

Summary of Appeal:

Workplace Health and Safety (WH&S) initially investigated a complaint received from a Worker who complained that he was unfairly dismissed from employment and that the actions of his employer constituted disciplinary action that contravened requirements of the Occupational Health and Safety Act. WH&S conducted an investigation and concluded that he had been terminated in contravention of the Code and ordered the Employer to reinstate the Worker and pay the equivalent sum of wages the Worker would have earned had he continued with his employment.

It is this order that the Employer, to be referred to as the Appellant, appealed to the Council. This appeal was heard in accordance with the authority granted to the Council under Section 7(b) of the Occupational Health and Safety Act.

The Employer contends the Worker was an aggressor in an incident in which he threatened a co-worker following which he left his worksite in direct contravention of a supervisory order. The Employer believes the Worker was not exercising any rights under the Occupational Health and Safety Code (Code) but rather he was in contravention of that Code. The Employer is of the opinion the Worker's termination is an employment concern and the Director of Mines has no jurisdiction to determine this matter under the Act or Code.

In considering this appeal, the Panel considered relevant sections of the Act, Regulations and Code which included:

Section 35 of the Act, Existence of Imminent Danger

35(1) No worker shall

- a) carry out any work if, on reasonable and probable grounds, the worker believes that there exists an imminent danger to the health or safety of that worker
- b) carry out any work if, on reasonable and probable grounds, the worker believes that it will cause to exist an imminent danger to the health or safety of that worker or another worker present at the work site, or
- c) operate any tool, appliance or equipment if, on reasonable and probable grounds, the worker believes that it will cause to exist an imminent danger to the health or safety of that worker or another worker present at the work site.

Note: In submissions from the Respondent this section of the Act is referred to as Section 31 (5) but quoted as Section 35 (1)

Where disciplinary action prohibited

36 No person shall dismiss or take any other disciplinary action against a worker by reason of that worker acting in compliance with this Act, the regulations, the adopted code or an order given under this Act or the regulations.

Section 37 of the Act, Disciplinary action complaint

37(1) A worker who has reasonable cause to believe that the worker has been dismissed or subjected to disciplinary action in contravention of section 31(5) or 36 may file a complaint with an officer.

- (2)** An officer who receives a complaint under subsection (1) shall prepare a written record of the worker's complaint, the investigation and the action taken and shall give the worker and the employer a copy of the record.
- (3)** A worker or an employer who receives a record under subsection (2) may request a review of the matter by the Council by serving a notice of appeal on a Director of Inspection within 30 days from the receipt of the record.
- (4)** After considering the matter, the Council may by order
 - (a)** dismiss the request for a review, or
 - (b)** require one or more of the following:
 - (i)** reinstatement of the worker to the worker's former employment under the same terms and conditions under which the worker was formerly employed;
 - (ii)** cessation of disciplinary action;
 - (iii)** payment to the worker of money not more than the equivalent of wages that the worker would have earned if the worker had not been dismissed or had not received disciplinary action;
 - (iv)** removal of any reprimand or other reference to the matter from the worker's employment records.
- (5)** If the worker has worked elsewhere while the dismissal or disciplinary action has been in effect, those wages earned elsewhere shall be deducted from the amount payable to the worker under subsection (4)(b)(iii).
- (6)** An appeal lies to the Court of Queen's Bench from an order of the Council on a question of law or a question of jurisdiction and on hearing the matter the Court may make any order, including the awarding of costs, that the Court considers proper.
- (7)** An appeal under subsection (6) shall be made by way of originating notice within 30 days from the date that the order of the Council is served on the person appealing the order of the Council.

- (8) The commencement of an appeal under subsection (6) does not operate as a stay of the order of the Council being appealed from except insofar as a judge of the Court of Queen's Bench so directs.

Part 27 of the Code, Violence

Section 389, Hazard assessment

389 An employer must ensure that workplace violence is considered a hazard for the purposes of section 7.

Section 391, Instruction of workers

391 An employer must ensure that workers are instructed in

- (a) how to recognize workplace violence,
- (b) the policy, procedures and workplace arrangements that effectively minimize or eliminate workplace violence,
- (c) the appropriate response to workplace violence, including how to obtain assistance, and
- (d) procedures for reporting, investigating and documenting incidents of workplace violence.

