

**Occupational Health and Safety Council**  
**Appeal Hearing**

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**Decision upon Application By:**

**PCL Industrial Constructors Inc. – Appellant**

**And**

**Michelle Whiffin – Respondent**

**Board Members**

Maggie Fulford- Appeal Panel Chair,

Rob Munro - Appeal Panel Member,

Janice Peterson - Appeal Panel Member,

**Appearances:**

For the appellant: David Myrol, Barrister and Solicitor

For the respondent: Michelle Whiffin

## **Appeal Hearing**

### **Michelle Whiffin/PCL**

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The Appeal Panel (the Panel) convened on June 10, 2013 to hear an appeal pursuant to Section 36 and 37 of the *Occupational Health and Safety (OH&S) Act*.

Section 36 of the *Act* reads:

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* 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 I4)(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:**

- On July 30, 2008, Ms. Michelle Whiffin was dismissed from PCL Industrial Constructors Inc. (PCL) for insubordination. Ms. Whiffin was determined to

## **Appeal Hearing**

### **Michelle Whiffin/PCL**

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be insubordinate because she was non-compliant with the company's Health and Safety Policy regarding use of safety goggles.

- Ms. Whiffin was told of the policy; however, refused to wear the approved safety goggles because they did not fit, they interfered with other personal protective equipment; specifically her respirator and was therefore a hazard.
- Ms. Whiffin believes this action was a violation of section 36 of the OH&S Act.
- Ms. Whiffin filed an appeal under s 37(3) of the OH&S Act and was successful. Specifically a September 5, 2012 letter from the Director of OHS Central states:

“the officer’s decision was that there was sufficient evidence to substantiate that [the respondent] was disciplined for complying with the *Occupational Health and Safety (OHS) Act*, Regulation or as outlined under Section 36 of the *OHS Act*.

- The appellant disagreed with this decision and appealed to the Occupational Health and Safety Council.

#### **The appellant contends that:**

- Ms. Whiffin was offered several pairs of approved safety goggles.
- Ms. Whiffin contended that all approved safety goggles offered to her were hazards.
- Ms. Whiffin was provided with an approved mono-goggle.
- Ms. Whiffin agreed to wear the approved mono-goggle; however, after one to two minutes she removed the approved safety goggles and returned to wearing safety glasses that were not approved by the appellant.
- This action is contrary to the Act and as such the respondent was disciplined.
- Ms. Whiffin was dismissed for insubordination and non-compliance with workplace policy.

#### **The respondent contends that:**

- The approved safety goggles provided to her did not fit and interfered with other personal protective equipment specifically her respirator.
- The respondent was offered approved mono-goggles as a last resort.
- The approved mono-goggles did not fit her face and that they too interfered with other pieces of safety equipment specifically her respirator.
- The safety glasses she was wearing fit “better” than the approved goggles and did not interfere with other pieces of safety equipment specifically her respirator.

**Appeal Hearing**  
**Michelle Whiffin/PCL**

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**The Issue to be Resolved:**

Does the action taken against the respondent by the employer constitute a violation of s.36 of the Occupational Health and Safety Act?

**Submissions Considered by the Appeal Panel**

The panel considered the:

- Submission binder produced from OH&S, containing appellant's information, OH&S investigation, investigating officer notes, interviews and findings [as applicable].

***From the Appellant,***

- Testimony from:
  - Bob Reykdal – UA 488 Job Steward
  - Barry Carlson- Superintendent for PCL.
  - Deborah Carlson – Healthy and Safety Professional for PCL.
  - Mike Morton – Regional HSE Manager for PCL.
- Submission provided at the hearing-both oral and written..

***From the Respondent,***

- Submissions, oral and written, from the Respondent documenting the events of the incident in question.
- An October 27, 2012 letter from the respondent's treating eye practitioner who indicated the respondent required tinted lenses in her safety glasses.

**Position of the Parties and Remedy Requested:**

The respondent was terminated for not using the approved safety goggles.

The respondent was initially sanctioned; however, this was overturned by the Occupational Safety Officer. The appellant believes the termination was correctly based on insubordination and violation of the Occupational Health and Safety policy regarding safety goggles.

