Noteworthy Decision Summary

Decision: WCAT-2004-00641 **Panel**: Heather McDonald **Decision Date:** February 5, 2004

Discriminatory action complaint - The employer failed to fully and fairly investigate the assault and threats against the worker as required by the Act and Regulation - In the absence of an impartial, objective investigation by the employer done in accordance with the Act and Regulation, the worker had reason to be concerned that his safety was at risk from the other worker if he returned to the workplace, and hence his refusal to return to work amounted to a constructive dismissal – Worker raised a prima facie case under section 151(a) that his job loss was due to the exercise of a right under Regulation 3.12 to refuse to participate in unsafe work – Worker was entitled to wage loss and interest

The worker and another welder, X, became involved in a heated argument in the welding shop, which began when X told the worker to get back to work. Bickering ensued, and finally the worker said to x "Kiss my a –". X became enraged at the taunt, and according to the worker poked him in the chest repeatedly, threatening to pound his face in. The worker reported the incident to his employer. Although the employer undertook an informal investigation, the investigation was inadequate because it did not comply with the Act and Regulation, which compels an employer to take steps consistent with an objective, impartial inquiry. The worker did not return to work. When he asked the employer to discipline X, the employer refused and told the worker to show up for work or he was considered to have taken a lay-off. The issue was whether the employer discriminated against the worker in contravention of section 151.

A legal finding of whether there was job abandonment or job dismissal depends on whether or not the worker was legally justified in staying away from his employment, which, in the panel's view, would change the character of job loss into a constructive dismissal situation. If the employer had conducted a proper incident investigation, even if its conclusions were essentially the same and it made no finding of blame against X, it is unlikely that the worker would have had a justifiable reason to refuse to return to work. It would be difficult to characterize such a refusal as a reasonable concern for his safety, if there had been an objective inquiry conducted in accordance with the Act and Regulation, with identification of the what led up to the argument, with recommendations of corrective action to prevent a future incident, and with a copy of the report forwarded to the Board. In the absence of an adequate incident investigation conducted, the worker was left with the impression that he would return to work in a vulnerable position, with X and the worker's direct supervisor as friends. The worker's refusal to return to work amounted to a constructive termination of his employment. The panel was satisfied that the worker raised a prima facie case under section 151(a) of the Act that his job loss was due to the exercise of a right under the Regulation, namely, the right under section 3.12 of the Regulation to refuse to participate in unsafe work. In the absence of an impartial, objective investigation by the employer done in accordance with the Act and Regulation, the worker had reason to be concerned that his safety was at risk from X if he returned to the welding shop. By way of remedy for the violation of section 151, the panel ordered the employer to pay the worker 3 months wages plus interest.

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WCAT Decision Number: WCAT-2004-00641
WCAT Decision Date: **February 05, 2004**
Panel: Heather McDonald, Vice Chair

Introduction

The appellant is a construction company (hereinafter referred to as the employer) that is appealing a March 11, 2003 decision of a case officer in the Compliance Section, Investigations Department, Prevention Division, Workers' Compensation Board (Board). In that decision, the case officer found that the employer had violated section 151 of the *Workers Compensation Act* (Act). Section 151 prohibits discrimination against workers for reasons such as exercising a right or carrying out any duty under Part 3 of the Act, or under the *Occupational Health and Safety Regulation* (Regulation), or because they provided information regarding health and safety matters. In this case, the respondent (hereinafter referred to as the worker) alleged that the employer had terminated his employment (laid him off) because he had provided information that a co-worker had made threats to injure him.

The case officer did not convene an oral hearing. Instead, the proceedings involved the Board requesting the parties for written submissions. The employer did not participate in the proceedings before the case officer. In the March 11, 2003 decision, the case officer found that the employer had not shifted its burden under section 152(3) of the Act to prove that no part of its rationale for dismissing the worker was due to any of the reasons described in section 151 of the Act. Therefore, the case officer found that the employer had violated section 151 of the Act in engaging in unlawful discriminatory action against the worker by laying him off.

The employer subsequently appealed the case officer's March 11, 2003 decision to the Workers' Compensation Appeal Tribunal (WCAT), and requested a stay of that decision, pending its appeal on the merits. On May 28, 2003, I granted the employer's request for a stay. One of the factors that justified granting the stay was that the employer had not received, in timely fashion, notice of the proceedings before the Board case officer. That explained its failure to provide written submissions and participate in those proceedings. Thus the case officer did not have the benefit of all of the evidence in reaching her March 11, 2003 decision.

Issue(s)

Did the employer discriminate against the worker in contravention of section 151 of the Act by terminating his employment because he provided information regarding a safety matter on the worksite, namely, information that a co-worker had threatened him with physical injury? Did the employer otherwise contravene section 151 of the Act? If so, what is the appropriate remedy?

Procedural Matters and Jurisdiction

The employer requested an oral hearing on the merits of its appeal. Given the disputes of fact and issues of credibility, I decided to convene an oral hearing. The oral hearing was held on Thursday, January 22, 2004 in Victoria, B.C.

Legal counsel represented the employer regarding its stay application and by providing written submissions on the merits of the appeal. However, legal counsel did not represent the employer at the oral hearing. The employer's office supervisor on the project represented the employer at the oral hearing. The office supervisor also testified at the hearing as a witness on the employer's behalf.

Legal counsel represented the worker at the oral hearing.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make a decision on the merits and justice of the case, but in so doing, it must apply a policy of the Board's governing body that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it. WCAT has jurisdiction to consider the record in the proceedings before the Board's case officer, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus this is an appeal by way of a rehearing.

Relevant Statutory and Regulatory Background

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 to
>
> (i) another 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.

