

Occupational Health and Safety Council

Appeal of Administrative Penalty

Jayson Global Roofing Inc.

Appellant

and

Alberta (OHS)

Respondent

ORDER

File Number: 1501

Issued by: Peter Bowal, Andrew Smith and Wally Baer

Date: January 30, 2015

 Jobs, Skills, Training
and Labour
Occupational Health and Safety Council

Summary of Decision

Jayson Global Roofing Inc. (“Jayson Global”) appeals an administrative penalty of \$5000 assessed by Alberta OHS on August 29, 2014. After reading and hearing submissions and arguments of Jayson Global on January 19, 2015, we dismissed the appeal without hearing from the Respondent. What follows are our written reasons for dismissing this appeal.

Procedural History

On July 3, 2014, Jayson Global was issued three Orders by Alberta Occupational Health and Safety at its worksite located at 17063 – 70 Street, Edmonton, Alberta, namely (Tab 5):

- Contravention of section 139(1) of the Occupational Health and Safety Code, 2009: a Stop Work order when a worker was observed working at a height of approximately 9 meters without adequate protection from a fall hazard;
- Contravention of section 140(1) of the Occupational Health and Safety Code, 2009: an order when no fall protection plan was in place for work being conducted at the height of approximately 9 meters at the worksite; and
- Contravention of section 135(1) of the Occupational Health and Safety Code, 2009: an order where workers had failed to ensure portable ladders were secured to prevent movement.

Compliance was achieved on the same day, although the Orders in the written form of the Contact Report were not served on Jayson Global until the next day, July 4, 2014. At the bottom of the written Orders, Jayson Global was advised, “Orders can be appealed within 30 days of the date of service.” Under the *Occupational Health and Safety Act*, RSA 2000, c O-2 (“the Act”), section 16, any appeal of these Orders would have to be made to this Occupational Health and Safety Council (“OHS Council”).

In an email five days later, Jayson Global wrote to OHS to seek a non-critical revision or gloss on the second Order. A letter of the same date was sent to the OHS officer to clarify Jayson Global’s communication and relationship with its contractor. It is not clear whether Jayson Global believed that it was appealing any of these Orders by its July 8, 2014 communications or what, if anything, occurred by way of further follow-up on these three Orders.

There was no appeal of any of these Orders to OHS Council. The appeal period expired on August 3, 2014.

On August 12, 2014, OHS sent Jayson Global a “Notice of Assessment of a Preliminary Administrative Penalty” from an OHS Director. It cited these three recent orders¹ and continued (at page 2):

According to s. 40.3 of the Occupational Health and Safety Act, these contraventions may be subject to a \$10,000 maximum penalty for each contravention per day. According to policy guidelines the starting point (which can be adjustable up or down based upon the circumstances) is at \$2,500 per offence when a worksite party has had no previous Administrative Penalties. Given the policy guidelines and the three (3) contraventions, your company is subject to a \$7,500 Administrative Penalty.

The letter from the Director continued:

In determining the appropriateness and the proposed amount of the penalty, OHS has considered the relevant information, including the seriousness of the contravention, the risk of harm to the workers, the compliance history of Jayson Global Roofing Inc., and the following:

- In 2012, within the Province of Alberta, there were 86 reported comparable claims due to falls from roofs, many of which were related to the type of contraventions observed being committed by workers employed by Jayson Global Roofing Inc.
- From January 2014 to July 2014 three (3) Stop Worker Orders have been issued to Jayson Global Roofing Inc. for related fall hazards including the Stop Work Order on July 3rd, 2014;
- Jayson Global Roofing received four (4) Stop Work Orders in 2013 and three (3) Stop Work Orders in 2012 all related to fall hazards.

Actually, the evidence (Tabs 9 through 11) suggests an even more troubling record than described above, *to wit*: five Stop Work Orders in 2013 and four Stop Work Orders in

¹ The August 12, 2013 letter mistakenly referred to 13(4) of the Occupational Health and Safety Regulation in connection with the third order, as well as section 135(1) of the *Code*. This section of the Regulation states: “If a regulation or an adopted code imposes a duty on a worker, the worker’s employer must ensure that the worker performs that duty.” Indeed, that provision is relevant to all three orders made on July 3, 2014. Since the specific *Code* section identified as contravened was also referenced, we find no import or error in the reference to this section of the Regulation.

