

Decision of the Appeal Division

Number: 2001-0295

Date: February 13, 2001

Panel: James Sheppard

**Subject: Occupational Health and Safety — Sloping Violation —
Presumption of High Risk of Injury — Due Diligence**

Introduction

- (1) The employer has filed an appeal of the reviewing officer's decision dated July 5, 2000 with the Appeal Division under Division 14 of the *Workers Compensation Act* (the "Act"). The reviewing officer's decision dated July 5, 2000 imposed an administrative penalty of \$7,500 on the employer under section 196(6) of the Act. The reviewing officer imposed the administrative penalty for a violation of section 20.81(1)(a) of the *Occupational Health and Safety Regulation* (the "Regulation"). The application for appeal was received by the Appeal Division on July 25, 2000. In the application for appeal the employer requested a stay or suspension of the reviewing officer's decision to impose the administrative penalty pending the consideration of his appeal on the merits. Applications for a stay or suspension are considered on a preliminary basis. In Appeal Division Decision #00-1414 the employer's stay application was denied. The Appeal Division is now ready to proceed with the consideration of the employer's appeal on its merits.

Issue(s)

- (2) Should the reviewing officer's decision of July 5, 2000 be confirmed, varied, cancelled or referred back to the Board for reconsideration?
- (3) On October 1, 1999 the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* ("Bill 14") came into force. Bill 14 creates an entirely new Part 3 to the Act which addresses occupational health and safety matters. Because of Bill 14 there have been consequential amendments made after October 1, 1999 to the existing Regulation.
- (4) The order concerning the violation of section 20.81(1)(a) of the Regulation was written after Bill 14 came into force on October 1, 1999. The reviewing officer imposed an administrative penalty under section 196 of the Act. The reviewing officer's decision of July 5, 2000 was made after October 1, 1999 and is appealable to the Appeal Division under Division 14 of the new Part 3 of the Act.
- (5) Section 207 of Division 14 of Part 3 of the Act provides for an employer's appeal to the Appeal Division of an administrative penalty imposed on an employer under section 196(6) of the Act. Section 212(1)(a)(b) of the Act provides that after considering the appeal, the Appeal Division

panel may confirm, vary or cancel the decision under appeal or refer the matter back to the Board for reconsideration. This provision is broader in wording than the limited grounds that existed for appeals of this nature prior to October 1, 1999. Section 96(6)(c) of the Act had provided an employer with the right to appeal an assessment levied under section 73(1) (repealed) to the Appeal Division on the limited grounds of error of law, fact or contravention of published policy. These limited grounds have been repealed and replaced by the provisions in section 212(1)(a)(b) of the Act. Appeal Division Decision #27 states:

An appeal involves an analysis of the correctness of the Board's decision; that is, whether there is a proper factual, legal and policy basis for the decision.

The actual nature of a hearing will vary in scope depending on the circumstances of a particular case. The hearing panel will have the information that was before the Board when it made its original decision and may hear any other evidence relevant to the issue before it.

- (6) The Appeal Division interprets the provisions of section 212(1)(a)(b) as providing it with the authority to re-weigh the existing evidence, seek and examine new evidence, and substitute its judgment for that of the reviewing officer's with respect to the findings of fact, the law, and Board policy. The Appeal Division has been granted a very broad scope of review in these cases.
- (7) A copy of the tapes of the oral hearing held by the reviewing officer on June 27, 2000 were disclosed to the employer's representative for comment before I rendered my decision. I have listened to these tapes and I considered them in my review of the evidence in this case.

Notification of Parties/Method of Appeal

- (8) Section 211(2) of the Act requires an employer who is appealing an administrative penalty to the Appeal Division to provide notice of the appeal application to the workforce by posting such notice at the workplace and also providing notice to the Joint Health and Safety Committee/Worker Health and Safety Representative/Union, where applicable. The employer's representative, on the application for appeal, has indicated that such a notice has been posted and given in this case. The Appeal Division has also notified the Joint Health and Safety Committee/Worker Health and Safety Representative/Union, if applicable, in a letter dated August 16, 2000 of the employer's appeal of the reviewing officer's decision dated July 5, 2000. The Appeal Division did not receive a notice of participation form from any of these parties nor any notification from any of the employer's workers that they wish to participate in this appeal. The employer's appeal will proceed without the participation of these other parties.
- (9) The employer on the application for appeal did not request an oral hearing. Appeal Division Decision #27 states that Part 3 of the Act does not specify the type of hearing the Appeal Division must hold. An appeal may be conducted by way of written submissions, an oral hearing or a combination of both. The reviewing officer did hold an oral hearing on June 27, 2000. The employer's representative provided a written submission dated November 6, 2000

