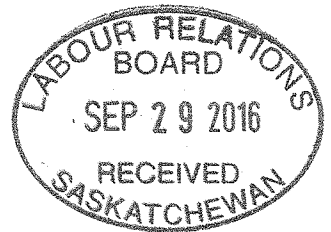


In the Matter of an Appeal to an Adjudicator Pursuant to Section 3-53 of *The Saskatchewan Employment Act*, SS. 2013, Chapter S-15.1

Decision Appealed from: Occupational Health Officer Report 1593
January 7, 2015



LRB File 016-15	
Appellant:	Marius Pintiliciuc
Respondents:	SaskEnergy Incorporated
Representing Marius Pintiliciuc	Himself
Representing SaskEnergy	Meghan R. McCreary
Appeal Adjudicator	Anne M. Wallace, QC

Appeal Decision

I. Introduction and Background

1. Marius Pintiliciuc ("Pintiliciuc") seeks to appeal Occupational Health and Safety Report 1593 dated January 7, 2015 (the "Report") to an adjudicator pursuant to s. 3-53 and s. 3-54 of *The Saskatchewan Employment Act* (the "Act"). I was appointed as Adjudicator to hear this case.
2. The Report, written by Occupational Health Officer ("OHO") Kent Rhodes, deals with a complaint of discriminatory action by Mr. Pintiliciuc against his former employer, SaskEnergy Incorporated ("SaskEnergy"). During his employment with SaskEnergy, Mr. Pintiliciuc was a member of and represented by Unifor Local 649 (the "Union").
3. Upon receipt of the appointment, I contacted the parties to arrange for a pre-hearing meeting by conference call. Mr. Pintiliciuc confirmed he would not be represented by counsel in the appeal. I also confirmed with the Union's counsel that the Union would not be representing Mr. Pintiliciuc and that the Union did not believe it had any interests in the matter. Mr. Pintiliciuc advised at that time that because of a rehabilitation program he was undertaking following back surgery, he would not be available for a conference call until at least October 2015.
4. With agreement of the parties, I convened a pre-hearing meeting by conference call on November 16, 2015. At that meeting the parties agreed:
 - a. I have jurisdiction to hear the appeal;
 - b. Mediation was not a viable option at that time;

- c. The parties would review the OHS file and consider whether there was any additional information that should be included in the appeal package; and
 - d. We would have another conference call on December 9, 2015 to discuss next steps.
- 5. I convened the next pre-hearing meeting by conference call on December 9, 2015. At that time the parties agreed:
 - a. The OHS file and any additional material filed by the parties would form part of the record for this appeal;
 - b. Mr. Pintiliciuc would prepare a package of documents to present as part of his appeal and would send a copy of the documents to each of me and SaskEnergy's counsel;
 - c. Counsel would review those documents and advise Mr. Pintiliciuc and me whether SaskEnergy would be filing any additional documents and she would provide Mr. Pintiliciuc and me with copies of those documents;
 - d. Mr. Pintiliciuc would appear in person at the appeal hearing to testify on his own behalf and would be calling one witness to testify. SaskEnergy would have the right to cross-examine Mr. Pintiliciuc and his witness;
 - e. SaskEnergy would then have the right to call their evidence and Mr. Pintiliciuc would have the right to cross-examine;
 - f. Each party would then have the right to present final arguments;
 - g. The hearing would proceed on January 19, 2016.
- 6. At the hearing on January 19, 2016:
 - a. The OHS file and Mr. Pintiliciuc's documents were entered into the record by consent;
 - b. Mr. Pintiliciuc testified on his own behalf and called one witness, Barry Chessal;
 - c. SaskEnergy called Maria McCullough, SaskEnergy's Director of Labour Relations and Staffing;
 - d. The parties agreed to provide final arguments on February 8, 2016.
- 7. On January 20, 2016, I received an email from Mr. Pintiliciuc which was effectively a request to re-open the appeal hearing to permit him to call an additional witness, Christy Best, President of Unifor Local 649 to respond to Ms. McCullough's evidence about her communications with the Union. I allowed the parties to provide written submissions on the question of whether Mr. Pintiliciuc should be allowed to re-open his case to call reply evidence. After considering the submissions, I decided to allow Mr. Pintiliciuc to re-open his case to ensure that he receives a fair hearing and to ensure that all relevant information is before me on the appeal.

8. I re-convened the hearing on May 27, 2016, at which time Mr. Pintiliciuc called Christy Best to testify. The parties then gave their arguments and the appeal hearing was concluded.
9. On July 13, 2016, Mr. Pintiliciuc sent me a copy of a June 22, 2016 Decision of the Workers' Compensation Board of Saskatchewan. The decision allows an appeal Pintiliciuc brought with respect to WCB's denial of benefits for a period of time. This decision is not helpful in this appeal because in dealing with this appeal, I must deal with the circumstances as they existed at the time in question.

