WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 00-1143
Date: July 27, 2000
Panel: John J. Steeves
Subject: Reconsideration of Appeal Division Decision — Repeat Fall Protection Penalty

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(1) This is a decision with regards to the employer's application for a reconsideration of the Appeal Division decision of March 9, 1999. That decision denied the employer's appeal of a March 12, 1998 decision of the Variance and Sanction Review Section.

Issue(s)

(2) The employer seeks reconsideration of Appeal Division Decision #99-0441, which denied the employer's appeal from the Board decision of March 12, 1998 to levy an additional assessment of $27,500, pursuant to section 73(1) of the *Workers Compensation Act* (the Act). For the reasons given below the employer's application is denied.

Appeal Division Jurisdiction

(3) Other decisions have decided that the only grounds available to an employer for a reconsideration of a previous Appeal Division decision on non-claim matters are breaches of the rules of natural justice. (Decision #93-0166, #93-0182, (9 *Workers' Compensation Reporter* 351)). In another decision, the common law grounds for reconsidering all Appeal Division decisions were articulated more broadly to include clerical mistakes or omissions, fraud, or an error of law going to jurisdiction, including breaches of rules of natural justice. (Decision #93-0740, 10 *Workers' Compensation Reporter* 127 at 131).

(4) Previous Appeal Division decisions have also discussed the substance of a review based on an error of law going to jurisdiction. In Decision #97-0510 (14 *Workers' Compensation Reporter* 56 at 55) the following was said:

> A patently unreasonable application (or interpretation) of the *Act* would amount to an "error of law going to jurisdiction." The phrase "patently unreasonable" indicates the degree of magnitude of the error before a decision may be set aside. An application (or interpretation) of a statutory provision is not patently unreasonable simply because there are other possible applications (or interpretations). It is "patently unreasonable", if it is not viable, in light of the legislative text and intent.

> The test for setting aside Appeal Division decision is strict because these decisions are protected by a privative clause. According to Section 96.1 of the *Act*, they are "final and conclusive." To set aside a decision on the basis that there is a preferable application of a statutory provision than the decision's own application of the provision would undermine the finality of Appeal Division decisions as entrenched in the legislation. So would setting aside a decision on the basis that, although viable, its application of a statutory provision is wrong. In other words, I am not at liberty to set aside a decision simply because I disagree with the panel's conclusion or because the conclusion is wrong.

(5) The following discussion is also useful background to this application for reconsideration,

> The worker's advisor argues that the impugned decision contains "an error of law". A mere error of law is not a sufficient ground to set aside an appeal division decision. The error must amount to an "error of law going to jurisdiction". What constitutes an "error of law going to jurisdiction"? A breach of the rules of natural justice is generally characterized as "an error of law going to jurisdiction". A wrong interpretation or application of a "jurisdictional" provision (such as a provision that defines the scope of a tribunal's powers or a provision that relates to access to a tribunal) is an "error of law going to jurisdiction"; a tribunal must be right when its interprets or applies a "jurisdictional" provision. A wrong interpretation or application of any other type of provision does not constitute, however, an "error of law going to jurisdiction". Where a tribunal is protected by a privative clause, decisions on points of law within the tribunal's expertise may not be reconsidered, unless they involve a patently unreasonable interpretation or application of a statutory provision. An interpretation that has some logical basis and is at all viable, in light of the wording of the legislation, may not be set aside. In other words, the "error of law" test for setting aside an appeal division decision is very strict. As explained in Decision No. 93-0740, a strict test is in keeping with the statutory scheme contemplated by the *Act*.
>
> For the impugned decision to be set aside, it must be shown, therefore, either that it involves a wrong interpretation or application of a jurisdictional provision or some analogous error or that it involves a patently unreasonable interpretation or application of a provision within the tribunal's expertise. (*Decision 97-0050*, 14 W.C.R. 23).

(6) The above discussion accords with the court's longstanding approach to reviewing administrative tribunal decisions that are protected by a privative clause. Until recently the courts had considered two levels of review, whether the tribunal's decision was correct and whether the tribunal's decision was patently unreasonable. In general, a correctness test will apply where there is no privative clause or where there are questions concerning the constitution, the common law, and the interpretation of a statute other than the tribunal's enabling statute or a statute closely connected with it. (Brown and Evans, *Judicial Review of Administrative Action in Canada*, 1998, 14:2210). Further, a tribunal must be correct when it interprets a jurisdictional provision of its enabling statute.

(7) What is patently unreasonable in a particular case is not always clear but one approach is to consider whether there has been a defect which is apparent on the face of the tribunal's reasons. If it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. *(Canada), Director of Investigation and Research, Competition Act* v. *Southam Inc.* [1977], 1 S.C.R. 748, paragraph 57.

(8) A recent decision of the Supreme Court of Canada has suggested that there might be an intermediate standard of review, reasonableness simpliciter. This standard is equivalent to a review based on whether the tribunal's decision was "clearly wrong." The test of reasonableness simpliciter "falls on the continuum between correctness and the standard of patent unreasonableness." However it is worth emphasizing that the clearly wrong test does not go as far as the standard of patent unreasonableness. It is also worth pointing out that the Supreme Court of Canada defined the reasonableness simpliciter test in the context of a decision of a tribunal not protected by a privative clause and with a statutory right of appeal to the courts. (*Southam,* supra, paragraph 60).

