

Noteworthy Decision Summary

Decision: WCAT-2005-06225-AD **Panel:** Heather McDonald **Decision Date:** November 22, 2005

Natural justice – WCAT and Workers' Compensation Board responsibility to provide information – Section 113(2) of the Workers Compensation Act

The Workers' Compensation Board (Board) imposed an administrative penalty against the employer for violations of the *Occupational Health and Safety Regulation* (Regulation). The panel held that as proceedings before the Workers' Compensation Appeal Tribunal (WCAT) are in the nature of a rehearing, any procedural injustice or unfairness that may have occurred in earlier Board proceedings is rectified. The panel further held that, beyond providing full disclosure of the information and evidence upon which the penalty was imposed, neither the Board nor WCAT is obliged to provide the employer with information that would assist in the employer's defence.

A Board safety officer recommended an administrative penalty of \$4,488.00 for violations of sections 16.8(1) and 16.10(1) of the Regulation. The employer wrote to the Board requesting answers to ten questions. The Board advised that it could not respond to these questions and referred the employer to the Employers' Advisers Office for further assistance. The penalty was then imposed. The employer requested the Board to reopen the matter under section 113(2) of the *Workers Compensation Act*. A reviewing officer confirmed the initial Board decision after an oral hearing. The employer appealed to the former Workers' Compensation Appeal Division. On March 3, 2003, the employer's appeal was transferred to WCAT under section 39 of the *Workers Compensation Amendment Act (No. 2), 2002*.

The employer wrote to WCAT with questions about the appeal. WCAT responded in writing to the questions and recommended the employer contact the office of the Employers Adviser if it still had questions about the appeal process. The employer wrote again to WCAT requesting clarification of the earlier response. WCAT responded to the employer's questions and requested a final submission from the employer. The employer did not submit any further final submission before the deadline. At the panel's request, WCAT wrote once again to the employer requesting its written submissions. The employer did not respond.

In addressing the allegation that the reviewing officer had committed procedural errors in reaching the decision, the panel noted that it was the same reviewing officer that earlier rendered the decision imposing the administrative penalty. The panel held that, although it would have been better to have had a different reviewing officer act in the section 113(2) proceedings so as to prevent an apprehension of bias, there was no basis from the audiotape of the hearing or the employer's firm file upon which to find a reasonable apprehension of bias on the part of the reviewing officer or the Board. The employer was not prejudiced in any way, but provided with a fair and reasonable opportunity to present its defence to the proposed administrative penalty.

The panel further noted that WCAT has authority to consider all questions of fact, law and discretion arising in an appeal. The proceedings before WCAT are in the nature of a rehearing, and thus offer a rectification of any procedural injustice or unfairness that may have prejudiced the employer in the earlier Board proceedings. The employer did not take advantage of the opportunity to present new evidence and arguments to WCAT.

The panel then addressed the employer's requests for information. The employer wanted WCAT and the Board to provide it with relevant articles that would benefit its position on appeal. The panel held it is not reasonable for the employer to expect WCAT or the Board to assist it in preparing its defence to an administrative penalty, beyond providing full disclosure of the information and evidence upon which the penalty was imposed. WCAT must act with neutrality in deciding the issues on an appeal, and cannot provide research of a legal or advocacy nature for a party to an appeal.

On these merits, the panel found the employer had violated sections 16.8(1) and 16.10(1) of the Regulation and that an administrative penalty of \$4,488.00 was appropriate. The employer's appeal was denied.

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Panel: Heather McDonald, Vice Chair

Introduction

The employer is in the business of rag manufacturing by way of recycling used clothing. It is appealing a July 23, 2002 decision of a reviewing officer in the Prevention Division, Workers' Compensation Board (Board). In that decision, issued after a July 11, 2002 hearing, the reviewing officer concluded that the employer had violated sections 16.8(1) and 16.10(1) of the *Occupational Health and Safety Regulation* (Regulation). Those provisions deal with the requirements to install rear view mirrors and audible warning devices on forklifts. The reviewing officer also imposed an administrative penalty of \$4,488.00.

On appeal, the employer alleged that the situation was not serious or potentially hazardous, and that the unique circumstances of its workplace and its employees were not taken into account by the Board.

Issue(s)

Did the employer violate sections 16.8(1) and 16.10(1) of the Regulation? Was it appropriate for the Board to have imposed an administrative penalty against the employer? If so, was the quantum of penalty appropriate?

Jurisdiction and Procedural Matters

The employer wrote a letter dated August 20, 2002, addressed to the reviewing officer who had issued the July 23, 2002 decision, disputing the reviewing officer's findings. Ultimately this letter was transferred to the Board's Appeal Division, and was accepted as the employer's notice of appeal of the July 23, 2002 decision. Under section 207 of the *Workers Compensation Act* (Act) as it existed at the time the employer initiated its appeal, the Appeal Division had jurisdiction to deal with appeals of administration penalties imposed by the Board under section 196 of the Act.

On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced both the Appeal Division and the Workers' Compensation Review Board. As an Appeal Division panel had not considered the employer's appeal by the transition date of March 3, 2003, I am deciding it as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39.)