II. The OHS Complaint, the Report and the Appeal

10. Pintiliciuc worked for SaskEnergy as a Service Tech from December 2009 until May 14, 2014, on which latter date SaskEnergy terminated Pintiliciuc's employment.
11. By way of a Discriminatory Action Questionnaire received by the Occupational Health and Safety Division on October 29, 2014, Pintiliciuc made a complaint of discriminatory action against SaskEnergy. He claimed SaskEnergy dismissed him because he raised health and safety issues in his workplace.
12. The OHO, Kent Rhodes, investigated the complaint and concluded at page 4 of the Report:

There is insufficient evidence that Mr. Pintiliciuc was terminated for raising health and safety issues. There is evidence to show that the reason for the termination of Mr. Pintiliciuc was due to his refusal to communicate with his employer and attend an independent medical examination. Primarily Mr. Pintiliciuc had a number of concerns regarding medical accommodation. This does not fall under OHS, and Mr. Pintiliciuc was redirected to Human Rights for this concern.

Based on the foregoing, it is my decision that the termination of Mr. Pintiliciuc's employment was not an unlawful discriminatory action contrary to section 3-35 of the Saskatchewan Employment Act.

13. In his appeal, Pintiliciuc claims SaskEnergy terminated his employment because of a work related injury to his spine and also probably due to his having raised safety concerns relating to the health and safety of service technicians and SaskEnergy customers. He says the OHO failed to investigate his safety concerns. Mr. Pintiliciuc also says he never refused to attend a real independent medical examination. He says he communicated through his Union and his Union says they communicated everything to SaskEnergy.

III. The Legislation and the Issues

14. Pintiliciuc's claim is one of discriminatory action under s. 3-35 of the *Act* which reads:

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

- (i) this Part or the regulations made pursuant to this Part;
- (ii) Part V or the regulations made pursuant to that Part;

- (iii) a code of practice issued pursuant to section 3-84; or
 - (iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;
- (b) seeks or has sought the enforcement of:
 - (i) this Part or the regulations made pursuant to this Part; or
 - (ii) Part V or the regulations made pursuant to that Part;
- (c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;
- (d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;
- (e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;
- (f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;
- (g) is about to testify or has testified in any proceeding or inquiry pursuant to:
 - (i) this Part or the regulations made pursuant to this Part; or
 - (ii) Part V or the regulations made pursuant to that Part;
- (h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;
- (i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;
- (j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or
- (k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part.

15. Discriminatory action is defined in s. 3-1 of the Act:

3-1(1) In this Part and in Part IV:

...

(i) "discriminatory action" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:

- (i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or

- (ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

- (A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the

health or safety of the worker or any other person at the place of employment;

(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or

(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a);

16.s. 3-36 permits a worker to refer a claim of discriminatory action to an OHO:

3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.

(5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.

(6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).

17. The Act, in ss. 3-31 to 3-34 deals with refusal to perform dangerous work:

3-31 A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:

(a) sufficient steps have been taken to satisfy the worker otherwise; or

(b) the occupational health committee has investigated the matter and advised the worker otherwise.

3-32 If there is no occupational health committee at a place of employment or if the worker or the employer is not satisfied with the decision of the occupational health committee pursuant to clause 3-31(b):

(a) the worker or the employer may request an occupational health officer to investigate the matter; and

(b) the worker is entitled to refuse to perform the act or series of acts pursuant to section 3-31 until the occupational health officer has investigated the matter and advised the worker otherwise pursuant to subsection 3-33(2).

3-33(1) If an occupational health officer decides that the act or series of acts that a worker has refused to perform pursuant to section 3-31 is unusually dangerous to the health or safety of the worker or any other person at the place of employment, the occupational health officer may issue a notice of contravention in writing to the employer requiring the appropriate remedial action.

(2) If an occupational health officer decides that the act or series of acts that a worker has refused to perform pursuant to section 3-31 is not unusually dangerous to the health or safety of the worker or any other person at the place of employment, the occupational health officer shall, in writing:

(a) advise the employer and the worker of that decision; and

(b) advise the worker that he or she is no longer entitled to refuse to perform the act or series of acts pursuant to section 3-31.

3-34 If a worker has refused to perform an act or series of acts pursuant to section 3-31, the employer shall not request or assign another worker to perform that act or series of acts unless that other worker has been advised by the employer, in writing, of:

(a) the refusal and the reasons for the refusal;

(b) the reason or reasons the worker being assigned or requested to perform the act or series of acts may, in the employer's opinion, carry out the act or series of acts in a healthy and safe manner; and

(c) the right of the worker to refuse to perform the act or series of acts pursuant to section 3-31.

