Noteworthy Decision Summary

Decision: WCAT-2006-01337 **Panel:** Warren Hoole **Decision Date:** March 22, 2006

Administrative penalty – Workers' Compensation Board jurisdiction – Whether an "owner" is an "employer" under Section 196 of the Workers Compensation Act (Act) – Obligation of an owner to disclose under section 119(b) of the Act – Effect of tenant's contractual obligation to give advance notice to owner before engaging in work – Asbestos exposure

In light of the important public interest purpose of promoting safe workplaces, subsection 119(b) of the *Workers Compensation Act* (Act) requires an owner to disclose a known hazard as soon as practicable to any person reasonably likely to come within the scope of that hazard. Generally, an owner will not discharge its obligation by providing information of a potential hazard only at such time as the owner is aware of a specific person's intention to engage in an activity likely to fall within the scope of that hazard, even in cases in which the person may have a legal obligation to give advance notice to the owner of their intention to engage in the activity.

Section 196 of the Act authorizes the Workers Compensation Board (Board) to levy an administrative penalty against an owner. The term "employer" as used in that section includes "owners" or any other person who employs one or more workers.

A tenant arranged for a contractor to perform renovation work. The lease provided that the tenant was required to give written notice to the owner of the building before carrying out work. The tenant did not give the required notice. The owner had been dealing with asbestos-related problems in the building for over a decade and knew that there was asbestos in the space being occupied by the tenant but had not disclosed this fact to the tenant. The tenant's contractor uncovered asbestos and stopped work. The Board subsequently levied a $20,721.46 Category A administrative penalty against the owner for breaching its occupational health and safety obligations pursuant to section 119 of the Act, namely by failing to notify the tenant of the presence of asbestos. The Review Division of the Workers' Compensation Board upheld the Board's decision and the owner appealed to WCAT.

The owner argued, among other things, that the tenant's failure to abide by the terms of the lease effectively deprived the owner of the opportunity to discharge its obligation to provide information about the presence of asbestos to the tenant or its contractors; and that section 196(1) of the Act only authorizes the Board to levy administrative penalties on an "employer". If the appellant had breached the Act's occupational health and safety obligations at all it had done so as an "owner" and so no administrative penalty may be levied.

In relation to the first argument, the panel found that the owner was obliged to take a proactive approach and notify the tenant and any other person who may be affected by the hazard of the hazard. Asbestos poses significant risk to those exposed to it. The panel determined that in this case it would have been a simple and inexpensive matter for the owner to have provided notice. The owner could have added a notification to its standard form lease, posted notices in the building, or circulated an inter-office memo.

In relation to the second argument, the panel found that the term "employer" in section 196(1) includes "owner". The panel noted that the definition of "employer" in section 106 refers to the definition of "employer" in section 1 which, in turn, is defined inclusively, not exhaustively. Further, the panel noted that section 108 of the Act, which describes the application of Part 3 of the Act, only refers to "employers" and "workers". To conclude that "employers" does not include "owners" would necessarily mean then that all of Part 3 of the Act would not apply to "owners", or by extension to "supervisors," "prime contractors" or "suppliers". The result would be the sterilization of the bulk of the occupational health and safety obligations set out in Division 3 of Part 3 of the Act.

The panel found that such a conclusion is not in accordance with section 107 of the Act, with section 8 of the *Interpretation Act*, or with the modern approach to statutory interpretation. Consequently, the panel found that the reference to an "employer" in Part 3 of the Act is simply to any person that employs one or more workers and is not otherwise expressly excluded. Thus, an "owner" is simply a more specific category of employer. As the appellant owner employed workers and was not otherwise expressly excluded from the definition of "employer", the panel found that the Board had the jurisdiction to levy an administrative penalty against the appellant.

The panel denied the appeal.

WCAT Decision Number: WCAT-2006-01337
WCAT Decision Date: March 22, 2006
Panel: Warren Hoole, Vice Chair

Introduction

The appellant is the owner of a building in downtown Vancouver (Building). The appellant owner leased fourth floor commercial office space in the Building to BSC Ltd. In late 2001, BSC Ltd. sub-leased its office space in the Building to IMC. The appellant owner approved this sub-lease.

In January and February of 2002, IMC employed various contractors to renovate the fourth floor offices in the Building. On February 26, 2002, one of the contractors noticed that chrysotile asbestos was present in the offices under renovation. The Workers' Compensation Board (Board) carried out an investigation and determined that the appellant owner knew of the presence of asbestos in the fourth floor offices of the Building but had not notified IMC of this information.

The Board concluded that, by failing to notify IMC of the presence of asbestos in the fourth floor offices of the Building, the appellant owner was in breach of its occupational health and safety obligations pursuant to section 119 of the *Workers Compensation Act* (Act). By way of Inspection Report 2003124770158 (IR 158), dated September 18, 2003, the Board levied an administrative penalty of $20,721.46 against the appellant owner.

The owner disagreed with the administrative penalty and appealed IR 158 to the Review Division of the Board. In *Review Decision #11658*, dated May 14, 2004, a review officer confirmed IR 158.

The owner now appeals *Review Decision #11658* to the Workers' Compensation Appeal Tribunal (WCAT). In her notice of appeal, the appellant owner's legal counsel indicated that an oral hearing of this appeal was not necessary.