The employer represented itself in these appeal proceedings. On June 30, 2003, a WCAT appeals coordinator sent the employer a copy of its firm file, and invited the employer to provide a written submission in support of its position on appeal. (Earlier, on September 6, 2002, the Board's reviewing officer had sent the employer a copy of an audiotape of the July 11, 2002 hearing before the reviewing officer.)

On July 11, 2003, the employer wrote to WCAT with three questions about the appeal. By letter dated August 12, 2003, a vice chair in the WCAT registry responded to the employer's July 11, 2003 letter. In that letter, the registry vice chair responded to the three questions, and also recommended that the employer, if it still had questions about the appeal process, to contact the office of the Employers' Adviser. The registry vice chair explained that the office of the Employers' Adviser was created to provide employers with advice and information pertaining to workers' compensation issues. The letter gave the address and telephone contact information for the Employers' Advisers' Office.

On October 6, 2003, the employer wrote to the WCAT vice chair and noted that the August 12, 2003 letter had not specifically answered a third of the employer's questions in its July 11, 2003 letter. The employer wanted to know if the WCAT panel assigned to deal with the appeal would be able to take into account alleged error of law as well as new information. The employer requested a prompt response.

There was no response from the WCAT registry and once more, on March 2, 2005, the employer again wrote to the WCAT vice chair requesting a response to its October 6, 2003 letter. The registry vice chair responded in a letter dated March 11, 2005, apologizing for the delay, indicating that he had thought the employer's questions and concerns had been dealt with in telephone conversations between the vice chair and an employer representative in the summer of 2003. In the March 11, 2005 letter, the registry vice chair went on to refer to sections 250(1) and 254 of the Act, in explaining the general scope of WCAT's jurisdiction in an appeal proceeding. The registry vice chair also discussed disclosure issues, confirming that the employer had been sent full disclosure of its prevention firm file. The registry vice chair indicated that should, in the course of the appeal, the WCAT panel assigned to deal with the appeal obtained further information not yet seen by the employer, the panel would disclose that to the employer and allow time for comment before any decision would be made. The registry vice chair concluded:

With this background, you must now either proceed with this appeal or request that it be withdrawn. At this point, we have not received a final submission from you. We do have your initial submission contained in your letter of August 20, 2002. Therefore, if you have any further information to provide to WCAT in support of this appeal, we ask that it be forwarded to us by April 5, 2005. Once we have received your submission or the time period for submission has passed and we have not received a request to withdraw the appeal, we will continue the registration of the

appeal for assignment to a WCAT panel to address the merits of the appeal.

The April 5, 2005 deadline passed without any further submission from the employer, and ultimately the appeal was assigned to me for adjudication.

In reviewing the history of the appeal, I became concerned that the employer may not have understood that the appeal was proceeding by way of “read and review” of written submissions, rather than an oral hearing. I was also concerned that the employer may not have understood that any new evidence and/or additional argument it might wish to make, would need to be made by way of written submission. Accordingly, I requested a WCAT appeal coordinator to write to the employer to make those points, and to explain the evidentiary basis upon which WCAT would be deciding the issues on appeal. The appeal coordinator’s letter, dated October 7, 2005, stated in part as follows:

... The deadline of April 5, 2005 has passed. The panel assigned to deal with your appeal is concerned that you may not understand that the appeal is proceeding by way of a “read and review” process, and that there will not be an oral hearing.

The WCAT panel assigned to deal with your appeal has listened to the audiotape of the July 11, 2002 oral hearing chaired by [name of reviewing officer] in the Workers’ Compensation Board’s Prevention Division. The panel also has access to your firm file and the information in the “Recommendation for Administrative Penalty” package that was before [the reviewing officer].

In your letter dated October 6, 2003, you referred to “errors of law or procedural wrongdoing” committed by the Board, and the need to ensure that there is accuracy and completeness in “the pursuit of justice in the collection of information” by the Board. On appeal, WCAT has the jurisdiction to accept and consider new evidence and information. The WCAT panel assigned to deal with your appeal is willing to consider new evidence and submissions that you may wish to provide, including submissions regarding errors of law and procedural wrongdoing. The panel requests that if you wish to provide new evidence and information for the panel to consider in the appeal, you should forward it, by way of written submission, to my attention by **October 31, 2005**.

If you do not forward a submission by that date, the panel will proceed to decide the appeal based on the documentary information, and the audiotape of the July 11, 2002 oral hearing, that now exists on the file.

[bold emphasis in original]

WCAT did not receive any further submission or other response from the employer. Therefore I have proceeded to consider the employer's appeal on the basis of the documentary information before me, as well as the audiotape of the Board's oral hearing. I have decided that it is unnecessary to convene an oral hearing for these appeal proceedings. This is because credibility is not an issue, I have the benefit of listening to the audiotape of the oral hearing before the reviewing officer, and further, I am satisfied that written submissions would give the employer a reasonable opportunity to provide a thorough explanation of its position on appeal.

Section 253(1) of the Act states that on appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 250 of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT has jurisdiction to consider the record in the proceedings before it, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus, this is an appeal by way of a rehearing. This is the final level of appeal.

Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the board of directors that is applicable in the case. Section 251 of the Act provides that WCAT may refuse to apply a policy only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted.

