OHS Penalty Assessment Appeals

Follow-up Report #1

submitted to the

Royal Commission on Workers’ Compensation
in British Columbia

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1) **Introduction**

This report provides further information and analysis of two issues concerning the appeals that are made to OHS penalty assessment. These issues can be framed by asking these questions:

- What defenses are being raised in the course of OHS appeals (in particular the defense of due diligence)? Do they shed any light on the use/effectiveness of administrative penalties generally?

- What use does the Board make of the OHS appeal decisions? Do they influence the way in which the regulations are enforced by officers or the content of those regulations?

The information set out in this report was obtained by studying the applicable legislation, the Board’s sanctions policy and assessment procedures, a review of recent OHS appeal decisions, and an interview with three members of the Appeal Division.

For ease of reference, the full text of the Board’s policies and procedures re: penalty assessments is set out in Appendix A. Summaries of selected OHS appeals decisions that were reviewed are in Appendix B.

Before addressing the above two issues, we describe the types of appeals that exist under the **WCAct** and the **IH&S Regulations**. This is followed by a discussion of the data concerning OHS penalty assessment appeals.
2) Types of OHS appeals

Three types of OHS appeals can be identified:

- Appeals to penalty assessments (and reconsiderations) initiated pursuant to the Act;
- Appeals to orders/directives initiated pursuant to the Regulations;
- Appeals to orders/directives that are granted by Board policy.

2.1) Appeals to penalty assessments (and reconsiderations) pursuant to the Act

Subsection 96(6) of the WCAAct states that an employer can appeal a penalty assessment levied under section 73 of the Act to the Appeal Division. This subsection reads:

(6) An employer who has received notice of

(a) an assessment under section 39 or 40,
(b) a classification, special rate, differential or assessment under section 42,
or
(c) an additional assessment, levy or contribution under section 73

may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

The WCB’s Occupational Safety and Health Policy and Procedures Manual at policy number 1.4.4 restates this subsection (albeit in different wording), but adds the Charter as a basis to appeal a penalty assessment under section 73. We note, however, that the mention of the Charter in the Policy Manual does not effectively broaden the grounds for an appeal because an appeal based upon an alleged breach of the Charter would fall within the scope of an “error of law” as set out under the Act.
Section 73 itself reads:

73(1): Where the board considers that
    (a) sufficient precautions were not taken by an employer for the prevention of injuries and occupational disease;
    (b) the place of employment or working conditions are unsafe; or
    (c) the employer has not complied with regulations, orders or directions made under section 71,

the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

(2) Where an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and the board considers that this was due substantially to the gross negligence of an employer or to the failure of an employer to adopt reasonable means for the prevention of injuries or occupational diseases or to comply with the orders or directions of the board, or with the regulations made under this Part, the board may levy and collect from that employer as a contribution to accident fund the amount of the compensation payable in respect of the injury, death or occupational disease, not exceeding in any case $11,160.08* [$36,297.21], and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.

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1 By section 25(4) of the Act, the statutorily stated amount is periodically changed by regulation and effective January 1, 1996 it was the bracketed amount per BC Reg. 559/95.
Section 96.1 of the **WCA**ct provides a basis for someone to request a reconsideration of an Appeal Division decision. That subsection states:

**Reconsideration by appeal division**

96.1(1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

(2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

(a) is substantial and material to the decision, and

(b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,

he may direct that

(c) the appeal division reconsider the matter, or

(d) the applicant may make a new claim to the board with respect to the matter.

2.2) **Appeals to orders/directives pursuant to the Regulations**

Subsection 96(6) of the Act is silent with respect to appeals regarding orders or directives that a Board offer may issue, however section 2.12 of the **IH&S Regulations** states (in part):

(2) Any person affected by any order or directive issued under these regulations or by any penalty under Section 61 of the Workers’ Compensation Act, or any representative of such a person, may appeal to the Commissioners. Notice of appeal shall be submitted within 21 days, or such further period as the Commissioners may allow, and shall be made in writing and shall state the reasons therefor.

(3) No appeal in itself shall operate as a stay in respect of any order or directive or penalty assessment.
2.3) Appeals to orders/directives granted by Board policy

The OSH Policy Manual at policy number 1.4.5 provides persons who disagree with a Board order or directive an internal appeal mechanism. The first level of “appeal” is to have the order/directive reviewed by the officer’s Regional Manager. The next level is an appeal to the Director of Field Operations. The final appeal is to the Vice-President, OSH Division.

