

DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTIONS 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT



COMPLAINANT:
(Employee)

James Washburn

RESPONDENTS:
(Employer)

Bill's Trucking Co. Ltd.
William Murphy and Eunice Murphy
(Directors)

Robert Ard, lawyer, appearing for the Respondents (Employer)

Ron Byers, Employment Standards Officer, appearing for Government of Saskatchewan,
Ministry of Labour Relations and Workplace Safety, Employment Standards Division

DATE OF HEARING:

January 26, 2017, 12 noon

PLACE OF HEARING:

Conference Room
113 - 2nd Ave. E.
Kindersley, Saskatchewan

I. INTRODUCTION

This is an appeal by the Employer, Bill's Trucking Co. Ltd., from the Wage Assessment of Ron Byers, Employment Standards Officer, in favour of the Employee, James (Jim) Washburn. The Wage Assessment is for \$9,312.17 and dated October 5, 2016.

Jim claimed he was wrongfully dismissed by Bill's Trucking and entitled to eight weeks pay in lieu of notice. In its appeal of the Wage Assessment, the Employer stated it had just cause to dismiss Jim, particulars of which include:

- a) the Employee was sleeping during his hours of employment;
- b) the Employee failed to pay proper or sufficient attention to the performance of his employment duties and was negligent in the performance of those duties;
- c) the Employee failed to follow the procedures established by the Employer and communicated to the Employee for the safe performance of his employment duties;

- d) the Employee was dishonest in statements made to the Employer and to Safety Personnel by stating that he was not sleeping during his hours of employment and while business operations of the Employer for which he was responsible as part of his employment duties were ongoing;
- e) the Employee created situations posing potentially serious injury to other persons, to property of the Employer and to property of customers of the Employer, and to the environment by sleeping while the Employee was on work sites and responsible for monitoring equipment performance, or by not paying proper or sufficient attention to the performance of his employment duties;
- f) the Employee created situations of potentially serious harm to other persons, property of the Employer and of customers of the Employer, and to the environment by failing to follow procedures established by the Employer or failing to take proper and sufficient care and provide sufficient attention to ensure those procedures were followed;
- g) the Employee did cause serious harm to the environment and to property of the Employer and customers of the Employer by sleeping while responsible for performing his employment duties;
- h) the Employee's neglect of his duties and responsibilities, or his negligent or improper performance of those duties as directed by the Employer continued over a period of a year or years despite warnings and admonishments by the Employer to: follow the Employer's procedures; to use all due care and attention while performing his employment duties, given the potentially serious consequences of failing to do so; to attend at work fully rested and able to perform his employment duties in an attentive and safe manner;
- i) the Employee's failure to perform his employment duties or his negligent and dangerous performance of those duties interfered with the employment relationship and the Employee's ability to perform the employment duties required of him by the Employer as required by the terms of his employment because customers of the Employer had specifically refused to use the services of the Employer if the Employee was the person attending at a job site;
- j) the Employee's failure to perform his employment duties or his negligent and dangerous performance of those duties interfered with the Employer's ability to employ the Employee since customers of the Employer had specifically refused to use the services of the Employer if the Employee was the person attending at a job site;
- k) the Employee's continued negligent performance of his employment duties or failure to perform his employment duties and failure to follow Employer procedures and directives caused the Employer significant financial liability; the Employee's continued employment in those circumstances exposed the Employer to further and more significant financial liability.

To summarize, Bill's Trucking maintains the Employee was caught multiple times either sleeping on the job or not paying attention to his work, endangering people and property, causing the Employer economic loss, and potentially to lose major customers.

The Employer also contests the amount of the Wage Assessment:

- a) the calculation of the Employee's average weekly wage by the Director included as regular wages the holiday pay which the Employee received from the Employer during the weekly pay periods preceding the Employee's dismissal;
- b) the amount included in the Wage Assessment as holiday pay on regular wages had already been included as part of the Employee's regular wages by the Director.

The Ministry provided documents in advance of the Hearing confirming the Employer's appeal and appeal deposit were received within the time requirements in s. 4-4(4) and s. 4-5(1)(b) of *The Saskatchewan Employment Act*.

