

Decision of the Appeal Division

Number: 99-0441

Date: March 9, 1999

Panel: Paul Petrie, Verna Ledger, James L. Tonn

Subject: Repeat Fall Protection Penalty

The employer appeals the March 12, 1998 decision to impose an additional assessment (penalty) for violation of fall protection regulations. In that decision, the sanction review officer considered a range of arguments raised by the employer and found that there was a violation of regulation 34.04(1) and that a repeat Type IV penalty of \$27,500 was appropriate.

The processing of this appeal has been procedurally complicated and can be briefly summarized as follows. The appeal involves a cited violation of regulation 34.04(1) on February 7, 1996 when a Board safety officer reported observing a worker at the edge of a building at a height of approximately 25 feet without fall protection. A sanction review officer notified the employer that in light of the history of prior sanctions for fall protection violations, a penalty of \$25,000 was under consideration. A hearing to consider the proposed penalty was set for July 17, 1996. However, on June 11, 1996, the employer initiated an appeal of the February 7, 1996 order to the director of Field Services. As a result, the July 17, 1996 penalty hearing was postponed.

The director's decision of February 7, 1997 denied the order appeal. The employer then initiated an appeal of the order to the vice-president of the Prevention Division, further delaying consideration of the proposed penalty. The vice-president's decision of May 21, 1997 concluded that the order was appropriately written. The employer then attempted unsuccessfully to appeal the vice-president's decision on the validity of the order to the Appeal Division and to the Panel of Administrators. Each declined the matter because of lack of jurisdiction.

On July 31, 1997, the Board president responded to the employer's concerns about the lack of an oral hearing before the vice-president and involvement of a sanction review officer in the order appeal. A hearing to consider the proposed penalty before a new sanction review officer was scheduled for November 27, 1997, but the employer declined to attend that hearing and provided a written submission. The sanction review officer's decision of March 12, 1998 accepted the officer's evidence that a worker was installing roofing at the edge of the roof approximately 25 feet above grade without fall protection. The sanction review officer also found that a penalty of \$27,500 was appropriate. The employer now appeals that decision to the Appeal Division.

The Appeal

The employer continues to be represented by legal counsel. In his submission of July 21, 1998, counsel argues that the employer was denied a fair hearing in the order review process and on this basis submits that the order should be set aside. The representative also submits that the sanction review officer did not have the jurisdiction to consider the validity of the order under the delegation in policy 1.4.2. He says the Appeal Division has the jurisdiction to consider the order appeal process under policy 1.4.4 on the basis that it constitutes an error of law and a contravention of published policy.

With respect to the validity of the order, the representative relies on a statutory declaration by Mr. A sworn on February 24, 1998. In that statement, Mr. A said he was the supervisor of the roofing crew on the day of the inspection and responsible for fall protection. He said the weather was cold and wet and they did not think they would be on the job very long. He stated they were not wearing lifelines because they were working from a height (garage roof) less than 10 feet from ground. He stated:

The only height we were exposed to was crossing the top of the roof to access the ladder which was on the opposite side of the house from the garage.

Counsel for the employer said they did not regard the fact that the worker was in the middle of the roof to be in dispute. In their December 11, 1997 submission to the Prevention Division, the employer's representative argued that the violations cited by the safety officer under regulation 34.04(1) should be excused under regulation 14.30(2). That regulation provides an exception for safety belt requirements limited to structural steel erectors or similar tradesmen experienced in working at heights where such a requirement could produce an additional hazard or is clearly impracticable. The representative argued that in the circumstances, the worker was permitted to cross the roof to access the ladder to descend to the work area and no violation occurred.

Counsel for the employer also submitted that the Board was without jurisdiction to cite the employer for a violation of regulation 34.04(1), since there is only one specific regulation applying to the roofing industry – regulation 32.68(2), which requires toe hold and safety belts where the roof pitch is 8 vertical to 12 horizontal or greater. Because the pitch of the roof in this case was less than 8 to 12, regulation 32.68(2) did not apply. Counsel argued that it was inappropriate to use the construction regulation 34.04(1) to apply to the roofing industry. He argued, since there was no applicable regulation, the penalty is unlawful. He submitted:

It is as well unlawful because the Board has purported to apply a general regulation where a specific regulation already exists. The application of the general regulation increases the duties upon an employer in a fall protection situation well beyond those contemplated under the existing regulation 32.68. As a matter of law, specific regulations take precedence over general regulations.

Counsel argued that by applying regulation 34.04(1), the Board was using a more stringent requirement for lesser pitches with the general regulation.

Counsel argued that the employer exercised “due diligence” by taking all reasonable precautions to protect the workers, including a documented health and safety program tailored to the roofing industry. The employer’s representative pointed to the roofing supervisor’s evidence that the crew wore safety belts on a previous day as evidence supporting due diligence.

Finally, counsel submits that the \$27,500 quantum of the penalty is in error and questions the sanction review officer’s reliance on the first aid regulation criteria for “rapid transit” for a fall of 20 feet or more to establish high risk. He also argued that the quantum imposed is far in excess of the guidelines in policy 1.4.1 and the sanction review officer lacks jurisdiction to determine the amount of the penalty in excess of the guidelines. In summary, counsel argued that the order leading to the penalty must be set aside or at least the quantum of the penalty must be substantially reduced.

The issue is: whether the order should be quashed as a result of the order appeal process; and if the order is allowed to stand, whether the violation occurred; and if it did, whether the \$27,500 penalty assessment is consistent with the facts of the case and in accordance with published policy and the Act.

Background

Evidence on file shows that a Board safety officer inspected the employer’s worksite on February 7, 1996 and cited the employer for violation of regulations 34.04(1) regarding fall protection; 8.18 with respect to worker instruction and training; and 8.20 regarding the adequacy of supervision. On the inspection report, the safety officer stated:

When I approached the site I observed 3 workers working on a 4/12 pitched roof applying cedar shakes. A worker was observed at the edge of the building at a height of approximately 25 feet without fall protection.