2.4) Discussion

The Appeal Division does not accept appeals that may be submitted pursuant to section 2.12 of the Regulations or by Policy 1.4.5. It accepts only those appeals which flow from a penalty assessment, as permitted under section 96(6) of the Act (and reconsiderations under section 96.1).

It appears that the review of orders described under Board policy 1.4.5 is simply the Division’s way to operationalize the appeals to orders that are permitted under section 2.12 of the Regulations.

3) Penalty Assessment Appeal Procedures, etc.

The appeals to penalty assessment that are initiated under section 96(6) of the WCAAct are not directed to the field officer’s decision to recommend a penalty, but to the subsequent decision reached by the reviewing officer at the sanction review hearing to impose a penalty assessment. However, as a practical matter and as can be seen in many of the written decisions, the appeal commissioners look beyond the sanction review decision and will consider the merits of the field officer’s original recommendation.

An appeal conducted under section 96(6) is more of an inquiry than it is an appeal. For example, the appeal commissioners are not limited to considering only the information that the employer submits with its appeal. They can seek out and obtain new information from
the Board or external consultants or experts, and do so on their own initiative. (They must, however, disclose new information they obtain to the employer and provide the employer with an opportunity to respond to same.)

On the other hand, the scope of the commissioner’s review is prescribed by the statute; the Appeal Division can only make findings concerning errors of fact or law, or a contravention of Board policies (e.g. policy 1.4.1 and related).

The remedial powers of the Division is also defined. A commissioner can refer a file back to the Prevention Division (for reconsideration by the sanctions review officer) with or without direction, or the commissioner may substitute the Division’s original penalty decision with a new decision.

As a matter of process, the so-called hearings are often “read and reviews”; oral hearings are rarely employed. The commissioner’s will grant an employer’s request for an oral hearing (or order such a hearing), if they ascertain from their review of the file materials that there is an issue that needs to be assessed in such a forum (e.g. credibility), or if the matters under appeal are technically complex, or if there was an apparent lack of a full hearing at the sanction review stage.

Interestingly, neither the Prevention Division nor any of its staff appear before the Appeal Division as parties. The Appeal Division commissioners we interviewed suggested it would not be proper for the Prevention Division to be a party to these appeal proceedings. (Field officers may, however, appear as witnesses.) Employers (or their representatives) are always party to a penalty assessment appeal they have initiated.

On the other hand, workers, unions and family members may appear before the Appeal Division as “interested parties” and have been granted standing to submit evidence and argue the merits of the appeal, albeit in very few cases.
4) Penalty Assessment Appeal Decision Data

In advance of its July 18th public presentation, the Board provided the Commission with data about penalty assessment appeals. The appeal decision data set out in the following table does not include the few appeals that were withdrawn before they could be adjudicated.

<table>
<thead>
<tr>
<th>YEAR OF DECISION</th>
<th>ALLOWED</th>
<th>DENIED</th>
<th>PARTIAL</th>
<th>TOTAL</th>
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<tr>
<td></td>
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<td></td>
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<td>19</td>
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<tr>
<td></td>
<td>140</td>
<td></td>
<td></td>
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<tr>
<td>1995</td>
<td>13</td>
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<td>84</td>
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<td>83</td>
<td>89.2</td>
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<td>3.2</td>
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<tr>
<td></td>
<td>93</td>
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<td></td>
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<tr>
<td>TOTAL</td>
<td>239</td>
<td>19.1</td>
<td>969</td>
<td>77.5</td>
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On average each year, just over 20% of appeals have been allowed in full or in part during the past eight years. While the percentages each year varies and it appears that the proportion is dropping, it is fair to say generally that one in every five appeals is

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2 The data the Board provided to the Commission in advance of the July 18th hearing does not correspond with the count of appeals allowed, denied or partial that the OHS Team obtain from the list of decisions the Appeal Division provided on June 24th along with the CD-ROM of the full text of the decisions. We cannot readily explain these discrepancies.
successful. If 1997 turns out to be like 1996, the trend would be more like one in every ten appeals are successful.

The outcome of OHS appeals could be an important source of information to help the Board evaluate the appropriateness of the OHS regulations generally and the fairness its enforcement policies and priorities in particular. For example, if a number of successful appeals dealt with the same problem with the wording of a particular provision, that problem could be addressed if the Board made an appropriate amendment to the regulation. Alternatively, the appeals could demonstrate that the Board’s officers are enforcing certain provisions in an incorrect or unfair manner. Further analysis of the applicable appeal decisions could help to refine or improve the Board’s enforcement policies.

