

## Decision of the Appeal Division

**Number:** 92-1192, 92-1193, 92-1194, 92-1195  
**Date:** June 19, 1992  
**Panel:** Patrick L. Byrne, Verna Ledger, Derrick Spooner  
**Subject:** O.S.H. Penalties — Delegation of Authority

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This is an appeal of four penalty assessments totalling \$470,000.00 imposed by the director of the Research and Standards Department, Occupational Safety and Health Division (O.S.H.) under Section 73 of the *Workers Compensation Act* for reported violations of the *Industrial Health and Safety Regulations*.

The employer appeals on an error of fact, error of law and a contravention of a published policy of the governors. The issue is whether the director of Research and Standards had the authority to impose the penalty assessments.

### Background

The employer is in the pipeline installation business. Following inspections of their worksites by W.C.B. occupational safety officers the employer was sent show-cause letters and attended divisional oral hearings with the following results:

#### Sanction Recommendation (SR) #910753

A penalty assessment of \$100,000.00 was imposed on October 17, 1991 for violations of Regulations 38.06, 38.18 and 38.22 reported by the officer on May 3, 1991. The orders cited the employer for allowing workers to enter an unsafe excavation eight feet in depth. The employer filed a notice of appeal on November 1, 1991.

#### SR #911048

A penalty assessment of \$110,000.00 was imposed on January 29, 1992 for violations of Regulations 38.06(1)(a), 4.02(5)(c), 8.18, 8.20 and 16.106(1)(b)(c) reported by the officer on June 25, 1991. The orders cited the employer for allowing workers in an unshored and unsloped excavation six feet in depth, for allowing workers to work under a suspended pipe without the use of restraining devices, for failing to develop work procedures and for failing to properly train and supervise workers. The employer filed a notice of appeal on February 12, 1992.

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### **SR #911049**

A penalty assessment of \$120,000.00 was imposed on January 30, 1992 for violations of Regulations 38.06, 8.18 8.20 and 4.02(5)(c) reported by the officer on July 16, 1991. The orders cited the employer for allowing workers to enter an unsafe excavation, for failing to develop work procedures and for failing to properly train and supervise workers. The employer filed a notice of appeal on February 12, 1992.

### **SR #911333**

A penalty assessment of \$140,000.00 was imposed on February 4, 1992 for a violation of Regulation 38.06(1) reported by the officer on September 5, 1991. The order cited the employer for allowing workers to enter an excavation seven feet in depth which had not been properly sloped or shored. The employer filed a notice of appeal on April 8, 1992. The employer was granted an extension of time to appeal by the chief appeal commissioner.

An oral hearing was held before the appointed panel of the Appeal Division on April 23 and 24, 1992. The employer presented evidence and arguments with respect to each of the penalty assessments. Counsel for the employer forwarded written arguments with respect to whether the authority to impose penalty assessments under Section 73 of the *Act* had been properly delegated to the director of Research and Standards.

The vice-president of the Occupational Safety and Health Division was invited to respond and on May 22, 1992 the director of Research and Standards provided a submission. Counsel for the employer forwarded a reply to the director of Research and Standards' submission on May 27, 1992.

### **Law and Policy**

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,

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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.

The governors' Policy 1.4.2 contained in the *O.S.H. Policy and Procedure Manual* provides:

The General Manager, Occupational Safety and Health Division, and the Director, Field Services Department, do each have authority on behalf of the Board to:

1. Assess and levy on the employer an additional assessment as provided by Section 73(1), and to make levies under Section 73(2) of the *Workers Compensation Act*.
2. Impose a special rate of assessment under Section 70(1)(b) of the *Workers Compensation Act*.

An appeal to the Commissioners may be made on a decision to impose or not to impose a penalty levy or special rate of assessment or the amounts thereof.

## **Evidence and Argument**

Counsel for the employer argued that all of the penalty assessments in this appeal were decisions of the director of Research and Standards and that he was not authorized either explicitly or impliedly by the *Act* or the governors' Policy 1.4.2. to impose penalty assessments. Counsel referenced *Regina v. College of Physicians and Surgeons of British Columbia Ex. p. Ahmad* (1970), 18 D.L.R. (3d) 197 and argued that:

The law in British Columbia is that there can be no delegation of judicial or quasi-judicial decisions except where such delegation has been specifically authorized by statute or must be authorized by necessary implication.

Counsel for the employer argued that, ". . . our courts are more prepared to accept implied delegation of merely administrative functions but not of legislative or judicial ones." Further, the decisions of the director of Research and Standards were

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“judicial in nature or at worst quasi-judicial” and neither the *Act* nor the governors’ policies specifically authorized the director of Research and Standards to impose penalty assessments.