18. The legislation gives rise to these questions:

- a. Did Pintiliciuc engage in or participate in one of the activities described in s. 3-35 of the *Act* that on its face could be the reason, or a reason for discriminatory action?
- b. Did SaskEnergy take discriminatory action against Pintiliciuc?
- c. If the first two questions are answered in the affirmative, has SaskEnergy met the onus in s. 36(4) to establish that the discriminatory action was taken against Pintiliciuc for good and sufficient other reason?

IV. The Evidence

19. Pintiliciuc began working with SaskEnergy in December 2009, initially in Estevan. He says his issues with occupational health and safety began in 2010 when he

complained to SaskEnergy's Vice President about "huge issues in training" and the refusal of all Pintiliciuc's colleagues in Estevan to work with him in field training. Pintiliciuc says he was met with harassment and retaliation. Pintiliciuc had issues with respect to response times to gas leaks and the risk of explosion because of that. He also had concerns about building entry procedures and the lack of a wind bag to establish wind direction.

20. On June 6, 2011, Pintiliciuc transferred to Wadena and worked from there as a Service Technician.
21. On May 1, 2012, SaskEnergy suspended Pintiliciuc for three weeks because of misconduct for fraudulent use of sick leave and his behaviour around the sick leave:
 - a. McCullough testified that in this instance, SaskEnergy had conflicting information about when Pintiliciuc could return to work from a medical leave. The information suggested Pintiliciuc had orchestrated his medical leave to coincide with a planned vacation to Cuba. Pintiliciuc maintained the trip was a last minute thing that came up while he was on sick leave. SaskEnergy was prepared to accept this explanation if Pintiliciuc produced evidence to show when the trip was booked. Pintiliciuc refused to produce anything to verify his claim. SaskEnergy imposed the three week suspension. The Union grieved the suspension but did not pursue the grievance because Pintiliciuc refused to provide documentation to show when the Cuba trip had been booked.
 - b. Pintiliciuc says he did not fraudulently use sick leave and SaskEnergy keeps using this incident to defame him. In cross-examination, Pintiliciuc maintained there was no reason to suspend him. He said the Union didn't pursue the grievance because the Manager recommended to the Union that they back off and have a good life with SaskEnergy. Pintiliciuc withdrew the grievance because the Union strongly recommended it. In reply, Pintiliciuc testified that his wife refused to give him the credit card receipts from when she booked the trip to Cuba. He said she didn't have an obligation to show anything to SaskEnergy management.
22. On October 1, 2012, Pintiliciuc sent an email to Monique Kowalchuk of the Union raising issues about the suspension. The Union did not pursue the grievance and the three week suspension remains on Pintiliciuc's discipline record.
23. In March 2013, Pintiliciuc raised issues with Monique Kowalchuk about a conflict he was having with a co-worker. Pintiliciuc claimed he was being harassed.
24. On March 18, 2013, Pintiliciuc sent an email to Dean Reeve of SaskEnergy to advise Reeve of a few "bad situations" affecting Pintiliciuc's "personal and professional life". These complaints involve conflicts Pintiliciuc had with various people at SaskEnergy including harassment allegations and include Pintiliciuc's objection to being suspended because of the Cuba issue.
25. In an email dated June 23, 2013 to Ken Burton of the SaskEnergy Yorkton/Weyburn Area, Pintiliciuc raised two safety concerns with respect to line locates.

26. In 2012, a co-worker made a harassment complaint against Pintiliciuc. The Investigator issued a report on June 10, 2013 finding one incident of harassment by Pintiliciuc towards the co-worker. On July 22, 2013, SaskEnergy suspended Pintiliciuc for one week because of this harassment finding. Pintiliciuc says his co-worker made the harassment complaint after Pintiliciuc raised life and death issues because of a colleague's wrongdoing. Pintiliciuc disagrees with the harassment report and says he was harassed when his colleague swore at him and insulted him in the office. Pintiliciuc confirmed in cross-examination that the Union refused to pursue a grievance with respect to the one week suspension. The one week suspension remains on Pintiliciuc's disciplinary record.
27. On August 12, 2013, Pintiliciuc sent an email to Monique Kowalchuk to raise an issue about a decision SaskEnergy had been made with respect to how to handle standby. Pintiliciuc objected to SaskEnergy's decision and had made his concerns known to Yorkton/Weyburn Area General Manager Paul Gurski. Minutes of the SaskEnergy Local SHE Committee of August 20, 2013, say a concern, which is noted as "Information Only" was raised with respect to Wadena/ Wynyard Standby:
- Concern brought forward about the Wadena/Wynyard Standby arrangement. At this time the Wynyard and Wadena districts will be combined into one standby unit. Coverage until further notice will be on a three person rotation. K. Burton will be in charge of managing and creating the roster, any changes or alterations to the schedule should be made through him. The concern is this will create longer response time in emergency call-out situations due to travel distance.
- SHE committee discussed concern. This arrangement will be temporary. One service tech in Wadena district is still on S/L, the other service tech will be going into Module 3 STQP training. The company is also accelerating tech from Yorkton district to help cover standby. At this time, this approach of combining standby units is being done in other areas for example in the Shaunavon/Maple Creek area.
28. On August 12, 2013, Pintiliciuc sent a letter to Tim McMillan, Minister responsible for SaskEnergy claiming discrimination and harassment and raising safety issues including jobs not well done by other technicians and the standby issue.
29. In October 2013, Pintiliciuc raised an issue with respect to the accuracy of a gas line map. The Operations Manager responded giving Pintiliciuc advice on how to handle the matter.
30. In cross-examination, Pintiliciuc acknowledged he never at any time raised any safety issues with Maria McCullough. He said he raised issues off and on in 2010 to 2013 variously with his supervisor and manager, and with the General Manager, President and Minister responsible for SaskEnergy.
31. In April 14, 2014, Maria McCullough of SaskEnergy notified Pintiliciuc by letter that they had arranged an appointment for Pintiliciuc to attend for an Independent Medical Examination (IME) with CBI Physical Rehabilitation Centre in Saskatoon on May 8, 2014. The letter closes:

You are expected to attend and participate in the IME. Following receipt of the IME report, the Company will determine next steps. Should you have any questions, do not hesitate to contact me at [number] or your Union representative at [number].

32. McCullough testified that:

- a. The reason SaskEnergy asked for the IME was that they had conflicting medical information. Pintiliciuc had been away from work off and on sometimes on workers' compensation and sometimes on sick leave. In December 2012 and January 2013, Pintiliciuc participated in a workers' compensation eight week return to work program. The treatment team said there were no objective concerns about Pintiliciuc's fitness to return to work and that he would be able to reach full demands when he came back to work February 3, 2014. WCB discharged Pintiliciuc from the program with no restrictions.
- b. Instead of returning to work at that time, Pintiliciuc asked for and was granted three weeks' vacation and his return to work date was amended to February 24, 2014. On February 20, 2014, Pintiliciuc gave a note to his Operations Supervisor to say that the symptoms related to his back and shoulder injury had resurfaced while he was on vacation in Cuba. Pintiliciuc asked that five days of his vacation be changed to sick leave. Pintiliciuc also provided information about medical treatment he had received in Cuba and in Canada.
- c. SaskEnergy was not able to provide sick leave for the five days because Pintiliciuc had no sick leave credits available. SaskEnergy had confirmation from WCB that Pintiliciuc was fit to return to work with no restrictions and medical information that he was not fit to work. Pintiliciuc told his Operations Supervisor that his doctor was sending him to a specialist in Saskatoon and the doctor's information said he was sending Pintiliciuc to someone in Regina. With this information, SaskEnergy concluded an IME was warranted to determine Pintiliciuc's fitness to return to work.
- d. McCullough wrote the April 14, 2014 letter to Pintiliciuc to notify him SaskEnergy was requiring an IME in accordance with Article 19.05(6) of the Collective Agreement between SaskEnergy and the Union. SaskEnergy wanted to know if Pintiliciuc was fit to return to work and if he was, whether there would be any work restrictions. The Union contacted McCullough and said Pintiliciuc raised an issue about the IME being done at CBI in Saskatoon. As a result, McCullough made arrangements for the IME to be done in Regina.

33. On April 24, 2014, Pintiliciuc wrote a lengthy letter to Christy Best, Monica Radwasky and Monique Kowalchuk of the Union. Among other things, Pintiliciuc objects to attending at CBI in Saskatoon because he had attended there previously for an assessment with respect to his WCB claim. Pintiliciuc also says this:

After I consulted my chiropractor, my physician, and after I checked neurosurgeon, dr. Eugenio Aguila Hurtado, recommendations about avoiding physical efforts, long driving time, sitting and walking periods, the common conclusion was that this activities are giving me strong pains and could hurt me even more. So is better to limit a minimum of time this things at least till I'll see the neurosurgeon, dr A Kumar, on may 13/2014 and I'll have his report soon after. So, I request a little bit understanding from the company to

avoid a long travel for myself until I'll get the neurosurgeon, dr. A Kumar, opinion and recommendations and will go from there if it will be necessary to get a physiotherapist assessment against a few neurosurgeons, physicians and a chiropractic that already confirmed my huge damages that gave me big physical limitations and enormous psychological issues related with the pain. That's why it will be necessary some special arrangements if I'll have to drive long hours to avoid to hurt me. I think the company will easily understand that a delay after the proposed May08/2014 for the IME is the only reasonable way not to put me on another high risk to hurt more myself and the new neurosurgeon report soon after my May13/2014 appointment will help to clarify and determine further steps.

