WCAT Decision Number: WCAT-2009-00470
WCAT Decision Date: February 16, 2009
Panel: Herb Morton, Vice Chair

Introduction

[1] This is a referral to the chair of the Workers' Compensation Appeal Tribunal (WCAT) under section 251 of the *Workers Compensation Act* (Act). I consider an aspect of policy item #D12-196-6 of the *Prevention Manual* to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

[2] The policy contains Tables for determining the "basic amount" of a penalty with reference to an employer's assessable payroll. The policy further provides that the basic amount of the administrative penalty will be determined on the basis of the employer's assessable payroll for the most recent full calendar year for which figures are available at the time the penalty is imposed.

[3] The employer's appeal to WCAT stems from an inspection on September 28, 2005, in which an excavator was being used to remove underground fuel tanks.

[4] If the Workers' Compensation Board, operating as WorkSafeBC (Board), had proceeded to issue a penalty during the remainder of 2005, this would likely have been based on the employer's payroll in 2004. If the Board had issued the penalty in 2006, the penalty would likely have been based on the employer's payroll in 2005 (the year in which the alleged violation occurred). Either of those approaches would appear reasonable.

[5] However, as the Board did not levy the penalty until 2007, it used the employer's payroll for 2006 (the year subsequent to the year in which the alleged violation occurred). A question arises as to whether it is unduly arbitrary, and patently unreasonable under the Act, for the amount of the administrative penalty to vary simply as a result of the Board's delay in imposing the penalty (and to take into account changes in the employer's circumstances subsequent to the date of the violation).

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Preliminary – form of referral

[6] Item #12.40 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) contains a practice directive on referrals to the WCAT chair for unlawful policy. This begins by stating:

> *The following practice directive applies to referrals under section 251:*
>
> *(a) a panel must provide written reasons in a memorandum to explain its belief that a policy is so patently unreasonable that it is not capable of being supported by the WCA and its regulations;*
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> [italics in original]

[7] MRPP item #1.10 explains that section 13 of the *Administrative Tribunals Act* (ATA) allows WCAT to issue non-binding practice directives. Practice directives are identified in italics in the MRPP. Section 13(2) of the ATA provides:

> The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

[8] I have been advised by WCAT's tribunal counsel that a revision of item #12.40 is to be considered in relation to a forthcoming revision of the MRPP. This would provide for a referral to the WCAT chair under section 251 to be issued in the form of a numbered WCAT decision, rather than in a memorandum. This would facilitate transparency, by ensuring that the referral document is written without identifiers so that it may be readily disclosed without requiring further editing to protect privacy. Currently, such memoranda are posted on WCAT's website, but this requires that any personal identifiers be removed.

[9] As the current practice directive is not binding, and as the reasons provided for using a decision format rather than a memorandum have some force, I have decided to depart from the practice directive and to initiate this referral in the format of a numbered decision.

[10] For clarity, I note that this is a change in form, and not of substance. The initiation of a referral under section 251 does not constitute a decision in respect of the merits of the appeal. I am not "functus" in respect of any matter addressed in this referral, and will fully consider all issues in the appeal once the outcome of the referral is known (subject to the determination of the WCAT chair and/or the board of directors of the Board on the referral issue, as set out in section 251(4) and (8) of the Act, or amendment of the policy).

Background

[11] Relevant background dates to this appeal may be summarized as follows:

Current Penalty Appeal

- September 28, 2005 inspection – removal of fuel tanks with an excavator, exposure to hydrocarbon emissions
- October 6, 2005 orders regarding violation
- April 28, 2006 Review Division decision (*#R0059376*) regarding orders
- June 6, 2007 decision to impose penalty of $97,272.90
- June 16, 2008 Review Division decision (*#R0082802*) to vary the penalty: category B penalty, without variance, doubled as a repeat penalty

[12] Due to the lapse of time between the inspection on September 28, 2005, and the June 6, 2007 decision to levy a penalty, a question arises as to whether the penalty should be based on the employer's payroll during 2004 (the last full year prior to the alleged violation), the employer's payroll for 2005 (the calendar year in which the alleged violation occurred), or in 2006 (the last full year prior to the decision to levy a penalty). This would make a significant difference in the amount of the basic penalty:

Year	**Employer's Payroll**	**Basic Penalty Based on Payroll**	
		Category A	**Category B**
2004	$ 873,114.00	$20,895.07	$ 6,343.21
2005	$1,720,715.00	$37,612.51	$ 9,018.00
2006	$2,823,240.00	$54,040.50	$11,646.48

[13] The June 6, 2007 decision to levy a penalty used the employer's payroll in 2006. The basic penalty of $54,040.50 was reduced by 10% to $48,636.45, and doubled to $97,272.90 as a "repeat" penalty.