Prior to the Hearing, the Ministry requested an adjournment, as it was unclear Mr. Washburn had notice of the proceeding. Fortunately, he was located, and the Hearing proceeded.

II. EVIDENCE

Bill's Trucking provides pressure truck services to the oil and gas industry around Kindersley, Saskatchewan. The company is owned and operated by Bill and Eunice Murphy. Eunice is the Office Manager for the company. Bill did not give evidence. At the time of the Employee's dismissal the company had six workers operating trucks, as well as three contractors. Workers were dispatched from a central shop. The business had approximately half a dozen major customers for whom they performed work, as well as a number of other clients.

Jim started work for the Employer on January 23, 2004 as a pressure truck driver and operator. He was dismissed on September 25, 2015.

A. Employer's Evidence

The main witness for the Employer was Darren Tate who has worked for Bill's Trucking from 1996-2002 and from 2004 to the present day. Darren is a manager, dispatcher and sales representative for the company, with the authority to hire and fire people and to arrange the daily work schedule. As he sends out the trucks to job-sites, he had the most contact with the Employee.

Another witness for the Employer was TJ Zavlanos, who described himself as the "safety guy" for Bill's Trucking. Among his duties he maintained the safety program, did field and shop inspections, updated the safety manual, conducted safety meetings and investigated incidents. TJ also was responsible to ensure Bill's Trucking maintained its Certificate of Recognition (COR), a national safety standard required by the Employer's customers. TJ performed the investigations and wrote the incident reports referred to in his and Darren's testimony.

Several witnesses at the Hearing testified about the high standards expected of workers in the oil patch. When working with a pressure truck, along with the danger of an oil or chemical spill is the risk of the release of hydrogen sulfide (H²S): a toxic gas which can kill people and harm the environment.

Bill's Trucking has several written policies specifically addressing safety concerns. Policies set out strict step by step procedures for transferring oil (Employer Exhibit #11), transferring water (Employer Exhibit #16) and transferring and pumping petroleum distillates (Employer Exhibit #21).

Because of the catastrophic effects that can result from an accident, worker fatigue is an important concern in the industry. Bill's Trucking has a Fatigue Management Policy (Employer Exhibit #10) fairly standard for the industry. This policy is reviewed with employees during orientation and regularly scheduled safety meetings. The policy details the effects of fatigue,

factors that may contribute to fatigue, and places the onus on both managers and workers to be aware of the potential for fatigue. Workers are expected to:

- Inform their supervisor if the work schedule is causing excessive fatigue
- Inform their supervisor if they are experiencing fatigue levels that may affect their ability to work safely and effectively
- Take breaks and manage their time at work to reduce the potential for fatigue
- Take responsibility for obtaining sufficient rest to work safely and effectively

Note: If a worker feels that, due to fatigue, he/she cannot safely operate a vehicle or other equipment, they must refuse the work and this refusal must be respected by the supervisor.

A copy of the policy is in every safety manual in every truck operated by Bill's Trucking.

In Jim's work as a pressure truck driver he was dispatched to various customers' worksites. In very basic terms, he would hook up the pressure truck to whatever was being pumped into or out of: a well, a tank, a pipeline etc. As well as hooking on and off, the major responsibility of the truck operator is to monitor the gauges on his truck tank. There are three gauges located on the truck: one in the cab, one on the passenger side of the truck box bulkhead and a third tank gauge on the passenger side of the truck. The operator can see both the cab and the passenger bulkhead gauges simply by turning his or her head. The gauge on the bulkhead is a float that indicates the level in the tank while the gauge in the truck is electronically regulated. The operator must monitor the levels to ensure the tank is filling or emptying properly and at the correct pressure. The operator should also keep an eye on the hose connection to the truck, which is on the passenger side and within the sight line of the driver.