In a similar way, a systematic review of the appeal decisions (both accepted and denied) would help to guide the Prevention Division at the sanction review stage.

We were told by the Appeal Division that the large number of cases in 1992 derived from earlier amendments to the Act. While they were large in number, those appeal decisions provided a foundation for clarifying certain legal and policy issues concerning penalty assessments. This guidance was directed to the field officers, the sanction review officers, the Prevention Division generally, and to employers. The Appeal Division suggested that the relatively low proportion of appeals that are have been allowed (in whole or in part) since that time (about 16% of cases for 1993 to 1996) compared to the higher proportion in the four previous years (about 25% of cases from 1989 to 1992) reflects an improvement in the way field officers are applying the regulations and the Board’s penalty assessment policy, as well as improvements in the sanctions review process itself. (Again, if the rate of accepted appeals for 1997 matches that for 1996, that would be further

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3 From 1989 to 1991 OHS appeals were treated as if they were de novo hearings. The employer did not have to set out a specific grounds. From June 1991 onward, however, the employer’s appeal had to fit within the grounds specified under the Act (e.g. error of law, fact, etc.).
5) Issues Raised on Appeal

The grounds for an appeal to a penalty assessment are limited by the wording of section 96(6) of the WCAct. As noted above, to succeed, an appeal must fall into one or more of the following three categories:

- an error of law;
- an error of fact;
- a contravention of Board policy.

The Appeal Division does not keep readily accessible data concerning the issues or defenses that are raised on appeals to OHS penalty assessments or concerning which of these grounds the commissioners ultimately decide an appeal. Therefore, it is not possible to identify the specific defenses that have been raised during the past decade. In our conversation with the Appeal Division, they suggested that all three grounds are often stated in the submissions, but in recent years most employers often claim that there was an error of fact; errors of law or policy contraventions are less common grounds.

A common example of current submissions is that the review officer did not take into consideration the reasonable measures that the employer had put into place to prevent the breach of the regulation. In effect, this ground is similar to a defense of due diligence, although not expressly stated as such.

The commissioners also indicated to us that the quality of the arguments raised in the appears varies considerably, from simple assertions of “I can’t afford this penalty” through to submission with well articulated grounds for appeals, and detailed facts and supporting argument, including the defense of due diligence. They felt that the Ministry
of Labour’s employer advisors have helped to improve the quality of a number of the submissions they now receive, an observation also made by Rest and Ashford.\(^4\)

We scanned recent OHS appeal decisions for those where the term “due diligence” was expressly stated and discussed in the decision. This legal term is not defined in the WCA\(\text{Act}\), the regulations or the Board’s Policy Manual, however, in determining whether to recommend a sanction, the Board’s policy 1.4.1 suggests that the officer should consider four factors. The first two of those factors contain elements that could, in appropriate circumstances, constitute a factual foundation for a determination that the employer had exercised due diligence. The two applicable factors that officers are to consider are (our emphasis):

i) If the orders refer to items which have been overlooked by a management actively pursuing a program of compliance, sanctions should not normally be considered;

ii) If the orders result from the independent action of workers who have been properly instructed and trained, sanctions against the employer should not normally be considered. However, where an employer neglects to ensure that effectual training of workers has been carried out, or that work activities are being properly supervised, a penalty assessment will be considered;

A number of the decisions identified in a sonar search discuss the merits of the due diligence defense in relation to the Board’s decision to issue a penalty assessment. In those cases where it is expressly addressed, it appears the commissioners give due diligence consideration before rendering their decision as to whether that “defense” has been met in the particular case. For example, in appeal decision #95-0614, the panel had the following to say in ruling in the employer’s favour:

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After reviewing the employer's safety program, we conclude that, in fact, there is evidence that the employer required workers to report hazards to a supervisor and also prohibited workers from carrying out any unsafe work operation. This evidence was before the hearing officer at the time the decision was made. We conclude, therefore, the decision was based in part on an error of fact.

The safety officer indicated that the employer had shown due diligence in inspecting the worksite and selecting a safe location for unloading prior to the work being carried out. The officer said it was only the demand from the general contractor upon the driver that resulted in the selection of the secondary unloading area which was not safe. The governors' prevention policy No. 1.4.3 outlines the policy for penalty assessments in high risk work situations. That policy states, in part:

. . . where the inspecting officer is of the opinion a recommendation for a penalty assessment is an inappropriate action, the officer must still issue the remedial orders and also document the reasons for not recommending a penalty assessment. In some instances the appropriate action would be to issue the remedial orders and a letter warning the employer a penalty assessment may be recommended if further instances of such non-compliance with regulations or Board orders are observed.

