

Decision of the Appeal Division**Number: 2002-1769; 2002-1770****Date: July 11, 2002****Panel: John Steeves, Herb Morton, Heather McDonald****Subject: Whether it is Appropriate to Impose a Claims Cost Levy Under 73(1) in Addition to an Administrative Penalty Under Section 196**

OCCUPATIONAL SAFETY AND HEALTH (SANCTIONS) (PROCEDURAL FAIRNESS) – A fatal injury at the employer's premises led to the imposition of both an administrative penalty under section 196 and a claims cost levy under section 73(1) of the *Workers Compensation Act* (the Act) – A review by the Review and Penalty Section rejected the employer's argument that imposing an administrative penalty and a claims cost levy was inappropriate and contrary to published Board policy – The employer submitted that since changes to the Act by *Bill 14* in 1998 were equivalent to the repeal and simultaneous re-enactment of essentially the same statute, there is a continuation of former policies – The employer argued that *Rehabilitation Services and Claims Manual* item #115.20, concerning alternate penalties, was still applicable – The Appeal Division panel carefully reviewed the application of item #115.20 and found it cannot be assumed to reflect the current intent of the Panel of Administrators' concerning the relationship between s. 73(1) and s. 196 of the Act – Employer's appeal denied.

Law: WCA (1996): s. 73(1), s. 196(1)**Policy:** RSCM: #94.20; #115.20**Decisions:** *Smith v. I.C.B.C.* (1981), 30 B.C.L.R. 31; Appeal Division Decision No. 98-1950, 15 *Workers' Compensation Reporter* 26518 *Workers' Compensation Reporter* p. 859

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- (1) This decision relates to two decisions of the Workers' Compensation Board (the Board) following a fatal injury at the employer's premises. Both were dated November 15, 2001 and both were made by the Review and Penalty Section, Prevention Division, of the Board.
 - (2) The first decision was to impose an administrative penalty in the amount of \$10,000.00 against the employer, pursuant to section 196 of the *Workers Compensation Act* (the Act). The second decision was to impose a levy in the amount of \$41,634.88 against the employer, pursuant to section 73(1) of the Act. The employer has appealed these decisions to the Appeal Division, arguing that it was inappropriate to impose an administrative penalty under section 196, and a claim costs levy under section 73(1), of the Act.
 - (3) After preliminary consideration, the Appeal Division panel scheduled an oral hearing for July 23, 2002, to further inquire into the background facts and evidence. Following a prehearing telephone conference on June 6, 2002, the employer's lawyer confirmed by letter of July 5, 2002 that the employer is content to have the outcome of this matter rest on the success or failure of its argument that it was inappropriate to levy an assessment under section 73(1) of the Act in view of the fact that an administrative penalty had already been established under

section 196 of the Act for the same infraction. The lawyer representing the employer has provided extensive legal argument dated February 19, 2002 and June 24, 2002 (together with a book of authorities).

Issue(s)

- (4) Was there an error of law or policy in the decision to impose a claim costs levy under section 73(1), in addition to an administrative penalty under section 196 of the Act?

Background

- (5) In view of the narrow basis on which the employer's appeal is being pursued, the factual background will not be set out in detail. Very briefly, the employer operated in the fibre optic cable business. On December 14, 1999, a worker of the employer was fatally injured. He was rewinding fibre optic cable onto a wooden reel when he was caught in the bight and carried around a number of revolutions resulting in serious injuries to his head and chest after hitting the concrete floor. An electric eye had been in place as a safeguard but this was apparently not adjusted to accommodate the various sizes of reels used in production.

