because of his or her physical or mental impairment. The panel found the odour of tobacco smoke in the workplace made it unsafe for the worker only because of the worker's asthma. Unlike a situation of a generally unsafe work condition, the employers in this case were not obliged to remedy the smell of smoke. Therefore, the physically impaired worker could not use the fact that his employers did not remedy the condition as evidence of constructive dismissal. The employers acted appropriately by offering the worker shifts in another area of the facility. In the circumstances, the panel determined that the employers were not motivated in any part to retaliate against the worker under section 150 of *Workers Compensation Act* (Act) because he refused to work in an area that smelled of smoke.

The worker is a nurse who accepted a temporary placement in the psychiatric ward of a hospital. Patients on the ward were permitted to smoke in a designated room. The smell of tobacco smoke was evident elsewhere on the ward. The worker claimed that he was unable to commence his duties and that the employers had constructively dismissed him due to his refusal to perform unsafe work. The worker filed a complaint under section 151 of the Act alleging unlawful discriminatory action by his employers. WCAT allowed the employers' appeal from the Workers' Compensation Board, operating as WorkSafeBC (Board), decision in the worker's favour.

The Board determined that the odour of smoke on the ward constituted an unsafe work condition, which triggered the employers' obligations to take prompt remedial action under section 3.12 of the *Occupational Health and Safety Regulation* (Regulation). The Board officer found that the employers' offer of alternate duties, rather than taking steps to remediate the unsafe condition, wrongly put the worker in a "take it or leave it" situation amounting to constructive dismissal.

The panel said the Board erred in determining that part 3 of the Regulation applied. Instead, the panel determined that working on the ward was hazardous to the worker only because of his physical impairment and section 4.19 of the Regulation was the correct provision to apply. Because section 4.19 does not require an employer to remediate a work condition, it followed that the employers' conduct did not constitute constructive dismissal.

The panel disagreed with the view that because the offer of an alternative assignment was directly related to the worker's refusal to work on the psychiatric ward, the necessary illegal motivation under section 151 of the Act is thereby established. The panel noted that WCAT jurisprudence is clear that a special kind of causal connection between a worker's conduct and discriminatory action must exist before an employer will have violated section 151. Specifically, an employer must intend to retaliate against a worker for exercising his or her rights and obligations under the section. In this case, the panel found no such causal connection.

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WCAT Decision Number: WCAT-2011-00503
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Panel: Heather McDonald, Vice Chair

Introduction

[1] In March 2008 Employer A, a temporary placement agency, placed the worker with Employer B, the operator of a hospital, as a nurse in the hospital's psychiatric ward. The worker, who is asthmatic, refused to work because patients were permitted to smoke in the psychiatric ward. The evidence is that there was a designated smoking room but nevertheless the smell of tobacco smoke was evident on the ward. The worker claimed he was unable to commence his duties and that the employers constructively dismissed him due to his refusal to perform unsafe work. He filed a complaint under section 151 of the *Workers Compensation Act* (Act) alleging unlawful discriminatory action by the employers. In a decision dated March 15, 2010 an investigations legal officer (officer) in the Workers Compensation Board (Board)[1] found in favour of the worker's complaint. The matter of a remedy was not addressed in that decision but was the subject of a subsequent decision by the Board officer.

[2] On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employers request a finding that the Board officer's March 15, 2010 decision be varied to find they did not violate section 151 of the Act.

Issue(s)

[3] Do sections 3.9 through 3.13 of the *Occupational Health and Safety Regulation* (Regulation) apply in this case or is section 4.19 of the Regulation the relevant provision? Does the worker's complaint meet the first component of a threshold case under section 151 of the Act, that is, did the worker act within section 151(a) through (c)? Does the worker's complaint meet the second component of a threshold case under section 151, that is, did the employers constructively dismiss the worker or did they otherwise commit a "discriminatory action" within the meaning of section 150? Does the worker's complaint meet the third component of a threshold case under section 151, that is, were the employers motivated in any part to retaliate against the worker under section 150 because he acted under section 151?

Jurisdiction and Procedural Matters

[4] Section 240 of the Act provides that a determination made pursuant to section 153 may be appealed to WCAT. The Board officer's March 15, 2010 decision was a determination made under section 153. Section 250(1) and section 254 allow WCAT to

[1] Operating as WorkSafeBC

consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.

[5] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so. WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may confirm, vary, or cancel the appealed decision or order.

[6] This appeal involves an issue under Part 3 of the Act, regarding occupational health and safety. The standard of proof in such matters is the balance of probabilities. Section 152(3) of the Act provides that the burden of proving there has not been a contravention of section 151 is on the employer.

[7] The employers did not request an oral hearing but on their notices of appeal indicated a preference for an appeal process by way of written submissions. I agree that an oral hearing is not necessary to decide this appeal. The WCAT *Manual of Rules of Practice and Procedure* Rule #7.5 states that WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based and credibility is not at issue. The issues in this appeal require consideration of the relevant law and policy and the application of that policy to the facts in this case. The factual background to this appeal is largely undisputed. Where there are facts in dispute I find I am able to resolve any contentious evidentiary issues on the material before me using the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1951] B.C.J. No. 128, [1952] 2 D.L.R. 354. In that decision, the court stated as follows:

> In short, the real test of the truth of the story of a witness in such a case 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.

[8] WCAT invited the worker to participate in these appeals but did not receive a response from the worker; accordingly the worker is not participating in these appeals. Each employer is represented by a separate employers' adviser. Both parties, through their representatives, have provided written submissions regarding the issues in these appeals.

