

Decision of the Appeal Division

Number: 2001-0339

Date: February 19, 2001

Panel: James Sheppard

**Subject: Occupational Health and Safety — Fall Protection Violation —
Departure from Recommended Schedule of Sanctions**

Introduction

- (1) The employer has filed an appeal of the reviewing officer's decision dated June 6, 2000 with the Appeal Division under Division 14 of the *Workers Compensation Act* (the "Act"). The reviewing officer's decision dated June 6, 2000 imposed an administrative penalty of \$2,000 on the employer under section 196(6) of the Act. The reviewing officer imposed the administrative penalty for violations occurring on January 22, 2000 of sections 20.73 (fall protection requirements) and 33.2(3) (First Aid) of the *Occupational Health and Safety Regulation* (the "Regulation"). The proposed administrative penalty was also based on a violation of section 13.16(1) (general requirements for scaffolds) of the Regulation. However, the reviewing officer held that there was insufficient evidence to establish this violation. The application for appeal was received by the Appeal Division on July 5, 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 #00-1674 the employer's stay application was dismissed. 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 June 6, 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 orders concerning the violation of sections 20.73 and 33.2(3) of the Regulation were 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 June 6, 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.

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- (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.

Notification of Parties/Method of Appeal

- (7) 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, 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 25, 2000 of the employer's appeal of the reviewing officer's decision dated June 6, 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.
- (8) The employer on the application for appeal requested an oral hearing with no reasons being provided for this request. In a letter dated November 15, 2000 the employer was informed that he was being given time to provide a written submission in support of his appeal. No response was received by the Appeal Division from the employer on the merits of this appeal. The employer has not provided the Appeal Division with any new information concerning the first administrative penalty imposed by the reviewing officer in his decision dated June 6, 2000.

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.

- (9) The employer's representative was also provided with a copy of the tape of the oral hearing held by the reviewing officer on May 25, 2000. The principal of the employer, an interpreter, and the two occupational safety officers who inspected the worksite on January 22, 2000 were in attendance. I have listened to the tape of the May 25, 2000 oral hearing, reviewed the employer's written submission dated May 8, 2000, the reviewing officer's decision dated June 6, 2000, and the other related evidence in the employer's Prevention firm file. I believe that I can render a fair and thorough decision based upon a review of this material without the need for an oral hearing.

Background and Evidence

- (10) The occupational safety officer indicated on the inspection report dated January 22, 2000 that **two** workers were observed on a roof (with a slope in excess of 4:12 but less than 8:12) approximately 15 to 22 feet above the ground with no fall protection or guarding. The occupational safety officer in his memo dated January 23, 2000 to the regional manager stated:

“we observed a worker installing stucco wire while standing on a roof of a single family residential house under construction from which a fall of approximately 20 feet into a basement well could occur. The slope of the roof was 5:12 (5 inches vertical on a horizontal run of 12 inches). The worker was not protected from falling from the roof either by guardrails or by the use of a personal fall arrest system. No personal fall arrest equipment was available at the site. The weather was overcast, foggy and damp. In our opinion the worker was exposed to a high risk of injury from falling.”

[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 Review and Penalty Section, Prevention Division. The penalty letter informed the employer that a proposed penalty of \$3,500 was being considered based on information that the alleged activity resulted in a high risk of serious injury, illness or death and repeated non-compliance with the Regulation. Similar issues concerning first aid and scaffolding requirements had been brought to the attention of the employer in an inspection report dated July 25, 1997.
- (12) The reviewing officer found sufficient evidence to establish a violation of sections 20.73 (fall protection) and 33.2(3) (no level one first aid attendant on site) of the Regulation. The reviewing officer indicated in his decision that the employer acknowledged that there were no workers at the time of the inspection who were qualified as first aid attendants. The employer in a letter dated May 8, 2000 to the reviewing officer stated that his worker was not working without fall protection. The worker had not started the work and was waiting for some lumber for the scaffolding that the homeowner was picking up from the lumber yard. There is a written statement from the homeowner attached to this letter.

