WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: **2001-0438**
Date: **February 28, 2001**
Panel: **Teresa White**
Subject: **Occupational Health and Safety — Notification to Parties — Posting Requirements — Fall Protection**

Introduction

(1) The employer appeals the decision letter dated March 31, 2000 from a reviewing officer in the Prevention Decision of the Board. The decision imposed a $7,000.00 administrative penalty against the employer under section 196 of the *Workers Compensation Act*, R.S.B.C. 1996, Chap. 492 (the "Act") for violation of occupational health and safety regulation 20.73.

(2) The employer is represented. The president of the employer provided a submission dated May 2, 2000. An articled student provided a submission dated July 27, 2000.

(3) Regulation 20.73 provides:

> 20.73 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.

(4) On October 1, 1999 the *Workers Compensation (Occupational Health and Safety) Amendment Act* ("Bill 14") came into force. It created an entirely new Part 3 to the Act. 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) and (b) of the Act provide that after considering the appeal, the Appeal Division may confirm, vary or cancel the decision under appeal or refer the matter back to the Board for reconsideration. This provision is broader than the limited grounds that existed for appeals prior to October 1, 1999. Section 96(6) of the Act had provided the employer with the right to appeal an assessment levied under section 73(1) (repealed) to the Appeal Division on the limited grounds of error of law, error of fact, or contravention of published policy. These limited grounds have been repealed and replaced by the provisions in section 212(1)(a) and (b) of the Act.

(5) The Appeal Division interprets the provisions of section 212(1)(a) and (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 officer's with respect to the findings of fact, the law and Board policy.

Is This Appeal Within Time?

(6) The decision under appeal is dated March 31, 2000. The notice of appeal was received by the Appeal Division on May 24, 2000. The effect of section 209(1) of Bill 14 is that in order to bring this appeal, the employer must have applied in writing to the Appeal Division within 30 days of the decision being appealed. The reviewing officer's decision was sent to the employer by registered mail. Section 221 of Bill 14 provides that the document was deemed to be served on the 8th day after deposit with Canada Post. The employer in this case wrote a letter dated May 2, 2000 to the "Prevention Division (Appeal Division)." It was received by the Appeal Division on May 4, 2000. The letter states:

> I received a letter that is showing you charge a penalty of $14,000 something to [employer]. But we only had one hearing on January 20, 1999. Accoring to that we had a penalty of $ 7000 which is very big amount for me or my company. And now you charge me $14000 which is unaffordable for me. Could you please tell me what is that $7000 for. Please consider my case again. I can't even afford the amount of $7000 and the amount of $14000 is very high. I could not pay this amount. I shall be very thankful to you if you see my case again and lessen the amount of penalty.
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> [reproduced as written]

(7) It should be noted that the employer refers to a previous $7000 penalty, which is the subject of another Appeal Division [decision].

(8) Section 209(2), subsections (a), (b) and (c) require the application to identify the decision that is the subject of the application for appeal, to state the basis upon which the appeal is made and the outcome requested, and to include other information required by the Appeal Division. Although the letter of May 2, 2000 is not on the proper form, it was addressed to the Appeal Division and clearly indicates that the employer wishes the penalty considered again. It protests that the amount is too large.

(9) Concerning the time limit in section 209, it is clear that the Appeal Division received the May 2, 2000 letter on May 4, 2000, before the expiration of 30 days plus eight days for deemed service from the date of the reviewing officer's decision (March 31, 2000).

(10) I consider the letter of May 2, 2000 to satisfy section 209.

Notification of Parties/Method of Appeal

(11) 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.

(12) There is a problem with the evidence concerning posting in this case. The employer was informed of the posting requirement and provided with a blank notice for posting by the appeal officer in a letter dated June 2, 2000. The employer filled out the form and returned it dated June 5, 2000. The problem is that the employer did not properly complete the form. The date of decision under appeal was not written on the form and the wrong file number was written on the form. He wrote the number relating to another administrative penalty that he was appealing at or about the same time. The appeal officer, who was dealing with both appeals, did not notice that the wrong number was written on the form, and proceeded with the remaining correspondence on the file on the basis that the employer had confirmed posting on June 5, 2000.

