DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Summary

[1] The employer appeals *Review Reference #R0285027*, dated March 23, 2022 to the Workers Compensation Appeal Tribunal (WCAT). That decision confirmed a November 3, 2021 Workers' Compensation Board (Board) decision to impose an administrative penalty on the employer for a safety violation related to an unshored excavation.

[2] The current version of the *Prevention Manual* at policy item P2-95-2 "RE: High Risk Violations" directs the Workers' Compensation Board (Board) to automatically designate any of the six listed types of safety violations as "high risk" in nature[1]. The list of six automatically "high risk" safety violations includes the excavation at issue in the present appeal.

[3] A "high risk" safety violation has significant implications for whether to impose an administrative penalty, and the amount of that penalty, pursuant to section 95 of the *Workers Compensation Act* (Act). Further, a "high risk" violation may play a role in an employer losing its annual COR[2] rebate in the context of assessment matters.

[4] In other words, it is of considerable importance whether a safety violation is characterized as "high risk". Yet, the impugned policy provides no discretion to depart from automatically designating any of the six listed contraventions as "high risk". This is so even if the particular safety violation may not reasonably appear to be hazardous. Because the authority to impose an administrative penalty under section 95 of the Act is discretionary, we consider that the mandatory list of designated high risk violations in policy item P2-95-2 extinguishes or at least fetters that statutory discretion and is therefore patently unreasonable.

[5] In such circumstances, section 304 of the Act permits a panel of the Workers' Compensation Appeal Tribunal (WCAT) to refer a policy the panel considers to be patently unreasonable to the WCAT Chair for direction as to whether we must apply the policy. We therefore refer policy item P2-95-2 "RE: High Risk Violations" to the Chair pursuant to subsection 304(2) of the Act. We note in this regard the practice directive set out in Chapter 10 of the WCAT *Manual of Rules of Practice and Procedure*.

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[1] Prior versions of the policy in question merely raised a rebuttable presumption of a "high risk" violation.

[2] The Board's Certificate of Recognition program provides substantial rebates to employers that meet independently audited safety program goals and is further described in the Board's *Assessment Manual* at policy item AP5-247-4 "RE: Certificate of Recognition Program".

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Jurisdiction

[6] Pursuant to paragraph 285(5)(a) of the Act, the WCAT Chair has appointed a non-precedent panel of three vice-chairs to hear this appeal. Our jurisdiction to hear the appeal and to issue the present referral is further set out in subsections 288(2) and 304(2) of the Act.

Background

[7] This appeal is about whether the employer should be fined for a safety violation in relation to an unshored excavation. Shoring is a method of temporarily supporting the sides of an excavation in order to prevent the excavation from collapsing.

[8] On September 16, 2021, a (Board) officer attended the employer's worksite. The officer inferred from his observations and discussions with workers at the worksite that at least one of the employer's workers had been working in an excavation measuring about 3 feet by 3 feet across and somewhere between 4 and 5 feet in depth. There is some dispute as to the exact depth; however, it will suffice for the moment to say that the excavation may have been as deep as 58 inches or as shallow as 46 inches. We need not resolve that issue for the purposes of the present referral other than to note that an excavation 48 inches deep or more requires the use of shoring or other ameliorative steps, such as sloping approved by an engineer, to ensure that the excavation will not collapse on a worker[3].

[9] As a result of his inspection, the officer considered that the excavation in question contravened these safety requirements because it was more than 48 inches deep and was unshored. The officer therefore issued inspection report 202119055119A, dated September 16, 2021 (the "contravention order"), in which the officer set out his observations and conclusions. The officer went on to conclude by way of inspection report 20218055119Z, dated November 3, 2021, that the contravention order warranted an administrative penalty in the amount of $15,911.90 (the "penalty order").

[10] The employer requested a review of the penalty order. It disputed that the excavation was 48 inches or more in depth or that, in any event, it should be subject to the penalty order. As already noted, a review officer confirmed the penalty order. The employer now appeals to the WCAT.

