

Occupational Health and Safety Council

Appeal Hearing

June 4, 5, 6 & 18, 2007

Decision upon Application By:

Theodore Jager – Appellant

And

Albian Sands Energy Inc. – Respondent

And

Workplace Health and Safety – Respondent

Board Members

Eugene Sarrasin – Appeal Panel Chair, Employer Representative,
Occupational Health and Safety Council

Betty Unger – Public Representative
Occupational Health and Safety Council

Ernest Tessier – Employee Representative
Occupational Health and Safety Council

Appearances:

For the appellant: Ted Bosse, Legal Council for Theodore Jager
Theodore Jager

For the respondent: Vicki Giles, Legal Council for Albian Sands Energy
Anita Semple, Human Resources, Albian Sands Energy

For the respondent: Mark Greene, Legal Council for Workplace Health and Safety
(WH&S)
Len Kobernick – (WH&S)

The Appeal Panel (the Panel) convened on June 4, 5, 6 & 18, 2007 to hear an appeal pursuant to Section 37(3) of the *Occupational Health and Safety (OH&S) Act. (Act)*

Section 37 of the *Act* reads:

Disciplinary action complaint

(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.

1983 c39 s15; 1988 c36 s12

The specific reasons for appeal are:

- Theodore Jager believes there was disciplinary action taken against him because he raised safety concerns related to unsafe conditions in his workplace to his employer, Albian Sands Energy.
- Theodore Jager believes his re-earnable merit bonus was reduced due to the Performance Improvement Assessment Plan (PIAP) that was issued because he was attempting to comply with the Occupational Health and Safety Act, Regulations and Code.
- Theodore Jager believes that Workplace Health and Safety did not properly consider the evidence in their investigation of his complaint.

The respondents contend that:

- Albian Sands Energy disciplined the worker for events related to his behaviour.
- Albian Sands Energy did not withhold a portion of Theodore Jager's annual re-earnable merit bonus for attempting to comply with the Occupational Health and Safety Act, Regulations and Code.
- Workplace Health and Safety conducted the investigation of the worker's case in a thorough manner.

The Issue to be Resolved:

Was Theodore Jager disciplined as a result of attempting to comply with the Occupational Health and Safety Act?

Submissions Considered by the Appeal Panel

From the Appellant, Theodore Jager

- OHSC Appeal Questionnaire – completed by Theodore Jager
- Evidence by Witness – David Baxter
- Evidence presented by Theodore Jager
- Evidence by Witness via teleconference – Grant Gaudet
- Documents that show safety concerns were present at the worksite

From the Respondent, Albian Sands Energy Inc. and Workplace, Health and Safety (WH&S)

- Package of information relating to the appeal obtained from both the Appellant and the Respondent including:
 - OHSC Appeal Questionnaire – completed by Theodore Jager
 - Statements obtained by WH&S during their investigation
 - Evidence by Witness – Garth Gilbert
 - Evidence by Witness via teleconference – Stephen Reynish
 - Evidence by Witness – Anita Semple
 - Evidence by Witness – Mark deJager
 - Emails from various employees and management relating to alleged behaviour problems of Theodore Jager
 - Performance Improvement Action Plans (PIAP) for Theodore Jager
 - Letter of Reprimand for Theodore Jager
 - Albian Sands Energy policy documents
 - Submission binder produced from WH&S, containing appellant's information, WH&S investigation, investigating officer notes, interviews and findings

Preliminary Facts:

The following is a list of relevant facts that precede the appeal:

- Albian Sands Energy was making major changes to the shop/facility where Theodore Jager worked and played a major role in the initial setup.
- The nature of the changes to the shop/facility and the way they were conducted resulted in several conflicts between Theodore Jager and the newly appointed shop supervisor, Elvin Peterson.

Facts:

The following is a list of facts agreed to by the parties and considered by the appeal panel:

- Theodore Jager did raise safety concerns in the workplace relating to unsafe conditions.
- Unsafe conditions were found on inspections of the worksite. The safety infractions noted did not meet the definition of imminent danger as defined in the Occupational Health & Safety Act, Section 35.
- Theodore Jager did refuse to participate in a Safety Committee that was being formed for shop in which he worked on July 14, 2004.
- Albian Sands Energy did place Theodore Jager on a Performance Improvement Action Plan (PIAP) on August 30, 2004 and revised the PIAP on November 1, 2004.
 - Theodore Jager did send emails to employees of Albian Sands Energy that in the opinion of Albian Sands were of a derogatory nature and resulted in a Performance Improvement Action Plan (PIAP) to be issued on August 30, 2004.
 - Theodore Jager stated he was willing to accept a PIAP if Albian Sands thought it would be beneficial.
 - Theodore Jager did participate in a Safety Walk in the shop on October 27, 2004 after which Garth Gilbert, Team Lead for Maintenance and Planning advised his supervisor Mark deJager that Theodore Jager made inappropriate comments about the shop supervisor, Elvin Peterson. Albian Sands Energy revised Theodore

Jager's Performance Improvement Plan (PIAP) based on Garth Gilbert's report.

- Albian Sands Energy has a Performance Management Plan in place detailing the conditions to earn the re-earnable merit and the implications of a PIAP.

Position of the Parties:

Appellant, Theodore Jager asks the board to rule that Albian Sands Energy Inc. disciplined him for raising safety concerns and placing him on a Performance Improvement Action Plan, which reduced his re-earnable merit bonus from 11 percent to 5 percent when he was attempting to comply with the Occupational Health and Safety Act, Regulations and Code.

Theodore Jager requests payment of money equal to the amount of the 6 percent of re-earnable merit he did not receive as a result of being placed on a PIAP.

Finally, Theodore Jager requests that there is a removal of any reprimand or other reference to the matter from his employment records.

Respondent, Albian Sands states that Theodore Jager was disciplined for reasons relating to behaviour and not for raising safety concerns.

Albian Sands states that Theodore Jager was placed on a PIAP as part of their progressive discipline to correct his behaviour.

Respondent, Workplace Health and Safety, upon reviewing all the evidence provided to them, concluded that Albian Sands Energy did not discipline Theodore Jager for raising safety concerns.

Decision:

Both Theodore Jager and Albian Sands presented extensive evidence in the form of documents and witnesses. Although there were safety concerns found at the worksite and Theodore Jager brought them forward, a link must be established between the safety concerns raised and the discipline received.

The panel thoroughly reviewed all the evidence and concluded the documentary evidence and testimony presented did not establish a relationship between the safety concerns raised and the discipline issued. For this reason the panel finds that Theodore Jager was not disciplined for acting in compliance with the OH&S Act (section 37) and no remedy is awarded.

Occupational Health and Safety Council Appeal Panel

Eugene Sarrasin, Appeal Panel Chair
Occupational Health and Safety Council
Employer Representative

Betty Unger
Occupational Health and Safety Council
Public Representative

Ernest Tessier
Occupational Health and Safety Council
Employee Representative