Relevant Law and Policy

[9] 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,
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> (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
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> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment to
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> (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.

[10] A complainant worker must establish a basic case (a *prima facie* or threshold 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. 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.
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> (2) Without restricting subsection (1), discriminatory action includes
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> (a) suspension, lay-off or dismissal,
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> (b) demotion or loss of opportunity for promotion,
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> (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,
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> (d) coercion or intimidation,
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> (e) imposition of any discipline, reprimand or other penalty, and
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> (f) the discontinuation or elimination of the job of the worker.

[11] 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.

[12] 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. This is because section 152(3) 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.

[13] 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) of the Act, a respondent must prove that in no part were its actions tainted by anti-safety motivation prohibited under section 151.

[14] Division 3 of Part 3 of the Act describes the general duties of employers, workers, and others. Section 115 of the Act requires employers to ensure the health and safety of all workers working for that employer, and to remedy any workplace conditions that are hazardous to the health or safety of the employer's workers. Section 116(2)(e) provides that a worker must report to a supervisor or employer the existence of any hazard that the worker considers is likely to endanger the worker or any other person.

[15] Part 3 of the Regulation is entitled "Rights and Responsibilities", with sections 3.9 through 3.12 dealing with correction of unsafe conditions and refusal to perform unsafe work. Section 3.9 states:

> **3.9 Remedy without delay**
> Unsafe or harmful conditions found in the course of an inspection must be remedied without delay.

[16] Section 3.10 of the Regulation refers to the obligation of any person who perceives unsafe or harmful work conditions. Specifically, section 3.10 says:

> Whenever a person observes what appears to be an unsafe or harmful condition or act the person must report it as soon as possible to a supervisor or to the employer, and the person receiving the report must investigate the reported unsafe condition or act and must ensure that any necessary corrective action is taken without delay.

[17] Section 3.12 of the Regulation, under the heading "Refusal of Unsafe Work", establishes a procedure for refusal which must be followed by workers, and also establishes a procedure for response which must be followed by employers. A person must not carry out or cause to be carried out any work process or operate any tool or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person. It is important to emphasize that the Regulation requires that the person have "reasonable cause" that the work process

or equipment is unsafe. Thus, a worker cannot make a frivolous or unreasonable allegation of danger and expect that section 3.12 will support a refusal to work. On the other hand, a worker need not be necessarily correct regarding his or her safety concerns – they only need to have a reasonably-held belief.

[18] Subsection (2) of section 3.12 of the Regulation requires that a worker who refuses to carry out unsafe work must immediately report the unsafe situation to his supervisor or employer. This is consistent with a worker's obligations under section 116(2)(e) of the Act.

[19] Section 3.12's procedure for response by employers requires the following process:

> (3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and
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> (a) ensure that any unsafe condition is remedied without delay, or
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> (b) if in his or her opinion the report is not valid, must so inform the person who made the report.
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> (4) If the procedure under subsection (3) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, the supervisor or employer must investigate the matter in the presence of the worker who made the report and in the presence of
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> (a) a worker member of the joint committee,
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> (b) a worker who is selected by a trade union representing the worker, or
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> (c) if there is no joint committee or the worker is not represented by a trade union, any other reasonably available worker selected by the worker.
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> (5) If the investigation under subsection (4) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, both the supervisor, or the employer, and the worker must immediately notify an officer, who must investigate the matter without undue delay and issue whatever orders are deemed necessary.

[20] Section 3.13 of the Regulation provides that a worker, who has complied with section 3.12 in refusing to perform unsafe work, must not be the subject of discriminatory action in violation of section 151 of the Act. In other words, the union or

employer must not take discriminatory action against a worker as retaliation for his refusing to perform unsafe work. Section 3.13(2) of the Regulation states that:

> (2) Temporary assignment to alternative work at no loss in pay to the worker until the matter in section 3.12 is resolved is deemed not to constitute discriminatory action.

[21] In Part 4 of the Regulation, entitled "General Conditions", section 4.19 deals with workers who have physical or mental impairments that may affect their ability to safely perform assigned work. Where a worker has a physical impairment that may affect his or her ability to safely perform assigned work, the worker must take action in that regard. Section 4.19(1) of the Regulation provides:

> 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.

[22] Section 4.19(2) of the Regulation states:

> (2) A worker must not be assigned to activities where a reported or observed impairment may create an undue risk to the worker or anyone else.

[23] Unlike the provisions in sections 3.9 through 3.12 of the Regulation, dealing with correction of unsafe conditions and refusal to perform unsafe work, section 4.19 does not specify a process for employers and workers to follow after a worker reports to his or her employer that he or she has a physical or mental impairment that may affect their ability to safely perform assigned work.

Evidence, Submissions, Reasons and Findings

Background

[24] The worker signed an employment agreement with Employer A to provide full-time temporary nursing services in Employer B's hospital psychiatric ward, from March 3 to March 30, 2008. The worker advised Employer A about his asthma and that it was aggravated by cigarette smoke. The work assignment was outside the geographical area of the worker's residence and Employer A agreed to provide him with smoke-free accommodation. For the reasons provided by the Board officer, I find that both parties simply assumed the hospital would be smoke-free but did not expressly discuss that issue.

[25] Article 3 of the employment agreement stated as follows:

> **Assignment Duties & Location**
> 3. The Employee shall be assigned to work at a Client's facilities based on the Employee's specific skills and Client facility staffing needs. The Employee's preference will be considered in making all assignment matches with the Client facilities. The Employer will make every effort to facilitate the Employee preference with regard to client assignment length and location.

