

## Decision of the Appeal Division

**Number:** 92-0943  
**Date:** May 5, 1992  
**Panel:** Patrick L. Byrne, Lorna Pawluk, A. Grant McRitchie  
**Subject:** O.S.H. Penalty — Definition of Employer

---

This is an appeal of the January 8, 1991 decision of the director of the Field Services Department, Occupational Safety and Health Division (O.S.H.) to impose a penalty assessment of \$5,500.00. The director concluded that C Management Ltd. had violated Industrial Health and Safety Regulations 38.22(1), 46.74(e), 34.16(2), 8.04, 8.24(1), 8.18, 8.20 and 42.05 on March 29, 1990 and that the circumstances warranted a type 3 penalty assessment.

C Management Ltd. (referred to herein as "CM") appeals on an error of fact. The issues are whether there were violations of Regulation 42.05 and whether CM is the employer responsible for all the cited violations.

CM is a labour contractor. On March 29, 1990 a work site was inspected by a W.C.B. occupational safety officer. He observed workers drilling below inadequately scaled sections of an excavation rock face. He issued a 24-hour Board Officer Closure Order and cited CM for violations of Regulations 38.22(1), 46.74(e), 34.16(2), 8.04, 8.24(1), 8.18 and 8.20 on Inspection Report No. 90764144. The officer also reported that workers were dry drilling without any dust control. He cited CM for violations of Regulations 42.05, 8.18 and 8.20 on Inspection Report No. 90764147. The officer concluded that CM was the employer of the workers involved with the infractions. He recommended that CM receive a penalty assessment and on May 8, 1990 they were sent a show-cause letter proposing a penalty of \$5,500.00.

CM provided various written submissions and on January 8, 1991 the director imposed the penalty assessment.

CM filed a Notice of Appeal.

CM argued that they were not the true employer and that there was no violation of Regulation 42.05. They did not provide arguments with respect to the reported violations of Regulations 38.22(1), 46.74(e), 34.16(2), 8.04, 8.24(1), 8.18 and 8.20.

---

## Was C Management Ltd. the employer responsible for the health and safety of workers?

CM argued that they were not the true employer and that P Drilling and Blasting Ltd. (P) and M Engineering and Construction Ltd. (M) were the true employers.

CM registered with the Board on July 7, 1989. They provided information on the Employer's Registration Form that workers were first employed on July 10, 1989 and the description of their business was one of "excavation site cleanup." The firm indicated they only provided labour. On July 17, 1989 the Board Assessment Department wrote to the firm advising that they would be placed in industrial classification 072612. CM was determined by the Board to be a labour contractor based on the information provided by the firm upon registration.

Section 20:30:20 of the *Assessment Policy Manual*, "Administering Registration Requirements," states:

### 3. Labour Contractors

Registration for labour contractors is not mandatory but is *allowed*. Those labour contractors who do not elect to be registered, and any help they employ to assist them, are considered workers of the prime contractor or firm for which they are contracting, and that firm is responsible for assessments and injury reporting.

If a firm is a labour contractor and does not elect to register, the partners or proprietors, the proprietors spouse and any member of the partner's (family unit partnership only) or proprietor's family under the age of 19 years are covered through the prime contractor. If the firm is registered, and therefore considered an independent firm, these individuals are not covered unless Personal Optional Protection is in effect.

In this particular case CM voluntarily registered with the Board. They are, therefore, considered an independent firm. CM's effective date for injury reporting and assessment was July 17, 1989, the date their registration was accepted by the Board.

This panel is urged to find that P and M rather than CM are the true employers responsible for the health and safety of workers. In support of this argument is the decision of the Industrial Relations Council, I.R.C. No. C128/90. That case involved a determination of "employer" for the purposes of the *Industrial Relations Act* which

---

found P and M to be the employer rather than CM. The Council applied seven criteria extracted from the Ontario Labour Relations Board case law in order to determine which company was the employer for labour relations purposes. The criteria include direction and control over employees; remuneration; discipline; hiring and firing authority; party perceived by employees to be the employer; and the intention of the parties. Critical to its conclusion was the requirement that “the broker must be an active and *bona fide* participant in the arrangement, not a mere shadow.” (p. 13) The actual arrangement did not comply with the parties’ commercial arrangement; thus the participation of CM was not one of an employer under the *Industrial Relations Act*. CM relies on that decision to maintain that it is not the employer under the *Workers Compensation Act* and that the penalties ought not to have been levied against it.

We do not agree: the conclusion of the Industrial Relations Council has no impact on CM’s obligations under the *Workers Compensation Act*. The two pieces of legislation contain different definitions of “employer.” Section 1(1) of the *Industrial Relations Act* defines employer as “a person who employs one or more employees and includes an employers’ organization.” Section 1 of the *Workers Compensation Act* defines it this way:

“employer” includes every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry.

