

REVIEW DECISION

Re: Review Reference #: 11369
Board Decision under Review: November 7, 2003

Date: November 16, 2004

Review Officer: Craig Maynard

The union requests a review of the decision of the Workers' Compensation Board (the "Board") dated November 7, 2003. In support of this request for review, the union has provided written submissions. The employer was given notice of the review and is participating. The Compliance Section of the Board filed submissions with respect to this review. The employer's and Compliance Section provided additional information which was disclosed to the union for their comment. The union requested an oral hearing. Upon examination of the evidence and submissions, I find that I can make a decision based on the evidence provided.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a Review Officer authority to conduct this review.

Issue

There are two issues with respect to this review:

1. whether the employer should be cited for contravening four sections of the *Occupational Health and Safety Regulation* (the "Regulation") and one section of the *Act*,
2. and whether the employer should receive an administrative penalty.

Background

The employer operates the provincial prison system. On November 6, 2003, a Board officer investigated a correction officer's (the "worker") refusal to continue working at one particular prison. As a result of the Board officer's investigation, the employer was cited for contravening the employer's general duty obligation under section 115(2)(e). On December 10, 2003, the union representing the worker requested a review under section 96.2. The union made further submissions.

The Inspection Text of the Board Officer

One of the correctional officers on shift (Echo III) went home sick, and one of the remaining officers on shift reported feeling unsafe to continue with his duties at that point, based upon the complement of staff on shift, and the possible need for emergency response. This was communicated to the [supervisor] and a 3.12 process initiated.

...

... Even though all the inmates are secured, there may still be the need to respond to a variety of situations such as conflict between inmates within a double bunked cell, a medical emergency, or responding to an individual inmate acting out within a cell and causing disturbances, property damage or attempting self harm. However, officers are prohibited from entering a cell on nightshift regarding the types of situations outlined above unless prior authorization of the shift supervisor has been provided ([the prison] policy B4.1.13). The intent being that officers are not to put themselves at risk unless appropriate backup is available and authorization provided.

...

The night shift operating policies at [this prison] provide general guidance for staff complement, roles and responsibilities, with the ultimate responsibility for the exact assignment and role of staff being the responsibility of the [supervisor]. The employer has provided the [supervisor] with some discretion in assessing the exact staffing situation during a shift, in order to take into account contingency planning if staff are taken ill during a shift, injured, or if the inmate population is unruly enough that a larger than normal complement of officers may be required. There is a call board system in operation if staff are required to be brought in at short notice. Exact guidance outlining the parameters and limits of an [supervisor's] discretion in these matters is not clearly outlined, and each [supervisor] is expected to assess each situation as it arises.

...

The training, expertise and knowledge of the [supervisor] is relied upon during a shift, to make determinations regarding flexibility in the operating policies from time to time depending upon circumstances. Many factors (somewhat subjective) go into an [supervisor's] decision in these matters, including recent history of activity and behaviours within the centre, experience of staff on shift, time within the shift when the person went home sick, the time required for a call in to take place.

It is this officer's determination that at the time of the initial work refusal, considering past and current operating practices that NO UNDUE HAZARD existed.

...

A second issue arising out of this work refusal was the exact implementation of the 5 step 3.12 process. Ultimately, when the WCB was called, and an investigation by the WCB conducted, no undue hazard was found. However, the 3.12 process that was conducted within the centre stalled at step 3 when a

difference of opinion occurred between the [supervisor] and the worker. The [supervisor] informed the worker that in their opinion the report was not valid, the worker did not accept this, at which point step 4 (involvement of a third person in the discussion, reasonably available, selected by the worker - consider someone on shift) should have taken place. This step did not take place. Given the continued refusal of the worker, and the fact that one person had already gone home sick the [supervisor] offered the worker in question a temporary assignment to other duties (control room) and the worker refused that offer. It is noted that the OHS director and select [occupational health and safety] committee members are in the process of writing a 3.12 procedure which is more specific to this workplace (specifying particular positions), and whom to contact at which step. This procedure needs to be finalized and then communicated to all staff.