[26] The evidence is that the worker is not a registered psychiatric nurse but wanted to gain experience working in a psychiatric context. The assignment was to perform general nursing services in Employer B's hospital psychiatric ward.

[27] On March 2, 2008, the day before his assignment was to commence, the worker visited the psychiatric ward with his girlfriend and noticed patients smoking and the smell of tobacco smoke on the ward. There is some dispute in the evidence about the extent of the tobacco smoke on the ward, with the worker's report on file of the ward being "blue with smoke". Applying the test in *Faryna v. Chorny*, I prefer the evidence of the Board safety officer, documented on file, wherein he noted there was a designated smoking room for the psychiatric ward where patients were permitted to smoke but the room did not meet ventilation standards. The Board safety officer observed nicotine stains on the floor around the door and he could smell smoke on the ward. He does not mention seeing patients smoking on the ward elsewhere than in the designated smoking room, nor does he indicate that air in the general ward was thick with the smell of tobacco smoke. The evidence satisfies me that there was a discernible tobacco smoke odour on the general psychiatric ward but not that the air was thick with smoke.

[28] After the worker's visit to the ward, he promptly contacted Employer A to explain that he would be unable to work on the ward due to the cigarette smoke. Early the next day Employer A contacted the psychiatric unit manager to ask if the smoking activity could be stopped. The manager indicated that it could not be stopped immediately due to the prospect of some psychiatric patients becoming violent as a result. The manager advised, however, that the psychiatric unit was working toward being smoke-free by the end of March 2008 due to amendments in provincial legislation[2] coming into effect. The manager also mentioned his concern about the worker's girlfriend visiting the psychiatric ward which the hospital viewed as a violation of patient privacy.

[29] Employer A then contacted the hospital's director of acute care to try to obtain alternate psychiatric nursing shifts for the worker. On the afternoon of March 3, 2008 the director toured the worker around the hospital and assembled a set of shifts that would keep him

[2] Amendments to the *Tobacco Control Act*, R.S.B.C. 1996, c. 451 prohibiting all smoking in hospitals (and other places of business) came into effect on April 1, 2008. There were also consequential amendments to the Regulation.

working in non-smoking areas through to the end of March 2008 without a loss in pay. However, none of those proposed shifts involved nursing in psychiatric units. Thus the new nursing assignment location was different from the original assignment but the type of general nursing skills required was the same, albeit the patients would not be psychiatric patients.

[30] In a telephone conversation on March 3, 2008 Employer A offered the worker the alternate shifts and initially he accepted them. The evidence is that the worker agreed the alternate shifts offered to him were medically suitable and so he indicated he was very interested in the work because he could pick up new skills. Before concluding the telephone call, Employer A mentioned the hospital's privacy concern about the girlfriend visiting the psychiatric ward but said it was not a huge concern although the worker should exercise caution in the future.

[31] The evidence is that approximately 30 minutes later the worker telephoned back to advise Employer A he was unhappy Employer B had questioned his professionalism in allowing his girlfriend to visit the psychiatric ward and so he decided to decline the alternate shifts. The worker also stated that his reason for taking the assignment in the first place was to work on the psychiatric unit; he could pick up non-psychiatric nursing shifts in his local city. Employer A indicated it understood the worker's position and then advised there might be psychiatric nursing shifts available nearby in another city. The worker said he would stay if those alternate psychiatric nursing shifts were confirmed by noon the following day (March 4, 2008) but if not, he expected to be reimbursed for his travelling expenses plus three days' lost wages. The next day Employer A advised that the potential psychiatric nursing shifts in the other city had not materialized. The worker and Employer A negotiated a resolution of their dispute whereby Employer A paid travel expenses and two days' lost wages. Three days later, however, the worker asked Employer A to pay all wages he would have earned had he worked the psychiatric assignment with the hospital.

[32] In his November 12, 2008 submission to the Board, the worker said that two of the offered shifts were in the hospital's ambulatory care ward, directly adjacent to the psychiatric ward, where the worker alleged there was just as much tobacco smoke present. The worker said the remaining shifts were on a different floor, and he would have had to walk through tobacco smoke-filled air on the first floor to get to other floors which would contaminate the worker's clothing with smoke and likely trigger an asthma attack. Employer B responded that the ambulatory care unit is separated from the psychiatric unit by the emergency department and that it is unlikely smoke would travel from the psychiatric unit through to the ambulatory care unit. Employer B said that it has no record of any complaints about smoke from nurses in either the emergency or ambulatory care departments.

[33] Keeping in mind the test in *Faryna v. Chorny*, the Board officer concluded that the worker initially accepted the alternative non-psychiatric nursing shifts although reluctantly, given that he had wanted psychiatric nursing duties as in the original

agreement he had with the employers. The Board officer found that after Employer A's concluding comments in the telephone conversation, the worker became irritated by Employer B's criticism of his girlfriend's visit to the psychiatric ward, as well as the prospect of having to take nursing shifts elsewhere in the hospital. The Board officer also concluded that when soon thereafter the worker telephoned Employer A to refuse the shifts, he did not offer smoke-related concerns as a reason for declining the non-psychiatric nursing shifts. The Board officer noted that if the worker had any concern over tobacco smoke on the alternate shifts, he would have promptly refused the offer. Further, the Board officer preferred Employer B's evidence that tobacco smoke was not present in the ambulatory care and emergency departments. I find the Board officer's analysis on these points to be sound, and in the absence of any argument to the contrary in these proceedings, I agree with the Board officer's findings in that regard.