34. In the letter, Pintiliciuc says that after his medical appointments, he invites management and the union to contact a list of doctors who will confirm his "medical huge damages and my temporary disability to work and the huge risk and also the huge risk associated with my injuries if I disregard their recommendations." Pintiliciuc says he did not refuse to communicate with SaskEnergy. He asked the Union to communicate with SaskEnergy and then he never heard from the Union.

35. In cross-examination:

- a. Pintiliciuc agreed that when he was asked to take the IME, he was off work. He admitted that while his doctor put him off work and he was to go see a specialist because of a suspected spine injury, the doctor did not tell Pintiliciuc it was unsafe for him to travel to Saskatoon. The doctor told him to go to the specialist and that it was unsafe to do any work that would put pressure on his spine. Pintiliciuc agreed he was able to travel to see the specialist.
- b. Pintiliciuc said when he got the letter it said to contact SaskEnergy or the Union, and he chose to contact the Union. Pintiliciuc wanted a delay in the IME so he could see the specialist first. He felt if he went to the IME he would be disregarding his doctor's orders.
- c. Pintiliciuc said he asked the Union to communicate with SaskEnergy and to get back to him and tell him what they were going to do. He expected the Union to talk with SaskEnergy.
- d. Pintiliciuc acknowledged he knew of the May 12 appointment (see below) and that during April and May before the termination, SaskEnergy was trying to contact him. Pintiliciuc testified:

My position there is loud and clear. I am not obliged to talk every day with the company for any reasons. I talk to the company once. I was hurt so badly and so much pain and psychological stress. SaskEnergy not want to understand that. It less stressful way for me was to talk to union – if they not communicate to SaskEnergy, don't blame me for that.

- e. Pintiliciuc acknowledged he did not at any time tell SaskEnergy it was unsafe for him to travel.

36. Christy Best testified:

- a. When the Union received Pintiliciuc's April 24, 2014 letter, the Union notified SaskEnergy that Pintiliciuc had concerns about the IME being scheduled at CBI in Saskatoon because there was a conflict of interest

because Pintiliciuc had been there before through WCB. SaskEnergy confirmed to Best and the Union that CBI Regina was independent of CBI Saskatoon, so they would set up the IME for Regina.

- b. Best remembers other communications with Pintiliciuc about dealing with his medical issues and encouraging him to get better. She also remembers dealing with him with respect to his various grievances.
 - c. With respect to the IME, however, Best only remembers the communications about moving the IME from Saskatoon to Regina. When the Union received the letter it went to Best's assistant, Monica Radwosky, who pointed out the issue about CBI. Best spoke to McCullough at SaskEnergy about this issue. She would not have told McCullough that Pintiliciuc wanted the IME delayed because he had a specialist appointment scheduled for May 13, 2014 because she was not aware Pintiliciuc wanted to delay the IME. After her communication with SaskEnergy about changing from Saskatoon to Regina, she never heard from Pintiliciuc again until after he was terminated.
 - d. Best was never made aware of Pintiliciuc's position that he was unable or unwilling to attend the IME.
 - e. Before Pintiliciuc's termination, the Union did not advise SaskEnergy that Pintiliciuc considered it unsafe for him to travel to the IME. Best does not remember reading the part of Pintiliciuc's letter where he says he wants to wait until after the appointment with the specialist. At the time, Pintiliciuc did not raise the issue verbally with Best.
37. By a letter of April 24, 2014 to Pintiliciuc, McCullough informed Pintiliciuc the May 8, 2014 IME had been cancelled and SaskEnergy was re-scheduling the appointment.
38. By letter of May 5, 2014 to Pintiliciuc, McCullough advised Pintiliciuc the IME was now set for May 12, 2014 in Regina. As with the earlier letter, this letter advises Pintiliciuc he is expected to attend the IME.
39. McCullough testified that:
- a. She believed the May 12 appointment in Regina was acceptable. The Union was well aware of the appointment and that SaskEnergy expected Pintiliciuc to attend. The Union did not say Pintiliciuc would not be attending.
 - b. There had been difficulty getting documents to Pintiliciuc previously because he refused to take delivery, so McCullough took several steps to get the information to Pintiliciuc. She sent the letter by email, regular mail and registered mail. She tried to contact Pintiliciuc several times to make sure he knew of the date and detail of the IME appointment. She had considerable difficulty connecting with Pintiliciuc.
 - c. When McCullough called Pintiliciuc's number his spouse and other persons who answered the phone variously hung up on her, refused to

transmit a message to Pintiliciuc, refused to take a message and said McCullough had no right to call.

- d. When CBI called to tell McCullough that Pintiliciuc had not attended for the IME, McCullough called the Christy Best at the Union. Best had no idea why Pintiliciuc didn't attend the IME.

40. In cross-examination McCullough confirmed that she never saw Pintiliciuc's April 24, 2010 letter until it came up much later in Pintiliciuc's duty of fair representation application before the Labour Relations Board. McCullough said the Union never told her Pintiliciuc wanted to wait for the IME until he had seen the specialist or that Pintiliciuc felt it was unsafe for him to travel or that Pintiliciuc wanted to delay the IME for any reason.