Union's Submission

The union disputes the Board officer's finding that "no undue hazard existed". The union further submits that an order should have been issued as this was a continuing non-compliance matter. They submit that a decision should be made regarding whether the worker was justified in refusing to work when:

- Staffing levels of correction officers should be higher,
- The supervisor was not knowledgeable on the procedure to follow when a worker refuses to perform unsafe work,
- The employer has not considered the number of prisoners in the workplace,
- The malfunctioning of an electronic personal alarm system, and
- The employer did conduct a risk assessment.

The union submits that "double bunking, insufficient staff and faulty equipment constitute an undue hazard". Therefore, the Board should issue orders requiring the employer to remedy those undue hazards. The union submits that the employer should be sanctioned. Noting that the worker was sent home without pay, the union asserts that this is discriminatory action. The union seeks that the employer be cited for contravening:

- section 2.4 of the *Regulation* because the employer had not complied with prior orders issued by the Board,
- section 3.12 of the *Regulation* because the employer did not follow step four in the dispute resolution process when a worker refuses unsafe work,
- section 3.13 of the *Regulation* because the supervisor sent the worker home without pay for refusing to continue working,
- section 4.3 of the *Regulation*, and
- section 117 of the *Act* because the worker's supervisor was unaware of the process to be utilized in the event of a work refusal.

On July 22, 2004 indicated that his review also includes a review of section 4.27 through to section 4.31 of the *Regulation*.

Law and Policy

The Act

- Section 96.2(1) of the *Act* states that the following Board decisions in a specific case may be reviewed:

...

(c) a Board order, a refusal to make a Board order, a variation of a Board order, or a cancellation of a Board order respecting an occupational health or safety matter.

- Section 96.2 (2) states in part:

No review may be requested under subsection (1) respecting the following:

...

(b) a determination, an order, a refusal to make an order or a cancellation or an order under section 153;

- Section 117 *General duties of supervisors*, states

(1) Every supervisor must

- (a) ensure the health and safety of all workers under the direct supervision of the supervisor,
- (b) be knowledgeable about this Part and those regulations applicable to the work being supervised, and
- (c) comply with this Part, the regulations and any applicable orders.

(2) Without limiting subsection (1), a supervisor must

- (a) ensure that the workers under his or her direct supervision
 - (i) are made aware of all known or reasonably foreseeable health or safety hazards in the area where they work, and
 - (ii) comply with this Part, the regulations and any applicable orders,
- (b) consult and cooperate with the joint committee or worker health and safety representative for the workplace, and

(c) cooperate with the Board, officers of the Board and any other person carrying out a duty under this Part or the regulations.

- Section 151 states *Discrimination against workers prohibited*, in part

An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker

(a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,

...

- Section 153, *Response to complaint*, states in part:

(1) If the Board receives a complaint under section 152 (2), it must immediately inquire into the matter and, if the complaint is not settled or withdrawn, must

(a) determine whether the alleged contravention occurred, and

(b) deliver a written statement of the Board's determination to the worker and to the employer or union, as applicable.

(2) If the Board determines that the contravention occurred, the Board may make an order.

- Section 187(1) *General authority to make orders*, states

The Board may make orders for the carrying out of any matter or thing regulated, controlled or required by this Part or the regulations, and may require that the order be carried out immediately or within the time specified in the order.

- Section 196 (1) *Administrative penalties*, states

The Board may, by order, impose an administrative penalty on an employer under this section if it considers that

(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.

- Section 240 - *Appeal of other Board Decisions* states

A determination, an order, a refusal to make an order or a cancellation of an order made under section 153 may be appealed to the appeal tribunal.

The Regulation

- Section 2.4 *Prompt compliance*, states:

Every person to whom an order or directive is issued by the Board must comply promptly or by the time set out in the order or directive.

- Section 3.12 *Procedure for refusal*, states:

1) A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.

2) A worker who refuses to carry out a work process or operate a tool, appliance or equipment pursuant to subsection (1) must immediately report the circumstances of the unsafe condition to his or her supervisor or employer.

