Occupational Health and Safety Council
Appeal Hearing

June 06, 2013

Andrew Egbase – Appellant

and

WorleyParsons Canada Services Ltd. – Respondent

Panel Members

Peter Bowal (Chair), Nina Novak and Hal Griffith

Appearances:

The Appellant

For the Respondent: Michelle McCaffery (Counsel), Erin Green, Robert Ge and Haider Taher

Observer

Angela Egbase

Alberta
Human Services

Occupational Health and Safety Council

The Appellant Andrew Egbase was dismissed from his position as a Staff Civil Engineer in Calgary after some seven and a half months of employment with the Respondent WorleyParsons Canada Services Ltd. ("WorleyParsons"). Mr. Egbase says he was dismissed because he refused to work in an unsafe scenario on October 19, 2012. After that incident, which is described below, he was removed from that project and six days later was terminated by WorleyParsons with one week of pay in lieu of notice in accordance with minimum employment standards legislation. WorleyParsons says the dismissal was wholly unrelated to any safety issue on October 19, 2012. While the company asserted a basis for cause for Mr. Egbase's dismissal, its position is that it dismissed him without cause with minimum statutory notice.

Mr. Egbase filed a complaint under section 37(1) of the *Occupational Health and Safety Act*, R.S.A. 2000, Ch. O-2 ("the Act") with Occupational Health and Safety officers on November 06, 2012. After conducting an investigation, on December 3, 2012, two officers jointly dismissed the complaint, concluding "that the Worker was terminated for performance reasons." On January 2, 2013, Mr. Egbase appealed to this Council for a review of that decision under section 37(3) of the Act. We convened the hearing of this appeal on June 06, 2013 in Calgary, Alberta.

For the reasons which follow, we dismiss this appeal. It is our view that the OHS officers properly investigated this complaint and made the decision that is best supported by the evidence. The officers' conclusion in this case was reasonable.

Facts

The incident in question is uncomplicated, although the specific facts that bear on the critical fifteen to thirty minute timeframe are in dispute. Mr. Egbase was sent to a construction site by WorleyParsons where his job was to conduct soil compaction testing at precisely 11:00 a.m., 3:00 p.m. and 6:00 p.m. Heavy equipment, such as a compactor, bull dozer, water truck and Caterpillar tractor, prepared the land while Mr. Egbase remained on the sidelines in his vehicle. At the first two specified times, the workers would stop their machinery and take their coffee breaks. At 6 p.m., they would shut down the machines and leave the site for the day. At these three points of time in the day, Mr. Egbase was tasked with walking out on the land being worked, among the parked machinery and do his compaction tests which would last about thirty minutes. These were the exact

windows of time that all equipment on the site was not operating and the workplace was safe so the testing could be performed.

October 19, 2012 was his third day doing this work on this site. Mr. Egbase did not test at 11:00 a.m. WorleyParsons says Mr. Michael Hillman, the Site Superintendent, drove over to Mr. Egbase who was sitting in his truck "shortly after 11 [when] the crew was stopped for coffee" and asked him to do the test. Mr. Egbase said Mr. Hillman came over to him between 11:15 a.m. and 11:20 a.m. Everyone agrees that this interaction quickly escalated into a nasty verbal altercation. Mr. Egbase "reminded him [Mr. Hillman] that I was representing a company, and wasn't his boy." In addition to the reported yelling and profanities, this may have invoked racial overtones. Mr. Egbase said some of the heavy machines were continuing to work at and after 11:00 a.m. and he stayed in his truck on what he referred to as "standby."

It is impossible for Council to know for certain if all the equipment was stopped at 11:00 a.m. sharp. Mr. Hillman says it was, in the email he wrote and sent at 1:49 pm that day. Mr. Hillman did not attend in person at the appeal. Mr. Egbase, who was present at the appeal, says the equipment was not stilled at 11:00 am. There were no other witnesses produced to corroborate or refute either side.

The burden of establishing reasonable and probable grounds for imminent danger is upon the worker who claims it exists [section 35(1)]. We note in this case that if Mr. Egbase was in fear of equipment operating on the site at 11:00 a.m., he did nothing about it until he was confronted by Mr. Hillman 15 to 20 minutes later by his account. He took no photographs until 27 minutes after he was supposed to start testing. He did not take any initiative to call his WorleyParsons managers or notify anyone present on the site about this problem. After the verbal confrontation with Mr. Hillman, he called Mr. Robert Ge, his "boss" (diary entry) at 11:25 a.m., and left a voicemail message reporting the confrontation and complaining how he was being treated. He took some photographs of the equipment in action, the earliest one being snapped at 11:27 a.m. according to his cell camera clock and sent them by email at 11:33 a.m. to Mr. Ge. The caption in the "subject" line of the email was "See photo of where he wants me to test when work is still going on. See my vehicle packed and equipment setup in the background in 2nd Photo". There was nothing written in the body of this email.

