November 14, 2022 |

Briefs

BCFED Referral to Workers' Compensation Appeal Tribunal re Policy Item# P2-95-2 of the WCB Prevention Manual

A pdf of the complete referral can be found here.

WCAT Appeal No A2200622, Section 304 Referral – High Risk Activities, Policy Item# P2-95-2 Prevention Manual

The BC Federation of Labour (Federation, BCFED) is pleased to be invited by the Workers' Compensation Appeal Tribunal (WCAT) to participate in a referral under Section 304 of the *Workers Compensation Act* (Act) involving the application of Policy Item# P2-95-2 of the Workers' Compensation Board (WCB) Prevention Manual. In WCAT Appeal No. A2200622, the panel determined the policy is patently unreasonable.

The Federation represents more than 500,000 members of our affiliated unions, from more than 1,100 locals, working in every aspect of the BC economy. The Federation is recognized by the WCB and the government as a major stakeholder in advocating for the health and safety of all workers in BC and full compensation for injured workers and their surviving dependents.

Background

The decision subject to this referral has to do with a November 3, 2021, WCB imposition of an administrative penalty on the employer for a safety violation related to an unshored excavation.

In this case, the WCB prevention officer conducted an inspection and based on their conversations with workers and observations of the excavation:

> Policy P2-95-2 “RE: High Risk Violations” requires the WCB to automatically designate any of the six identified types of safety violations as “high risk.” The list includes excavations.
>
> Violations of the Act or Occupational Health and Safety Regulation relating to the following circumstances are high risk:

1. Entry into an excavation over 1.2 m [four (4) feet] deep contrary to the requirements of the regulation.
2. Work at over three (3) m (10 feet) without an effective fall protection system.
3. Entry into a confined space without pre-entry testing and inspection to verify that the required precautions have been effective at controlling the identified hazards.
4. Causing work disturbing material containing asbestos, or potentially containing asbestos, to be performed without necessary precautions to protect workers.
5. Hand falling or bucking without necessary precautions to protect workers from the tree that is being felled or bucked, or other affected trees. **Explanatory note:** OHS Guideline G-P2-95-2 includes examples of circumstances where this would apply.
6. Work in the vicinity of potentially combustible dust without the necessary precautions to protect workers.[1]

The BCFED strongly supports this list of work given the high-risk designation in Policy P2-95-2 as follows:

1. The policy was developed through a rigorous tri-partite consultation process with the WCB Policy Research and Regulation Department, workers and employers. The policy was then carefully considered and passed by the WCB Board of Directors.

2. The policy review involves consideration of current science, research and similar policy in other jurisdictions; and in the case of excavations engineering practices. For example, most jurisdictions require shoring once an excavation is deeper than four (4) feet.
3. These types of work regularly result in fatalities, serious injuries and serious illnesses. In the case of excavations:

a. So far in 2022 there have been a dozen excavation incidents reported to the WCB resulting in worker injuries or near misses.
b. Between 2010 and 2021 in BC, four (4) workers have died in excavation-related work.[2],[3]

4. A worker has little or no opportunity to avoid or minimize severe injury or death or occupational disease.
5. The imposition of mandatory penalties for a high-risk violation sends a strong and clear message to employers to be aware and to comply with the regulatory requirements.
6. The 2016 study by the Institute of Work and Health (IWH) into what elements of policy could produce the best results for improving safety for workers. The study found government health and safety inspections that result in citations or penalties effectively motivate employers to make improvements that reduce work-related injuries.[4] The study also found that inspections with consultative activity only and no penalties did not reduce injuries.
7. Mandatory penalties are not an anomaly to the WCB system. Employment Standards, Motor Vehicle and Drug offence legislation all have mandatory penalties for non-compliance.

According to the Background Information, a WCB prevention officer conducted an inspection of the employer's worksite where excavation work was taking place. The officer talked to workers and was told that at least one worker had been working in the excavation which measured three (3) feet by three (3) feet across and was between four (4) to five (5) feet in depth. The panelists state there was a dispute as to the exact depth of the excavation. And they propose the depth could have been between 58 inches and 46 inches. We are curious as to how the panelists arrive at these figures, at one point stating the excavation could have been between four (4) to five (5) feet and then proposing the depth was somewhere between 58 and 46 inches.