(13) Thus, there is no direct evidence confirming that the posting requirements have been met in this case.

(14) I have reviewed the Appeal Division's files on both administrative penalties, and have issued a decision on the other $7000 administrative penalty. There is a separate posting form in that file. It can be inferred from the documents and the sequence of events that the employer posted notices relating to two $7000 penalties.

(15) The Appeal Division notified the Joint Health and Safety Committee/Worker Health and Safety Representative/Union in a letter dated June 26, 2000 of the employer's appeal of the reviewing officer's decision dated March 31, 2000. The Appeal Division did not receive a notice of participation from any of these parties nor any notification from any of the employer's workers that they wish to participate in this appeal.

(16) For reasons that will be clear below, it is not necessary for me to decide if the posting requirements have been, as a matter of law, met in this case. I have concluded based on the unique circumstances of this case, and in the absence of any participant other than the employer, that this appeal should proceed despite the fact that the Posting — Application for Appeal document has upon it the wrong number and does not reference the date of the decision under appeal.

Oral hearing

(17) 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 have. An appeal may be conducted by way of written submissions, an oral hearing or a combination of both. The employer did not provide a response to the Review and Penalty Section, Prevention Division before the reviewing officer reviewed the evidence and made his decision. There is only one party to the appeal. I consider that the issues raised in this appeal can be properly considered upon the basis of the evidence and submissions on file.

Evidence

(18) I have reviewed the file and the submissions received from the employer and its counsel. I have also listened to the audiotape of the oral hearing held before the hearing officer, a copy of which was disclosed to the employer. Submissions concerning the audiotape were invited but none received.

Issue(s)

(19) The issue is whether the reviewing officer's decision of March 29, 2000 should be confirmed, varied, cancelled or referred back to the Board for reconsideration.

Decision and Reasons

(20) The employer is a roofing company. On July 15, 1999 a Board officer inspected a worksite. The employer had a contract with the owner of a home under construction to install the roof.

(21) The officer observed two individuals on the roof. They were installing concrete tiles on the roof, which had a 10:12 pitch, at elevations from 13 to 24 feet above the ground. The two roofing workers told the officer, and he recorded on the inspection report, that they were subcontracting on a piece rate basis to the employer. However, the inspection report states that they "could provide no relilable [sic] information as to who is the registered employer whom they are contracting. Therefore this I.R. was written on [the employer] who was the roofing contract with the homeowner." [reproduced as written].

(22) The officer took photographs. There are three on the file. They show two workers on a steep roof. The caption states that the roof to ground height was 13.5 feet. It is apparent from the photographs that although the workers were wearing harnesses, they were not attached to a lifeline. I have considered the employer's argument before the hearing chair that the photographs show the workers were attached to lifelines and the fact that the lifelines appear slack is not sufficient evidence to confirm they were not attached. I do not accept that submission. The officer's evidence was that he observed the workers for approximately five minutes and they were actively moving about the roof and climbing in and out of a window (two of the photographs show one of the worker's standing in and/or climbing out of an opening that appears to be a skylight). The officer observed the workers moving freely about the roof to access materials, including climbing in and out of joists. The hearing chair in the decision under appeal said, at p. 4:

> The freedom of their movement between the trusses and climbing through windows confirmed his suspicion that although they were wearing safety harnesses, they were *not* attached to any life lines. The workers' activities were situated six to ten feet above the edge of the roof and he measured the edge of the roof to be 13 feet above grade. In addition, the O.S.O. also measured and confirmed that the pitch of the roof exceeded 8:12 which would require the use of fall protection at any height (even less than ten feet) according to the safety guidelines.

(23) The inspection report states that the workers were not connected to a fall protection system installed on the roof in contravention of section 20.73 of the *Occupational Health and Safety Regulation*. The officer also recorded that there were no first aid services or supplies on site, in contravention of Regulation 33.2(3). The report states:

> The workers were removed from the roof and instructed that they were not to return to the roof until they were wearing fall protection and safety headgear. Fall protection was provided and available at the site but was not worn by the workers. The owner of [the employer] was contacted via telephone, by [another officer of the Board] at 0930 hours 9 May at which time [the owner] stated that he had two previous financial penalties for failure to wear fall protection. [The owner] indicated that he provides all necessary fall protection for his workers but they will not wear it . . . He fired the worker responsible for his last two penalties.