- (13) The reviewing officer in his decision states:

[The employer] began by submitting that they were unaware of the need to wear a safety harness. They submitted that toe boards were being used to protect workers from the fall hazard. They acknowledge that they were working off of the lower roof which was approximately 15 feet above grade. [The employer] submitted that since the inspection they have purchased safety harnesses.

[reproduced as written]

- (14) Once the reviewing officer held that the evidence established a violation of sections 20.73 and 33.2(3) of the Regulation he then examined Prevention Division policy 1.0.0 and the defenses available to the employer as outlined in policy D12-196-1. He did not apply the high risk presumption set out in policy D12-196-2 but did find that the evidence of the occupational safety officer as to weather conditions and the height and slope of the roof established that there would likely be a serious hazard for workers. The reviewing officer took into account the employer's previous inspection record of no fall protection violations, a violation of first aid, the employer's small payroll, and the motivational impact required to ensure compliance in deciding to reduce the quantum of the proposed penalty from \$3500 to \$2000.

Law and Policy

- (15) 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).]

- (16) The Panel of Administrators have 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.

- (17) 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.

(18) The recommended schedule of sanctions (the “Schedule”) outlined in Prevention Division policy 1.4.1 are 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.

(19) Section 20.73 of the Regulation states:

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

(20) Section 33.2(3) of the Regulation states:

First aid must be provided and maintained according to Schedules 1 to 7, unless the requirements of this Part specify otherwise.

(21) Section 196(6)(a) of the Act 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 defense 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 defense in section 196(6), all the circumstances of the case must be considered.

(22) 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.

Reasons and Decision

- (23) Section 196(1) of the Act states that 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 the balance of probabilities that there is sufficient evidence that the requirements for a penalty are met. This means that it was more likely than not that the facts supporting the penalty occurred." Before the reviewing officer exercises the Board's 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 sections and 20.73 and 33.2(3) of the Regulation established, on the balance of probabilities?
- (24) The employer provided a written submission dated May 8, 2000. He stated:

Further to your letter of April 17, 2000 regarding [a] proposed penalty under section 196 of the Workers Compensation Act, I don't agree with [the occupational safety officer's] finding that my worker was working without fall protection.

My worker had not started the work and was waiting for some lumber that [the homeowner] was picking up from lumber yard. A letter from [the homeowner] stating the same has also been attached for your reference.

While [the occupational safety officer] was at site [the homeowner] also brought the lumber needed to complete the scaffolding and my workers started the job.

On Photo #1 [the occupational safety officer] wrote that single scaffold plank is there but the second scaffold plank was not completed because of short of lumber and it was completed when the rest of [the] lumber was brought by [the home owner].

Please cancel any proposed penalty as my company has [an] excellent record and have the necessary tools to work safely under the required WCB rules. I can assure you that we will not let thing [sic] kind of confusion happen in future and will only come to site when the complete lumber required is on the site.

[reproduced as written]

- (25) A statement dated May 8, 2000 from A., the homeowner for whom the work was being done by the employer, stated:

With due respect this is to certify that I'm the owner of this house where [the employer] & his crew supposed to work. They made the scaffold but didn't have a enough lumber. **I told them that in the meantime I get lumber for you you could start working on roof side.** I took their van to gone to p/up some lumber, after I left WCB officer came. When I came back they was there on the site. I did brought [sic] the lumber for them. WCB officer know that. Sooner [sic] I brought the lumber they make scaffold and start working. They had no intention of working without the scaffold. They working for my co. last 8 years. They are pretty safety oriented. If you need more information please don't hesitate to call.