Section 392, Response to incidents

392(1) Sections 18(3) to (6) and 19 of the Act apply to an incident of workplace violence.

- (2) An employer must ensure that a worker is advised to consult a health professional of the worker's choice for treatment or referral if the worker
- (a) reports an injury or adverse symptom resulting from workplace violence, or
 - (b) is exposed to workplace violence.

As well as:

The Disciplinary Action Report completed by the Director of Mines dated August 23, 2005

Direct testimony from Witnesses including the Worker and three co-workers who were directly involved in the incident.

Facts:

The Worker had commenced employment approximately four months prior to the incident which led to this complaint. He had previous experience with this industry and was known to some of the crew members he was working with.

On entering the area where the incident occurred, the Supervisor stated all workers had returned to work and things were progressing normally. He felt at that point there was no danger; however, he did stay in the area for the rest of the shift. The Worker asked for a change of crew assignment stating he would quit if this was not provided however, he did not attribute the need for the change to an unsafe or violent condition. The Supervisor stated it was unlikely that would have been accommodated as the Worker's crew assignment had already been changed once before at his request.

The Worker was unsatisfied with the response of the Supervisor and indicated he would like to leave the worksite. He stated he would go to the dry facility and dry his clothes. Co-workers confirm that conditions were wet during the days of August 20 to 23, 2005. He was advised not to leave by the Supervisor and was told that doing so would result in disciplinary action. Regardless, the Worker left and stated to the investigating Officer he felt he was still in danger.

When the Worker reached the dry facility, he was met by another co-worker who had been instructed by the Supervisor to take the Worker to the Main Office Locker Room. The Worker indicates he received no further instructions and so, changed and went home.

The Mine Superintendent advised the Panel he meets with the foremen from the mine on Sunday afternoons and was told about the fight on Sunday August 21, 2005. The Superintendent advised his office is located beside the area where the Worker would have changed before leaving the work site however, the Worker did not report to his office to discuss the incident or make any complaints of imminent danger or violence. The Superintendent also indicated his work and home telephone numbers are posted on the message board but he did not receive a call from the Worker.

The mine has a strict policy about people leaving the mine site; however, permission is granted frequently by Supervisors for a variety of reasons. All workers are also required to complete a safety card prior to commencing a shift and these cards are stored in monthly files. The Superintendent advised workers sign the cards so it is known who has completed the cards. He reviewed the cards for the months prior to this incident but indicated the Worker did not note any safety concerns on his cards. The card completed by the Worker on August 20, 2005 also did not note any safety concerns.

On August 23, 2006, the Worker filed a Disciplinary Action complaint with Workplace Health and Safety concerning his dismissal.

The Superintendent indicated that during the ensuing investigation, he arranged for the Officer to meet with the various co-workers and was requested by the Officer, to scribe several of the witness statements as dictated by the co-workers.

The Superintendent advised the Panel it was his opinion the Worker had abandoned his position and that had led to his employment ending. He is in disagreement with the finding that the Worker was terminated because of the incident on August 20, 2005.

Findings:

The Panel reviewed the Investigation report provided by the Officer and relied heavily upon this document as there were no other supporting documents offered by WH&S. It is noted that the report is not signed by the Officer and the Panel was advised the report is reviewed by several other WH&S officials prior to being finalized. The Officer was unable to establish that report used by the Panel was the one he had completed although he confirmed the findings and conclusion. The Panel was advised a clerical error had resulted in the original signed copy going out without a copy being retained by WH&S.