(9) With regards to findings of fact these too can be patently unreasonable and, if so, they can be fatal to the jurisdiction of the tribunal in the same way as errors of law or errors involving combinations of law and fact; "an unreasonable finding, whatever its origin, offends a jurisdiction of a tribunal" (*Blanshard* v. *Control Data Canada Ltd*. [1984], 2 S.C.R. 494–495). It has been said that courts can only impugn the findings of material facts on which an administrative decision is based if they are supported by "no evidence," although more recently this standard has been restated in terms of reasonableness. (Brown and Evans, supra, 15:1230).

(10) In summary, the review which I must apply to the employer's application for reconsideration in this case is one of an error of law going to jurisdiction. This is a very high level of deference to the Appeal Division panel decision of March 9, 1999 since the Appeal Division's reconsideration jurisdiction in matters such as this is based on common law rather than statute. The test of reasonableness simpliciter does not apply because the Appeal Division is protected by a privative clause and because there is no statutory appeal to the courts as in *Southam*. To put another way, the onus on the employer in this case is to demonstrate that the Appeal Division decision of March 9, 1999 was more than clearly wrong. This is very different than the de novo jurisdiction which the Appeal Division applies in claims appeals before it. For example, the wide scope of review set out in the governors' Decision #75 (10 *Workers' Compensation Reporter* 753) to "initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it" does not apply to this reconsideration application. It is also different from the standard of review based on "error of law or fact or contravention of a published policy of the governors" as set out in section 96(6) of the Act for assessment, classification and levies.

Submission of the Employer

(11) The employer has provided a helpful summary of its arguments and I quote the four issues raised by the employer as follows:

> 1. TAKING JURISDICTION OVER A DECISION WHICH IS A LEGAL NULLITY:
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> The order review process conducted by the Director of Field Services and the Vice-President of the Prevention Division resulted in a denial of natural justice. The Variance & Sanction Review Officer of the Prevention Division ("V.S.R.O.") and the Appeal Division had no jurisdiction to deal with decisions of the Director of Field Services and Vice-President of the Prevention Division when those decisions constitute a legal nullity. There was a second denial of a fair hearing by the Appeal Division because it failed to address this argument in its reasons for decision although it was raised in written and oral submissions.
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> 2. TAKING JURISDICTION OVER THE ORDER REVIEW PROCESS:
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> The Appeal Division found the V.S.R.O. has jurisdiction, pursuant to section 73 of the *Workers Compensation Act*, to review the merits of an order issued under that section of the *Act* and further, the Appeal Division has jurisdiction, under section 96(6) of the *Workers Compensation Act*, to hear an appeal from the V.S.R.O.'s decision on the merits of the order;
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> 3. JURISDICTION TO ISSUE PENALTY ORDERS UNDER OH&S REGULATION 34.04(1):
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> The Appeal Division found the V.S.R.O. had jurisdiction to cite the employer for a violation of Regulation 34.04(1) (failure to provide fall protection in roofing work);
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> 4. JURISDICTION TO ISSUE ORDERS IN EXCESS OF THE GUIDELINES:
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> The Appeal Division found that the V.S.R.O. has jurisdiction to issue penalties in excess of the guidelines established under O.S.&H. "Recommended Schedule of Sanctions" set out in Policy No.: 1.4.1.

I note that counsel for the employer has properly framed the employer's reconsideration application in terms of jurisdictional issues and has not suggested that the test is one of correctness.

Law and Policy

(12) Section 71(1) of the Act empowers the Board to:

> . . . make regulations, whether of general or special application and which may apply to employers, workers and all other persons working in or contributing to the production of an industry within the scope of this Part. . . .

(13) Section 71(2) authorizes the Board to

> . . . issue orders and directions specifying the means or requirements to be adopted in any employment or place of employment for the prevention of injuries and occupational diseases.

(14) Section 73(1) provides:

> Where the board considers that
>
> (a) sufficient precautions are not taken by an employer for the prevention of injuries and occupational disease;
> (b) the place of employment or working conditions are unsafe; or
> (c) the employer has not complied with regulations, orders or directions made under section 71,
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> the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

(15) Section 82 requires that the governing body of the Board, now the Panel of Administrators:

> . . . must approve and superintend the policies and direction of the board, including policies respecting . . . occupational safety and health. . . .

(16) Regulation 2.12(2) of the *Industrial Health and Safety Regulations* provides:

> Any person affected by any order or directive issued under these regulations or by any penalty under Section 61 of the Workers' Compensation Act, or any representative of such a person, may appeal to the Commissioners. Notice of appeal shall be submitted within 21 days, or such further period as the Commissioners may allow, and shall be made in writing and shall state the reasons therefor.

(17) Published policy clarifies the application of this regulation following amendments to the Act:

> The reference to Section 61 in Regulation 2.12(2) is incorrect. Section 61 was renumbered to Section 73 in 1979.
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> Regulation 2.12(2) refers to an appeal to the Commissioners. Amendments to the *Workers Compensation Act* in 1991 eliminated the Commissioners. Appeals against orders and directives are now made under Policy No. 1.4.5. Appeals against penalties are described in Policy No. 1.4.4.