Decisions of the Board

- (6) On October 16, 2000 the Board's occupational safety officer (O.S.O.) reviewed the December 14, 1999 fatal injury as well as the history of similar violations. An administrative penalty pursuant to section 196 of the Act and a levy of claim costs pursuant to section 73 of the Act were recommended. By letters dated February 19, 2001 and June 12, 2001, the employer was advised that an administrative penalty in the amount of \$10,000.00 would be considered and a levy for an additional sum of \$40,000.00 (plus C.P.I. increases) would be considered.
- (7) A review was conducted by the Board on the basis of written submissions provided by counsel for the employer dated August 7, 2001. The employer did not oppose a penalty pursuant to section 196 of the Act in the amount of \$10,000.00. However, the employer objected to an administrative penalty pursuant to section 196 as well as a claim costs levy pursuant to section 73(1) of the Act. According to counsel, it was inappropriate and contrary to published Board policy to impose both the administrative penalty and claim costs levy.
- (8) On November 15, 2001, the Review and Penalty Section issued a decision with regards to the review of the administrative penalty and levy. The reviewing officer concluded that an administrative penalty pursuant to section 196 of the Act in the amount of \$10,000.00 was appropriate. Further, the reviewing officer also found it was appropriate to levy the maximum sum of \$41,634.88 in respect of compensation paid for the fatal injury, pursuant to section 73(1) of the Act.
- (9) The reasoning of the review officer can be summarized as follows:

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- (a) The employer's argument that there should not be both a levy and penalty assessment was reviewed. Decisions of the Appeal Division reaching apparently different results were also reviewed.
 - (b) Recent health and safety legislation effective October 1, 1999 was noted as well as recent policy pursuant to that legislation.
 - (c) The reviewing officer found there was nothing evident in the wording of the new policy which prevents the Board's concurrent use of sections 196 and 73(1) of the Act.
 - (d) The reviewing officer noted that the employer acknowledged the failure to ensure that the electric eye was properly positioned. He recognised that "such a failure defeated its very purpose to safeguard workers" but he found "such a neglect was not deliberate or willful, and did not constitute 'gross negligence'."
 - (e) The reviewing officer noted the conclusion of the accident investigation report that this accident could have been avoided if the employer had recognized their workers were not complying with the essential need of the electric eye being positioned to match the reel size in use. If the employer had provided proper supervision and training of the cable winding operation the accident could have been prevented.
 - (f) It was evident that the operation of the cable rewind machine was an activity that exposed the workers to a "high" risk of hazard. A prior accident with the same machine and the provision of the electric eye following that accident were noted. The O.S.O.'s investigation, including interviewing of workers, revealed that it was common for workers to work within the danger area without the electric eye having been properly adjusted.
 - (g) The circumstances demonstrated a breakdown in the employer's responsibilities to properly supervise their staff and ensure they were following the safe and required operating procedures. The employer also failed to be duly diligent and, "to adopt all reasonable means for the prevention of this most unfortunate accident." The reviewing officer found the death of the worker was substantially due to the employer's failure to adopt reasonable means for the prevention of injuries, death or occupational diseases.
- (10) It was noted that the employer did not present any arguments concerning the quantum for a levy pursuant to section 73(1) of the Act. Considering the accident resulted in the death of the worker, the reviewing officer applied the maximum levy of \$41,634.88. (The pension reserve on the claim for dependant's benefits exceeded \$300,000.00.)

Law and Policy

- (11) The following provisions of the Act are applicable to this decision.
- (12) Section 73 of the Act provides:

73(1) If

- (a) an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and
- (b) the board considers that this was due substantially to
 - (i) the gross negligence of an employer,
 - (ii) the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational diseases, or
 - (iii) the failure of an employer to comply with the orders or directions of the board, or with the regulations made under Part 3 of this Act,

the board may levy and collect from that employer as a contribution to the accident fund all or part of the amount of the compensation payable in respect of the injury, death or occupational disease, to a maximum of \$40,000.

- (2) The payment of an amount levied under subsection (1) may be enforced in the same manner as the payment of an assessment may be enforced.
[B.C. REG 162-99, Oct 1 1999]

(13) Section 196 of the Act provides in part:

196(1) The board may impose an administrative penalty in accordance with this section if it considers that

- (a) an employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
- (b) an employer has not complied with this Part, the regulations or an applicable order, or
- (c) a workplace or working conditions are not safe.

...

(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 \$500 000.

...

