

Occupational Health and Safety Council
Appeal Hearing
Written Submission

Decision upon Application By:

Roy Sugai – Appellant

And

Top Notch Construction – Respondent

And

Workplace Health and Safety – Respondent

Board Members

Judy Barry – Appeal Panel Chair, Worker Representative,
Occupational Health and Safety Council
Eugene Sarrasin – Employer Representative
Occupational Health and Safety Council
Greg Harris – Public Representative
Occupational Health and Safety Council

Written Submissions:

For the appellant: Evidence Binder submitted by Workplace Health and Safety
Extra Submission submitted by Roy Sugai

For the respondent: John R. Gilmore, (Bennett Jones LLP), Legal Council for Top Notch
Construction

For the respondent:
Tim Schmidek, Investigating Officer – (WH&S)

Government of Alberta ■
Employment and Immigration
Occupational Health and Safety Council

The Appeal Panel (the Panel) convened on November 24, 2009, to consider the written submissions for 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 (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 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 reasons for appeal are:

- Roy Sugai believed that he was terminated for making false statements about unsafe work conditions

The respondents contend that:

- Roy Sugai's employment was terminated for failure to adhere to communication protocol established for the project.

The Issues to be Resolved:

Roy Sugai believes that he was terminated for complaining about unsafe working conditions. Was the appellant terminated in contravention of section 36 of the *Act* which states "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"?

Roy Sugai also believes he was exercising his rights under section 35 of the *Act* by refusing to perform unsafe work. Section 35 states in part that "No worker shall 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 and safety of that worker or another worker present at the work site. Was Roy Sugai terminated for being in compliance with section 35?"

Submissions Considered by the Appeal Panel

From the Appellant, Roy Sugai

- OHSC Appeal Questionnaire – completed by Roy Sugai
- The disciplinary action complaint to WPH&S contact center by Roy Sugai on Feb. 23, 2009
- Roy Sugai's OHS appeal extra submission dated August 31, 2009
- Photograph submission
- Binder produced from WH&S, containing appellant's information, WH&S investigation, investigating officer notes, interviews and findings

From the Respondent, Top Notch Construction 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 Larry Sincennes
 - Written submission letter from Bennett Jones LLP, council for Top Notch Construction dated August 26, 2009
 - Submission binder produced from WH&S, containing appellant's information, WH&S investigation, investigating officer notes, interviews and findings

Facts:

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

- Roy Sugai was a contract worker hired to drive gravel truck for Alberta Transportation Contract 7805/08, Waterton St. Mary Headworks System Slope maintenance and repairs, reaches 9 and 10.
- Roy Sugai's employment commenced on February 9, 2009 and terminated on February 20, 2010
- During his employment, Roy Sugai raised safety concerns
- During his employment, Roy Sugai made several phone calls to Ken Kriz of Alberta Transportation

Position of the Parties and Remedy Requested:

Roy Sugai, maintains he was terminated as a result of complaining about unsafe work conditions.

He therefore requests that he receive payment of money not more than the equivalent wages he would have earned if he had not been dismissed.

Top Notch contends that Roy Sugai was terminated for failure to adhere to the communication protocol established for the project.

Top Notch construction therefore requests that the Appeal Panel uphold the ruling of Workplace Health and Safety.

Decision:

After considering all the submissions, the panel finds that Roy Sugai has an understanding of his rights and responsibly under the *Act*. The directives on the Driver Agreement are consistent with the rights and responsibilities of a worker in accordance with the *Act*. Mr. Sugai's statements that he refused unsafe work are inconsistent with his actions and later statements that he was able to perform the work safely.

To the issue of Roy Sugai being terminated for exercising his right under section 35 of the *Act* by refusing to perform unsafe work, the Panel finds that at no time did Roy Sugai refuse to perform work.

To the issue of Roy Sugai being terminated under section 36 of the *Act*, the Panel finds that there is not enough evidence to support that Mr. Sugai was terminated for being in compliance with the *Act* and therefore upholds the ruling of Workplace Health and Safety.

Occupational Health and Safety Council Appeal Panel

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

Greg Harris
Occupational Health and Safety Council
Public Representative

Eugene Sarrasin
Occupational Health and Safety Council
Employer Representative