[34] The Board officer found the worker had reasonable cause to believe that exposure to tobacco smoke on the psychiatric ward would create an undue hazard to his health and safety; therefore section 3.12(1) of the Regulation came into play. He noted that although both employers investigated the worker's report and accepted it was valid, neither remedied the situation without delay. For the interim period before the legislative amendments took effect on April 1, 2008 (and the interim period coincided with the duration of the worker's assignment to the psychiatric ward), the worker was simply offered alternate shifts in non-smoking areas.

[35] The Board officer found the employers could not rely on section 3.13(2) of the Regulation because (a) that provision refers to "temporary" assignment to alternate work and in this case the offer of alternate shifts was intended to last the entire duration of the worker's assignment; and (b) the investigative procedure in section 3.12 is not intended to be stopped by the simple assignment of alternate work at no loss in pay. Neither employer proceeded with the formal steps outlined in section 3.12(4) despite the fact the matter was not resolved as contemplated by the Regulation. Instead Employer B was intent on compliance with provincial legislation by the end of March 2008, not prepared to accelerate compliance or explore acceptable alternatives. The only option given to the worker was to accept the non-psychiatric nursing shifts at the hospital. It was only when the worker contacted the Board safety officer to make a complaint that the safety officer suggested, on or about March 6, 2008, psychiatric ward patients be permitted to smoke outside until the end of March 2008. By that time the worker had already made a decision not to accept alternate non-psychiatric nursing shifts and had ended his employment relationship with the employers, being under the impression that there were not going to be any immediate changes to the hospital's smoking policy on the psychiatric ward.

[36] The Board officer found that it was not open to the employers to leave the psychiatric ward smoking issue unresolved. He found that section 3.12(4) of the Regulation imposes an obligation on an employer to continue to investigate an unresolved workplace refusal, first in the presence of the worker, and then if there is still no

resolution of the matter, by contacting a Board safety officer as a final step. The Board officer found that if the employers had continued with the investigative process, the solution ultimately proposed by the safety officer (allowing psychiatric ward patients to smoke outdoors) could have been implemented quickly and the worker would have been able to complete the psychiatric nursing assignment. The worker would not have been put in the "take it or leave it" position in which he found himself by the employers' offer of non-psychiatric nursing shifts.

[37] The Board officer concluded that under section 3.12(1) of the Regulation the worker was justified in refusing the initial assignment to the psychiatric ward. He also found that the employers could not rely on section 3.13(2) as a defence because the use of that provision is contemplated in circumstances involving an ongoing investigation. The worker's refusal to accept the alternate shifts did not, therefore, negate the fact the worker had been put in a "take it or leave it" situation. The Board officer therefore concluded the employers had constructively dismissed the worker. He found that the worker had established one of the elements of a threshold case under section 151 of the Act, as employment dismissal constitutes a discriminatory action under section 150(2)(a).

[38] The Board officer found the worker had also established a second component of a threshold case under section 151 of the Act, as the worker had refused unsafe work in accordance with section 3.12 of the Regulation; this constituted the exercise of a right under the Regulation and a duty under section 116(2)(e)(i) of the Act, as contemplated by section 151(a).

[39] The Board officer found more than a mere temporal connection between the worker's conduct in refusing unsafe work and his constructive dismissal. The Board officer found that the third and final component of a threshold case under section 151 of the Act was met because the worker's employment termination was tied directly to his refusal to perform unsafe work.

[40] The Board officer found the employers had failed to rebut the threshold case of unlawful discrimination raised by the worker. In that regard, the Board officer relied on *WCAT-2004-00641* (February 5, 2004) which found that an employer had not met the burden in section 152(3) of the Act of proving that the reason for the constructive termination of a worker's employment was not due to his exercise of a statutory or regulatory right, because the exercise of the worker's statutory or regulatory right amounted to the loss of his job.

Submissions

[41] Both employers refer to section 4.19 of the Regulation which they submit is the applicable provision in the worker's situation of raising his asthma condition as a reason for being unable to work on the psychiatric ward where patients were permitted to smoke. The employers submit that the worker's asthma was a "physical impairment"

under section 4.19, and they took appropriate action to offer the worker re-assignment to other duties in the hospital. The employers submit that when a worker reports a physical impairment to performing work, this report arises under section 4.19 which does not require the same type of investigatory process as a refusal to perform unsafe work under section 3.12. They submit that offering alternate duties at the same pay rate is a satisfactory response to a worker suffering from a physical impairment that prevents him or her from undertaking employment duties that other workers can perform safely.

[42] Employer B submits that the worker was not acting under section 3.12 of the Regulation because the work on the psychiatric ward was not a matter of refusing "unsafe work" in the sense contemplated by the provision. Other workers had been working on the hospital psychiatric ward even though, despite the designated smoking room, some tobacco smoke was still present in the ward. Employer B notes that when the worker made his complaint in early March 2008 to the Board, the Board safety officer did not write orders requiring immediate cessation of smoking by patients or otherwise immediately take action to stop patients from smoking on the psychiatric ward. Like Employer B, Employer A also notes that following his investigation at the hospital, the Board safety officer did not deem the work on the psychiatric ward to be unsafe work; he did not issue a stop work order in response to the presence of environmental tobacco smoke in the workplace.