(18) Policy 1.4.5 of the *Prevention Division Policy and Procedure Manual* states:

> The Board realizes as officers of the Board carry out inspections of workplaces and issue orders or directives there will, at times, be disagreement between those on whom the orders or directives were issued and the officer. To resolve these disagreements the Board recognizes several levels of appeal. These include:
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> 1. Discussion between the officer and the employer after an inspection has been completed. As the officer explains what was observed the employer has the opportunity to explain the employer's actions or intent, or correct an error in the officer's observations. The same can be done by a labour representative or worker present during a post-inspection discussion.
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> 2. After the officer has issued orders or directives, if the person affected is still in disagreement, that person may request a review or a hearing with the officer's Regional Manager.
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> 3. Should the decision of the Regional Manager still not resolve the disagreement, the affected person may appeal to the Director, Field Operations Department, Occupational Safety and Health Division.
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> 4. If the above three steps fail to resolve the issue, an appeal can be made to the Vice-President, Occupational Safety and Health Division.

(19) Regulation 2.08.

> When, for greater certainty, a specific regulation is contained within these regulations this shall not limit the generality of any other regulation.

(20) Section 34 of the *Health and Safety Regulations* relates to construction procedures and regulation 34.04(1) regarding fall protection provides:

> During the erection of buildings or structures, workers shall be protected from injury through falling from the unguarded portions of the structure at all elevations 10 feet (3m) or more above grade. Such protection shall be afforded by means of barriers, guardrails, fibre or wire guard ropes, safety-belts and life-lines, personnel safety-nets, or other effective means.

(21) Section 32 of the regulations outlines the requirements for scaffolds, swing stages and miscellaneous stages and regulation 32.68 relates specifically to roof work. Regulation 32.68 provides:

> (1) Crawl boards or ladders, used for roof work, shall be securely fastened over the ridge of the roof, or shall be otherwise effectively anchored. The use of eaves-troughs for support is prohibited.
>
> (2) When a worker is employed on a roof having a pitch of 1/3 (slope ratio 8 inches (20.3cm) vertical to 12 inches (30.5cm) horizontal) or greater, 2 inch by 6 inch toe-holds shall be employed, and the worker shall wear a safety-belt, secured to a firmly anchored life-line.

(22) Section 14 of the regulations provides for the requirements of personal protective equipment and regulation 14.30 states:

> **Safety-belt requirements**
>
> (1) Where it is impracticable to provide adequate work platforms, scaffolds or staging, as specified in these regulations or which would be required in the exercise of good practice for the safe conduct of work, safety-belts and life-lines or safety-straps shall be worn by all persons working at elevations 10 feet (3m) or more above grade or floor level.
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> **Exception**
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> (2) This regulation does not apply to structural steel erectors or similar tradesmen experienced in working at heights in circumstances where:
>
> (a) the use of belts, life-lines or safety-straps would produce an additional hazard or is clearly impracticable, or
>
> (b) safety nets or equivalent protection against falling are in use.

(23) Published policy #14.30(2) outlines the procedure for determining the "exception for structural steel erectors" under regulation 14.30(2). There is no published policy with respect to regulation 34.04(1) or for regulation 32.68.

(24) The 1994 inspection procedures for regulation 34.04(1) do not constitute published policy of the governors as provided in governors' decision no. 3 (7 *Workers' Compensation Reporter* 17).

(25) Governors' decision no. 75 (10 *Workers' Compensation Reporter* 753) provides:

> The Appeal Division shall apply and interpret the *Act*, regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy. The Appeal Division must make its decision according to merits and justice of each case as directed in section 99.

(26) Section 96(6) of the Act is as follows,

> An employer who has received notice of:
>
> (a) an assessment under section 39 or 40.
> (b) a classification, special rate, differential or assessment under section 42, or
> (c) a levy under section 73
>
> may, not more than 30 days after the receiving of the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

Factual Basis of the March 9, 1999 Appeal Division Decision

(27) The previous Appeal Division panel held an oral hearing on December 8, 1998 to hear evidence related to the employer's appeal.

(28) In its submission of June 10, 1999 the employer has made the following statement about the facts in this case,

> The Appeal Division (in the decision of March 9, 1999) made several factual findings concerning the events which relate to the inspection of our client's work site on February 7, 1996. While we do not agree that these findings are well supported by the evidence, factual findings are not properly the subject of an application for reconsideration and will not be challenged in this application for reconsideration. Our issues are jurisdictional: we submit the Appeal Division lacked the jurisdiction to address the factual issues because the decisions made previously in this case constituted a legal nullity. (page 3).