In the circumstances of this case, we conclude that a warning letter is the appropriate level of sanction. The employer was actively pursuing a program of compliance. The workers in question were adequately supervised and trained. From the evidence we conclude the violation occurred primarily as a result of demands made by the general contractor.

Some discussions of this defense, however, appear to simply parrot the wording of policy 1.4.1. For example, appeal decision #93-0377 states:

The employer has submitted that the argument of due diligence has been met. This panel finds, however, that there is no evidence or documentation indicating this company was pursuing a program of compliance prior to the accident. We note, when questioned regarding documentation of the safety meanings, or regarding development of a safety program, the employer says he does not have either one.
In appeal decision #94-1383, the panel stated:

The Industrial Health & Safety Regulations, without exception, require due diligence of employers. It is not enough for the employer, after the fact, to defend his diligence; he must be able to prove that not only has he provided and implemented a safety program with and for his employees but also that he has ensured that his workers are properly informed of the risks and safe practices in their work and that his supervision is effective.

Based upon our conversation with the Appeal Division and an admittedly quick review of selected appeal decisions, we conclude that the defense of due diligence has application in the context of a penalty assessment in the first instance (i.e. at the “show cause” sanction review hearing) and at the second phase, during the appeal of an OHS penalty assessment before the Appeal Division.

The defense of due diligence could also have application in relation to other enforcement options, such as challenging a decision to issue a ticket. As we have noted in Issues Paper #5, ticketing is an enforcement option under section 47.1 of the Yukon’s OHS statute and could be applied through BC’s Offences Act with appropriate amendments to the WCAct.

That said, we have the impression that the appeal panels are simply relying on the wording of the Board’s policy directive to ascertain whether the employer has exercised due diligence and have adopted that wording to frame their analysis of that defense in the case before them. Specifically, we are concerned that the commissioner’s are applying that policy directive as if it embodied all the essential elements of a defense of due diligence. We are not convinced it does, but see no merit in pursuing this issue further.
On the other hand, we did identified one penalty assessment appeal decision where the panel suggested that the defense of due diligence did not apply to penalty assessments, because such assessments are not derived from “offences” to which that defense would normally apply. We would suggest that this conclusion is wrong at law, but express no opinion on this point here.\(^5\) The extract of the appeal panel’s discussion is set out in Appendix C.

In summary and by way of conclusion, whether it is expressed or implied, it is clear that employers argue and provide evidence at the appeal hearing that they exercised due diligence in the particular circumstances which led to their penalty assessment.

6) The Board Use of the OHS Appeal Decisions

If the Board has ignored a potential source of useful information about the regulations and their enforcement, that would suggest there is a problem with the way the Board has administered the WCAct generally, to say nothing of suggesting that there are problems with its internal quality control and regulation review process. Based upon our research, we believe that the Appeal Division decisions can be a useful source of precisely this type of feedback.

The Board was not able to organize the appeal decisions it provided to the Commission in July (on the CD-ROM) by the regulation section numbers that were considered by the panels. The Board also could not compare the allowed to the denied appeals in a meaningful fashion (e.g. by types of reasons). The Board cannot also readily determine the average length of time of an OHS appeal, from date of receipt to date of decision.

\(^5\) We note, however, that the panel also suggested that section 73(1) of the Act might allow such a defense through the operation of the phrase: “The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.”
While the Appeal Division decisions are not binding on the Board owing to the wording of section 99 of the WCAct, the Prevention Division has advised the Commission that appeal decisions are used to revise the regulations and its field officer’s operational instructions. Apparently the Regulation Review Section reads the WC Reporter series and key appeal decisions and considers them in developing the new regulations.

It appears all that the Section staff do is read the decisions. The Board has not provided any details about other mechanisms, such as using a computer database to track problems over time with particular regulations or the way in which officer’s enforce those provisions.

The Appeal Division officials we interview felt there has been a change in officer behaviour, as documented in the information that is contained in the appeal files. They believe that the quality of the field staff’s penalty assessment decisions and subsequent sanction reviews have improved in the past five years, and that this improvement can be linked to the Prevention Division taking some cognizance of the Appeal Division’s decisions and making appropriate changes to its field policies, procedures, etc. For example, the staff noted that the total number of OHS appeals has been steadily dropping in the past five years, from a high of 299 in 1992 to 93 in 1996. Rest and Ashford provided in table 6.5 of their 1997 draft report data about the number of penalties that

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6 Section 99 states:

Legal precedent not binding
99. The board is not bound to follow legal precedent. Its decision shall be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker.