[11] It will suffice for the purposes of the background to the present referral to state that there may be some reasonable basis on which to conclude that, but for the impugned policy, the contravention order may not in fact reflect a "high risk" of injury or death. We make no finding in this regard. We merely point out that, given the size and volume of the excavation, it might be arguable that, even if it collapsed, the excavation might potentially pose no real risk. It might be

[3] See section 20.81 of the *Occupational Health and Safety Regulation*, BC Reg. 296/97, as amended (the Regulation).

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that a worker standing or even kneeling in the excavation would have taken up the bulk of the volume of the excavation, such that if it collapsed the worker would potentially have had no difficulty in safely exiting the excavation.

[12] In addition, the excavation, even if it were as deep as 58 inches, may only have been beyond the 48-inch threshold for a short time during the excavating process. It might be said as a matter of common experience that it does not take long to dig a 3 by 3 hole the extra few inches in depth as between requiring shoring and not requiring shoring (e.g., from less than 48 inches to more than 48 inches). For much of the excavation the hole would have been less than 48 inches, such that there was no safety concern. Thus, it might be that the duration of the hazard was relatively brief.

[13] Finally, the work performed in the excavation once it was fully dug appears to have been fleeting and involved connecting some plumbing lines together. The excavation seemingly only accommodated a single worker. In these circumstances, it might be arguable that the potentially brief duration of any hazard, minimal danger from that hazard, and limited exposure of workers to any such hazard, all point to an excavation safety violation that perhaps is not reasonably characterized as of a high risk nature absent the deeming effect of the impugned policy.

[14] Again, we emphasize that we make no specific factual findings to this effect. We are well aware that excavations are frequently highly hazardous and that employers must generally exercise great caution to protect their workers from that hazard. We merely say that, in the unusual circumstances of the present appeal, it is at least arguable that the contravention order may not demonstrate any meaningful risk of serious injury or death to a worker.

[15] Yet, the present wording of the impugned policy does not permit the panel to even entertain such an analysis because the policy simply deems all excavation safety violations to be automatically of a "high risk" nature. It is the lack of nuance and discretion in relation to perhaps the single most important driver of administrative penalties that is at the heart of the present referral.

The Impugned Policy

[16] We italicize and underline below the impugned portions of the policy:

> **RE: High Risk Violations ITEM: P2-95-2**
>
> **<u>BACKGROUND</u>**
>
> **1. Explanatory Notes**
>
> Items P2-95-1, P2-95-5, and P2-95-10 require consideration of whether a violation involves high risk of serious injury, serious illness, or death ("high risk").

[…]

This policy sets out how WorkSafeBC will categorize a violation as high risk. Violations may be classified as high risk in one of two ways:

A. Designated High Risk Violations

The first category are "designated high risk violations", ones that are *automatically considered to be high risk* because they regularly result in fatalities, serious injuries and serious illnesses. They generally give a worker little or no opportunity to avoid or minimize severe injury or death or occupational disease. *The six items on the list are high risk violations*.

B. High Risk Criteria

[…]

POLICY

For ease of reference, in this policy "high risk" refers to high risk of serious injury, serious illness or death.

This policy sets out how high risk is determined for the policies regarding occupational health and safety related penalties and warning letters. *Violations in the six circumstances on the list of Designated High Risk Violations (A) are high risk*. Determining whether other violations are high risk will depend on the High Risk Criteria (B).

[…]

A. Designated High Risk Violations

Violations of the Act or OHSR relating to the following circumstances *are high risk*:

1. Entry into an excavation over 1.2 m (4 feet) deep contrary to the requirements of the Regulation.

2. Work at over 3 m (10 feet) without an effective fall protection system.

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3. Entry into a confined space without pre-entry testing and inspection to verify that the required precautions have been effective at controlling the identified hazards.

4. Causing work disturbing material containing asbestos, or potentially containing asbestos, to be performed without necessary precautions to protect workers.

5. Hand falling or bucking without necessary precautions to protect workers from the tree that is being felled or bucked, or other affected trees….