in support of the employer's appeal. There is only one party to the appeal. I believe that I can render a fair and thorough decision based on a review of the evidence and the employer's representative's submission.

Background and Evidence

- (10) On January 9, 2000 the occupational safety officer inspected the employer's worksite and observed the following:

On January 9, 2000 an inspection was carried out at this firm's worksite at [location]. During the inspection it was found that a worker had been doing work in an excavation over four feet in depth that was not shored and the walls of the excavation were not adequately sloped. The excavation walls were six feet deep. The soil in this area is a type B soil likely to crack or crumble.

This firm received a warning letter in 1999 for an excavation violation and [the employer] received a penalty in 1997 for an excavation violation.

A Warning Letter for similar violations was processed under Sanction Recommendation [number].

[reproduced as written]

- (11) A recommendation for sanction was processed and a proposed penalty letter dated April 17, 2000 was sent to the employer by the Variance and Sanction Review Section, Prevention Division. The penalty letter informed the employer that a proposed penalty of \$7,500 was being considered based on information that the alleged activity resulted in a high risk of serious injury, serious illness or death. Similar issues were brought to the employer's attention in a June 10, 1999 warning letter.
- (12) An oral hearing was held by the reviewing officer on June 27, 2000 with the employer's representatives and the occupational safety officer in attendance. One of the employer's representatives provided the reviewing officer with a previously undisclosed colour copy of a photograph taken by the occupational safety officer during the inspection and copies of three signed letters from workers of the employer.
- (13) The occupational safety officer testified at the oral hearing that he had measured the excavation wall in question (as indicated by a red arrow in photograph two) from top to bottom. He had observed his measuring tape to read six feet where it reached the top of the excavation where the red arrow is pointing in photograph two. He conceded that the slope of the excavation wall at this point may not have been perfectly vertical (photograph two indicates it was vertical but the precis states it was not adequately sloped) but it was near vertical and the slope was not $\frac{3}{4}$ to 1. There is no evidence that he measured the width of the excavation. His conclusion that the slope of the excavation wall was not $\frac{3}{4}$ to 1 was based on his observations. His field note attached to the precis dated January 20, 2000 state: "6' deep, inadeq[ate] sloped exc."

(14) The reviewing officer concluded that the three statements provided by the employer's representative either supported or did not contradict the occupational safety officer's evidence about the depth of the excavation. The reviewing officer accepted the evidence of the occupational safety officer that the depth of the excavation was six feet.

(15) The employer's representative provided a letter from Mr. A., a photo-lab technician, who stated:

Based on my experience as a Photo-lab Technician at [name of business]. I was asked to give my opinion on two photographs given me. After observing the pictures, I concluded that: The photos appear to be a bit underexposed – meaning that at the time they were taken there was not enough light to give a clear picture (I suggest they were taken in the late afternoon/early evening). Also, due to the angle at which the photos were taken there is a lot of shadowing, thus disrupting the clarity of the picture. The photos that I saw also appear to be a bit deceiving in that the angle in which they were taken makes it impossible to tell what size any thing is (there is nothing in which to measure anything by, ie: a boot, glove, ruler, etc.).

My conclusion is, based on what I see, an exact judgement [sic] cannot be made on size, distance or clarity.