The Employer provided evidence of multiple occasions from 2012 to 2015 when the Employee was found sleeping or not paying proper attention while operating his pressure truck for customers. The Incident Reports are summarized below:

December 5, 2012 (Employer Exhibit #7)

Jim admitted he fell asleep while loading salt water. He stated he ate a large meal before he started work around 3 p.m. He was in his truck and woken by the operator on site informing him there was a spill. He advised his supervisor Darren Tate. Darren noted the spill was at least two cubic meters and a serious safety risk, with a possibility of H₂S escaping. Following the incident, Darren told Jim not to start loading if he was very sleepy, and to walk around the vehicle to wake up. Bill's Trucking paid to have the spill cleaned up. (Employer Exhibit #8)

September 4, 2013 (Employer Exhibit #20)

A mixture of water and diluent spilled from the truck when Jim was loading. Darren Tate's investigation concluded Jim did not follow proper procedure as Jim loaded the diluent and water in the wrong order, causing the spill. During the Hearing, Darren said he felt Jim had not been paying attention for some time, judging by the volume of the spill. Bill's Trucking paid to have the spill cleaned up. (Employer Exhibit #22)

October 11, 2013 (Employer Exhibit #18)

A significant spill of waste oil - seven cubic meters - escaped from Jim's pressure truck. Jim claimed he had gone to find a fitting in his toolbox and lost track of time. Darren

maintained that Jim was not paying attention as it would take at least twenty minutes for this volume of fluid to escape; the pressure truck only holds just over eleven cubic meters. Documents filed by the Employer show it cost over \$5,000 to clean up the spill. (Employer Exhibit #19)

October 15, 2013 (Employer Exhibit #23)

A spill occurred when a fitting came loose. Jim said he did not notice the defective fitting when hooking up, and the spill occurred when he was "rigging out". The incident investigation report found Jim's failure to follow procedure and check his fittings prior to performing his tasks led to the leak.

November 10, 2013 (Employer Exhibit #24)

An eighty litre spill occurred when Jim circulated his pump in winter to keep 'gunky' oil moving; he used too much pressure too fast and a leak ensued. The investigation concluded Jim did not follow procedure during his task, resulting in the spill.

July 7, 2014 (Employer Exhibit #9)

Jim's truck was on site around 11:00 a.m. to load oil. According to the investigation report, the operator on site, Derek Price, saw from about 100 yards away oil spilling from the truck. Mr. Price ran to the truck and found Jim sleeping; he yelled and screamed at Jim to wake up.

When TJ spoke to Jim in the course of the investigation, Jim first said he had been constantly monitoring the hose and jumped out of the truck and turned off the valve as soon as the spill started. Jim denied that he had been sleeping, even when advised Mr. Price said he had found Jim asleep. Jim then claimed to TJ that the gauges were 'off' and did not indicate his tank was full; i.e. his story changed from constantly watching to a gauge failure. Darren examined the gauges after the incident and said they were working fine. In any event, part of the job of the Employee is to monitor the gauges to ensure they are working; if they are not moving, then the operator should investigate.

The investigation concluded Jim had fallen asleep, resulting in the spill. The amount of the spill - two hundred litres - was such that Jim would have seen it sooner if he were awake and watching the gauges and connection as claimed. There was a significant safety risk because of the presence of hydrogen sulfide fumes.

After their investigation, Bill's Trucking suspended Jim for several days and the Fatigue Management Policy was reviewed with him and the other employees.

The representative from the customer told Darren Tate he did not want the Employee on their sites in the future.

September 12, 2014 (Employer Exhibit #25)

TJ Zavlanos wrote a record of an incident he witnessed on this date, around 10:00 a.m. In the course of an on-site safety inspection, he found the Employee asleep in the driver's seat of his truck:

As the writer approached the driver I noticed his head was slouched down. At first I assumed he was reading something or looking at his phone. I called his name with no response, I called a second time still with no response. I banged on his door and Mr. Washburn did not respond. At this time I determined he was asleep and I banged on the door again until he was responsive.

TJ informed Jim he could not sleep on the job; it was a serious safety hazard and could cost the Employer business. Jim said he was not sleeping. TJ and Darren agreed to notify Jim that he was to come to work rested and ready to perform the tasks required of him; he would have to improve his performance as this was not his first time found sleeping on the job. Jim stated he understood and it would not happen again.

