

REPORTER

Decision of the Appeal Division

Number: 91-0802
Date: November 8, 1991
Panel: Patrick L. Byrne, James L. Tonn, Sarwan Boal
Subject: O.S.H. Penalty – A Program of Compliance

This is an appeal of the June 14, 1991 decision of the director of Field Services, Occupational Safety and Health Division (O.S.H.) to impose a penalty assessment of \$7,500.00. The director concluded that the employer violated certain *Industrial Health and Safety Regulations* on November 22, 1990 and the circumstances warranted the penalty assessment.

The employer appeals on the grounds of a contravention of a published policy of the governors. The issue is whether the employer has a lawful excuse for the violations.

Background

The employer is a general contractor. On November 22, 1990 the employer's worksite was inspected by a W.C.B. occupational safety officer. The officer observed the following infractions and cited them on inspection report #90811762:

Inadequate footwear:	regulation 14.08(1)(2)
Inadequate lighting:	regulations 13.81(b)(c), 8.44
Inadequate housekeeping:	regulation 8.54
Single scaffold plank:	regulation 32.10(1)
Protruding steel:	regulation 34.28(11)

On December 19, 1990 the employer was sent a show-cause letter proposing a penalty assessment of \$7,500.00 on the basis that the first four infractions were of a repeat nature.

On March 25, 1991 the employer attended a divisional oral hearing and presented evidence. On June 14, 1991 the director imposed the penalty assessment.

Evidence and Argument

There is no dispute that the observations of the officer on November 22, 1990 and the subsequent citations are factual. The employer argues that the penalty assessment was inappropriate based on the employer's efforts to comply. They quote O.S.H. policy 1.0.0 (page 4, part 1):

If the order issued refers to items which have been overlooked by a management actively pursuing a policy of compliance with the regulations, a penalty assessment will not normally be considered.

The employer's evidence is that over the past three years the inspection reports issued by the Board indicate that the employer has taken significant and substantial steps to improve its occupational safety and health record. Further, that this was due to a strong commitment to workplace safety.

The employer's evidence of their commitment is that they hired a full-time safety coordinator, with executive authority and responsibility to develop policies and procedures to bring the employer into compliance. Further, the safety coordinator has authority to dismiss workers who neglect or refuse to follow these policies or procedures. Finally, a safety program has been implemented, including a reprimand policy as well as weekly tool-box chats where safety issues are discussed.

The employer presented evidence that:

[their] recent safety record, particularly since it began employing a full-time safety coordinator, has been much more favorable than before, as evidenced by the numerous "clean sheets" issued in 1990 and 1991.

The employer points to the October 12, 1990 inspection at the same worksite which found no violations as significant evidence of their compliance with the regulations at that time.

The employer also maintains that the above evidence demonstrates that:

From the foregoing it is clear that [the employer] is actively pursuing a policy of compliance with the regulations. There is no basis in fact to suggest that [the employer] is complacent about workplace safety. There is certainly no basis for suggesting that [the employer] deliberately fails to comply with the regulations. On the facts, [the employer] is making vigorous efforts to comply with the regulations and to adopt sound practices, and will continue to do so.

Findings and Reasons

The employer interprets O.S.H. policy 1.0.0 such that where a management is actively attempting to comply with the regulations, penalty assessments should not normally be considered. O.S.H. policy 1.0.0 differs from O.S.H. policy 1.4.1. (Applications of Sanctions) which states, in part:

If the orders refer to items which have been overlooked by a management actively pursuing a program of compliance, sanctions should not normally be considered.

The important distinction is that 1.0.0 merely requires a policy of compliance while 1.4.1 requires a program of compliance. These are significantly different tests. The panel favours the use of 1.4.1 for several reasons. The first is that 1.4.1 is specific to the application of sanctions and secondly the intent of the *Workers Compensation Act* is to prevent workplace injuries and diseases. Such injuries and diseases are better prevented by employers having a program of compliance with the regulations rather than merely a policy of compliance. In this case, it is the employer's program of compliance that is pertinent to the application of sanctions.

The second point with respect to policies 1.0.0 and 1.4.1 is the interpretation of the term "actively pursuing" a program or policy of compliance. The employer takes the position that the term means "actively attempting to comply" with the regulations. The panel does not agree. Considering the intent of the *Act* described above, it would defeat the intent to allow employers to merely attempt to comply with regulations. The proper interpretation of the term, in this case, is that the employer have a program of compliance and normally be in compliance with the regulations by "actively pursuing" their program. It is only when a few items are overlooked in such a program can the employer be excused from penalty assessments, based on point 1 of policy 1.4.1. (the policies allow lawful excuses based on other points). This approach is supported in policy 1.0.0. (page 3) which states in part:

... Such frequency in the use of sanctions could also be a discouragement to an employer who is *conscientiously striving to maintain a continuing compliance with the regulations*, and who has simply overlooked one or two particulars. (emphasis added)

The employer's evidence is that the program designed to ensure compliance with the regulations was implemented sometime after the inspection of November 22, 1990. While the panel was impressed by the sincere efforts of the employer to implement a program, the panel considers only those efforts made on or before November 22, 1990, the date of the infractions, to be pertinent to the penalty assessment under appeal.

The employer's evidence is that on November 22, 1990 they had a written health and safety program but it had not been implemented.

The panel finds that the employer did not have a program of compliance on November 22, 1990.

The penalty assessment was imposed at \$7,500.00. This amount appears in the recommended schedule of penalties in O.S.H. policy 1.4.1 as a type 3, high-risk penalty. The violations on which the assessment was based are clearly not high-risk violations. Considering this employer's previous penalty assessment record the assessment under appeal is more properly placed in the type 2 category in the amount of \$6,000.00.

Conclusion

The employer did not have a program of compliance at the time the infractions occurred. The panel finds that there is no contravention of a published policy of the governors with respect to the application of the penalty. There is, however, an error in the quantum of the penalty assessment.

THE APPEAL IS ALLOWED, IN PART. THE PENALTY ASSESSMENT IS REDUCED TO \$6,000.00.

Editors' note: This decision has been edited for publication.