When Mr. Ge was listening to the voicemail message and looking at the three photographs he had just received by email, he testified that he understood this to

be a call and concern about the unpleasant personal confrontation that had just transpired. Mr. Ge said he called Mr. Egbase back on the phone and the main message from Mr. Egbase then too was that there had been this verbal confrontation shortly after 11:00 a.m. and the site workers were not treating him well. Mr. Ge said he did not get a clear concern expressed by Mr. Egbase about his safety on the site.

More photographs were taken and sent in the next hour or so. However, they are unhelpful to us in this appeal because the heavy equipment operators were not expected or required to be stopped at those times. Even the only photograph showing one or two machines operating at 11:27 a.m., well after the verbal confrontation took place, is not helpful evidence. The camera clock could have a margin of error of three minutes. The workers could have been waved back to work after Mr. Hillman realized the 11:00 a.m. test would not be done.

Although Mr. Egbase referred to this incident at the appeal as a "near miss", he did not file a written notification at any time. Mr. Egbase was trained to report these incidents and near misses and indeed was the one who produced the blank WorleyParsons notification form at the appeal hearing (Exhibit 8).

It is reasonable to assume that the three or four heavy machines were not all killing their engines in unison at every one of the three scheduled work stoppages during the work day. Mr. Egbase said the equipment operators sometimes worked past these time points and that would delay his testing, but he offered no detail. When pressed about how many times this had happened in the three days he worked on that site, he was vague. Mr. Hillman in a rather more precise email narrative, timed at 1:49 p.m. on October 19, 2012, describing what transpired that morning added "I was here until 7:30 last night because Andrew didn't start testing until well after 6."

At this appeal, but not for the OHS officers' investigation, Mr. Egbase produced a rather detailed diary covering his work day on October 19, 2012. While some items were very to-the-minute specific, such as leaving home at 6:30 a.m. to beat the traffic, this safety issue and the verbal altercation were not as prominently featured in the diary as one might expect. The corporate Daily Field Report for October 19, 2012 made no mention of the incident at all.

Mr. Egbase and his WorleyParsons managers met with him on the next business day, October 22, 2012 and again on October 25, 2012, when he was notified of his dismissal. At these meetings, the managers said no safety incident was raised by Mr. Egbase. He did not talk about any safety concern. They said, "safety did not

come up at these meetings." The managers, Messrs. Ge and Taher, asked Mr. Egbase why he did not test at 11:00 on October 19, 2012. They said they did not get a response at all from Andrew to that question. He did not mention that the equipment was moving on the site at 11:00 a.m. and the photographs were not brought up at those meetings. Mr. Egbase says he did raise the safety concern at these meetings. His only written evidence to this effect was to "the issue of safety" in an email to WorleyParsons on November 2, 2012, after his dismissal was effective.

The remaining factual piece relates to Mr. Egbase's job performance over the previous 7 months he was in WorleyParsons' employ. He had been stationed in Fort McMurray but that did not work out and he was moved to Calgary within a few months. Out of the Calgary office, he was posted to a project at Pincher Creek where he continued to disappoint, according to WorleyParsons and their client at that project who sent a strongly worded email on August 29, 2012. Mr. Egbase's explanations at the appeal hearing answered and mitigated a few issues about his previous two postings, but competence, performance and attitude remained as concerns from a human resources perspective. A few months later came the October 19, 2012 incident on the Calgary site. WorleyParsons testified in its written response to the appeal that it terminated Mr. Egbase because he "demonstrated a lack of technical skill, he had difficulties maintaining positive client relationships, and he simply did not seem to be a good 'fit' for WorleyParsons." Although WorleyParsons' position is that it discharged Mr. Egbase with pay in lieu of notice *without* cause, we find that this third negative event on October 19, 2012 in the short employment of Mr. Egbase was a reasonable and plausible basis for his dismissal.