After noting two prior warning letters under S.R.#1 and S.R.#2, and penalty consideration under S.R.#3, S.R.#4, S.R.#5 and S.R.#6, the officer recommended penalty consideration. On March 25, 1996, a sanction review officer notified the employer that a penalty of \$25,000 was under consideration. The sanction review officer pointed out that since 1988, the employer had been assessed fall protection penalties totalling \$25,000 and a proposed penalty of \$25,000 was reduced to a warning letter in June 1994. Since that time, there had been a further warning letter and many further violations. In response, the employer’s representative requested a hearing on the proposed penalty, which was set for July 17, 1996.

On June 11, 1996, counsel for the employer wrote to the Prevention Division director of Field Services and requested an appeal of the orders issued on February 7, 1996. The employer’s request was sent to the regional manager for a response on June 24, 1996. On July 22, 1996, the

sanction review officer who issued the March 25, 1996 show cause letter sent a memo to the director of Field Services, outlining the reasons for the order appeal. The sanction review officer concluded:

The employer has not provided any significant evidence to challenge the orders. I do not find that an oral hearing is necessary to deal with this order appeal, or that any further information is required from the employer at this time. The order appeal should be denied and a hearing to discuss the proposed penalty should be scheduled.

The director's decision dated February 7, 1997 denied the employer's appeal of the orders on the grounds that no evidence had been presented to challenge the order and there was no basis to rescind the order.

The employer's counsel appealed the director's decision to the vice-president on February 18, 1997 on the ground that the director's decision denied natural justice by refusing to hold an oral hearing. Counsel requested an oral hearing at the vice-president level. On March 18, 1997, the Prevention Division advised the employer's representative that order appeals are normally considered on the basis of written submission and the employer was invited to provide a written submission. Counsel faxed the Prevention Division a four-page submission in support of the order appeal on April 1, 1997, along with an unsigned and undated statutory declaration of the roofing supervisor, Mr. A. In his submission, counsel said he met with the safety officer on February 16, 1996 and at that time did not dispute the officer's conclusion that the workers were working more than 10 feet above grade without fall protection. Subsequently, it came to his attention that the workers were working on the roof of the garage, which is "only 10 feet above grade. One worker was crossing the roof to the ladder on the other side." He also repeated and expanded on arguments raised in his June 11, 1996 submission.

The sanction review officer who had previously been involved with the order appeal to the director reviewed the employer's submission and provided a memo to the vice-president, which summarized the employer's submissions to that point in time and made recommendations to the vice-president regarding the validity of the orders and the oral hearing request.

In his decision of May 21, 1997, the vice-president declined to hold an oral hearing and said the issue could adequately be dealt with on the basis of written submissions. He concluded that the order was appropriately written and applied to the work situation in question. The vice-president noted that the worker accessing the ladder was more than 10 feet above grade and not protected from falling.

The employer's attempt to appeal the vice-president's May 21, 1997 decision to the Appeal Division was declined by the Appeal Division manager on the grounds that the decision on the order appeal did not involve a penalty assessment under section 73 of the Act and, therefore, did not fall within the Appeal Division's jurisdiction. The employer's representative attempted to appeal the vice-president's decision to the Panel of Administrators on the following grounds:

The failure to grant an oral hearing or even allow for written submissions by both the Director and the Vice-President is a flagrant breach of the rules of natural justice.

In his letter of July 31, 1997, the WCB president advised the employer's representative that the Panel of Administrators does not consider appeals in individual matters and there were no further appeal options for reviewing the validity of the order under regulation 2.12(2). The president pointed out that the role of the sanction review officer in order appeals was to provide administrative support to the director and the vice-president. The president noted the employer had the option to have an oral hearing before a sanction review officer when the proposed penalty assessment was considered. The president said a different sanction review officer with no prior involvement in the matter would be selected to consider the validity of the orders that form the basis of the proposed penalty assessment.

The penalty hearing was rescheduled for November 27, 1997. On November 25, 1997, counsel wrote to the newly appointed sanction review officer who was designated to consider the proposed penalty assessment and advised that he had been instructed to initiate a petition under the *Judicial Review Procedure Act*, which he said would be filed shortly. Counsel proposed that the hearing be postponed pending the judicial review petition because of an allegation of bias and a denial of a fair hearing, as well as a lack of jurisdiction. The sanction review officer assigned to hear the matter declined to postpone the hearing. On November 27, 1997, counsel advised the sanction review officer that the employer would not participate in an oral hearing because they perceived an apprehension of bias.

The employer provided a written submission on December 11, 1997. In that submission, the employer's representative said the sanction review officer did not have the appellate jurisdiction to review the director and vice-president's decisions on the order appeal. He submitted that the order written by the safety officer on February 7, 1996 should be quashed and the file referred to the vice-president to hold a hearing. Counsel also argued that the offending conduct witnessed by the safety officer should be excused under regulation 14.30(2) because the worker was away from the unguarded edge as much as possible. Counsel also argued that the officer failed to consider the employer's defence of due diligence.

In his decision of March 12, 1998, the sanction review officer denied the employer's appeal. He found that the policy on order appeals did not provide for a further appeal beyond that identified in the policy and he had no authority to remit the case to the vice-president. The sanction review officer also found he had the authority to determine whether the employer had complied with the regulation and he could therefore consider whether the orders were valid.

The sanction review officer did not agree that there had been an apprehension of bias. He said he was prepared to hold an oral hearing to determine the credibility of the witness, but the employer chose not to present the witness at the oral hearing offered on November 27, 1997. He noted that the sworn declaration from the witness was not signed and found it was not necessary to have an oral hearing to consider the matter.

After reviewing the photograph provided by the safety officer, the sanction review officer found that the employer was responsible for a violation of regulation 34.04(1), the regulation was valid, and it appropriately applied to the employer in the circumstances of this case. He also accepted the officer's evidence that a worker was installing roofing at the edge of the roof approximately 25 feet high without fall protection. He did not consider there was any relief available under regulation 14.30(2).