[14] The review officer found the penalty should be a category B penalty, and should be doubled from the base amount as a "repeat" penalty. It is readily apparent from the chart above that the amount of the administrative penalty differs significantly depending on which calendar year is used to identify the employer's payroll.

[15] (In this case, the initial decision to impose the first penalty was made on November 28, 2005 in relation to a violation on September 23, 2004. The second penalty stemmed from the September 28, 2005 inspection. At the time of the September 28, 2005 inspection, there had not been a prior decision to levy a penalty.)

[16] The Review Division decision did not expressly address the issue as to whether the occupational safety officer was correct in using the employer's payroll for 2006. However, this would appear to be required by the wording of policy item #D12-196-6 of the *Prevention Manual*. This gives rise to a question as to whether changes in the employer's payroll subsequent to the date of an infraction should be taken into account in determining the extent of the employer's potential liability for a penalty.

[17] The employer was provided with notice of this issue in my memorandum of October 31, 2008. By submission dated December 15, 2008, the consultant representing the employer commented, in part:

> From a purely administrative perspective, as violations may occur at any time during a calendar year, the payroll that is designated at the time of the violation should actually be the payroll from the calendar year previous to the violation. The previous year payroll figure is fixed, real and available. Otherwise, the Board would have to wait up to 12 months (to the end of the calendar year of the violation) to decide upon a payroll amount. That is unrealistic and unacceptable.
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> …
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> **[The employer] believes that this matter needs to be revisited in policy.** [The employer] is certain that the authors of the legislation did not conceive that WorkSafeBC would require multitudinous years to make an imposition decision.
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> [emphasis in original]

[18] While not directly relevant, the consultant representing the employer further comments:

> As an aside, when I was the Manager of the Penalty Section in Prevention Division, I set a performance standard for imposition of penalties. My standard, regardless of the lack of a statute of limitations on the imposition of penalties, was 12 months…. In many cases, even 12 months felt too long to retain a "motivational effect" (rather than a punitive one)….
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> [reproduced as written]

Act and Policy

[19] Section 196 of the Act provides, in part:

> **196** (1) The Board may, by order, impose an administrative penalty on an employer under this section if it considers that
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> (a) the employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
>
> (b) the employer has not complied with this Part, the regulations or an applicable order, or
>
> (c) the employer's workplace or working conditions are not safe.

[20] Policy item #D12-196-6 of the *Prevention Manual* states:

> The "basic amount" of the administrative penalty will be determined on the basis of the employer's assessable payroll **for the most recent full calendar year for which figures are available at the time the penalty is imposed.**
>
> [emphasis added]

[21] Section 250(2) of the Act provides:

> (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

[22] Section 251 of the Act further provides:

> **251** (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.
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> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.

Analysis

[23] In *Canada (A.G.)* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 964, the Supreme Court of Canada explained that under the patently unreasonable test a court should only interfere with the decisions of a tribunal if the decision is "clearly irrational."

[24] In *Law Society of New Brunswick v. Ryan*, (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 596, Iacobucci J. made the following comments concerning the standard of patent unreasonableness:

> … a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective… A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[25] I consider that the policy at item D12-196-6 is a reasonable one, to the extent it provides for the amount of an administrative penalty to be determined with reference to the amount of the employer's assessable payroll for the full calendar year with reference to either:

- the year in which the violation occurred, or
- the last full calendar year prior to the violation for which payroll figures are available.

[26] I consider the policy to be arbitrary in its effect, however, to the extent it permits the penalty to be based on the employer's payroll for a calendar year subsequent to the one in which the violation occurred, due to delay by the Board in imposing a penalty.

[27] Changes in the employer's circumstances with respect to the size of its assessable payroll in the year(s) following a violation would seem to be an irrelevant consideration. I consider that the policy is "clearly irrational," to the extent its wording provides for a change in the amount of the basic penalty to be levied on the employer based on changes to the employer's assessable payroll in a year or years subsequent to the year in which the violation occurred.

[28] I have also considered whether the policy is capable of being interpreted restrictively so as to avoid having the impugned effect. I consider that the clear and specific wording of the policy does not support such an interpretation.