Applicable Law and Policy

Section 16.8(1) of the Regulation states as follows:

Warning signal device

Mobile equipment in which the operator cannot directly or by mirror or other effective device see immediately behind the machine must have an automatic audible warning device which

- (a) activates whenever the equipment controls are positioned to move the equipment in reverse, and
- (b) if practicable, is audible above the ambient noise level.

Subsection (2) of section 16.8 refers to the steps to be taken if it is impracticable to provide an audible warning device.

Section 16.10(1) of the Regulation states as follows:

Rear view mirrors

Mobile equipment must have a mirror or mirrors providing the operator with an undistorted reflected view to the rear of the mobile equipment or combination of mobile equipment, except that if necessary to improve rear vision, parabolic mirrors in combination with flat mirrors may be used.

Subsection (2) of section 16.10 goes on to provide that a rear view mirror is not required on mobile equipment if the conditions of use or equipment structure make the use of mirrors impracticable.

The applicable statutory law is found in the version of the Act that existed at the time the Board imposed the administrative penalty against the employer. This decision will refer to those provisions of the Act.

Section 196 of the Act provides that the Board may impose an administrative penalty on an employer if it considers that the employer has failed to take sufficient precautions for the prevention of work-related injuries or illnesses, or the employer's workplace or working conditions are unsafe, or the employer has failed to comply with Part 3 of the Act, the Regulation or an applicable order. Section 196 also provides that the Board must not impose an administrative penalty if an employer exercised due diligence to prevent the unsafe circumstances.

As the Board's decision to impose an administrative penalty was dated July 23, 2002, the applicable policy is found in the version of *Prevention Manual* (Manual) policy that was in effect on that date. I will be referring to that policy.

"Due diligence" is described in Board policy item D12-196-10 of the Manual. The policy states that persons may prove that they exercised due diligence by showing on a balance of probabilities that they took all reasonable care. This involves a consideration of what a reasonable person would have done in the circumstances. The defence of due diligence is available if the person reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the person took all reasonable steps to avoid the particular event.

Board policy relating to administrative penalties is found in item D12-196-1 of the Manual. That policy provides that the primary purpose of administrative penalties is to motivate the employer receiving the penalty and other employers to comply with the Act

and Regulation. The policy says that the Board will consider imposing an administrative penalty when:

- an employer is found to have committed a violation resulting in high risk of serious injury, serious illness or death;
- an employer is found in violation of the same section of Part 3 or the Regulation on more than one occasion;
- an employer has failed to comply with a previous order within a reasonable time;
- an employer knowingly or with reckless disregard violates one or more sections of Part 3 or the Regulation. Reckless disregard includes where a violation results from ignorance of the Act or Regulation due to a refusal to read them or take other steps to find out an employer's obligation; or
- the Board considers that the circumstances may warrant an administrative penalty.

Policy item D12-196-1 also provides a list of additional factors that the Board will consider in deciding whether to propose or levy the penalty. They include such matters as whether the employer has an overall, effective program for complying with the Act and the Regulation; whether the safety violations resulted from the independent actions of workers who the employer had properly instructed, trained and supervised; the potential seriousness of the injury that might have occurred and the number of people at risk; the extent to which the employer was aware or should have been aware of the hazard or the fact that the Act and Regulation were being violated; and whether an alternative means of enforcing the Act and Regulation would be more effective.

Manual policy item D12-196-11 provides that if the Board decides that despite the existence of grounds to propose an administrative penalty, the penalty is not warranted at the time of the particular violation, the Board may send a warning letter instead, advising that a penalty will be considered if the violation is repeated.

Manual policy item D12-196-2 deals with the issue of whether a violation involves a high risk of serious injury, serious illness, or death. The policy says that the issue will be determined in each case on the basis of the available evidence concerning the likelihood of an injury, illness or death occurring; the number of workers affected; and the likely seriousness of any injury or illness. The policy sets out a list of 11 violations that are assumed, in the absence of evidence showing the contrary, to be high risk. The policy notes, however, that even though a violation is not on the list, the Board may consider the evidence in a case to illustrate that the violation posed a high risk to workers, and may impose an administrative penalty on that basis. In this case, the Board did not proceed to penalty on the basis that the employer's violation involved high-risk violations of the Regulation.

Manual policy item D12-196-6 deals with the quantum of administrative penalties. It provides tables for determining the “basic amounts” of penalties. Category A penalties deals with serious injury or illness or death; or high risk of serious injury or illness or death; or non-compliance that was wilful or with reckless disregard. Category B penalties deal with other violations. The basic amount of the penalty is determined on the basis of the employer’s assessable payroll for which figures are available at the time the Board issues the penalty notice. In this case, the Board proceeded on the basis of a Category B penalty. The Board safety officer recommended a penalty on the basis that the employer’s history indicated that this was not the first time it had ignored Board orders to comply with a Regulation; there were three prior instances when the employer ignored the Board’s orders until in each case, the Board sent a warning letter. The Board safety officer indicated that there was a need to provide an incentive, other than a warning letter, to motivate compliance by the employer.