The sanction review officer found that the workers at the site lacked adequate supervision. He found insufficient evidence in the circumstances to show that the employer had a program of compliance in accordance with policy 1.4.1. He declined to grant the employer relief on this ground. The sanction review officer found that the risk of falling from a height greater than 20 feet likely involved a high risk and relied on the industrial first aid manual that categorized a fall over 20 feet as requiring "rapid transit" for immediate medical attention.

After reviewing the recommended schedule of sanctions and the employer's prior penalty history, the sanction review officer concluded:

Given the incremental nature of \$5,500 assessments for high risk violations for employers who have [this employer's] payroll, the last assessment should have been \$22,000. In my view, the amount should simply be an additional \$5,500 above what should have been \$22,000. Thus, I find a \$27,500 amount appropriate. While this is somewhat larger than proposed amount in the March 25, 1996, letter, it fits within the \$25,000 "general range."

Oral Hearing Evidence

The employer's request for an oral hearing was denied on a preliminary basis by the acting chief appeal commissioner. After reviewing the evidence on file and considering the employer's submissions, this panel convened an oral hearing on December 8, 1998 to further consider the circumstances of the violation and the employer's arguments in support of the appeal.

At the oral hearing, the safety officer said he conducted the unplanned inspection on February 7, 1996 after observing a worker at the edge of the roof in a kneeling or crouched position while driving by the worksite. He said the road approaching the worksite was uphill and he had a clear view looking down to the roof. He drove into the worksite access road and stopped to take a photo of the workers on the roof. At that time, the worker had moved away from the edge of the roof.

The safety officer called the workers down and determined that they did not have fall protection on the roof but did have it in the van. He said that English was not the workers' first language, but he was able to communicate with them. He concluded from his discussion with the supervisor and the workers that they had not received sufficient direction and instruction on fall protection and did not have adequate supervision to ensure compliance with the fall protection regulations.

The safety officer emphasized that the worker he observed at the edge of the roof was exposed to a high risk situation and indicated that the slope of the roof could have contributed to the risk of falling. He said, at the time of the inspection, the focus of his discussion with the workers was the high risk associated with the worker at the location involving a potential 25-foot fall. He indicated the workers did not dispute his observation of where the worker had been positioned at the edge (corner) of the roof. He said: "There was no doubt in my mind that I saw a worker at the edge of the roof." He pointed out that at the location where he observed the worker, there was an open ("broken") bundle of shingles and the photograph appears to show that a line of shingles had been installed at the roof edge, but left unfinished.

The safety officer said that when he met with the employer and the employer's legal representative on February 21, 1996, they did not dispute that a worker had been working at the edge of the roof where he was exposed to a 25-foot fall.

The officer indicated that, in his opinion, regulation 34.04(1) was the appropriate regulation because the work involved a construction site where there was a fall hazard during the erection of a building. He said regulation 34.68(2) was a more specific regulation which applied to work on a roof with a steep pitch (8 to 12 or greater), which required toe holds *in addition to* safety belts. He considered regulation 14.30 to apply to more general worksite situations where a building was not being erected. He did not consider the exception in regulation 14.30(2) applied to the circumstances in this case because the situation required the worker to have "positive fall protection" and fall protection would not have presented an additional hazard. He noted that new fall protection regulations were to be implemented in May 1996, but safety officers had been instructed not to apply the new regulations until the implementation date.

The employer's worksite supervisor at the time of the February 7, 1996 inspection, Mr. A, gave evidence on behalf of the employer. Mr. B provided interpretation from the Punjabi language. Mr. A stated that February 7, 1996 was the second day of roofing on that house. On the first day, there were more people on the job and they had completed over half of the roof. He said, on the first day, all workers wore fall protection, including workers who worked on the other garage roof that was part of the duplex being constructed.

Mr. A stated that on February 7, it was very cold when they started work and it had been raining with a mix of rain and wet snow. He indicated from his recollection that workers were only working on the garage roof that did not involve a fall greater than 10 feet. He said no workers were wearing fall protection. He said he was the worker in the photograph that was standing at the peak of the roof of the house and had been going to the other side of the roof to get some materials. He said he did not recall anyone working at the edge of the roof where the safety officer indicated he observed a worker. He said that a line of shakes had been started along that edge of the roof, but it had been started by workers on the previous day and had not been worked on on February 7.

He said he had been appointed a supervisor approximately a year and a half before the inspection. He confirmed that he and all the other workers on the site had been fined \$100 by the employer for the violation of the employer's fall protection safety policy on February 7, 1996. He also said he had received other fines for failure to use fall protection, including a

\$100 fine on March 31, 1996 and a \$500 fine by the employer on April 18. He had also received an observation report by a Board officer for the infraction on April 18 and he said he was laid off for one month as a result of that violation. He indicated the only times he had received fines were when he had been observed by a Board safety officer or by one of the company owners not wearing fall protection. As supervisor, it was his job to ensure that workers wore their safety belts, safety boots and hard hats. He said when he told workers to use their safety belts, they would put them on. He said he did not report workers to the employer who did not wear their safety belts and said workers only received fines when they were observed by one of the owners.

Mr. A indicated that when he started working for the employer, the roofing work was done on the basis of an hourly wage. This was subsequently changed to piece work and the workers were paid on the basis of the number of squares installed. He indicated that safety belts and fall protection would slow production somewhat and he could make more money installing roofing when he was not wearing a safety belt.

The company co-owner, Mr. C, also provided evidence at the appeal hearing. He indicated that it had been his understanding that prior to 1995, roofing workers only needed safety belts when working on steep-pitched roofs greater than 8 vertical to 12 horizontal. He understood that the Board was taking a tougher stand and on May 19, 1995 provided a letter to workers indicating that fines would be applied if they did not wear safety belts. He indicated that they updated their fall protection program following the February 7, 1996 inspection in preparation for the new fall protection regulations that were coming into effect in May. Mr. C recalled the March 7, 1995 meeting with safety officer D in which the Board provided an educational presentation discussing the requirements for fall protection when working at elevations more than 10 feet above grade. The safety officer at that time explained the distinction between regulations 34.04 and 32.68(1) and (2) and also pointed out that regulation 14.30(1) applied to all situations.