[29] It is not evident whether the policy was intended to have this effect. This issue would not arise if the initial decision to impose a penalty was made no later than the end of the year following the year in which the violation occurred.

[30] In the text *Sullivan and Driedger on the Construction of Statutes*, 4th edition, by R. Sullivan (Ontario: Butterworths, 2002), the author comments at page 544:

> Perhaps the most fundamental tenet of the rule of law is that those who are governed by law must have knowledge of its rules before acting; otherwise any compliance with the law on their part is purely accidental. Citizens must have knowledge of the law before acting so they can adjust their conduct to avoid undesirable consequences and secure desirable ones.

[31] Employers have notice, through the policy at D12-196-6, that they may be liable for a penalty for a violation of the Act or the *Occupational Health and Safety Regulation*, adjusted with reference to their annual payroll so as to have an appropriate impact. It seems arbitrary and unfair, however, for the amount of the applicable payroll to vary based on changes in the employer's payroll during subsequent years. The amount of the employer's future payroll would not be within the employer's contemplation at the time of the violation.

[32] In the event the delay in imposing a penalty was the result of non-compliance by the employer, it may be that this could be addressed through an upward variation in the amount of the penalty, or separate enforcement action.

[33] Another approach might be to treat the amount of the employer's payroll in the year preceding the violation, or in the year of the violation, as a "cap" affecting the calculation of the administrative penalty. If the employer's payroll in subsequent years were to have any relevance, it may be that this could serve as a basis for considering a possible reduction taking into account the employer's reduced circumstances (i.e. as a discretionary factor).

[34] Section 11 of the *Canadian Charter of Rights and Freedoms* (Charter) provides:

> **11.** Any person charged with an offence has the right
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> …
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> i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[35] Pursuant to section 44 of the ATA, WCAT does not have jurisdiction over constitutional questions, including the application of the Charter. This provision is of interest, however, to the extent it appears to identify a general principle or societal value. I have not relied on this provision in this referral.

[36] In *Thow v. B.C. (Securities Commission)*, 2009 BCCA 46, February 12, 2009, the British Columbia Court of Appeal allowed an appeal from a decision of the B.C. Securities Commission. Thow committed offences under the *Securities Act* between 2003 and 2005, at a time when the maximum administrative penalty was $250,000.00. The *Securities Act* was amended in May 2006 to provide for an administrative penalty of not more than $1 million for each contravention. The Securities Commission imposed an administrative penalty of $6 million. The Court of Appeal reasoned:

> [49] Here, the Commission's imposition of the fine was arguably not "punitive" in the narrow sense of the word; that is, it may not have been imposed as a punishment for Mr. Thow's moral failings, and it may not have been motivated by a desire for retribution or to denounce his conduct. Nonetheless, it was "punitive" in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct. It was not merely a prophylactic measure designed to limit or eliminate the risk that Mr. Thow might pose in the future.
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> [50] Accordingly, I am of the view that the Securities Commission erred in finding that the presumption against retrospectivity was inapplicable to the increase in the maximum administrative penalty authorized by the 2006 legislation.

[37] In paragraph 12, the Court of Appeal noted that section 11 of the Charter has been held not to be generally applicable to disciplinary penalties imposed by administrative tribunals. It commented, however, that the same fundamental values that lie behind section 11(i) of the Charter animated the argument put forward by the appellant.

Conclusion

[38] In summary, I consider policy item #D12-196-6 of the *Prevention Manual* to be so patently unreasonable ("clearly irrational") that it is not capable of being supported by the Act and its regulations. The policy provides for the use of an employer's payroll in years subsequent to the one in which the violation occurred, where the Board's decision to impose a penalty is not made for two or more years after the violation (by stipulating that the "basic amount" of the administrative penalty will be determined on the basis of the employer's assessable payroll for the most recent full calendar year for which figures are available at the time the penalty is imposed).

[39] Changes in the amount of the employer's payroll in the years subsequent to a violation would seem to be an irrelevant consideration in determining the basic amount of the penalty. I consider it arbitrary and unfair for delay of two or more years by the Board in imposing an administrative penalty to influence the determination of the amount of the penalty to the employer's detriment. The amount of the difference in this case is not small and this involves an issue with broader implications.

[40] My decision concerning the employer's appeal will be deferred pending the outcome of this referral. WCAT's Tribunal Counsel Office will contact the employer concerning the further handling of this referral.

Herb Morton
Vice Chair

HM/gw