Policy item D12-196-6 also allows for variation factors, whereby the basic penalty amount may be varied by up to 30%, having regard to the circumstances, including the following factors:

- (a) the nature of the violation;
- (b) the nature of the hazard created by the violation;
- (c) the degree of actual risk created by the violation;
- (d) whether the employer knew about the situation giving rise to the violation;
- (e) the extent of the measures undertaken by the employer to comply;
- (f) the extent to which the behaviour of other workplace parties has contributed to the violation;
- (g) employer history;
- (h) whether the financial impact of the penalty would be unduly harsh in view of the employer’s size; and
- (i) any other factors relevant to the particular workplace.

Background and Evidence

On August 21, 2001, the Board wrote to the employer advising that a Board safety officer had recommended penalty action against the employer regarding violations of sections 16.8(1) and 16.10(1) of the Regulation. The penalty was recommended on the basis that the alleged violations had resulted in repeated non-compliance with the Regulation, and there was evidence of the employer’s general lack of commitment to compliance with the Regulation. The letter indicated that the Board had raised similar issues with the employer in inspection reports dated May 15, 2001; February 12, 2001; and August 8, 2000. The amount of penalty proposed was \$4,488. The letter enclosed a package of information/evidence relating to the alleged Regulation violations, and advised that the employer would have the opportunity to either meet with, or write to, a section officer in the event the employer did not agree with the proposed penalty. The letter requested that the employer respond by September 28, 2001 advising how it

wished to proceed (oral hearing or written submissions); failure to respond would result in the penalty review being evaluated on the basis of the information contained in the package enclosed with the letter.

The employer wrote back to the Board in a letter dated September 5, 2001, posing ten questions to which it stated it needed the answers in order to provide a response to the penalty review.

An officer in the Board's Review and Penalty Section responded in a letter dated September 11, 2001 advising the employer that the Board would not be able to respond to the employer's ten questions. Instead, the officer enclosed a copy of the Board's Prevention Manual policy applicable to administrative penalties, and advised the employer to contact the Employers' Advisers Office (Ministry of Skills, Development and Labour) if it needed further assistance to prepare its response for the penalty review. The Employers' Advisers is a free service sponsored by the provincial government to assist employers with workers' compensation cases.

The employer responded to the officer in a letter dated September 13, 2001, requesting contact information about persons at the Board who would be able to provide answers to the ten questions posed in the September 5, 2001 letter. The employer also sent a copy of its letter to the Board's Freedom of Information and Protection of Privacy (FIPP) Department, asking for a response to its information requests.

The employer sent a letter dated October 3, 2001 to the Board's Review and Penalty Section, advising that the FIPP Department had told the employer to discuss the questions with the Review and Penalty Section. The employer stated that it seemed to be getting nowhere with its request for information to respond to the penalty review.

By letter dated November 8, 2001, the Review and Penalty Section advised the employer that it was extending the date for a "written submission or a request for an oral hearing" to November 22, 2001. The letter advised that if the employer did not reply by that date, the Board would proceed to make its decision based upon the information on file.

By letter dated November 13, 2001, the employer wrote to the Board safety officer who had recommended penalty action, requesting answers to the ten questions it had posed to the Board.

By letter dated December 18, 2001, a regional manager in the Board's Prevention Division wrote to the employer, responding to the employer's letter that posed the ten questions. The regional manager provided responsive answers to some of the questions. He indicated that some of the other questions needed to be processed through the Board's FIPP Department, and he had forwarded those questions to the FIPP Department. The regional manager noted that the employer had indicated that it needed all of the information in order to respond to the penalty review. The regional

manager advised that he disagreed with that position, as some of the information was “probably not relevant.” The regional manager suggested that the employer consult with the office of the Employers’ Advisers, who could assist the employer prepare for the penalty review.

By letter dated December 31, 2001, the Review and Penalty Section granted the employer another extension of time for the employer to indicate whether it wanted to proceed with the penalty review by way of written submission or oral hearing. The new deadline was January 15, 2002.

The employer then faxed a letter dated January 11, 2002 to the regional manager who had sent the December 18, 2001 letter. The employer thanked the regional manager for his response, but requested further information. Such information included the current classification units for a list of companies, as well as penalty assessments for the companies, definitions of how the penalties constituted contraventions of section 196 of the Act, as well as definitions of alternative means of enforcing the Regulation (apart from a penalty). The employer stated that it needed the information in order to prepare its written response “to the hearing on Tuesday, January 15, 2002.”

On January 31, 2002, the reviewing officer issued a written decision with respect to the penalty review. In this decision, he reviewed the foregoing history of proceedings, and noted that on the file, as of that date, there were no further submissions from either the employer, or responses by the regional manager. The reviewing officer noted that section 196(5) of the Act (as it then existed) stated that when the Board gave a penalty notice to an employer, the Board must give the employer a reasonable time to provide information and make other representation to the Board respecting the matter. The reviewing officer concluded that a reasonable time had passed, and that as the employer had not requested additional time to make its submission, it would be appropriate to proceed to make the decision on the basis of the file information. The reviewing officer also considered the ten questions posed by the employer and did not find them relevant to the issues in the penalty review. After reviewing the evidence on the file and the safety officer’s recommendation, the reviewing officer decided that the employer had violated the Regulation as alleged by the safety officer, and that it was appropriate to impose an administrative penalty against the employer. The reviewing officer imposed an administrative penalty in the basic amount of \$4,488.