At the oral hearing, the employer's representative requested an opportunity to file an additional written submission.

In his submission of December 23, 1998, counsel for the employer again submitted that the decision of the Prevention Division vice-president is a nullity because there was a denial of a fair hearing. Counsel asserts that: "the jurisdiction to review an order on the merits rests with the Director and Vice-President."

Counsel contends that the March 12, 1998 decision by the sanction review officer is a legal nullity because it follows a void decision of the vice-president. He argues that the sanction review officer lacked the jurisdiction to consider on the merits the order leading to the penalty assessment.

Counsel noted the Appeal Division manager's decision of June 16, 1997, which advised that the Appeal Division did not have the jurisdiction under section 96(6)(c) of the Act to consider the employer's application to appeal the vice-president's decision. Counsel now argues:

... there is an issue about whether the Appeal Division has jurisdiction to address any issue other than whether the decision of the V.S.R.O. was a nullity. Otherwise, the Appeal Division is assuming jurisdiction through the back door by reviewing the penalty assessment after it claimed previously to have no jurisdiction over the order review process.

In the alternative, counsel argues that the Appeal Division has the jurisdiction under section 96(6) of the Act to review decisions for errors of law and seeks a decision from this panel that the order review process resulted in a decision which was void.

Counsel submits that if the sanction review officer is found to have jurisdiction in the matter, his decision is still flawed because of several procedural errors which denied the employer a fair hearing, including the sanction review officer's conclusion that he had jurisdiction to consider the validity of the orders. Counsel argues that because the order review process is delegated to the Prevention Division director and vice-president, it cannot reside with the sanction review officer. He submitted the sanction review officer:

... can review the circumstances in which an order was issued to decide whether or not a penalty is appropriate. He can vacate the penalty, but cannot impeach the underlying order.

Counsel also alleges an apprehension of bias on the grounds that:

... a reasonable person would conclude an employee cannot fairly review the decision of the most senior person in the Department.

Counsel contends that the sanction review officer relied on material not disclosed in order to increase the penalty assessment including material from the *Industrial First Aid Safety and Training Manual* without requesting submissions on the increase in the penalty.

Counsel submits that the sanction review officer has no independent jurisdiction to raise the penalty amount set out in the recommended schedule of sanctions in policy #1.4.1. He relies on Appeal Division Decision #95-0242 (11 *Workers' Compensation Reporter* 315) to support the employer's position.

He also argues that the procedures used by the Prevention Division for interpretation and application of regulation 34.04(1) are beyond the Board's legal power or authority. Counsel said the employer's record shows that the Board only applied regulation 34.04(1) after it implemented new procedures under that regulation in 1994. Prior to 1994, he contends the employer was only cited for fall protection violations under regulation 32.68.

Finally, counsel submits if the foregoing arguments are not accepted, that there is insufficient evidence to show on a balance of probabilities that the employer's workers were in violation of the regulations. He relies on supervisor A's testimony that neither he nor any of the workers with him worked on the edge of the roof where the safety officer claimed to have observed a worker and that the workers were working on a garage roof less than 10 feet from the ground.

Counsel questioned the safety officer's evidence that he observed a worker at the edge of a roof 25 feet above ground from a distance of between 750 and 1,000 feet from the job site. Counsel argued that the supervisor in the photograph without fall protection was on the ridge of the roof walking to the other side to get more equipment for the job.

Counsel admits the safety officer is a credible witness and he did not suggest the officer invented any of his evidence. He did, however, question the officer's ability to observe a worker at the edge of a roof from the distance in question and submitted that the officer's claimed observations stretched beyond the limits of human vision. He argued:

In the end, there is an evidentiary divide between Officer [E] and Mr. [A] with no objective evidence to establish the likelihood of either story being more credible than the other. We note in particular the photos do not show in any conclusive fashion that there was a course of shakes being laid on the corner where Mr. [E] allegedly saw a worker working without fall protection.

Counsel also submitted the supervisor had been trained in the employer's safety program and argued:

While [the supervisor] was not an ideal witness on this point, it is clear he did supervise the workers and they all wore fall protection the day before Officer [E] appeared on the job site. Further, he rightly concluded fall protection was not required on the garage roof aspect of the job.

He submitted that in these circumstances, the employer was entitled to the defence of due diligence and relief of the penalty.

Law and Policy

Section 71(1) of the Act empowers the Board to:

. . . 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. . . .

Section 71(2) authorizes the Board to

. . . issue orders and directions specifying the means or requirements to be adopted in any employment or place of employment for the prevention of injuries and occupational diseases.

Section 73(1) provides:

Where the board considers that

- (a) sufficient precautions are not taken by an employer for the prevention of injuries and occupational 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.

Section 82 requires that the governing body of the Board, now the Panel of Administrators:

. . . must approve and superintend the policies and direction of the board, including policies respecting . . . occupational safety and health. . . .

Regulation 2.12(2) of the *Industrial Health and Safety Regulations* provides:

Any person affected by any order or directive issued under these regulations or by any penalty under Section 61 of the Workers' Compensation Act, or any representative of such a person, may appeal to the Commissioners. Notice of appeal shall be submitted within 21 days, or such further period as the Commissioners may allow, and shall be made in writing and shall state the reasons therefor.

Published policy clarifies the application of this regulation following amendments to the Act:

The reference to Section 61 in Regulation 2.12(2) is incorrect. Section 61 was renumbered to Section 73 in 1979.

Regulation 2.12(2) refers to an appeal to the Commissioners. Amendments to the *Workers Compensation Act* in 1991 eliminated the Commissioners. Appeals against orders and directives are now made under Policy No. 1.4.5. Appeals against penalties are described in Policy No. 1.4.4.