The panelists contend that given the size and volume for the excavation “it might be arguable that, even when it collapsed, even if it collapsed, the excavation might potentially pose no real risk be that a worker standing or kneeling in the excavation would have taken up the bulk of the volume of the excavation such that if it collapsed the worker would have potentially have had no difficulty in safely exiting the excavation.” According to the Occupational Safety and Health Administration (OSHA) in the US, one cubic metre of soil can weigh as much as a car.

In health and safety practice, the potential for an incident or accident that could result in a close call, minor or serious injuries means the precautionary principle applies. Robert L. Zimdal says it most simply in his paper “Agriculture’s Ethical Horizon.”

The essence of the precautionary principle is—if one is not sure what may happen, caution is the proper course of action. In its simplest terms it is—look before you leap (Dundon, 2003). Caution prevents Calvin's (Watterson, 1993) inevitable problem. ***[5]***

Therefore, in BC there is health and safety law, regulation and policy setting out the requirements to prevent an incident and allowing for a penalty system when an employer is non-compliant.

The WCAT panel has determined that “because the authority to impose an administrative penalty under Section 95 of the Act is discretionary, they consider the mandatory list of designated high-risk violations in Policy item# P2-95-2 extinguishes or at least fetters that statutory discretion and is therefore patently unreasonable.”

The employer assumed the excavation was low risk without any regard for the safety of the worker or for the regulatory requirements, and based on their summary, it appears the panelists agree.

The BCFED strongly disagrees with the WCAT decision that Policy item# P2-95-2 fetters the statutory discretion of WCA Section 95. We believe there is sufficient discretion to determine the penalty. For example, the WCB officer conducting the inspection has the discretion to determine if the high-risk violation should result in a warning letter or a penalty. The manager and compliance division may review the penalty and could recommend a warning letter, but the final decision is the officers.

We have previously cited research that has shown the combination of ongoing inspections and penalties for non-compliance result in employers paying attention and making improvements to their health and safety practice.

In the Analysis, Section B The significance of a “high risk” violation to employers.

#27.

The panel is concerned that in addition to the administrative penalty, an employer who is qualified for the Certificate of Recognition (COR) risks losing the associated rebate in the year they have an administrative penalty.

The BCFED opines the loss of the COR rebate is not relevant to the discussion of the review. The review is about the impugned policy being patently unreasonable.

WCB Policy AP5-247.4 of the Assessment Manual prescribes the requirements for the COR program, including criteria, the employer must meet to be eligible for premium reductions.[6]

And indeed, if an employer has “engaged in activity that would cause WorkSafeBC to impose, or consider imposing, an administrative penalty” they are not eligible for their rebate.

Both the high-risk policy and the COR policy send a clear message to employers there are consequences for non-compliance.

Section C Fettering/extinguishing of discretion

#35.

The panel proposes the impugned policy need only a minor amendment to be consistent with the Act such as adding “presumptive,” “generally” and “in most cases”. The policy would no longer be mandatory. The panel sees nothing problematic with generally assuming the listed safety violations are “high-risk” as long as there remains at least some scope for departing from such an outcome in some cases.

The BCFED strongly disagrees with “watering down” the impugned policy for all the reasons we have given previously in this submission.

The panel admits their concerns are relatively narrow in this case. It is limited to concern for the financial losses for employers.

We believe the language they propose will endanger the lives of workers and result in a step back in health and safety practice and compliance in BC.

Conclusion

We thank the WCAT for the opportunity to participate. We strongly urge the WCAT Chair to uphold the current policy and direct the panel to apply the policy.

We believe this would ensure continued protections for workers who go to work every day to work the work that is listed as high-risk.

Sincerely,

Sheila Moir
Director, Occupational Health & Safety

[1] https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-policies/policies-for-the-workers-compensation-act#SectionNumber:P2-95-2

[2] https://vancouversun.com/news/b-c-coroners-service-investigating-death-at-burnaby-construction-site

[3] https://www.worksafebc.com/en/resources/health-safety/incident-investigation-report-summaries/excavation-collapses-killing-worker?lang=en

[4] https://www.hrreporter.com/focus-areas/safety/penalties-work-citations-and-fines-can-reduce-workplace-injuries/302004

[5] https://www.sciencedirect.com/book/9780123705112/agricultures-ethical-horizon

[6] https://www.worksafebc.com/en/resources/law-policy/assessment-manual/assessment-manual