The appellant requests the Workplace Health & Safety decision be overturned.

## **Appeal Hearing**

### **Michelle Whiffin/PCL**

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The respondent is asking for:

- An equivalent of four months of wages and
- That any reprimand letter and other references to the matter that were placed on her employment records be removed.

In order to make a determination as to whether there was a contravention of s.36 of the Act, we considered the following:

1. Was the disciplinary action taken by the appellant a result of the respondent acting in compliance with the OHS Act, Regulation, or Code; and
2. Is there a causal and demonstrable relationship between the disciplinary action taken against the respondent and the respondent's act of compliance with the OHS Act, Regulation, or Code?

### **Evidence and Findings:**

The following is a list of undisputed facts received from the parties and considered by the appeal Panel:

- Ms. Whiffin was employed by PCL.
- Ms. Whiffin was terminated from PCL.
- Ms. Whiffin, raised safety issues related to the fit of the approved safety goggles and its interference with other pieces of safety equipment during the course of her employment with the appellant.
- Ms. Whiffin was provided with several types and pairs of approved safety goggles.
- Ms. Whiffin indicated that each approved safety goggle, including the mono-goggles, provided did not fit her face and interfered with other pieces of safety equipment specifically her respirator.

The respondent contends that Section 2 of the OHS Act states:

#### **Obligations of employers, workers, etc.....**

- (2) Every worker shall, while engaged in an occupation
- (a) take reasonable care to protect the health and safety of the worker and of other workers present while the worker is working, and
  - (b) co-operate with the worker's employer for the purposes of protecting the health and safety of
    - (i) the worker,
    - (ii) other workers engaged in the work of the employer, and
    - (iii) other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.

## **Appeal Hearing**

### **Michelle Whiffin/PCL**

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The respondent contends that she did co-operate with the employer for the purpose of protecting her health and safety and the protective equipment provided comprised her health and safety thus she correctly refused to wear the approved safety goggles and was therefore in compliance with the OHS Act, Regulations and Code

In this case, the panel finds that the respondent did co-operate with the employer for the purpose of protecting her health and safety. The following evidence supports this finding:

- The appellant provided several approved safety goggles to the respondent all of which she rejected.
- The respondent applied for a variance that would allow her to wear her old safety glasses and to her understanding that variance was being considered; however, later it was confirmed the variance was denied.
- The appellant provided approved mono-goggle to the respondent which they contend fits universally and was the last approved safety goggle they had to offer the appellant.
- The respondent disagreed and felt that her old safety goggles fit better and that under the *OHS Act* she has a responsibility to protect her health and safety.
- Section 228(2) of the Occupational Health and Safety Code of Alberta 2009, states:

**228(2)** A worker must

- a) use and wear properly the appropriate personal protective equipment specified in this Code in accordance with the training and instruction received,
- (b) inspect the personal protective equipment before using it, and
- (c) not use personal protective equipment that is unable to perform the function for which it is designed.

In this case, the respondent did not feel the personal equipment provided performed the function for which it was designed because it did not fit her face and did not allow her to properly use her other pieces of safety equipment specifically her respirator. The panel finds that the evidence confirms that the initial newly approved safety goggles did not fit the respondent and did interfere with other pieces of safety equipment contention. This finding is supported by:

- The respondent's testimony.
- The testimony of Deborah Carlson – Healthy and Safety Professional, who testified that:
  - The respondent was having difficulty with the fit of the approved safety goggles and that they did interfere with other personal safety devices.

## **Appeal Hearing**

### **Michelle Whiffin/PCL**

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- A variance was requested for the respondent because the approved safety goggles did not fit.
- Photographs of the respondent in the approved safety goggles located in the binder produced from OH&S showing the approved safety goggles did not seal correctly.

The panel also finds that the approved mono-goggles provided by the appellant did not perform the function for which it was designed because they did not fit her face and did not allow her to properly use her other pieces of safety equipment specifically her respirator. This finding is supported by the following evidence:

- The respondent's testimony
- The testimony of Bob Reykdal – UA 488 Job Steward, who indicated that the approved mono-goggles fit universally but acknowledged he has no specific training in the fitting of this equipment
- Barry Carlson- Superintendent- who did not indicate he assessed the fit of the approved mono-goggles on the respondent.
- Deborah Carlson – Healthy and Safety Professional, who testified she did not fit the respondent for approved mono-goggle use.