6. Work in the vicinity of potentially combustible dust without the necessary precautions to protect workers.

[17] We note that item B of the policy provides criteria with which to measure whether any other type of safety violation might also be characterized as "high risk" even if it is not listed as an automatic high risk violation. The criteria to consider include the likelihood of an incident or exposure actually occurring and the likely seriousness of any resulting injury.

Analysis

[18] The meaning of "patently unreasonable" for the purposes of section 304 of the Act has been discussed in several decisions of former WCAT Chairs and we need not repeat that analysis here. We merely point out that, where a policy is clearly contrary to the Act the policy will be patently unreasonable[4].

[19] We note at the outset that we do not suggest the impugned policy is patently unreasonable in its entirety. We conclude only that the policy is patently unreasonable to the extent that there is no residual discretion to consider in exceptional or unusual circumstances that a listed safety violation may not in fact be properly designated as "high risk".

[20] In support of this conclusion we discuss three key issues. First, we consider whether the impugned policy is properly interpreted as mandatory. Second, we discuss the central and critical significance of a "high risk" finding for an employer. Third, we address the meaning of patent unreasonableness under the Act, particularly in relation to a policy that fetters or extinguishes a statutory discretion.

[4] See, for example, *Glover v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1878 at paragraph 56.

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A. Interpreting the impugned policy

[21] We have already set out the relevant wording above. The rules of statutory interpretation are well-settled and require consideration of the ordinary meaning, context, and purposes of the provisions in question. These principles are found in cases such as *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353.

[22] Here, the ordinary meaning of the policy is to exclude any discretion in relation to characterizing the six listed safety violations as "high risk". The words "designated", "automatically", and "are" all have the ordinary meaning of mandating an outcome with no discretion.

[23] Similarly, the context also supports this conclusion. The context of providing a secondary section in the policy with criteria for assessing whether or not a non-listed safety violation is also "high risk" means that the listed group must be different and must be mandatory. If that were not so, all cases would simply fall to be decided under the (B) section of the policy. Thus, the only contextual role of the (A) designated "high risk" section is to be mandatory.

[24] Finally, the purpose of the mandatory list appears to be to illustrate for the employer community the importance of these safety areas and also to simplify decision-making. These purposes are best achieved by interpreting the impugned portions of the policy in a mandatory manner. We therefore conclude that the impugned portions of the policy mandate a finding of "high risk" in relation to the six listed safety violations and that there is no discretion within the policy to reach a different conclusion.

B. The significance of a "high risk" violation to employers

[25] There are three areas where a "high risk" violation impacts an employer. First, policy item P2-95-1 "RE: Criteria for Imposing OHS Penalties" provides that the general process is to first "consider" whether a penalty is generally appropriate. If the underlying safety violation is "high risk" then the first step in the analysis is satisfied. Thus, while an employer may still avoid imposition of a penalty at the second stage of the analysis under P2-95-1, or by demonstrating due diligence, the fact remains that a finding of a "high risk" safety violation plays an important role in the analytical framework for imposing an administrative penalty on an employer.

[26] Second, the finding of a "high risk" safety violation intersects with the quantum of any penalty ultimately levied on an employer. In this regard, policy item P2-95-5 "RE: OHS Penalty Amounts" directs that the base amount of an administrative penalty must be doubled if the underlying safety violation was of a "high risk" nature. Therefore, a finding of "high risk" has a direct and significant effect on the amount of any administrative penalty ultimately levied on an employer.

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[27] Third, and related to the first issue, an employer who has qualified for COR risks losing the associated rebate for any year in relation to which that employer is subject to an administrative penalty. The COR rebate may be up to 10% of an employer's annual assessments. It is therefore apparent that, because a "high risk" violation makes imposition of an administrative penalty more likely, a "high risk" violation also makes more likely the loss of an employer's COR rebate. For larger employers who have qualified for COR, the rebate may well be substantially more than the administrative penalty itself.