[reproduced as written]

(16) The reviewing officer held that it was more probable than not that the occupational safety officer's conclusion that the slope exceeded a $\frac{3}{4}$ to 1 ratio was correct. The occupational safety officer did not use any measuring instruments to determine the slope. Nor, were there any calculations. The reviewing officer noted there was no legal or policy requirement to produce such evidence. The occupational safety officer's personal observations were sufficient to make a distinction between a near vertical and a $\frac{3}{4}$ to 1 ratio slope. The photograph provided by the employer was also evidence of a vertical slope. The two pipes which are presumably vertical showed that the excavation walls were nearly vertical and definitely exceeded the $\frac{3}{4}$ to 1 ratio. The reviewing officer accepted the occupational safety officer's evidence that the soil was a Type B (soil likely to crack or crumble) as set out in section 20.85 of the Regulation. The soil classification information/referencing system provided by the employer was not accepted by the reviewing officer. The occupational safety officer was found to be qualified to determine the type of soil.

(17) The excavation had a staircase dug into one of the walls for means of access and egress.

(18) The reviewing officer concluded that the occupational safety officer's evidence supported the finding of a violation of section 20.81(1)(a) of the Regulation. The presumption in Prevention Division policy D12-196-2 applied. The evidence did not rebut this presumption. In particular, there was an absence of proven techniques and instruments to measure cohesive qualities of the soil typically found in the field notes of professional engineers or geoscientists. The reviewing officer also concluded that the employer was not practicing due diligence. There was no evidence of instruction or education to workers, no work plans or instructions to show what the ratio of the excavation would be.

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- (19) The reviewing officer also considered the prior warning letter and the factors outlined in Prevention Division policy D12-196-1. He concluded that an administrative penalty in the amount of \$7,500 was appropriate. He found that the employer had violated section 20.81(1)(a) of the Regulation. The administrative penalty was a Type III penalty as outlined in the Recommended Schedule of Sanctions (the “Schedule”) to Prevention Division policy 1.4.1.

Law and Policy

- (20) Section 196(6) of the Act states:

196(6) After considering any representations made by the employer under subsection (5) and any other information the board considers relevant, the board may, by order, impose an administrative penalty on the employer, subject to the limits that

- (a) the employer is not liable to an administrative penalty if the employer proves that the employer exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates, and
- (b) the board must not impose an administrative penalty greater than \$510 445.05. [Note: Amount changed periodically by regulation under section 25(4).]

- (21) Section 20.81(1)(a) of the Regulation states:

(1) Before a worker enters any excavation over 1.2 m (4 ft) in depth or, while in the excavation, approaches closer to the side or bank than a distance equal to the depth of the excavation, the employer must ensure that the excavation sides are sloped or supported as specified by a professional engineer or professional geoscientist, or that the sides of the excavation are

- (a) sloped at angles, dependent on soil conditions, which will ensure stable faces, but in no case may the slope or combination of vertical cut and sloping exceed that shown in Figure 20-1,

- (22) The Panel of Administrators have also developed and implemented further policies effective October 1, 1999 concerning the imposition of an administrative penalty under section 196 of the Act: D12-196-1 to 11.

- (23) Prevention Division Policy D12-196-1 states:

The main purpose of administrative penalties and similar levies is to motivate the employer receiving the penalty and other employers to comply with the *Act* and regulations.

The Board will consider imposing an administrative penalty when:

- an employer is found to have committed a violation resulting in high risk of serious injury, serious illness or death;
- an employer is found in violation of the same section of Part 3 or the regulations on more than one occasion;
- an employer is found in violation of different sections of Part 3 or the regulations on more than one occasion, where the number of violations indicates a general lack of commitment to compliance;
- an employer has failed to comply with a previous order within a reasonable time;
- an employer knowingly or with reckless disregard violates one or more sections of Part 3 or the regulations. Reckless disregard includes where a violation results from ignorance of the *Act* or regulations due to a refusal to read them or take steps to find out an employer's obligations; or
- the Board considers that the circumstances may warrant an administrative penalty.

If violations or other circumstances requiring consideration of a penalty have occurred, the following additional factors will also be considered in deciding whether to propose or to levy the penalty:

- whether the employer has an effective, overall program for complying with the *Act* and the regulations;
- whether the employer has otherwise exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates;
- whether the violations or other circumstances have resulted from the independent action of workers who have been properly instructed, trained and supervised;
- the potential seriousness of the injury or illness that might have occurred, the number of people who might have been at risk and the likelihood of the injury or illness occurring;
- the past compliance history of the employer, including the nature, number and frequency of violations, and the occurrence of repeat violations;
- the extent to which the employer was aware or should have been aware of the hazard or that the *Act* or regulations were being violated;

- the need to provide an incentive for the employer to comply;
- whether an alternative means of enforcing the regulations would be more effective; and
- other relevant circumstances.