Policy 1.4.5 of the *Prevention Division Policy and Procedure Manual* states:

The Board realizes as officers of the Board carry out inspections of workplaces and issue orders or directives there will, at times, be disagreement between those on whom the orders or directives were issued and the officer. To resolve these disagreements the Board recognizes several levels of appeal. These include:

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1. Discussion between the officer and the employer after an inspection has been completed. As the officer explains what was observed the employer has the opportunity to explain the employer's actions or intent, or correct an error in the officer's observations. The same can be done by a labour representative or worker present during a post-inspection discussion.
 2. After the officer has issued orders or directives, if the person affected is still in disagreement, that person may request a review or a hearing with the officer's Regional Manager.
 3. Should the decision of the Regional Manager still not resolve the disagreement, the affected person may appeal to the Director, Field Operations Department, Occupational Safety and Health Division.
 4. If the above three steps fail to resolve the issue, an appeal can be made to the Vice-President, Occupational Safety and Health Division.

Regulation 2.08.

When, for greater certainty, a specific regulation is contained within these regulations this shall not limit the generality of any other regulation.

Section 34 of the *Health and Safety Regulations* relates to construction procedures and regulation 34.04(1) regarding fall protection provides:

During the erection of buildings or structures, workers shall be protected from injury through falling from the unguarded portions of the structure at all elevations 10 feet (3m) or more above grade. Such protection shall be afforded by means of barriers, guardrails, fibre or wire guard ropes, safety-belts and life-lines, personnel safety-nets, or other effective means.

Section 32 of the regulations outlines the requirements for scaffolds, swing stages and miscellaneous stages and regulation 32.68 relates specifically to roof work. Regulation 32.68 provides:

- (1) Crawl boards or ladders, used for roof work, shall be securely fastened over the ridge of the roof, or shall be otherwise effectively anchored. The use of eaves-troughs for support is prohibited.
- (2) When a worker is employed on a roof having a pitch of 1/3 (slope ratio 8 inches (20.3cm) vertical to 12 inches (30.5cm) horizontal) or greater, 2 inch by 6 inch toe-holds shall be employed, and the worker shall wear a safety-belt, secured to a firmly anchored life-line.

Section 14 of the regulations provides for the requirements of personal protective equipment and regulation 14.30 states:

Safety-belt requirements

- (1) Where it is impracticable to provide adequate work platforms, scaffolds or staging, as specified in these regulations or which would be required in the exercise of good practice for the safe conduct of work, safety-belts and life-lines or safety-straps shall be worn by all persons working at elevations 10 feet (3m) or more above grade or floor level.

Exception

- (2) This regulation does not apply to structural steel erectors or similar tradesmen experienced in working at heights in circumstances where:
 - (a) the use of belts, life-lines or safety-straps would produce an additional hazard or is clearly impracticable, or
 - (b) safety nets or equivalent protection against falling are in use.

Published policy #14.30(2) outlines the procedure for determining the “exception for structural steel erectors” under regulation 14.30(2). There is no published policy with respect to regulation 34.04(1) or for regulation 32.68.

The 1994 inspection procedures for regulation 34.04(1) do not constitute published policy of the governors as provided in governors’ decision No. 3 (7 *Workers’ Compensation Reporter* 17).

Governors’ decision No. 75 (10 *Workers’ Compensation Reporter* 753) provides:

The Appeal Division shall apply and interpret the *Act*, regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy. The Appeal Division must make its decision according to merits and justice of each case as directed in section 99.

Decision and Reasons

Counsel asks this panel to rule on the Prevention Division vice-president’s decision and to find that decision void. As explained to the employer in the Appeal Division manager’s letter of June 16, 1997, the Appeal Division does not have jurisdiction under section 96(6) to consider an appeal from a decision made under policy 1.4.5. We are in agreement with the Appeal Division manager’s decision and find that section 96(6)(c) does not provide an avenue for appealing a decision of the vice-president made under the order review process.

However, section 73 of the Act provides for consideration of whether the employer has complied with the regulations with respect to the imposition of a penalty assessment. The evidence and findings of an order appeal may well be relevant in considering the validity of

the violation leading to penalty consideration, but those findings are not determinative. Section 73 provides for separate consideration of that issue.

We are, therefore, prepared to consider counsel's arguments with respect to the effect of the order appeal process on the sanction review officer's application of a penalty assessment under section 73 of the Act.

As noted in policy 2.12(2), the order appeal process under regulation 2.12(2) initially rested with the Board's former commissioners, the same body that previously considered penalty assessment appeals under section 73 of the Act. The amendments to the Act in 1991 eliminated the role of the former commissioners and established an Appeal Division. The legislature did not extend to the Appeal Division the same authority to consider order appeals that had previously been given to the former commissioners by way of regulation 2.12(2). As a result, the governors established a general policy for reviewing orders relating to regulation violations by way of policy 1.4.5. Policy 1.4.5 provides for a separate process for considering order appeals and is not a prerequisite for considering a penalty under section 73(1) of the Act.

In practice, review of orders under policy 1.4.5 are generally carried out where the orders do not lead to penalty consideration but the employer seeks relief from the effect of the order itself. Where regulation violations lead to the consideration of penalty assessments or sanctions, policy 1.4.1 through policy 1.4.4 generally apply. These policies relating to penalty assessments are specifically anchored in section 73 of the Act. For the most part, appeals considered by the Appeal Division do not involve orders that have been challenged through the order review process. This case provides an exception to the usual practice.

Published policy does not provide any guidance with respect to the use of the order review process after penalty assessment consideration is initiated under section 73 of the Act. As illustrated by the circumstances in this case, the postponement or suspension of the penalty assessment consideration while the order review process is accessed can lead to some confusion and to potential delays. In this case, the employer alleges the result of the penalty review process has resulted in a void decision by the vice-president for failing to hold an oral hearing and has placed the sanction review officer in a situation where there is a reasonable apprehension of bias.

Counsel referred this panel to the recent B.C. Supreme Court judgement in *Weldwood of Canada Ltd. v. British Columbia (Workers' Compensation Board)* (20 October 1998) Vancouver A980904 (B.C.S.C.).