(9) If an administrative penalty is imposed on an employer, a prosecution under this Act for the same contravention may not be brought against the employer.

(14) The following are excerpts from policy of the Panel of Administrators that are applicable to this decision.

(15) Item D24-73-1 of the *Prevention Manual* provides in part:

RE: Imposition of Levies – Charging of Claim Costs

Section 73 authorizes the Board to charge claims costs to the employer in certain circumstances. The maximum of \$40,000 is adjusted in accordance with the Consumer Price Index under section 25 of the Act.

...

This section may be applied if:

- the grounds for an administrative penalty under Item D12-196-1 are met; and
- a serious injury or disablement from occupational disease, or a death, results from a violation of the regulations.

A claim may be reopened at any time in the future and further costs may be incurred after the decision under section 73(1). The Board will charge the employer:

- the costs incurred up to the time of the decision; and
- any additional amounts that result from matters still under consideration by the Compensation Services Division or an appeal body under a current valid appeal.

Where appropriate, the Board will apply the policies and practices set out in the following Items to the charging of claim costs under section 73(1):

- D12-196-1, -2, -3, -4, -5;
- D12-196-8;
- D12-196-10, -11; and
- D16-223-1.

(16) Policy in the *Rehabilitation Services and Claims Manual* provides in part:

#115.20 Significance of Employer's Conduct in Producing Injury

As an alternative to the charge under section 73(2), penalty assessment may be levied under sections 70 and 73(1). These are general provisions allowing the Board to penalize employers for infractions of Occupational Safety and Health or First Aid Regulations or for other unsafe practices which apply whether or not an injury has occurred. Levies made under any of these sections are additional to the employer's ordinary liability to pay assessments and are credited to the Board's general funds rather than to the employer's class or subclass.

[emphasis added]

Submissions

- (17) The employer relies on the policy at #115.20 of the *Rehabilitation Services and Claims Manual*. The employer further relies on the reasoning of the majority in published Appeal Division Decision #98-1950, 15 *Workers' Compensation Reporter* 265. The employer objects to the reasoning expressed in subsequent unpublished Appeal Division Decisions #00-1160, 00-1434, and 2001-1547, which came to the opposite conclusion.
- (18) The employer's lawyer notes that in 1998, the legislature passed *Bill 14* (which came into effect on October 1, 1999) The former s. 73(1) became s. 196, and the former s. 73(2) became s. 73(1). He submits that for the purposes of interpretation, the repeal and simultaneous re-enactment of substantially the same statutory provisions must be construed, not as an implied repeal of the original statute, but as an affirmation and continuance of the statute, and the rules which it expresses are deemed to remain in force without interruption [see *The Interpretation of Legislation in Canada*, Third Edition, Pierre-André Côté, p. 104, and *Smith v. ICBC*, (1981) 30 B.C.L.R. 31]. He submits that if an enactment is repealed and another enactment is substituted for it, the procedure established for the new enactment must be followed as far as it can be adapted in the recovery or enforcement of penalties and forfeitures incurred under the former enactment, in the enforcement of rights existing or accruing under the former enactment, and in a proceeding relating to matters that have happened before the repeal. This implies that regulations adopted under the authority of the earlier enactment giving effect to the previous statute apply in such a way as to permit operation of the new one.
- (19) The employer's lawyer submits that policy #115.20 should be treated as equivalent to a regulation in respect of continuity upon the passing of replacement legislation. Accordingly,

policy #115.20 is still applicable to s. 73(1) and s. 196 of the current Act. He submits that while there are differences between s. 196 of the Act and s. 73(1) of the Act as it existed prior to October 1, 1999, these are not differences in substance (except that the current section gives the Board a discretion as to the amount of any claim costs levy under s. 73(1), whereas the former s. 73(2) required the Board to levy the entire amount of compensation that had been paid up to a specified cap).