(24) Prevention Division policy D12-196-2 (high risk violations) states:

Whether a violation involves high risk of serious injury, serious illness, or death will be determined in each case on the basis of the available evidence concerning:

- the likelihood of an injury, illness or death occurring;
- the number of workers affected; and
- the likely seriousness of any injury or illness.

Violations on the list set out below are assumed to be high risk in the absence of evidence showing the contrary:

1. Working in an excavation over four feet deep without adequately supporting or sloping the sides of the excavation or adopting other safeguards allowed by the regulations.

(25) The Schedule outlined in Prevention Division policy 1.4.1 is applicable to this case as the violation occurred before May 1, 2000. The Panel of Administrators have passed a resolution imposing new penalty guidelines in light of the increased ceiling for administrative penalties of up to \$500,000 [indexed] that now exists within the provisions of section 196 of the Act. These new penalty guidelines apply to violations that have occurred on or after May 1, 2000.

(26) Section 196(6)(a) of the Act [section 215 provides a due diligence defence in cases of prosecutions] provides that the employer is not liable to an administrative penalty if the employer proves that the employer exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. Prevention Division policy D12-196-10 states:

Persons may prove that they exercised due diligence by showing on a balance of probabilities that they took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. The defence is available if the person reasonably believed in a mistaken set of facts which, if true, would render the act of omission innocent, or if the person took all reasonable steps to avoid the particular event.

In determining whether the employer has met the due diligence defence in section 196(6), all the circumstances of the case must be considered.

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- (27) Prevention Division policy D12-196-11 states:

Where violations have occurred that provide grounds for proposing an administrative penalty, it may be concluded that a penalty is not warranted at that time to motivate the employer to comply. The Board may then send a warning letter to the senior management of the employer, advising that a penalty will be considered if the violations are repeated.

Submissions

- (28) The employer's representative stated in a written submission dated November 6, 2000:

The grounds on which we are proceeding to the Appeal Division is that of error of fact that would establish that [the employer] has not committed a violation of the regulation and as such did not violate Section 20.81(1)(a) of the Occupational Health and Safety Regulation. . . .

We take issue with respect to the photographic evidence, the Occupational Safety Officer's observations and measurements, the evidence concerning the soil conditions and the level of risk associated with those conditions and the due diligence measure[s] taken by our firm . . .

[Mr. A.] has been in the industry 24 years and is a very seasoned individual when it comes to bell hole excavation. The excavation in question was viewed by our employees, B., Supervisor; C., Project Ground Disturbance Supervisor; and D., Project Safety Supervisor and deemed by them to meet or exceed this specification set out by the WCB and the company policy. [The occupational safety officer's] comments to A. that this was so close to being a legal excavation demonstrates a subjective conclusion regarding the dynamics and specifics of the excavation. In order for subjective concerns to be substantiated they must be supported by objective measurements. We submit there are no quantitative measures present that would accurately substantiate the depth of the is [sic] excavation and/or this slope. There is also the fact that there is fresh snow in the photographs, which makes the photographic evidence of no evidentiary value.

At the Review and Penalty Hearing of June 27, 2000, we presented a third photo at the hearing which was not part of the package we received from the WCB indicating that a sanction was being considered against our firm. Our concern is that this photo (attached) was taken at a different angle than the two photos used as an attempt to demonstrate the allegations against our firm. Looking at the third photograph one can see that snow is attached to the entire slope of Side C as indicated in the photograph. If one was to look on Side B, the left side, there is no snow on the lower portion of the bell hole, but where the operator started this slope, the snow is attached to the ground. In photos Number 1 and 2, submitted by the WCB Officer, photograph Number 2 refers to a 6' vertical

wall directly to the right of the front piling. If this is indeed a vertical wall we then question the allegation that this wall is indeed vertical due to the fact that it has snow on it. The mean temperature for January 9, 2000, was -27.4 degrees Celsius. The ground was frozen for the first 5'. The left side, Side B demonstrates a vertical slope in that snow does not stick to the portion of the bell hole walls that are vertical. In the right side, Side C, snow is sticking to the wall substantiating that it is not truly vertical and is indeed sloped. Also, in photo 3 what is apparent but is not apparent in photos 1 and 2 is that wall D in the foreground at the front of the bell hole excavation is not vertical as Number 1 photo seems to suggest. . . .