[reproduced as written, emphasis added]

- (26) The occupational safety officer in the text to the inspection report dated January 22, 2000 states: "two workers were observed on a roof (in excess of 4:12 but less than 8:12) approx. 15 to 22 feet above the ground; no fall protection available or in use." The occupational safety officer in his January 23, 2000 memo to the regional manager indicated that he had seen a worker installing stucco wire while standing on a roof of a single family residential house with a fall potential of approximately 20 feet into a basement. The slope of the roof was reported to be 5:12. At the oral hearing the employer did not dispute that the workers were up on the roof applying stucco wire to the house. They were not doing any work to the roof. The employer indicated that he did not know that they needed fall protection in this situation. He indicated that his workers usually were not on the roof applying stucco wire but usually used scaffolding for this work. He did not have any fall protection equipment available at the worksite at the time of the inspection.
- (27) The reviewing officer examined whether or not section 20.73 of the Regulation applied to this situation where workers were not doing roof work but were on a roof applying stucco wire to the face of the house. He states:

Section 20 of the Regulation is titled 'Roof Work', and sets out a requirement for fall protection when "*work is being done on a roof*". In this case workers were applying stucco wire to the exterior of a building, while standing on the roof. Workers were not performing roof work. I do not however find that the citing of this Regulation is fatal to the issue of its validity as the headings in the Regulation are only meant as guidelines and according to the Interpretation Act (R.S.B.C. 1996) should be construed as being inserted for convenience of reference only. Given the lack of fall protection I find there was a violation of this section.

- (28) I would add that section 20.73 states that fall protection as required by Part 11 must be used if work is being done on a roof from which a fall of 10 feet or more may occur. The words "work is done on a roof from which a fall" are broad enough to include work of any kind while standing on a roof and not just roof work done on a roof. This is supported by the wording of

11.2(1) (general requirements for fall protection) which states that unless elsewhere provided for in the Regulation, an employer must ensure that a fall protection system is used **when work is being done at a place from which a fall of 10 feet or more may occur**. In addition the opening words of section 20.73 requires fall protection as required by Part 11. When is fall protection required by Part 11? When work is being done at a place from which a fall of 10 feet or more may occur.

- (29) I am satisfied that the evidence, on the balance of probabilities, establishes a violation of section 20.73 of the Regulation.
- (30) The reviewing officer also considered the violation of sections 13.16(1) (general requirements of scaffolding) and 33.2(3) (first aid attendant) of the Regulation. He states:

- Section 13.16(1) of the Regulation

This section states “employers must ensure that scaffolds used by their workers are in safe condition, regardless of who erected these scaffolds.”

[The employer’s] position is that the scaffold was not used in the condition that it was observed by the Officers. In the inspection report the Officers submitted, “the single pole scaffolding in use by this subcontractor is not in a safe condition . . .”

In the hearing the officer’s evidence was that they did not observe workers on this scaffold, and had no evidence as to the condition of the scaffold at the time that it may have been used.

There is no evidence therefore that scaffolds used by workers of [the employer] were not in a safe condition. As such, I do not find the order to be valid.

- Section 33.2(3) of the Regulation

This section of the Regulation sets out the basic requirements for first aid. In the inspection report the Officers submitted the employer has not provided a level one first aid attendant.

[The employer] acknowledged that there was no first aid attendant at the time of the Officers inspection although there was a first aid kit. Given the lack of a first aid attendant I find there to be a violation of this section.

- (31) I am satisfied that the evidence as outlined by the reviewing officer does not establish, on the balance of probabilities a violation of section 13.16(1) of the Regulation but does establish a violation of section 33.2(2) of the Regulation. I would add that the evidence provided by A.’s statement also supports the conclusion that there was no violation of section 13.16(1) of the Regulation.

- (32) The reviewing officer examined the issue of the risk associated with the violation of section 20.73 of the Regulation. He states:

[The employer] was advised that the penalty was based on repeated non-compliance and based on the high risk of the violations. The Officers evidence is that workers were exposed to a high risk of injury because of the fall hazard of approximately 20 feet. The Officers evidence was of the weather being over-cast, foggy, and damp. Although there is no presumption of a serious hazard associated with a fall protection violation, I would agree that a fall hazard of approximately 20 feet when considered, in conjunction with other factors such as the weather, and the slope of the roof, is likely a serious hazard for workers, and serious injury would likely be the result of a fall from such a height, onto building materials.