February 23, 2015 (Employer Exhibit #15)

On this occasion Jim took up water to flush his tank at the end of a job and was sitting in the truck cab. A site employee about two hundred feet away saw steam coming from the truck's load box and ran up to alert Jim. It turned out the valve assembly was not properly in place (not the Employee's fault) but it was Jim's job to check the valve before hooking up, the leak was clearly within his line of sight, and he did not notice it until approximately 200 litres of scalding hot water spilled on the ground. The dangerous chemical hydrogen sulfide would also have been produced. Bill's Trucking paid to clean up the site (Employer Exhibit #17)

TJ Zavlanos noted in his testimony that incident reports and investigations concerning spills only occurred five to ten times a year at Bill's Trucking; Jim was involved in a disproportionate number of these incidents.

The Employer provided evidence of three incidents which occurred in September 2015, which directly led to Jim's dismissal.

September 5, 2015 (Employer Exhibit #12)

Wace Hartell is a contract operator for Rock Industry and testified by telephone. On September 5, 2015 around 2:00 p.m. Mr. Hartell was working with the Employee on a job. A pig was stuck in a pipeline and the job that day was to get the pig out backwards (a pig is a device used in pipelines for cleaning or inspection). Jim's truck was hooked up to one end of the line, pushing fluid into the pipeline and through it into another truck. Jim's job was to run the truck pressure line up to 750 lb., then clutch the truck and wait for the pressure to decline, then start it up again and repeat over and over until the pig was freed. This required him to watch constantly the gauges on his truck as the pressure in the lines should not exceed 1,000 lb. Mr. Hartell said the time between when the truck had to 'push fluid' varied, usually between five and ten minutes, although it could be up to fifteen minutes, so the operator had to keep his eye on the gauges at all times.

Mr. Hartell was going back and forth between the two trucks. At one point, he noticed Jim was sitting in the driver's seat with his head tilted down and his eyes closed. Mr. Hartell climbed up on the truck's running board and pounded on the window before Jim appeared to wake up. Mr. Hartell told Jim to quit sleeping; Jim never denied he was sleeping, or admitted to it, but just said something about it being a long day.

When asked by Mr. Byers if Jim could have just been sitting with his eyes closed, Mr. Hartell replied he knew Jim was sleeping, but, even if he was sitting with his eyes closed, he still was not doing his job of monitoring the gauges.

Fortunately, Mr. Hartell testified, the truck was not pushing pressure when he found Jim asleep, but simply idling. However, as he later told Darren Tate, this was a serious safety issue. If the pressure exceeded 750 lb. there could have been damage to the pipeline, the trucks and harm to the two truck drivers as well as Mr. Hartell. Mr. Hartell told Darren he did not want Jim on his job site again.

In his report, safety officer TJ Zavlanos, wrote that the cause of the incident was "operator failed to pay attention or follow procedure during the required tasks." To prevent recurrence, he advised "continue to educate and provide training on all equipment" and to "review all policies and procedures, ensure all personnel are aware and understanding of said policies and procedures". The report noted this was completed on September 18, 2015.

At the Hearing, TJ testified that during the investigation Jim never said he was tired or fatigued, and, he denied sleeping. He never indicated he had any medical condition or was going to seek medical advice.

Darren Tate stated he discussed the report and the incident with Jim. He advised Jim that Mr. Hartell said he would phone the competition if he ever saw Jim at his job site again.

September 23, 2015 (Employer Exhibit #13)

Greg Dinney testified by telephone that on September 23, 2015 he was working as a well site supervisor for Pen West Petroleum. The Employee was on site to operate the pressure truck. The job involved running a coil tubing string into a well. The tubing displaced liquid as it entered the well. Jim and his truck were sucking out excess liquid from the well bore valve to prevent overflowing. Jim was to watch the tubing unwind from its reel. When the tubing reached the bottom of the well, the reel would stop moving, and Jim was to stop the suction, shut off the valve and remove the hose. When Mr. Dinney noticed that Jim was not 'rigging-off' the hose, he went up to Jim's truck and found him sleeping. He testified that when he opened the door, Jim sat up quickly, opened his eyes and got orientated. Mr. Dinney did not see a phone. Mr. Dinney told Jim it was not appropriate to operate equipment while sleeping. Jim did not deny that he was sleeping, but said something about being very tired.

Mr. Dinney testified this was third occasion in a one year period when he caught the Employee sleeping. He had not previously mentioned it to the company, but only discussed it with the Employee.