[28] It is therefore apparent that the issue of whether a safety violation is "high risk" is of considerable significance to all employers, including the employer in the present appeal. Indeed, the "high risk" issue may reasonably be described as one of the most important drivers in deciding the consequences of a safety violation. It is the central importance of a "high risk" finding, in conjunction with mandating such a finding without exception for the six listed safety violations, which leads us to conclude the impugned policy is patently unreasonable due to its fettering or extinguishing of a statutory discretion. We consider this last point in more detail below.

C. Fettering/extinguishing of discretion

[29] The Act is dominant over policy or regulation. The latter are forms of subordinate legislation that take their authority from the Act. Because the Act is dominant, the policy cannot contradict the Act and must always be consistent with it.

[30] Here, we have already noted that section 95 of the Act authorizes the Board to impose an administrative penalty on an employer. Section 95 is a discretionary authority because it provides that the Board "may" impose an administrative penalty subject to various requirements.

[31] It is therefore apparent that the administrative penalty regime is infused with a statutory discretion. It is well-understood that subordinate legislation such as a binding policy may validly guide a statutory discretion; however, the subordinate legislation cannot extinguish or otherwise improperly fetter that discretion.

[32] In our view, the impugned policy has the effect of extinguishing or at least fettering the discretion found in section 95 of the Act. This is particularly so when considered in the context of the important role of finding a "high risk" violation in imposing a penalty and doubling the amount of that penalty. Such an outcome is patently unreasonable because a policy, as a form of subordinate legislation, cannot override or contradict the enabling statute (the Act) without being patently unreasonable.

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[33] We note that similar concerns, particularly regarding unfairness of the impugned policy, were recently voiced by another WCAT panel in *WCAT Decision A2001695*, dated July 21, 2021. The panel ultimately did not have to directly resolve the issue; however, we find further support for our referral at paragraph 84 of that decision, where the panel reasoned:

> … if…policy item P2-95-2 has eliminated the ability for employers to rebut a designation of high risk in the case of designated violations, as submitted by the firm's counsel […] then this case appears to be a strong example of the apparent unfairness of such a policy. The only evidence before me about the level of risk posed by the non-compliant excavation consists of Ms. A's evidence—and her evidence was clear that, due to the unique factors and conditions of the soil present at the time of this particular excavation, there was no risk of the trench collapsing and potentially injuring a person standing in the trench. Therefore, to simply accept that this violation created a high risk of injury or death to workers, without considering the expert evidence before me which supports a contrary conclusion, seems, on an intuitive level, to be unfair to the employer. Therefore, if the decision on this appeal were to turn upon whether the July 16, 2019 violation created a high risk of injury, then I would be inclined to a) undertake a purposive review of the policy to determine if, in fact, the ability to rebut the designation of high risk through evidence has been eliminated; and b) possibly refer this question to the chair of WCAT for a determination under section 304 of the Act before proceeding to render a decision.

[34] We agree with those concerns and they similarly inform our decision to refer the impugned policy to the WCAT Chair on the basis that it is so patently unreasonable it cannot be supported under the Act.

[35] As a final point and in an effort to illustrate the relatively narrow scope of our concerns, we expect that the impugned policy need undergo only a minor amendment to be consistent with the Act. It would seem to us that the statutory discretion would be adequately maintained by adding "presumptively", "generally", "in most cases", "unless exceptional circumstances are present", or such other language so as to modify the impugned portions of the policy such that they are no longer mandatory and retain at least a modicum of the statutory discretion found in section 95 of the Act. We see nothing problematic with **generally** assuming the listed safety violations are "high risk" as long as there remains at least some scope for departing from such an outcome in appropriate cases.

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Conclusion

[36] We find that the underlined portions of the impugned policy are patently unreasonable to the extent that they mandate a finding that any of the six listed safety violations are automatically of a "high risk" nature.

[37] We therefore consider that the impugned policy should not be applied to the current appeal and we refer further consideration of the impugned policy to the Chair of the WCAT pursuant to subsection 304(2) of the Act.

Warren Hoole
Vice Chair

James Sheppard
Vice Chair

Cynthia Katramadakis
Vice Chair

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