41. On May 14, 2014, McCullough wrote Pintiliciuc a letter, the relevant portion of which reads:

SaskEnergy has been advised that you did not attend the IME scheduled on Monday, May 12, 2014. Your failure to attend this scheduled IME is another example of your continued refusal to cooperate with the Company in its attempts to maintain your employment with SaskEnergy. SaskEnergy cannot tolerate your misconduct any further. As such, you are dismissed effective immediately, pursuant to the indefinite suspension provisions of the Collective Bargaining Agreement.

42. McCullough testified that:

- a. McCullough made the decision to terminate in consultation with VP Human Resources Robert Haynes, with input from Manager Perry Gurski.
- b. SaskEnergy terminated Pintiliciuc's employment for insubordination because he did not attend the IME and did not communicate with SaskEnergy or cooperate at all with them. McCullough was not aware of any claim by Pintiliciuc that it was unsafe for him to attend the IME.
- c. McCullough was never aware Pintiliciuc raised issues with the standby protocol or any other health or safety issues. She only became aware of the SHE Committee minutes about the standby issue after Pintiliciuc filed his OHS complaint. Those minutes reflect that Monique Kowalchuk raised the standby issue at the meeting. There is nothing in the minutes to suggest Pintiliciuc had been the person who raised the issue. At the time of the termination, McCullough was not aware Pintiliciuc had raised any health or safety issues. Health and safety issues played no part in the decision to terminate.
- d. The termination was for cause. Pintiliciuc had been with SaskEnergy for 4.5 years. He had failed to attend the IME, was uncooperative and failed to communicate with the employer when all they were looking for was confirmation of whether he needed to be away from work for medical reasons. Pintiliciuc also had the two incidents of previous discipline in relation to the sick leave in 2012 and the harassment complaint in 2013. The Union grieved the termination, but ultimately withdrew the grievance because they felt they could not be successful at arbitration. Pintiliciuc

filed a duty of fair representation complaint with the Saskatchewan Labour Board, and the complaint was dismissed on February 5, 2015.

43. The witness, Barry Chessal, testified that when he worked for SaskEnergy in Nipawin, he was involved in an explosion in 2008 that killed two people. He said he was left with PTSD. He said when he raised safety issues, he was harassed and bullied and his job performance and credibility were challenged. Chessal says he quit his job with SaskEnergy in 2013 because of a near explosion.

V. Positions

44. Pintiliciuc submits:

- a. Sask-Energy terminated Pintiliciuc's employment because of harassment, retaliation and revenge against Pintiliciuc. He was punished three times because he repeatedly raised all kinds of safety issues, and the fact he raised safety issues was the reason SaskEnergy terminated his employment. SaskEnergy engages in pressure and harassment of any whistleblower.
- a. By giving him an order to attend the IME, SaskEnergy gave him a direct work order that put his life in danger and he was justified in refusing to attend the IME.
- b. SaskEnergy did not have the right to ask Pintiliciuc to attend the IME while he was on medical leave and under workers' compensation.
- c. No employer can oblige their employee to repeatedly put the employee's health and safety in danger. SaskEnergy didn't check first to see if Pintiliciuc was able to work.

45. SaskEnergy submits:

- a. Pintiliciuc has not established a nexus between his occupational health and safety activities and SaskEnergy's act of terminating his employment in 2014.
- b. While Pintiliciuc did raise a concern about the standby schedule in 2013, which was ultimately presented by others at the SHE committee meeting in August of 2013, Pintiliciuc has not presented sufficient evidence to support that he exercised a "health and safety right" so as to engage section 3-35 of the *Act*.
- c. Pintiliciuc's evidence that it was unsafe for him to travel to the IME is not supported by the evidence.
- d. Even if Pintiliciuc was exercising a health and safety right, that event occurred in 2013, long before his termination for insubordination and insolence in May of 2014. Furthermore, the individuals who made the decision to terminate had no knowledge that Pintiliciuc had taken issue with the standby schedule in 2013.

VI. Analysis

46. The issues before me are:

- a. Did Pintiliciuc engage in or participate in one of the activities described in s. 3-35 of the Act that on its face could be the reason, or a reason for discriminatory action?
- b. Did SaskEnergy take discriminatory action against Pintiliciuc?
- c. If the first two questions are answered in the affirmative, has SaskEnergy met the onus in s. 36(4) to establish that the discriminatory action was taken against Pintiliciuc for good and sufficient other reason?

Did Pintiliciuc engage in or participate in one of the activities described in s. 3-35 of the Act that on its face could be the reason, or a reason for discriminatory action?