2012, some of which were two days apart and others four days apart. The Director did not mention some seven other Orders that were issued against Jayson Global in that three year period. The Orders were written by different OHS officers.

The Director's preliminary notification letter continued:

The nature of these contraventions is serious given the extreme risk of harm to the workers OHS has attempted repeatedly to encourage Jayson Global Roofing Inc. to comply through the issuance of orders, and the company has failed to demonstrate compliance.

Before OHS makes a final decision as to the Administrative Penalty, it is requested that you meet with me to discuss the circumstances associated with the proposed penalty. This will be your opportunity to address any concerns that you may have as well as provide me with any information that you believe should be considered when making my decision.

That meeting between OHS and Jayson Global took place on August 25, 2014 in Edmonton.

On August 29, 2014, OHS assessed an administrative penalty against Jayson Global in the amount of \$5,000, payable by October 14, 2014 (Tab 2).

The assessment letter noted that Jayson Global raised the point at the meeting that the non-compliant worker was not a Jayson Global employee at the time of the contraventions. The Director concluded otherwise and set out six reasons. Discretion was applied to reduce the final penalty, based upon (pages 2 – 3):

- Jayson Global Roofing Inc. engaged the services of three (3) health and safety advisors (2 of which are field personnel) in 2013 to ensure compliance with OHS requirements. In addition, two (2) quality assurance personnel were hired and in the future you stated that they will assist with the monitoring of compliance at your field work sites;
- Jayson Global Roofing Inc. will consider making changes to its compensation structure for piecework in order to build in safety time compensation; and
- Jayson Global Roofing Inc. is currently working with a Partnerships consultant to improve their overall health and safety management system.

On September 23, 2014, Jayson Global filed a Notice of Appeal. This was received by OHS Council in November. A hearing was set for December 12, 2014 which was adjourned by consent to enable further preparation. The hearing was re-scheduled for January 19, 2015.

Jurisdiction and Applicable Law

Section 40.3 of the Act governs. It reads:

40.3 (1) In this section, “regulated person” means:

- (a) a contractor;
 - (b) an employer;
 - (c) a prime contractor;
 - (d) a supplier;
 - (e) a worker.
- (2) If an officer is of the opinion that a regulated person
- (a) has contravened a provision of this Act, the regulations or an adopted code,
 - (b.) has failed to comply with an order made under this Act, the regulations or an adopted code,
 - (c.) has failed to comply with a term, condition or requirement of an acceptance issued under section 34, or
 - (d.) has failed to comply with a term, condition or requirement of an approval issued under an adopted code,

the officer may, by notice in writing given to the regulated person, require the regulated person to pay to the Crown an administrative penalty in the amount set out in the notice.

(3) The amount set out in a notice of administrative penalty must not exceed

- (a) \$10 000, or
 - (b) in the case of a contravention or a failure to comply that continues for more than one day, \$10 000 for each day or part of a day on which the contravention or failure to comply occurs or continues.
- (4) A regulated person who pays an administrative penalty in respect of a contravention or a failure to comply shall not be charged under this Act with

an offence in respect of the same contravention or failure to comply that is described in the notice of administrative penalty.

(5) A notice of administrative penalty may be given within 2 years after the alleged contravention or non-compliance occurs, but not afterwards.

(6) Subject to the right to appeal, where a regulated person fails to pay an administrative penalty in accordance with the notice of administrative penalty and the regulations, the Minister may file a copy of the notice of administrative penalty with the clerk of the Court of Queen's Bench, and on being filed, the notice has the same force and effect and may be enforced as if it were a judgment of the Court.

The *Administrative Penalty Regulation*, Alta Reg 165/2013 sets out further requirements for Administrative Penalties under this legislation:

- 1 In this Regulation, "Act" means the *Occupational Health and Safety Act*.
- 2 A notice of administrative penalty must contain the following information:
 - (a) the name of the regulated person who is required to pay the administrative penalty;
 - (b) an identification of
 - (i) the provision of the Act, the regulations or the adopted code that was contravened, or
 - (ii) the order or the term or condition of the approval or acceptance that was not complied with, whichever is applicable;
 - (c) a brief description of the nature of the contravention or failure to comply identified under clause (b);
 - (d) the amount of the administrative penalty;
 - (e) the date the notice of administrative penalty is issued;
 - (f) the date by which the administrative penalty must be paid;
 - (g) a statement describing the right to appeal to the Council under section 16 of the Act and particulars of how the appeal is to be made and the time within which it must be made.

