

DECISION OF THE APPEAL DIVISION

#2002-0636 &
#2002-0637

March 12, 2002

RE: Appeal Division Reference #2002-0636 and #2002-0637

Panel Appointed:
Heather McDonald

Introduction:

- (1) The employer is appealing two decisions of a reviewing officer in the Prevention Division, Workers' Compensation Board (the "Board"). The first decision, dated July 26, 2000, imposed an administrative penalty of \$3,500.00 regarding an inspection on June 5, 1999, in which safety officers found violations of the *Occupational Health and Safety Regulation's* (the "*Regulation*") fall protection provisions and the requirement for a supervisor to properly instruct workers. The second decision, dated July 27, 2000, imposed an administrative penalty of \$3,500.00 regarding an inspection on June 12, 1999 in which a safety officer cited the employer for the same violations as the week before.
- (2) On appeal to the Appeal Division, the employer's position is that both administrative penalties should be reduced or rescinded.

Issue(s):

- (3) Does the common law principle of res judicata apply to the alleged regulatory violations found by the Board in the June 5, 1999 and June 12, 1999 inspections? Did the employer violate Sections 3.23 and 20.73 of the *Regulation* in the circumstances of those two inspections? If so, was it appropriate to impose an administrative penalty in those cases? If so, what is the appropriate quantum of penalty?

Procedural Matters:

- (4) Legal counsel represented the employer in these appeal proceedings. I convened an oral hearing on November 19, 2001 at which the employer and the safety officers participated. The purpose of the safety officers' attendance at the oral hearing was for them to be witnesses providing factual background regarding their inspections and recommendations for penalty action. The Prevention Division is not a party in these proceedings.
- (5) The employer also provided extensive written submissions in these proceedings.

- (6) My jurisdiction in this appeal arises under Sections 207 – 212 of the *Workers Compensation Act* (the “Act”). When appealing an administrative penalty to the Appeal Division, an employer does not need to establish a threshold error of fact, law or contravention of published policy, in order for the appeal to proceed. Under Section 212 of the *Act*, the appeal tribunal may (a) confirm, vary or cancel the decision under appeal, or (b) refer the matter back to the Board for reconsideration. In this case, the decisions under appeal are the reviewing officer’s two decisions to impose an administrative penalty of \$3,500.00 in each case, for a total of \$7,000.00 owing by the employer to the Board.

Evidence and Background:

- (7) Section 3.23 of the *Regulation*, in force at the time of the inspections in this case, stated:

Every supervisor is responsible for the proper instruction of workers under the supervisor’s direction and control, and for ensuring their work is performed without undue risk.

- (8) Section 20.73 of the *Regulation*, also in force at the relevant time, stated:

Fall protection as required by Part 11 (Fall Protection) must be used if work is being done on a roof from which a fall of 3 m (10 ft) or more may occur or if a fall from a lesser height may involve an unusual risk of injury.

The June 5, 1999 inspection

- (9) Two Board safety officers inspected one of the employer’s worksites and observed one worker installing cedar shakes on a roof approximately twenty-five feet above grade. One of the safety officers spoke the worker’s first language and after a conversation with him, determined that the worker knew he should have been wearing fall protection. The worker also mentioned that two other workers had been on the roof earlier without fall protection. He indicated there was no supervisor on site. A few minutes later, a van arrived with two other workers. Both those workers indicated there was no supervisor on site. The safety officers inspected the van and found three sets of fall protection available in the van, along with a fall protection program.
- (10) One of the safety officers contacted Mr. X, the employer’s manager, by cell phone and he arrived quickly at the job site. Mr. X identified one of the workers as the supervisor responsible for ensuring that fall protection was worn by the workers. That worker was one of the workers who had been in the van, away from the worksite. In the presence

of Mr. X, that worker acknowledged himself as the supervisor in agreeing with Mr. X when Mr. X identified him as the supervisor. At the oral hearing, the safety officer who spoke the workers' first language, testified that despite the worker's ultimate acknowledgement of supervisor status, he still didn't believe that worker was the on-site supervisor. This safety officer testified that the worker didn't know he was a supervisor until Mr. X told him he was the supervisor, the worker didn't know what his duties were as a supervisor and the other two workers didn't know he was the supervisor.

