**WCAT** Workers' Compensation Appeal Tribunal

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**WCAT Decision Number:** WCAT-2015-03065
**WCAT Decision Date:** October 07, 2015

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**Panel:** Lesley A. Christensen, Vice Chair

| WCAT Number | Discriminatory Action Number | Employer's Registration Number | Date of Decision Appealed |
|---|---|---|---|
| 150475-A | 2013D159 | 54363 | January 21, 2015 |

**Appellant:** Rio Tinto Alcan Inc.
Kitimat Plant, Division of
(the employer)

**Respondent:** Marc Young
(the worker)

**Representatives:**

For Appellant: Ashley Medeiros

For Respondent: Martin Mcilwrath

**WCAT**

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## Introduction

[1] The worker complained to the Workers' Compensation Board (Board), operating as WorkSafeBC, that his employer had taken discriminatory action against him under the *Workers Compensation Act* (Act) when it imposed a 10-day suspension.

[2] The Board investigated the complaint. On January 21, 2015, a case officer of the Board issued the decision under appeal.

[3] The case officer found that the employer took discriminatory action against the worker when he was suspended for 10 days. The case officer also decided that the appropriate remedy was removal of the suspension from the worker's record and reimbursement to the worker for the lost pay.

[4] The employer disagreed with the Board's decision, and now appeals to the Workers' Compensation Appeal Tribunal (WCAT). The employer requested its appeal proceed via written submissions and I agree that this is an appropriate method of deciding the appeal. The employer provided written submissions with the notice of appeal, and provided no further submissions when invited to do so. The worker participated in the employer's appeal but provided no submissions.

## Issue(s)

[5] Did the employer unlawfully discriminate against the worker within the meaning of section 151 of the Act? If so, what is the appropriate remedy?

## Jurisdiction

[6] Section 240(1) of the Act provides a right of appeal to WCAT from a decision under section 153 of the Act regarding a complaint of unlawful discrimination.

## Statutory and Policy Provisions

[7] The discriminatory action provisions in the Act were added by the *Workers Compensation (Occupational Health and Safety) Amendment Act*, 1998 (Regulations), in force October 1, 1999 (BC Reg 162/99).



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[8] Section 151 of the Act has a summary title "Discrimination against Workers Prohibited" and states as follows:

> An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment to
>
> (i) an employer or person acting on behalf of an employer,
> (ii) another worker or a union representing a worker, or
> (iii) an officer or any other person concerned with the administration of this Part.

[9] In order for a complainant worker to establish a basic case (a *prima facie* case) under section 151 of the Act, the complainant must establish that the respondent took action that could fall within the meaning of discriminatory action in section 150 of the Act. Section 150 defines "discriminatory action" as follows:

> (1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.
>
> (2) Without restricting subsection (1), discriminatory action includes
>
> (a) suspension, lay-off or dismissal,
> (b) demotion or loss of opportunity for promotion,
> (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,
> (d) coercion or intimidation,
> (e) imposition of any discipline, reprimand or other penalty, and
> (f) the discontinuation or elimination of the job of the worker.



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[10] A complainant must also provide sufficient evidence to establish a basic case (a *prima facie* case) that the respondent's discriminatory action was causally linked to the complainant's conduct under section 151(a), (b) or (c) of the Act.

[11] If a complainant has provided sufficient evidence to establish a basic case (or *prima facie* case) against the respondent, then the respondent bears the burden of showing that their actions were not motivated in any part by unlawful reasons as specified in section 151 of the Act. This is because section 152(3) of the Act provides that the burden of proof that there has not been a violation of section 151 is on the employer. Section 153 describes the Board's procedure for dealing with a complaint.

[12] Like the former Appeal Division, WCAT has applied the "taint" principle in appeals involving section 151 complaints. A complainant will establish a case of illegal discrimination even if a ground prohibited in the Act provides only a partial motivation for the employer or trade union action. The "taint" principle requires that in order to discharge the burden of proof under section 152(3) of the Act, a respondent must prove that in no part were its actions tainted by motivation relating to any of the grounds prohibited under section 151 of the Act.

[13] In *Appeal Division Decision #2002-0458* (February 21, 2002), the panel referred to the taint principle in the following terms:

> There is no doubt that the taint theory makes it more difficult for the employer to discharge its burden under Section 152(3). The employer must demonstrate that its reasons for taking action against the Worker were not related to any of the prohibited grounds in Section 151. This means that the employer cannot shield itself by pointing to proper cause, or what may be a valid business reason for the impugned conduct, where there is also evidence of a prohibited action...
>
> ...The taint theory stands for the proposition that safety considerations need not be the only or dominant reason for the employer's action, but rather, it is sufficient if it is one of the reasons for the employer's actions under review....