In that decision, Macaulay J. held that the formulation and adoption of general policy guidelines for the order review process cannot remove the discretion given under section 96(2). Justice Macaulay said:

I do not accept that the WCB has denied Weldwood procedural fairness or natural justice by failing to follow the Policy it established. I agree with the WCB that although the Policy provides an avenue of appeal that includes an

appeal to the Vice-President, it does not preclude the Board reopening a matter pursuant to s. 96(2) of the *Act*. The language of the Policy itself states that the appeal mechanism “includes” those set out in the Policy; this implies that the list is neither exhaustive nor final.

The court also addressed the issue of whether Weldwood was denied natural justice and procedural fairness by the vice-president. While the court found that there was a reasonable apprehension of bias on the part of the vice-president Prevention Division in that case, the judgement held that:

I agree with the WCB that *Knezevic* is authority for the proposition that the WCB need not be prohibited in general from proceeding with the matter if there is no reasonable apprehension that the person who makes any decision to reopen, or any decision at any subsequent hearing is biased.

I conclude that there is a reasonable apprehension of bias on the part of the Vice-President and that he must be prohibited from hearing any aspect of this matter. I am not persuaded by Weldwood’s argument that the WCB should be prohibited from any rehearing on this basis alone.

The court also found that any prejudice occasioned by the three-year delay could be dealt with at a hearing on the merits.

After considering the arguments advanced by the employer’s counsel in light of the facts and circumstances of this case, we are unable to grant relief to the employer on the grounds that the Prevention Division vice-president declined to hold an oral hearing in considering the order review under policy 1.4.5. That policy does not make specific provision for a hearing at the director or vice-president level. Policy 1.4.5(1) does indicate the employer “. . . may request a review or a hearing with the officer’s Regional Manager.”

On February 21, 1996, the employer and his counsel met with the safety officer and the acting regional manager to discuss the orders from the February 7, 1996 inspection. The officer’s record of that meeting indicates the meeting was held to give the firm an opportunity:

. . . to provide all information and documentation available on compliance actions taken to comply with IH&S regulations.

There is no indication that the employer challenged the validity of the orders at the time of that meeting. The employer’s representative has stated that when he initially met with the safety officer in February 1996 following the inspection, he did not dispute the officer’s conclusion that a worker was working more than ten feet above grade without fall protection.

It was only after the employer received the March 25, 1996 letter proposing a \$25,000 penalty and after a penalty hearing had been scheduled for July 17, 1996 to consider the proposed

penalty that the employer's counsel wrote to the Prevention Division director on June 11, 1996 advising that the orders were in error:

. . . because the workers were not working more than ten feet above grade without fall protection. . . .

At that time, counsel proposed that the July 17, 1996 hearing to consider the proposed \$25,000 penalty be held in abeyance while the employer's concerns regarding the validity of the orders were addressed under policy 1.4.5. The employer did not seek a review or hearing with the regional manager but addressed the employer's concerns to the director.

We are unable to conclude that there has been any substantial breach of natural justice by the Board's vice-president under policy 1.4.5 sufficient to rob the sanction review officer or the Appeal Division of jurisdiction to consider this matter under section 73(1).

Counsel argues that a reasonable person would conclude that the sanction review officer cannot fairly review the decision of the Prevention Division vice-president, who is the senior person in that division.

The employer raises an important issue that merits careful consideration. That consideration must include not only the abstract or structural relationship between the sanction review officer and the Prevention Division vice-president. Consideration must also be given to the applicable provisions of the Act and to the manner in which the sanction review officer exercises his or her responsibilities under the Act.

Section 73 of the Act specifically authorizes the Board to determine whether or not the employer has complied with the regulations when considering a penalty assessment. The exercise of that authority is assigned to and exercised by a sanction review officer. The order review process on the other hand is not based on any specific provision of the Act. It is a formulation of general policy under the authority of sections 82 and 96(2) which empowers the four-step order review process in policy 1.4.5. The relationship between the requirements of section 73(1) of the Act and the general policy for the order review process has, in our view, primary significance for determining the sanction review officer's jurisdiction to consider the validity of the order, particularly where there has been a decision by the vice-president under policy 1.4.5.

The discretion for the sanction review officer to consider the validity of the order is given by section 73(1)(c) of the Act and is not, in our view, superseded by the formulation and adoption of the policy guidelines for the order review process. That general policy process cannot confine or remove the discretion granted to the Board by the statute or assigned to the sanction review officer for determination. To give the order review policy guidelines the effect contended by counsel for the employer elevates those guidelines to the level of law and can fetter the discretion assigned to the sanction review officer under the Act. We do not, therefore, accept the employer's position that the final jurisdiction to review an order on the merits rests with the director and vice-president under policy 1.4.5. That policy cannot be construed to impair the exercise of the discretion granted to the Board under section 73 of the Act.

The Act gives the sanction review officer assigned to consider the penalty under section 73(1) the final authority within the Prevention Division to determine whether the employer has violated the regulations. This fact, coupled with the WCB president's assurance to the employer that the sanction review officer assigned to consider the penalty would be independent from the order review process, provided sufficient insulation to ensure an independent determination of the issues related to the proposed penalty. We are unable to find a reasonable apprehension of bias in this case.

A further issue of importance is whether the sanction review officer met his obligation to comply with the principles of natural justice and procedural fairness in exercising his authority under section 73 of the Act.

The sanction review officer had the authority under section 73 of the Act to consider the validity of the orders. The employer had the opportunity to expose the decision of the vice-president to careful scrutiny at the sanction review oral hearing where the employer could call witnesses and the safety officer who issued the order could provide further evidence or clarification if necessary. In this case, the employer declined to attend the oral hearing scheduled for November 27, 1997 where this close scrutiny of the issues could be considered. The sanction review officer assigned to hear that matter had no prior involvement in the order review process and did not do anything that would deprive the employer of a fair hearing.

After considering all the circumstances, we are unable to find any substantial grounds that would undermine this panel's jurisdiction to hear the employer's appeal from the sanction review officer's decision to impose a penalty.

This panel has provided the employer with a full opportunity to participate in a hearing where the employer could hear and examine the evidence of the safety officer and provide any further evidence with respect to the validity of the cited violations and the decision to impose a penalty. In these circumstances, we are unable to accept the employer's submission that we find the vice-president's decision a nullity or the sanction review officer's decision a nullity.