I have considered item #8.90 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP), and the criteria for oral hearings set out in that item. There are no significant factual complexities, nor is credibility an issue. Having reviewed the issues, evidence and submissions in this appeal, I am satisfied that an oral hearing is not necessary for the full and fair adjudication of this appeal.

The WCAT invited participation from the appellant owner's worker representative; however, the worker representative did not respond to the invitation and is not participating in these proceedings.

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The WCAT also invited the Compliance Section of the Board to provide a submission. The Board's Compliance Section filed a submission dated December 5, 2005. This submission was disclosed to the appellant owner and its legal counsel filed a response.

Issue(s)

1. Did the appellant owner breach its occupational health and safety obligations pursuant to section 119 of the Act?
2. If the answer to issue 1 is "yes," was the Board correct to impose an administrative penalty on the appellant owner?
3. If the answer to issue 2 is "yes," was the amount of the administrative penalty levied in IR 158 correct?

Jurisdiction

The WCAT's jurisdiction in this appeal arises under subsection 239(1) of the Act, as an appeal of a final decision of a review officer under paragraph 96.2(1)(c) of the Act confirming a Board order respecting an occupational health and safety matter under Part 3 of the Act.

The WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (subsection 250(1) of the Act). The WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's governing body that is applicable in the case. The WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it.

Preliminary Matters

There are two preliminary matters to consider. Both matters are said to constitute a breach of the appellant owner's right to procedural fairness.

First, legal counsel strenuously objects to the participation of the Board's Compliance Section in this appeal. Counsel filed submissions on this issue in a letter dated November 9, 2005. In that letter, counsel cited jurisprudence on the permissible role of an administrative tribunal appearing as a party in judicial review proceedings. This jurisprudence is relied on in support of counsel's contention that the Compliance Section of the Board does not have the status of a party to the proceedings and nothing in the Act provides the WCAT with jurisdiction to elevate the Compliance Section of the

Board to the status of a party. For this reason, counsel says I ought not accept the December 5, 2002 submission from the Compliance Section. Although I agree that the Compliance Section is not a "party," I consider that I have the discretionary authority to request the Compliance Section to participate in these proceedings as I see fit, including providing written submissions.

The jurisprudence counsel cites deals with the scope of an administrative tribunal's role in judicial review proceedings before a court. A proceeding before the WCAT is quite different from judicial review proceedings before a court. It need hardly be said that judicial review proceedings in court are of an adversarial nature while proceedings before the WCAT are of an inquisitorial nature.

Further, the jurisprudence to which counsel refers does not relate to the specific statutory scheme under which the WCAT operates. This is of significance because different administrative tribunals may have quite different powers depending on the specific wording of the administrative tribunal's home legislation.

Indeed, specific authority is set out in the Act for WCAT panels to undertake investigations into matters and to seek advice or assistance from any person the WCAT panel considers may assist in the resolution of the appeal. In this regard, I note paragraphs 246(2)(c), (d) and (i) of the Act. I also note items #4.37, #4.50 and #8.82 of the MRPP.

Consequently, I find the jurisprudence cited by the employer's counsel to be readily distinguishable from the circumstances of this appeal. It follows that I disagree with counsel's argument that the Compliance Section of the Board is not entitled to file a submission in this appeal. I note that a similar conclusion was reached in *WCAT Decision #2005-04674*, dated September 6, 2005.

In the result, I am satisfied that I may properly consider the December 5, 2005 submissions of the Compliance Section of the Board.

The second preliminary matter counsel raised in her letter of December 22, 2005, is her objection to the Compliance Section of the Board filing "new evidence" in its December 5, 2005 submission. Counsel pointed out that allowing the Board to introduce new evidence at such a late stage in the appeal proceedings should be discouraged in order to ensure that the Board fully discloses all relevant evidence on file during the initial stages of appeal proceedings.

I agree in general that the Board must be discouraged from introducing evidence that it should have disclosed at an earlier time. However, I have carefully reviewed the December 5, 2005 submission and I do not see "new evidence" of any significance. Rather, the Compliance Section's December 5, 2005 submission appears to re-argue its case and provide general, publicly available background information, such as a Review Division decision and a Board publication regarding asbestos safety. I therefore see

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little in the Compliance Section's December 5, 2005 submission to offend the principle of timely and full disclosure to which counsel refers.

Consequently, I see no reason to exclude the Compliance Section's December 5, 2005 submission.

As a final point, I note that counsel for the appellant owner has received and availed herself of the opportunity to rebut the Compliance Section's December 5, 2005 submission. Counsel herself provided new evidence in rebuttal and I have accepted this new evidence into the record for this appeal.

In the result, I am satisfied that it was not a breach of procedural fairness to request and accept the Compliance Section's December 5, 2005 submission. I therefore dismiss counsel's preliminary arguments objecting to the Compliance Section's December 5, 2005 submission.