He also testified that there is an implied standard in the oil patch that you are alert and fit for duty, as there is potential to endanger people, property and the environment. In this situation, fortunately Jim was 'pumping off'; there is much more risk, including loss of

life, if you are 'pumping in' to the well. Mr. Dinney told Darren Tate he did not want Jim to be on his site ever again - the risk was too high if an operator fell asleep

Darren spoke to Jim after this incident. Jim claimed he was looking at his phone, not sleeping. Darren replied that Mr. Dinney caught him sleeping and refused to have him on the job site again. During the Hearing, Darren noted that the incident had occurred around 3:00 p.m. He personally dispatched Jim to do the work and Jim never said he was tired or fatigued.

September 25, 2015 (Employer Exhibit # 14)

Around 1:00 p.m. Darren dispatched Jim to a Penn West Petroleum job site to complete an injection job. Shortly thereafter, the Penn West representative on site, Wes Ganser, phoned Darren to tell him he found the Employee sleeping in his truck twice within an hour, when he was supposed to be working. Mr. Ganser told Darren that Jim could not remain on site as he was a safety risk to all personnel, and this was not the first occasion he had found Jim sleeping.

When Darren learned of the incident he phoned Jim. Jim once again denied sleeping. Darren terminated Jim's employment with Bill's Trucking. Darren testified his reasons were that Jim was endangering people and property by falling asleep, not paying proper attention to his job duties, was denying he was sleeping, and, the Employer now had four major customers who did not want Jim on their job sites, which threatened the Employer's business economically.

While Jim was working for the Employer, Darren was unaware Jim had any medical condition or other factors in his personal life which may have caused him to fall asleep while at work.

Darren testified that later in 2015 Jim did some work around the shop for Bill's Trucking but at no time did Darren ever tell him he could return to work as a truck driver/operator.

In her evidence, Office Manager Eunice Murphy, who prepared pay cheques for all the company's employees, stated that to her knowledge Jim never requested time off because he was too tired to work. Eunice also testified that prior to Jim's dismissal in September 2015 he never told her he was suffering from any medical condition; he did say, in casual conversation to her, that he spent a lot of time playing video games with people online, which occurred at all hours of the day and night.

B. Employee's Evidence

During his testimony Jim Washburn commented randomly on the different events described by the witnesses for the Employer.

In most of the spill incidents, he blamed the occurrence on faulty equipment. Regarding the escape of diluent in September 2013, he claimed two gauges were not working. In October of

2013, it was the fittings that were faulty. In November 2013, when he was circulating the cold oil, it was again an equipment malfunction.

Instead, Jim said he was an honest guy, and if he had fallen asleep at work he would say so. He speculated that perhaps he had been reading a book when others thought he was asleep; he read hundreds over the years until his employers asked him not to read while working, as this prevented him from paying attention. He spent a lot of time on his cell phone after that, and might have been looking at his phone when people accused him of being asleep. He held the phone in his lap, out of the sunlight, which caused him to look down. He said further he was a very light sleeper, so if someone banged on the window, he would immediately wake up, so on the occasions mentioned he was probably focused on his phone.

When questioned by the Employer's lawyer, Jim initially was adamant that he had never fallen asleep on the job. If he had, he testified, he would have said so when it happened. Concerning the September 5, 2015 incident, he said he was sitting with his eyes closed, or perhaps on his phone, and was so absorbed he did not hear Mr. Hartell shout or pound on the window of the truck. He gave the same response when asked about the September 23 incident when Mr. Dinney used similar actions to gain Jim's attention.

However, in reply to further questions during the Hearing, Jim admitted that on September 5 and September 23, he was sleeping. He also admitted to sleeping during the September 2014 incident, despite denying it at the time.

Then, contradicting his earlier statements, Jim went on to say that if he had denied sleeping at the time of any of these incidents, he probably was not sleeping.

Although Jim said he was never disciplined for sleeping or lapses in attention, he admitted Darren told him, "If you get caught sleeping one more time I'll have to let you go". When Darren telephoned him to tell him he was dismissed, Jim testified he told Darren he understood; you can't have people falling asleep on the job.

Jim also denied being told that several major customers of the Employer refused to have him on their job sites.