7 The Board has also indicated that the Section monitors variances the Board has granted to the existing regulations and, by that process, attempts to ensure that regulations, which do not correspond with workplace reality, are amended to fit that reality.
were finally assessed after a sanctions review from 1992 to 1995. If we presume that all of
the appeals decisions handed down in one year come from the penalties that were assessed
in that same year, it is possible to generate rates for appeals from 1992 to 1995, as
follows:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Appeals allowed or denied</th>
<th>Final penalty assessments made</th>
<th>Appeals as a percentage of assessments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>299</td>
<td>321</td>
<td>93.2%</td>
</tr>
<tr>
<td>1993</td>
<td>159</td>
<td>375</td>
<td>42.4%</td>
</tr>
<tr>
<td>1994</td>
<td>140</td>
<td>361</td>
<td>38.8%</td>
</tr>
<tr>
<td>1995</td>
<td>106</td>
<td>403</td>
<td>26.3%</td>
</tr>
</tbody>
</table>

The above data suggests that fewer employers are following through with appeals in 1995
than they did 1992. The reasons for this decline could be attributed to improvements in the
field officers’ skills in applying the regulations, or to improvements in the sanctions review
process, or both. On the other hand, as Rest and Ashford have suggested, because the
total dollar amount of penalties imposed has dropped compared to what the officer’s were
originally recommending, it may no longer be cost-effective for employers (in particular
large ones) to initiate an appeal.

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8 An employer has 30 days to file an appeal to a penalty assessment and the Appeal Division is mandated
to complete such an appeal with 90 days of its receipt.
9 Table 6.5 in the Rest and Ashford draft report could be used to help narrow those options. That table sets
out data for the number of field officers’ recommendations (or warning letters that were sent out) and the
number of penalty assessment recommendations that were eventually forwarded to sanctions reviews for a
“show cause” hearing. Those figures could be used to ascertain if the sanctions review process has
screened out fewer recommendations in recent years. If that was the case, it may suggest that officers are
applying the Board’s penalty assessment policy in a more realistic fashion.
10 Rest and Ashford draft report at page 155
The commissioners we spoke to expressed some concern for the fact that new review officers have been hired to conduct the sanction reviews. Apparently, these officers are not as skilled in adjudicating initial penalty review hearings in that they do not have detailed technical knowledge about the issues that are being presented to them. In a few instances, they believe that the review officers may not have been clear about their roles as adjudicators as opposed to advocates.

In summary and by way of conclusion, the Board makes some use of the Appeal Division’s penalty assessment appeal decisions, but perhaps not in as systematic or useful fashion as would be appropriate, given that these decisions are the Board’s primary source of “common law” for how its regulations are being applied. Based upon the information available to us, we cannot conclude that the appeal decisions have helped to improve the way that field officers enforce the regulations. There is some suggestion this may be the case, but more research is required on this point.

7) Further Observations

The Board’s policy 1.4.1 is the source of guidance given to officers in terms of deciding when an penalty assessment should be levied and the amount of such an assessment. While section 73 of the WCAct permits penalty assessments, we would suggest that the amounts and the criteria for issuing such penalties should be set out in legislation, as opposed to contained in Board policy.
Appendix A

APPLICATION OF SANCTIONS
AND PENALTY ASSESSMENT PROCEDURES

O. S. & H. POLICY - NO: 1.4.1
APPLICATION OF SANCTIONS (Issued/Reviewed: July 1993)

The Board has as one of its prime responsibilities the inspection of employers’ places of work to assess the health and safety practices and the level of compliance with the regulations. Where hazardous conditions or practices, or violation of the regulations come to the attention of an officer of the Board, orders will be issued against the employer. The Board may also impose a penalty assessment, prosecute, or where necessary, close down all or part of the work site. Failure to comply with regulations is an offence whether or not an order has been issued.