[43] The employers therefore submit that it was appropriate to offer the worker other nursing duties in the hospital at the same rate of pay to accommodate his physical impairment of asthma. Employer A submits that as required by section 4.19(2) of the Regulation, it was obliged to ensure that the worker was not "assigned to activities" where a "reported or observable impairment may create an undue risk to the worker or anyone else." Employer A submits that the employers would have been in violation of section 4.19(2) had they not taken immediate action to have the worker's job duties reassigned as soon as they became aware of the situation.

[44] Employer B emphasizes that section 151 of the Act is intended to prohibit employers from taking *retaliatory action* against a worker who raises a safety issue. Employer B submits that in this case both employers had responded immediately in a favourable way to the worker's concern, investigating the matter and immediately trying to find a way to accommodate his medical condition of asthma. Indeed, the worker agreed to the new nursing assignment, and this illustrates a satisfactory accommodation for his medical disability.

[45] Employer B says that at the time the worker raised the issue of smoking on the psychiatric ward, the hospital was implementing measures on site that would eliminate the hazard rather than just move smoking to an outdoor location. There were a variety of options in which the smoking hazard could have been dealt with; all options had potential consequences that needed to be considered and evaluated. For example, an immediate edict that psychiatric ward smokers stop smoking or even move to a different outside location had the potential to create another safety hazard for workers, namely,

the risk of violence by psychiatric patients confronted with an immediate change in routine: stop smoking or move outdoors to smoke. Therefore, the hospital needed to consider the type of hazard control and the risks of implementing the control, then determine the best solution for the situation, and finally implement the control. Another possible control would have been for the worker to wear a personal respirator at work to control his exposure to tobacco smoke. Employer B says that the solution agreed to by all parties was for the worker to be assigned nursing duties at another location. That solution would accommodate the worker's asthma. Meanwhile, Employer B was continuing with its plans to gradually implement a ban on smoking.

[46] Employer B says that even if section 3.12 of the Regulation applies in this case, it was an effective solution under section 3.12(3)(a), agreed to by the worker and both employers, that assignment to nursing duties other than the psychiatric ward would immediately and effectively remedy the risk to the worker's health of exposure to tobacco smoke. The employer says this solution was an effective temporary solution, pending the implementation of its smoking cessation program. The employer refers to section 3.13(2) as expressly stating that such assignments are not to be considered discriminatory action under the Act.

[47] Employer B disagreed with the Board officer's conclusion that even though the worker had left their employment, the employers were still required to carry on to the final step of the refusal to work process and contact a Board safety officer to resolve the matter. Employer B says that the process under section 3.12 of the Regulation requires both parties to follow the procedures, not just the employer. Because the worker had made his own choice to leave the employ of the employers, he was no longer participating in the process and there was no "refusal to work" requiring the employers' attention. Because the worker was no longer participating in the process even the Board safety officer could not follow the procedures to find a suitable mutually agreed upon control to eliminate tobacco smoke to the worker.

[48] Employer B submits that in any event the matter is moot because even though the worker simply terminated his employment, the hospital continued with its plans to implement control of tobacco smoke exposure so that the hospital would be completely smoke free by April 1, 2008. Employer B says it did not stop that process simply because the worker quit his employment but rather it continued to implement its plans.

[49] Employer B submits there was no retaliation by the employers against the worker as a result of him raising his asthma condition and the risk to his health by exposure to tobacco smoke on the psychiatric ward. Employer B says that instead, it worked with the worker in good faith to put in place an administrative control, that is, reassignment of nursing duties, which would accommodate his impairment under section 4.19 of the Regulation. Employer B says that after a long conversation with the worker, the employers agreed to a change in assignment to a high-level nursing job requiring an ability to respond to a very wide range of medical issues, with pay and benefits being the same as the initial nursing assignment on the psychiatric ward. Employer B says it

was the worker who indicated he was heading home, without any further chance the employers could respond to the issues. Employer B submits that the worker abandoned his job after the employers met their obligations under the Regulation. Employer B says that it did not make any retaliatory actions or display any anti-safety motivation.

[50] Employer A submits that alternate nursing shifts would have involved the worker continuing to perform general nursing duties so there was no "transfer of duties" within the meaning of section 150(2)(c) of the Act. Employer A says that it immediately investigated the worker's report about tobacco smoke on the psychiatric ward but could not "remedy the situation without delay" within the meaning of section 3.12 of the Regulation because it had no authority to force the hospital to stop smoking activities of individuals on hospital premises. Employer A submits that it followed the only course available to it in order to comply with section 3.12(3)(a) of the Regulation which was to immediately negotiate with Employer B to provide the worker with safe work away from patients who smoked at the hospital. Employer A submits that as such, it did begin to remedy the situation without delay. Employer A says the worker acknowledged that the alternate shift assignments were medically appropriate for him but later unilaterally decided to quit the assignment as a matter of personal choice. Employer A submits that it did not constructively dismiss the worker and that the worker has established no threshold case that it did so.

Do sections 3.9 through 3.13 of the Regulation apply in this case or is section 4.19 of the Regulation the relevant provision? Does the worker's complaint meet the first component of a threshold case under section 151 of the Act, that is, did the worker act within section 151(a) through (c)?

[51] I have concluded that section 4.19 of the Regulation is the applicable regulatory provision in this case. The focus in sections 3.9 through 3.13 of the Regulation is not on an individual worker's health or medical condition but rather on work processes, conditions or equipment in the workplace that are in and of themselves harmful or unsafe to operate or carry out. As noted in paragraph 39 of *WCAT-2008-03834* (December 19, 2008):

> At this point it is important to note that the alleged (by the worker and his physician) unsafe conditions at the former work site were not the typical conditions that one often associates with the duties and obligations referred to under sections 115 and 116 of the Act, or sections 3.10 to 3.13 of the Regulation (Refusal of Unsafe work). This was not a situation of faulty machinery or a dangerous work process that, if not remedied, might physically harm workers at the work site. In those more typical types of workers' compensation-related cases, an investigation by the employer, a union, or a Board officer usually quickly points to the solution for rendering the work site safe.