Background and Evidence

The appellant owner has been dealing with asbestos-related problems in the Building for over a decade. In this regard, A Consultants Ltd. prepared and delivered to the appellant owner a report entitled "Asbestos Identification and Management Program" (AIM Report). The AIM Report was dated December 1990 and related to the Building. Item 3.0 of the AIM Report described a "tagging system" in which A Consultants Ltd. identified asbestos contamination of the Building with yellow tags. Item 4.7 of the AIM Report described the installation of 24 yellow tags in the tenancy area on the fourth floor of the Building. It was further stated that:

> There is spray applied asbestos containing insulation located on the ducts within every fourth perimeter mullion. This material is enclosed behind a sheet metal liner from the floor to the T-bar ceiling. Above the T-bar ceiling, at the perimeter wall and inward approximately 8 lineal feet, this friable spray applied asbestos containing insulation and overspray is exposed.
>
> Access to the perimeter 8 feet of this ceiling space is restricted to essential or emergency situations only. If access is necessary, trained and authorized personnel must perform this work in accordance with "Moderate Risk Work Procedures" as described by the Workers' Compensation Board of British Columbia in their publication "Safe Handling of Asbestos – A Manual of Standard Practices".
>
> **NOTE**: Access to the perimeter 8 feet of the ceiling space must not be performed while the tenancy area is occupied.

[reproduced as written]

Since 1990, the appellant owner has engaged in gradual remediation of asbestos in the Building. For example, I note a "Site Inspection Report" dated November 3, 1992, which describes an asbestos clean-up and enclosure project that was carried out in suite 306 of the Building. In addition, a "Notice of Project" dated March 14, 2001, refers to asbestos remediation on the eighth floor of the Building.

On July 12, 2001, a Board Occupational Safety Officer (OSO) investigated renovations carried out by the appellant on the fifth floor of the Building. At that time, the OSO requested a copy of any surveys identifying asbestos in the Building, particularly on the fifth floor. A representative of the appellant owner indicated that its asbestos surveys were incomplete. The OSO set out her request for asbestos survey information in Inspection Report #200124770125 (IR 125). The text of IR 125 also stated:

> Section 119 of the Workers Compensation Act states that every owner of a workplace must give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons in the workplace. This is why a survey of asbestos is required to be forwarded by the owner to the general contractor and to the employer of the suite being renovated.
>
> [reproduced as written]

On October 12, 2001, a Board OSO again notified the appellant that its asbestos inventory was not complete and current.

Renovations in the fourth floor offices of the Building began in early January 2002.

In a memo dated February 27, 2002, an employee of IMC described the discovery of asbestos in the fourth floor offices of the Building. The February 27, 2002 memo recorded a call from one of the contractors that was carrying out renovations for IMC. The contractor called IMC around noon on February 26, 2002, and indicated that he had observed asbestos in the ceiling where he was working. Work ceased immediately and IMC called in an asbestos consultant on February 27, 2002.

The asbestos consultant conducted testing of the office space on the fourth floor of the building. In a report dated February 28, 2002, the asbestos consultant noted that it collected three debris samples from IMC's office space on the fourth floor of the Building. Following lab analysis, the three samples were all found to contain 10% to 30% chrysotile asbestos.

The Board collected five of its own samples from IMC's office space on the fourth floor of the Building. Four samples from various window ledges revealed the presence of chrysotile asbestos. The fifth sample, collected from debris located on the edge of an open ceiling tile was discovered to contain 1% to 10% chrysotile asbestos.

In March 2002, the appellant owner provided the Board with a copy of an Asbestos Survey and Asbestos Management Program dated February 26, 2002. This document had been prepared by an asbestos remediation contractor (A Corporation). In its covering letter dated February 26, 2002, A Corporation stated:

> Please accept our sincere apologies for the delay in getting this asbestos survey and [Asbestos Management Project] completed for you. [A Corporation] could have been more persistent when attempting to co-ordinate access to the building, therefore, getting the project completed sooner. Again, please accept our apologies.

In Inspection Report 2002124770068 (IR 068) the OSO set out her conclusions regarding the asbestos exposure incident on the fourth floor of the Building. The OSO's findings indicated that the main cause of asbestos exposure for IMC's renovation contractors was the owner's failure to notify IMC of the presence of friable asbestos in its offices on the fourth floor of the Building. The OSO also noted a contributing factor in causing the asbestos exposure was that the renovation contractors working above the T-bar ceiling did not inquire as to the presence of asbestos-containing materials before beginning work. As a result of her investigations, the OSO wrote the following order against the appellant owner:

> From mid-January 2002 until February 26, 2002, workers of several employers at this workplace were exposed to asbestos while working above the T-bar ceiling and caused disturbance of the friable asbestos, asbestos debris and dust thereby contaminating the workplace for other workers. The owner of this workplace did not give the employer of this workplace or other contractors at the workplace the information known to the owner regarding the friable asbestos above the T-bar ceiling. The information was necessary for workers to prevent their exposure to asbestos during work above the T-bar ceiling.
>
> This is in contravention of the Workers Compensation Act section 119(b).
>
> Every owner of a workplace must give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health and safety of persons at the workplace. The owner of this workplace is required to notify all employers of the presence of known hazards including asbestos.

In a consultation record dated March 5, 2002, the OSO contacted BSC Ltd., the sub-lessor to IMC of the fourth floor offices in the Building. A representative of BSC Ltd. stated that it was unaware of the presence of asbestos in the fourth floor of the Building.