Section 150 of the Act 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.

(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.

Section 116 of the Act refers to the general duties of workers. Among other things, a worker must not engage in horseplay or similar conduct that may endanger the worker or any other person, and a worker has a duty to report to the employer any contravention of Part 3 of the Act, the Regulation or any applicable order of which the worker is aware.

The "Workplace Conduct" provisions of the Regulation state as follows:

4.24 Definitions

In sections 4.25 and 4.26

"*improper activity or behaviour"* includes

(a) the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any

threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury, and

(b) horseplay, practical jokes, unnecessary running or jumping or similar conduct.

Note: Worker means a worker as defined in the *Workers Compensation Act*, and includes a supervisor or other representative of the employer (see Part 3, Division 1, section 106).

4.25 Prohibition

A person must not engage in any improper activity or behaviour at a workplace that might create or constitute a hazard to themselves or to any other person.

4.26 Investigation

Improper activity or behaviour must be reported and investigated as required by Part 3 (Rights and Responsibilities).

[reproduced as written]

Sections 4.27 – 4.31 of the Regulation is entitled "Violence in the Workplace," and this Part of the Regulation requires employers to perform risk assessments of violence in the workplace, and requires employers to report incidents of violence in the workplace. I am satisfied that the "Violence in the Workplace" aspect of the Regulation does not apply to the case at hand, because the definition of "violence" in the Regulation refers to violent conduct (including threats) by a person other than a worker in the workplace. Thus the regulatory provisions in section 4.27 through section 4.31 of the Regulation do not apply to assaults or threats made by one worker to another in the workplace. The "Workplace Conduct" provisions of the Regulation are intended to apply to the situation of improper behaviour by a worker in the workplace, including threatening behaviour directed at a co-worker.

Division 5 of Part 3 of the Act, entitled "Right to Refuse Unsafe Work", (unproclaimed sections of the Act – sections 141 through to 149) was not in force at times relevant to this case, and is still not in force. This unproclaimed Division of the Act refers to a worker's right to refuse to carry out work if the worker has reasonable grounds for believing that the work is unsafe. The definition of unsafe work is where the work activities, the conditions of the work, or the conditions that would result if the work were performed, are such that there is a significant risk of serious injury or death to the worker or another person. The right to refuse work provisions include a process for investigation by the employer, and reports to the Board and investigations by the Board, as well as a process for resolution of disputes about whether or not work is unsafe.

Part 3 of the Regulation, "Rights and Responsibilities," requires in section 3.3 that an employer have an occupational health and safety program that includes provisions for the prompt investigation of incidents to determine the action necessary to prevent their recurrence. Section 3.4 of the Regulation states that an employer must prepare an incident investigation report as required by Division 10 of Part 3 of the Act, and such a report must contain information relating to the place, date and time of the incident, names of witnesses, a brief description of the incident, and other requirements specified in section 3.4. Turning to Division 10 of Part 3 of the Act, section 173 of the Act requires that an employer investigate any accident or incident that is required to be reported to the Board under section 172 (generally refers to serious accidents involving serious injury or death or the real potential for same), that resulted in injury to a worker, had the potential to cause serious injury to a worker, or was otherwise an incident required by Regulation to be investigated. Sections 174 and 175 of the Act give criteria for how employers should conduct investigations and prepare investigation reports for investigations required under the Act.

Section 3.12 of the Regulation, entitled "Refusal of Unsafe Work," states in part as follows:

> (1) A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance 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.
>
> (2) A worker who refuses to carry out a work process or operate a tool, appliance or equipment pursuant to Subsection (1) must immediately report the circumstances of the unsafe condition to his or her supervisor or employer.
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> (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
>
> (b) if in his or her opinion, the report is not valid, must so inform the person who made the report,
>
> (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
> (a) worker member of the joint committee,
>
> (b) a worker who is selected by a trade union representing the worker, or

(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.

(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.

Background and Evidence

I have reviewed all the evidence (including the documentary evidence on file) and have considered the parties' submissions, but will not relate every detail of evidence in this decision. Rather, I will focus on the central issues and provide my findings on the facts that relate to those issues. Three witnesses testified at the oral hearing: the worker, the employer's equipment supervisor on the dock project ("R") and the employer's office supervisor on the dock project ("P"). My assessment of all three witnesses is that they did their best to tell the truth at the oral hearing. However, over a year has passed since the events in question and understandably, there were some conflicts in their testimony and as well, gaps in memory. Where there was a dispute or difference in the testimonial evidence, I have applied the *Faryna v. Chorney* [1952] 2 D.L.R. 354 test, 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."

The employer is a construction company. In the late spring of 2002, it began a project building a dock on military land. On July 12, 2002, the worker commenced employment on the project as a welder, with the general expectation (albeit not a firm commitment) that there would be work for him on the project until sometime toward the end of the year. The worker's supervisor was "Y", the supervisor of the welding shop on the dock project.

On July 31, 2002, the worker and another welder ("X") became involved in a heated argument at the welding shop. At the time the incident began, the welding shop supervisor Y was not in the area. The incident began when X observed the worker in a conversation with another colleague, "J", and, perceiving that the worker was slacking off, told him to get back to work. The worker took offence to this and challenged X's authority to tell him what to do. There was further bickering between the two workers, with X swearing at the worker and accusing him of being lazy, and the worker accusing X of interfering where he had no authority to do so. Finally the worker (according to the written statement he subsequently provided to the military police) spoke to X in a rude and taunting vernacular: "Kiss my a--".