(24) The employer explained at the hearing before the hearing chair, held on January 20, 2000, that the employer had subcontracted the roofing to another individual. He said that he had worked with this particular subcontractor several times, and believed that the subcontractor had his own workers' compensation coverage. The evidence of the officer was that the employer had the roofing contract, another individual had been "sub-contracted" to supervise the workers employed by the employer. The employer said that after the inspection report he telephoned the Board and learned that the sub-contractor did not have an active registration. The employer explained to the hearing chair that the employer had previously subcontracted with the same individual, who at the time was registered, and therefore he assumed he continued to be registered.

(25) The owner of the employer said that he had been at the job site at 0800 hours on the morning of July 15, 1999 and all three workers were wearing harnesses attached to life lines anchored to the roof. He could not remain and supervise them. He submitted that he should not be penalized for non-compliance if the workers disconnected their lifelines after he left.

(26) The employer has had a number of previous violations of the Regulations.

(27) On January 31, 1995 workers were working on an inclined roof without life lines and safety belts.

(28) On February 24, 1995 an officer observed the workers at the employer's worksite working on a roof without lifelines and safety belts. A warning letter of March 21, 1995 states that no penalty would be applied but a continuing or repeat violation would lead to consideration of a penalty.

(29) An inspection report dated March 11, 1996 states "reviewed and discussed need for workers to wear fall protection equipment at all times when on roof." Workers had been observed on a steep roof without safety belts and life lines.

(30) On May 31, 1996 four workers were observed without fall protection. An inspection report was written.

(31) On October 1, 1996 an officer inspected one of the employer's worksites. A worker was observed without fall protection. An additional assessment of $1,500 was proposed. The hearing chairperson imposed an additional assessment of $1,000.

(32) An officer inspected the worksite on July 18, 1997 and observed two workers on the roof of a two story single family dwelling under construction. They were not wearing fall protection. The workers had the gear in their truck but were not using it. In a decision dated October 15, 1997, a hearing chair decided that a type III additional assessment in the amount of $3,500 was appropriate for violations of the *Industrial Health and Safety Regulations* and the *Occupational First Aid Regulation*. The employer's argument concerning the fall protection equipment at the hearing on September 30, 1997 was that the workers had fall protection equipment and had been told they were responsible for using it, but they were not using it. The additional assessment was not appealed.

(33) An inspection on or about May 8, 1999 found three workers on a roof without fall protection or safety headgear. That violation resulted in the $7000 administrative penalty that is the subject of the employer's other appeal, culminating in a decision of the Appeal Division to deny the appeal and confirm the penalty.

(34) The employer's representative provided a submission dated July 27, 2000. It states, in part:

- The one time inspection is always doubtful unless supported by a second inspection on the same day.
- Evidence of a one time inspection is insufficient to prove the violation beyond a reasonable doubt.
- Previous violations do not prove the alleged violation beyond doubt.
- Photographs are not sufficient to link the employer with the alleged violations.
- The heavy penalty is likely to cause [the employer] to go out of business.
- Only five minutes of observation by the O.S.O. is not sufficient time to prove the violation beyond a reasonable doubt.
- The subcontractor or employees of the subcontractor are not legally employees of the contractor.

The representative submitted that the violation was not proven beyond a reasonable doubt and that the penalty should be cancelled, or in the alternative reduced.

(35) 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.

(36) 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.

(37) Concerning the standard of proof, 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 [hearing] 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 is was more likely than not that the facts supporting the penalty occurred." Before the [hearing] 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) or (c) of the Act, on the balance of probabilities.