The Board also contacted the various contractors that had performed renovation work for IMC on the fourth floor of the Building. The details of the contractors exposed to asbestos during the renovation are set out in the Board's Accident Investigation File #2002030085.

On July 28, 2003, the Compliance Section of the Board notified the appellant owner that an administrative penalty was being considered. Included with the July 28, 2003 letter was a "Penalty Information Package" setting out the grounds for the administrative penalty.

Counsel for the appellant owner submitted an opinion from Mr. Gordon Wedman, dated March 8, 2004. Mr. Wedman is a Certified Industrial Hygienist and Registered Occupational Hygienist with more than 20 years of experience. Mr. Wedman holds a Master of Engineering degree in Occupational Health and Safety from the University of Toronto (1987). Mr. Wedman provided his opinion as to whether asbestos testing in IMC's fourth floor offices indicated a high probability of serious illness or death. In particular, Mr. Wedman stated:

> …In the present case the exposure of workers, in terms of fibre-years, would be very low and this would suggest a low probability of asbestos related illness.
>
> I also note that the type of asbestos is identified as chrysotile. Of the three types of asbestos commonly found in building materials, chrysotile is generally considered to be the least hazardous, ie. the incidence of asbestos-related disease is lower amongst those workers exposed only to chrysotile than for those workers exposed to crocidolite or amosite asbestos.
>
> Of the three types of asbestos-related disease mentioned by WCB it is generally thought that development of mesothelioma requires the lowest exposure to asbestos. Chrysotile commonly used in industry may sometimes be contaminated with very small percentages of other types of asbestos nevertheless the incidence of mesothelioma in workers exposed only to chrysotile is very low; much lower than the incidence for workers exposed to equivalent amounts of crocidolite or amosite asbestos.
>
> Given the above considerations I feel it would again be speculative to assert that a "high risk of serious illness or death" resulted from the exposures in question.
>
> [reproduced as written]

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Counsel submitted a copy of a standard form lease agreement dated May 30, 1997. Clause 4.09.01 of the lease agreement requires a sub-lessee to abide by the terms of the lease agreement. Clause 4.16.01 of the lease agreement prohibits the lessee from making any alterations to the leased space without the prior written consent of the lessor.

Mr. Wedman provided a second opinion dated December 19, 2005. Mr. Wedman reiterated his view that there were insufficient details regarding the asbestos exposure of the various contractors to conclude that these workers were exposed to a high probability of serious injury or death. Mr. Wedman therefore concluded that it was no more than speculation to suggest that IMC's renovation contractors faced a high probability of serious injury or death while working on the fourth floor of the Building.

Submissions

Counsel for the appellant owner raises five primary issues in her submissions. Briefly put, counsel's arguments are, first, that the appellant owner did not breach the owner's occupational health and safety obligations set out in section 119 of the Act.

Second, if the appellant owner did breach its section 119 obligations, section 196 of the Act does not authorize the Board to levy an administrative penalty against an owner.

Third, if the Board is authorized to levy an administrative penalty against the appellant owner, the appellant owner exercised due diligence and its due diligence is a full defence to the imposition of an administrative penalty.

Fourth, even if the appellant owner did not exercise due diligence, all the circumstances of the case do not favour the imposition of an administrative penalty.

Fifth, even if an administrative penalty was properly imposed, the amount of the penalty should be calculated on the basis of a "Category B" penalty. The amount of the "Category B" penalty should also be varied downwards by 30%.

Counsel's arguments will be addressed in more detail during the course of my reasons.

Reasons and Findings

1. *Did the appellant owner breach its occupational health and safety obligations pursuant to section 119 of the Act?*

Order Number 1 of IR 068 states that the employer breached subsection 119(b) of the Act by failing to notify IMC of the presence of asbestos in the fourth floor offices of the Building. I agree with this conclusion.

Section 119 of the Act states:

> 119. Every owner of a workplace must
>
> (a) provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace,
>
> (b) give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace, and
>
> (c) comply with this Part, the regulations and any applicable orders.

WCAT panels are bound by published policies of the Board pursuant to subsection 250(2) of the Act. Published policies of the Board in relation to occupational health and safety matters are set out in the Board's *Prevention Manual*. In particular, policy item D3-119-1, "General Duties – Owners," directs the Board to consider a variety of factors in deciding whether an owner has breached its section 119 obligations. The thrust of the inquiry relates to the owner's knowledge of a potential hazard, the severity of the hazard and the reasonableness or otherwise of the owner's efforts to minimize that hazard by providing information to other parties.

I am satisfied from the evidence on file that the appellant owner knew of the presence of asbestos in the Building, including the presence of asbestos in the fourth floor of the Building. I reach this conclusion in light of the 1990 AIM Report, the appellant owner's asbestos remediation efforts in the Building, and IR 125.

I am also satisfied that the appellant owner did not inform its lessees of the presence of asbestos in the Building. In this regard, I note the text of IR 068 which states, in relevant part, that the OSO:

> Requested any documentation that is provided by [the appellant owner] to tenants or contractors on the presence of asbestos. [The appellant owner's representative J.G.] stated that there was none.