[52] Thus, the language in sections 3.9 through 3.12 of the Regulation refer to a person "observing" unsafe or harmful work conditions (section 3.10) and a refusal to "carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment." (section 3.12). That language does not fit comfortably with the worker's situation vis-à-vis the psychiatric ward. Rather, section 4.19 of the Regulation speaks directly to the worker's situation in that it refers to a worker with a physical impairment which may affect the worker's ability to perform assigned work. In that respect the worker's situation was akin to that of a worker with asthma commencing a job as a salesperson who finds herself assigned to the perfume department or the floral department of a large retail store. Working in perfume or floral departments would not be unsafe or harmful for many persons, but a worker with asthma might well be unable to safely perform work in a context with exposure to strong scents.

[53] I agree with Employer B's submission that in March 2008 the work on the psychiatric ward, even with some patients permitted to smoke in a specific designated room on the premises and with some tobacco smoke smell generally discernible in the general ward area, was not in and of itself the type of unsafe condition that within the meaning of sections 3.9 and 3.10 of the Regulation could be "remedied without delay" or in relation to which "necessary corrective action" could be taken "without delay." As Employer B points out, even in the Board officer's investigation he did not find it appropriate to immediately issue "stop work" or even "stop smoking" orders on the ward. This was not a matter of shutting down a dangerous machine or stopping a particular hazardous work practice. Workers such as nurses were continuing to work on the psychiatric ward without immediate undue hazard to their health although of course it is important to recognize, as did the amendments to the provincial legislation, the long-term potential for negative effects on health. The hospital was aware of the need to bring the psychiatric ward into a "no-smoking" state by April 1, 2008. However, this was a complex matter that required consideration of a variety of factors including the potential that an immediate ban on smoking, or even an immediate order that all smoking be done outdoors, might result in an unacceptable risk of violence to workers by psychiatric patients suddenly faced with a disruption in routine.

[54] I also disagree with the Board officer's finding that if the employers had undertaken all the investigative steps referred to in section 3.12 of the Regulation, they would have reached a satisfactory resolution allowing the worker to work on the psychiatric ward because the hospital would have been able to quickly implement the Board officer's suggestion that psychiatric patients be permitted to smoke outside. The Board officer's consultation record dated March 14, 2008 reports that he discussed with the nurse on shift about the possibility of closing down the designated smoking room. The nurse mentioned the hospital's transitional plan to be totally smoke-free by April 1, 2008, with psychiatric patients to be provided with nicotine replacement and other therapies under physician supervision. The nurse expressed her concern that some patients might react violently if in the interim, patients were not permitted to smoke anywhere.

[55] The Board officer then asked if patients could smoke in an outside recreation area just outside the ward. The nurse noted that the hospital already had a policy that there was no smoking anywhere on the hospital, including hospital grounds, with the exception of the designated smoking room in the psychiatric ward. The Board officer then made the same proposal to the hospital's health services administrators. The file does not indicate that at the Board safety officer's request, the hospital promptly changed its policy regarding outside smoking. To the contrary, the file documentation indicates that the safety officer's request conflicted with established hospital policy, suggesting a complication or hurdle that might take some time to overcome, if it could be overcome at all. Further, the evidence does not indicate that such a change would in any event have satisfied the worker's concerns regarding his asthma and inability to work on the psychiatric ward. Given the apparent proximity of the outside recreation area to the ward and the potential for smoke to seep into the ward (as happened with the designated smoking room), the evidence does not establish, on a balance of probabilities, that the section 3.12 investigative steps would have resulted in a speedy resolution whereby the worker would have been able to work on the psychiatric ward, as initially planned, throughout the month of March 2008.

[56] Section 4.19 of the Regulation directly applies to the worker's situation because it refers to the interface of a worker's particular physical or mental impairment with workplace conditions such that the worker's ability to safely perform assigned work is affected. This was precisely the situation of the worker, with an asthma condition, facing the prospect of daily assigned work on the psychiatric ward where patients were permitted to smoke. He was facing an immediate undue hazard to his health by being present on the ward, which was not a risk experienced by other workers on the ward despite the existence of some exposure to tobacco smoke in that workplace.

[57] It is important to interpret regulatory and statutory provisions so that they make sense and do not put any party in an impossible position. My view is that the lack of a specific process or other established regulatory procedure in section 4.19 of the Regulation is not accidental. See paragraph 106 of *WCAT-2008-03834* which stated as follows:

> I have earlier noted that section 4.19 of the Regulation does not impose the level of immediate intervention, focus on prompt remedial action to cure the problem, and failing success, prompt intervention by a Board officer that is contemplated by sections 3.10 through 3.13 of the Regulation.

[58] From time to time workers may have physical or mental impairments that an employer must make its best efforts to accommodate without the need for Board involvement. In some cases accommodation may require an employer to offer a worker alternate duties that are slightly different than those that interact negatively with the worker's physical or mental impairment. This may be the case simply because there are no other jobs precisely like the one involving duties that negatively interact with the worker's impairment.

