

IN THE MATTER OF AN ARBITRATION

BETWEEN:

AGRIFOODS INTERNATIONAL COOPERATIVE LTD.

("the Employer")

AND:

TEAMSTERS LOCAL UNION NO. 464

("the Union")

(James Burt - Wrongful Dismissal Grievance)
(L.R.B. Section 104 Case No. 54356/06L)

ARBITRATOR: JOHN P. SANDERSON, Q.C.

REPRESENTING THE EMPLOYER: BRUCE M. GREYELL

REPRESENTING THE UNION: V.R. (SAM) BLACK

DATE OF HEARING: FEBRUARY 21, 2006

LOCATION OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF PRELIMINARY AWARD: MARCH 3, 2006

Preliminary Award

The grievance in this arbitration arises from the termination of the grievor's employment. Issues concerning his activities while off work and receiving Workers' Compensation Benefits appear to be relevant in these proceedings. The hearing of this grievance is currently scheduled for March 27, 29, 30 and 31, 2006. As a preliminary matter, an issue has arisen between the parties, concerning the admissibility of information in the grievor's WCB file. The file relates to a claim for benefits paid as a consequence of the grievor's absence from work.

The grievor's original claim for benefits under section 5 (1) of the Workers' Compensation Act, was initially granted. The claim was later reviewed and reconsidered and by a decision dated June 29, 2005, the earlier decision was reversed and the claim was denied. That decision was appealed by the grievor. In accordance with the WCB's usual practice, a copy of the file was sent to the employer when the WCB decision reconsidering and denying the claim was appealed by the grievor.

The position of the employer is that it has reviewed the contents of the file. In part, it has acted on what it has learned with respect to the grievor's conduct, as revealed by the file and the content of the statements to be found in the file. The employer proposes to enter information contained in the file into evidence at the arbitration hearing. As a consequence, the employer requests that I issue subpoenas requiring certain WCB officials to attend at the arbitration hearing to answer questions concerning the documents in the WCB file and to provide information they gathered, particularly from the grievor, in the course of dealing with the claim.

The union submits it would be improper and unlawful to allow the file or any of its contents to be disclosed in this proceeding. The union relies on section 95 of the Workers' Compensation Act and what it describes as the overriding right of the grievor's privacy. In the circumstances, the union strongly urges that no such subpoenas should be issued.

On February 21, 2006, I convened a preliminary hearing to allow the parties to present argument on this important issue. The parties have provided a thoughtful review of the statutory and arbitral authorities that deal with the question before me. At the completion of the preliminary hearing I was asked to provide a written decision, with reasons, within an expedited timeframe.

The position of the union is clear and direct. The union submits that section 95 (1) is a blanket prohibition against disclosure of the WCB file or its contents. According to the union, the only exception is section 96 (2) of the Act, which allows the Board and its employees to divulge information and the file itself, to the employer provided an employee has appealed a decision of the Board. The union further submits that while the statute permits the employer to receive the file when an appeal is launched from a decision of the Board, the employer may not reveal its contents and therefore the documents are not admissible in evidence before me. The result would be that the WCB officials the employer is seeking to subpoena may not testify on the contents of the file.

In the union's view, section 95 (1) embodies the public policy requirement that privacy rights of workers who file claims before the WCB must be protected. In the alternative, if I find that section 95 (1) is not a blanket prohibition, the union submits I should deny the employer's request in that the grievor's right to privacy should be preferred on the balancing of interests test as against the

employer's rights to ascertain facts. In support, the union referred to the following arbitral authorities:

1. *Ridge Meadows Hospital and H.E.U. (Perry) (Re)*, [2003] 120 L.A.C. (4th) 205 (Hope, Q.C.)
2. *Canada Safeway Ltd., and U.F.C.W., Local 2000 (Falbo) (Re)*, [1997] 71 L.A.C. (4th) 97 (Sanderson, Q.C.)
3. *MacMillan Bloedel Ltd. (Powell River Division) and C.E.P., Loc.76 (Re)*, [1997] 67 L.A.C. (4th) 443 (Taylor, Q.C.)
4. *Canada Post Corporation and C.U.P.W. (Yee) (Re)*, [2004] 131 L.A.C. (4th) 197 (Munroe, Q.C.)

The employer agrees that one of the important underpinnings of the Act is the right of privacy of workers with regard to relevant information collected by the Board in determining claims. However, the employer disagrees with the union that the statutory scheme provides for no exceptions. The employer submits that the security of the file and its contents can be breached in certain limited circumstances. By virtue of section 95 (1.1), one of those ways is by subpoena, issued by a competent tribunal. In this case, as an arbitrator dealing with a labour relations grievance, the employer notes that I have authority under the Labour Relations Code to issue subpoenas.