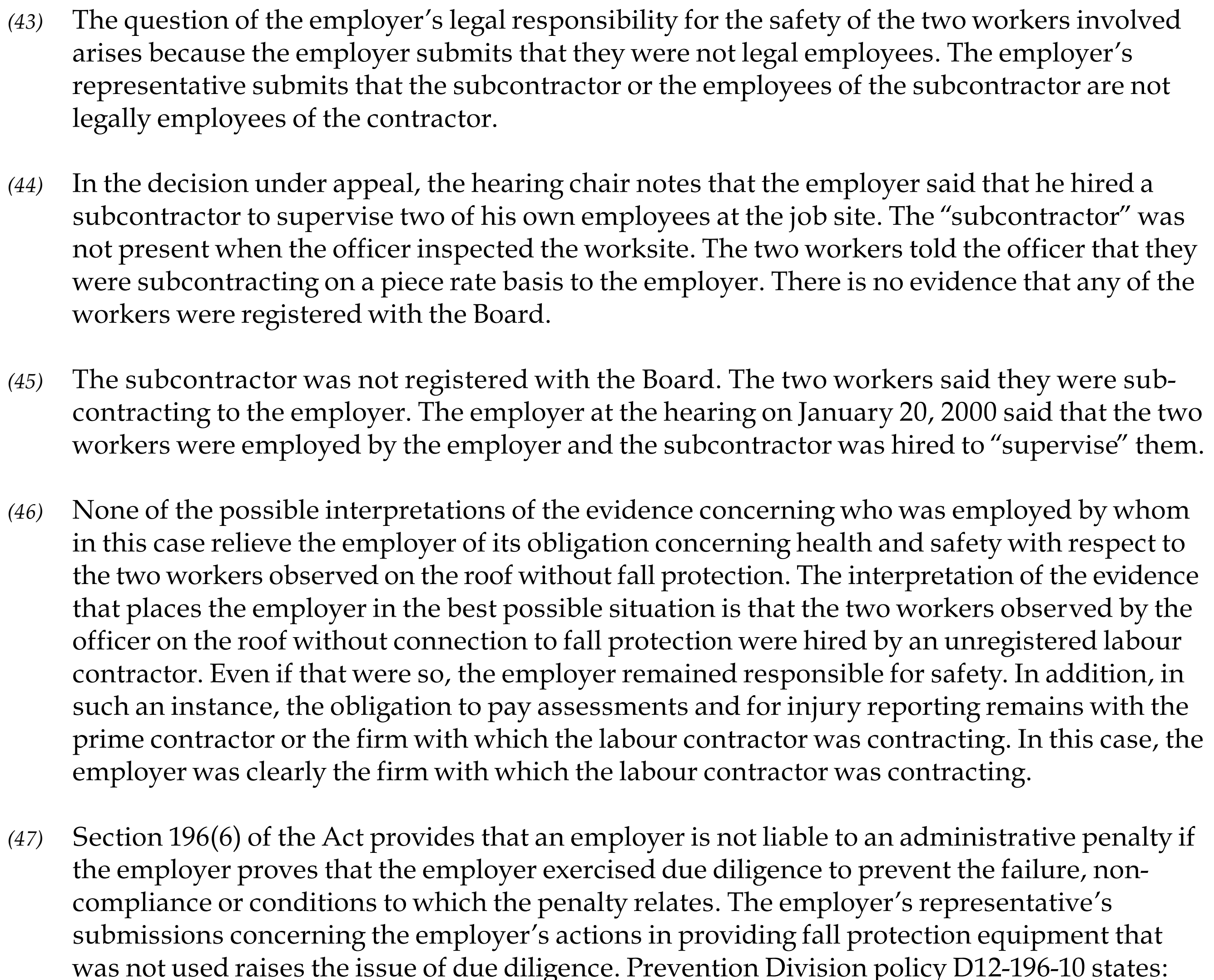
(38) Thus, the applicable standard of proof is not "beyond a reasonable doubt." It is the balance of probabilities.

(39) Concerning the representative's argument that a "one time inspection is always doubtful," and that it must be supported by a second inspection, I do not consider that more than one inspection on the same day should or would be required. The workers were observed without fall protection. One would hope that a second inspection would find them wearing fall protection. However, that would not change the fact that a violation had occurred. A requirement for a second inspection would simply give the employer an opportunity to remedy the violation on that particular day and would defeat the purpose of the legislation.