[14] I observe that the panel in the above decision referred to "safety considerations," which I consider was a short-hand way of describing motivations relating to the prohibited grounds in the discriminatory action provisions.

**Relevant Information**

[15] The worker's complaint of discriminatory action provides information that on August 14, 2013, he refused to operate the employer's anode past plant (APP). He and another worker shut the plant down as there was not the correct number of operators (three) to

run the plant safely. The worker stated that the employer suspended him for 10 days as a result of this action, describing the worker's actions as insubordination.

[16] In accordance with the provisions of item 3.12 of the Board's Regulations, the employer and the worker called the Board on August 14, 2013 to advise they had been unable to resolve the worker's safety concern. A Board officer attended the work site and prepared a memorandum. It notes that workers had shut down the employer's APP because there were only two qualified workers available to run the plant. The worker reported that past practice required a minimum of three qualified workers, and the workers were concerned that if upset conditions developed, there would not be enough qualified persons available to clear the upset in a timely manner. During normal operations, the crew included two qualified workers working in the plant and a truck driver that was also qualified to assist the plant workers during upset conditions. On August 14, 2013, the truck driver was a summer student who had not received training for working the APP. At the time of the work refusal, no upset conditions had occurred.

[17] The Board officer investigated the matter and determined there was no undue hazard in accordance with item 3.12 of the Regulations. The officer issued an order in this regard.

[18] A representative for the employer made submissions to the Board during the investigation. The representative provided information that on August 14, 2013, the APP supervisor arrived at work to find the APP shut down. The two workers assigned to run the APP (the worker and a co-worker) told the supervisor that they thought there was an agreement in place which required the APP to have three qualified operators to run it. The workers raised a concern that if there were problems with the process, there would not be enough qualified people to respond safely. The workers began the work refusal process in accordance with item 3.12 of the Regulations. The supervisor did not see an undue hazard, and thought work should resume. The workers did not accept this, and a manager and a union safety representative were called. The workers operating the APP agreed that, unless there was a breakdown, there was no undue hazard. The manager found there was no undue hazard as well, and asked the workers to return to work. However, the workers continued with their work stoppage, and Board officers were called in.

[19] The employer submitted the work stoppage resulted in a significant loss of production in the APP, amounting to a $72,000 production loss.

[20] During the investigation, the worker provided information to the Board. In his written submission, the worker confirmed that the APP was shut down as there were only two trained operators. He stated that this had been the standard practice for four to five years, and the policy was only changed after he was suspended. The worker stated that, based on the research of one of his co-workers, the APP had been shut down on 28 occasions between August 18, 2010 and August 14, 2013 due to lack of manpower. The worker provided a list of shut down dates.


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[21] With respect to the employer's suggestion to "just leave the line down" if a process interruption occurs, the worker submitted that this is a very involved procedure and not an option, as a result of the high temperatures at the machines. In addition the liquids in the machines would begin to back up. The work resulting from the frozen equipment would be "horrendous". He stated the process must be attended to directly and the machines emptied in a timely manner to maintain the integrity of the machine and process. He submits the employer's statement in this regard is a direct result of a general lack of knowledge on the part of management.

**Submissions**

[22] The employer's submissions were provided with its notice of appeal. The employer disputes that the worker was disciplined as a result of discriminatory action, but rather submits that he was suspended from work for insubordination for refusing to carry out legitimate instructions. The employer submits that item 3.12 of the Regulations provides that a worker must have reasonable cause to believe there was an undue hazard. In this case, the worker could not identify an undue hazard or even an imminent risk; the situation was entirely hypothetical. If an upset had occurred, the worker was correct that a third person would be needed for support, but was incorrect to state that the operation could not be shut down until either someone could be called in or to wait until there were enough staff.

[23] The employer further argues the worker failed to follow the procedures in item 3.12 in that he did not immediately report the unsafe condition to his supervisor. On the morning of the incident, the supervisor arrived to find the process shut down. He called the control room and was advised by the co-worker that it was unsafe to operate as there were only two operators. The employer submits it was the worker's responsibility to contact the supervisor immediately. The workers failed to do so, and took it upon themselves to shut down a fully functioning operation without reporting. Further, the worker refused to return to work when he was unable to identify the undue hazard, without a hypothetical situation. There was no risk in the process at the time and it was unreasonable for the worker to base his decision to shut down the process on a hypothetical situation.