The employer further submits that section 96 deals with the specific area of appeals against decisions of the Board. The employer does not disagree that it would be an offence under the Act to disclose the contents of a WCB file given to the employer by the Board because an appeal had been launched under section 96, except where a subpoena has been issued. In the view of the employer, it is acting precisely as it should to comply with the statutory scheme in asking me to exercise my powers as a competent tribunal with "jurisdiction to compel the production of information", as set out in section 95 (1.1) (c). Simply put, the

employer submits that it is acting within the spirit of the legislation, not against it. In addition to the arbitral authorities referred to above, the employer makes reference to the following cases:

1. *Smith v. Discovery Land Services Ltd.*, [1979] B.C.J. No. 1091 (S.C.) (Q.L.).
2. *Fording Coal Ltd. -and- United Steelworkers of America, Local 7884*, [1996] B.C.C.A.A.A. No. 94 (Dorsey) (Q.L.).
3. *Crown Packaging -and- C.E.P., Loc.951 (Lutz) (2002)*, 111 L.A.C. (4th) 279 (Moore).
4. *Workers' Compensation Board v. Compensation Employees' Union (Savoie Grievance)*, [2001] B.C.C.A.A.A. No. 168 (Dorsey) (Q.L.).

The relevant statutory provisions are as follows:

Workers Compensation Act, R.S.B.C. 1996, C. 492, s. 95.

Secrecy

95 (1) Officers of the Board and persons authorized to make examinations or inquiries under this Part must not divulge or allow to be divulged, except in the performance of their duties or under the authority of the Board, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part.

(1.1) If information in a claim file, or in any other material pertaining to the claim of an injured or disabled worker, is disclosed for the purposes of this Act by an officer or employee of the Board to a person other than the worker, that person must not disclose the information except

- (a) if anyone whom the information is about has identified the information and consented, in the manner required by the Board, to its disclosure,
- (b) in compliance with an enactment of British Columbia or Canada,

(c) in compliance with a subpoena, warrant or order issued or made by a court, tribunal, person or body with jurisdiction to compel the production of information, or

(d) for the purpose of preparing a submission or argument for a proceeding under this Part, Part 3 or Part 4.

(1.2) No court, tribunal or other body may admit into evidence any information that is disclosed in violation of subsection (1.1).

(2) Every person who violates subsection (1) or (1.1) commits an offence against this Part.

(3) The workers' advisers, the employers' advisers and their staff must have access at any reasonable time to the complete claims files of the Board and any other material pertaining to the claim of an injured or disabled worker; but the information contained in those files must be treated as confidential to the same extent as it is so treated by the Board.

Workers Compensation Act, R.S.B.C. 1996, C. 492, s. 96.2 (1) and (6)

96.2 (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:

(a) a Board decision respecting a compensation or rehabilitation matter under Part 1;

(b) a Board decision under Part 1 respecting an assessment or classification matter, a monetary penalty or a payment under section 47 (2), 54 (8) or 73 (1) by an employer to the Board of compensation paid to a worker;

(c) a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter under Part 3.

96.2 (6) As soon as practicable after a request for a review is filed, the Board must provide the parties to the review with a copy of its records respecting the matter under review.

I have carefully considered the submissions of the parties and the authorities referred to in their respective submissions. In my view, the various subsections of the Act must be read together in order to fully understand the statutory scheme and purpose. I accept the employer's position that subsection (c) of s. 95 (1.1) applies in the circumstances of this case.

I agree with the arbitral analysis of arbitrators Dorsey and Taylor as to the importance of protecting privacy rights under the Act. I also agree with their conclusion that these rights are not paramount in every case. In my view, that is the clear statutory direction imposed by section 95 (1.1) and, in particular, Subsection (c). In the circumstances before me, refusing to issue a subpoena would effectively read this provision out of the Act.

There is no question that I have the power to issue subpoenas under the Labour Relations Code. Whether I should do so is a factual rather than a legal

determination. In this case, the grievor's right to privacy must be balanced against the need for all of the significant and relevant facts to be available and presented at arbitration and for the parties to receive a fair hearing. In the circumstances of this case, the factual information sought to be introduced is relevant and perhaps determinative in dealing with the merits of the grievance.

Accordingly, I will issue the subpoenas as requested to do so by the employer. In so doing, I do not wish to be seen as having ruled that any specific piece of evidence is automatically admissible, notwithstanding issues of relevancy or other evidentiary concerns that may arise in the course of the arbitration hearing. Those matters, should they arise, can be dealt with in the usual manner by counsel at that time.

Dated at Vancouver, British Columbia this 3rd day of March 2006.

John P. Sanderson, Q.C.
Arbitrator