In the matter of an appeal under Section 21 of the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, S.N.B. 1994 c. W-14, as amended.

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION

Date of Hearing:	November 6, 2020
Date of Decision:	February 2, 2021
Decision Number:	20219249
Decision of the Appeals Tribunal:	This appeal is accepted.
Policy affected:	

ISSUE

The October 31, 2019, decision in which Order No. 160198 on Inspection Report 324157 issued on October 2, 2019, by a health and safety officer, is revoked.

INFORMATION CONSIDERED

The following material was presented to, reviewed and considered by the Appeals Tribunal:

- Appeal Record dated October 20, 2020
- Explanations provided during the hearing by:
  - The appellant
  - The appellant's witness
  - The appellant's representative, a lawyer
  - The respondent's representatives, the chief compliance officer and a health, safety and environment manager
  - The respondent's representative, a legal counsel for the Workplace Health, Safety and Compensation Commission (the Commission) of New Brunswick

Another representative from the respondent attended the hearing as an observer.

INTRODUCTION

[1] The appellant is an employees' representative for the employer. The employer hired a contractor to abate asbestos found at the place of employment. While the contractor and the employees' representative agreed that the appropriate measures for abatement of the asbestos was to use a full enclosure, the safety and environmental manager for the employer requested the use of a drop sheet instead.

[2] As a result of the disagreement, a health and safety officer from the Commission was called in to inspect the area and provide his recommendations.

[3] The health and safety officer issued an Inspection Report and an Order requiring the employer to use a full enclosure to abate the asbestos.

[4] The employer appealed the Order to the chief compliance officer who subsequently revoked the Order.

[5] The appellant appeals the decision of the chief compliance officer on the basis that he misapprehended the responsibilities, duties and obligations of the employers, owners and contracting employers under the *Occupational Health and Safety Act* (the *OHS Act*) and that both the contractor and the employer were obligated to comply with the *Code of Practice for Working with Materials Containing Asbestos in New Brunswick*.

[6] The respondent submits that the matter comes down to the statutory interpretation of sections 3 and 4 of the *OHS* Regulation as those sections put a specific onus on specific parties. In their submissions, these sections contemplate the employer, not the contractor, and, as such, the Order was incorrectly issued. Because it was not lawful, the Order was revoked.

[7] For the reasons set out below, the appeal is accepted.

BACKGROUND

[8] This matter arises out of Order No 160198 issued on October 2, 2019, by a health and safety officer [page 3 of the Appeal Record].

[9] After asbestos was found in two areas on the employer's premises, the employer, the contractor hired to perform the abatement and the employees' representative could not agree on the method to be used for abatement of the asbestos. The contractor and employees' representative agreed that a full enclosure ought to be used while the employer felt the use of drop sheets would be sufficient [page 4 of the Appeal Record].

[10] At the hearing, both the appellant and an employee of the contractor testified. The appellant, a chemical technologist who does environmental and chemical testing for the employer, has worked for the employer for approximately 20 years. He is also the co-chair of the Health and Safety Committee, which represents the employees.

[11] The employee who testified on behalf of the contractor is the lead supervisor in insulation and asbestos removal division for the contractor company. He has worked in the field of asbestos removal for 35 years, five of which have been with the contractor. He was the person on site on October 2, 2019.

[12] Both the appellant and the contractor testified at the hearing that there are three classes of asbestos, which are low, mid and high-risk classes. There are different operations and procedures for the abatement of each class. Class 1 is what is referred to as non-friable asbestos which does not become airborne. As a result, drop sheets can be used for this class of asbestos. Class 2 and 3 refer to friable asbestos, which is easily airborne. Class 2 refers to an area less than 30 square feet while Class 3 refers to an area greater than 30 square feet. For Classes 2 and 3, asbestos dust has to be prevented. Therefore, a full enclosure is generally used. While a drop sheet can be used with a Class 2 abatement, this is only appropriate if the asbestos is enclosed, such as in a room with walls. If not, a full enclosure is required. A full enclosure is the most expensive method of abatement as it has to be built, joints need to be sealed with spray glue and/or tape and be fully sealed. In Class 3 abatements, a decontamination area is also required.

[13] The appellant's and contractor's testimonies also provided the following information. On October 2, 2019, the appellant was advised that there were two areas which contained exposed asbestos. After confirming that the samples were positive for asbestos, the employer advised the appellant that he had permission from the health and safety officer to use drop sheets for the abatement. The appellant called the health and safety officer to confirm this information as, in his opinion, that method was not sufficient. The health and safety officer had apparently clarified the options with the employer and told him he had to do a hazard assessment. When the appellant requested the results of the hazard assessment from the employer, one had not been conducted. The appellant and contractor did not agree with the use of a drop sheet in these two areas as, according to their testimony, the two areas were exposed, were not enclosed and the asbestos could become easily airborne, thereby potentially exposing employees and contractors who were working underneath the area and up to 100 feet away. Since asbestos fibers can stay in the air for up to 72 hours and given the existing wind currents in the area, they felt a full enclosure was required.