- (11) The safety officer testified that Mr. X was very upset with the workers for not wearing fall protection and he suspended them for their failure to wear it. Mr. X told the safety officers that he had been on the site earlier that day and had seen the workers wearing fall protection. The safety officers could not dispute Mr. X's evidence in that regard.
- (12) Mr. X advised the safety officers that all his workers were trained to wear fall protection and that he had employed a safety consultant to inspect and train the workers in the safe performance of their duties.
- (13) The safety officers recommended penalty action against the employer based on their observation of the first worker roofing 25 feet above grade. They provided four photographs showing the worker working at various points on the roof. They considered the worker at high risk for serious injury or death had he fallen from the roof. They also noted that the manager Mr. X was familiar with fall protection requirements, and referred to fall protection violations on numerous inspection reports in 1995, 1996 and 1997, involving the employer in question as well as a different employer of which Mr. X was the owner.
- (14) The recommendation for penalty action went before a reviewing officer in the Prevention Division at an oral hearing on June 30, 2000. The employer referred to a 1994 Prevention Division field operations guideline indicating that safety officers had a discretion not to issue fall protection orders for roofers in the "first man up" situation, working in a limited area/time frame such as roof capping or removing anchors, or estimating roof work. The employer suggested that the employer (as well as the worker observed on the roof) considered it acceptable for workers to proceed without fall protection in the case of the June 5, 1999 inspection, as they were only doing roof-capping work at the time.
- (15) The employer also argued that the prior inspection history of another employer (of which Mr. X is the owner) could not support penalty action against the employer in question, a different legal entity. He further noted that while some of the prior violations involved the proper use of lifelines and anchoring, they did not involve failure to wear fall protection. Thus these were not "repeat" violations in any event.

- (16) The employer also noted that the employer had recently hired a project supervisor to ensure future compliance with the *Regulation* at the employer's job sites, and that the fall protection program had been upgraded. The employer submitted that although the penalty proposed had been categorized as a "Type III" violation, a lesser quantum would be appropriate.
- (17) The reviewing officer decided that whether or not one of the workers was the supervisor on the jobsite that day, the evidence supported a finding that there was inadequate supervision. Therefore he found the employer in violation of Section 3.23 of the *Regulation*.
- (18) With respect to Section 20.73 of the *Regulation*, the reviewing officer noted that the photographs clearly showed the worker actively working in three different positions and locations on the roof. The photos also indicated that the progress of the roof work appeared to be less than mid way to completion. Accordingly, the reviewing officer did not accept the employer's argument that the worker should have been excused from wearing fall protection because of their belief that it was not necessary to do so while performing brief and temporary work activities such as final roof capping.
- (19) The reviewing officer referred to Item D12-196-1 of the *Prevention Policy Manual* (the "*Manual*"), which outlines policy regarding the imposition of administrative penalties. Under that policy, the primary purpose is to motivate the employer receiving the penalty and other employers to comply with the *Act* and *Regulation*. He agreed that the inspection history relied on by the safety officers included a separate legal entity from the employer, but found that Mr. X had been involved with both employers during numerous inspections involving fall protection requirements. The reviewing officer found that this demonstrated prior awareness and knowledge by the employer's manager for the *Regulation's* fall protection requirements. Therefore, given that "prior persuasive means have failed to gain a meaningful commitment for compliance", as well as the high risk nature of the violations in this case, the reviewing officer found it appropriate to impose an administrative penalty.
- (20) The high-risk nature of the situation categorized the violations as "Type III" in the Recommended Schedule of Sanctions in Item 1.4.1. of the *Manual*. The size of the employer's payroll indicated a penalty of \$3,500.00. The reviewing officer declined the employer's suggestion that he exercise discretion to lower the quantum, as he could find no reason to support a deviation from \$3,500.00.
- (21) On appeal to the Appeal Division, the employer says that the Board engaged in an illegal practice of issuing duplicitous orders, as Sections 3.23 and 20.73 of the *Regulation* describe different offences, yet both are cited for the same set of facts. In this regard, it relies on Kienapple v. The Queen (1974) 15 C.C.C. (2d) 524 (S.C.C). In that case, the Court determined that the principle of *res judicata* applies when more

than one charge is used to describe the same offence. In other words, a person should not be charged and convicted of two offences arising from a set of facts that essentially constitutes one, same action by the person.

- (22) The employer submitted that even if the Board finds the employer in violation of the *Regulation* regarding the June 5, 1999 inspection, no administrative penalty is appropriate. It says that there was no independent evidence to substantiate that the violations were high-risk in nature. In this regard, the employer relies on Appeal Division Decision #95-0247 [11 W.C.R. 315 (March 6, 1995)]. Further, it submits that the Board improperly relied on prior inspection history of a different legal entity, as well as inspection history of the employer that was not relevant, as it did not involve a failure to use fall protection equipment. As well, the employer submits that it was duly diligent, as it provided the worker in question with fall protection equipment, training on how to use it, and directions to use it. The employer relied on evidence that there was a worker on site acting as a “leadhand”, with the responsibility of telling other workers to wear fall protection. The employer says that it employed a system of “roving supervision” by the manager, Mr. X, who had seen workers on the site wearing fall protection earlier that day. The employer submits that it should not be held responsible for the independent actions of its workers deciding not to wear fall protection.
- (23) In the alternative, if an administrative penalty is found to be appropriate in this case, the employer says that the penalty should be mitigated because of the 1994 safety officer guideline, of which the worker was aware, that indicated temporary activities such as roof capping would not attract enforcement of the fall protection requirements of the *Regulation*. The employer says that the reviewing officer improperly dismissed its argument out of hand. The employer submits that it is a “double standard in the extreme for the Board to expect an employer to be knowledgeable of the regulations and their interpretation while at the same time dismissing the relevance of that knowledge when it offers an explanation for conduct that is otherwise a breach of the regulations.”