3(1) Subject to section 40.3(3) of the Act, the amount of an administrative penalty for a contravention or a failure to comply is the amount set in accordance with this section by the officer giving the notice of administrative penalty.

(2) In setting the amount of an administrative penalty for a contravention or a failure to comply, an officer shall consider

- (a) the seriousness of the contravention or failure to comply, and
- (b) the risk of harm resulting from the contravention or failure to comply and may consider any other factor the officer considers relevant.

4(1) Subject to any stay that is in effect under section 16(7.1) or (9) of the Act, a regulated person who is required to pay an administrative penalty shall pay the amount of the administrative penalty on or before the date specified in the notice of administrative penalty.

(2) The date referred to in subsection (1) must be one that is at least 30 days after the day on which the notice of administrative penalty is served.

Appeals of Administrative Penalties lie to the OHS Council. Section 16 of the Act states, in relevant parts:

16(1) A person

- ... (b) who is given a notice of administrative penalty ...

may appeal the order, administrative penalty, cancellation or suspension to the Council.

(2) An appeal under subsection (1) shall be commenced by serving a notice of the appeal on a Director of Inspection

- ... (b) in the case of an appeal from an administrative penalty, within 30 days from the date that the notice of administrative penalty was given to the person making the appeal ...

(3) After considering the matter being appealed, the Council may by order

- ... (b) in the case of an appeal from an administrative penalty, confirm, revoke or vary the administrative penalty ...

(4) When an appeal is made to the Council under subsection (1), the Council shall hear the appeal and render a decision as soon as practicable.

. . .

(7.1) When an appeal from an administrative penalty is commenced under subsection (1) (b), the commencement of that appeal operates to stay the administrative penalty until the Council renders its decision on the appeal or the appeal is withdrawn.

This appeal was filed in the requisite 30 days.

Arguments of Jayson Global

We now turn to, and analyze, the arguments of Jayson Global in this appeal.

(1.) The “Regulated Person” Issue

As stated above, the OHS Director indicated in her final notice of the Administrative Penalty that Jayson Global (Tab 2) “mentioned that the worker (who was observed in non-compliance) was not working for Jayson Global Roofing Inc. at the time. You stated that he was an independent employer who was subcontracted to Jayson Global roofing Inc. to do roofing and was paid by piecework.”

The Director considered this objection and was not persuaded by it. She wrote in the same August 29th letter:

Based upon evidence presented at the meeting, I am satisfied that the worker in question was employed by Jayson Global roofing Inc. (within the meaning of the Occupational Health and Safety Act: see definition of “worker” and “employer”) at the time of the observed contraventions:

- Stop work and compliance orders were issued against and served upon Jayson Global Roofing Inc. related to these contraventions. Jayson Global Roofing Inc. did not raise the sub-contractor issue in relation to these Orders;
- The worker in question represented to the OHS Officer that he worked for Jayson Global Roofing Inc.;
- The worker in question was covered under Jayson Global roofing Inc. workers’ compensation insurance;
- The worker was required to complete Jayson Global Roofing Inc. health and safety documentation, including the fall protection plan;
- The worker was subject to monitoring and supervision by Jayson Global Roofing Inc.; and

- The worker was disciplined by Jayson Global Roofing Inc. for the infraction.