[59] Having determined that sections 3.9 through 3.13 of the Regulation do not apply in this case, I find that the worker was not acting under section 3.10 when he reported to Employer A about the presence of tobacco smoke on the psychiatric ward and his inability to perform the assignment on that ward.

[60] However, I find that the worker was acting under section 4.19 of the Regulation when he reported to Employer A about his inability to work on the psychiatric ward with his asthma condition and that report fell within activity protected by both sections 151(a) and 151(c) of the Act. Therefore, I find that the worker's case meets the first component of a threshold case under section 151.

Did the employers constructively dismiss the worker?

[61] Given my determination that section 3.9 through 3.12 of the Regulation do not apply in this case, I find that the employers were not required to carry out all the investigative steps referred to in section 3.12. I also find that the employers did not constructively terminate the worker's employment. The Board officer relied on *WCAT-2004-00641* (February 5, 2004) for the proposition that as in that case, the worker in this case was legally justified in staying away from his employment, because of a "take it or leave it" attitude by the employers. I find that there are significant differences between the situation of the worker in *WCAT-2004-00641* and the worker's situation in this case. In *WCAT-2004-00641* the worker refused to return to work because he had reasonable grounds for concern that his safety would be at risk if he did so. In that case, there was no issue of a physical or mental impairment of the worker making it unsafe for him to perform assigned work. Instead, there was an objective risk of violence in the workplace from a co-worker which the employer had not taken satisfactory steps to remedy. In that case the worker's inability to return to the employer's worksite amounted to a constructive termination of his employment.

[62] By contrast, the evidence in this case is that both employers and the worker had initially agreed to a safe alternative work assignment for the worker. I find that in good faith the employers took the worker's asthma condition seriously and made their best efforts to find an immediate solution to accommodate his medical condition. The worker had agreed that the alternate work was medically suitable for him and expressed his interest in working the new assignment. Thus, there was no longer any issue of the worker's asthma condition making it unsafe for him to work under the new assignment. Further, I find the evidence does not support a finding that the worker was coerced or pressured into accepting the new assignment; rather, the evidence illustrates an agreement arrived at by congenial discussion between the parties.

[63] The evidence is that the alternate duties also required the worker's general nursing skills in a challenging environment and that he would suffer no loss of compensation. I note that under the wording of Article 3 of the worker's employment agreement with Employer A, assignments were to be based on the worker's specific skills and "Client facility staffing needs." While in making assignments Employer A was required to

consider and facilitate the worker's preference with regard to client assignment length and location, the employment agreement did not require it to always fulfill the worker's preferences. I find that the worker and the employers, in reaching their initial agreement for an alternate assignment, had worked out a reasonable solution to accommodate the worker's physical impairment of an asthma condition.

[64] The evidence is that it was the worker, not the employers, who made the decision to end the employment relationship. In the second telephone conversation with Employer A on March 3, 2008, the worker was the one who initiated the telephone conversation to advise that he had decided to decline the alternate shifts because he was unhappy about Employer B having raised a privacy concern that questioned the worker's professionalism. Although he also mentioned that he had wanted psychiatric nursing experience, he made it clear he did not want to work for Employer B who had questioned his professional integrity.

[65] The worker did reiterate his preference for working in a psychiatric context. Under the employment agreement the worker was entitled to express his preferences and Employer A was required to take them into consideration and make its best efforts to facilitate an assignment that met such preferences. But under the employment agreement the worker was not entitled to insist that his preferences be fulfilled. Employer A did try to find other psychiatric nursing assignments for the worker in another city but was unsuccessful. I am satisfied that Employer A made its best efforts in the circumstances to accommodate both the worker's asthma condition and his preferences for working in a psychiatric context. It was the worker who put a strict deadline of less than 24 hours on Employer A's efforts to find an alternate nursing assignment for him in a psychiatric context, and advised that if his deadline was not met, he would be looking elsewhere for employment. I find that Employer A's lack of success in meeting the worker's strict deadline does not equate to a constructive termination of the worker's employment. It underscores the point that the worker had made a decision to leave Employer B and was planning to leave Employer A if it could not meet his preferred type of assignment by noon the next day.

[66] In the March 3, 2008 telephone conversation the worker advised Employer A that he had made the decision to leave Employer B. He did not want to work for Employer B because of the privacy concern that had been raised and he so advised Employer A. I find that at that point the worker had communicated his choice to unilaterally terminate his employment relationship with Employer B. The rest of the conversation with Employer A, discussing the possibility of alternate psychiatric work, was in the context of another employer, not Employer B. I find that it was made clear to Employer A by the worker that he was burning his bridges with Employer B; he was not seeking another resolution so that he could work, as initially agreed, on the Employer B's hospital psychiatric ward.

Did the employers otherwise commit a "discriminatory action" under section 150 of the Act? Does the worker's complaint meet the second component of a threshold case under section 151?

[67] Although Employer A submits that the proposal for the alternate nursing assignment at the hospital did not constitute a "transfer of duties" under section 150(2)(c) of the Act because general nursing skills were required in both assignments' duties, it was certainly a change of workplace location because the assignment location was changed from the hospital psychiatric ward. Therefore, I find that in that sense, the employers' offer of a change of workplace location did constitute a "discriminatory action" within section 150(2)(c). Thus, the worker's complaint meets the second criterion for a threshold case under section 151. Although to some persons the phrase "discriminatory action" may have a nefarious connotation, under section 150 it has a technical meaning referring to the types of employment-related actions that may affect workers. In and of themselves, "discriminatory actions" such as change of work duties, lay-offs, etc. are not illegal; rather, it is the motivation behind such actions which is important to analyze to determine whether the discriminatory actions are prohibited in any given case.