The employer promptly filed a judicial review application with the Supreme Court of British Columbia. Subsequently, in June 2002, the petition for judicial review was adjourned generally by consent, so that the employer could proceed with a request to have the Board reopen the penalty review matter under section 113(2) of the Act. The employer requested an oral hearing for the penalty review. The Penalty and Review Section then scheduled an oral hearing for Thursday, July 11, 2002 at the Board’s Richmond premises. The employer requested disclosure of its firm file and wanted to know the “proper protocol and/or procedures” for the oral hearing, as well as the names of the panel members attending. By letter dated July 2, 2002, the Board sent the

employer disclosure of its firm file and an excerpt from the policy Manual regarding oral hearings. The letter advised that hearings did not have a pre-set format or protocol, and indicated that “the goal of any hearing is to ensure that the chair hears your arguments and evidence.”

The same reviewing officer that issued the January 31, 2002 decision convened the oral hearing on July 11, 2002. The employer’s president participated in the hearing, as well as the Board safety officer who had recommended penalty action.

The safety officer’s memorandum dated June 7, 2001 advised that he had inspected the employer’s premises on June 7, 2001, as a third follow-up inspection since an August 8, 2000 inspection in which he had written orders finding the employer in violation of nine provisions of the Regulation. One of those violations indicated that forklifts did not have automatic audible warning devices and contravened section 16.8(1) of the Regulation. Another violation indicated that a forklift did not have a mirror or mirrors providing the operator with an undistorted reflected view to the rear, in contravention of section 16.10(1) of the Regulation. The safety officer indicated that the employer’s owner promised him that all of the violations would be rectified immediately.

The safety officer returned to the employer’s premises on February 12, 2001 and found the employer to be in “continuous non-compliance” of five of the orders written on the August 8, 2000 inspection report. Two of those violations dealt with sections 16.8(1) and 16.10(1) of the Regulation. The safety officer stated that he spoke with the employer’s office manager and told her that there must be immediate compliance, and she promised him that within the next two weeks, the employer would achieve compliance.

On February 23, 2001, the employer submitted a notice of compliance to the Board advising that it had complied with three of the five outstanding orders; however, there remained two outstanding orders dealing with the forklifts and sections 16.8(1) and 16.10(1) of the Regulation.

The Board safety officer returned for a follow-up inspection on May 15, 2001, and found that the two orders related to sections 16.8(1) and 16.10(1) of the Regulation were still outstanding. The employer was not in compliance with those provisions of the Regulation. The employer’s owner told the Board safety officer that the employer had ordered the necessary parts and the work on the forklifts would be completed within one week. The inspection report advised the employer that it was required to provide a notice of compliance to the Board by May 31, 2001, indicating that the violations of sections 16.8(1) and 16.10(1) had been rectified. The inspection report also stated that “Further action will be considered if no compliance by May 31, 2001.”

The inspection report of June 7, 2001 indicates that the employer had still not complied with the orders relating to the forklifts. The inspection report says that the employer’s office manager told the Board safety officer that the employer was still waiting for parts.

The Board safety officer indicated on the inspection report that he would be recommending an administrative penalty.

The memorandum dated June 7, 2001 by the Board safety officer states that he had spoken with the office manager who told him that the employer had not yet complied with the orders, but that she would call a forklift company and get the work done immediately. The Board safety officer stated that a review of the employer's firm file indicated that in the past (twice in 1997 and once in 1998), the Board had issued warning letters to the employer regarding repeated non-compliance with other orders. The Board safety officer stated that this showed a trend on the employer's part to ignore orders until a warning letter was issued. In his opinion, the Board had allowed the employer more than reasonable time to comply with the forklift orders, that persuasive means to gain compliance had failed, and that there was a need to provide an incentive (other than a warning letter) to motivate the employer to comply. Accordingly, the Board safety officer recommended that the Board proceed to penalty action on the basis of Manual policy D12-196-1 of "repeated violations and failure to comply with an order within a reasonable time." The memorandum also provided the following evidence regarding the employer's workplace:

This place of work is a small building, where 19 workers perform sorting and remanufacturing of old clothing. There is storage of old and new materials in the building. A forklift is used to move the pallets and bails of clothing materials. Being a congested environment, it is very imperative that the forklift operator is able to see behind him and other workers in the area must be warned of the hazard when the forklift moves in reverse.

The evidence is that on June 20, 2001, the employer installed the alarm and mirror equipment on its forklifts, achieving compliance with sections 16.8(1) and 16.10(1) of the Regulation.

In the written decision dated July 23, 2002, the reviewing officer reviewed the evidence and concluded that the employer had violated sections 16.8(1) and 16.10(1) of the Regulation as described by the Board safety officer. In that regard, the reviewing officer stated as follows:

... There are no exceptions based on an employer's perception that their workplace is otherwise safe, or because another officer had not cited a violation on prior inspections. Similarly, their frequency and severity accident rates are not determinative of compliance or obligation.