The general guidelines for the applications of sanctions are:

1) In cases of non-compliance with regulations where, in the opinion of the officer of the Board, workers have been exposed to a serious hazard, and the employer appears to have knowingly exposed workers to such hazard, the officer shall issue appropriate orders and shall recommend that sanctions be considered;

2) In situations where there are recorded observations of previous non-compliance with regulations or orders, officers shall recommend the application of sanctions. Such a recommendation should be considered when the officer is satisfied that persuasive means have failed to gain a meaningful commitment to comply, from the employer. The amount assessed will reflect the degree of hazard occasioned by the non-compliance and/or consideration of the motivational impact required;
3) In determining whether or not to recommend sanctions, officers should consider the following:

i) If the orders refer to items which have been overlooked by a management actively pursuing a program of compliance, sanctions should not normally be considered;

ii) If the orders result from the independent action of workers who have been properly instructed and trained, sanctions against the employer should not normally be considered. However, where an employer neglects to ensure that effectual training of workers has been carried out, or that work activities are being properly supervised, a penalty assessment will be considered;

iii) If the orders refer to items which result from general neglect or a complacent attitude toward compliance, sanctions should be considered;

iv) If the orders refer to items which are the result of a deliberate attitude of non-compliance, sanctions should be considered.

In considering the sanction recommendations made by officers, the Board will make an assessment based on the foregoing factors and these considerations:

a) The seriousness of the hazard created by the violation;

b) The previous record of the firm;

c) Any evidence the employer was aware workers were exposed to a hazard, or the operation was in violation of the occupational safety and health regulations.
### RECOMMENDED SCHEDULE OF SANCTIONS

**EMPLOYERS' PAYROLL**

<table>
<thead>
<tr>
<th>Violation Category</th>
<th>Description</th>
<th>Less Than 230,000</th>
<th>231,000 to 575,000</th>
<th>576,000 to 2,300,000</th>
<th>2,301,000 to 5,750,000</th>
<th>5,751,000 to 11,444,000</th>
<th>Over 11,440,000</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type I</strong></td>
<td>Risk of injury or disease is moderate. There was no accident requiring Board notification. Injuries are of a minor nature. Exposure to chemical substances can cause temporary, reversible injury or illness requiring medical treatment. There has been repeated non-compliance with Board orders. Non compliance with regulations due more to neglect than willful and deliberate.</td>
<td>$1,500</td>
<td>$2,000</td>
<td>$2,500</td>
<td>$3,000</td>
<td>$3,500</td>
<td>$4,000</td>
</tr>
<tr>
<td><strong>Type II</strong></td>
<td>Type I violation repeated within three years of last sanction.</td>
<td>$3,000</td>
<td>$4,000</td>
<td>$5,000</td>
<td>$6,000</td>
<td>$7,000</td>
<td>$8,000</td>
</tr>
<tr>
<td><strong>Type III</strong></td>
<td>Risk of injury or disease is high. There has been a fatality or serious injury. Exposure to chemical substances could result in permanent, irreversible injury, illness or death (includes high exposure to carcinogens, teratogens, mutagens).</td>
<td>$3,500</td>
<td>$4,500</td>
<td>$5,500</td>
<td>$7,500</td>
<td>$10,000</td>
<td>$15,000</td>
</tr>
<tr>
<td><strong>Type IV</strong></td>
<td>Type III violation repeated within five years of last sanction.</td>
<td>$7,000</td>
<td>$9,000</td>
<td>$11,000</td>
<td>$15,000</td>
<td>$20,000</td>
<td>$30,000</td>
</tr>
</tbody>
</table>

**O. S. & H. POLICY - NO: 1.4.1-1**

**PENALTY ASSESSMENT PROCEDURES** (Issued/Reviewed: July 1994)

Policy No. 1.4.1 sets out the guidelines followed in considering whether a penalty assessment should be imposed.
1. Proposal to Consider a Penalty Assessment

A proposal to consider a penalty assessment will normally be made by a Board officer after an inspection and endorsement by the officer's manager. A proposal may also be made by the Vice-President, Occupational Safety and Health Division or any officer, manager or director assigned that authority in writing by the Vice-President.

The penalty assessment process is currently administered by the variance and sanction review section.

A letter will be sent to the employer advising that a penalty is being considered and the reasons. The letter will be accompanied by copies of any documents submitted in support of the proposal, including any relevant inspection reports, photographs and memoranda by Board officers. The letter will give the employer 21 days to reply or request a meeting.

If no reply is received, the officer making the decision (See Policy No. 1.4.2.) will decide, on the basis of the available information, whether to levy the penalty.

2. Notification of Worker Representative

Notice of the penalty proposal will be given to the trade union representing the workers affected and the Chair and Secretary of the Industrial Health and Safety Committee at the worksite. If there is no trade union or committee, notice will, where practicable, be given to a worker representative. If a person notified advises that they wish to participate, they will receive copies of any supporting documents, be given the opportunity to provide written submissions and participate in any meeting, and receive a copy of the decision.
3. Written Submissions

Any written submissions may be distributed for comment to the Board officer or other staff member involved in proposing consideration of the penalty. Where required by the rules of natural justice, written submissions or comments provided by the employer, a Board officer or other person participating in the process will be disclosed to other persons participating and an opportunity given for response.