The June 12, 1999 inspection

- (24) At a different worksite, one of the same safety officers involved in the June 5, 1999 inspection observed two of the employer’s workers on a roof approximately twenty-seven feet above grade. The workers were wearing fall arrest harnesses but were not attached to lifelines. The safety officer took six pictures of the workers, carrying bundles of cedar shakes, at various points on the roof situated at both the front and rear of the house. At the oral hearing before the reviewing officer, the safety officer testified that about three to five minutes elapsed while he drove from the rear to the front of the residence, took photos, and exited his truck to call the workers down from the roof. During this period he saw workers moving to various points on the roof.

- (25) The safety officer did not speak the workers' first language, but was able to communicate in English with one of the workers. He asked him why they weren't attached to the lifelines, and the response was that they were moving cedar shake bundles on the roof and therefore couldn't wear the lifeline when doing that activity.
- (26) At the hearing before the reviewing officer, one of the workers testified that he and his fellow worker had been attached to the lifelines while they worked before the safety officer arrived. He testified that they had just returned from a coffee break when the safety officer observed them, and they had not reattached to their lifelines at that moment. The worker also confirmed in his testimony that he and the other worker had been fully trained, instructed, and aware of the requirements to wear fall protection.
- (27) The safety officer attempted to contact Mr. X, the employer's manager, by cell phone, but was unable to do so. The safety officer did not directly discuss the issue of supervision with the workers. He testified at the Appeal Division oral hearing, that there was a failure by the employer to adequately supervise, because the workers weren't adequately hooked up: "There was a violation, so there must have been lack of supervision". Thus the safety officer found the employer in violation of both Sections 3.23 and 20.73 of the *Regulation*. He further found the employer to have violated a first aid requirement in the *Regulation*.
- (28) The safety officer recommended penalty action, finding that the workers were exposed to a serious risk of injury by a fall, and that the employer had failed to adequately supervise the workers in the safe performance of their duties. He also noted that the first aid kit was depleted. He recommended penalty action based on the high-risk nature of the fall protection violation, the previous inspection history of the employer the week before, and the lack of adequate first aid.
- (29) For reasons that are unnecessary to describe here, the reviewing officer did not find the employer in violation of the *Regulation's* first aid provision.
- (30) With respect to the lack of fall protection, the reviewing officer did not accept the worker's evidence that he and the other worker were only briefly unattached to the lifeline because they had just returned from a coffee break and hadn't yet had an opportunity to re-attach when the safety officer observed them. In this regard, he reviewing officer preferred the evidence of the safety officer. He also stated:

I note that the photos #1, 2, 3 and 5 show another worker...who is shown actively working at various places on the roof over the time that the pictures were taken and this is not consistent with one merely returning back to work from a break before attaching his safety line. The OSO stated that during the time he observed the workers he witnessed them

performing work duties that included carrying bundles of roofing materials and not simply returning to a single work location to re-attach a lifeline.

- (31) The reviewing officer therefore found the employer in violation of Section 20.73 of the *Regulation*.
- (32) The employer had argued that a supervisor need not be present at all times on a worksite to ensure workers' safety. The reviewing officer, however, found that it is a supervisor's responsibility to be absolutely confident that workers have adequate training and that they will follow instructions before they are left on their own to work – otherwise there must be an on-site supervisor to ensure compliance with the *Regulation*. Thus the reviewing officer found the employer in violation of Section 3.23 of the *Regulation*.
- (33) The reviewing officer found an administrative penalty to be appropriate in the circumstances, given the repeated violations by the employer within one week, and the high-risk nature of the violations. (Before the reviewing officer, the employer had not disputed the high-risk nature of the violations). He stated that that the inadequate supervision and failure to ensure the use of fall protection demonstrated the employer's "neglect and complacency" for the *Regulation*.
- (34) The reviewing officer noted that the penalty proposal for \$3,500.00 had not taken into account the penalty proposal for similar violations arising out of the June 5, 1999 inspection. If that had been taken into account, the penalty proposal for the June 12, 1999 inspection would have been \$7,000.00 as a "Type IV" category. The reviewing officer declined to reduce the proposed quantum of \$3,500.00, finding "no reason to deviate from the penalty sum previously advised by letter which is less than what could have been recommended" in this case.
- (35) On appeal to the Appeal Division, the employer makes the same argument regarding duplicate charges that it made regarding the June 5, 1999 inspection.
- (36) The employer argues that the safety officer did not adequately investigate the issue of adequate supervision for the June 12 incident, as he simply relied on the finding of a fall protection violation to conclude there was a lack of adequate supervision. In this regard, the employer refers to Appeal Division Decision #2001-2043 (October 17, 2001, unpublished).
- (37) The employer also submits that the reviewing officer denied the employer natural justice by relying on the photo evidence to conclude that the workers were moving and working at various spots on the roof, not just returning from a coffee break. The employer says that this opinion was not put to the worker during his testimony for his comments, and

thus the worker's testimony about just returning from a coffee break remains unchallenged.