There is some conflict in the evidence regarding what next transpired. The only two employer witnesses who testified at the oral hearing were not present during the most heated segment of the argument. There was "will-say" evidence tendered in documentary form before the oral hearing from X and Y, but they did not appear at the oral hearing to testify. Further, Y was not present during the argument when it was at its height. Thus, with respect to what transpired during the argument, I have placed little weight on the will-say evidence of X and Y since, ultimately, it was never said under oath or affirmation, and was not tested under cross-examination. In that regard, I have placed more weight on the written statement that the worker provided to the military police who investigated the incident on the same day it occurred.

I find credible the worker's evidence in that written statement that X became enraged by the worker's taunt, and that the argument suddenly took a turn for the worse. X (who according to the worker's written statement had been heading back to his work station before the worker's taunt) spun on his heel, stormed over to the worker, and began poking the worker in the chest repeatedly, threatening to pound his face in, yelling and swearing at him. The worker did not reciprocate, but asked X not to touch him. Eventually X stopped the threats and the finger-poking and went back to his work station. On reflection, the worker decided that he would report the incident to the office supervisor, P.

In the meantime, the employer's equipment supervisor R drove up to the welding shop on an errand and found the worker visibly upset. The worker began to tell his side of the story and X also started to give his version. R decided to take the worker away from the welding shop area. They drove away in R's truck to find P, the office supervisor. P was not on site. R and the worker drove back to the welding shop and by that time, Y, the welding shop supervisor, was in the shop. X began to yell again at the worker. The welding shop supervisor ignored the situation and walked away. R decided to take the worker away from the site to a coffee shop, to help the situation cool down and to figure out how to resolve the conflict.

The testimony of R and the worker were largely consistent about their conversations and their dealings with each other. At the coffee shop, R listened to the worker's side of the story. The worker wanted X to be fired for his behaviour and he told R that he wanted to make a police report about the incident. R suggested that the worker not file a police report, as the employer preferred to deal with such matters itself. R told the worker that X had more seniority than the worker, and that X was a friend of Y, the welding shop supervisor. R suggested that the worker's options were to accept the situation as it existed and to go back to work in the welding shop, or to take a layoff. (At the oral hearing, R testified that sometimes people argue on the worksite, and that he himself has had his differences with Y; however, ultimately, everyone has to get along together on the job.) The worker then asked R if he could be moved to work elsewhere on the site. Unfortunately, there was no suitable work available elsewhere for him. R suggested that the worker wait until the next morning to see how the situation would resolve, and he also suggested that the worker return to work that afternoon to see if he

and X could get along. R further told the worker that R needed to discuss the situation with P, the employer's office supervisor.

R and the worker then returned to the welding shop. R was going to discuss the situation with Y. It is clear from the testimony of both R and the worker that Y became irate with R (probably due to a perception that R had interfered in Y's "turf" by taking the worker off-site) and refused to discuss anything with R. R made a quick exit. Y then yelled at the worker, told him to stop whining and get back to work. The worker responded that he did not feel safe to do so. Y responded impatiently in words to the effect that if the worker did not return to work, if he wanted to leave, then fine, he should leave. The worker left the worksite and made his way to the military police to file a complaint that X had physically assaulted him and verbally threatened him with violence.

R testified that later in the morning he located P, the office supervisor, and told him about the conflict between the worker and X. In his will-say document dated August 7, 2003, R indicated that he told P that there was a problem between the worker and X, and the employer "might have to lay someone off or let someone go." At the oral hearing, R testified that he left the matter to P to investigate. R testified that his perception at that point in time was that the worker had the option of returning to work or take a layoff.

P testified that after speaking with R, he went down to the welding shop to investigate the matter. From the evidence at the oral hearing, I am satisfied that R was also present and participated in the investigation. X admitted to P and R that there had been a heated argument, but denied making any physical contact with the worker or using violent language or making threats. The colleague who was a witness to the incident, J, corroborated X's version of events by indicating that while there had been an argument between X and the worker, X had made no physical contact with the worker and had made no threats of physical violence. Neither P nor R made a written report about their questioning of X and J and the responses made by X and J. P testified that he did not think it was a requirement for the employer to do so.

Sometime later that afternoon, the military police arrived on the dock project. The police were investigating the worker's complaint about X. The military police report indicates that they interviewed J, P, R, but not X. J's statement was that he was standing approximately an arm's length away from X and the worker, and that he did not witness any physical contact between them, and that he did not hear any threats being made by either of them. P and R had not witnessed the incident.

The military police concluded that there was insufficient evidence to justify laying criminal charges against X. The police told P their conclusion. P testified that his assessment was that there was no risk of injury to the worker from X in returning to work in the welding shop. There had been no previous trouble involving X, and P believed that if the worker took a day or so off from work, the matter would resolve. P's

understanding of the situation was that R had earlier suggested to the worker that if he wished to do so, he could take a day or so off work. P testified that as of the end of the day on July 31, 2002, he believed that the worker's job was open to him and that there would be no safety risk to his returning to work.

The next day, August 1, 2002, the worker telephoned P and wanted to know what was happening about the situation between X and the worker. At that time, P expressed his displeasure to the worker about the worker taking the matter to the military police to resolve, as the employer would have preferred dealing with the matter without police involvement. P's recollection was vague about precisely how the matter was left with the worker at the end of the conversation. He recalled that generally, he gave the worker the message that he had a choice: he could return to work in the welding shop, or "take a layoff" if he did not want to return to work. P testified that he was not sure what the worker was going to do.

P testified that the worker telephoned him again within a day or two, and he gave the worker the same options. P adamantly denied that he decisively laid off the worker on or about August 2, 2002. P was also firm in his testimony that he did not telephone the worker on or after July 31, 2002, but that the worker had been the one to contact him.