4. Meetings

A meeting will be arranged if the employer requests one. The meeting will be chaired by the Board officer who is to make the decision on the assessment. The meeting will normally be attended by the Board officer or other staff member proposing consideration of the penalty.

Members of the public may attend the meeting subject to the following:

- The schedule of meetings for each day will be posted in a publicly accessible position by the beginning of the day.
- Attendance is to observe the proceedings only.
- No electronic recording is made.
- The officer conducting the meeting may limit or exclude public attendance. In deciding this, the officer will consider the requirements of the Canadian Charter of Rights and Freedoms. The person seeking the limitation must prove that it is “justified in a free and democratic society.” The proposed ban must be shown to be necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure. For example, there may be exceptional circumstances where public admission will prevent a fair hearing or harm the employer's business by revealing a trade secret. Any restriction on public attendance will be the smallest necessary to achieve its object. This may mean that the public will only be excluded from the part of the hearing where the evidence in question is dealt with. Requests
by a party to restrict public attendance must normally be made at the outset of the meeting.
The officer conducting a meeting will stop the proceedings and exclude from further attendance any member of the public whose conduct is in any way disruptive of the proceedings.

5. Decision
The Board officer making the decision will inform the employer in writing of the decision.

6. Expenses
The Board does not normally pay the fees or expenses of persons attending penalty meetings. An exception may be made for wages and travelling expenses of witnesses or individual representatives whose attendance is approved by the Board and who are not being reimbursed by their union or employer. No travelling expenses will be paid for a journey from a place less than 24 kilometres from the meeting room. Where the worker travels by personal vehicle, the rate per kilometre set out in #82.20 of the Rehabilitation Services and Claims Manual is paid. The amount paid for lost wages is 75% of the individual's actual loss, subject to the maximum wage rate under Section 33 of the Workers Compensation Act.

7. Reconsiderations
Written clarification of a decision on a penalty assessment may be provided on request if the officer making the decision considers this necessary. The officer will not reconsider a decision unless grounds are provided that, in the officer's opinion, indicate a significant error was made. Grounds might include new evidence or an error of law or policy.
Appendix B

SUMMARY OF SELECTED 1997 APPEAL DECISIONS

The following is a summary of the salient facts and findings of the Appeal Division in a series of 1997 appeal decisions. In keeping with the Board’s policy re: publishing these decisions, the affected companies have not been identified by their full name.

1) Appeal Denied

_DCT Ltd. (#97-0571)_
Company penalized 7,500 for failing to lock-out control device in a debarking machine, contrary to s.16.100(1)(c) of Regulations. Employer appeals on error of fact. Panel reviewed entire file, but did not hold a hearing. Appeal denied: unlocked machinery could have started and could have injured workers.

_SC Ltd. (#97-0391 & 97-0392)_
Company penalized $9,000 (combined penalty) for failing to provide fall protection and rescue equipment in the construction of a bridge, as required under s. 34.04(1) and 343.12 of the Regulations. Employer appeal on error of facts and application of policy. Panel reviewed entire file, and held oral hearing as appeal involved issues of credibility. Appeal denied: fall protection and rescue equipment should have been provided. Penalty should not have been combined (and thereby reduced), because they were no related breaches; new penalty set (increased) to a total of $13,500.

_TR (#97-0276)_
Company penalized $3,500 for failing to provide fall protection equipment in a roofing operation, as per s.32.68(3) of the Regulations. Employer appeals on error of fact. Panel reviewed entire file, plus past warnings, etc. Appeal denied: fall protection equipment required in these circumstances; original penalty assessment was to be $5,000, but reduced to $3,500 by sanction review officer.
**NF Ltd. (#97-0435)**

Company penalized $3,500 for failing to provide fall protection equipment in a crane repair situation, as per s.34.04(1) of the Regulations. Employer appeals on error of fact. Employer requested an oral hearing, but panel found it could adjudicate matter based upon written evidence. **Appeal denied:** worker was undeniably exposed to a situation which was immediately dangerous to his life or health; however, worker should be held accountable to employer to follow safety procedures.

**FC Ltd. (#97-0500)**

Company penalized $3,500 for various infractions of the Regulations. E. appeals finding of violation and amount of penalty. Employer requested an oral hearing, but panel found it could adjudicate matter based upon written evidence and the tape of the hearing itself. **Appeal denied:** facts supported original decision; Employer was in violation of applicable provisions of the Regulations.