(29) On this basis and to provide background to this application I quote the original panel's account of evidence obtained from an oral hearing (pages 7–9),

> The employer's request for an oral hearing was denied on a preliminary basis by the acting chief appeal commissioner. After reviewing the evidence on file and considering the employer's submissions, this panel convened an oral hearing on December 8, 1998 to further consider the circumstances of the violation and the employer's arguments in support of the appeal.
>
> At the oral hearing, the safety officer said he conducted the unplanned inspection on February 7, 1996 after observing a worker at the edge of the roof in a kneeling or crouched position while driving by the worksite. He said the road approaching the worksite was uphill and he had a clear view looking down to the roof. He drove into the worksite access road and stopped to take a photo of the workers on the roof. At that time, the worker had moved away from the edge of the roof.

The safety officer called the workers down and determined that they did not have fall protection on the roof but did have it in the van. He said that English was not the workers' first language, but he was able to communicate with them. He concluded from his discussion with the supervisor and the workers that they had not received sufficient direction and instruction on fall protection and did not have adequate supervision to ensure compliance with the fall protection regulations.

The safety officer emphasized that the worker he observed at the edge of the roof was exposed to a high risk situation and indicated that the slope of the roof could have contributed to the risk of falling. He said, at the time of the inspection, the focus of his discussion with the workers was the high risk associated with the worker at the location involving a potential 25-foot fall. He indicated the workers did not dispute his observation of where the worker had been positioned at the edge (corner) of the roof. He said: "There was no doubt in my mind that I saw a worker at the edge of the roof." He pointed out that at the location where he observed the worker, there was an open ("broken") bundle of shingles and the photograph appears to show that a line of shingles had been installed at the roof edge, but left unfinished.

The safety officer said that when he met with the employer and the employer's legal representative on February 21, 1996, they did not dispute that a worker had been working at the edge of the roof where he was exposed to a 25-foot fall.

The officer indicated that, in his opinion, regulation 34.04(1) was the appropriate regulation because the work involved a construction site where there was a fall hazard during the erection of a building. He said regulation 34.68(2) was a more specific regulation which applied to work on a roof with a steep pitch (8 to 12 or greater), which required toe holds *in addition to* safety belts. He considered regulation 14.30 to apply to more general worksite situations where a building was not being erected. He did not consider the exception in regulation 14.30(2) applied to the circumstances in this case because the situation required the worker to have "positive fall protection" and fall protection would not have presented an additional hazard. He noted that new fall protection regulations were to be implemented in May 1996, but safety officers had been instructed not to apply the new regulations until the implementation date.

The employer's worksite supervisor at the time of the February 7, 1996 inspection, Mr. A, gave evidence on behalf of the employer. Mr. B provided interpretation from the Punjabi language. Mr. A stated that February 7, 1996 was the second day of roofing on that house. On the first day, there were more people on the job and they had completed over half of the roof. He said, on the first day, all workers wore fall protection, including workers who worked on the other garage roof that was part of the duplex being constructed.

Mr. A stated that on February 7, it was very cold when they started work and it had been raining with a mix of rain and wet snow. He indicated from his recollection that workers were only working on the garage roof that did not involve a fall greater than 10 feet. He said no workers were wearing fall protection. He said he was the worker in the photograph that was standing at the peak of the roof of the house and had been going to the other side of the roof to get some materials. He said he did not recall anyone working at the edge of the roof where the safety officer indicated he observed a worker. He said that a line of shakes had been started along that edge of the roof, but it had been started by workers on the previous day and had not been worked on February 7.

He said he had been appointed a supervisor approximately a year and a half before the inspection. He confirmed that he and all the other workers on the site had been fined $100 by the employer for the violation of the employer's fall protection safety policy on February 7, 1996. He also said he had received other fines for failure to use fall protection, including a $100 fine on March 31, 1996 and a $500 fine by the employer on April 18. He had also received an observation report by a Board officer for the infraction on April 18 and he said he was laid off for one month as a result of that violation. He indicated the only times he had received fines were when he had been observed by a Board safety officer or by one of the company owners not wearing fall protection. As supervisor, it was his job to ensure that workers wore their safety belts, safety boots and hard hats. He said when he told workers to use their safety belts, they would put them on. He said he did not report workers to the employer who did not wear their safety belts and said workers only received fines when they were observed by one of the owners.

Mr. A indicated that when he started working for the employer, the roofing work was done on the basis of an hourly wage. This was subsequently changed to piece work and the workers were paid on the basis of the number of squares installed. He indicated that safety belts and fall protection would slow production somewhat and he could make more money installing roofing when he was not wearing a safety belt.

The company co-owner, Mr. C, also provided evidence at the appeal hearing. He indicated that it had been his understanding that prior to 1995, roofing workers only needed safety belts when working on steep-pitched roofs greater than 8 vertical to 12 horizontal. He understood that the Board was taking a tougher stand and on May 19, 1995 provided a letter to workers indicating that fines would be applied if they did not wear safety belts. He indicated that they updated their fall protection program following the February 7, 1996 inspection in preparation for the new fall protection regulations that were coming into effect in May. Mr. C recalled

> the March 7, 1995 meeting with [the] safety officer in which the Board provided an educational presentation discussing the requirements for fall protection when working at elevations more than 10 feet above grade. The safety officer at that time explained the distinction between regulations 34.04 and 32.68(1) and (2) and also pointed out that regulation 14.30(1) applied to all situations.
>
> [reproduced as written]

(30) With regards to the evidence of the safety officer it was accepted by counsel for the employer that he was a credible witness and he did not suggest the officer invented any of his evidence. The argument of the employer was that the officer's ability to observe certain critical events was in question (page 11 of the March 9, 1999 decision).