Applicable Law

The Act mandates workers to refrain from what they reasonably believe to be imminently dangerous work. If they do so, and are then disciplined in any way for that, they have access to the OHS officer and, by appeal, to this Council for a remedy. This duty to refrain from the dangerous work is set out in section 35 of the Act:

> *Existence of imminent danger*
>
> *35(1) No worker shall . . .*
>
> *(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 . . .*
>
> *(2) In this section, "imminent danger" means in relation to any occupation*
>
> *(a) a danger that is not normal for that occupation, or*
>
> *(b) a danger under which a person engaged in that occupation would not normally carry out the person's work.*
>
> *(3) A worker who*
>
> *(a) refuses to carry out work . . . pursuant to subsection (1) shall, as soon as practicable, notify the worker's employer at the work site of the worker's refusal and the reason for the worker's refusal.*

Once the worker believes, on reasonable and probable grounds, that he faces an imminent danger at work and refuses to carry out that work, he must notify the employer about that imminent danger that led to the refusal. This then sets in motion a series of legal obligations upon the employer to investigate, abate the danger and report on the mitigation efforts [see section 35(4) to (13)].

Analysis

As described above, we are not completely comfortable with Mr. Egbase's version of what happened on this worksite at 11:00 a.m. on October 19, 2012. However, even if we were to accept that he was expected and asked to walk among moving heavy equipment on the site and conduct the compaction testing, and we further found that presented an imminent danger to him, we conclude that he did not adequately notify his employer of this. That failure broke the statutory sequence and WorleyParsons, without proper notification, was under no obligation to investigate, remedy and report. The employer, accordingly, could not be accused of disciplining Mr. Egbase for refusing to perform unsafe work when it was not sufficiently apprized of the safety issue. We accept WorleyParsons' evidence that it always understood and believed that it was dealing with a troublesome interpersonal conflict on the morning of October 19, 2012, not a safety issue.

The oft-stated three-part legal test in these disciplinary action complaints is:

(1.) There must be evidence that the worker acted in compliance with the Act;

(2.) There must be evidence that the worker was disciplined; and
(3.) There must be evidence that the worker was disciplined *because of* his or her act of compliance.

We conclude that Mr. Egbase did not adequately notify the employer of the safety concern, orally or in writing, in compliance with section 35(3). He did not act in compliance with the Act and thus he failed to establish the first part of the legal test above. Consequently, WorleyParsons' discipline – termination in this case – could not have been *because of* this notification and compliance because the notification and compliance did not happen. The employer states that it dismissed Mr. Egbase for other reasons and it has furnished a sensible evidentiary basis for those other reasons.

Conclusion

The appeal is dismissed.

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Peter Bowal, Appeal Panel Chair

_____

Nina Novak

I concur with the decision to dismiss the appeal. My rationale differs enough that I will describe it.

I used the evidence and statutory requirements as listed in the main decision.

I considered if this Appeal Panel had enough information on the matter to form an opinion anew and concluded that we did.

I did not find that the evidence proved the Appellant was acting in compliance with the OHS Act, Regulation, or Code in the event purported to have culminated in discipline.

I do not find that the appellant has sufficiently established the required facts to successfully appeal a discipline resulting from his following of the OHS Act, Regulation, or Code.

A central issue was whether or not the Appellant was complying with the *Act* at about 11:00am on October 19, 2012. That was the time of an altercation with a client's representative that was or may have been a culminating event leading to the Appellant's termination. The client's representative was the Prime Contractor's site Superintendent. The altercation occurred when the Appellant was approached by the Superintendent for not conducting testing as a pre-set testing time.

The Appellant states he made it clear, to the Superintendent, that this was an unsafe work refusal situation. Further he states that, in short order, he made that work refusal clear to his supervising senior engineer.

The Respondent contends no unsafe work refusal was made or claimed until after the Appellant's termination, days later. The claimed unsafe condition of moving equipment did not exist at the pre-set time of 11:00. No reasonable cause existed for the Appellant to not be conducting required testing at that time.

The Appellant stated that the pre-set 11:00am, 3:00pm, and 6:00pm testing times were not strictly adhered to by the equipment operators. The reality was that the equipment would stop near to those times at completion of intermediary stages of the compaction process. The process requires several pieces of equipment to each complete tasks such as adding materials, wetting compactions and scraping. The length of time required may vary depending on materials, wetness and environmental factors. Testing is appropriate only when a certain stage is complete. The equipment operators would then scrape clear testing spots and then move off the testing area either to work in another area or to shut down. The cleared spots were places that had been scraped level where he could set up

his equipment for accurate sampling. The testing windows were to be ½ hour long. The testing window for the incident in question was to be 11:00am – 11:30am.

According to the Appellant, sometimes the equipment operators would take breaks earlier than expected, sometimes later and sometimes they would request sampling in between scheduled testing times to judge how the work was proceeding. Breaks are ideally taken between stages.

It would not be normal for the Appellant to call in to say it was dangerous to work if his testing was delayed on account of a stage not being readied for testing at a particular moment. He would simply remain at the ready and available to complete testing as soon as the site was prepared. The time would be logged on his sample, whenever it was taken. He would not have considered the act of waiting on standby to be an act of work refusal and would not have reported a work refusal, as such.