After he was terminated, Jim followed up on a comment from Darren Tate that maybe Jim should see a doctor. He saw a GP on September 30 and was referred to the Department of Respiriology at Royal University Hospital in Saskatoon. He went to see Dr. Nataraj there about November 27 or 28, 2015. After the examination, the physician told Jim he believed Jim had sleep apnea, and he had to advise SGI to suspend Jim's driving license immediately. Jim's license was cancelled November 30. Jim had further medical testing in January 2016, and was fit with a machine to use to control his sleep apnea during the night. His driving licence was restored two weeks later.

Jim testified that during October and November Bill's Trucking gave him work to do around the shop. No evidence was provided by either party of the number of hours worked or the amount paid to Jim. It was a minimal number of hours.

Jim testified he was under the impression that the owner of the Employer, Bill Murphy, would re-hire him once SGI issued him another driving licence.

At the end of his testimony, Jim said he had a good relationship with his employers and thought they were "good people". He thinks now they fired him because he was getting old and sick, although no one knew at the time that he was sick. If they had given him anything, he said, he would not have pressed this claim.

Jim also provided some evidence on his work schedule prior to his dismissal. He had regular scheduled days off – always three in a row, usually after eleven days of work, but was not sure if the records produced by the Employer about when those days were scheduled are accurate (Employer Exhibits #2, #6). He thought he worked most statutory holidays. The records for June to September 2015 show several periods where Jim did not work for more than six days in a row.

Jim acknowledged that over the years his work schedule could be irregular; during spring break-up there may not have been any work for a couple of weeks; if there had been a heavy rain, the roads would be closed and he could not work, often for many days at a time; and, sometimes he would volunteer to stay home so the younger guys with families could have more hours, or switch days with another driver. He also agreed that the summer of 2015 was a slower time in the oil patch. He admitted he told Darren Tate he would be happy to work only eighty to one hundred hours a month.

C. Evidence Concerning Wages

Eunice Murphy provided evidence on the Employee's pay. She prepared the Record of Employment, using copies of the Employee's Statements of Earnings and Deductions, and a calendar of the days and hours worked by the Employee (Employer Exhibits #1, #2, #3). Eunice testified vacation pay and statutory holiday pay were included in every pay cheque. She noted 'truck hours' (\$33.09 + \$1.91 vacation pay) were paid at a higher rate than 'shop hours' (\$18.91 + \$1.09 vacation pay). This was all broken out on the Statements of Earnings.

Also, pursuant to a permit issued pursuant to *The Labour Standards Act* section 9, in effect at the time the Employee was fired, the Employer was only required to pay overtime after 12 hours in a day, and after a prescribed number of hours in a month. Jim did not exceed these hours in the 13 pay periods prior to his last day of work.

In preparation for the Hearing, Eunice calculated the Employee's earnings in two different ways (Employer Exhibit #4). First by adding up the hours worked and applying the different rates of pay for truck hours, shop hours, and adding holiday and stat holiday pay. She then added up the Statement of Earnings one more time. In summary, one set of calculations equaled an average weekly pay of \$862.89 while the other set equaled \$862.92.

If the Employee were to be awarded 8 weeks of pay in lieu of notice, this would equal either \$6,903.12 or \$6,903.36.

Ron Byers, the Employment Standards Officer, explained the copies of the Statements of Earnings he received from the Employer were virtually illegible (Employee Exhibit #1). He was also unable to get the time records he required from the Employer and so relied on the Statement of Earnings to calculate the amount of pay in lieu of notice. He acknowledged that with access to this information the two parties could agree on an amount, if pay in lieu of notice is found to be owing.

III. ANALYSIS

The main issue in this matter is whether Bill's Trucking established just cause to terminate Jim Washburn's employment.

Just cause is defined as:

...conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

Caudle v. Louisville Sales & Services Inc., 1999 SKQB 276 (CanLII), para 17

The onus is on the Employer to show just cause exists, "taking into account the nature of the conduct and all of the circumstances of the particular employment".

Warren Ens v. Gfs Prairies Inc., 2012 SKQB 295 (CanLII), para. 18

I must determine first if the Employer has proven misconduct by the Employee and secondly, if this misconduct was so serious as to strike at the heart of the employment relationship.