Does the worker's complaint meet the third component of a threshold case under section 151 of the Act, that is, were the employers motivated in any part to retaliate against the worker under section 150 because he acted under section 151?

[68] Even although I have found that the worker acted under section 151(a) and (c) of the Act and that the employers committed a discriminatory action under section 150(2)(c) in transferring his assignment location, I find that in this case the third element of a threshold case has not been met. I disagree with the Board officer's finding that the worker had established more than a mere temporal connection between the worker's conduct in refusing to work on the psychiatric ward and the employers' subsequent "discriminatory action" (which I have found to be the subsequent offer by the employers of an alternate nursing assignment).

[69] I disagree with the view that because the offer of an alternative assignment was directly related to the worker's refusal to work on the psychiatric ward, the necessary illegal motivation under section 151 of the Act is thereby established. WCAT jurisprudence is clear that there must be a special type of causal relationship between a worker's action protected under section 151(a) through (c), and an employer's action that falls within the definition of "discriminatory action" in section 150. As stated in part of paragraphs 87 and 88 of *WCAT-2008-03834*:

> [87] The discriminatory action provisions of the Act require more than a temporal connection between a worker's conduct in subsections (a), (b), and/or (c) of section 151, and discriminatory action as described in section 150 of the Act. The Act also requires a special type of causal connection between a worker's conduct as described in subsections (a), (b), or (c) of section 151 and between discriminatory action as described

> in section 150 of the Act. *The specific type of causal action reflects the purpose of Part 3 of the Act to ensure health and safety in the workplace. The causal connection must be between a discriminatory action committed with the intent, in any part, of retaliating against a worker for raising an occupational health and safety issue or otherwise exercising his or her rights as specified in subsections (a), (b), and/or (c) of section 151.* There are numerous former Appeal Division cases reported on the Board website www.worksafebc.com, as well as WCAT cases reported on the WCAT external website www.wcat.bc.ca, which refer to this requirement…
>
> [88] This is where the worker's case fails. He persists in his arguments that the employer, because it responded to his safety issue with his former workplace by negotiating a work site location transfer with the union, is thereby guilty of a violation of section 151 of the Act. *I have found that the employer's intent was not in any way tainted by a desire to retaliate against the worker for raising the safety concern or by refusing to return to work at his former Vancouver work site or for any other reason prohibited by section 151. The employer was responsive to its understanding that the worker had indicated that a location transfer would resolve his concerns about his former work site being psychologically unsafe for him. The employer's responsiveness on this point, while "caused" by the worker raising the safety concern regarding his former work site and then further motivated by the worker's suggestion of a workplace transfer, was not motivated by any intent, to any degree, to retaliate against or otherwise punish the worker for exercising his rights as described in section 151 of the Act.* Therefore I confirm the case officer's decision that the worker's section 151 complaint against the worker fails.
>
> [italic emphasis added]

[70] Even if I were to assume that the worker had raised a *prima facie* case on both elements of the basic threshold test for succeeding in a discriminatory action complaint, I would find that in this case the employers have satisfied the reverse onus burden in section 152(3) of the Act. That is, I find on a balance of probabilities the employers have proved that in no part were their actions motivated by any intent to retaliate against the worker because he reported the presence of tobacco smoke on the psychiatric ward and refused to work there due to his asthma condition.

[71] I agree with the employers' submissions that they both worked in good faith with the worker to accommodate his concern about tobacco smoke on the psychiatric ward making it impossible for him, with his asthma condition, to work there. I find that the employers did not propose the alternate nursing assignment as a means in any part of retaliating against the worker for having raised his concerns about tobacco smoke at the workplace, or to otherwise punish him for exercising his rights as described in section 151 of the Act. They were acting in a positive way to the worker's concerns, not

in a negative response of retaliation against him. Therefore, the worker's complaint fails because the final criterion under section 151, the critical factor of illegal motivation, is lacking on the part of both employers. Accordingly, the employers' offer of an alternate nursing assignment, although technically within the definition of a "discriminatory act" under section 150, did not violate section 151.

Conclusion

[72] For the foregoing reasons, I allow the employers' appeals of the Board's March 15, 2010 decision and vary that decision to find that the employers did not violate section 151 of the Act. In these appeals I have found that:

- section 4.19 of the Regulation is the relevant regulatory provision, not sections 3.9 through 3.13;

- the worker did act within section 151(a) and (c) of the Act in raising his concerns to the employers about the existence of tobacco smoke in the hospital psychiatric ward and his inability to work there due to his asthma;

- the employers did not constructively terminate the worker's employment. The worker chose to leave their employment for his own personal reasons related to his irritation with Employer B having criticized his professionalism;

- in offering the worker an alternate nursing assignment to accommodate his asthma, the employers did commit an act which falls within the technical definition of a "discriminatory act" under section 150(2)(c) of the Act; and

- the necessary illegal motivation of retaliation against the worker because he raised his safety concerns is lacking in this case on the part of both employers. In no degree were the employers motivated to offer him the alternate nursing assignment to punish or otherwise retaliate against him for raising his concerns about tobacco smoke on the psychiatric ward and his inability to work there due to his asthma. Thus, the employers did not commit an illegal discriminatory action against the worker in this case.

[73] There was no request for reimbursement of appeal expenses, none are apparent from the file, and accordingly I make no order in that regard.

Heather McDonald
Vice Chair

HMcD/hb