The appellant owner's failure to inform its lessees of the presence of asbestos in the building is troubling given how simple and inexpensive it would be to communicate this information to tenants. For example, notification regarding the presence of asbestos in the Building could be accomplished by reference to asbestos in the lessor's standard form lease agreements, by circulating an inter-office memo or by posting the necessary information at various locations throughout the Building.

Thus, because the appellant owner knew of the asbestos risk and could have mitigated this risk with minimal expense or effort, I agree with the Board's conclusion that the appellant owner breached its occupational health and safety obligations pursuant to subsection 119(b) of the Act.

For her part, counsel argues that subsection 119(b) of the Act does not mandate how an owner is to discharge its subsection 119(b) obligations. Counsel then says that the appellant owner used a two-step approach that was sufficient to discharge its subsection 119(b) obligations.

First, the appellant owner states that it required written notice before any tenant carried out work in the building. Counsel points to clause 4.16.01 of the standard form lease agreement in support of this argument. Second, as soon as the appellant owner was notified of such proposed work, counsel says that the appellant owner would then inform the tenant or contractor of the presence of asbestos in the relevant area of the Building.

In this case, counsel contends that IMC did not notify the appellant owner of the planned renovations. Consequently, counsel submits that IMC's failure to abide by the terms of the lease effectively deprived the appellant owner of the opportunity to discharge its obligation to provide information to IMC, or its renovation contractors, regarding the presence of asbestos on the fourth floor of the Building. In this sense, it is said that IMC is at fault rather than the appellant owner. I disagree with counsel's argument on this issue.

At the outset, I note that the standard form lease provided to me in support of the above argument is dated 1997 and does not appear to be signed by any of the parties relevant to this appeal. However, even if I were to assume that IMC was bound by the terms of the standard form lease submitted as evidence, I would still not accept counsel's argument.

In my view, an owner will not generally discharge its subsection 119(b) obligation by providing information of a potential hazard only at such time as the owner is aware of a specific person's intention to engage in an activity likely to fall within the scope of that hazard. Although this interpretation is not necessarily excluded by the wording of subsection 119(b), I consider such an interpretation to be unduly technical and restrictive. I reach this conclusion in light of the important public interest purpose of

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occupational health and safety, as described in section 107 of the Act. I also note section 8 of the *Interpretation Act*, which directs that:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

In light of the important public interest purpose of promoting safe workplaces, I consider subsection 119(b) of the Act to require an owner to disclose a known hazard as soon as practicable to any person reasonably likely to come within the scope of that hazard. As pointed out in policy item D3-119-1 of the *Prevention Manual*, an owner's duty pursuant to subsection 119(b) of the Act is flexible and will vary depending on the precise circumstances of each case. For example, if a particular hazard is minor, the chances of the hazard arising are remote, and it would be disproportionately expensive or otherwise unreasonably prejudicial for an owner to provide information regarding the hazard, then the threshold for that owner to discharge its subsection 119(b) duty might be relatively low.

However, in this case, it need hardly be said that asbestos poses a significant health hazard. Uncontrolled asbestos dust was lying on top of ceiling tiles in the fourth floor offices of the Building. These tiles were easily moved and there was no warning not to do so. I therefore do not consider the risk of a person being exposed to asbestos in the Building as remote. Even if this risk were remote, the cost or prejudice to the appellant owner of notifying its tenants of the presence of asbestos in the Building would be negligible. Thus, I am satisfied that it was incumbent on the appellant owner to notify its tenants of the presence of asbestos in the Building.

Consequently, in the circumstances of this appeal, I find that subsection 119(b) of the Act obliged the appellant owner to alert IMC to the presence of asbestos in IMC's sub-leased offices on the fourth floor of the Building. I further find that the appellant owner was required to disclose this information as soon as it approved IMC's sub-tenancy, that is, well before the renovations commenced in January of 2002.

As a result, I agree with Order Number 1 of IR 068 and I find that the appellant owner breached its occupational health and safety obligations under subsection 119(b) of the Act.

2. *Was the Board correct to conclude that it should impose an administrative penalty on the appellant owner?*

As a preliminary point, counsel for the appellant owner disputes the Board's jurisdiction to levy an administrative penalty on the appellant owner.

Subsection 196(1) of the Act applies to this issue and provides the Board with a discretionary authority to levy administrative penalties:

> 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.

Counsel says that subsection 196(1) only authorizes the Board to levy administrative penalties on an "employer." Because the appellant is an "owner" and has breached the occupational health and safety obligations of an "owner," counsel submits that no administrative penalty may be levied against the appellant. Counsel contends that: "[if] the legislature had intended to confer a power to impose an administrative penalty on owners, it would have been expressly provided in the legislation." Counsel refers to the "implied exclusion" and "*ejusdem generis*" principles of statutory interpretation in support of her argument.

In my view, counsel's argument relies on an overly narrow interpretation of "employer." To accept this argument, I would have to consider that "employer" does not include an "owner." I do not accept this proposition.

