

Decision of the Appeal Division

Number: 2001-0503

Date: March 12, 2001

Panel: Laura Bradbury

**Subject: Occupational Health and Safety Appeals —
Request for Stay of Decision Under Appeal (No. 1)**

Introduction

- (1) The applicant requests a stay of the December 14, 2000 decision of a reviewing officer of the Workers' Compensation Board. The reviewing officer imposed an administrative penalty of \$5,000 on the applicant for a breach of section 11.2(1) of the *Occupational Health and Safety Regulation*. The section requires an employer to provide fall protection for workers when work is being done [above] 10 feet.
- (2) The applicant's request for a stay of the decision is brought pursuant to section 210(1) of the *Workers Compensation Act* (the Act) which states that unless the Appeal Division directs otherwise, an appeal does not operate as a stay or suspend the operation of the decision under appeal.

Issue(s)

- (3) Is the employer entitled to a stay of the reviewing officer's decision?

Background

- (4) The applicant appealed the reviewing officer's decision to the Appeal Division on January 8, 2001 which is within the 30-day time period for filing an appeal of an administrative penalty.
- (5) An appeal officer in the Appeal Division wrote to the applicant on January 18, 2001 and asked the applicant to provide written submissions in support of the request for a stay. The appeal officer referred the applicant to Appeal Division Decision #27, item 4.3 which outlines the criteria we will consider in deciding stay requests. The item states in part:

In the context of occupational health and safety, the most important factor to consider is whether the granting of a stay would endanger worker safety.

Other factors to be considered by the Appeal Division in determining whether to issue a stay or suspension pending the hearing of an appeal include:

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- (1) an assessment of the merits of the appeal to ensure the appeal is not frivolous; that is, there is a serious question to be heard.
 - (2) Whether the appellant would suffer irreparable harm if the stay is not granted (for example, loss of a business), and
 - (3) An assessment as to which party would suffer greater harm or prejudice from granting or denying a stay or suspension.
- (6) The applicant's representative provided submissions on January 23, 2001. The representative made the following points in support of the applicant's stay request:
- Workers were not endangered by the alleged violation of the regulation due to the fact that the applicant had not been registered with the Board since early 2000 and has had no workers since then.
 - The applicant is not an employer under the Act and therefore no assessments or penalties can be collected from him.
 - The reviewing officer erred in interpreting a central policy issue about varying the amount of the penalty.
 - The appeal raises a serious issue – the applicant disputes the reviewing officer's findings of fact.
 - The applicant will suffer irreparable harm if the decision is not stayed. He is the sole employee of the operation and his income is minimal.

Decision

- (7) I have considered the applicant's submission in light of the Act and the Appeal Division's criteria for granting stay applications. The ultimate issue for me is whether it would be just and equitable to issue a stay given the relative risk of harm to the parties if a stay is granted. This involves a balancing of the factors outlined in Decision #27.
- (8) In the circumstances of this case I am persuaded that a combination of the following factors support granting the request for a stay:
- The applicant contests the reviewing officer's finding that he is an employer and submits that he had no employees other than himself at the time of the alleged violation; therefore, no other workers are affected.
 - The applicant's financial situation is precarious considering the information that his total assessable payroll in the 3 years prior to the incident was \$15,163. The applicant's representative submitted information that the applicant has

no assets other than a 34 foot wooden boat which is over 40 years old and is worth approximately \$3,000; he also has a 1997 vehicle with 170,000 km.

- The quantum of the administrative penalty is almost 5 times greater than the applicant's assessable payroll of \$1,100 in the 6 months prior to the alleged violation.
- This is not a frivolous appeal since the applicant alleges errors of fact and an error in the interpretation of policy as the basis of the appeal.

(9) By granting the stay request, I am not finding that the applicant will succeed in his appeal, only that the criteria for granting a stay have been met in this case.

Conclusion

- (10) The applicant's request for a stay of the reviewing officer's December 14, 2000 decision is granted. Therefore, the \$5,000 administrative penalty will not be collected before the appeal can proceed.
- (11) The Appeal Division will contact the applicant about the merits of the appeal.