- (38) The employer submits that no administrative penalty is justified in this case. However, if a penalty is imposed, the employer submits that the quantum should be lowered. First, it notes that the finding of a first aid violation formed part of the basis for the penalty recommendation, and that allegation was determined to be unfounded. Second, the employer submits that in this case the workers were wearing harnesses, and that the employer's prior inspection history of a complete lack of fall protection is therefore irrelevant. The employer also disputes that this was a case of a high-risk, relying on Appeal Division Decision #95-0247. The employer suggests that an administrative penalty of no more than \$1,500.00 would be appropriate in this case.

Analysis and Findings:

The June 5, 1999 inspection

Does the principle of res judicata apply in this case?

- (39) The first matter to address is the employer's submission regarding the Board engaging in an illegal practice of issuing duplicitous orders, contrary to the common-law principle referred to in Kienapple v. The Queen.
- (40) Section 2.12(1) of the *Regulation*, in force at the relevant time,¹ provided:

A contravention of this Regulation will be deemed to be a contravention by the employer and will make that employer liable for any penalty described by the *Workers Compensation Act*, or by the *Workplace Act*, where applicable.

- (41) This is the reason the safety officers were entitled to issue an order against the employer under Section 20.73 of the *Regulation*. The workers were doing the work on the roof and not wearing fall protection, but their failure to wear fall protection became, by virtue of Section 2.12(1), the employer's violation of Section 20.73 of the *Regulation*.
- (42) In the Kienapple case, the accused was charged, in two separate counts in one indictment, with (a) rape and (b) unlawful sexual intercourse with a female under fourteen years of age. The charges arose out of the same sexual assault upon a young female. The accused was convicted on both counts, and sentenced separately on each

¹ The current version is Section 2.8 of the *Regulation*.

count, with the result of concurring sentences. The appellate court upheld the convictions, and he appealed to the Supreme Court of Canada. A majority of the Supreme Court allowed the appeal, finding that a person cannot be convicted twice, even under ostensibly different offences, for the same matter.

- (43) Then Chief Justice Laskin, speaking for the majority, noted that it was appropriate for the Crown to seek an indictment on two counts, as the offence of unlawful sexual intercourse was not an included offence on a charge of rape. This is because unlawful sexual intercourse might involve a situation in which there was consent to the intercourse, which would be inconsistent with the offence of rape. However, he noted that the two offences might involve an overlap in a situation where the intercourse was without consent and involved a female under the age of fourteen. In such a case, the Crown was entitled to seek an indictment on both counts, but the second charge would fall as an alternative. There could not be “multiple convictions for the same delict against the same girl”. The Court noted that there was a long common law history supporting that conclusion.
- (44) The Court referred to an 1875 English decision of Wemyss v. Hopkins (1875) L.R. 10 Q.B. 381 which stated in part that:

I think the fact that the appellant had been convicted by justices under one Act of Parliament for what amounted to an assault is a bar to a conviction under another Act of Parliament for the same assault. The defence does not arise on a plea of autrefois convict, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, transit in rem judicatam, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise, there might be two different punishments for the same offence.

[italic emphasis added]

- (45) Subsequently Chief Justice Laskin stated:

The relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences. Moreover, it cannot be the case that if an accused is tried on several counts charging different offences, he is liable to be convicted and sentenced on each count, and yet if he was tried and convicted on one only he would be entitled to set up the defence of res judicata as a defence to other charges arising out of the same cause or matter.

Although there have been cases where multiple convictions were registered, when in substance only one “crime” has been committed, refusal to interfere on appeal was justified on the “no substantial wrong” basis because only one sentence was imposed: see R. v. Lockett, Grizzard, Gutworth and Silverman, [1914] 2 K.B. 720; Kelly v. The King (1916), 27 C.C.C. 282, 34 D.L.R. 311, 54 S.C.R. 220. The better practice, however, is to avoid multiple convictions....

[italic emphasis added]

- (46) The Court concluded that the principle of res judicata is grounded on “the Court’s power to protect an individual from an undue exercise by the Crown of its power to prosecute and punish”. It stated that:

Parliament’s power to constitute two separate offences out of the same matter is not in question, *but unless there is a clear indication that multiple prosecutions and indeed, multiple convictions are envisaged*, the common law principle...[of res judicata]...should be followed. Neither the definitions of the respective offences nor their history gives any support to the view that that common law principle has been ousted.