Jayson Global appeared to deviate from the position that it was not liable for the worker under the OHS legislation when it filed the Notice of Appeal. The dismissal document of the worker in question is included in the Hearing Package. In the grounds for appeal, Jayson Global wrote:

In the notice of assessment of administrative penalty letter it was mentioned that we stated that the worker was not working for Jayson Global Roofing Inc. at the time and that the worker was independent and sub-contracted to Jayson Global Roofing Inc. We believe this to be a miss communication (sic). ***The worker was working for Jayson Global at the time.*** What we were implying was that the worker works as any other sub-contractor we hire. Paid in the same way. . . . we treat both direct hires and sub-contractors in exactly the same manner . . . all workers are subject to the same treatment. [emphasis added]

Nevertheless, at the appeal hearing, Jayson Global sought to introduce and circulate fresh documentary evidence about the worker's sub-contractor status, which also seemed to have post-dated the July 3, 2014 Orders. Jayson Global says it did not fully understand the nature of an Administrative Penalty. Now, with a new perspective and understanding, company representatives acknowledged they should have pressed the point that the installer was not an employee but was an employer and now wanted to provide documentary proof of that.

The Respondent objected on the basis of surprise. After consideration, the panel unanimously decided not to allow the fresh evidence for several reasons. Fresh evidence at the appeal stage will be introduced only if it, with reasonable diligence, could not have been produced to the regulator in the first instance *and* if its introduction would likely have a significant influence on the result.

We were not convinced that this evidence could not have been produced at the meeting with the OHS Director in late August 2014. There was sufficient time since the August 12th preliminary notification. Indeed, if this argument was advanced it should have been advanced against the July 3, 2014 Orders, not the Administrative Penalty. We note that Jayson Global did not take this sub-contractor status position until the August 25th meeting. It did not disclaim responsibility for this worker when the Orders were written and complied with. It did not appeal those Orders. While it requested minor revisions to the Orders, Jayson Global did not raise this point until the Administrative Penalty was issued. The appeal period on the Orders had passed by that time and the Orders cannot be appealed through an appeal of the Administrative Penalty. They must be taken as a matter of fact at that point. Hence, fresh evidence on the worker's status in this appeal could not change the Orders upon which it is based and, accordingly, the fresh evidence could not affect the result of this appeal.

Moreover, in its Notice of Appeal, Jayson Global clearly left the impression that it was no longer advancing this argument. The Notice of Appeal is an important document upon which the Respondent, and to a lesser extent this Council, rely. Jayson Global made no effort to advise the Respondent of this issue being revived until the morning of the hearing, some six and a half months after the original relevancy of this evidence should have become apparent, and some five months after the first notification of the Administrative Penalty and when the company first raised the point with the OHS Director.

On two separate Notices of Hearing dated November 6, 2014 and December 18, 2014, Jayson Global was directed thus: “The Appellant’s list [of witnesses] and any written evidence must be received 3 weeks prior to the hearing.” There had already been an adjournment granted at the request of Jayson Global. The hearing and deciding of administrative penalty appeals must be accomplished “as soon as practicable” [section 16(4)].

(2.) Challenges of the Alberta Roofing Industry

Jayson Global described at length the challenges they face in their industry. These include the difficulty in travelling to and supervising all their worksites. Despite that, the company said it inspects every site every day which is well beyond industry practice. The industry is characterized with high turnover and shortages of installers, vigorous competition, strict schedules, and thin margins. Jayson Global described a workforce, specifically installers, who are free-spirited, work hard, accept risks, do not always follow directions, and work independently.

We appreciate the challenges of Jayson Global’s competitive environment. We were informed by the evidence also that the residential roofing industry in Alberta is the source of a disproportionate number of preventable workplace injuries and deaths. The challenges in any particular industry, while acknowledged, cannot be a general legal defence to enforcement of the legislated standards of safety.

(3.) Enhanced Corporate Safety Efforts

Jayson Global described its corporate history. It currently is the product of two companies that merged in 2012. It has grown fast and is today a very major player in the residential roofing industry. As business and the roofing sites grew, more on site quality control and safety staff were hired. Mr. Trevor Klein, a safety auditor from Jayman Homes spoke strongly in Jayson Global’s favour. He would be in a good position to compare roofing companies. He said Jayson Global is proactive and sees them as a leader in the industry which is why they contract most of their residential roofing to Jayson Global.

On the other hand, there was something unsettling about Jayson Global’s evidence. The President, Mr. Bunce, explained the twelve Stop Work Orders and the seven other OHS Orders in the three years of 2012, 2013 and 2014 as due to the fact that Jayson Global “has the largest volume of roofing work in the industry.” He said, when it comes to due

diligence, “we did everything right.” The company uses progressive discipline: after the first safety violation, they talk to the worker, get immediate compliance and return him to work. The second violation leads to a two-week suspension, and a third violation results in the worker’s dismissal.