[24] In his submissions during the investigation, the worker submitted that his suspension created an atmosphere where workers chose not to refuse unsafe work because of fear of reprisal by the employer. He submits this created a very unsafe work environment.

**Findings and Reasons**

*Did the employer unlawfully discriminate against the worker within the meaning of section 151 of the Act? If so, what is the appropriate remedy?*

[25] In order to establish a claim of discriminatory action, the worker is first required to show a *prima facie* case of discriminatory action by his employer or a person acting on behalf

of the employer. A *prima facie* case is a bare outline of a complaint that will prevail until contradicted and overcome by other evidence. A threshold test in establishing a *prima facie* case is whether or not the employer took action that comes within the meaning of discriminatory action in section 150, and whether the worker engaged in activities as described in section 151 of the Act that allegedly prompted the discriminatory action. A worker's evidence is generally accepted as being accurate at this first stage.

[26] With respect to the first component of a *prima facie* case, there is no dispute that the worker was suspended from work for 10 days. Suspension is captured under section 150(2)(a) of the Act. I find there is evidence to support the first component.

[27] With respect to the second component of a *prima facie* case, again there is no dispute that the worker was exercising his right to refuse what he perceived to be unsafe work, in accordance with item 3.12 of the Regulations.

[28] Item 3.12 of the Regulations provide that a person must not carry out a work process if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person. If a worker refuses to carry out a work process, the worker must immediately report the circumstances to his supervisor. The supervisor must then immediately investigate the matter and ensure that any unsafe condition is remedied without delay. Or, if in the opinion of the supervisor, the report is not valid, the supervisor must inform the worker who made the report. If this does not resolve the matter, and the worker continues to refuse to carry out the process, the supervisor must investigate the matter in the presence of the worker, as well as a worker member of the joint committee, a representative of the union or any other reasonably available co-worker selected by the worker. If this still does not resolve the matter, and the worker continues to refuse to carry out the process, the Board must immediately be notified, who will investigate without undue delay, and issue whatever orders are deemed necessary.

[29] The employer's submissions centered on the issue that the worker did not have reasonable cause to believe that continuing to run the APP was unsafe. The employer submits that because the worker was unable to identify an undue hazard or imminent risk, he did not have reasonable cause to refuse to run the APP. The employer submits the worker's concern was entirely hypothetical.

[30] As stated in the decision under appeal, in order to conclude that the worker was exercising a right under item 3.12 of the Regulations, I must be satisfied that the worker had "reasonable cause" to believe he was being asked to perform unsafe work. If he did not have reasonable cause, then it cannot be said that he exercised a protected right.

[31] The Board publishes a guideline to the Act and Regulations (Guideline), available on the Board's public website at www.worksafebc.com. The Guideline provides that, with


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respect to reasonable cause, the worker must assess the situation as a reasonable person, taking into account relevant and available information and exercising good faith judgement with respect to the hazard with due regard to the worker's training and experience. Ultimately, there must be an objective basis for a continued refusal to for unsafe work.

[32] The Guideline goes on to state that Board prevention officers investigating work refusals (as happened in this matter) will deal with each refusal on a case by case basis, and will undertake a full assessment of the situation in order to conclude whether the worker had reasonable cause to believe an undue hazard existed. When the assessment is complete, the Board officer will issue an order setting out his findings.

[33] In this matter, the prevention officer did not identify an undue hazard.

[34] The worker's evidence was that it was the employer's standard practice, up until the date in question, to shut down the APP when there were less than three qualified operators available to deal with an upset. In support of this statement, the worker provided a list of 28 dates in a three-year period when the APP had been shut down due to less than three qualified operators being present.

[35] The employer did not refute or dispute the worker's evidence about past practice or the list of dates when the APP had been shut down. With respect to this issue, the employer submitted the worker should have shut down the operation if there was an upset. In response to this comment, the worker provided information about the effect of shutting the operation down, stating the safety of the operators would be at risk without more people present to deal with the upset. As well, the integrity of the machine and process would be compromised if it were shut down with insufficient operators to deal with it.

[36] Given this evidence, I conclude the worker had reasonable cause to believe it was unsafe to run the APP. The employer's standard operating procedure until the date of the incident in question was to shut down the APP when less than three operators were present, and the worker acted in accordance with those procedures.

[37] I find the worker has established the second component of the *prima facie* case.

[38] With respect to the third component, there is no dispute of the causal connection between the worker's refusal to perform unsafe work (which the employer interpreted as insubordination), and the employer's action of suspending him from his employment.

[39] I find the worker has established a *prima facie* case of discriminatory action.