[The occupational safety officer] did not close down the worksite. [The occupational safety officer] did not indicate that orders would be forthcoming with respect to this excavation. [The occupational safety officer] did not ask [A.] to take any corrective measures with respect to the excavation of the bell hole. We submit that the photographic evidence is not conclusive in substantiating that this is indeed an illegal excavation and one that would be in violation of Section 20.81(1)(a) of the WCB Regulation. . . .

The WCB Officer indicates that the soil in this area was a Type B soil likely to crack or crumble. We do not dispute this, but want it known for the record that the mean temperature for the first 9 days of January 2000 was -27.52 degrees and that the soil on site was frozen by way of permafrost for the first 5' of the excavation. The soil by virtue of its frozen nature would therefore be less likely to crack or crumble than it would in unfrozen conditions.

We submit that with respect to the level of risk pertaining to this excavation with respect to an accident and/or injury occurring in respect of the depth and sloping of the excavation was virtually nil.

[reproduced as written, emphasis added]

(29) The employer's representative with respect to due diligence stated:

Section 215 of the WCB Act provides a defense of due diligence whereby it states, "A person is not guilty of an offence if the person proves that the person exercised due diligence to prevent the commission of the offence." We are a firm that has been in business since 1969 and have been constantly updating and modifying our safety practices to be what we believe [to be] the best in the industry. **We have site supervisors, ground disturbance supervisors and project safety supervisors, whose sole job is to examine all our work sites and ensure that at no time is our firm putting any of our workers in any degree of danger or exposing them to any level of risk of an injury, accident or disease.** [The reviewing officer] in his decision of July 5, 2000 states that this defense is available if the person reasonably believed in a mistaken of facts, which if true, would

render the act or omission innocent, or if a person took all reasonable steps to avoid the particular event. We submit that as a firm we took all reasonable steps to avoid a particular event; that being an illegal excavation. **Based upon the operator's qualifications and the level of expertise of the site supervisors we believe that we had a fully legal excavation. We believe that this demonstrates that on the balance of probabilities that we took all reasonable care for this excavation.** [The reviewing officer] makes mention in his analysis that he did consider our report of inspection, but indicates that it is only evidence of a conclusion that there was compliance. He indicates that he can't tell what areas of the regulation the report is talking about, but we did offer information that there was compliance with specific to this bell hole. **The fact that our firm had an individual with 24 years experience excavating the hole, who is properly trained and educated and the fact that we had 3 site supervisors attesting that this was a legal excavation, based upon all of their training and experience we are not sure how [the reviewing officer] can come to the conclusion that our firm, [the employer] was not practicing due diligence.** For your information please find attached a copy of our company safety policy, copies to Mr. [A.'s] qualifications.

[reproduced as written]

- (30) The employer's representative attached to his November 6, 2000 written submission: enlarged coloured photocopies of the third photographs examined at the Prevention Division oral hearing; a copy of the front page of the inspection report dated January 9, 2000 showing the employer representative as being an E. (which was a typing error as the occupational safety officer's field notes indicate there was a C., D., and B. present); a copy of the occupational safety officer's field note circling the measurement of the excavation and the part of the note indicating that it was not adequately sloped; a letter dated August 4, 2000 from Mr. F., a professional engineer, with enclosures; the statement from Mr. A., a photo-lab technician; Environment Canada readings for the region where the worksite was located for the month of January 2000; copies of the statements from B., site superintendent, D., project safety supervisor, and C., project ground disturbance supervisor; and A., the worker who dug the bell hole, and a copy of the employer's occupational safety and health program manual dated April 19, 1999.