The lack of specific requirements in each piece of legislation means that development and refinement of these terms has been left to the respective statutory tribunals to define in accordance with the specific cases. The purposes of the two pieces of legislation are different. Section 27(1) of the *Industrial Relations Act* requires the Industrial Relations Council to interpret the legislation in such a way as to encourage “expeditious resolution of labour disputes.” By contrast, the purpose of the *Workers Compensation Act*, although not specifically set out in the *Act*, was defined by the Honourable Mr. Justice Charles W. Tysoe in his 1966 Commission of Inquiry into the *Workmen’s Compensation Act* as:

. . . the prime purpose of the *Act* is . . . to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible.

Under these circumstances, the decision of the Industrial Relations Council has no bearing on the authority of the Board to find that CM is the true employer and to impose penalty assessments for violations of regulations.

---

Since CM registered with the Board as an employer and paid assessments (on the workers' wages) they are for the purposes of the *Workers Compensation Act*, the employer of the workers.

Section 71(1) of the *Workers Compensation Act* provides in part:

The board may make regulations whether of general or special application and which may apply to employers, workers and all other persons working in or contributing to the production of an industry within the scope of this Part, for the prevention of injuries and industrial diseases in employment, and places of employment . . .

Section 73 of the *Workers Compensation Act* provides:

- (1) Where the board considers that
  - (a) sufficient precautions are not taken by an employer for the prevention of injuries and industrial disease;
  - (b) the place of employment or working conditions are unsafe; or
  - (c) the employer has not complied with regulations, orders or directions made under section 71,

the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

Therefore, since CM is the employer of the workers who were involved with the reported violations of regulations promulgated under Section 71(1) of the *Act*, penalty assessments under Section 73 of the *Act* may be applied to CM, if it is found that the violations occurred.

### **Were there violations of the regulations?**

Industrial Health and Safety Regulation 42.05 provides:

Every rock drill shall be equipped with a water jet, spray, or other device of a type acceptable to the Board to suppress drilling dust effectively. . . .

---

The employer argued that the violations pertaining to dry drilling did not occur. Their November 12, 1990 submission provides arguments with respect to reported violations of Regulations 42.05 on November 24, 1989, December 11, 1989 and March 29, 1990. The employer relies on information provided by P to dispute the orders. The O.S.H. Division applied the penalty in part for the reported violation of Regulation 42.05 on March 29, 1990. They relied on the other reported violations as evidence of the employer's history of non-compliance with this regulation.

The officer's evidence was that he observed the dry drilling in each case and that P's representative, although present on the worksite, did not take part in all the inspections. In determining whether there were violations of Regulation 42.05 the panel weighed the officer's direct evidence that he observed the violations against the employer's indirect evidence of comments provided by P's representative. The panel prefers the direct evidence of the officer. The employer did not provide any direct evidence from their employees on site during the inspections. The panel also notes that the employer first raised an objection to the orders following the show-cause letter of May 8, 1990. By that time there had already been three orders issued which were not challenged by the employer either to the officer or the O.S.H. Division. It may have been that the employer objected to the orders and chose not to challenge them prior to the show-cause letter for their own reasons. However, a lack of any challenge or appeal of the earlier orders weighs against the employer in this case. On the balance of probabilities, the panel finds that there were violations of Regulation 42.05.

The employer did not provide any evidence or argument with respect to the reported violations of Regulations 8.18 and 8.20 pertaining to worker training and supervision. While the employer initially objected to the orders at the divisional level they do not appear to have pursued that objection on appeal.

The employer did not provide any arguments or evidence concerning the reported violation of the regulations concerning work below an unscaled rock face, the more serious of the reported violations. The officer characterized this violation as one which, ". . . exposed workers to conditions which were immediately dangerous to their life and health."

The governors' policy 1.4.3 ("Penalty Assessments in High Risk Work Situations") contained in the *O.S.H. Policy and Procedure Manual* provides:

The work practices listed below have a high risk of death, serious injury or industrial disease. . . .

4. Permitting workers to be exposed to situations or conditions which are immediately dangerous to life or health.

---

The recommended schedule of sanctions in the governors' policy 1.4.1 contained in the *O.S.H. Policy and Procedure Manual* provides for a penalty assessment of \$5,500.00 for such a violation.

The employer did not provide any evidence or argument with respect to the application of this policy. The panel reviewed the file and finds that the application of the policy was appropriate in the circumstances.

### **Conclusion**

CM was the employer responsible for compliance with the regulations. There were violations of the regulations pertaining to dust control and scaling of the rock face above workers and worker training and supervision. There was no error of fact, error of law or contravention of a published policy of the governors. The penalty assessment was properly imposed.

THE APPEAL IS DENIED.

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