We find the sanction review officer had the jurisdiction to consider the validity of the cited violations as part of his determination under section 73 of the Act and to determine whether a penalty was consistent with the facts of the case and in accordance with published policy. We find that we have the jurisdiction under section 96(6) of the Act to hear and determine the employer's appeal from the sanction review officer's decision on the grounds specified in section 96(6) and in accordance with the merits and justice of the case.

We find no merit in counsel's argument that the Board was without jurisdiction to cite the employer for a violation of regulation 34.04(1). That regulation applies generally to construction and specifically to the erection of a building. Regulation 32.68(2) is a more specific regulation that applies to steep-pitched roofs and contains additional requirements beyond regulation 34.04(1). That more specific regulation does not limit the generality of regulation 34.04(1). We note that the employer was cited for violations of regulation 34.04(1) on a number of occasions prior to the violation cited on February 7, 1996 and also attended an educational session provided by the Board, detailing the application of the relevant fall protection regulations in March 1995.

We also find that the exception regarding the use of fall protection in regulation 14.30 does not apply in this case. There is no evidence to show that the prerequisites in 14.30 (that the use of safety belts would produce an additional hazard or were clearly impracticable) were met in this case.

We are left, therefore, with the question of whether there was in fact a violation of regulation 34.04(1) and if so, whether a \$27,500 penalty is appropriate in the circumstances and in accordance with published policy.

After considering the evidence of the officer and the evidence of the supervisor, Mr. A, we find the evidence of the officer more compelling and more persuasive. The officer states without qualification that he observed the worker in a kneeling or crouched position at the edge of a 25-foot high roof as he approached the worksite. Because access to the worksite was downhill, his vantage was unobstructed and unimpeded. The officer called the workers down at the time of the inspection and explained the violation related to working at the 25-foot high level without fall protection. The workers and the supervisor at the time did not question or dispute that observation. The safety officer's evidence with respect to his observations has been consistent throughout this lengthy process.

We have considered counsel's submission that the safety officer's observation at the estimated distance of 750 to 1,000 feet stretched beyond the limits of human vision. We note that the safety officer's estimate of this distance from the worksite when he observed the violations was just that, an estimate. Counsel accepted that the safety officer was a credible witness. This panel also found the officer's evidence wholly consistent and found the safety officer a very credible witness. When he had doubt on an issue or could not recall a particular detail, he appropriately qualified or limited his evidence. The officer was certain that he saw a worker at the edge of the roof 25 feet above grade. There was an open bundle of shakes at the location where the officer observed the worker. The supervisor confirmed that a line of shakes had been started along the edge of the roof at that location. A careful examination of the photograph supports a finding that there was an open bundle of shakes and a line had been started along the edge.

The employer, at the time of the inspection and at least up to the time of the March 25, 1996 letter proposing the \$25,000 penalty, did not dispute or contest the validity of the orders. The employer imposed a \$100 fine on the crew members, including the supervisor, for failure to comply with the fall protection regulations. The employer and the employer's counsel met with the safety officer and acting manager approximately two weeks after the cited violation and did not dispute the violation at that time. The unsigned and undated affidavit from supervisor A was not provided to the Board until April 1997, more than a year after the employer was advised of the proposed penalty. The signed affidavit was not provided until after the sanction review officer declined to give the unsigned affidavit weight in his decision of March 12, 1998.

We did not find the testimony of supervisor A to be persuasive or entirely reliable. He did not dispute the safety officer's observation at the time of the inspection. He did not protest the imposition of the \$100 fine by the employer for the February 7 fall protection violation. He

subsequently received further fines by the employer for fall protection violations. He also received an observation report by a safety officer for an April 18, 1996 fall protection violation. As the designated supervisor, he said he did not report fall protection violations of his crew to the employer. He also indicated that safety belts and fall protection would slow production somewhat because of the piece work method of payment.

After considering all the evidence and the submissions, we find that the cited violation of regulation 34.04(1) occurred as stated and observed by the safety officer. The evidence, when taken as a whole, supports the officer's conclusion that he observed a worker without fall protection at the edge of the roof near an open bundle of shakes approximately 25 feet above grade. We also find that the evidence supports a conclusion that the supervision was inadequate to ensure compliance. The evidence also shows that the employer did not have an effective program of compliance in place at the time of the violations.

We find that the severity of the hazard created by the violation was significant. The risk of injury resulting from an unprotected fall from 25 feet is generally high. This is more than twice the height requiring fall protection under the regulations. The supervisor's evidence at the time was that it was very cold on the morning of February 6 and there had been some rain mixed with wet snow. The roof was sloped, which added to the risk. The evidence as a whole supports the sanction review officer's finding that the risk of injury associated with the violation was high.

The previous compliance record of the firm with respect to fall protection is detailed in Appeal Division Decision #97-1355 dated October 16, 1997 and need not be fully repeated here. That record shows:

- S.R.#7 - April 18, 1988 (fall protection) a warning letter
- S.R.#8 - May 15, 1989 (fall protection) \$2,500 penalty
- S.R.#6 - October 4, 1991 (fall protection) \$5,000 penalty
- S.R.#5 - December 9, 1991 (fall protection) \$7,500 penalty
- S.R.#4 - December 11, 1991 (fall protection) \$10,000 penalty
- S.R.#3 - April 29, 1992 (fall protection) \$12,500 penalty was "amalgamated" with the \$10,000 penalty under S.R.#4
- S.R.#2 - June 10, 1994 (fall protection) sanction review officer reduced the proposed \$25,000 penalty to a warning letter

As detailed in Appeal Division Decision #97-1355 following the June 10, 1994 decision to reduce the \$25,000 proposed penalty to a warning letter, the employer was again cited for fall protection violations on June 17, 1994, July 12, 1994, July 13, 1994, November 24, 1994 and February 10, 1995. None of these violations led to consideration of sanctions contrary to

published policy 1.4.1(2), which states that officers “shall recommend the application of sanctions” in situations where there are recorded observations of previous non-compliance with regulations or orders. Where repeat orders follow a warning letter, policy 1.4.1-2 states the officer shall “recommend a penalty assessment or prosecution.”