3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and

(a) ensure that any unsafe condition is remedied without delay, or

(b) if in his or her opinion the report is not valid, must so inform the person who made the report.

4) If the procedure under subsection (3) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, the supervisor or employer must investigate the matter in the presence of the worker who made the report and in the presence of

(a) a worker member of the joint committee,

(b) a worker who is selected by a trade union representing the worker,
or

(c) if there is no joint committee or the worker is not represented by a trade union, any other reasonably available worker selected by the worker.

5) If the investigation under subsection (4) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, both the supervisor, or the employer, and the worker must immediately notify an officer, who must investigate the matter without undue delay and issue whatever orders are deemed necessary.

- Section 3.13 *No discriminatory action*, states:
 - (1) A worker must not be subject to discriminatory action as defined in section 150 of Part 3 of the *Workers Compensation Act* because the worker has acted in compliance with section 3.12 or with an order made by an officer.
 - (2) Temporary assignment to alternative work at no loss in pay to the worker until the matter in section 3.12 is resolved is deemed not to constitute discriminatory action.

Note: The prohibition against discriminatory action is established in the *Workers Compensation Act* Part 3, Division 6, sections 150 through 153.

- Section 4.3 *Safe machinery and equipment*, states in part,

The employer must ensure that each tool, machine and piece of equipment in the workplace is

 - (a) capable of safely performing the functions for which it is used, and
 - (b) selected, used and operated in accordance with
 - (i) the manufacturer's recommendations and instructions, if available,
 - (ii) safe work practices, and
 - (iii) the requirements of this Regulation.

Policy

The policies relating to this review are found in the Prevention Manual:

- Policy Item D3-117-1 *RE: General Duties – Supervisors*, states:

In determining whether Section 117 applies, the following guidelines will be considered:

 - A supervisor is a person who instructs, directs and controls workers in the performance of their duties.
 - A supervisor need not have the title "supervisor". He or she may have some other title or have no title at all.
 - The supervisor will normally be appointed by an employer as such, but a person may be a supervisor without being specifically appointed by an employer if, as a matter of fact, he or she instructs, directs and controls workers in the performance of their duties. The employer himself or herself may be a supervisor.

- "Direct supervision" may take place even though a worker may be located in a different place than the supervisor or may travel to different places as part of his or her work. Directions may be given by any communications medium.

- Policy Item D12-187-1 *RE: Orders - General Authority*, states

Employers and other persons covered by the *Act* have an obligation to comply with the *Act* and *Regulations*. It is not sufficient simply to obey orders of the Board's officers after a violation, injury or disease has occurred.

Where violations of the *Act* or regulations are found, orders will be issued to the persons responsible for the failure to comply.

In operations where cooperation and compliance are generally present, and minor, low hazard violations are noted, Board officers may issue oral orders at their discretion, but shall check back to ensure compliance before leaving the site. In such cases, a brief explanatory note shall be included in the office memo portion of the Inspection Report. Where compliance has not been achieved by the end of the inspection, the Board officer shall issue a written order.

- Policy Item D12-196-1 *RE: Administrative Penalties - Criteria for Imposing states*, in part:

The main purpose of administrative penalties and similar levies is to motivate the employer receiving the penalty and other employers to comply with the *Act* and regulations.

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 regulations on more than one occasion. This includes where, though a different section is cited, the violation is essentially the same, for example, citations of sections 8.11 and 20.11 of the *OHS Regulation* for failure to use safety headgear;
- an employer is found in violation of different sections of Part 3 or the regulations on more than one occasion, where the number of violations indicates a general lack of commitment to compliance;
- 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 regulations. Reckless disregard includes where a violation results from ignorance of the *Act* or regulations due to a refusal to read them or take other steps to find out an employer's obligations; or
- the Board considers that the circumstances may warrant an administrative penalty.