I did consider whether [the employer] could have seriously considered that they were not obligated to the orders at issue. If there was any evidence to say they had a false understanding of their obligations, then not following the repeated orders could be considered logical. However, given that they had complied with other orders relating to first aid and safety

programs, even though somewhat unwillingly. I conclude that [the employer] knew its obligations and the consequences of administrative penalties.

The reviewing officer went on to decide that it was appropriate to impose an administrative penalty in this case. He observed that the main policy reason for imposing an administrative penalty is to motivate the employer receiving the penalty and other employers to comply with the Regulation. The reviewing officer then quoted some of the submissions orally made by the employer's owner at the oral hearing. From those statements, the reviewing officer concluded that the employer viewed as unimportant any Board orders that the employer did not find to be significant safety matters. The reviewing officer found that the employer questioned the motives of the Board's safety officer in finding a Regulation violation if it concerned a matter that the employer viewed as an insignificant safety issue. This applied to the orders respecting mirrors and audible warning devices on the forklifts. The reviewing officer stated that the employer's owner had an "unfounded belief that [the employer] could disobey an order if he thought that order was not concerning a legitimate safety issue."

The reviewing officer considered whether in this case he should issue a warning letter rather than impose an administrative penalty. He decided that to do so would not be an appropriate signal to send to other firms who might want to rely on arguments similar to the employer in this case to avoid Regulation obligations, namely, that it is only necessary to comply with safety requirements that one perceives to be important safety matters.

With respect to quantum of penalty, the reviewing officer maintained the penalty at the basic amount proposed by the Board, \$4,488. He reviewed the variation factors referred to in Manual policy D12-196-6, but decided that there were insufficient reasons to vary the basic penalty amount upward or downward by any amount.

Apart from its comments in the letters to the Board and WCAT to which I have referred in this decision, the employer did not provide a written submission in response to WCAT's invitation to provide information regarding the merits of its position on appeal. The employer did not provide any new evidence or argument regarding alleged errors of law and procedural wrongdoing by the reviewing officer, or other information relevant to the Board's finding of Regulation violations and the imposition of the administrative penalty.

Reasons and Findings

In rendering his July 23, 2002 decision, did the reviewing officer commit any procedural wrongdoing or errors of law related to procedure such that WCAT should vary or cancel his decision?

In its correspondence to the Board and to WCAT, the employer has suggested that the reviewing officer committed errors of law and procedural wrongdoing that would justify WCAT overturning the decision. Although invited to provide particulars of these allegations, the employer has failed to provide them.

I note that it was the same reviewing officer in the section 113(2) proceedings that earlier rendered the January 31, 2002 decision imposing the administrative penalty proposed by the Board. In my view, it would have been better for the Board to have appointed a different reviewing officer to act in the section 113(2) proceedings, simply for the sake of precluding any apprehension of bias by the adjudicating panel. Having said that, I have listened to the audiotape of the July 11, 2002 hearing, read the employer's firm file including the penalty review information and the reviewing officer's July 23, 2002 decision, and do not find a basis upon which to find a reasonable apprehension of bias on the part of the reviewing officer or the Board. Although it was a very informal hearing, my assessment of the proceedings is that the employer was not prejudiced in any way, but provided with a fair and reasonable opportunity to present its defence to the proposed administrative penalty.

In any event, I also note that under the Act, WCAT has authority to consider all questions of fact, law and discretion arising in an appeal. In its correspondence with the employer, WCAT explained that the employer had the opportunity to provide new evidence and argument. This included particulars of the allegations of errors of law and procedural wrongdoing by the reviewing officer. It also included the opportunity for the employer to explain its position on the merits of the appeal relating to the findings of Regulation violations and whether or not it was appropriate for the Board to have imposed an administrative penalty in this case. These appeal proceedings were in the nature of a rehearing, and thus the proceedings offered a rectification of any procedural injustice or unfairness that arguably may have prejudiced the employer in the earlier Board proceedings. The employer did not take advantage of the opportunity to present new evidence and arguments to WCAT.

One of the employer's complaints to WCAT was that the disclosure it received (firm file, with penalty review package and oral hearing audiotape) did not reflect "accurate information" to properly judge the appeal. The employer indicated that it wanted "articles (information) relevant to the case" that would benefit its position on appeal, and it wanted either the Board or WCAT to provide them. This position was similar to the position it had earlier taken with the Board prior to the first penalty review decision of January 31, 2002, when the employer posed its ten questions, asserting that full answers to the questions were necessary for it to prepare its appeal.

My view is that WCAT's registry vice chair responded appropriately to the employer when he recommended, in his letter dated August 12, 2003, that the employer contact the office of the Employers' Advisers for assistance. This is the same advice that the Board had earlier given the employer when it continued to request that the Board provide it with answers to its questions before it would explain its position in the penalty

review. (I note at this point that I agree with the Board that the answers to the ten questions were either irrelevant or at best, only tangentially relevant to the merits of the penalty review.) It is not reasonable for the employer to expect the Board and/or WCAT to assist it in preparing its defence to an administrative penalty, beyond providing full disclosure of the information and evidence upon which the penalty was imposed. With respect to WCAT, the tribunal must act with neutrality in deciding the issues on an appeal, and cannot undertake to provide research of a legal or advocacy nature for a party to an appeal.