- (33) I would agree that given the slope, weather conditions, the height at which the workers were working, the fact that they would have to move around the roof with tools and material to apply the stucco wiring to the face of the house with only a toe board to prevent a fall would, on the balance of probabilities, give rise to a high risk work practice.
- (34) The employer had been in business since about 1991 or 1992 prior to the violation of section 20.73 of the Regulation in January of 2000. The employer did not know that fall protection was required in these situations. The reviewing officer concluded that it was appropriate to impose an administrative penalty given this lack of understanding about fall protection requirements, the seriousness of the hazard created by that violation, and because of a violation of section 33.2(3) (first aid attendant). However, given the fact that the employer had not been previously cited for a violation for fall protection (he had for first aid), the employer's small payroll for the previous year (\$23,565 and personal optional coverage), a lesser amount of \$2,000 was imposed rather than the \$3,500 which had been proposed in the Board's penalty letter dated April 17, 2000.
- (35) The Schedule describes a Type III violation as a situation where the risk of injury is high or there has been a fatality or serious injury. A Type I is described as a situation where the risk of injury is moderate and non compliance with the Regulation is due more to neglect than willful and deliberate. Neither the words to Prevention Division policy 1.4.1 nor Prevention Division policy D12-196-1 indicate that the amounts outlined in the Schedule must be applied in each case. The Schedule is a framework of recommended penalties to ensure a degree of consistency and predictability as to what the amount of the administrative penalty will likely be in any given situation. There is a need for employers to know that like situations will be treated the same. The Schedule already takes into account the size of the assessable payroll of the employer and the level of risk associated with the violation in recommending the amount of administrative penalty that should be imposed. As indicated in the law and policy portion of this decision the Panel of Administrators have passed a new schedule of recommended penalties for any violation that has occurred on or after May 1, 2000. The old Schedule does apply in this case.

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- (36) I believe that the evidence shows that the recommended amount in his case would normally be \$3,500 (Type III with an assessable payroll of less than \$230,000). However, as the Schedule is a recommendation as to the amount to be imposed it is open to the reviewing officer and myself, if the circumstances warrant it, to depart from the Schedule provided reasons are given that are in accordance with the purpose of the Act and Regulation and the intent of the published policies of the Panel of Administrators. The reviewing officer has given reasons (past history, the motivational/incentive impact needed) for departing from the Schedule which are factors specifically listed in Prevention Division policy D12-196-1. The size of the assessable payroll is not specifically listed but the policy also lists "other relevant circumstances" as a factor to be consider in deciding to levy an administrative penalty. Although the policy lists factors in deciding whether to levy an administrative penalty and not specifically to the amount to be levied after it is decided one is warranted it makes sense to consider these factors if I decide to depart from the Schedule in this case. I confirm the reviewing officer's decision to impose a \$2,000 instead of a \$3,500 administrative penalty for the reasons he has outlined in his decision. The employer on his application for appeal is seeking to have the administrative penalty reversed or lowered to the amount of \$500. However, given the employer's lack of knowledge of the requirements for fall protection and the nature of the hazard created by the violation of section 20.73 of the Regulation and the violation of section 33.2(3) (first aid attendant) I believe that the amount imposed is appropriate.

Conclusion

- (37) The reviewing officer's June 6, 2000 decision to impose a reduced administrative penalty of \$2,000 under section 196(6) of the Act on the employer is confirmed. The lack of a previous violation of fall protection, the size of the employer's payroll, and the amount needed to motivate compliance were all factors which warranted a departure from the recommended amount of \$3,500 as outlined in the Schedule. The employer's appeal of the reviewing officer's decision dated June 6, 2000 is denied.