Review Division Practices and Procedures

B2.1.6. Prevention Decisions

As set out in Item B2.1 of this Manual, a Board order, a refusal to make a Board order, a variation of a Board order or a cancellation of a Board order respecting an occupational health or safety matter in a specific case can be reviewed. Two exceptions where there is no right of review are:

(a) *An order relating to a complaint of discriminatory action made on or after March 3, 2003.* These are appealable direct from the Prevention Division to WCAT. [Sections 96.2(1)(c), 96.2(2)(b) and 240(1)]

Reasons and Decision

The issue I have to decide is whether the employer contravened various sections of the *Act* and *Regulation*. The union submits a list of *Regulation* references that do not appear to include matters that were not before or were considered by the Board officer. I note that the Board officer included a lengthy text in his inspection that explains the background and the issues he addressed on November 6 and 7, 2003.

Matters not considered

With respect, I find that sections 4.27 – 4.31 should not be considered. The obligations stated in section 4.27 through to 4.31 are not matters that arose from the incidents of November 6, 2003. Rather, those obligations are matters arising from the employer's general obligation to protect workers from violence in the workplace. There is no evidence on file to indicate that the worker had raised the specifics of whether the employer had complied with specific obligations in sections 4.27 – 4.31 of the *Regulation*.

Regarding section 117 of the *Act*, I find that this matter should not be considered as well. Section 117 of the *Act* is obligations of supervisors, not employers. The union's argument is that the employer should be cited for contravening section 117. With respect I disagree. Only supervisors can be cited for contraventions to section 117.

Section 3.13 of the *Regulation* is a matter regarding discriminatory action as defined in section 150 of part 3 of the *Act*. Section 96.2(2) does not allow review officers to conduct reviews into whether an order should have been cited for discrimination matters. Therefore, I will not decide this matter.

Issue #1 – Contraventions of the Regulation

Section 2.4 of the Regulation – Prompt Compliance

The union's submission is that because the employer did not complete a risk assessment for this workplace this is continued non-compliance. Similar to the reasoning noted regarding sections 4.27 – 4.31, I find that the officer, on the evening of November 6, 2003, was not addressing the employer has a larger obligation to those sections including whether the employer was meeting obligations that were cited in prior inspection reports. Therefore, I find that an order is not appropriate.

Section 3.12(4) of the Regulation – Refusal of unsafe work

The evidence on file indicates that when the worker learned from his supervisor that the supervisor believed that the report of unsafe conditions was not valid, the supervisor told the worker that he could go home. This evidence indicates that the supervisor took no further action. There is no evidence on file indicating that the supervisor or employer investigated the matter further as required under paragraph four of section 3.12. Because there is an obligation under section 3.12(4) to further investigate, I find there was a contravention. As such, an order must be issued.

Section 4.3 of the Regulation – Safe machinery and equipment

The union submits that the employer should be cited for section 4.3 of the *Regulation*. The union does not identify which of the paragraphs in section 4.3 were contravened. I note from the evidence that a personal alarm system had failed at 11:30 PM. However, the file indicates that this system was repaired before the end of the evening. Having looked at the remainder of the evidence I find no other possible issues to consider in whether the employer contravened section 4.3. Therefore, I find that in order is not appropriate.

I find that with the exception of section 3.12(4), the employer did not contravene the requested sections of the *Act* or *Regulation*. As a result, I allow the union's request in part.

Issue #2 – Administrative Penalty

The evidence on file indicates that the Board officer was addressing the specific issues of whether the night shift operating policies at this were location provided enough guidance for the supervisor to deal with his obligations under section

3.12. There is no evidence on file indicating that the Board officer was contemplating an administrative penalty.

Policy item #D12-196-1 provides the criteria for when the Board officer wishes to propose an administrative penalty. There is no evidence on file indicating that any of the criteria listed in this policy was a matter that the Board officer was considering on November 6, 2003. Therefore, I find that an administrative penalty is not appropriate.

I find that an administrative penalty is not appropriate. As a result, I deny the union's request.

Conclusion

As a result of this review, I vary the Board's decision of November 7, 2003.

Craig Maynard
Review Officer
Review Division