[italic emphasis added]

- (47) Thus the Court allowed the appeal of the accused, quashing the conviction for unlawful carnal knowledge and the sentence of ten years that accompanied the conviction.
- (48) In this case, the employer notes that the inspection matter involved a worker engaged in work activity twenty-five feet above ground, allegedly not wearing fall protection equipment. Relying on Kienapple, the employer says that it was improper for the Board to find violations by the employer of two regulatory offences for that same set of facts: Section 20.73 (not wearing fall protection equipment), and 3.23 (failure in supervision by failing to ensure the worker’s work was performed without undue risk – in other words, the employer’s failure to ensure the worker wore fall protection equipment).
- (49) The employer has raised a clever and interesting legal argument. I have decided, however, that the Kienapple principle does not apply in this particular case of enforcement action by a Board safety officer and reviewing officer, in the safety and accident prevention context of the *Act* and *Regulation*.
- (50) I acknowledge that previous Appeal Division decisions have recognized the quasi-criminal nature of enforcement proceedings under the *Regulation*, noting in particular that employers are potentially subject to substantial penalties and even criminal prosecution for violations of the *Act* and *Regulation*. See

Appeal Division Decision #2001-0934/0935, (May 11, 2001, unpublished) and Appeal Division Decision #2002-0109, (January 16, 2002, unpublished).

- (51) There are significant purposes of the *Act* and *Regulation*, however, which highlight that the workers' compensation enforcement context amounts to something different than a system of criminal justice aimed at punishing offenders. Part 3 of the *Act* has the specific purpose, stated in Section 107(1), to benefit all citizens of British Columbia "by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety." Section 107(2), among other things, refers to the purposes of preventing work related accidents, injuries and illnesses and to ensure an occupational environment that provides for the health and safety of workers and others. These provisions echo the former Section 71(1) of the *Act* (in force at the time of the inspection in question but since repealed), which stated that the Board "may make regulations.....for the prevention of injuries and occupational diseases in employments and places of employment...."
- (52) The predominant purpose of the *Regulation*, then, is not to punish but to educate and motivate persons, including workers and employers, toward ensuring safe work environments and protecting the health and safety of workers and others in the work place.
- (53) When a safety officer inspects a workplace and issues orders (that is, finds violations of the *Regulation*), he or she may or may not recommend penalty action. The first concern must be to identify safety problems in the workplace, to identify and describe the causes of the problems, and to recommend and direct means of removing or otherwise resolving any dangerous situations. For these predominantly educational and preventative purposes, identifying violations of the *Regulations* is a useful and concise way to report the safety problems, identify the causes of the problems, and recommend their rectification. Thus for one set of facts, such as those involved in the June 5, 1999 inspection, there may be several provisions of the *Regulation* and/or the *Act* referred to in the inspection report.
- (54) In the inspection report at hand, the unsafe situation involved a worker not wearing fall protection when he was working on a high roof. The officers' findings, however, referred to two different violations: the worker not wearing fall protection, and the failure in supervision that led up to that violation. In a sense, the second violation (Section 3.23 of the *Regulation*) was one of the causes of the first violation (Section 20.73 – worker not wearing fall protection).
- (55) When it comes to proceeding with penalty action against an employer, the various findings of regulatory violations, albeit that they may all arise from the same set of facts, do not each attract separate penalties in the Board's system of enforcement.

(The Board's system of enforcement involves a safety officer, reviewing officer, and ultimately, the imposition of an administrative penalty or other means of enforcement such as a warning letter) . This is a critical difference from the Criminal Code system of justice, where each offence carries with it a separate penalty.

- (56) In this case, the penalty recommendation proceeded on the basis of one recommended penalty of \$3,500.00. This penalty was not composed of, say, \$1,500.00 for the violation of Section 3.23 of the *Act* and \$2,000.00 for the violation of Section 20.73 of the *Act*, or \$3,000.00 for the former and \$500.00 for the latter. The penalty notification letter sent to the employer referred to the violations, but stated that penalty action "was proceeding on the basis that *the alleged activity* resulted in a high risk of injury, serious illness or death and resulted *in repeated non-compliance with the Regulation*". The letter went on to state that "administrative penalties for violations of this type generally range in the amount of \$3,500.00". Whether there was one finding of a regulatory violation or ten findings of different regulatory violations, the Board was proceeding with administrative penalty action on the basis of the one inspection of the employer's workplace on June 5, 1999. There was no intent by the Board to punish the employer separately for each separate regulatory violation subsequently confirmed by the reviewing officer.
- (57) In Kienapple, the Court noted that the principle of *res judicata* is intended to protect a person from an undue exercise of the power *to prosecute and punish*. Quite simply, it is unfair to punish a person twice (or more) for the same act. The Court observed that in some cases, multiple convictions have been left to stand, albeit that only one crime had been committed, when only one sentence was imposed. The Court stated that the better practice was to avoid multiple convictions, although tacitly the Court seemed to acknowledge that the evil of double punishment at which *res judicata* is aimed would not exist in those circumstances where only one sentence was imposed.
- (58) In my view, the public interest in preventing workplace injuries and educating workers and employers about workplace safety is well-served by the Board's common practice on inspection reports of identifying several regulatory violations for a single set of facts. This is because the practice helps to identify all relevant sources of the safety problem, and thereby educates stakeholders in the means of attaining a safe workplace. I also find that no Kienapple situation arises because the Board does not seek to penalize an employer separately for each regulatory violation arising out of a single matter.
- (59) Even if I am wrong in that regard, I believe that the Board has the authority to constitute two separate offences, and to punish separately on each offence, for the same set of facts. Earlier in this decision I have referred to Section 2.12 of the *Regulation*. In my view, there is an indication in Section 2.12 of the *Regulation* that the Board would have been entitled to proceed with separate penalty action for each separate regulatory violation albeit that only one safety "matter" was involved. In other words, I believe that