- (20) The employer's lawyer notes that the overall scheme of the Act is "no fault," and the old s. 73(2) and current s. 73(1) are exceptions to that general scheme. He submits that by policy, the Board has chosen to deal specifically with the interpretation of this section. Policy at #115.20 provides that: "As an alternative to the charge under section 73(2), penalty assessment may be levied under sections 70 and 73(1)." He argues that the Board as a matter of policy has clearly set out that levies under the old s. 73(1) and (2) are mutually exclusive. He notes that Decision #98-1950 invited clarification of the policy at #115.20 (at Volume 15, page 276), but none has been provided.

Findings and Reasons

- (21) The initial Order in this case, and the June 12, 2001 notice letter to the employer, cited s. 115(2)(e) of the Act concerning the employer's obligation to provide instruction, training and supervision to workers. The November 15, 2001 decision referred only to s. 115(2)(f) of the Act, concerning an employer's obligation to make a copy of the Act and regulations available for review by the employer's workers. The references to s. 115(2)(f) were evidently intended to refer to s. 115(2)(e). While this error was unfortunate, we note that the employer does not appear to have been misled by the incorrect references in the decision. We infer that the employer was aware that those references in the decision were concerned with the employer's responsibilities under s. 115(2)(e), rather than (f).
- (22) The employer has no objection to the \$10,000 administrative penalty, except in relation to the claim costs levy (of \$41,634.88) being applied together with the administrative penalty. The employer's appeal concerning the imposition of a claim costs levy under s. 73(1), is brought under section 96(6)(c) of the Act. This requires that grounds be established for the employer's appeal, of error of fact or law or contravention of published policy.
- (23) The employer has elected to restrict its appeal to the issue of law and policy as to whether it is appropriate or legally permissible to apply a s. 73(1) claim costs levy and an administrative penalty together. In this appeal, the employer does not ask the Appeal Division to review the facts, to determine whether there was any error of fact in the decision to impose a claim costs levy under s. 73(1). The employer's lawyer specifically advised that "the circumstances respecting the operation of the electric eye and the training related to it . . . need not be explored."
- (24) The panel has acceded to the employer's request to address its appeal on this limited basis. The panel has, therefore, refrained from engaging in a fuller enquiry. The panel has not inquired into the facts to determine, for example, whether the panel would find gross negligence on the part of the employer pursuant to s. 73(1)(b)(i) of the Act. In view of the limited nature of this review, the panel will not address the argument presented in the February 19, 2002 submission

concerning the standard by which failures under s. 73(1) are to be measured.

- (25) The Appeal Division will not provide declaratory opinions, on issues which are not necessary to the determination of an appeal. We find that the issue of law and policy raised by the employer (as to whether a claim costs levy under section 73(1) and an administrative penalty under section 196 may both be imposed in relation to the same event), is one which was addressed in the November 15, 2001 decision, and is properly before us on the employer's appeal.
- (26) The employer's lawyer relies on published Appeal Division Decision #98-1950. That decision was based on the express wording of the policy at #115.20 of the *Rehabilitation Services and Claims Manual*, which was in effect at the time of the events addressed in that decision. While #115.20 remains in that Manual, it is stated to concern the Board's authority to levy penalty assessments under sections 70 and 73(1) as an alternative to a claim costs levy under s. 73(2) of the Act. The authority to impose a claim costs levy is now contained in s. 73(1) of the Act. The Board's authority to impose an administrative penalty is now contained in s. 196 of the new Part 3 to the Act, pursuant to the *Bill 14* amendments effective October 1, 1999.
- (27) On its face, therefore, #115.20 is concerned with the relationship between the former s. 73(1) and (2). It is evident that #115.20 has not been reviewed by the Panel of Administrators in the context of the *Bill 14* amendments.
- (28) The employer's lawyer argues that the policy at #115.20 concerning the application of s. 73(2) of the Act continues to speak to the application of the similarly worded s. 73(1). We have considered, in this regard, whether the policy at #115.20 concerning the relationship between s. 73(1) and (2), continues to apply in respect of the relationship between the current s. 73(1) and section 196 of the Act.
- (29) In considering this issue, we note that *Bill 14* resulted in very substantial revisions to the Act effective October 1, 1999. These statutory amendments were made effective prior to the accident on December 14, 1999 which gave rise to these appeals.
- (30) Previously, section 73(1) and (2) were both contained in Part 1 of the Act. Appeals under section 73(1) and (2) were both under s. 96(6) of the Act. Currently, section 73(1) is in Part 1, and section 196 is in Part 3 of the Act. Different appeal processes apply to decisions under section 73(1), and section 196 of the Act. Some of the points on which these appeal mechanisms differ concern:
- whether there is authority to grant an extension of time to appeal;
 - the applicability of the 90-day time frame for Appeal Division decision-making;
 - requirement for appeal grounds of an error of fact or law or contravention of published policy;
 - requirements for posting notices;