The Panel found the investigation was flawed because of the following:

1. The Employer was given prior notice of the witnesses to be interviewed. This would have allowed witnesses to discuss the incident before being interviewed with each other as well as the Employer thereby potentially tainting the evidence.
2. The Employer was afforded the opportunity to meet with the witnesses after each interview at which time he was asked to transcribe their statements for them. It was indicated this was done because of literacy issues however, no provisions were made to check the accuracy of the statements against what workers had said.
3. The Investigator was not the sole author of the report. It is unclear whether or not this editing could have changed the context of facts leading the reader to a conclusion not intended by the Officer. As this is a fact driven report, it would seem proper that the individual conducting the investigation would be the only author of the final report.
4. No written report of the events was obtained from the Superintendent as to his involvement with the incident.
5. Although the policy of the Employer with respect to violence requires the involvement of the Human Resources Director for the mine, no interview was conducted with this individual.
6. No copy of the employer's handbook was requested or obtained during the investigation.
7. The Officer did not prepare a list of questions to be used for all interviews. A standardized list would have ensured all individuals involved would have provided information basic to the investigation. Any areas where there were discrepancies could have then been investigated further. The

- lack of standardized questions makes it impossible for the Panel to determine if conclusions drawn were relative to questions asked.
8. The interview statements were not provided and therefore could not be cross examined.
 9. While there was testimony from WH&S during the hearing about Imminent Danger, there is no mention anywhere in the 'Findings' section of the report of Imminent Danger.
 10. The report contains a statement in the 'Conclusion' indicating *"the employer did not fulfill the basic requirements of Sections 389 to 392, Part 27 – Violence, or section 7, Part 2 – Hazard Assessment, Elimination and Control, as defined by the Occupational Health and Safety Code."* The Panel notes however, the investigating officer did not make any orders or recommendations to the Employer regarding this breach of legislation.
 11. Although the Officer makes an order for reinstatement, the report states; *"The investigation determined that employer (sic) clearly dismissed the complainant for unspecified reasons, subsequent to that worker being exposed to a situation of violence in the workplace."* It is unclear to the Panel how the Officer could determine the Act had been breached if the reasons are unspecified.

Conclusion:

The Panel took into consideration and relied on the direct testimony provided by witnesses who were actually at the site of the altercation on August 20, 2005. Although witness statements were not provided to the Panel, some of the co-workers did present in person and provided their accounting of the incidents as they occurred and are remembered several months later.

It is the finding of the Panel that the Worker was the aggressor and was threatening his co-worker in a violent manner when he picked up a hammer in the incident on August 20, 2005. The Worker did not make any statements to indicate he was the cause of a situation that could have constituted Imminent Danger and did not state he needed to leave the mine to avoid doing something more violent than what had already occurred. Further, he did not report a safety concern, violence issue or imminent danger to the Superintendent prior to leaving the mine. He was aware that he was jeopardizing his employment by choosing to leave without permission from his Supervisor.

The Panel also accepts the testimony of the witnesses who indicated the Supervisor was not told the argument had escalated to the involvement of the hammer when he was summoned by co-workers. Although it is unclear as to the nature of the banter that goes on between the workers who work in the mine, the Panel is very concerned with what would appear to be a negative work environment and a tolerance to a level of hostility that one would not accept in

other interpersonal interactions. We would caution that if allowed to escalate, this could lead to future violence and a negative work environment.

The Supervisor advised the Panel the Worker did not raise a safety concern with him on the day of the incident when they spoke upon his attendance at the worksite. The Panel accepts his testimony that he specifically denied the Worker permission to leave the mine when the request was made by the Worker during their conversation on the day of the incident. We also accept that when he attended the area of the altercation, he found the workers had disengaged from their argument and returned to work thus ending the incident. While there is conflicting evidence as to how long it took for the Supervisor to attend the site, we find the testimony of the Supervisor to be credible as to how far away he was and how long it would take someone to navigate through the mine to the area as described.

Following a review of all evidence and the relevant legislation, the Panel is unable to support a finding that the Worker's employment ended in a manner that would contravene any section or part of the Occupational Health and Safety Act or Code. The Order to reinstate the worker and make payment of wages is therefore vacated.

**Occupational Health and Safety Council
Appeal of Grande Cache Coal Corporation, Appellant**

And

**Alberta Human Resources and Employment, Workplace Policy and Standards,
Respondent**

Dated: July 5, 2006