the common law principle of *res judicata* was ousted by Section 2.12 of the *Regulation*.² This reflects the exception referred to in the Kienapple decision whereby legislation can override the common law principle against “double jeopardy”. Section 2.12 stated in part:

- 2.12 (1) A contravention of this Regulation will be deemed to be a contravention by the employer and will make that employer liable to any penalty prescribed by the *Workers' Compensation Act*, or by the *Workplace Act*, where applicable;
- (2) A contravention of this Regulation by a supervisor or a worker will be deemed to be a contravention by the supervisor and will make that supervisor liable for any penalty prescribed by the *Workers Compensation Act*, or by the *Workplace Act*, where applicable;

- (60) These provisions contemplate multiple penalties against an employer (or in the case of subsection 2, a supervisor) arising out of the same set of facts or the same safety problem. For example, envision a situation in which an inspection report finds five different workers of an employer in breach of the fall protection provisions of the *Regulation*. All of the workers are up on the high roof at the same time. None wears fall protection. Each worker is separately in contravention of the *Regulation* as a result of the incident. Section 2.12(1) of the *Regulation* provides that their employer is also in contravention, five times over, of the same fall protection provisions, and liable for five penalties arising out of that one, same fact pattern involving one safety problem: no fall protection when needed.
- (61) There is no need to pursue that example further, or to offer any others like it. This is because in this case, the Board did not recommend or pursue separate penalties for each finding of a regulatory violation by the employer. There was no “undue exercise” by the Board of a power to both prosecute and punish, in multiple fashion, for the same matter. I have found that there are important public interest and workplace safety reasons supporting the Board’s practice of making multiple findings of regulatory violations arising from one safety incident. Thus I find the principle in Kienapple does not apply in this case.

Did the employer violate Sections 3.23 and 20.73 of the Regulation on June 5, 1999? Was there a high risk of serious injury or death in this case? Did the Board improperly rely on irrelevant inspection history? Should the administrative penalty be mitigated in

² As I indicated earlier, Section 2.12 of the Regulation was the version in force at the time of the inspection in question on June 5, 1999. The current applicable reference is Section 2.8 of the Regulation.

light of the worker's belief that he was entitled to leave off fall protection if engaged in brief work activities such as roof capping?

- (62) The evidence satisfies me that the employer did violate Sections 3.23 and 20.73 of the *Regulation* on June 5, 1999. My assessment of the evidence is that the worker in the van was not the on-site supervisor or leadhand with responsibility to ensure that workers wore fall protection. Rather, the method of supervision relied on by the employer was the "roving supervision" by Mr. X, the employer's manager. This supervision was inadequate. Even accepting that Mr. X did observe the workers wearing fall protection earlier in the day, they obviously felt safe in removing the fall protection equipment, either in the expectation that Mr. X would not be around again without notice or that there would be no serious ramifications if he did return to find them without fall protection. I do not accept that the worker observed on the roof by the safety officers was relying on the belief that he did not need fall protection when doing temporary roof work, such as finishing work. I note the evidence of the safety officer who interviewed the worker, in his first language, who admitted that he knew he should have been wearing fall protection at the time. Further, the photographs of the worker, as well as the evidence of the safety officers at the Appeal Division hearing, indicate that the worker was not engaged in roof capping activity, removing anchors, or other like activity. The project was well underway (one-third to completion, according to one safety officer). The evidence does not support that the worker was engaged in providing an estimate. I do not agree with the employer's submission that the reviewing officer arbitrarily dismissed the employer's argument relying on the 1994 officer guidelines in this regard.
- (63) Having confirmed the findings of the regulatory violations, I also confirm the finding that there was a high risk of serious injury in this case. It is true that there was no policy presumption of a high-risk situation, as in Decision #95-0247. There might be circumstances of a worker, working ten feet or more above grade, who might not be in a high-risk situation. For example, the risk of fall and serious injury might be low, depending on a worker's position on a roof, if a roof were a flat-top, the fall area were cushioned by soft snow, or other moderating factors were present. In this case, however, the roof had a significant slope, the worker was approximately twenty-five feet above grade, and there is no evidence of any cushioning factors for a fall. In these circumstances, I find that the safety officers and reviewing officer were right to consider this a situation involving a risk of serious injury to the worker if he fell.
- (64) The *Prevention Policy Manual* provides that the Board will consider imposing an administrative penalty when an employer is found in violation of the same section of Part 3 of the *Act* or the regulations on more than one occasion. It also refers to factors such as "other relevant circumstances" and the extent to which the employer was aware or should have been aware of the hazard or that the *Act* or *Regulation* were being violated. Like the reviewing officer, I agree that the inspection history of the separate