After reviewing the evidence in this case, I find that any procedural wrongdoing by the Board with respect to the initial decision dated January 31, 2002 had been corrected by the Board's subsequent decision to reopen the penalty review matter under section 113(2) of the Act, and to convene an oral hearing so that the employer would have a full opportunity to present its case. On my review of the section 113(2) proceedings before the reviewing officer that led to the decision under appeal to WCAT, I am unable to find any procedural errors, breach of natural justice or bias that would justify a cancellation of variation of his July 23, 2002 decision. I now proceed to deal with the other aspects of the appeal, which relate to the Board's decision to impose an administrative penalty against the employer for violations of the Regulation. This will include an assessment of whether or not the reviewing officer erred in law or in policy in his July 23, 2002 decision.

Did the employer violate sections 16.8(1) and 16.10(1) of the Regulation?

After reviewing the evidence, I have decided to confirm the reviewing officer's finding that the employer violated sections 16.8(1) and 16.10(1) of the Regulation. The evidence supports the safety officer's observations in his inspection reports, confirmed by his testimony at the July 11, 2002 oral hearing that forklifts at the employer's warehouse operation did not have either mirrors to provide an undistorted reflected view to the rear, or automatic audible warning devices that would activate when the forklifts were moved in reverse. The evidence did not support that it was impracticable to use mirrors or provide audible warning devices.

The employer indicated that it would have requested an "exception" under the Act if it had known that it could have done so. By this I believe the employer is referring to an application for a "variance" under section 166 of the Act. The provisions respecting the Board's authority to grant a variance (see sections 166 through 171 of the Act) outline a formal procedure whereby an employer makes a written application for a variance, explaining why a variance is requested and giving information with respect to the benefits and drawbacks in relation to the matters addressed by the Regulation that might reasonably be anticipated if the Board were to allow the variation. The Board then undertakes a process of consultation with affected persons, before rendering a decision with written reasons. In this case, the employer did not apply to the Board for a variance and the evidence falls well short of suggesting that the employer had a good chance of success if it had made its application. The employer also indicated that the

Board safety officer had a duty to inform the employer about the Act's variance provisions. I do not agree that there was such a duty on the Board safety officer in the circumstances of this case. Rather, an employer has a responsibility to be reasonably familiar with the Act and Regulation, as well as the Manual policies. It is not reasonable for the employer in this case to expect that the Board safety officer should have undertaken both a role in enforcing the Regulation as well as the role of advocate for the employer in defending safety violations under the Regulation.

The employer did not provide sufficient evidence to support a finding that the employer did not violate the mirror and audible warning device provisions of sections 16.8(1) and 16.10(1) of the Regulation. The employer's submissions and arguments instead focused on the points that the violations were not very serious and did not pose real safety hazards to its workers. Accordingly, for the foregoing reasons, I confirm the reviewing officer's decision that the employer did violate sections 16.8(1) and 16.10(1) of the Regulation as found by the Board safety officer in his June 7, 2001 inspection.

Was it appropriate for the Board to have imposed an administrative penalty against the employer for the Regulation violations? If so, was the quantum of penalty appropriate in the circumstances?

The employer's position was that sections 16.8(1) and 16.10(1) of the Regulation were not serious safety matters. The employer pointed out that in years earlier, other Board safety officers had inspected the warehouse and had not cited the employer for such violations, so how important could the violations really be? Further, the employer submitted that there were not that many people working in its warehouse and there was no forklift noise or other loud equipment; therefore the lack of mirrors and audible warning devices on forklifts in the warehouse did not pose a serious danger to workers. The employer provided pictures of the warehouse layout, and pointed out although it had been operating since 1984, there had never been an accident involving forklifts. The employer's position was that sections 16.8(1) and 16.10(1) of the Regulation might be relevant to other firms' operations, but the lack of forklift rear mirrors and audible warning devices did not pose a safety risk in its operation. The reviewing officer quoted some of the statements made by the employer's owner at the hearing. Those statements are repeated here for sake of completeness:

I'm hoping we can take a look at this and review that in its light. Because, quite frankly...the work has been done now...it's irregardless of the fact. We did it. But, really, it stems from the fact that this was really an issue of going well beyond what we consider to be, like necessary, to do in our work environment.

Granted, we'll do anything for worker safety. But, we've never had a forklift accident with anybody involved. We never had this as an issue. When we had 45 people working in our facility, we had three forklifts going eight hours a day, in the same space – with 45 employees and that was

never brought up – ever – not even cited by one previous inspector. *Eighteen years in business and I've never had it cited to me.*

First of all, I consider it to be an unimportant issue. Second of all, when we get a report, we do try to comply with the report, as best as possible. But, I still question it...the motives behind it, and the reasons why we had to continue with it. Not only on this one, but on previous ones. Why were all the other ones dealt with, and not this one in particular?

[italic emphasis added]

With respect to safety issues, the employer's owner also said:

We are always considered to be in compliance. If we find something immediately not in compliance, that is an issue that is irrelevant. Because we are safety oriented. We are exemplary in our industry – in our field.