P testified that the worker's direct supervisor was Y, and that P took his instructions from Y regarding matters such as layoffs in the welding shop. Y had told P words to the effect that "either he comes back to work, or he can lay off." P testified that he did not see or hear from the worker again until near the end of August, when the worker telephoned to request a record of employment. At that time, P believed that the worker had chosen to take a layoff. That is when the employer issued a written record indicating that the worker had been laid off. In response to my questions, P responded that after a week or so went by and the worker had not returned to work, he assumed that the worker would not be returning. However, if the worker had telephoned and asked to return in the middle of August, for example, the employer would have allowed him to return to work.

The worker testified that he telephoned P on July 31, 2002, the day of the incident in question, and P was upset about the military police requiring statements. The worker testified that P made it clear to him that the worker "wouldn't be looked at favourably if" he came back to the project site to work. The worker testified that he was trying to decide how to deal with the situation, but P telephoned him on August 2, 2002 to advise him that Y, the welding shop supervisor, had laid him off.

The "will say" document of Y states that after the worker left the job site on July 31, 2002, Y never saw him again and eventually Y told R to issue a lay-off notice for the worker.

On or about August 6, 2002, the worker contacted a Board prevention officer to complain about the safety issue arising from X's assault and threats to the worker. The

prevention officer decided that it was a police matter and not a health and safety matter within the Board's jurisidiction.

On August 14, 2002, the worker wrote to the employer's Ontario office. The letter stated in part as follows:

> I have been advised to write a letter concerning a breach of contract between [the employer] and [the worker's name].
>
> This breach of contract is in regards to the unjust lay-off given to me after lodging a complaint concerning a fellow employee's inappropriate behaviour towards me on July 31, 2002.
>
> This lay-off is unacceptable and damaging. I fully expected to work until the job ended in Dec. 2002. I would be most willing to resume work and accept some type of compensation for time missed. In the mean time I will continue to look for replacement work to offset wage loss.
>
> I hope we can come to a speedy resolution to this problem.

The evidence is that the worker contacted the employer near the end of August 2002 and requested a record of employment. The employer issued him a record of employment indicating the worker had been laid off.

At the oral hearing, the worker testified that X's behaviour on July 31, 2002 concerned him because he felt it would be dangerous for him to work at the welding shop with him. The worker had been afraid that X was going to hit him during the argument, although ultimately that did not happen. There was a variety of equipment in use at the welding shop that could be used improperly to harm someone. The worker was concerned that X might "accidentally on purpose" cause an accident to injure the worker. The worker felt vulnerable in the situation because Y, the welding shop supervisor, was a friend of X's. The worker felt there would be no support from Y if X again behaved badly towards the worker. No action had been taken by the employer to reprimand X for his behaviour. In those circumstances, the worker perceived that returning to work in the welding shop with X posed a risk to his safety.

I have found that in testifying at the oral hearing, both the worker and P made their best efforts to give honest recollections of the events in question. The differences in their versions of the story I attribute to their differing perceptions at the time of the events, and to fading memories superimposed on those differing perceptions. It has been my task to make findings by determining what likely occurred. I have done so by assessing witness testimony against the evidence as a whole. This has helped to determine the sequence of events, motivations and intentions that are logically consistent with the weight of the evidence and the preponderance of probabilities that one would recognize as reasonable and likely to have happened.

With that in mind, I have found that during telephone conversations with the worker on or after July 31, 2002, P did not tell the worker that things would be difficult for him if he returned to the project site, or otherwise express to the worker that the employer would not treat him favourably if he came back to work. The worker may have gained that impression from the advice that R had earlier given him that the employer preferred not to have police involvement when co-workers fought on the site, and from P now telling the worker that he was not pleased about the military police showing up on site to take statements on July 31, 2002. In his oral testimony at the oral hearing, P candidly admitted that he had told the worker he had been unhappy about the military police showing up on the work site. P did not attempt to deny or downplay his irritation in that regard. However, reviewing the evidence as a whole, I find that the employer's attitude was not to discourage the worker from returning to the project, but rather one of encouraging him to forget about the argument, try to get along with X, and return to work.

From the employer's point of view, the argument between X and the worker was relatively minor in the context of workplace disputes between co-workers on construction sites. R testified that heated arguments do take place on the site, and the employer's expectation is that workers will strive to resolve their differences themselves. An employer's goal is to achieve an efficient and productive workplace, and obviously arguments that escalate into outright fights disrupt that goal. It was clear that X had not actually hit the worker in the sense of physical contact that might reasonably cause even minor injury. The military police report summary describes the event as a "minor altercation" between X and the worker. The employer was faced with a situation where the only witness to the incident, J, corroborated X's version of events. Thus two out of the three persons who were actually there when the argument was at its peak, gave evidence to both the military police and to the employer's representatives R and P that X did not threaten the worker or make physical contact with the worker. Further, X had been employed for several months on the project without incident and the employer's perception was that he got along well with co-workers. Thus the employer concluded there was no threat to the worker's safety from X, and that it was safe for the worker to return to work at the welding shop. At the oral hearing, the employer's representatives testified that X continued to work throughout 2002 and into 2003 on the project, with no problems in relationships with co-workers. Thus the employer's position is that on July 31, 2002, it was correct in its assessment that X posed no danger to the worker or anyone else at the project site.

