

Decision of the Appeal Division

Number: 92-0923
Date: April 27, 1992
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Section 96.1 and 96(2)

This is a request for reconsideration of a commissioners' decision of March 22, 1991. The request is contained in a November 25, 1991 letter to the Appeal Division from the president of the employer company (herein referred to as "the employer's representative"). The commissioners' decision confirmed two decisions of the Occupational Safety and Health Division (O.S.H.), levying assessments of \$4,500.00 and \$9,000.00 for violations of the *Industrial Health and Safety Regulations* relating to excavations.

The *Workers Compensation Act* was amended on June 3, 1991 when the *Workers Compensation Amendment Act, 1989* (Bill 27) came into force, creating a new Appeal Division. The jurisdiction of the Appeal Division to reconsider previous decisions is set out in Bill 27 as follows:

Reconsideration by appeal division

- s. 96.1 (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
- (2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
- (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
- (a) is substantial and material to the decision, and
 - (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

he may direct that

- (c) the appeal division reconsider the matter, or
- (d) the applicant may make a new claim to the board with respect to the matter.

Section 17(5) of Bill 27 contained the following transitional provision:

A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*.

In order for there to be reconsideration of the decision of the prior commissioners by the Appeal Division under Section 96.1 of the *Act*, the statutory requirements in respect of new evidence must be met.

The Appeal Division may also reconsider a decision made by the former commissioners on the basis of the governors' resolution of January 6, 1992, which reads as follows:

RESOLVED THAT the Appeal Division of the Workers' Compensation Board of British Columbia shall exercise the authority of the Workers' Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991 where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

The \$4,500.00 penalty was imposed by the Occupational Safety and Health Division in a decision dated April 11, 1990, for a violation of Regulation 38.06(1) which prohibits a worker from entering an excavation over four feet in depth without proper shoring, sloping or other protection. The initiating inspection report of O.S.H. stated that a worker was digging in a five-foot trench when the unshored and unsloped sides of the trench caved in. A follow-up inspection report stated that the shoring which had been installed was deficient.

In a letter dated September 21, 1989, the employer was advised that a penalty was being considered, and he was invited to provide written submissions or request a meeting with the Occupational Safety and Health Division concerning the matter.

Written submissions were provided, but no meeting was requested. The employer's representative submitted that he was not on the job site, and had not known that the hole would be as long and deep as it was. He requested consideration of the firm's excellent safety record, and the fact that this was a first offence and that safety training had since been provided to the workers. His submissions acknowledged that the shoring was inadequate and that it had been installed as an effort to show compliance rather than to ensure further safety.

The penalty of \$9,000.00 was imposed by the Occupational Safety and Health Division in a decision dated August 7, 1990, for another violation of regulations concerning excavations. In this case, the inspection report stated that a worker had entered the unshored and unsloped excavation, and that no certificate for soil stability of the excavation was onsite as required by the Regulations. A written submission was received from the foreman and the employer requested a meeting with the Occupational Safety and Health Division. According to the minutes of the meeting, the officer who had inspected the site explained that he had seen a pick and a pry bar in the excavation which was more than four feet deep, and was not properly shored. In their written submissions and according to the minutes of the meeting, the employer acknowledged that the excavation was not properly shored, but stated that no one had been working in the trench at that time. The employer advised that one worker (David Sommerfield) had worked from approximately the third rung down on a 10-foot ladder, using a long-handled shovel to clear waste from the bottom of the trench. Similar descriptions were contained in a notarized statutory declaration from Mr. Sommerfield and a handwritten statement from another worker.

The employer appealed both decisions of the Occupational Safety and Health Division to the previous commissioners. After reviewing the penalty of \$4,500.00, the commissioners concluded:

The Commissioners consider that it is clear that violations occurred. Your worker was found in an excavation that did not conform to the regulations. He had not received proper instruction. The responsibility of an employer is to ensure that workers safely perform their work . . .

In relation to the penalty of \$9,000.00, the following was stated:

The Commissioners point out that the regulation prohibits entry. It is not restricted to cases where a worker's feet touch the bottom of the excavation. They consider that aside from whether [the Occupational Safety Officer's] interviews revealed violations it is clear that [your employee] *entered* the excavation. The regulation

exists to ensure that workers are not exposed to the risk of an excavation collapsing. The fact that [the worker] was on a ladder would not have prevented injury had a collapse occurred.

The employer's representative submits that an oral hearing was necessary as there was "clearly an absolute credibility issue" between the occupational safety officer and his employees, and he had requested an oral hearing to provide his employees the opportunity to swear under oath if necessary as to the conditions that existed at the worksite on the day of the inspection. He further submits that he was never given the opportunity to have an unbiased hearing, and that the commissioners' decision was based on the biased information from the Occupational Safety and Health Division file.

The commissioners had denied the oral hearing request as follows:

As you were advised in [the] 18 May 1990 letter appeals to the Commissioners are usually dealt with through a review of the submissions and the information on file. The Commissioners consider that a fair and reasonable decision can be reached on these appeals without holding an oral hearing.

In his submissions, the employer's representative has not pointed to any new evidence which would meet the qualifications of s. 96.1.

He submits that the commissioners' decision to deny his request for an oral hearing constituted a breach of natural justice. The *Workers Compensation Act* did not require the commissioners to hold an oral hearing on an appeal, nor does it require the present Appeal Division to hold oral hearings on appeals.

Nonetheless, in some instances the failure to hold an oral hearing can constitute a breach of natural justice. Having reviewed this entire matter, however, I do not consider that such was the case here.

The employer's representative has alleged that a credibility issue was involved. I cannot agree. In respect to the first penalty assessment the facts were largely undisputed. With respect to the second penalty the facts alleged by the employer were accepted by the commissioners. The issue, however, was whether, in law, the position of the worker as established by the employer's evidence constituted having "entered" the trench for the purposes of the application of the regulation. The commissioners concluded that it did and, therefore, upheld the assessment of the penalty.

The employer also alleges an error of law based upon the previous decision being "based . . . on the biased information file from the occupational safety division."

No specific facts are alleged that would constitute bias on the part of the former commissioners. The employer was given ample opportunity to reply to the information placed on his file by the O.S.H. Division. As earlier indicated, the factual basis of the two penalties was not disputed.

The employer obviously disagrees with the interpretation of the regulation applied by the former commissioners. It was, however, within their jurisdiction to interpret the *Act* and regulations. Whether or not any different interpretation of the regulations is possible is not in issue. I could only set aside the previous commissioners' decision if their interpretation was patently unreasonable. I do not find that to be the case.

The employer's request for reconsideration under s. 96.1 or a reopening under s. 96(2) is, therefore, denied.

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