47. The onus with respect to this issue is on Pintiliciuc.

48. The OHO said this at page 3 of the Report:

There are emails provided by Marius that show that he had raised concerns regarding health and safety in the past. One of the emails was sent to Ken Burton and Don Lawrence on June 27, 2013. The email was regarding missed locates. Another email was regarding the new stand by decision and customer danger which was sent to Monique Kowalchuk and Christie Best on August 12, 2013. A third email was sent to Perry Gurski regarding stand by and district coverage on August 12, 2013.

49. The OHO found this information sufficient to establish Pintiliciuc had been raising health and safety concerns in the workplace sufficient to engage s. 3-35 of the Act. I agree.

50. A review of s. 3-35 reveals that under ss. (h) if someone gives or has given information to an occupational health committee, the prohibition against discriminatory action will apply. At a minimum, the issue Pintiliciuc raised with respect to the new standby process was one where he gave information to the occupational health and safety committee. When he raised other concerns about safety issues such as response times, wind bags and line locates, Pintiliciuc was effectively seeking enforcement of the occupational health and safety provisions of the Act or its predecessor. I am satisfied Pintiliciuc had, at some points during his employment, been engaged in activities described in s. 3-35.

51. I do not accept, however, that when Pintiliciuc refused to attend the medical appointment on May 12, 2014 or to communicate with SaskEnergy, he was participating in any of the activities listed in s. 3-35 of the Act. Pintiliciuc is essentially claiming he was refusing dangerous work when he refused to go to the appointment. In his arguments, Pintiliciuc sometimes claims it was dangerous because it required him to travel and sometimes claims it was dangerous because the medical examination might aggravate his condition. S. 3-31(1) of the Act says:

3-31 A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts

is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:

- (a) sufficient steps have been taken to satisfy the worker otherwise; or
- (b) the occupational health committee has investigated the matter and advised the worker otherwise.

52. On examining the wording of this section, it appears the legislature intended to ensure that when a worker is directed to perform tasks in the workplace that may be unusually dangerous, the worker is entitled to refuse that work until the real or perceived danger has been dealt with. Section 3-34 supports this interpretation when it says the employer cannot ask another worker to do the work that is claimed dangerous unless certain conditions are met. The section was not intended to cover a situation where the employer directs the employee to undergo an IME under the Collective Agreement. That is a labour relations issue.
53. Even if s. 3-31 could be construed to cover a situation where an employer requests an IME, the evidence in this case would not support a conclusion that Pintiliciuc actually sought enforcement of the provision. The evidence does not establish that Pintiliciuc communicated to SaskEnergy that he considered the direction to attend the IME to be a direction to perform dangerous work. The section contemplates the dangerous work issue being taken to the occupational health and safety committee. There is no evidence this occurred. Indeed, SaskEnergy had no knowledge whatsoever that Pintiliciuc wanted to delay the IME.
54. Pintiliciuc did not directly tell SaskEnergy about the appointment with the specialist he claimed to have for May 13 nor did he communicate with SaskEnergy or the Union to tell them he was refusing to go to the IME because he considered it to be unsafe work. He may have raised concerns with the Union about going to the IME, but he never told the Union he didn't intend to go to the IME or that he was refusing to go because of safety reasons. There is no evidence before me that Pintiliciuc raised any issue about attending the IME with SaskEnergy before he was terminated. It is obvious that if SaskEnergy did not know about the alleged safety issue in relation to attendance at the IME, they could not terminate Pintiliciuc's employment because of the issue.
55. Furthermore, Pintiliciuc's behaviour with respect to the IME is not that of a worker attempting to exercise an occupational health and safety right. When SaskEnergy directed Pintiliciuc to attend the IME, he refused to communicate with SaskEnergy. He sent the April 24, 2014 letter to the Union. The Union worked with SaskEnergy to deal with Pintiliciuc's concern about not using CBI Saskatoon. SaskEnergy accommodated that concern and made an appointment for Regina. Pintiliciuc admitted he knew about the Regina appointment. Pintiliciuc did not contact the Union when he got the May 5 letter directing him to attend at the IME on May 12, and he steadfastly refused to communicate with SaskEnergy. He took the position he did not have to talk to SaskEnergy. He also complains that after the appointment was changed, he never heard from the Union. Any reasonable person in the circumstances would, at a minimum, have contacted the Union on receipt of the letter to ask the Union to intervene again. Any reasonable person claiming an occupational health and safety right would have communicated that claim to their

employer and their occupational health and safety committee. Pintiliciuc did none of these things.