roofing company was not relevant evidence that this employer had previously violated the *Regulation*, but that nevertheless there was relevant evidence regarding whether or not to impose an administrative penalty against the employer. The employer acknowledged that Mr. X provides management services for the employer from time to time, that he is experienced in the use of fall protection equipment and that he had been involved in a company with a history of fall protection violations. Further, the 1997 employer violations, although they were not the same fall protection provisions of the *Regulation* as in this case, did involve the proper use of fall protection equipment. Thus there was sufficient evidence that the employer and Mr. X, its manager, were very familiar with the *Regulation's* provisions regarding the necessity for fall protection equipment and the proper use of it. I am satisfied that this was a relevant circumstance supporting the administration of an administrative penalty, together with the high risk nature of the situation observed by the safety officers on June 5, 1999.

- (65) I accept that the employer had trained the workers in fall protection requirements and had a fall protection plan developed by a safety consultant. In this case, however, I have found a lack of due diligence by the employer, as the method of roving supervision by Mr. X was clearly inadequate. The worker observed on the roof acknowledged that he should have been wearing safety equipment at the time of the inspection, but obviously felt he could get away with not doing so. The other workers felt comfortable leaving the job site with the van, with the fall protection equipment in the van and their colleague still up on the roof, lacking fall protection. The circumstances in this case point to a lack of due diligence by the employer, as it is not enough just to train workers and provide them with fall protection. The employer must accomplish more, such as either providing an on-site supervisor with appropriate disciplinary authority or otherwise ensuring that the workers understand that there will be serious job-related consequences if a roving supervisor finds them without fall protection when it is required. I note that the employer sent the workers home for the day after he arrived on the site and heard that they were not using the fall protection equipment. I am not satisfied on the evidence that the workers were aware, either before Mr. X arrived on the scene or afterward, that there would be consequences significant to them such as a loss in pay or other meaningful job suspension for breach of the *Regulation*.
- (66) For the foregoing reasons, I confirm the administrative penalty of \$3,500.00 as imposed by the reviewing officer. I do not see any reason to lower the amount of the recommended penalty in this case.

The June 12, 1999 inspection

Does the principle of res judicata apply? Did the reviewing officer deny the employer lack of natural justice by relying on photo evidence as proof that fall protection equipment was required? Was there sufficient evidence to find a lack of adequate supervision for the June 12 incident? Did the employer violate Sections 3.23 and 20.73

of the Regulation? Was an administrative penalty justified in this case? If so, is it appropriate to reduce the quantum?

- (67) For the reasons I have given with respect to the June 5, 1999 inspection, I find that the Kienapple decision does not apply in this case.
- (68) I confirm the finding of a Section 20.73 violation regarding the workers' lack of fall protection. I disagree with the employer's argument that the reviewing officer denied the employer natural justice by not questioning the workers on the photographs submitted into evidence and by relying solely on that evidence to conclude that the workers were moving and working at various spots on the roof.
- (69) The hearing process before the reviewing officer is in the nature of an inquiry process. The employer received disclosure of the documentary evidence on file relevant to the sanction proceeding, including the photographs taken by the safety officer showing the workers in various locations on the roof. The safety officer testified, and the reviewing officer's decision refers to this testimony that:
- ...he witnessed workers carrying of bundles to various points on the roof situated at both the front and rear of the house. The OSO indicated that about 3 – 5 minutes elapsed while he drove from the rear to the front of the residence, took some photos before he exited his truck to call the workers down and discuss the fall protection requirements. During this time period he saw workers moving to various points on the roof.”
- (70) With this testimony at the oral hearing, I find that it was reasonable for the reviewing officer to rely on the photographs as evidence supporting the safety officer's testimony. It was unnecessary, in my view, for the reviewing officer to cross-examine the workers on this point. The reviewing officer's role is not to act as both prosecutor and judge in the proceedings, but rather to elicit relevant evidence in a way that is fair to the employer. The employer saw the photographs and heard the safety officer's testimony, and was given a reasonable opportunity to respond to the evidence.
- (71) I agree with the reviewing officer's finding that there was a violation of Section 20.73 of the *Regulation* on June 12, 1999, as the evidence persuades me, like him, that the workers were not wearing their lifelines attached to their harnesses and that this was not just a brief situation arising from their return from a coffee break. I note that the reason for lack of a hookup that one worker provided to the safety officer had nothing to do with a return from a coffee break; rather, the worker gave an explanation that moving cedar bundles up and down the roof didn't require a lifeline hook-up.
- (72) The next matter is Section 3.23 of the *Regulation*. I agree with the employer that it is insufficient to merely rely on the finding of a fall protection violation as proof that the