Procedural Background to this Application

(31) Since the employer challenges on jurisdictional grounds the procedures and decisions of the Board at various levels it is worth recording the history of those procedures and decisions.

(32) The first event was the safety officer's inspection of the employer's work site on February 7, 1996. An Inspection Report was issued which included three Orders against the employer based on violations of Regulations 8.18, 8.20 and 34.04(1). Because of a history of previous violations a recommendation for a penalty assessment was made. As explained below a penalty assessment creates financial consequences for violations of health and safety standards.

(33) A review hearing of the penalty assessment in this case was scheduled for July 17, 1996 before the Variance and Sanction Review Section. In a letter dated June 11, 1996 the employer then asked for a review by the director, apparently pursuant to Policy 1.4.5, of the Orders written with the Inspection Report of February 7, 1996. A hearing to address the issues raised by the employer with regards to the Orders was also requested. Counsel for the employer also suggested that the hearing for review of the recommendation for a penalty assessment "may need to be placed in abeyance" because of the new review of the Orders and that is what happened.

(34) A decision from the director of February 7, 1997 dismissed the employer's request for a review of the Orders. No hearing was held by the director. A further appeal was made to the vice-president Prevention and the "primary ground" was the director's refusal to hold a hearing. This was dismissed in a letter dated May 21, 1997. The letter stated, among other things, the employer,

> has reasonably articulated their arguments in their written submissions and an oral hearing is not required. As well, there appears to have been sufficient opportunity for (the employer) to provide evidence at the director level of the order appeal process .

(35) An appeal of the vice-president's decision was filed with the Appeal Division but, in a letter dated June 16, 1997, the Appeal Division pointed out that amendments to the Act eliminated appeals to the commissioners (the predecessor of the Appeal Division in some respects) as described in section 2.12(c) of the *Occupational Safety and Health Policy*.

(36) The employer attempted a further appeal dated July 3, 1997 to the Panel of Administrators, the governing body of the Board. Counsel for the employer wrote to the Panel of Administrators again on July 18, 1997 to report that he had just received information that the appeal process "has been a complete fiction." It turned out that the president's letter of May 21, 1997 had been prepared on the basis of a memo prepared by the person who made the decision at the Variance and Sanction section. According to the employer "natural justice was breached in a most flagrant manner," they no longer had confidence in this process and the matter must be reviewed by the Panel "according to the appeal authority granted to them under" the Act. I am not aware of any applicable appeal authority as relied on by the employer.

(37) In a letter dated July 31, 1997 the president of the Board, replying on behalf of the Panel, pointed out that the Panel does not consider appeals on individual matters. With regards to the allegation that the vice-president's letter of May 21, 1997 was largely written by the person who made the decision below, the president stated, "I am assured by the Vice-President that he has personally reviewed the entire file and did not rely on the officer's comments."

(38) While the employer was continuing their reviews of the Orders they re-started their review of the penalty assessment. In a letter dated April 1, 1997 counsel for the employer asked the Variance and Sanction Section for an oral hearing to review the recommendation for a penalty assessment. In support of factual assertions of the employer a "draft," unsigned and unsworn statutory declaration was attached.

(39) In a letter of November 25, 1997 counsel for the employer advised that he had been instructed to "initiate" a Petition pursuant to the *Judicial Review Procedure Act*. Attached was a "draft," undated, unsigned and unfiled Petition. The employer asked that the review of the recommendation for a penalty assessment be adjourned pending hearing of the employer's Petition. The employer also stated,

> If the Prevention Division insists on proceeding, we will submit that as a matter of law, your jurisdiction is confined to consideration of the penalty and not whether the orders ought to have issued in the first place.

(40) According to a letter from counsel for the employer to the Board dated November 27, 1997 the Board, in a telephone conversation of November 26, 1997, refused an oral hearing for the review of the recommendation for a penalty assessment. Apparently the Board also refused to adjourn the review of the recommendation for a penalty assessment "pending" the employer's application to court. The employer raised a number of issues including apprehension of bias, a concern about the Variance and Sanction Section sitting "on appeal of two decisions reached by Senior Management" and the jurisdiction of the variance and sanction section officer itself. The latter point related to a concern about delegation of authority. The request for an adjournment was denied in a letter dated November 27, 1997 and a submission was requested from the employer. This was provided on December 11, 1997.

(41) In a decision dated March 12, 1998 the variance and sanction review officer (V.S.R.O.) concluded that an additional assessment should be levied pursuant to section 73(1) of the Act. The decision addressed the issues raised by the employer as follows: it was that the V.S.R.O. had jurisdiction to consider the review; there was no bias or denial of a fair hearing; Regulation 34.01(1) is valid; and an additional assessment is appropriate.

(42) This decision was appealed to the Appeal Division by the employer.

Appeal Division Decision of March 9, 1999

(43) In a decision dated March 9, 1999 the Appeal Division denied the employer's appeal of the Variance and Sanction Review Section decision dated March 12, 1998.

