

Decision of the Appeal Division

Number: 2001-0535

Date: March 16, 2001

Panel: Laura Bradbury

**Subject: Occupational Health and Safety Appeals —
Request for Stay of Decision Under Appeal (No. 2)**

Introduction

- (1) The employer requests a stay of the November 23, 2000 decision of a reviewing officer in the review and penalty section of the Workers' Compensation Board. The reviewing officer imposed an administrative penalty in the amount of \$20,189.40 for a breach of Occupational Health and Safety Regulation section 11.2(1). The section requires an employer to ensure a fall protection system is used in specific circumstances.
- (2) The employer has appealed the reviewing officer's decision to the Appeal Division. The employer's request for a stay is brought under section 210(1) of the *Workers Compensation Act* (the Act) which states that unless the appeal tribunal directs otherwise, an appeal does not operate as a stay or suspend the operation of the decision under appeal.
- (3) If I grant the stay, the employer does not have to pay the penalty in advance of its appeal to the Appeal Division.

Issue(s)

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

Background

- (5) The employer filed its appeal of the reviewing officer's decision with the Appeal Division on December 19, 2000 which is within the 30-day time period specified in section 209 of the Act.
- (6) An appeal officer wrote to the employer, the joint health and safety committee, and the union on January 30, 2001 requesting submissions on the stay request. The appeal officer enclosed a copy of Appeal Division Decision #27 which sets out the factors we will consider when deciding whether a stay should be granted. The appeal officer summarized the factors:
 1. Worker's safety is the paramount factor in considering whether a stay will be granted;

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2. The merits of the appeal are assessed to ensure it is not frivolous and there is a serious question to be heard;
 3. Whether the appellant will suffer a irreparable harm if the stay is not granted (for example, loss of a business); and
 4. There is an assessment as to which party would suffer the greater harm or prejudice from granting or denying a stay.
- (7) The employer provided a written submission on February 2, 2001 and made the following points in support of its stay request:
- The breach of section 11.2(1) resulted from the failure of a foreman and two workers to adhere to known, written, reviewed, and commonly used procedures and was contrary to instructions from the site superintendent. Those employees have since been reprimanded verbally and in writing. The employees are also being remedially trained. Thus, workers' safety is not an issue pending appeal.
 - The employer has a long history of instituting and auditing health and safety programs and therefore has a documented record of active support for health and safety in the workplace.
 - The administrative penalty is large and will require the employer to seriously restrict its spending which may affect the safety program's budget. The employer suggested that the administrative penalty be transferred instead to the purchase or development of safety-related equipment or procedures.
- (8) No other submissions were received on the stay issue.

Decision

- (9) I have considered the employer's submission in light of the Act and the Appeal Division's criteria for granting stay applications. The wording in section 210 of the Act establishes that a stay is an extraordinary remedy. A stay should only be granted where the employer has established sufficient grounds to satisfy the criteria set out in Decision #27.
- (10) I agree with the employer that the appeal raises a serious issue. The employer contends the reviewing officer did not give sufficient weight to its evidence that the violation was due to the independent actions of three workers. Therefore, the appeal is not frivolous.
- (11) I find, however, that the employer has not met the other criteria for granting a stay. The employer referred to possible budget restrictions if it has to pay the administrative penalty prior to the appeal but did not provide evidence that paying the penalty will have a serious impact on its ability to operate its business. I find, therefore, that paying the administrative penalty now will not cause the employer irreparable harm.

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- (12) With respect to balancing the various interests, I believe the circumstances surrounding the violation as found by the reviewing officer require maintaining the status quo pending the outcome of the appeal. This will underscore the importance of workers' safety and the need to comply with the Regulation's fall protection requirements.
 - (13) The employer's suggestion about applying the penalty to safety-related equipment is one that is more appropriately dealt with by the panel hearing the merits of the appeal.

Conclusion

- (14) The employer's request for a stay of the reviewing officer's November 23, 2000 decision is denied. The Appeal Division will contact the employer about the merits of the appeal.

