

Occupational Health and Safety Council

Appeal Hearing

April 20, 21, 2009

Decision upon Application By:

Tuboscope Canada Inc. and National Oilwell Varco – Appellant

And

Delilah Dayton – Respondent

Board Members

Judy Barry	Appeal Panel Chair, Worker Representative, Occupational Health and Safety Council
Wendy Clark	Public Representative Occupational Health and Safety Council
Peter Schaefer	Employer Representative Occupational Health and Safety Council

Appearances:

For the appellant: Daniel C.P. Stachnik, QC Legal Council for Tuboscope Canada Inc.
Heather Swenson
Dr. J. David McDougall, MD
Mike Makowecki
Zbigniew Filip, C.I.H.

For the respondent: Delilah Dayton

Workplace Health and

Safety: Mark Green, Legal Council for Workplace Health and Safety
Mike Mills, Occupational Health and Safety Officer

**Government
of Alberta** ■
Employment
and Immigration

Occupational Health and Safety Council

The Appeal Panel (the Panel) convened on April 20 & 21, 2009, to hear an appeal pursuant to Section 37 of the *Occupational Health and Safety (OH&S) Act*. (Act)

Section 37 of the Act reads:

37(1) *A worker who has reasonable cause to believe that 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 14(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 Council 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.*

The specific reason for appeal is

- On August 28, 2008, Workplace Health and Safety Compliance upheld a Disciplinary Action Complaint made by Delilah Dayton that she had been wrongfully dismissed by the Employer and was absent from work due to compliance with Section 2 of the OH&S Act.

The appellant contends that:

- The Investigators acted without jurisdiction, misapprehended the evidence and decided the issues not properly before them.
- In the alternative, the decision contains a fundamental error of law in terms of interpreting the relevant legislation and the responsibilities of Tuboscope Canada Inc. (Tuboscope). At page 9 of the decision, it states in part “Tuboscope Canada Inc. had a legal obligation to inform Ms Dayton of the measurements made of airborne concentrations of harmful substances at the worksite as outlined in Order No. 1 of the CCRMALD-7DPTHE provided to Tuboscope Canada Inc. on April 17, 2008.” [Writer’s emphasis]
- In the alternative, the decision is unreasonable as it does not disclose an offence under the Occupational Health and Safety Act, the Code or any regulations. There are no Occupational Exposure Limits for airborne fungal contaminants.
- In the alternative, Tuboscope did not dismiss the Complainant because she raised a complaint regarding an occupational health and safety matter. The dismissal arose out of the chronic absenteeism of this employee. Her termination arose due to her insubordination in refusing, despite repeated requests and extensions of time over several months, to provide credible medical information necessary for Tuboscope to address a safe return to work or develop a plan for a continued absence if such absence was necessary due to her health status.

The Issue to be Resolved:

Does the action taken against the Complainant by the Employer constitute a violation of s.36 of the *Occupational Health and Safety Act*?

Submissions Considered by the Appeal Panel:

From the Appellant, Tuboscope Canada Inc./National Oilwell Varco

- OHSC Appeal Questionnaire and attached materials – completed by Daniel C.P. Stachnick, Q.C.
- Evidence by Witnesses
 - Heather Swenson
 - Dr. J. David McDougall, MD
 - Mike Makowecki
 - Zbigniew Filip, C.I.H.
- Evidence presented by Tuboscope
 - Exhibit 1 – *Curriculum Vitae* – 2009, J. David McDougall, M.D.
 - Exhibit 2 – October 16, 2008, Independent Medical Evaluation, Viewpoint Medical Assessment Services Inc., Dr. J. David McDougall
 - Exhibit 3 – four (4) e-mails authored by Mike Makowecki
 - Exhibit 4 – November 10, 2005 – Occupational Hygiene Assessment, Tuboscope Lloydminster Facility
 - Exhibit 5 – Excerpt from the Occupational Health and Safety Code 2006 Explanation Guide, Reference Section 21 Potential Worker exposure
 - Exhibit 6 – *Curriculum Vitae* Zbigniew Filip, C.I.H.
 - Exhibit 7 – February 15, 2008 letter Re: Proposal to provide a mould survey, Tuboscope Canada Office, Lloydminster, Alberta
 - Exhibit 9 – July 24, 2006 Invoice from First General Services to Delilah Dayton
 - Exhibit 10 – Facsimile Letter of May 27, 2008 to Heather Swenson RE: Delilah Dayton, from Dr. Z. Kostic
 - Summation Document
- In consideration of the Decision the Appeal Panel reviewed all of the above submission

From the Respondent, Delilah Dayton

- Exhibit 8 – Binder of submissions

- In consideration of the Decision the Appeal Panel reviewed all of the submitted material

From Workplace Health and Safety

- Submission binder produced from WH&S, containing appellant's information, WH&S investigation, orders, officer's case notes, and Client Contact Reports
- Evidence by Witness– Mike Mills
 - August 26, 2008 Workplace Health and Safety – DAC summary including Conclusion and Decision
- In consideration of the Decision the Appeal Panel reviewed all of the submitted material

Facts:

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

- Delilah Dayton was an employee of Tuboscope Canada
- Delilah Dayton was absent from the workplace October 24, 2007 to June 5th, 2008 inclusive
- Delilah Dayton had concerns regarding the air quality in the Tuboscope Lloydminster, Alberta facility specifically, in regards to her personal tolerance to dust and mould
- Tuboscope hired two independent contractors to investigate the possibility of mould at the Lloydminster facility
- Workplace Health and Safety conducted an investigation at the Tuboscope Lloydminster facility in April 2008 and found no evidence of mould
- On May 28th, 2008, Tuboscope Canada Ltd. issued to Delilah Dayton correspondence advising of the completion of a third party workplace assessment, advising that responses for repeated requests for medical information have been unsatisfactory, providing an outline of specific medical information required, and advising that if the requested information was not received by Tuboscope Canada Inc. by June 4, 2008, they would have considered Delilah Dayton to have abandoned her employment
- As of the end of the work day, June 4, 2008, Delilah Dayton had not appeared for work nor had she submitted the requested medical documentation

- On June 5, 2008, Tuboscope Canada Ltd. issued to Delilah Dayton correspondence advising that her employment with Tuboscope was terminated
- Mould has been identified as a harmful substance
- The Legal Test to determine a Contravention of s.36 of the *Act* includes:
 - Disciplinary action must have been taken against the complainant;
 - The disciplinary action must have been taken as a result of the complainant acting in compliance with the *OHS Act*, Regulation, or Code; and
 - There must be a causal and demonstrable relationship between the disciplinary action taken against the complainant and the complainant's act of compliance with the *OHS Act*, Regulation, or Code.

Position of the Parties and Remedy Requested:

Appellant, Tuboscope Canada Inc. and National Oilwell Varco

It is the position of Tuboscope Canada Inc., that Delilah Dayton was terminated on June 5, 2008, for reasons of not providing medical and other information requested by Tuboscope Canada to support her continued absence from work. Tuboscope Canada was acting under the belief that Ms Dayton had been fully informed of acceptable levels of mould in the workplace and that by remaining away from the worksite without further medical documentation supporting her absence, she had abandoned her position. Tuboscope Canada further believed that because mould is not specifically identified as a hazardous substance under Part 4 of the OHS Code they were under no obligation to inform the worker of the measurements as expressed in Part 4, section 21 (2) (b).

The remedy sought: the Council (Occupational Health and Safety) set aside the decision ordering Tuboscope Canada Inc. to pay two weeks wages.

Respondent, Delilah Dayton

The position of Delilah Dayton is that she was not given enough information from Tuboscope Canada to take forward to her physicians in order for them to make an informed decision on whether or not the workplace provided a safe environment for her return.

Ms Dayton requests that Tuboscope Canada Inc. be ordered to pay her two weeks severance pay and that reference to dismissal be removed from her work record.

Decision:

After considering evidence given by Tuboscope Canada Inc., Delilah Dayton and Workplace Health and Safety regarding Ms Dayton having been informed that a third party consultant, Golder Associates Ltd. had completed a full worksite assessment confirming; there were no elevated moisture levels, no visible signs of mould growth, no indication of mould growth based on surface samples, and finally, that air quality had a normal fungal ecology, it is the determination of the panel that the disciplinary action complaint did not meet the legal test to determine a contravention of s.36. There will therefore be no requirement of Tuboscope Canada Inc. to take action on the WPHS order, CCR #MALD-7HVTC3¹, dated August 26, 2008. The order is revoked (s.16) and no remedy will be considered.

Further to Tuboscope Canada's belief that because mould is not specifically identified as a hazardous substance under Part 4 of the Code they were under no obligation to inform the worker of the measurements as expressed in Part 4, section 21 (2) (b). It is the decision of the Panel that mould is not listed in Schedule 1, Table 2 of the OH&S Code because this table references occupational exposure to chemical substances only. Mould is widely known to have a potential negative effect on the health of workers and was identified as a harmful substance by Workplace Health and Safety in a report to the Appellant on April 17, 2008. It was identified by the worker, Delilah Dayton, as a substance that was harmful to her health. Once a worker has identified mould as a personal hazard under Part 2 of the Code it is incumbent upon the Employer to eliminate, or control the hazard or protect the worker from further exposure. Tuboscope Canada Inc. took reasonable measures to remove substances from the workplace that tested positive for mould. They then informed Ms Dayton that the results of the subsequent assessment performed at the worksite concluded that no toxic mould was present in the worksite and that measures of mould within the building were at a lower level than measures of mould in the exterior atmosphere surrounding the building. The question of meaning of the word inform came into discussion at the hearing. The Panel researched the meaning of the words inform, confirm and provide and concluded that under the Code, the requirement to inform did not compel the Employer to disclose the full report to the Worker but to inform her of results of the assessment.

¹“ REQUIREMENT: Tuboscope must pay Ms. Dayton the equivalent of two weeks wages and remove any reprimand or other reference to this matter from the Ms. Dayton's employment records.”

Occupational Health and Safety Council Appeal Panel

Judy Barry, Appeal Panel Chair
Occupational Health and Safety Council
Worker Representative

Wendy Clark, Occupational Health and Safety Council
Public Representative

Peter Schaefer, Occupational Health and Safety Council
Employer Representative