- standing of worker, union or other aggrieved person to appeal;
- requirement for service by registered mail or other means; and,
- power to issue a stay.

(31) On August 1, 1999, the Panel of Administrators approved a resolution entitled *Policies to Implement Bill 14 – Workers Compensation (Occupational Health and Safety) Amendment Act, 1998*.

(32) While not necessary to our decision, we note that another policy in the *Rehabilitation Services and Claims Manual* which was affected by *Bill 14* was previously set out at #94.20 of that Manual. An Appeal Division decision dated February 28, 2001 (#2001-0416) noted:

In view of the repeal of section 13(2) of the *Act* effective October 1, 1999, I would flag the need for revision of the policy at #94.20. Given the extensive provisions contained in the new Part 3 of the *Act*, and the fact that those provisions are largely dealt with by the prevention division rather than the compensation services division, there would appear some risk of such situations not being appropriately addressed under the new sections of the *Act* unless guidance is provided by policy to board officers in the compensation services division. Coordination between the compensation services division and the prevention division will likely be required to ensure that such issues are addressed under the current provisions of the *Act*.

(33) By resolution dated July 17, 2001 (*Re: Claims Avoidance*), the Panel of Administrators amended policy item #94.20 of the *Rehabilitation Services and Claims Manual*. That amendment was stated to recognize the repeal of s. 13(2), the enactment of section 177 of the *Act* regarding attempts to prevent reporting, and the Board's authority to levy an administrative penalty in respect of a violation of s. 177. These policy changes were made effective August 1, 2001. The new policy at #94.20 also states:

As an alternative to imposing an administrative penalty, the Board may refer the case to Crown Counsel for consideration of prosecution.

(34) (This new policy uses the phrase "as an alternative," in connection with the statutory prohibition in s. 196(9) to bringing a prosecution where an administrative penalty has been imposed. This usage tends to confirm the interpretation of the phrase "as an alternative" in the policy at #115.20, which was applied in Decision #98-1950.)

(35) The Panel of Administrators has undertaken a process for consolidating the policies contained in the Prevention Division's *Policy and Procedure Manual* into the new *Prevention Manual*. The amendment of #94.20 on August 1, 2001, in light of the *Bill 14* amendments effective October 1, 1999, suggests that the policies in the *Rehabilitation Services and Claims Manual* had not previously been fully reviewed to ensure they remained valid in light of the *Bill 14* amendments.

(36) We appreciate that the wording of the current s. 73(1) is similar to the wording of the prior s. 73(2), and the wording of the current s. 196 is similar to the wording of the former s. 73(1).

However, we do not consider that this is a situation involving the repeal and simultaneous re-enactment of substantially the same statutory provisions. The new Part 3 of the Act contains very substantial changes to the Act, with many significant differences. We do not consider that this is a case where the prior policy can be assumed to speak to the new provisions in the Act. Accordingly, we do not find that this is a situation involving a simple affirmation and continuance of the statute, so that the policies may be viewed as remaining in force without interruption. The policy at #115.20, which concerned the relationship between the former s. 73(1) and (2) of the Act, cannot, in our view, reasonably be assumed to reflect the current intention of the Panel of Administrators in terms of providing policy guidance concerning the relationship between the current s. 73(1) and s. 196 of the Act.