At the oral hearing, the worker suggested that J may not have been an objective witness because he would have felt compelled to support X, as J knew that he would be working with X and for Y in the welding shop where X and Y were friends. Thus there was a power alliance between X and Y, and J would not have been in a good position if he had spoken truthfully to the military police and to the employer's representatives. This may have been the case. However, there was no objective evidence to support that speculation, apart from the fact that X and Y were friends. There may also have

been other reasons for J's position. For example, J may have perceived X's threats as not made with any literal intention (just as, doubtless, the worker's taunting invitation to X to "Kiss my a--" was not intended to be taken literally). J may not have perceived finger-jabbing at the worker's chest as "physical contact" in the sense that the term might be normally used in the context of an argument between co-workers at a construction site. Strictly speaking, J may have believed that he was telling the truth to the military police and the employer's representatives when he corroborated X's version of events.

In any event, my assessment of the evidence is that while the worker was angry and shaken by X's behaviour, and wanted the employer to take action against X, the employer's attitude was that the July 31, 2002 argument was an unfortunate but minor incident between co-workers that should best be put behind them. P, R and Y simply wanted everyone to go back to work and get the job done, and to avoid any similar dispute in the future. Thus while I find that P was certainly not pleased that the worker had approached the military police, P wanted the dispute between X and the worker to be at an end, whether by way of the worker returning to the welding shop and settling back into the job, or by the worker simply deciding to leave the job. I do not find it likely that P told the worker things would be difficult for him if he returned to the project site. The evidence leads me to conclude that P simply wanted peace on the site, not continued tension. The most expeditious way of getting the welding work completed was to have the worker return, and for X and the worker to resume a civil working relationship.

I have also determined that during the telephone conversations between P and the worker shortly after he left the project site, the worker indicated that he wanted the employer to reprimand or otherwise discipline X so that the worker would feel supported and safe to return to work in the welding shop. P's understanding from R after the worker left the site on July 31, 2002 was that the worker might be taking the rest of the day off to cool down, and perhaps the next day as well. I am satisfied that on or about August 1, 2002, when the worker had failed to show up for work, that Y had instructed P that the worker was either to return to work, or be given a layoff. When the worker telephoned P on August 1, 2002 to inquire about what the employer was going to do about X, P's response was that the employer would not be taking any disciplinary action against X. P told the worker that he could either return to work or be laid off, it was his choice. During a subsequent telephone conversation between the worker and P on or about August 2, 2002, (I do not find it significant as to who initiated the call), when the worker had still failed to show up for work, I find that P told the worker that Y's instructions were that the worker either showed up for work, or he was considered to have taken a lay-off. Thus the worker's perception (because he did not intend on returning to the job unless the employer disciplined X) was that P was telling him Y had laid him off the job. And P's perception (because in his view the job was still open to the worker) was that when the worker failed to show up for work within a week or so, the worker had decided never to return.

Legal counsel for the employer, in written submissions preceding the oral hearing, submitted that after its investigation of the July 31, 2002 incident, the employer had verbally reprimanded both the worker and X for their roles in the dispute. At the oral hearing, however, there was a lack of evidence to support that submission. Instead, the evidence supports a finding that the employer viewed the situation as one of "stale-mate", with no discipline to be taken against either X or the worker. However, the employer's expectation was that both X and the worker would return to work without further altercation. X went back to work. The worker did not.

The employer's position is that it did not contravene section 151 of the Act. The employer submits that it did not terminate the worker's employment, but rather, the worker abandoned his job. In this regard, the employer relies on *Axelroad v. Beth Jacob of Kitchener* [1944] 1 D.L.R. 255 (Ont. CA) for the proposition that an employer has grounds to dismiss an employee where an employee repudiates his employment by refusing to continue working in a particular manner and with a particular co-worker. The employer also relied on *McIntyre v. Atlantic Hardchrome Ltd.* (1991) 102 N.S.R. (2d) 1 (N.S. S. C). The employer submits that it conducted a reasonable investigation of the workplace incident and concluded that there were no reasonable grounds to find that the worker's safety was in jeopardy from X if he returned to work. In the alternative, the employer submits that the worker suffered no damages because the welding job was nearing an end in any event, and the worker was under an obligation to mitigate his damages.

The worker's position is that the employer did not conduct an adequate investigation of the incident, and that it did not do so because of the power alliance between X and Y. The worker submits that the employer terminated his employment on or about August 2, 2002 as Y gave instructions for a layoff. Further, the worker's position is that the employer offered him a Hobson's choice, that is, no real choice at all, in suggesting that he could return to work at the welding shop with X or decide not to return. The worker's position is that it was not safe for him to return to work with X, and that therefore the employer's offer was tantamount to a layoff.

The worker provided evidence that it was difficult for him to find steady employment as a welder in August and in the autumn of 2002. He requests that WCAT order the employer to reimburse him for lost wages through to the end of December 2002 (less the amounts he earned elsewhere during that period), or at least to the end of October 2002.

Analysis and Reasons

Was there discriminatory action?

A threshold test in establishing a *prima* facie case under section 151 against an employer is whether or not the employer took action that comes within the meaning of discriminatory action in section 150. In this case, the worker ended up without a job, but

the facts of how that happened are more difficult to assess than the typical case. The legal finding of whether the facts in this case constituted job abandonment or job dismissal depends on whether or not the worker was legally justified in staying away from his employment, which in my view would change the character of the job loss into a constructive dismissal situation. Thus I turn to assess the reasons for the worker's refusal to return to work as well as the adequacy of the employer's investigation of the July 31, 2002 incident.