Reasons and Decision

Standard of Proof

- (31) Section 196(1) of the Act states the Board may impose an administrative penalty if it considers that an employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses, an employer has not complied with Part 3 of the Act, the regulations or an applicable order or a workplace or working conditions are not safe. Prevention Division policy D12-196-6 states that "before levying an administrative penalty, the [reviewing] officer must be satisfied on a balance of probabilities that there is sufficient evidence that the requirement for a penalty are met. This means that it was more likely than not that the facts supporting the

penalty occurred." Before the Board decides to exercise its discretion under section 196 to impose an administrative penalty the evidence must establish one of the circumstances outlined in section 196(1)(a)(b)(c) of the Act, on the balance of probabilities. In this case was there a violation of section 20.81(1)(2) of the Regulation established, on the balance of probabilities? The employer's representative submitted that the evidence does not establish, on the balance of probabilities, a violation of section 20.81(1)(a) of the Regulation.

[. . .]

Violation of 20.81(1)(a)

- (37) The evidence must establish on a balance of probabilities (the civil standard of proof) that a violation occurred on January 9, 2000 of section 20.81(1)(a) of the Regulation in order to trigger the Board's discretionary power under section 196(1) of the Act to impose an administrative penalty. It is the violation of this section that has given rise to the allegation that the work activity in the excavation resulted in a high risk of serious injury, serious illness or death and resulted in repeated non-compliance with the Regulation. The evidence does not have to show beyond a reasonable doubt (the criminal standard of proof) that a violation has occurred of the Regulation nor does there have to be conclusive proof of such a violation.
- (38) I have concluded that the evidence does establish on the balance of probabilities a violation of section 20.81(1)(a) of the Regulation. The occupational safety officer measured the depth of the excavation wall at the point in question (where the red arrow points in photograph two) to be 6'. The evidence of the three workers of the employer does not establish that the depth of the excavation wall was not 6' at this point. The evidence only indicates that the occupational safety officer measured the depth of the excavation wall at the point in question. I accept this finding of fact with respect to the depth of the excavation wall at the point in question.
- (39) The next question is the slope of the excavation wall at the point in question. The occupational safety officer observed the angle of the slope to be near vertical. He stated at the oral hearing and in his precis and field notes that it was not adequately sloped $\frac{3}{4}$ to 1. The occupational safety officer is an experienced officer and although he may not be a professional engineer I accept that he observed the excavation wall not to be sloped $\frac{3}{4}$ to 1 as required by the Regulation. I agree that the photographs in this case are not helpful in determining this issue given the snow conditions and the angle of the camera lens at which the photographs were taken. However, I do not believe that the photographs establish that the excavation wall was sloped $\frac{3}{4}$ to 1. I note the expert opinion provided by Mr. F., a professional engineer, that "if the photographs are to be used as **corroborating evidence** of a contravention of a Regulation which is based on critical dimensions [width, depth, pipe diameters], then the photographs are of no value without some known dimensional material inserted in the frame." I acknowledge receipt from the employer's representative of the sketch that was enclosed with Mr. F.'s opinion. I also note the comments made about the quality of the photographs and the same point about a reference point made by Mr. G., the photo-lab technician. I have also considered the employer's representative's argument about the presence of snow on the excavation wall suggesting some sloping present.

