Richmond Elevator Maintenance Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)

Decision Summary

Court	B.C. Supreme Court
Citation	2021 BCSC 91
Result	Judicial Review Allowed
Judge	Mr. Justice Gomery
Date of Judgment	January 21, 2021
WCAT Decision(s) Reviewed	A1606046

Keywords:

Judicial review – Occupational health and safety – Administrative penalty – Section 95 of the Workers Compensation Act – Policy D12-196-6 of the Prevention Manual of the Workers' Compensation Board (since amended by policy P2-95-5) – Repeat administrative penalty – Notice of a potential penalty for a prior violation

Summary:

The court determined that a decision of the Workers' Compensation Appeal Tribunal (WCAT) was patently unreasonable in finding that an employer had been given notice of a potential penalty for a violation of occupational health and safety requirements.

The Workers' Compensation Board (Board) had found the employer to be in violation of the same provision of the *Occupational Health and Safety Regulation* on three occasions within a relatively short span of time. After the first violation, the Board issued a warning letter to the employer instead of an administrative penalty. After the second violation, the Board's inspection report noted that based on the violation, the Board "has determined that there are grounds for imposing an administrative penalty" and if the Board "decides to impose a penalty, … further information will be provided". The Board did issue a penalty but before it did so, the employer committed the third violation. The Board also imposed a penalty for the third violation and did so as a *repeat penalty*, which entailed a significant increase in the amount of the penalty relative to the amount that would have been imposed if the penalty had not been assessed as a repeat penalty. At the time, policy D12-196-6 of the Prevention Manual required (among other things) that before a repeat penalty can be imposed, the employer must have been given "notice of a potential penalty for the prior violation".[1]

[1] The policy has since been amended. The current policy, P2-95-5, requires "notice to the employer that

On appeal to WCAT, the employer argued that the language contained in the inspection report following the second violation did not constitute notice of a potential penalty. WCAT agreed, noting that the "statement did not communicate a warning that the Board intended to impose a penalty in relation to the [second] violation". However, WCAT found that the language contained in the inspection report, when read in the context of the warning letter sent after the first violation, did provide the notice of a potential penalty required by policy D12-196-6. In support of its conclusion, WCAT noted that the warning letter said that the "issuance of a warning letter does not affect or limit WorkSafeBC's ability to pursue administrative penalties… for subsequent violations" and the policy governing warning letters – D12-196-11 (now policy P2-95-10) – provides that the Board will ordinarily not issue more than one warning letter for the same or similar violations.

On judicial review, the employer argued that the warning letter was just as ambiguous as the language in the inspection report and even taken together, the two documents could not amount to sufficient notice. The court agreed with the employer, finding that the tribunal did not explain in its reasons how the warning letter resolved the ambiguity in the inspection report. The court said that the statement in the warning letter added nothing to the statement in the inspection report. Neither did the record establish any basis for inferring that the warning letter resolved the ambiguity. As the court observed, although policy D12-196-11 provides that the Board will not ordinarily issue a second warning letter, that provision was not brought to the employer's attention. The failure to explain how the two documents, when read together, provided the sort of notice the tribunal found to be necessary is a patently unreasonable flaw in the logic of the decision.

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a penalty was being considered for the same or substantially similar violation…".