The reasons for the worker's refusal to return to work

My assessment of the evidence is that the worker refused to return to the project site because he was not satisfied with the conclusions of the employer's investigation and he was not sure that it was reasonably safe for him to return to work with X. He would have to return to the welding shop where X and Y, the supervisor, were friends. Although X did not injure him during the July 31, 2002 argument, X had been enraged by their disagreement and the worker's taunt. X had threatened the worker with physical violence, and the worker took the threats seriously. The "stale-mate" or "draw" way in which the employer had left the incident made the worker uncomfortable that there was leeway for X to subsequently retaliate against the worker in a sly way, with a supposed "accident" that Y, as supervisor, might complicitly sanction.

The adequacy of the employer's investigation

When the worker complained to R about X's conduct on July 31, 2002, he was complaining about conduct that fell within the definition of "improper activity or behaviour" in section 4.24 of the Regulation. That definition includes a threatening statement which gives the worker reasonable cause to believe he or she is at risk of injury. The worker's complaint was of that character, and thus section 4.26 of the Regulation came into play. Section 4.26 requires an employer to report and investigate the complaint as an incident under Part 3 ('Rights and Responsibilities") of the Regulation. Part 3 of the Regulation required the employer not only to promptly investigate the incident to determine the action necessary to prevent its recurrence, but also, under section 3.4 of the Regulation, to prepare a written investigation report with the following elements:

> (a) the place, date and time of the incident,
>
> (b) the names and job titles of persons injured in the incident, [not applicable in this case],
>
> (c) the names of witnesses,

(d) a brief description of the incident,

(e) a statement of the sequence of events which preceded the incident,

(f) identification of any unsafe conditions, acts or procedures which contributed in any manner to the incident,

(g) recommended corrective actions to prevent similar incidents, and

(h) the names of the persons who investigated the incident.

Further, as such a written investigative report is required by the Regulation, section 175(2) of the Act required the employer to provide a copy of the report to the Board as well as the joint safety committee on the project site (if one existed) or alternatively, as applicable, the worker representative who participated in the investigation. (One of the requirements of a proper incident investigation is that employer and worker representatives participate in the investigation.)

I also note that as the worker was refusing to return to work in the welding shop for the reason that he perceived it was unsafe to do so, section 3.12 of the Regulation came into play, with investigatory requirements that require that a Board officer be notified if an employer and a worker do not reach a resolution on the issue of whether it is safe to work.

As I have indicated, the employer did conduct an investigation but it was a very informal one. The employer did not view the July 31, 2002 incident as particularly serious and was unaware of the requirements under the Act and the Regulation regarding the way in which to conduct an incident investigation as well as the need to complete a written investigative report with specified elements. Not only was the employer ignorant of the statutory and regulatory requirements, even the Board failed to properly react in this case. A Board safety officer, when contacted by the worker in August 2002, did not even think that the worker's complaint fell within the Board's jurisdiction to investigate, let alone raise the need for the employer to have conducted an appropriate investigation of the complaint under the Act and Regulation.

The investigation and report requirements of the Act and Part 3 of the Regulation are relatively formal. But there are benefits to a formal process. When, as here, a worker complains that he has been physically threatened on the job site, and that he does not feel safe to return to work, it makes sense that an employer take reasonably formal steps to investigate the matter, even if the employer's first impressions are that the complaint is invalid or that the incident was a trivial one.

The requirements of the Act and the Regulation with respect to incident investigations compel an employer to take steps consistent with an objective, impartial inquiry. The advantage of an objective, impartial inquiry is that it may well reveal facts, not immediately apparent, that support a complaint which initially seemed baseless. In this case, for example, even if the results of the employer's investigation turned out to be much the same (e.g. generally a stale-mate situation of X's story vs. the worker's story, with J corroborating X's story), complying with the Act and Regulation's requirements on investigation and reporting would have forced the employer to formally identify what led up to the argument, and to "recommend corrective action" to ensure that similar escalated bickering or threats did not happen in the future. There is a real likelihood that the formal inquiry process, with the accountability provision of a written report, would at least have resulted in some type of reprimand to both workers. It would also have been to the employer's advantage to undertake this formal process of inquiry, as there would have been a written record about the incident and the investigation for the Board, the employer, and all workers involved with the incident. Further, if the parties failed to reach consensus on whether it was safe for the worker to work in the welding shop, there would have been the prospect of mediation by a Board safety officer, and his ultimate recommendation on the matter.

The serious tone of a formal inquiry can itself go a long way toward preventing future incidents. In my view, if the employer had conducted a proper incident investigation in this case, even if its conclusions were essentially the same and it made no finding of blame against X, it is unlikely that the worker would have had a justifiable reason to refuse to return to work. It would be difficult to characterize such a refusal as a reasonable concern for his safety, if there had been an objective inquiry conducted in accordance with the Act and the Regulation, with documented identification of the circumstances that led up to the confrontation, with documented recommendations of corrective action to prevent a future incident, and with a copy of the written report forwarded to the Board. Certainly, if a Board officer had become involved in the matter and had reached a conclusion that there was no hazard to the worker returning to work, it would have been difficult for the worker to argue that his safety concerns had not been taken seriously.

In the absence of an adequate incident investigation conducted in accordance with the Act and the Regulation, the worker was left with the impression that he would return to work in a vulnerable position, with X and Y as allies, with J perhaps a reluctant or passive party to the alliance. The worker observed the conflict between Y and R, the employer's equipment supervisor, when a firm indication was given to R by Y that the welding shop was Y's area to deal with, not in R's jurisdiction to try to play peacemaker. The worker doubted the employer's impartiality surrounding the incident, and was concerned that there might be, in essence, a poisoned work environment. Without sufficient evidence that the employer fully and fairly investigated the incident, I cannot find X's discomfort in returning to work to be an unreasonable belief. Applying an

objective test of "reasonable cause" to refuse to return to work (see Brown and Beatty's *Canadian Labour Arbitration*, 2nd ed. (Canada Law Book, Aurora, 1984), I find that the worker was justified in not returning to work at the welding shop for the employer, on the reasonable grounds for concern that his safety would be at risk if he returned to work with X.