- (40) At the oral hearing the occupational safety officer asked the employer's representative if he was saying the excavation wall in question was sloped $\frac{3}{4}$ to 1. The employer's representative said he could not say this but he was relying on the statements of the three workers. D., the project safety supervisor, in his statement dated June 22, 2000 indicated the occupational safety officer did take measurements but he did not see what they were. He indicated that A., an operator, had dug the excavation in question. D. did not state that the portion of excavation wall in question was sloped $\frac{3}{4}$ to 1. B., the site superintendent, states in his undated statement: "The excavation in question was viewed by myself, C. — the project ground disturbance supervisor, and D. — project safety supervisor, and deemed to meet or exceed the specifications set out by the WCB and our company policy." Although this is a broad statement it does not specifically address the area of the excavation in question (e.g. what the slope was). A., the operator who dug the excavation, in his undated statement indicated the excavation was $6\frac{1}{2}$ feet deep with the ground frozen for about five feet. He states: "no bank was over 4 ft. straight up and down, where any men would be working in bell hole. The sides were sufficiently sloped." The statement does not indicate how the depth was determined. The statement as a whole suggests that parts of the excavation was up to $6\frac{1}{2}$ feet in depth and parts were not over 4 feet in depth and that some parts of the excavation had walls straight up and down and others were sloped. It again does not indicate what the slope was of the excavation wall in question.
- (41) The employer's representative indicated in his written submission dated November 6, 2000 that the occupational safety officer told both B. and A. that the slope was "so close to being a legal bell hole and a legal slope." I did not get this from reading A.'s statement. I understood him to say that B. told him (hearsay) that that is what the occupational safety officer told B. B. does not indicate that this is what the occupational safety officer told him directly in his statement. The employer's representative had acknowledged at the oral hearing that at the time of the occupational safety officer's inspection A. was not at the excavation. Even if the occupational safety officer had stated this to both B. and A. (and I not do think the evidence clearly establishes this) it does not establish that the slope was in fact in compliance with the Regulation. It may go to the risk associated with any non compliance with the Regulation concerning sloping.
- (42) The employer's representative acknowledged at the oral hearing that a worker did enter the excavation to do some work activities. There are markings on the ground of the excavation around the pipes as shown in the photographs. The one pipe is facing the portion of the excavation wall in question.
- (43) I have concluded that the occupational safety officer's measurement as to the depth of the excavation wall at the point in question and his observations that the slope of the excavation wall at the point in question was not $\frac{3}{4}$ to 1 but near vertical coupled with the evidence that a worker was working in the excavation near that part of the wall in question establishes, on the balance of probabilities, a violation of section 20.81(1)(a) of the Regulation.

Risk Assessment

- (44) The next question is what risk was associated with this violation? Prevention Division policy D12-196-2 raises the presumption that working in an excavation over four feet deep without adequately sloping the sides is of high risk. There needs to be evidence that establishes, on the balance of probabilities, that the risk was not high. This factor of risk is relevant to the quantum of the administrative penalty with reference to the Schedule set out in Prevention Division policy 1.4.1. The \$7,500 administrative penalty imposed by the reviewing officer in this case was a Type III penalty according to the Schedule. A Type III penalty is described by the Schedule to be where the risk of injury is high. A Type I (\$3,000) is where the risk of injury is moderate. Non-compliance with the Regulation due more to neglect than willful and deliberate.
- (45) The occupational safety officer observed and described (see precis dated January 20, 2000) the soil type in this case to be a type B soil likely to crack or crumble. There was a lengthy discussion at the oral hearing about the use of types of soil as set out in section 20.85 of the Regulation being an unrecognized soil classification method over that of other classification methods. I believe the point that is being missed here was that for risk assessment purposes what was important were the observations made by the occupational safety officer about the type of soil conditions. The employer's representative appears to have conceded the description of the soil conditions in his November 6, 2000 written submission but raises the issue of the ground in question being frozen down to 5 feet as eliminating any risk that may have been present. There was a discussion about the need for a professional engineer to assess the soil stability. This was not done at the time of the inspection. However, with the evidence on the file I believed it was necessary to refer this file to the Engineering Section of the Prevention Division for an opinion on the likely risk associated with this violation.
- (46) A copy of my memo dated January 10, 2001 to the Engineering Section, Prevention Division and a reply by H., a professional engineer, in a memo dated January 18, 2001 was provided to the employer's representative for comment. The employer's representative did not comment on the memo in their response to the Appeal Division.
- (47) H. stated in his memo:

The soil was described as being frozen for the top five feet. At -27 degrees Celsius, I have difficulty believing that the soil would crack or crumble. To do so, it would have to be extremely dry, at which point it would probably be hard. Soil freezing is an effective means of stabilization. The method of soil freezing is in fact utilized commercially for certain excavations and for tunneling. The effectiveness of the method can be compared with "excavating" ice cream vertically inside a one-gallon pail. As long as the pail is kept in the freezer, nothing happens . . .

In the described case, the worker who dug the excavation had 24 years of experience in this type of work. Since excavation safety is not an exact science (there is no minimum Standard or minimum factor of safety, such as, lets say,

for the design of concrete or steel structures), soil assessment is largely based on visual observation and a feel developed by years of experience. The value of experience must not be discounted.