The definition of an "employer" is set out in section 106 of the Act:

> (a) an employer as defined in section 1,
>
> (b) a person who is deemed to be an employer under Part 1 or the regulations under that Part, and
>
> (c) the owner and the master of a fishing vessel for which there is crew to whom Part 1 applies as if the crew were workers,
>
> but does not include a person exempted from the application of this Part by order of the Board;

An "employer" as defined in section 1 of the Act includes:

> every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

It is therefore apparent that section 106 of the Act defines "employer" in an inclusive rather than exhaustive manner. Although I agree with counsel that neither section 106 nor section 1 expressly states that "employer" includes an "owner," I have no difficulty in concluding that this is necessarily so.

In this regard, I need look no further than section 108 of the Act. Section 108 describes the application of Part 3 of the Act in British Columbia:

> 108(1) Subject to subsection (2), this Part applies to
>
> (a) the Provincial government and every agency of the Provincial government,
>
> (b) **every employer** and worker whose occupational health and safety are ordinarily within the jurisdiction of the Provincial government, and
>
> (c) the federal government, every agency of the federal government and every other person whose occupational health and safety are ordinarily within the jurisdiction of the Parliament of Canada, to the extent that the federal government submits to the application of this Part.
>
> [emphasis added]

If I were to agree with counsel's argument that "employer" is distinct from and does not include "owner," then Part 3 of the Act would simply not apply to "owners." Nor would Part 3 of the Act apply to "supervisors," "prime contractors" or "suppliers." The result would be the sterilization of the bulk of the occupational health and safety obligations set out in Division 3 of Part 3 of the Act. Such a conclusion is not in accordance with section 107 of the Act, with section 8 of the *Interpretation Act*, or with the modern approach to statutory interpretation, as described in, for example, *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] S.C.J. No. 24 at paragraph 25.

Consequently, in my view, the reference to an "employer" in Part 3 of the Act is simply to any person that employs one or more workers and is not otherwise expressly excluded. This interpretation encompasses rather than excludes the more specific categories of employer described in Division 3 of Part 3 of the Act, such as a "supervisor," "owner," "prime contractor" and "supplier." It follows that the reference to

an "employer" in subsection 196(1) of the Act must similarly include each specific type of employer, including an "owner." Indeed, if "employer" in subsection 196(1) did not include the more specific categories of employers set out in Division 3 of Part 3 of the Act, the Board would be virtually powerless to enforce the bulk of the occupational health and safety obligations described in Division 3 of Part 3 of the Act.

I find further support for this conclusion in the reasoning of Burdett, Prov. Ct. J. in *R. v. Ted Newell Engineering Ltd.*, [2001] B.C.J. No. 2046. In that case, an engineering firm was charged with breaching the *Occupational Health and Safety Regulation* (Regulation). Counsel for the engineering firm noted that the provision of the Regulation which the firm was alleged to have breached related only to an "employer," whereas the firm also fell within the definition in the Regulation of a "professional engineer." Counsel noted that throughout the Regulation, the role of a "professional engineer" was distinguished from the role of an "employer." Counsel for the accused firm therefore argued that "employer" should be given a narrow interpretation such that it did not include a "professional engineer." It was then argued that the firm was improperly charged with breach of an employer obligation because it was a "professional engineer" and therefore not an "employer."

The court reviewed the various applicable principles of statutory interpretation and concluded that the ordinary meaning of "employer" was a broad one that included rather than excluded a "professional engineer." The charge against the accused "professional engineer" was therefore valid because the accused was also an "employer." I recognize that this case is factually distinct from the circumstances of this appeal and relates to the Regulation rather than to the Act. I further recognize that I am in any event not bound to follow precedent. However, I reference this case because I consider Burdett, Prov. Ct. J.'s reasoning to be sufficiently similar in principle to support my reasoning in this appeal.

In light of the above, I conclude that the reference to an "employer" in subsection 196(1) of the Act includes any person that employs one or more workers and is not otherwise expressly excluded from the definition of "employer" set out in section 1 or section 106 of the Act. It follows that subsection 196(1) empowers the Board to impose an administrative penalty on any employer, whether or not that employer may also be one of the specific types of employer described in Division 3 of Part 3 of the Act, such as an "owner," "supplier," or "prime contractor."

In the circumstances of this appeal, the appellant owner employs workers and is not otherwise expressly excluded from the definition of "employer." I find that the appellant owner is therefore an "employer" within the meaning of subsection 196(1). Consequently, I am satisfied that the Board has the necessary statutory jurisdiction to levy an administrative penalty against the appellant owner.

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Because the Board's jurisdiction to impose an administrative penalty is of a discretionary nature, I must next consider whether the Board correctly exercised this discretionary jurisdiction when it decided to impose an administrative penalty on the appellant owner.

Policy item D12-196-1 of the *Prevention Manual* assists the Board in exercising its broad discretionary power to impose administrative penalties pursuant to subsection 196(1) of the Act. The policy item lists six threshold criteria that justify imposition of an administrative penalty. If any one of these six criteria is satisfied, the Board must go on to consider whether or not to actually impose an administrative penalty.

With respect to this first step of the analysis under policy item D12-196-1, three of the six criteria are potentially relevant to the circumstances of this appeal. Those criteria are:

- the employer committed a violation resulting in high risk of serious injury, serious illness or death; or
- an employer is found in violation of the same section of Part 3 or the Regulation on more than one occasion; or
- the employer "knowingly or with reckless disregard" violated Part 3 of the Act or the Regulation.