McKinley v. BC Tel, 2001 SCC 38 (Can LII) and *Parkinson v. Kemh Holdings Ltd.*, 2013 SKQB 196 (CanLII)

Jim worked in an industry where errors or inattention can have serious, even fatal, consequences for people, property and the environment.

Bill's Trucking has a stringent safety program, mandated by the national standards of its Certificate of Recognition. This includes a policy on Fatigue Management, which is reviewed with every employee on hiring, and at regular safety meetings. The Policy highlights that "if a worker feels that, due to fatigue, he/she cannot safely operate a vehicle or other equipment, they must refuse the work and this refusal must be respected by the supervisor."

On seven occasions from December 2012 to February 2015 Jim was found responsible for spills involving his truck. Two of these involved accusations that he was sleeping (December 5, 2012 and July 7, 2014). He was also found sleeping in another situation that did not involve a spill (September 12, 2014).

I find these incidents prior to September 2015 relevant in two ways. First of all, they provide evidence that inattention to the job at hand, especially sleeping, was a serious concern for this industry in general and this employer in particular. Events involving any kind of spill were carefully investigated, as was required by the COR standards, the cause identified, and

remedial action taken. As shown in the reports entered as Employer Exhibits, this included a discussion with the employee involved, reference to existing written policies and further re-training of all employees. Investigation reports were available to, and reviewed with, the Employee. The importance of paying attention to what he was doing was reinforced with Jim after these eight investigations.

In particular, after the December 5, 2012 spill (the only occasion when Jim admitted at the time he had fallen asleep) Darren discussed what Jim was to do if he felt sleepy, including not loading the truck, or walking around the vehicle to wake up.

These incidents are also relevant to show Jim did not take responsibility for his actions, and, indeed, would lie to protect himself. He blamed spills on faulty equipment, for the most part, despite evidence that the volume of the spills indicated inattention by him for prolonged periods. He also specifically denied sleeping on two occasions where evidence from a third party demonstrated he was sleeping: Derek Price on July 7, 2014 and TJ Zavlanos on September 12, 2014.

The events of September 5, September 23 and September 25, 2015 were the immediate cause for Jim's dismissal by the Employer. I find the evidence established that the Employee was sleeping on each of these occasions. Wace Hartell woke up Jim when Jim was supposed to be monitoring the pressure while 'pushing a pig' on September 5. On September 23 Greg Dinney found Jim sleeping while the truck was sucking excess oil from a well. In both situations, Jim's inattention could have led to a serious industrial accident. On September 25, Jim's supervisor Darren Tate was alerted by Wes Ganser that Wes found Jim sleeping in the truck twice while working on Ganser's site.

This is not a case where an employee nods off at their desk or a worker is caught taking extra-long naps in a break room; all Jim's duties as a pressure truck operator required him to be alert and careful. The potential results if he did not were severe. Jim never asked for assistance or time off or not to be called when he felt tired. Jim knew he worked in potentially dangerous situations; if he was falling asleep unwillingly, why did he not discuss it with his employer, or, seek medical attention?

During the investigations of these incidents, Jim lied to his supervisor and said he was not sleeping. He denied he had a problem.

In *Richardson v. Davis Wire Industries Ltd.*, 1997 BCSC 4221 (CanLII), a production foreman was fired when found sleeping on the job and after lying to his supervisor when confronted. The employee had medical problems and had taken some time off to deal with them in the past. The Judge found not only that the employee was sleeping while he was supposed to be working, but had broken the implied duty of faithfulness and honesty owed to his employer by lying to him about doing so (pars. 31, 34)

I find that by September 25, 2015, the Employer had two valid reasons to terminate Jim's employment. First of all, Jim's sleeping on the job and failure to take steps to keep himself alert were in violation of the Employer's clearly defined policies and procedures, and, endangered

people and property. Secondly, Jim repeatedly lied to his Employer. He said he was not sleeping when unbiased evidence to the contrary showed he was. The Employer could no longer rely on Jim to be truthful.

I find these two factors struck at the very heart of the employment relationship between Bill's Trucking and Jim, and provided just cause for his dismissal.