[40] The onus now shifts to the employer to demonstrate, on a balance of probabilities, that its reasons for taking action against the worker were not related to any of the prohibited grounds. The employer cannot shield himself by pointing to proper cause, or what may


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be a valid business reason for the impugned conduct where there is also evidence of a prohibited action. The taint theory stands for the proposition that safety considerations need not be the only or dominant reason for the employer's action, but rather, it is sufficient if it is one of the reasons for the employer's actions.

[41] The employer has not rebutted the first component of the worker's *prima facie* case, as it does not dispute that the worker was suspended from his employment for 10 days.

[42] With respect to the whether the employer has rebutted the second component, I have already found the worker had reasonable cause to believe that continuing to run the APP was unsafe. Further, the worker believed that he was acting in accordance with the employer's established policy of shutting down the APP when there were less than three qualified operators present.

[43] The employer submitted the worker was unable to identify an immediate hazard when he refused to continue to operate the APP. However, there is no requirement in the Regulations for the worker to be able to identify an immediate hazard. The only requirement is that the worker has reasonable cause to believe that continuing to do the thing he identified as unsafe would create an undue hazard to the health and safety of any person. I accept the worker's explanation of why he believed it would be unsafe to continue to run the APP with less than three qualified staff members. While the employer has argued that the worker could merely have shut the process down in the event of an upset, the worker's response to that argument has not been rebutted by the employer. I accept the worker's response.

[44] With respect to the third component, the employer's submissions confirm that it contravened item 3.12 of the Regulation which provides that a worker must not be subject to discriminatory action because a worker has acted in accordance with item 3.12 or with an order made by an office. In this matter, I have found the worker had reasonable cause to invoke the provisions of item 3.12 of the Regulations. As such, the employer's action in response to that is a direct contravention of item 3.12, and constitutes discriminatory action.

[45] The employer's decision to discipline the worker for continuing to refuse what he perceived to be unsafe work is a textbook reason for why discriminatory action provisions are required. The employer relied on the prevention officer's finding that there was no undue safety hazard as supportive of their decision to discipline the worker for refusing what it believed was a reasonable direction. However, if the Act permitted such an action, it would have a considerable chilling effect on workers considering whether perceived unsafe work should be refused. If a worker knew that disciplinary sanctions may result from an unsafe work refusal (such as in this case, if a prevention officer does not agree the work was unsafe), potentially unsafe work may continue. It is only when the action of refusing what is perceived to be unsafe work cannot attract discriminatory action that a worker can feel free to refuse what he believes to be unsafe work, even if the work eventually is deemed to be safe.


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[46] A worker has a right to be wrong about whether the work is safe.

[47] I find the employer has not demonstrated, on a balance of probabilities, that its reasons for taking action against the worker were not related to any of the prohibited grounds.

**Remedy**

[48] Section 153(2) of the Act provides that when the Board determines that a prohibited discriminatory action has occurred, it may make an order requiring the employer to cease the discriminatory action, pay the wages required to be paid (among other things) and do any other thing the Board considers necessary to secure compliance.

[49] The Board officer ordered the employer to remove the suspension from the worker's record and to reimburse the worker for the lost pay. I confirm that order, and direct the employer to comply. This action will put the worker in the same position that he would have been in had the discriminatory action not occurred.

**Conclusion**

[50] In accordance with the above reasons, I deny the employer's appeal. The Board's original decision letter of January 21, 2015 is confirmed.

[51] The employer took prohibited discriminatory action against the worker when it suspended him from his employment for 10 days.

[52] The employer is ordered to remove the suspension letter from the worker's record and reimburse the worker for the lost pay.

[53] No expenses were requested or are apparent to me. None are ordered.

Lesley A. Christensen
Vice Chair

LAC/ml


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## ADVISORY NOTICE

The enclosed WCAT decision is final and conclusive pursuant to section 255 of the *Workers Compensation Act.* It cannot be appealed. The Workers' Compensation Board, operating as WorkSafeBC (Board), must comply with a final decision of WCAT.

A copy of this decision has been sent to the Board to ensure that:

- the decision is placed on the appropriate Board case file;
- the Board takes the necessary steps to implement the decision (if applicable).

**NOTE: If you have any questions concerning the implementation of this decision, please contact the Board officer or department that is handling the case file.**

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Toll free: **1-888-967-5377**

If you are writing to the Board, please mail correspondence to:

WorkSafeBC
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WorkSafeBC
Local fax: 604-233-9777
Toll free: 1-888-922-8807

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For information on processes that may be available to you to after this decision, see WCAT's Post Decision Guide available on our website at www.wcat.bc.ca.
**Time limits apply to some of these processes**.