It may be that the circumstances of this appeal are sufficient to satisfy all three of these criteria; however, because only one criterion needs to be satisfied, I will limit my discussion to the question of whether the employer "knowingly or with reckless disregard violated Part 3 of the Act or Regulation." In addressing this question, I need look no further than the text of IR 125, issued on July 12, 2001:

> Section 119 of the Workers Compensation Act states that every owner of a workplace must give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons in the workplace….

Although IR 125 did not specifically relate to IMC's fourth floor offices in the Building, I am satisfied that IR 125 put the appellant owner on notice that it was generally required to notify its tenants in the Building of the presence of asbestos. I therefore find that the appellant owner knew of but failed to discharge its obligation to notify tenants in the Building of the presence of asbestos.

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As a result, I conclude that the appellant owner knowingly violated Part 3 of the Act. It follows that at least one of the six threshold criteria for imposing an administrative penalty against the appellant owner is satisfied.

Policy item D12-196-1 sets out a number of secondary considerations that assist the Board in determining whether or not to actually impose an administrative penalty. The general thrust of these considerations is whether or not the employer has taken effective steps to ensure overall safe operations and whether the employer exercised due diligence in respect of the specific contravention. Further guidance on the meaning of "due diligence" is set out in policy item D12-196-10, "Administrative Penalties – Due Diligence."

In my view, these secondary considerations favour the imposition of an administrative penalty. In particular, I note that the appellant owner has been aware of the presence of asbestos in the Building since at least 1990 and did not inform its tenants of this hazard. The appellant owner has also been aware of its obligation to notify tenants of this hazard since at least July 21, 2001 and took no steps to discharge this obligation.

I understand from counsel's submissions that the appellant owner has expended significant funds to remediate the asbestos hazards in its buildings. I also note that A Corporation appears to have been slow in providing the appellant owner with a final assessment of asbestos in the Building. However, I do not consider this evidence to relieve the appellant owner of its obligation to be duly diligent by notifying its tenants of the presence of asbestos in the Building. Whether or not asbestos in the Building were remediated, and whether or not the updated asbestos survey was slow, the fact remains that the appellant owner knew for several years prior to 2002 that the Building contained significant asbestos contamination. As already discussed earlier in my reasons, due diligence in terms of notifying those at risk of exposure to asbestos in the Building could have been accomplished through a variety of timely and inexpensive methods.

In this case, the appellant owner did not attempt to introduce any such measures and therefore cannot be said to have taken all reasonable steps to avoid the asbestos exposure that occurred during January and February 2002. Indeed, I note that, even after the asbestos exposure incident and subsequent Board investigations, it appears that the appellant owner still did not notify its tenants to the presence of asbestos in the Building until December 2002. In this regard, Inspection Report 2003124770043, dated February 20, 2003, states in relevant part:

> [The appellant owner] provided [the Board OSO] with a copy of a letter that they sent in December of 2002 to the tenants of [the Building] with information on asbestos and restricted entry into the ceiling spaces.

In the result, I find that the Board had the necessary jurisdiction to impose an administrative penalty on the appellant owner. In addition, weighing all the relevant

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factors set out in policy item D12-196-1, including the issue of due diligence, I agree with the Board's decision to impose an administrative penalty on the appellant owner.

Therefore, I find that the Board was correct to conclude that it should impose an administrative penalty on the appellant owner in respect of the appellant owner's breach of its section 119 occupational health and safety obligations.

2. Was the amount of the administrative penalty levied in IR 158 correct?

The policy applicable to this issue is set out in policy item D12-196-6, "Administrative Penalties – Amount of Penalty." This policy item creates two methods for calculating administrative penalties.

The Category A method applies to more serious breaches of occupational health and safety obligations while the Category B method applies to the less serious situations not captured under Category A. Category B penalties are substantially less costly than Category A penalties.

The basic amount of a Category A or Category B penalty may be varied up or down by as much as 30%, depending on the circumstances of each individual case. Policy item D12-196-6 lists a number of factors relevant to varying a penalty up or down.

The applicable policy therefore sets out a two-step approach to calculating the amount of an administrative penalty. The first step is to classify the penalty as either Category A or Category B. The second step is to consider whether the resulting basic amount of the penalty should be varied up or down.

An administrative penalty is classified as Category A if the penalty arose in circumstances that posed a "high risk of serious injury, illness or death" to a worker. Alternatively, a Category A penalty is appropriate where a person's breach of the occupational health and safety scheme was "wilful or with reckless disregard." In my view, a Category A penalty is appropriate in the circumstances of this case because I consider the appellant owner's breach of its subsection 119(b) obligation to have posed a "high risk of serious injury, illness or death."

The review officer in *Review Decision #11658* considered that the exposure of workers to friable chrysotile asbestos in January and February of 2002 did not pose a "high risk of serious injury, illness or death to a worker." The review officer considered policy item D12-196-2, "Administrative Penalties - High Risk Violations" and concluded at page 9 of his reasons that there was inadequate evidence of each worker's exposure to make a finding that the appellant owner's breach of section 119 led to a high risk of serious injury, illness, or death.