(44) A submission dated July 21, 1998 was received from the employer which raised issues of jurisdiction, fair hearing, validity of the Order, due Diligence and amount of penalty. An oral hearing was held by the Appeal Division on December 8, 1998. The grounds of appeal for the Appeal Division in this case were "error of law or fact or contravention of a published policy of the governors" as set out in section 96(6) of the Act.

(45) The reasoning of the previous Appeal Division decision to deny the employer's appeal can be summarized as follows,

a) The panel declined to find the vice-president's decision of May 21, 1997 void because the Appeal Division does not have jurisdiction to consider an appeal from the vice-president's decision concerning an Order.

b) The panel accepted that the evidence relating to the vice-president's decision may be relevant to issues under section 73 of the Act.

c) The panel were unable to grant relief to the employer on the grounds that the vice-president declined to hold an oral hearing to consider a review under Policy 1.4.5. That policy does not make specific provision for a hearing.

(46) There is no indication that the employer challenged the validity of the orders at the time of the meeting on February 21, 1996.

Decision and Reasons

(47) Bearing in mind that I must be satisfied that there was a patently unreasonable error of law or fact or a combination of law and fact , including breaches of the rules of natural justice, I will address the issues raised by the employer;

(a) Taking Jurisdiction Over a Decision which is a Nullity

(48) The employer has consistently argued that the decisions of the director and the vice-president in the Order review process were nullities and all decisions following from those decisions are also nullities.

(49) The main concern put forward by the employer on this issue is that "both the Director of Field Services and the Vice-President referred our submissions to the (Variance and Sanction Review Officer — "V.S.R.O.") for his review without advising (the employer) or allowing an opportunity to reply." The V.S.R.O. was responsible for deciding the penalty assessment. In previous submissions the employer has argued that the V.S.R.O. was hearing the appeal of his decision. According to the employer, the order review process constituted "a fundamental denial of a fair hearing and the decisions which came afterwards were all of a legal nullity." The decisions which came afterward were the decisions on the penalty assessment as well as the previous Appeal Division decision.

(50) The employer argues that what happens in the Order review process can make what happens in the penalty assessment review process a nullity. They suggest, for example, that it is a breach of natural justice for a V.S.R.O. to assist by way of a memo the director and vice-president who are reviewing the V.S.R.O.'s previous review of orders. I note that the employer's dispute is not with the memo itself. Instead the employer says there was a breach of natural justice because they were was not given an opportunity to respond to the V.S.R.O.'s recommendations in the memo. In any case, the employer's position is that, once this occurred all decisions afterwards, including those in the review of the penalty assessment recommendation process are a nullity.

(51) It is important to bear in mind the difference between a decision to issue and review an Order and a decision to issue and review a penalty assessment;

a) An Order is part of an Inspection Report. It is a remedial decision of the Board pursuant to the then section 71(2) of the Act (new health and safety legislation changed the Act effective October 1, 1999) that requires an employer to cease doing something or to do something. A review of an order is done pursuant to Policy 1.4.5 and it involves, among other things, discussion between the Board officer and the employer, review by the regional manager, appeal to the director and then an appeal to the vice-president Prevention. Except for judicial review there is no further review or appeal of a decision to issue an Order after the vice-president to, for example, the Appeal Division. Put another way, there is no statutory right of appeal of an Order.

b) A penalty assessment is a financial assessment by the Board against an employer pursuant to the then section 73(1) of the Act because sufficient precautions were not taken for unsafe working or employment conditions or for non-compliance with the Regulations. The steps in a penalty assessment include a "show cause" letter which gives notice to the employer of the possible assessment and which gives the employer the opportunity to attend a hearing or make a written submission. The decision to issue a penalty assessment is made by the Variance and Sanction Review Section. An appeal from this Section is available to the Appeal Division pursuant to section 96(6) of the Act.

(52) On this construction of the Act and Board policy I find that it can be fairly stated that there are really two procedures at play in the circumstances of this case and they are founded in separate provisions of the Act. The Appeal Division, as pointed out by the previous Appeal Division panel, does not have jurisdiction to consider any dispute that arises out of the order review process such as alleged by the employer in this case. Indeed, it would be a clear error of jurisdiction for the Appeal Division to attempt to do so.

(53) It is through the Appeal Division's jurisdiction over appeals from penalty assessment decisions that any potential remedy exists for the employer and that is where they focus their argument. They do this by impugning the decisions made under the penalty assessment process on the basis that they are, in effect, infected by what occurred in the order review process. However, there is a logical problem with this argument. An implicit but necessary part of the employer's argument on this point (other issues are dealt with below) is that there was a nullity in the Order review process. But a nullity has not been accepted by anyone with the authority to do so. As above, for jurisdictional reasons, I cannot make a finding that there was a nullity in the order review process because I am not a competent authority to make such a finding. In these circumstances it must be taken that there is no nullity in the order review process. I reach this conclusion solely on grounds of jurisdiction and without deciding if there was a nullity in the Order review process or not.