[14] The appellant and contractor both testified that the contractor felt pressured by the employer to use drop sheets. Both also testified that, while the party doing the work is supposed to decide what procedure to adopt, this particular employer sometimes decided for the contractor, citing cost as a reason to adopt one method over another.

[15] As a result, they contacted the Commission and the health and safety officer attended the premises for inspection. He issued Order No. 160198 dated October 2, 2019, which stated the following:

> **Order No.: 160198**
>
> **Description of the violation(s) / Description des infractions**
> **<u>The employer</u>** shall ensure the two asbestos encapsulation activities being conducted in the Evaporator area are done using enclosures as required in section 6.2.l (J)(i) of the Code of Practice for Working with Materials Containing Asbestos in New Brunswick.
>
> **Action(s) required for compliance of the violation(s) / Mesures nécessaires pour remédier aux infractions**
> The employer, asbestos abatement contractor and employees could not come to an agreement about what the best & most practical method of stopping the spread of asbestos dust during an enclapsulation project (Class 2). See Eval Summary for remainder of discussion.... [*sic*] [emphasis added] [page 3 of the Appeal Record]

[16] The employer sent an email to the Commission chief compliance officer on October 10, 2019, stating that he wished to "...officially appeal this order; # 160198" [page 95 of the Appeal Record]. There were no grounds set out in the employer's email upon which he sought the appeal. By that time, the work had already taken place, under full enclosure.

[17] A meeting was held on October 11, 2019, and included the chief compliance officer, the employer, an employees' representative, an employer's representative and the contractor [page 6 of the Appeal Record].

[18] In a letter dated October 31, 2019, the chief compliance officer revoked Order No. 160198 on the following basis:

> [...]
>
> Finally, in providing my decision, I considered the following:
>
> 1. At the time of the inspection, there were no [name of the employer] employees who were to work with or disturb material containing asbestos;
> 2. [The employer] had contracted out the work to [the contractor] resulting in [the employer] being the contractor/owner for this work.
> 3. Since [the contractor] employees would be the ones at risk of disturbing or working with material containing asbestos, the employer referred to in sections 3 and 4 of Regulation 92-106 would be [the contractor];

4. Therefore, it would be [the contractor] and its employees who would be required to comply with the code of practice as required by sections 3, 4 and 5 of Regulation 92-106.
5. [The employer] would also have legislated responsibilities under the *Occupational Health and Safety Act* for this work including Section 10 (duties of contractors) and 11 (duties of Owners). [*sic*] [page 7 of the Appeal Record]

[19] A Notice of Appeal of this decision was filed on November 7, 2019, citing the following grounds of appeal:

The grounds upon which the Appelant intends to rely are as follows:

- CCO [name given] misapprehended the responsibilities, duties and obligations of employers, owners, contractors and contracting employers under the *Occupational Health and Safety Act*;

- [The contractor] **and** [the employer] were obligated to comply with the *Code of Practice for Working with Materials Containing Asbestos in New Brunswick*, referenced in NB Regulation 92-106 under the *Occupational Health and Safety Act* ("CoP") for the work in question. [*sic*] [page 18 of the Appeal Record]

[20] In the Notice of Appeal, the appellant states the following:

The background to the Appeal is as follows:

- [The employer] contracted asbestos abatement work to [the contractor];

- [The employer] instructed [the contractor] to use drop sheet as the asbestos abatement method in the specific work area.

- [The employer] took the position that the use of a drop-sheet was sufficient under the *CoP* in the circumstances. [The union] took the position that the use of use of enclosure was required. [The contractor] believed that an enclosure was required but took no position and was following [the employer]'s instructions;

- [The union] requested that there be an inspection by WSNB. WSNB Officer [name given] inspected the work area in question;

- On October 2, 2019, WSNB Officer [name given] issued an order (#160198) which enjoined [the employer] and [the contractor] to perform the asbestos abatement work using an enclosure in compliance with the *CoP*;... [*sic*] [pages 18 and 18(1) of the Appeal Record]

[21] The matter is now before me to determine whether the Order was appropriately revoked.