employer failed to properly supervise its workers. See Decision #2001-2043. The safety officer's testimony at the Appeal Division oral hearing suggested that he found a violation of Section 3.23 for the sole reason that there was a violation of Section 20.73.

- (73) The reviewing officer, however, did not confirm that error. He noted the other circumstances that supported a lack of adequate supervision. In this case, the June 12, 1999 inspection followed on the heels of the June 5, 1999 inspection, where the system of "roving supervision" had earlier failed to ensure workers were wearing fall protection when required to do so under the *Regulation*. Workers should be able to contact an off-site supervisor readily if they need to ask questions, particularly safety questions. In this case, the safety officer was unable to reach Mr. X by cell phone, albeit that he only made one attempt. Although the employer may have trained and instructed the workers on the use of fall protection equipment, once more the workers felt confident enough to wear only harnesses and not attach themselves with lifelines. After the failure a week before in the roving supervision method, and with the resulting consequence of recommended penalty action, one would have expected the employer to have implemented on-site supervision or otherwise ensured compliance by, for example, proposed disciplinary consequences to its workers in the event of violations. But the employer, at this point, had not moved to a system of on-site supervision. The employer did not provide evidence of any other means it had taken to ensure compliance with fall protection requirements. The evidence supports a finding of inadequate supervision, and I confirm the finding that the employer violated Section 3.23 of the *Regulation* in this case.
- (74) The photographs in this case as well as the officer's evidence indicates that the workers were twenty-seven feet above grade, working on a roof with a significant slope, with an uncushioned fall area. I am satisfied that the violation situation was one of high risk of serious injury to the two workers if they had fallen.
- (75) This was also a situation of "repeat violation", with only one week since the last finding of a fall protection violation by Board. The employer has attempted to draw a distinction between a complete lack of fall protection (the June 5, 1999 situation) and this case, in which the workers were at least wearing harnesses. Given that harnesses alone would not protect from a fall, I do not accept that distinction as a valid one.
- (76) The high-risk situation and the circumstances of a repeat violation support the safety officer's recommendation for an administrative penalty.
- (77) The employer notes that the safety officer's finding of a first aid violation formed part of the basis for the penalty recommendation, but was not confirmed by the reviewing officer. The employer suggests that the unfounded allegation in this regard justifies lowering the proposed penalty of \$3,500.00. For the reasons I provided earlier

regarding the applicability of the Kienapple decision, I do not agree. The quantum of penalty is not based on a system of separate amounts for each finding of a violation. Apart altogether from the allegation of a first aid violation, the *Recommended Schedule of Sanctions* in Policy 1.4.1 of the *Prevention Manual* (the policy applicable for the time in question) provides that the June 12, 1999 incident was a Type III violation, thus suggesting a penalty of \$3,500.00. I also support the reviewing officer's observation that in fact the incident amounted to a Type IV violation, as it was a repeat of a Type III violation that had occurred the previous week. The recommended penalty for a Type IV violation, given the employer's payroll size, would be \$7,000.00. Given that the notice letter to the employer proposed only a \$3,500.00 penalty rather than a \$7,000.00 penalty, the reviewing officer did not move to revise the amount upward. I agree with that approach.

- (78) The evidence is that the employer has since moved to a system of on-site supervision, suggesting that the penalties in this case have served their motivational purpose. Although the employer suggests a reduction in the penalty of \$3,500.00, the evidence does not support a move toward reducing the penalty regarding the June 12, 1999 fall protection violation. I agree with the reviewing officer's observations that the circumstances of a high-risk violation within one week of the same finding justify maintaining the recommended penalty of \$3,500.00.

Conclusion:

- (79) For the foregoing reasons, I dismiss the employer's appeals of the reviewing officer's decisions dated July 26 and July 27, 2000. I have determined that the principle of *res judicata*, or the Kienapple principle, does not apply in these cases. I have found that on both June 5, 1999 and June 12, 1999, the employer violated Sections 3.23 and 20.73 of the *Regulation*. I have found that it was appropriate for the Board to have imposed administrative penalties for those incidents, and confirm the separate penalties of \$3,500.00 for each incident.

Heather McDonald
Appeal Commissioner

HMC:rw