The Appellant asserts he did not consider the matter an actual work 'refusal' until Oct 19, 2012 shortly after 11:00am. That was when the Prime Contractor's site Superintendent demanded that he test an area where moving equipment was an active imminent danger. He refused stating safety as the reason why he was not already out there. After providing this formal refusal to the Superintendent he reported to his senior engineer that he had had an altercation with the Superintendent about refusing to work during the time that equipment was creating hazards. Shortly after that he began collecting photo evidence. By then it was near the end of the pre-planned testing window.

I draw no direct conclusions from any appearance of delay in his evidence gathering or lack of timely formal documentation on the incident. It is entirely consistent with the Appellants explanation he would have seen no need to gather evidence of moving equipment until after his altercation with the Superintendent

and understandable that he may not have been operating at his best after such an incident. The Appellant was sufficiently upset from the altercation with the Superintendent that there could be understandable delays or deficiencies on those accounts. That there is a lack of timely and accurate documentation to support his claim is simply a limitation on the documented evidence he was able to present.

The Respondent holds that they did not knowingly discipline the Appellant for following OHS legislation. The Appellant never mentioned any safety issues to them. The conversations were about the altercation with the Superintendent.

Respondent witnesses stated that they asked for but never received a reason for the subject's alleged failure to perform testing at the required time. They did not receive a reason for the subject's sending of photos of the site around the time the testing window would be closing.

The Appellant provided evidence in the form of a document showing that he emailed photos to the Respondent three minutes after the alleged testing window was closed. The subject line in the email was, "Clearwell Capping: See photo of where he wants me test when work is still going on. See my vehicle packed (*sic*) and equipment setup in the background in 2nd Photo"

The Respondent did not much investigate the altercation or situation around the altercation. They asked the subject why the incident occurred and so indicate that any blindness was not wilful. When the Respondent had asked the Appellant why he had sent photos and failed to test, his answers focused on his ill treatment at the hands of the Prime Contractor's site Superintendent He did not describe any safety issues.

Three witnesses for the Respondent testified to speaking to the Appellant about the subject without the subject discussing safety issues. The witnesses included the senior engineer that he normally reported to.

The Appellant maintains that he did report the issues, particularly to his senior engineer. He emailed photos gathered near the time of the end of the outlined testing windows to back up his report of safety refusal on account of imminent danger.

The Appellant did not enter a copy of his log book or diary into evidence. He did not produce a copy of a health and safety issue report form or any other documentation reporting the issue for evidence. He states did not retain copies of records he had been required to turn into his employer upon termination.

The Appellant described a situation where there would not normally be a formal work refusal if equipment was still operating during a proposed testing time. He simply would not test until it was safe to do so. The Appellant described a situation where it was not unusual for a testing time to come early or to arrive late on account of stages of the compaction processes being done. The process includes moving compacting materials, applying moisture and compacting. He reported that compaction work has to be at a particular stage for testing. It was relatively normal for stages to not be ready at prescribed testing times. When the proper stage in the process of is reached the equipment would clear testing spots and move elsewhere. Normally no official refusal would be required to comply with the *Act* by simply waiting for a safe testing window. Testing times were targets subjected to the realities of field conditions.

The Appellant did not produce documentation showing a history of variance in the testing schedule.

A copy of testing protocol was not produced.

A copy of a recognized testing standard was not produced.

A copy of a practice for completion of a given layer prior to testing was not produced.

The Appellant indicated his case was more difficult to prove as any of the records that properly belonged to his former employer were surrendered to them upon termination.

The Investigation Summary does not show that Officers reviewed any of the Prime Contractors documentation about testing processes or standards, testing logs or related incident reports.

The Contact Report shows Officers reviewed Worker Training Records, HSE Planning Tool, Emergency Response Plan for the worksite, A Work Refusal Standard and a Workplace Violence Standard.

The Investigation Summary does not show that Officers interviewed the Prime Contractor Superintendent directly involved in the October 19, 2012 11:00am testing incident, or any of the equipment operators present at that time.

At the Appeal Hearing, no witnesses were called from the Prime Contractor or other subcontractors.

The Appeal panel was left largely with the testimony of three witnesses in the direct employ of the Respondent, the testimony of the Appellant, parts of emails and copies of the time stamped photographs to determine if there was a critical act of compliance with the *Act*, *Regulation*, or *Code*.

Section 36 of the *Act* (2009) 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* (2009) 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 Issue to be Resolved:

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

The Test to be Applied

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

All three parts of the test must be met for the appeal to be allowed.

As the 2nd part of the test has not been met, the appeal cannot be allowed.

Hal Griffith