In conclusion, I believe the probability of a soil collapse in the described situation was very low.

[reproduced as written]

- (48) H. suggested that frozen soil might be considered “other effective means” as outlined in section 20.81(1)(d) of the Regulation. I question whether this section applies in these circumstances (e.g., frozen soil). The words “other effective means” follow the words “supported by manufactured or prefabricated trench boxes or shoring cages.” The words “other effective means” suggest something that is “equal or better than.” It could be argued that the words “other effective means” mean something akin to these other forms of manufactured or prefabricated devices. I accept H.’s risk analysis that given the likely temperature at the worksite based on the government weather records and A.’s visual observations of frozen soil for at least five feet that the risk of a collapse (hence injury or death) was likely (probably) low not high. I am satisfied that H.’s opinion rebuts, on the balance of probabilities, the presumption of high risk set out in Prevention Division policy D12-196-2. However, H. did not actually attend the worksite to do a risk assessment. I would not, even if the wording of section 20.81(1)(d) of the Regulation could be used to argue that frozen soil is “other effective means,” conclude, on the balance of probabilities, using H.’s opinion that there had been compliance with the Regulation.

Due Diligence

- (49) As outlined in the law and policy portion of this decision Prevention Division policy D12-196-1 and section 196(6)(a) of the Act set out the factors that are considered in deciding whether to impose an administrative penalty. Section 196(6)(a) indicates that the employer must prove, on the balance of probabilities, that it exercised due diligence to prevent the non-compliance to which the penalty relates. The employer’s representative has provided a copy of the employer’s occupational health and safety manual dated April 19, 1999 that outlines the requirements for excavations. A. provided evidence that he had been given training in digging trenches and he had many years of experience as an operator. He did create a staircase for safe access and egress. The employer does have individuals employed to perform inspections, and to address safety compliance and concerns as indicated by the inspection reports. There is the evidence of B. who indicated that he and other safety control personnel had inspected the excavation for compliance. I do believe the employer through their submissions have indicated they take their responsibilities and obligations under the Regulation seriously and have taken steps to comply with them. I do not believe the evidence establishes in this case that the employer willfully or deliberately violated the Regulation.
- (50) Although the employer was given an order for a violation of section 20.81(1)(a) of the Regulation on March 16, 1999 on the recommendation of the occupational safety officer it was given a warning letter dated June 10, 1999. The occupational safety officer found that the employer

had not been cited for such a violation previously, the employer had provided documentation showing the orientation of its supervisors related to compliance with the O.H.S. excavation requirements, and the employer had taken corrective measures with the supervisors involved. Observation reports had been issued against all four supervisors (none of whom appear to have been involved in this case) involved for their failure to take corrective action. All of these mitigating factors warrant consideration in this case.

Administrative Penalty

- (51) I have reviewed the employer's submission and the evidence and I have decided to cancel the reviewing officer's administrative penalty of \$7,500. The Review and Penalty Section, Prevention Division proceeded with the proposed penalty on the basis that the alleged activity resulted in a high risk of serious injury, illness, or death and repeated non-compliance of the Regulation. H.'s opinion has established the risk of serious injury, illness, or death was not high but low. I acknowledge that he did not say it was nil. He also did not have the benefit of actually being at the worksite to do a risk assessment. Although, I have also found, on the balance of probabilities, a violation of section 20.81(1)(a) of the Regulation I believe that given the employer's representative's evidence on due diligence, the risk involved, and my review of the circumstances surrounding the previous history of non compliance that what is warranted in this case is a warning letter.

Conclusion

- (52) I have decided to cancel the reviewing officer's imposition under section 196 of the Act of an administrative penalty in the amount of \$7,500. I believe, on the balance of probabilities, that the evidence does establish a violation of section 20.81(1)(a) of the Regulation. However, I also believe that H.'s opinion has rebutted the presumption that this violation gave rise to a high risk of injury, illness, or death. Given the employer's representative's evidence on due diligence and my review of the employer's previous history of non-compliance I have decided that what is warranted in this case is a warning letter.