REASONS/RATIONALE

[22] Section 9 of the *OHS Act* sets out the duties of an employer towards its employees. More specifically, subsection 9(1) provides the following:

> **9**(1) Every employer shall
>
> (a) take **every reasonable precaution** to ensure the health and safety of his employees;
>
> (b) **comply with this Act, the regulations and any order made in accordance with this Act or the regulations**; and
>
> (c) ensure that his employees comply with this Act, the regulations and any order made in accordance with this Act or the regulations. [emphasis added]

[23] Section 10 sets out the duties of a contractor as follows:

> **10** Every contractor and sub-contractor shall
>
> (a) comply with this Act, the regulations and any order made in accordance with this Act or the regulations; and
>
> (b) for every project site **for which he is responsible** take every reasonable precaution to ensure the health and safety of any person having access to such project site. [emphasis added]

[24] Section 11 applies to the owner of a place of employment:

> **11** Every owner of a place of employment or part thereof shall
>
> (a) comply with this Act, the regulations and any order made in accordance with this Act or the regulations; and
>
> (b) take every reasonable precaution to ensure the health and safety of any person having access to or using that place of employment or part thereof.

[25] Sections 3 and 4 of Regulation 92-106 the *Code of Practice for Working with Material Containing Asbestos Regulation – Occupational Health and Safety Act* (the Regulation) specify the following:

> **3** An **employer** whose employees work with or disturb material containing asbestos at a place of employment shall adopt the code of practice entitled "A Code of Practice for Working with Materials Containing Asbestos in New Brunswick" as prepared by the New Brunswick Occupational Health and Safety Commission and dated March 19, 1992.
>
> **4** An **employer** shall follow the code of practice specified in section 3 and shall ensure that employees follow the code of practice. [emphasis added]

[26] The code of practice referenced in the Regulation provides at subparagraph 6.2.1(j)(i) that the employer shall ensure "that the spread of asbestos-dust from the work area is prevented, where practicable, by... an enclosure of polyethylene or other suitable material thick enough to withstand wear and tear where walls do not enclose the work area".

[27] In accordance with the *OHS Act,* Regulation 92-106, and the Code of Practice mandated by the Regulation, the employer prepared, with the input from the Health and Safety Committee, the Asbestos Management Program (the AMP), which sets out the responsibilities of both the employer and employees. The AMP's mission statement provides the following information:

> **As the employer, the company has the responsibility to safely manage asbestos containing material on site. This responsibility includes** that establishment of abatement and inspection procedures, **assignment of resources** and funding needed to manage this hazard **and the requirement to provide supervision over the resources assigned to manage this risk**. The changes to the Asbestos Management Program will align the company with these responsibilities and other regulatory requirements. [emphasis added] [page 175 of the Appeal Record]

[28] In addition, the AMP's purpose sets out the following:

> **1.0 Purpose**
>
> **The principal objective of [the employer]'s Asbestos Management Program is to prevent exposure of employees, contractors** or visitors to asbestos fibers. This is accomplished through the process of:
>
> - Training employees and contractors of [the employer]'s Asbestos Management Program;
> - Properly labeling of asbestos containing material (ACM)
> - Monitoring the condition of asbestos containing material
> - Maintaining asbestos containing material in satisfactory condition
> - Planning and executing abatement actions needed prior to maintenance activities

- Planning abatement activities to address areas of concern identified in asbestos assessment surveys
- Ensuring proper clean up of asbestos fibers
- Preventing further release of asbestos fibers

> A second objective of this plan is to comply with regulatory requirements including: New Brunswick Regulation 92-106 A Code of Practice for Working with Materials Containing Asbestos in New Brunswick under the Occupational Health and Safety Act [emphasis added] [page 177 of the Appeal Record]

[29] Section 8.4 of the AMP specifies that, "[w]hen contracting out asbestos abatement, the Project Manager must review the scope of the job with the ASC. They are responsible to ensure the Act/Regulations are complied with along with [the employer]'s AMP." [page 181 of the Appeal Record]. The ASC refers to the Asbestos Steering Committee.

[30] At the hearing, the respondent argued that the Order was revoked because it was issued under section 3 of the Regulations and section 3's scope only encompasses the employer and the employees, not the contractor. As there was a contractor performing the abatement work, he submitted that the Order ought to have been issued to the contractor or, alternatively, under a different section of the Regulation. The respondent recognized, however, that section 3 has some serious gaps and once proposed changes which were submitted are enacted, this type of confusion will not occur anymore. While the respondent argued that they fully support the method which was adopted for abatement of the asbestos in this matter, he urged this Tribunal to interpret section 3 in its plain meaning and find that the revocation of the Order was correct. His contention is that this matter comes down to the interpretation of sections 3 and 4 of the Regulation and that the Order was without jurisdiction as it simply did not apply to the contractor. He concluded that, while the chief compliance officer could have varied the Order or requested that the health and safety officer write the correct order, he did not do so because the work had already been done and the issue was moot.