**EI Ltd. (#97-0082)**

Company penalized $3,000 for breaches of various ventilation provisions of the Regulation re: exposure to carbon monoxide. (Separate breach re: lack of a committee did not receive a penalty.) Employer requested an oral hearing, but panel found it could adjudicate matter based upon the original written evidence and subsequent written submissions. **Appeal denied:** no error in reviewing officer’s finding of facts; no error in applying the Board’s penalty policy.
2) Appeal Allowed (or allowed in part)

**CWSM Ltd. (#97-0038)**
Company penalized $4,500 for breach of the excavation/trenching requirements of s. 38.06(1) Regulations. Oral hearing held, but no reasons given why it was not simply a “read and review”. **Appeal allowed in part:** (a) inspecting officer made an error of fact re: one breach; (b) penalty reduced to $3,500 for other breach because of incorrect application of policy. This decision finds that the penalties that are assessed should be on the basis of the current year and not the immediate past year’s payroll figures.

**GC Ltd. (#97-0083)**
This is a reconsideration of an earlier appeal division decision, which upheld a $2,000 penalty assessment for failing to have a first aid attendant on site, contrary to s.1.02 of the Regulations. Earlier AD decisions (#93-0166, #93-0182, #93-0740) placed certain limits on s.96.1 reconsiderations; e.g. no reconsiderations of appeals based upon simply new evidence; need an error of law that goes to jurisdiction. Employer requested an oral hearing, but after reviewing the file, the commissioner concluded he could deal with the request on the basis of written submissions. **Reconsideration allowed:** Appeal decision is of no force and effect; the appeal panel did not allow the employer to give evidence in person on an issue he felt was central to his appeal, specifically in its reasons the panel did not address the issue of there being no need for repeated violations to receive a penalty (the employer mistakenly believed that he could not be penalized for just one violation). This decision also notes that appeal division panel should give written reasons in plain language that explain their conclusions and reasons.

**FC Inc. (#97-0335)**
Employer appeals penalty of $5,500 re: breach of s.16.100 of the Regulations re: lock-out of machinery. **Appeal allowed:** There was an error of law; the employer was not given notice (before the sanctions hearing) that it was also in breach of s.16.100 (linked to s.8.20); there were no “repairs” or “maintenance” going on, just tuning of the elevator.
prior to its full operation and that work was being undertaken in accordance with standard industry practice.

**FC Inc. (#97-0036)**

Employer appeals penalty of $5,000 re: breach of s.8.20 of Regulations re: supervision of workers. **Appeal allowed in part:** The employer could not demonstrate that relief should be granted, because could not provide any evidence that workers were adequately supervised. However, penalty assessed was too great in these circumstances, a contravention of policy.

**RE (#97-0512)**

Employer appeals $9,000 penalty assessed for breach of s.8.102(1)(a) of the Regulations requiring fall protection. Oral hearing held, but no indication why not a “R&R”. **Appeal allowed:** There was a mistake of fact: the inspecting officer had made an assumption that the worker rode on the top of the elevator (thereby requiring fall protection), but had no evidence to support that assumption. Panel noted that worker was otherwise in no danger and the situation could have been addressed by warning letter.
Appendix C

EXTRACT FROM APPEAL DIVISION DECISION #93-1795

Finally, the employer argues that they are entitled to the due diligence defense as set out by the Supreme Court of Canada in R. v. Sault Ste. Marie (1978) 2 S.C.R. 1299:

It is the position of the employer in this instance that they took all reasonable care by establishing policies and procedures including extensive safety and training programs and that they took all reasonable steps to ensure the effective operation of the system through training and discipline.

There is no dispute that the #3 conveyor belt was not properly locked-out, contrary to the cited Regulations. The employer's submission argues that a penalty is not appropriate, as they meet the test of due diligence as set out in the cited Supreme Court of Canada case. We do not find reference to that case helpful in our deliberations. That case sets out the defense of due diligence for "offences". We would not characterize "additional assessments", commonly referred to as penalty assessment under Section 73(1) as "offences". Further, even if such assessments are "offences", Section 73(1) allows an appropriate defense which, in effect, is a due diligence defense. In order to determine whether a "default was excusable", under Section 73(1), the Board of Governors have set out the guidelines for the application of penalty assessments in Policy #1.4.1 contained in the Occupational Safety Health Policy and Procedure Manual. That Policy sets out a number of factors to be considered in determining whether a penalty assessment is appropriate, and a recommended Schedule of Sanctions, where penalties are imposed.