On March 7, 1995, a safety officer provided a fall protection education session and explained the application of regulations 34.04(1), 32.68 and 14.30 to the employer and his crew. That safety officer reported:

Several options for complying with the requirements of the regulations were discussed. The workers, who work by piece work were ext[r]emely concerned that these requirements would slow them down so much that the[y] would not be able to make their normal wage.

Following this education session, the employer was again cited for violations of regulation 34.04(1) on the following dates:

- April 12, 1995 - which resulted in a warning letter on May 5, 1995
- May 8, 1995 - no penalty consideration
- November 30, 1995 - no penalty consideration

Following the February 7, 1996 violations that led to the penalty under consideration in this appeal, the employer was again cited for violations of fall protection regulations on July 18, 1996. Those violations led to the imposition of a \$25,000 penalty under S.R.#9 on May 9, 1997. Although the July 18, 1996 violation that led to the \$25,000 penalty in May 1997 came after the February 7, 1996 violation leading to the current appeal, it received prior consideration because of the delays involved with the employer’s use of the order appeal process to challenge the February 7, 1996 orders. Apparently, the proposed penalty for the July 18, 1996 violations was set at \$25,000 because the proposed penalty under S.R.#10 was held in abeyance pending adjudication of the order appeal process.

The 1997 Appeal Division panel denied the employer’s appeal under S.R.#9 on the grounds that the employer had not instituted an effective program of compliance and had failed to provide adequate supervision or training to the workers. With respect to the issue of the quantum of penalty under S.R.#9, the 1997 Appeal Division panel said:

The amount of the penalty includes consideration of the motivational impact required. The evidence, when taken as a whole, indicates that the employer was not sufficiently motivated by the prior penalties to establish an effective program of compliance. . . .

. . . the issue of motivation was raised as early as February 1992 (S.R.[#3]) when a \$12,500 penalty was proposed. The violations of April 6, 1993 (S.R.[#2]) led to a proposed penalty of \$25,000 in part because of the need for motivational

impact. As previously noted, the employer was relieved of these penalties although the violations were upheld. A number of subsequent violations did not receive penalty consideration. The violations of February 7, 1996 again led to a proposed penalty of \$25,000 (which has not yet been finally resolved). In these circumstances, *it was open to the sanction review officer to consider a penalty in excess of \$25,000 for the July 18, 1996 violation given the prior penalty history, the employer's record of non-compliance with the fall protection regulations, the extent of risk involved, and consideration of the motivational impact required.* However, the absence of specific policy on the quantum in these circumstances leaves the matter to the judgement of the sanction review officer, after considering the circumstances of the case.

[emphasis added]

The panel referred the general issue of determining the recommended penalty amount for multiple repeat penalties to the Panel of Administrators to determine if a policy clarification was required.

In the employer's current appeal under S.R.#10, the March 25, 1996 letter proposed the quantum of \$25,000 for the following reasons:

Previous non-compliance is clearly evident from numerous prior inspection reports and sanctions. Since 1988 fall protection violation penalties of \$25,000 have been applied to your firm. During the last sanction review against your firm a \$25,000 penalty was reduced to a warning. This was confirmed in a letter of June 10, 1994. Since that time there has been a further warning letter and many subsequent further violations. Referring the Prevention Division Policy 1.4.1. the amount of the penalty assessed in this review is \$25,000.

The sanction review officer decided to increase the proposed penalty to \$27,500 on the following basis:

The *Recommended Schedule of Sanctions* at Policy 1.4.1 provides recommended amounts for V.S.R.O.s to consider. In this case, this should be considered in the context of the "motivational impact required" statement in paragraph 2 of 1.4.1. Clearly I should consider the prior four assessments (S.R.[#6], S.R.[#5], S.R.[#4] and S.R.[#11]). Furthermore, there are a series of inspection reports citing similar violations during this time. Given the incremental nature of \$5,500 assessment for high risk violations for employers who have [the employer]'s payroll, *the last assessment should have been \$22,000.* In my view, the amount should simply be an additional \$5,500 above what should have been \$22,000. Thus, I find a \$27,500 amount appropriate. While this is somewhat larger than proposed amount in the March 25, 1996, letter, it fits within the \$25,000 "general range."

[emphasis added]

It is not entirely clear from the sanction review officer's explanation which assessment he is referring to by the statement "the last assessment should have been \$22,000." We note the last assessment was the decision of May 9, 1997 that imposed a \$25,000 penalty for the July 1996 violation. We do not accept the sanction review officer's conclusion on quantum for the following reasons.

It was determined in January 1994 that the appropriate amount of additional penalty assessment was \$25,000 with respect to fall protection. As previously indicated, that penalty was reduced to a warning letter. The March 25, 1996 proposed penalty was appropriately set at \$25,000 for the reasons set out in that letter. We find that the sanction review officer's statement that the last penalty should have been \$22,000 to be based on an error of fact. As pointed out by the 1997 Appeal Division panel, the subsequent penalty arising out of the July 18, 1996 violation could have been set in excess of \$25,000, since it followed the February 7, 1996 violation. The fact that the \$25,000 penalty under S.R.#9 was imposed prior to the current penalty under S.R.#10 does not, in our view, provide a substantial basis to now revise the proposed penalty for the February 1996 violation. Any adjustment to the proposed \$25,000 penalty for motivational purposes would have more appropriately been applied to the subsequent violation of July 1996. We also find it was inappropriate to alter the amount of the proposed penalty under S.R.#10 without providing the employer with notice and an opportunity to respond.

For the preceding reasons, we find that the appropriate quantum for the penalty under S.R.#10 is \$25,000. The employer's appeal is allowed to the limited extent of restoring the penalty of \$25,000 initially proposed in the March 1996 penalty letter. In all other respects, the employer's appeal is denied.

Editor's Note: This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.