(54) In my view it must also follow that the previous Appeal Division decision cannot be another nullity, as argued by the employer. This is because the previous Appeal Division panel could not find a nullity where none exists and they similarly had no authority to find one. They correctly made this finding on their own at page 15. The employer's suggestion that I consider whether the panel "mischaracterized" the employer's argument or not is not responsive to the jurisdictional issues inherent in the employer's position.

(55) The facts underlying the issuing of an Order may be relevant to understanding the facts underlying the issuing of a penalty assessment. The circumstances giving rise to the Order can be heard by, for example, the Appeal Division on an appeal pursuant to section 96(6) of the Act since a penalty assessment follows an Order. The facts underlying the decision to issue an Order are relevant to an appeal of a related penalty assessment. But this is quite different from the Appeal Division making a finding that a decision in the Order review process was a nullity. Further, if a competent authority found there was a serious breach of natural justice in an Order review process and, therefore, the Order was a nullity that may have serious consequences for the assessment penalty review process and it could ultimately be admissible at the Appeal Division. But, again, on the record before the Appeal Division in this case, the conclusion must be that there is no error in the order review process and no jurisdiction in the Appeal Division to find one.

(56) The previous Appeal Division panel interpreted section 73 in this way [Volume 17 *Workers' Compensation Reporter* at pages 205–206]. The employer suggests that "it is impossible to conclude (the panel) had no jurisdiction before the matter became a penalty and then find it had jurisdiction over the order at that point." In my view the previous Appeal Division panel did no more than recognize the overlap that can exist with issues of fact that are relevant to an Order and a penallty assessment.

(57) There is no error in the decision of the Appeal Division of March 9, 1999 on this issue and certainly no error of law going to jurisdiction.

(b) Taking Jurisdiction over the Order Review Process

(58) The employer argues that the Board of Governors in Policy 1.4.1 did not delegate their authority to review the validity of Orders under section 73 of the Act to the variance and sanction review officer ("V.S.R.O."). Specifically, the employer suggests that the statement in Policy 1.4.1 that "(t)he penalty assessment process is currently administered by the Variance and Sanction Review Section" does not delegate authority over the validity of Orders to the V.S.R.O.

(59) This argument was considered and rejected by the V.S.R.O. and the Appeal Division decision that is the subject of this application for reconsideration.

(60) I am asked to determine if the previous Appeal Division made an error going to jurisdiction. For the reasons given above the standard of reasonableness simplicitor does not apply since that standard would apply to a tribunal without a privative clause and with a statutory right of appeal to the courts as in *Southam*. Appeal Division decisions are protected by a privative clause and there is no statutory right of appeal to the courts for Appeal Division or Prevention Division decisions.

(61) The reason given by the employer for saying the V.S.R.O. does not have jurisdiction to review the validity of Orders is because,

> nothing in (Policy 1.4.1) gives jurisdiction to the V.S.R.O. to review the validity of orders. Moreover, the Board of Governors did not delegate their authority under section 73 of the Act to the V.S.R.O. . . . there is absolutely no support for the conclusion of the Appeal Division that the Vice-President is simply exercising a general policy in the order review process as opposed to a legal jurisdiction exercised by the Variance and Sanction Review Section. Both bodies come by their authority the same way, by jurisdictional delegation from the Board of Governors. There is nothing in the language that delegates the authority which would allow one body to arrogate authority from the other.

(62) These assertions are more in the manner of conclusions than they are legal reasoning. Also, the employer characterizes this argument as one of "institutional bias" (and not "personal bias"). However, I take the point to be that the language of Policy 1.4.1 is not capable of supporting a V.S.R.O. taking jurisdiction over the validity of Orders.

(63) As discussed in dealing with the employer's previous argument, the point is well taken that the Order review process must be seen as separate from the penalty assessment review and appeal process except where issues of fact arising from the Order process are relevant to a review or appeal of an additional assessment. While the previous Appeal Division panel stated at page 19 that the vice-president's authority under the Order review process was a matter of "general policy" I am unable to read this to be anything other than a reference to

Policy 1.4.5 of the governors. The vice-president's authority arises from that policy and there is no jurisdictional error in stating that fact.

(64) Similarly, the previous panel did state that the authority of the V.S.R.O. arises from section 73(1) of the Act "and, is not, in our view, superseded by the formulation and adoption of the policy guidelines for the order review process" (page 19). But I am unable to read this statement to mean that somehow the decision of the previous Appeal Division panel was flawed because, as suggested by the employer, it arrogated authority from one authority to another.

(65) As for the assertion that the previous Appeal Division panel committed a jurisdictional error by a "flawed" and ""inconsistent legal analysis" because it found it had jurisdiction to "review orders on their merits after making a finding it has no jurisdiction to review order appeals under Policy 1.4.5" I do not accept this interpretation of the previous decision. As discussed above the previous panel did no more than recognize that there were overlapping questions of fact as between a review of an Order and a review or appeal of a penalty assessment.