Counsel for the employer argued that there could be no implied delegation of the judicial or quasi-judicial function. He attempted to distinguish the decision of the Supreme Court of British Columbia in *Re Gill et al. and Workers’ Compensation Board* (1983) 149 D.L.R. (3d) 678 which considered whether the Board’s Assessment Department was implicitly authorized to carry out an investigation and to make a determination. The Court held:

. . . the assessment department is impliedly authorized to carry out its investigation and to make its determination and to advise the employer of its right to appeal, and such actions are not an improper delegation of a judicial or quasi-judicial function.

Counsel argued:

In that case, the Court was prepared to assume that a Board investigator carried out an investigation which the Board impliedly authorized because there was no evidence to the contrary.

He reasoned that in the cases under appeal there was a specific delegation of authority to the general manager of the O.S.H. Division and to the director of the Field Services Department and therefore:

. . . it would be straining all rules of interpretation to suggest that jurisdiction could be impliedly bestowed upon [the director of Research and Standards]. Certainly, such jurisdiction could not be bestowed by the Governors who pursuant to Section 82 are restricted to delegating their powers and duties in writing.

Finally, counsel for the employer argued that the necessary consequence of a finding that the director of Research and Standards did not have jurisdiction to make his rulings is, “to render his decision *ultra vires* and therefore void *ab initio*.”

The director of Research and Standards’ submission pointed out that the Penalty Section of the Field Services Department had been transferred to the Research and Standards Department on January 1, 1992 and renamed the Variance and Sanction Review Section. Further, the Executive Committee had approved the transfer on January 29, 1992. The director of Research and Standards argued:

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It is my opinion that *the business change* reflected in the assignment of processing of penalties to the Research & Standards Department rather than the Field Services Department *is within the domain of the O.S.H. Division to enact*. The change in reporting relationships which would naturally arise as a result of such transfer would surely be expected. It is my opinion that the delay in rewording Policy 1.4.2 and, consequent — but resolvable — delay in submission of the rewording to the Board of Governors for tacit approval (seeing that the transfer had already received approval from the Executive Committee), *should not affect the ability of the Director, Research & Standards to impose*.

(original emphasis)

The director of Research and Standards outlined the decision-making process his department followed and argued that the employer was afforded, “the same courtesies of procedure and process afforded to any employer.” The director of Research and Standards argued that decisions regarding whether violations occurred and what the quantum of the penalties should be are decisions of officers in his department and, “[t]he decision to impose [by the director of Research and Standards] is an authentication of process.” (original emphasis)

Finally, the director of Research and Standards argued:

It is my opinion that the Monroe (sic) Committee report which originated the concept of an internalized Appeal Division did so in an attempt to prevent a purely external tribunal from becoming too legalistic in its approach. To overturn an action of this nature on such a trivial technical basis (a procedural defect) would be “too legalistic an approach” and would defeat the envisioned role of the Appeals (sic) Division. It would also significantly compromise the Board’s ability to assess and levy on an employer an additional assessment when the employer fails to take sufficient precautions to ensure the health, safety and well-being of workers for whom they bear responsibility.

## **Reasons and Findings**

We heard oral arguments in six separate penalty assessment appeals from this employer. From the appearance of the documentation, the penalties in three of the cases were imposed by the director of the Field Services Department and in three cases by the director of Research and Standards . Following the oral hearings we invited counsel for the employer to provide written arguments with respect to the delegation

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issue in the three cases imposed by the director of Research and Standards. Submissions were provided for four cases with counsel arguing that in the additional case (SR910753) the director of Research and Standards was also the actual decision maker rather than the director of Field Services. The submission of the director of Research and Standards confirmed he had imposed that penalty assessment under a delegation from the director of the Field Services Department. This decision concerns the four penalties imposed by the director of Research and Standards.

The authority of the Board to impose penalty or additional assessments on employers for violations of Regulations is contained in Section 73 of the *Act*. Counsel for the employer acknowledged that the *Act* specifically contemplates delegation of that authority. Certainly decisions to impose penalty assessments must, by necessity, be made by individuals and the Board under Section 86(1) of the *Act* may appoint the officers, “. . . necessary to carry out the business and operations of the Board.”

Section 82 of the *Act* provides that, “[t]he Governors shall approve and superintend the policies and direction of the board, including policies respecting compensation, assessments, rehabilitation and occupational safety and health.” As such, the governors’ Decision No. 3 (*Workers’ Compensation Reporter*, 1991, Vol. 7(4): p. 17) provides:

The published policies of the governors, as of June 3, 1991, consist of the following:

1. *Assessment Policy Manual*;
2. *Occupational Safety and Health Division Policy and Procedure Manual*;
3. *Rehabilitation Services and Claims Manual*;
4. *Workers’ Compensation Reporter* — Decision Nos. 1–423.