Given the foregoing analysis, I conclude that the worker's refusal to return to work amounted to a constructive termination of his employment. In fact the employer issued him a layoff notice but there was no justification for a layoff. I have not found the case law relied on by the employer to be relevant or helpful to me in this case. The *Axelrod v. Beth Jacob* case did not deal in any way with safety issues, and in my view is not relevant to the case at hand. The other decision, *McIntyre v. Atlantic Hardchrome Ltd.*, is also not on point, not relevant to the case at hand, and does not even offer an analogy that might be helpful.

Reason for the job loss

Section 151 prohibits an employer from taking discriminatory action against a worker for reasons specified in subsections (a), (b) and (c). Section 152(3) is a reverse onus provision stating that the burden of proof that there has been no contravention of section 151 is on the employer.

Subsection (b) does not apply in this case. With respect to subsection (c), I am satisfied on the evidence that the employer has met the onus in section 152(3) of proving that it did not terminate the worker's employment because he reported the July 31, 2002 incident to the military police, or otherwise complained about X's conduct on July 31, 2002. For reasons earlier provided, I am satisfied that the employer was encouraging the worker to return to the project site and put the argument with X behind him.

Section 151(a) refers to a worker exercising any right or carrying out any duty in accordance with Part 3 of the Act (Occupational Health and Safety), the Regulation or an applicable order. Again, for reasons earlier provided, I am satisfied that the worker was justified in refusing to return to work with X at the welding shop. His refusal in that regard fell within section 3.12 of the Regulation, as I have found that in the absence of an impartial objective investigation of the incident by the employer, conducted in accordance with the Act and the Regulation, the worker had reason to be concerned that his safety was at risk from X if he returned to the welding shop. Thus the worker was "refusing to carry out a work process" due to his safety concerns, within this admittedly awkward wording of section 3.12 of the Regulation. I note that despite the awkward wording of section 3.12, there is Appeal Division jurisprudence which applies section 3.12 to situations where, for safety concerns about the general work environment, workers walk off the job or refuse to return to work. I agree with that interpretation of section 3.12, as I am also satisfied that the wording of section 3.12 is

broad enough to encompass the circumstances of the case at hand, particularly given the prohibition against improper activity or behaviour in the workplace in section 4.25 of the Regulation.

I have applied an objective test in assessing whether there were reasonable grounds for the worker to believe that X represented an undue hazard to the worker. I emphasize that in applying this test, I do not have to be satisfied that the worker was *correct* in his assessment about whether or not the welding shop environment was a safe place for him to work. He may have been wrong. The test in section 3.12, however, is one of reasonable belief.

The unfortunate aspect to this case, for both the employer and the worker, is that if the employer had conducted a proper investigation in accordance with the Act and the Regulation, the worker's perception of hazard might well have changed. The worker might well have returned to work, with no further cause for complaint, as soon as the investigation was completed. Or, even if the worker's perception of hazard did not change after a full and fair investigation in compliance with the Act and the Regulation, and the worker continued to refuse to return to work, in my view it is unlikely that the worker would have had reasonable grounds for maintaining that X still represented a hazard to him in the workplace.

Thus I am satisfied that the worker has raised a *prima facie* case under section 151(a) of the Act that his job loss was due to the exercise of a right under the Regulation, namely, the right under section 3.12 of the Regulation to refuse to participate in unsafe work.

In the circumstances of this case, the employer has not met the onus in section 152(3) of the Act to prove that the worker's job loss was not due, in any part, to the worker exercising a right to refuse unsafe work. The peculiar fact pattern in this case is such that in order to characterize the worker's job loss as a constructive termination of employment by the employer (or an unjustified layoff), the worker had to prove that his refusal to return to work was legally justified. I have earlier found that the worker had reasonable grounds for concern that his safety would be at risk if he returned to work with X at the welding shop, and that the job loss in this case amounted to a constructive termination. Thus the layoff was inextricably linked to the exercise by the worker of his right under section 3.12 of the Regulation to refuse unsafe work. The employer has not, therefore, met the burden in section 152(3) of the Act of proving that the reason for the worker's job loss was not due to his exercise of a statutory or regulatory right. Indeed, the exercise of his statutory or regulatory right amounted to the loss of his job.

Remedy

At this time, reinstatement is not appropriate in this case, as the worker has moved on in his career and in any event, the evidence does not satisfy me that there is a suitable welding job with the employer to which he could return at this time. At the oral hearing, the worker did not request reinstatement as a remedy, but requested compensatory damages as a remedy. I agree that the appropriate remedy in this case is to compensate the worker, in so far as it is possible to do so, for wages lost as a result of the employer's contravention of section 151 of the Act. I note that the case officer in the original decision in this case referred to Board policy that it is the Board's objective in exercising the remedial powers in section 153(2) to *in so far as it is practicable*, to put the worker in the same position the worker would have been in if a discriminatory action had not occurred. The policy (see item D6-153-2 of the *Prevention Manual*) also provides that the Board may order an employer to pay back wages and "perform other incidental acts," with the authority to do so found in section 153(2) of the Act.

I note that the worker has been mitigating his damages by obtaining work with other employers. I agree with the employer's submission that the worker is required to mitigate his damages.