(c) Taking Jurisdiction to Issue Penalties under Regulation 34.04(1)

(66) One of the three Orders arising from the Inspection report of February 7, 1996 relied on Regulation 34.01(1). That Order stated,

> A worker was observed performing work at heights 10 feet (3m) or more above grade, and was not protected from injury through falling from the unguarded portions of the structure by any means.
>
> This is a contravention of Industrial Health and Safety Regulation 34.01(1).
>
> During the erection of buildings or structures, workers shall be protected from injury through falling from the unguarded portions of the structure at all elevations 10 feet (3m) or more above grade. Such protection shall be afforded by means of barriers, guardrails, personal fall protection equipment, personnel safety-nets or other effective means.

(67) The last paragraph of the Order is a recitation of Regulation 34.01(1).

(68) The employer argues that this Regulation 34.01 does not apply to them. They submit that Regulation 32.68(2) is a more specific regulation and it is as follows,

> 32.68(1) Crawl boards or ladders, used for roof work, shall be securely fastened over the ridge of the roof, or shall be otherwise effectively anchored. The use of eaves-troughs for support is prohibited.
>
> (2) When a worker is employed on a roof having a pitch of 1/3 (slope ratio 8 inches (20.3cm) vertical to 12 inches (30.5cm) horizontal) or greater, 2 inch by 6 inch toe-holds shall be employed, and the worker shall wear a safety-belt, secured to a firmly anchored life-line.

(69) The employer submits this regulation is the more specific because it "sets out a very specific requirement for roof work" and Regulation 34.01 is more general because it describes construction work generally. According to the employer, "(n)o general requirement to provide fall protection for roof work is found in" Regulation 32.68. A specific regulation should prevail over a more general one, according to the employer. Comparing the two regulations does not persuade me that there is merit in the employer's argument. First, I read Regulation 32.68 to require fall protection by means of a "safety-belt, secured to a firmly anchored life-line."

(70) Further, I accept that there is a principle of statutory interpretation that is similar to the employer's argument but this is premised on a conflict between the specific and general, in this case, regulations. I see no conflict between Regulation 34.01(1) and Regulation 32.68(2) and none has been suggested. Assuming that one regulation has more specific fall protection and another does not, is not a conflict but a difference. The two regulations are not inconsistent. What is suggested by the employer in this case is that *in the absence of a conflict* the specific should prevail over the general and there is understandably no support for that proposition. As stated by the previous Appeal Division decision at page 20, "That regulation (34.01(1)) applies generally to construction and especially the erection of a building. . . . The more specific regulation does not limit the generality of regulation 34.01(1)."

(71) The employer also argues that the Prevention Division of the Board made various errors in considering this issue. The decision before me for reconsideration is the Appeal Division decision of March 9, 1999 and I do not have authority to re-visit all previous decisions before then. It is submitted on behalf of the employer that Field Operation Supplementary instructions affect the enforcement of Regulation 34.04:

> (h)owever laudable its reasons, the Prevention Division has finessed the regulation requirements of the *Workers (sic) Compensation Act*. It has, under the guise of the Field Operation Supplementary Instructions" (sic) entered into the arena of regulation which is the power vested with theBoard.

(72) This issue arose before the vice-president as part of the Order review process and it was decided by the vice-president against the employer in a letter dated May 21, 1997. For the reasons given above I cannot enter into a consideration of the validity of matters that have been decided under the Order review process.

(73) I cannot find an error, jurisdictional or otherwise, in the Appeal Division of March 9, 1999 on this issue.

(d) Penalty in Excess of Recommended Schedule of Sanctions

(74) Penalty assessments are calculated on the basis of a number of criteria set out in the Regulations. These can include a history of previous violations, using payroll in order to match a penalty with the scale of an employer's operations as well as other factors such as motivational impact. The V.S.R.O. decided a penalty assessment of $27,500 was appropriate but the Appeal Division decision that is the subject of this reconsideration application reduced the penalty to $25,000.00. The employer says a fine of $9,000 is appropriate.

(75) The basis of the employer's argument is that they say that there is no authority to include an amount for "motivational impact." As above, the employer raises concerns about how the V.S.R.O. handled this issue and that is not before me. An application for reconsideration such as this has a limited scope of review and it is not an opportunity to re-argue a case.

(76) With regards to the Appeal Division decision of March 9, 1999 the employer notes that the decision identified the employer's argument on a jurisdictional point but they did not discuss it. The employer says this was a denial of a fair hearing but I reject that suggestion. It cannot be said that the previous panel ignored the employer's argument since the decision discussed the point at length and actually reduced the penalty. The previous Appeal Division decision also noted that the hazard created by the violation was significant and the risk was high since it occurred at 25 feet, more than twice the height required for fall protection. The penalty assessment was reduced to $25,000 because the decision to assess at $27,500 was based on an error of fact with regards to the previous violations of the employer.

(77) The jurisdiction argument of the employer is that the V.S.R.O. did not have delegated authority from the governors to exceed the Recommended Schedule of Sanctions. This is because the policy "does not even have the authority of a regulation under the Act." Since section 82 of the Act authorizes the governors to make policy with respect to occupational safety and health I reject this argument of the employer.

(78) I cannot find an error of law going to jurisdiction in the March 9, 1999 Appeal Division decision on this issue.

(79) For all of these reasons the employer's application for reconsideration of the March 9, 1999 decision of the Appeal Division is denied.