The company seems resigned to accept less than full compliance with safety standards. It stated in its written submission:

We believe that the human factor has to be accounted for. When a worker chooses non-compliance over compliance that he has agreed upon and signed off on when not under direct supervision, that is a decision we cannot prevent unless otherwise observed. . . . With the focus of OHS officers specifically on the roofing industry [enforcement] this year we would only assume that there will be contraventions found by OHS officers on sites. We . . . also hope that it is realized that the number of stop work orders will increase with such new [enforcement] measures . . .

We are of the view that the Government of Alberta OHS Director addressed her mind to any credible mitigating factors such as Jayson Global’s efforts to improve its safety performance in the context of its industry and the attendant workplace risks faced by its workers. Indeed, she reduced the proposed administrative penalty on this basis, which was reasonably within her discretion.

Administrative Penalties are a new regulatory tool for enforcement of safety standards in Alberta. The OHS Director is afforded with discretion in this regard. If she did not render a downward adjustment, there would be no error in that. It is not the effort, but the outcome, that is most critical to safety enforcement. To put this another way, it is not a defence or mitigating factor to an Administrative Penalty for an employer with a problematic safety enforcement record to assert that it was trying to do better.

(4.) Challenge to the three July 3, 2014 Orders

In its written submission that accompanied the Notice of Appeal, Jayson Global took issue on various grounds with each of the three Orders it received on July 3, 2014. It is not clear that the OHS Director was required to base her decision upon Orders *per se*. Orders are not necessary prerequisites to Administrative Penalties. Section 40.3(2)(a) authorizes issuance of Administrative Penalties “if an officer *is of the opinion* that a regulated person has contravened a provision of this Act, the regulations or an adopted code” (emphasis added).

In any event, Jayson Global chose *not* to challenge the Orders when they were made, but to challenge them only after the Administrative Penalty was imposed. Appeals of the two separate enforcement mechanisms are distinct processes under the Act. One cannot use the pretext of an Administrative Penalty appeal to launch an appeal against a previous Order. Final Orders, after the relevant appeal periods have expired, become a factual part of the OHS safety record. Accordingly, we cannot consider Jayson Global’s objections to the Orders now in the context of this appeal against the Administrative Penalty.

Analysis of Three Categories of OHS Obligation for Administrative Penalties

In this appeal, Jayson Global asserted arguments in relation to its industry challenges, corporate development, initiatives to improve safety performance and alleged errors in the original Orders. With all due respect, these are not legal reasons to vary or revoke this Administrative Penalty.

The legislation set out above creates three categories of obligation on the part of OHS in relation to Administrative Penalties. First, it confers upon OHS a broad opinion-based discretion to issue an Administrative Penalty at all. Second, it prescribes how the penalty amount is determined. There are monetary limits. Under section 3(2) of the *Regulation*, the OHS officer *shall consider* both “the seriousness of the contravention or failure to comply” and “the risk of harm resulting from the contravention or failure to comply” when setting the amount of an Administrative Penalty. It is clear from the Notice that the OHS Director did address her mind to those two factors. Jayson Global did not dispute this at the appeal hearing.

Third, the legislation enumerates a number technical process requirements about notice in writing, two year limitation period after the contravention(s), and a number of formal contents of the Notice of Administrative Penalty, such as time for payment and information on appealing the Administrative Penalty. These technical process requirements were all met in the letter of August 29, 2014.

We conclude that the OHS Director met the requirements of all three categories under the legislation. She properly and reasonably exercised her discretion when she decided to issue, consult and adjust the penalty. She supplied adequate reasons for issuing this Administrative Penalty for how its final amount was determined. We are not convinced that Jayson Global has established any legal error in it.

Order

We dismiss the appeal by Jayson Global and confirm the Administrative Penalty as set out in the Notice letter dated August 29, 2014. We announced our decision to dismiss this appeal on January 19, 2015 and further confirm that on that date we fixed **February 18, 2015** as the final date for payment of this penalty.