I agree with the review officer that the evidence on file is vague as to the precise exposure of individual workers to asbestos on the fourth floor of the Building. Mr. Wedman's opinions highlight the lack of evidence clearly quantifying each worker's asbestos exposure. Indeed, it was because of the lack of satisfactory evidence on this issue that I provided the Compliance Section with an opportunity to respond to Mr. Wedman's opinion.

The Compliance Section's December 5, 2005 response included the statement:

> One can only assume that they were exposed to high levels of asbestos since they were disturbing the asbestos and no precautions were taken, such as misting, to minimize disturbance. The level of exposure in this case could easily be in the range of 10 to 100 times the exposure limit. No respiratory protection was used.

In my view, the Compliance Section's response was of little assistance because it did not offer specific evidence regarding the exposure of each worker, the location of work being carried out, the amount of friable asbestos disturbed and the number of asbestos fibres in the air. In the absence of more detailed evidence, I am not inclined to simply assume that workers were exposed to high levels of asbestos contamination.

Notwithstanding the above deficiencies in the evidence, I am satisfied that the appellant owner's breach of its section 119 obligations resulted in a "high risk of serious injury, serious illness or death." I reach this conclusion in light of the specialized meaning of the phrase "high risk," as described in policy item D12-196-2.

Policy item D12-196-2 indicates that the phrase "high risk of serious injury, serious illness or death" must be assessed in light of 3 factors: 1) the likelihood of an injury occurring; 2) the number of workers affected; and 3) the likely seriousness of any injury.

It is apparent from the wording of policy item D12-196-2 that the term "high risk" has a specialized meaning in the context of occupational health and safety. The analysis is not limited to the single question of whether or not there is a statistically or quantifiably high probability of developing a particular disease.

Indeed, the statistical risk of developing a disease or injury is only one of three factors to consider. This highlights a deficiency in Mr. Wedman's opinions. Mr. Wedman addresses only the literal meaning of "high risk," rather than the specialized sense of this phrase as required by policy item D12-196-2. Because Mr. Wedman limits his opinions to the statistical probability of developing an asbestos-related disease, his opinions are of only partial assistance in determining whether the appellant owner's breach of subsection 119(b) of the Act led to a "high risk of serious injury, serious illness or death" within the meaning of policy item D12-196-2. I turn now to consider each of the three factors referenced in policy item D12-196-2.

With respect to the first factor, the appellant owner says that there is inadequate evidence to conclude that workers on the fourth floor of the Building were likely to develop an asbestos-related disease. Mr. Wedman's opinions support this contention. As with the review officer, I consider the evidence of each worker's exposure to asbestos in the Building to be unsatisfactory in this case. I therefore consider that no particular worker can be said to be statistically likely to develop an asbestos-related disease. This factor weighs in favour of finding that the appellant owner did not commit a "high risk" violation when it failed to comply with section 119 of the Act.

However, I do not read policy item D12-196-2 as requiring that each of the three factors relevant to determining "high risk" be satisfied in order to establish "high risk." Rather, all three factors should be weighed and considered as a whole.

I therefore turn to the second factor, which relates to the number of workers affected. The evidence on file shows that approximately 30 workers were exposed to some degree of asbestos contamination during the renovation of IMC's fourth floor. The Board tested samples of dust taken from window sills on the fourth floor and this testing revealed the presence of asbestos. This evidence suggests that friable chrysotile asbestos from above the T-bar ceiling was dislodged by workers and became airborne throughout the fourth floor of the Building. In my view, the number of workers exposed to this contamination is significant and this factor weighs in favour of a finding that the employer's contravention of section 119 of the Act was a "high risk" violation.

The third factor listed in policy item D12-196-2 relates to the likely "seriousness of any injury." I need not address this issue in detail as there can be no dispute that, once contracted, an asbestos-related disease is invariably serious and often fatal.

Considering all three factors as a whole, I find that the serious nature of asbestos-related diseases and the significant number of workers exposed to asbestos contamination on the fourth floor of the Building outweigh the lack of clear evidence proving that any particular worker was statistically likely to develop an asbestos-related disease.

Consequently, I am satisfied that the appellant owner's contravention of subsection 119(b) of the Act was a "high risk" violation within the meaning of policy item D12-196-2. It follows that the imposition of a Category A penalty is appropriate.

The next question to consider regarding the proper quantum of the administrative penalty levied pursuant to IR 158 is whether or not the Category A penalty should be varied up or down. In *Review Decision #11658*, the review officer reduced the Category A penalty by the maximum permissible amount, that is, by 30%. I have considered the variation factors set out in policy item D12-196-6 and I see no reason to depart from the review officer's reasoning on this point.

In summary, I agree with the result set out in *Review Decision #11658*. The appellant owner is properly subject to a Category A penalty reduced by 30% in respect of the events described in IR 068 and IR 158.

As a result, I dismiss the appellant owner's appeal.

Conclusion

I confirm *Review Decision #11658*.

The appellant owner has not requested reimbursement for appeal expenses and none are apparent. There is no basis to order reimbursement of expenses to the appellant owner and I consequently make no order regarding expenses of this appeal.

Warren Hoole
Vice Chair

WH/jm/gl