. . . After proclamation of the *Workers Compensation Amendment Act, 1989*, the published policies of the Governors shall consist of the documents listed above, amendments to the three policy manuals, any new or replacement manuals issued by the Governors, and all decisions of the Governors declared to be policy decisions. . . .

An original of each policy signed by the Chairman shall be filed with the Secretary of the Board.

The policies of the Governors shall be published in print in the three policy manuals or the *Workers’ Compensation Reporter*.

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The governors' Policy 1.4.2 in the *O.S.H. Policy and Procedure Manual* provides that the general manager, Occupational Safety and Health Division and the director Field Services Department, "do each have authority on behalf of the Board," to assess and levy on employers additional assessments under Section 73 of the *Act*. The position of the director of the Research and Standards Department has existed for some time, certainly prior to June 3, 1991 and is not simply a renaming of either the general manager or director Field Services Department positions. It is clear that the director of Research and Standards did not have explicit authority to impose penalty assessments under Section 73 of the *Act*. That authority rests with the Board and was properly delegated to two individual office holders through the policies of the governors. Section 73 of the *Act* should be read in conjunction with the governors' policy and the phrase, "the board may assess and levy on the employer" should therefore be read, "the General Manager, Occupational Safety and Health Division and the Director Field Services Department may assess and levy on the employer."

The director of Research and Standards appears to be of the view that the authority to impose penalty assessments rests with the O.S.H. Division and a transfer of the administration of the "Penalty Section" carries with it a transfer of the authority to impose penalty assessments. We disagree. The authority to impose penalty assessments rests with the individual office holders delegated such authority by the Board through the policies of the governors. The director of Research and Standards was not one of the delegated office holders and therefore we find that the director of Research and Standards did not have explicit authority to impose the penalty assessments.

We considered whether the director of Research and Standards could have acquired jurisdiction in another manner. That is, whether there could be a sub-delegation from the properly delegated office holders or whether the director of Research and Standards was implicitly authorized to impose penalties. This issue was discussed by R. Dussault and L. Borgeat in *Administrative Law*, 2nd ed., pp. 259:

Indeed for reasons of efficiency, legislators more and more frequently grant a power of delegation to administrative authorities. This power may relieve them of some decisions and has the advantage of bringing the decision-maker closer to the public. This delegation may be authorized explicitly or implicitly. . . .

It is a well-known legal principle that a power must be exercised personally by the agent upon whom it was conferred. This principle, generally expressed in the form of a maxim, *Delegatus non potest delegare*, is even more applicable when some degree of discretion is combined with the decision-making . . .

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The British Columbia Court of Appeal in *Regina v. College of Physicians and Surgeons of British Columbia Ex p. Ahmad* (1970) 18 D.L.R. (3d) 197 held:

There is no doubt that judicial functions cannot be delegated unless by express authority or by necessary implication, while on the other hand many administrative functions may be validly delegated: see *Barnard v. National Dock Labour Board*, [1953] 2 Q.B. 18, and *Vine v. National Dock Labour Board*, [1957] A.C. 488.

The question here is whether the decisions to impose penalty assessments under Section 73 of the *Act* should be characterized as judicial (or quasi-judicial) or administrative. We accept the tests for determining whether a function is judicial as set out in de Smith's *Judicial Review of Administrative Action*, 4th ed., pp.80–85:

The first test that may be applied for distinguishing judicial functions from other classes of functions turns upon whether the performance of the function terminates in an order that has conclusive effect . . . This characteristic is generally regarded as one of the essential features of judicial power, and a body exercising powers which are of a merely advisory, deliberative, investigatory or conciliatory character, or which do not have legal effect until confirmed by another body, or involve only the making of a preliminary decision will not normally be held to be acting in a judicial capacity. . . .

A second test, or group of tests, for ascertaining whether statutory functions are of a judicial character turns primarily on the presence or absence of certain formal or procedural attributes . . . The fact that a body has been endowed with many of the “trappings of a court” may not always be sufficient to establish conclusively that it has been invested with judicial power; but the presence of such trappings tends to support that conclusion. Thus in seeking to establish that the proceedings (or the functions) of a statutory body are to be established as judicial for any given purpose, it may be material to show that the body is called a “tribunal” which hold “sittings” and makes “decisions” in relation to “cases” before it, that it is empowered to summon witnesses and administer oaths, that is normally required to sit in public, that its members are debarred from sitting if personally interested in a matter before them, that it has power to award costs or to impose sanctions to enforce compliance with its orders.