56. Lastly, I agree with SaskEnergy's counsel that Pintiliciuc's suggestion it was unsafe for him to travel to the IME is not supported on the evidence. There is no reliable evidence to suggest it was unsafe for Pintiliciuc to travel to the IME or to undergo the IME. In his April 24, 2012 letter to the Union, Pintiliciuc claims there are recommendations that he avoid "physical efforts, long driving time, sitting and walking periods". He says there will have to be special arrangements if he has to drive long hours. Pintiliciuc did not provide any evidence from a physician or otherwise that it was unsafe for him to travel to the IME or undergo the IME. Pintiliciuc admitted his doctor never told him it was unsafe to travel to Saskatoon. The doctor told Pintiliciuc it was unsafe for him to do work that would put pressure on his spine.
57. In conclusion, when Pintiliciuc did not attend the IME on May 12 as directed by SaskEnergy, he was not engaging in an activity listed in s. 3-35 of the *Act*.

Did SaskEnergy take discriminatory action against Pintiliciuc?

58. Termination of employment is discriminatory action within the meaning of s. 3-1(1)(i) of the *Act*. SaskEnergy terminated Pintiliciuc's employment. Discriminatory action is established.

Has SaskEnergy met the onus in s. 36(4) to establish that the discriminatory action was taken against Pintiliciuc for good and sufficient other reason?

59. Subsection 3-36(4) of the *Act* creates a presumption that the discriminatory action (termination) was taken against Pintiliciuc because he participated in occupational health and safety activity and puts the onus on SaskEnergy to establish that Pintiliciuc's termination was taken for good and sufficient other reason. The standard of proof is the civil standard of balance of probabilities.
60. The OHO, at page 3 of his decision said this:

The information provided by the employer shows that the reasons for the termination of Marius was due to the fact that he refused to communicate with his employer and refused to attend an independent medical examination, which SaskEnergy deemed necessary to verify his absence from work, and which was permitted under SaskEnergy's collective bargaining. This was not disputed by Marius as he stated that he wanted an extension on his medical examination, and that he made this request know to his Union rather than to his employer.

There is insufficient evidence that Mr. Pintiliciuc was terminated for raising health and safety issues. ...

61. The last sentence quoted above might suggest the OHO expected Pintiliciuc to prove he was terminated for raising health and safety issues when the onus is on SaskEnergy to prove Pintiliciuc was not terminated for health and safety reasons. Application of the proper onus, in any event, leads to the same result.

62. I accept McCullough's evidence about the reason SaskEnergy directed Pintiliciuc to attend the IME. SaskEnergy was faced with a situation of conflicting information on Pintiliciuc's fitness to work. The Collective Agreement with the Union permits SaskEnergy to require an IME in those circumstances, so SaskEnergy directed Pintiliciuc to attend an appointment for an IME. The original IME was set for May 8, 2014, but the location was changed at Pintiliciuc's request and the new appointment was set for May 12, 2014. At no time did Pintiliciuc contact McCullough to say he had any concern about the May 12 date for any reason. Indeed, Pintiliciuc refused to communicate with McCullough when she tried to reach him. May 12 came and went and Pintiliciuc did not attend the appointment or communicate with the Employer. No one ever told McCullough that Pintiliciuc did not want to attend the appointment for any reason or that Pintiliciuc had an appointment with a specialist on May 13. No one provided SaskEnergy with any medical information about Pintiliciuc between the time the first appointment was arranged and May 12, 2014.
63. I accept McCullough's testimony that, faced with these circumstances, she and Robert Haynes decided to terminate Pintiliciuc's employment because of the issues around the IME. The fact Pintiliciuc had raised health and safety issues in the past never entered their minds. Pintiliciuc's past occupational health and safety activities were not a factor in the decision to terminate.
64. Having accepted McCullough's evidence, I find that SaskEnergy has established, on a balance of probabilities, that the only reason for Pintiliciuc's termination was his insubordination by his refusal to attend the IME and refusal to communicate with SaskEnergy, when considered in light of his existing disciplinary record. The termination was not because Pintiliciuc had exercised any occupational health and safety rights. The termination was a labour relations response to circumstances that in labour relations terms could involve a disciplinary response including termination. The circumstances amounted to good and sufficient other reason for Pintiliciuc's termination.

VII. Conclusion

65. In conclusion:

- a. Pintiliciuc engaged in some activities described in s. 3-35 of the Act that on their face could be the reason, or a reason for discriminatory action. Those activities included Pintiliciuc raising concerns about training, response times, building entry procedures, wind bags, line locates and the SaskEnergy standby schedule;
- b. SaskEnergy took discriminatory action against Pintiliciuc when SaskEnergy terminated Pintiliciuc's employment on May 14, 2014;
- c. However, SaskEnergy has met the onus in s. 36(4) to establish that the discriminatory action was taken against Pintiliciuc for good and sufficient other reason. That good and sufficient other reason was Pintiliciuc's refusal to communicate with SaskEnergy and refusal to attend the IME he was directed to attend when considered in light of his disciplinary record.

66. For all the reasons set out above, I hereby dismiss Marius Pintiliciuc's appeal with respect to Report 1593.

Issued at Saskatoon, Saskatchewan, September 29, 2016.



Anne M. Wallace, Q.C.
Appeal Adjudicator