Ron Byers, the Employment Standards Officer, argued the Employer should have made arrangements to accommodate Jim's illness of sleep apnea.

During the Hearing, the reason Jim slept at work was addressed only indirectly. Neither Jim nor his Employer had any idea he suffered from sleep apnea. After his termination, Jim went to see a doctor, was referred to a specialist and was diagnosed two months later. His driving license was suspended until he was fitted with a machine to wear during the night while sleeping.

No medical evidence was presented, although the Employment Standards Officer provided some information gleaned from the internet about sleep apnea. I think it safe to say it is common knowledge that for a variety of reasons sleep apnea interrupts a person's breathing while they are sleeping, causing them to repeatedly wake up and not obtain a restful night's sleep.

While it is possible Jim suffered the consequences of sleep apnea in September 2015, he produced no information about its general effect on his life. He did not claim he was falling asleep at inopportune times other than when he was at work. There was no evidence he was working unduly long hours, and, all three incidents in September 2015 occurred during the daytime. Other factors may have led to the sleeping – boredom, or, as suggested by Eunice Murphy's testimony, lifestyle choices including late nights playing video games.

The onus was on the Employee to show that sleep apnea was the cause of his problem and the reason for his dismissal. He did not. The Employee was aware of the oil field industry's fatigue management policy in general and the Employer's policy in particular, and had many opportunities to inform the Employer if he were having problems. He did not.

Even if Jim had sleep apnea which caused daytime sleepiness it does not explain or justify why he lied to his employer about sleeping at work. Jim was responsible to make Bill's Trucking aware of any conditions that affected his ability to properly perform his job. He did not do so. None of the Employer's witnesses suspected or had reason to suspect a medical problem.

At the Hearing, Jim still appeared muddled about whether or when he fell asleep while on the job – contradicting himself several times. He seems to be an earnest man; perhaps he just did not remember if and when he slept at work. By his own admission, it was boring work at times, and he resorted to reading books, then when that was taken away from him, to looking at his phone, to pass the time.

After his dismissal, Bill's Trucking found some work around the shop for Jim; it was only when this petered out that Jim pursued this claim.

Ron Byers also argued at the Hearing that progressive discipline should have been taken against the Employee before dismissal.

Progressive discipline did occur; evidence showed Jim was suspended for several days after the spill which occurred July 7, 2014 when Jim fell asleep. He was reminded after each of the eight investigated incidents prior to September 25 of the importance of being alert, and even given tips on how to remain wakeful. There were no incidents where his behaviour was condoned or ignored by the Employer. Each incident was taken seriously and thoroughly investigated. Even without this evidence, I am not convinced that falling asleep in one situation where people and property can seriously if not fatally injured, then lying about it, would not serve as just cause for dismissal.

Jim had been employed by Bill's Trucking for over eleven years when he was dismissed. Mr. Byers argued treating a long-term employee in this manner was unacceptable and a warning should have been given before Jim's dismissal. A warning was given; although the timing of the conversation was not clear, Jim admitted in his testimony that Darren told Jim if he fell asleep again Jim would be fired.

Mr. Byers also suggested the gaps in Jim's working days in the months prior to his dismissal were sufficient to satisfy the statutory requirements for a lay-off, defined in *The Saskatchewan Employment Act* s.2 -1(l) as "the temporary interruption by an employer of the services of an employee for a period exceeding six consecutive work days". As noted by Mr. Ard, arguing on behalf of the Employer, although the calendars produced as evidence included some periods of more than six days without hours being recorded, no reasons for those absences were presented at the Hearing. There may have been no work, or Jim may have asked for the time off, been sick or declined the work. Certainly there was no evidence that Jim considered himself to be laid off. I find that no lay-off within the statutory definition was proven.

IV. CONCLUSION

I conclude Bill's Trucking had just cause to dismiss Jim Washburn. I allow the Employer's appeal and overturn the Wage Assessment.

If I had found in favour of the Employee, I would reduce the amount owing to him to \$6,903.36; holiday and statutory holiday pay were already included in the Employer's figures on the Record of Employment, as shown in Eunice Murphy's testimony.

Dated at North Battleford, Saskatchewan: February 16, 2017.

original signed by
Karen C. Ulmer, Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.