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In our view the authority to impose penalty assessments under Section 73 of the *Act* substantially meets the above tests and is quasi-judicial in nature. Although a complete analysis is not necessary we note that oral hearings are held, decisions are rendered imposing penalties and there is authority to administer oaths. We further note that in *Re Gill et al.* the Court characterized an investigation and determination by the director of the Assessment Department as a “judicial or quasi-judicial function.” A decision to impose penalty assessments for violations of Regulations is not merely an administrative function. The impact of a decision to levy a penalty assessment on an employer confirms this conclusion.

Having determined that the decision is quasi-judicial we find that the function cannot be sub-delegated by the authorized office holders. They must exercise such authority personally. The director of Research and Standards could not have acquired jurisdiction from the properly authorized office holders to whom the delegation had been made.

We considered the director of Research and Standards’ argument that the Executive Committee had approved the administrative transfer and renaming of the “penalty section” and that the governors would tacitly approve that action and therefore he ought to be able to impose penalty assessments. It is unclear what the director of Research and Standards meant in his reference to obtaining “tacit” approval from the Board of Governors. The term “tacit” means “understood or implied without being stated.” The governors have provided in Decision No. 3, as noted above, that their policies must be published. Therefore, there could be no understood or implied policy in this case. We could find no evidence that the governors either explicitly or implicitly delegated the authority to impose penalties to the director of Research and Standards.

We agree with the employer’s counsel that the circumstances in this appeal can be distinguished from those in *Re Gill et al.* In that case there was no express delegation and the Court held, in the absence of evidence to the contrary, there was an implied delegation. The Court stated:

In the absence of any contrary indication in the evidence before me, I am prepared to assume that [the Director of Assessments’] “investigation” was one that the board impliedly authorized.

At the time the director of Research and Standards imposed the penalty assessments there was an express delegation in the governors’ policy, however, the authority was not exercised by those to whom it had been specifically delegated. In our view there could be no implied delegation in the face of an explicit delegation.

We find that the director of Research and Standards acted beyond his authority by imposing the penalty assessments.

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The director of Research and Standards complained that to overturn the penalties on the basis that he lacked jurisdiction would be too legalistic an approach. We disagree.

There is a distinction between not being bound to follow legal precedent as outlined in Section 99 of the *Act* and not following the Rule of Law. The Ontario Workers Compensation Appeal Tribunal also dealt with this issue. They reasoned in *Decision #915A* (1988), (269 ONT. W.C.A.T.) at pp. 299:

The meaning of the s. 80 “licence” not to follow “strict legal precedent” has been considered in previous Tribunal decisions. It has been interpreted as meaning that the Tribunal is not required to follow strictly the common-law rules governing an adjudicator’s obligation to be bound by previous precedent setting decisions. It has not, however, been seen as intended to free the Tribunal from an adjudicative tribunal’s general obligation to be governed by the rule of law or to be bound by the substantive law generally prevailing in Ontario.

Similarly, Section 99 of the *Act* does not free the director of Research and Standards from the Rule of Law or the substantive law prevailing in British Columbia.

The director of Research and Standards also argued that to overturn his decisions in these cases would significantly compromise the Board’s ability to assess penalties. We disagree.

We could find no impediment to the properly delegated office holders exercising their authority to impose penalties in compliance with the *Act*, and the policies of the governors.

In their discussion of the legality of administrative action R. Dussault and L. Borgeat in *Administrative Law*, 2nd ed., pp. 31–32 provided the following observation which we find appropriate in this case:

The State, just like its citizens, is subject to the Rule of Law. For public administrators, respect for the law comprises three principle elements: respect for the Constitution, which applies not only to legislators but also to public servants who act for the Administration; respect for the limits of their powers, which have been established by statutes and regulations; and finally, respect, in the exercise of their duties, for certain principles of equity. . . . When the Rule of Law is transgressed, one speaks of an excess of jurisdiction and of an *ultra vires* act.

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We considered the consequences of the finding that the director of Research and Standards acted beyond his authority. Certainly the penalty assessments are removed. We, however, make no finding with respect to whether the employer was in violation of the Regulations, as cited by the officers, in these cases.

## **Conclusion**

There was an error of law and a contravention of a published policy of the governors. The director of the Research and Standards Department did not have authority to impose the penalty assessments. The penalty assessments are removed.

THE APPEAL IS ALLOWED.

*Editors' note: This decision has been edited for publication. The Governors adopted changes to the delegation of authority on July 27, 1992. These changes have now been published in the OS&H Policy and Procedure Manual.*