- (37) Accordingly, we conclude that one cannot assume that #115.20 applies to the new section 73(1). To the extent #115.20 provided guidance concerning the relationship between section 73(1) and (2), we do not consider that it can be safely inferred that this same guidance would apply concerning the relationship between section 73(1) and the new provisions for administrative penalties under Part 3, given the extent of the revisions to the Act set out in Part 3.
- (38) Section 196(9) of the Act expressly prohibits the Board from bringing a prosecution against an employer, where an administrative penalty has been imposed on the employer. There is no provision in the Act to expressly prohibit the Board from imposing an administrative penalty under s. 196, and a claim costs levy under s. 73(1), in connection with the same event. We do not consider that the wording of the Act necessarily requires that s. 73(1) and s. 196 be mutually exclusive.
- (39) The employer's payroll for 1999 was close to seven million dollars. Pursuant to the Panel of Administrators' resolution dated September 21, 1999, published at 15 *Workers' Compensation Reporter* 585, the *Recommended Schedule of Sanctions* in effect in December, 1999 provided for an administrative penalty of \$10,000.00 (based on a Type III violation, and a payroll of \$5.7 to 11.4 million). Under the current schedule approved under the *Bill 14* amendments, the "basic amount" of the administrative penalty would be \$68,250 plus 0.125% of payroll over 5,000,000, or \$75,000, whichever is less. Having regard to the substantially increased range of administrative penalties currently being imposed, it may be that the arguments against imposing both an administrative penalty and a claim costs levy are now even more compelling. However, that remains a policy issue, on which the Panel of Administrators may provide direction. Alternatively, it is an issue which could be expressly addressed in the Act, in similar fashion to s. 196(9).
- (40) For the purposes of our decision, we need not contemplate what new policy might be developed concerning the relationship between s. 73(1) and s. 196. Conceivably, the Panel of Administrators might choose to adopt a policy requiring the Board to choose between imposing a claim costs levy under s. 73(1) or imposing an administrative penalty under s. 196. However, the issue before us in this appeal is whether the November 15, 2001 decision involved an error of law or policy, in imposing a claim costs levy under section 73(1), in addition to an administrative penalty under section 196 of the Act. As set out above, we consider that the policy at #115.20 is obsolete, in view of the October 1, 1999 changes to the Act. In the absence of any guidance from policy at #115.20, we are not persuaded that the board officer erred in law or policy by

imposing a claim costs levy under section 73(1), in addition to an administrative penalty under section 196 of the Act.

- (41) Decision #98-1950 stated at page 276 of Volume 15 of the *Workers' Compensation Reporter*:

Having regard to the concerns expressed in the dissent, we will ask the chief appeal commissioner to refer this decision to the attention of the panel of administrators. Consideration might be given to whether the policy currently contained at #115.20 of the *Rehabilitation Services and Claims Manual* would be better placed in the *Occupational Safety and Health Division Policy and Procedure Manual*, and whether any changes to the wording of the policies may be appropriate in respect of the apparent contradiction between them. While we consider that the policies are reasonably interpreted in a fashion which resolves this seeming contradiction, it would be desirable that the wording be clarified to remove any question as to their intended effect. Consideration might also be given to providing additional policy guidance as to the general circumstances in which consideration will be given to levying the costs of a claim against an employer under section 73(2) of the Act.

- (42) In view of our conclusion that the policy at #115.20 is obsolete, based on its reference to the authority in s. 73(2) to impose a claim costs levy, a review of #115.20 is clearly required. The chief appeal commissioner will bring this concern to the attention of the Panel of Administrators. It may well be desirable, in any review of #115.20, to provide additional policy guidance as to the general circumstances in which consideration will be given to levying the costs of a claim against an employer under section 73(1) of the Act, and concerning the situations in which the maximum amount under s. 73(1) should be levied. This might include policy direction as to the meaning and application of the situations in section 73(1)(b) of the Act.

Conclusion

- (43) The employer's appeal is denied. The November 15, 2001 decision did not err in law or policy in imposing a claim costs levy under section 73(1) in addition to an administrative penalty under section 196 of the Act.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