[italic emphasis added]

The primary purpose of administrative penalties is to motivate the employer receiving the penalty and other employers to comply with the Act and the Regulation. The Board will consider imposing an administrative penalty where, as in this case, an employer has failed to comply with a Board order within a reasonable time and is thus found to be in violation of the same regulatory provision on more than one occasion. Section 196 of the Act and Manual policy D12-196-10 provide that an employer may avoid an administrative penalty if it exercised due diligence to prevent the safety violation, that is, by showing on a balance of probabilities that it took all reasonable care to avoid the violation.

After reviewing the evidence and considering the employer's position, I agree with the Board's safety officer and the reviewing officer that it was appropriate in the circumstances of this case to impose an administrative penalty against the employer. I find no error by the reviewing officer in his reaching that decision, in particular no error of law or policy as alleged by the employer. The due diligence defence has not been fulfilled by the employer, as it is clear that the employer did not take reasonable steps to avoid the forklift mirror and warning device violations, largely because the employer did not view them as serious safety issues. The Board safety officer first cited the employer for the violations on August 8, 2000, and it was not until approximately ten months later and several more inspections, and after the Board officer advised the employer that he was recommending penalty action, that the employer finally rectified the equipment deficiencies to comply with the Regulation. It is noteworthy that the employer did take steps to comply with the other regulatory provisions, breaches of which were found in the August inspection. But it resisted the safety officer's citations regarding the forklift deficiencies, and did not rectify the problems in a timely way.

The employer alluded to uneven enforcement by the Board when it relied on the fact that in previous inspections since 1984, no other Board safety officer had cited the employer for violations of sections 16.8(1) and 16.10(1) of the Regulation. I note that the employer provided evidence at the oral hearing that in previous years at a different location, the employer's forklifts did have warning devices (lights) as there were hearing-impaired workers at the time. Thus the employer's forklift equipment may have been in compliance during previous inspections. In any event, the fact that other safety officers may have overlooked these safety infractions does not constitute a defence to violations that a diligent Board safety officer has repeatedly noted in inspection reports and orders requiring the employer to comply with the Regulation. That argument is akin to saying that there is a legitimate defence to running a red traffic light if a different police officer has failed to ticket the same offender for the same offence committed on an earlier day.

At the oral hearing, the reviewing officer commented that the type of "equipment" safety issues such as the forklift deficiencies in this case, did not usually present a problem for most employers as the cost of compliance is not generally much of a burden. The reviewing officer asked the employer's owner about the cost to bring the forklifts into compliance with the Regulation, and the owner responded that it was about \$300. The reviewing officer compared the penalty amount proposed by the Board (over \$4,000) with the cost of adding mirrors and audible warning devices to the forklift, and wondered whether there was some larger philosophical issue which prevented the employer from simply acting promptly to comply with the Regulation. The employer's owner responded:

The reluctance to do it or to do it as you see it stems from the fact we don't understand the Regs. correctly. We would have applied for a variance immediately. Now I can tell our people that we should raise the issue immediately. We shouldn't let it get to the point it has now. We regret it terribly. We were shocked when we received a penalty in that amount without much warning. We got a warning and fixed it within a few days and it just went on and on.

The employer had approximately ten months in which to apply for a statutory variance, and failed to do so. The evidence is that during the ten-month period before the Board safety officer recommended penalty action, employer representatives continued to tell him that the employer would be complying with sections 16.8(1) and 16.10(1) of the Regulation, and then failed to live up to their commitments on behalf of the employer. I agree with the reviewing officer's comments that the employer was acting on an unfounded belief that it was entitled to disobey a Board order and contravene the Regulation if it viewed the regulatory provisions as unimportant, not raising legitimate safety issues. In these circumstances, I also agree with the reviewing officer's decision that a warning letter would not be appropriate in this case. An administrative penalty sends the important signal to both this employer and other employers that they can not

pick and choose which provisions of the Regulation to comply with and which Board orders to obey.

Turning to the matter of quantum, the Board proposed a basic administrative penalty in Manual policy "Category B" of \$4,488. This was based on the Category B table, which indicates that 1.0% of payroll under \$500,000, or \$1,000, whichever is greater, is the basic penalty amount. I find that the Board correctly calculated the basic penalty amount.

With respect to the variation factors in Manual policy D12-196-6, I have decided not to change the reviewing officer's decision to maintain the quantum of penalty at the basic amount proposed by the Board. Arguably the employer's history of refusing to comply with Board orders until a warning letter is issued, the ten months of resistance in this case to complying with the Board officer's order, and the employer's continued attitude of declining to view the forklift safety issues as important, might justify a variation upwards in the basic penalty amount. However, given the evidence at the oral hearing about the employer's general attempts to improve its safety record, I have decided not to disturb the reviewing officer's decision to maintain the basic amount of penalty.

Conclusion

For the foregoing reasons, I deny the employer's appeal and confirm the Board reviewing officer's decision dated July 23, 2002. This has the effect of confirming the administrative penalty of \$4,488 imposed against the employer for violations of sections 16.8(1) and 16.10(1) of the Regulation.

Expenses of the appeal proceeding were not requested and therefore none are awarded.

Heather McDonald
Vice Chair

HM/hb