Given, that the appellant's agents did not assess the fit of the approved mono-goggle on the respondent, we accept the testimony of the respondent that the approved mono-goggles did not fit her face and did not allow her to properly use her other pieces of safety equipment. We accept the testimony of the respondent because we were able to test her testimony and question her with respect to the "incident" in question. We also note that the respondent answered the questions put to her in a straightforward manner without hesitation and, if she did not remember events, she conveyed that to the panel.

Given that we were able to question the respondent about the incident, that the history of the incident was reported consistently and there were no evidence to the contrary, we find the approved mono-goggles did not perform the function for which they were designed because they did not fit her face and did not allow her to properly use her other pieces of safety equipment specifically her respirator.

Based on this analysis, the panel finds the respondent complied with Section 228(2) of the Occupational Health and Safety Code of Alberta 2009 in that she must not use personal protective equipment that is unable to perform the function for which it is designed.

We also note that Section 228(3) of the Occupational Health and Safety Code of Alberta 2009 indicated that the appellant (employer) must ensure that the use of personal protective equipment does not itself endanger the worker. For reason cited above, the panel accepts the respondent testimony that the approved mono-goggles did not fit her face and did not allow her to properly use her other pieces of safety equipment which could have endangered the worker. Therefore based on this analysis the panel finds the appellant did not comply with Section 228(3) of the Occupational Health and Safety Code of Alberta 2009.

**Appeal Hearing**  
**Michelle Whiffin/PCL**

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We also note that the respondent did use personal protective equipment that was able to perform the function for which it is designed. Specifically, the respondent used safety goggles that were previously approved by the appellant and there is no evidence that these glasses contravene Section 229(1) Occupational Health and Safety Code of Alberta 2009, which state:

If a worker's eyes may be injured or irritated at a work site, an employer must ensure that the worker wears properly fitting eye protection equipment that

(a) is approved to

(i) CSA Standard Z94.3-07, *Eye and Face Protectors*,

(ii) CSA Standard Z94.3-02, *Eye and Face Protectors*, or

(iii) CSA Standard Z94.3-99, *Industrial Eye and Face Protectors*, and

(b) is appropriate to the work being done and the hazard involved.

**Conclusion:**

Based on the above findings the panel concludes:

- A hazard assessment indicated the need for personal protective equipment; specifically, the need for eye protection.
- While the appellant contends the respondent did not comply with the OHS Act, Regulations and Code, the panel concludes the respondent did comply with the OHS Act, Regulation, or Code in that:
  - The initial approved safety goggles did not fit the respondent and did interfere with other pieces of safety equipment.
  - The approved mono-goggles provided by the appellant did not perform the function for which it was designed because they did not fit the respondent's face and did not allow her to properly use her other pieces of safety equipment.
  - Section 228(2) of the Occupational Health and Safety Code of Alberta 2009 states that the respondent must not use personal protective equipment that is unable to perform the function for which it is designed. The respondent complied with Code and did not use the approved safety goggles.
  - The respondent did utilize personal protective equipment that was able to perform the function for which it is designed. Specifically, the respondent used safety goggles that were previously approved by the appellant and there is no evidence that these glasses contravene

**Appeal Hearing**  
**Michelle Whiffin/PCL**

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Section 229(1) Occupational Health and Safety Code of Alberta  
2009.

The respondent complied with the Act, Regulations and Code. We find no other causal link for her dismissal from the appellant's employ, other than that she complied with the Act, Regulations and Code

The Occupational Health and Safety Officer's decision is upheld and the appeal is denied.  
The panel orders:

- Payment to the respondent 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 for the requested four (4) months.
- Removal of any reprimand or other reference to the matter from the worker's employment records.
- 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.

**Occupational Health and Safety Council Appeal Panel**

Maggie Fulford, Appeal Panel Chair,

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Rob Munro, Appeal Panel Member,

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Janice Peterson, Appeal Panel Member,