The evidence is that the worker was earning $25 per hour working as a welder for the employer. His last day of work was July 31, 2002 and the employer paid him for that day. I have reviewed the employer's evidence regarding the layoff of welders in the autumn of 2002 and have assessed the worker's seniority against the evidence of the seniority of other welders who were laid off by the employer in the autumn of 2002. My assessment of the evidence is that in all likelihood, were it not for the section 151 job termination that occurred, the duration of his employment as a welder for the employer would have lasted until on or about October 31, 2002. Thus appropriate damages would encompass three months wages (August 1 through to October 31, 2002), less wages for 18 days of work that the worker was able to find elsewhere during that three-month period.

Documentary evidence provided by the worker to the Board indicates that from July 12 through to July 31, 2002, the worker worked 218 hours for the employer. I have determined that it is reasonable to find that the worker would have worked approximately 70 hours per week for the employer, from August 1 through to October 31, 2002, and accordingly I find that the total loss during that period amounts

to 13 weeks of employment, multiplied by 70 hours, or 910 hours lost in total. I have subtracted 180 hours from that total (representing 18 days of work at 10 hours per day for other employers), to arrive at a total of 730 hours of wages owed by the employer to the worker. This amounts to $18,250.00 in wages that the employer owes the worker. While this may not be an absolutely precise measurement of the worker's loss, I am heeding the policy in the *Prevention Manual* to make the remedy that is "practicable" in the circumstances. On the evidence that was tendered before me with respect to remedy, this is the best approximation of the worker's wage loss that I can make. In my

view, this wage loss approximation is the best guide to assist me in providing a remedy that is practicable in the circumstances.

I turn now to the matter of interest. In the stay decision that preceded this decision on the merits (See *WCAT-2003-00679*, May 28, 2003), I noted that in granting the employer a stay of the case officer's decision that had found the worker's section 151 complaint to be valid, the worker would suffer an immediate loss of the opportunity of using the back wages awarded by the case officer. Such a loss would not be rectified by a subsequent decision on appeal that confirmed the remedy. Rather, only if the employer paid interest on the financial aspect of the remedy, could the loss of opportunity to use the back wages be "repaired."

Section 153(2)(g) refers to the Board's authority to order a party "to do any other thing that the Board considers necessary to secure compliance with this Part and the regulations." In *Appeal Division Decision #2003-0089* (January 15, 2003), the panel ordered an employer to pay interest on back wages to a complainant under section 153(2)(g) of the Act, viewing the interest as "ancillary to an order to pay wages." I agree with that interpretation of section 153(2)(g). The panel also stated in that case as follows:

> As for the rate of interest, I have taken guidance from the Panel of Administrators' Resolution 98/09/11-01 (September 11, 1998), which states that the interest rate on successful prevention appeals by employers will be the "same rate as paid under policy item #50.00 of the *Rehabilitation Services and Claims Manual* [Volume 1] (RSCM) on compensation matters."

I find that to be a fair and reasonable approach to use in this case. Item #50.00 of the RSCM provides that:

> In all cases where a decision to award interest is made, the Board will pay simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the CIBC). During the first 6 months of a year, interest must be calculated at the interest rate as at January 1. During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

I requested the Board's actuarial department to apply that interest rate calculation pursuant to Item #50.00 of the RSCM on $18,250.00, with the effective date for interest being August 1, 2002 (the first day the worker suffered wage loss due to the employer's contravention of section 151 of the Act), until today, February 5, 2004. The actuarial department has indicated that the total interest payable on $18,250.00 is $1,258.49. I am awarding interest of $1,258.49 in addition to the wage loss award of $18,250.00, for a total award of **$19,508.49**.

There was no request by the worker for an order that the employer pay his legal costs or other costs incurred in pursuing his section 151 complaint

I have decided that it is not appropriate to award payment of the worker's legal costs in this case, although I note that section 153(2)(f) of the Act provides authority for such an award. In reaching this decision, I have considered Board policy in item D6-153-2 of the *Prevention Manual*, which provides that ordinarily such orders for costs will not be made. I am satisfied that this was not a case of "flagrant abuse" of the Act and Regulation by the employer, or that there were other exceptional circumstances justifying an award of costs. I have also considered sections 6 and 7 of the *Workers Compensation Act Appeal Regulation*, and find that it is inappropriate to order payment of legal costs under those provisions.

However, under section 7 of the *Workers Compensation Act Appeal Regulation*, WCAT may order the Board to reimburse a party to an appeal for expenses associated with attending at an oral hearing. I understand that the worker had to travel from Vancouver to attend the Victoria oral hearing, and I order the Board, upon the worker providing the Board with evidence of his travel costs associated with attending the oral hearing, to reimburse him for those costs. I also order the Board to reimburse the worker for any wages lost as a result from participating in the oral hearing on January 22, 2004, upon the worker providing evidence of wage loss to the Board.

Conclusion

I dismiss the employer's appeal and confirm the March 11, 2003 decision of the case officer that found the worker's section 151 complaint against the employer to be valid. I vary the case officer's March 11, 2003 decision by finding that while the employer met the onus in section 152(3) of the Act of proving that it did not terminate the worker's employment in contravention of section 151(c) of the Act, the employer has not met the onus in section 152(3) of proving that it did not terminate the worker's employment in contravention of section 151(a) of the Act. I have found that the employer unlawfully discriminated against the worker by laying him off. The worker was lawfully refusing to return to work by exercising a right under the Regulation, which the employer interpreted as justification to deem his employment to be completely at an end, without need for further action by the employer. By way of remedy for the violation of section 151 of the Act, I order the employer to pay the worker, within 21 days of this decision, the sum of $19,508.49. I have also directed the Board to reimburse the worker for his travel costs and wage loss associated with attending the oral hearing on January 22, 2004.

Heather McDonald
Vice Chair

HM/mak

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