(40) The representative submitted that five minutes of observation was not sufficient time to prove the violation beyond a reasonable doubt. As noted above, the standard of proof is the balance of probabilities. I consider the weight of evidence, including the photographs, the inspection report and the evidence of the inspecting officer, to establish that the workers, although they were wearing safety harnesses, did not have them attached to the lines. I have carefully examined the photographs and am left with little, if any doubt that the workers were not connected to any lines. They were clearly able to move freely over the roof, which appears to have a very steep slope. I further find that the edge of the roof was 13 feet above grade, and that the workers were approximately six to ten feet above the edge of the roof.

(41) The workers are not wearing safety headgear in the photographs. Even if the standard of proof were beyond a reasonable doubt, I consider the evidence to establish that the violations occurred.

(42) Accordingly, the question then becomes whether the administrative penalty of $7000 assessed against the employer was appropriate under the circumstances.



(43) The question of the employer's legal responsibility for the safety of the two workers involved arises because the employer submits that they were not legal employees. The employer's representative submits that the subcontractor or the employees of the subcontractor are not legally employees of the contractor.

(44) In the decision under appeal, the hearing chair notes that the employer said that he hired a subcontractor to supervise two of his own employees at the job site. The "subcontractor" was not present when the officer inspected the worksite. The two workers told the officer that they were subcontracting on a piece rate basis to the employer. There is no evidence that any of the workers were registered with the Board.

(45) The subcontractor was not registered with the Board. The two workers said they were subcontracting to the employer. The employer at the hearing on January 20, 2000 said that the two workers were employed by the employer and the subcontractor was hired to "supervise" them.

(46) None of the possible interpretations of the evidence concerning who was employed by whom in this case relieve the employer of its obligation concerning health and safety with respect to the two workers observed on the roof without fall protection. The interpretation of the evidence that places the employer in the best possible situation is that the two workers observed by the officer on the roof without connection to fall protection were hired by an unregistered labour contractor. Even if that were so, the employer remained responsible for safety. In addition, in such an instance, the obligation to pay assessments and for injury reporting remains with the prime contractor or the firm with which the labour contractor was contracting. In this case, the employer was clearly the firm with which the labour contractor was contracting.

(47) Section 196(6) of the Act provides that an 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. The employer's representative's submissions concerning the employer's actions in providing fall protection equipment that was not used raises the issue of due diligence. 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.
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> In determining whether the employer has met the due diligence defence in section 196(6), all the circumstances of the case must be considered.

(48) It is apparent that the employer in this case was aware of the requirement for all protection and safety headgear. The equipment had been provided. The employer had been subject to a number of prior inspections, warnings and sanctions. Although I acknowledge that workers can and do take independent actions, the responsibility for compliance with occupational

health and safety rests substantially on the employer. I do not consider that simply providing the equipment and relying on the workers to use it constituted due diligence. This is particularly the case because this employer was well aware of the requirements.

(49) As noted by the hearing officer, the employer has provided no documentation outlining the training and instruction of workers, written procedures, safety manuals, supervisory log books, safety meeting minutes or any disciplinary procedures to deal with workers when safety is compromised. The evidence does not support a conclusion that there was due diligence exercised by the employer.

(50) The recommended schedule of sanctions in Prevention Policy 1.4.1 are applicable to this case because the violation occurred before May 1, 2000. That schedule creates a type IV violation where there is a type III violation repeated within five years of the last sanction. In this case, there was a type III violation leading to sanction that occurred on July 18, 1997, clearly less than five years before May of 1999. A type IV violation category sanction was properly applied.

(51) I have concluded that the reviewing officer's decision of March 31, 2000 to impose an administrative penalty of $7,000.00 under section 196(6) of the Act should be confirmed. The evidence shows that the employer's workers were exposed to a high risk of work practice resulting from violation of the Regulations. I do not find grounds to warrant the cancellation or reduction of the imposed penalty.

(52) The employer's appeal is denied and the reviewing officer's decision confirmed. The reviewing officer's decision of March 31, 2000 should not be varied, cancelled or referred back to the Board for reconsideration.