[31] The appellant's solicitor, on the other hand, argued that he might agree with the respondent if the employer had not gotten involved in this matter in the first place. He submitted that the employer put pressure on the contractor to use a less costly but also more hazardous method of abatement, which essentially put the contractor in the back seat of the decision. As such, the employer was responsible, and section 3 of the Regulation was properly used in the Order. It would make no sense if all the employer had to do to avoid complying with the *OHS Act*, its Regulations and the Code of Practice is to hire a contractor and then still be in control of the decision. There would then be no purpose to the *OHS Act*, its Regulation or the Code of Practice. Finally, he argued that, whether or not a contractor was doing the work, the employer still has an obligation towards its employees under section 9 of the *OHS Act* to take every precaution for their safety. The AMP is proof positive that the employer has that

obligation. The goal of the *OHS Act* is to promote a safe work culture and to strictly interpret the Regulation would promote the contrary.

[32] Indeed, section 17 of the *Interpretation Act* provides the following:

> Every Act and regulation and every provision thereof **shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision**. [emphasis added]

[33] The appellant's solicitor referred this Tribunal to the decision of *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (CanLII), [2018] 1 S.C.R. 635, wherein a tree faller employed by an independent contractor was killed by a rotting tree while working in the area of a forest license held by West Fraser Mills. The Workers' Compensation Board of British Columbia concluded that West Fraser Mills had failed to ensure that all work activities were conducted in accordance with the Regulation and imposed a fine. The Appeal Tribunal rejected West Fraser Mills contention that it was simply an owner and not an employer within the meaning of the *Act* and, as such, it could not be found to be responsible as an employer. The matter was appealed all the way to the Supreme Court of Canada who dismissed the appeal. In its decision, the majority of the Court disagreed with the narrow approach proposed by West Fraser Mills and upheld the Appeal Tribunal's decision. In doing so, it provided the following context:

> [40] So we arrive at the crux of the debate. The Tribunal had before it two competing plausible interpretations of s. 196(1) (although it did not articulate the options precisely as I have). One was a narrow approach that would undermine the goals of the statute. The other was a broad approach, which both recognized the complexity of overlapping and interacting roles on the actual worksite and would further the goals of the statute and the scheme built upon it. The Tribunal chose the second approach. Was this choice "openly, clearly [and] evidently unreasonable" so as to border on the absurd? I cannot conclude that it was.
>
> [41] Courts reviewing administrative decisions are obliged to consider, not only the text of the law and how its internal provisions fit together, but also the consequences of interpreting a provision one way or the other and the reality of how the statutory scheme operates on the ground: see e.g. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 61. This is particularly the case where the standard of review is patent unreasonableness. Practical justifications and the avoidance of impacts that would undermine the objects of the statute may close the door to a conclusion that a particular interpretation "border[s] on the absurd" or is "openly, clearly [and] evidently unreasonable".
>
> [42] In this case, the respective consequences of the competing interpretations militate against finding that the interpretation chosen by the Tribunal is patently unreasonable. The same is true when one considers the intended operation of the scheme.

[43] First, as already discussed, a broad interpretation of s. 196(1) to include employers under the Act whose conduct can constitute a breach of their obligations as owners will best further the statutory goal of promoting workplace health and safety and deterring future accidents. This broad interpretation supports the statutory purpose, which, again, is "to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety": s 107 of the Act. There is a connection between increased remedies against owners who hold duties as employers for given workplaces and increased occupational health and safety. The general scheme of the Act is to hold both owners and employers responsible in an overlapping and cooperative way for ensuring worksite safety.

[44] Second, this interpretation is responsive to the reality that maintaining workplace safety is a complex exercise involving shared responsibilities of all concerned. By contrast, a narrow interpretation of s. 196(1) would hold only one actor - the actual employer of the person injured - responsible for what is, in fact, a more complex joint set of interactions that, in combination, produced the accident.

[45] Third, and crucially, while it is true that s. 196(1) can be engaged on the basis of an employer's failure to comply with its specific obligations as an "employer" under the Act and any applicable regulations (by virtue of s. 196(1)(b)), the provision is not limited to such circumstances. Employers can also be subject to a penalty under s. 196(1) if they fail "to take sufficient precautions for the prevention of work related injuries or illnesses" (s. 196(1)(a)) or if "the employer's workplace or working conditions are not safe" (s. 196(1)(c)). Section 196(1)(c) in particular indicates the Legislature's choice to focus, not on the specific relationship between the impugned employer and the victim of a workplace accident, but on the relationship between the employer and the worksite that led to the accident and injury.

[46] Seen in this light, it is not specifically West Fraser Mills' violation of s. 26.2(1) of the Regulation (in its role as owner) that triggers s. 196(1). Instead, the same failures that led to the infraction under s. 26.2(1) can be separately seen as either a failure "to take sufficient precautions" or as an indication that the "workplace or working conditions are not safe" (or perhaps both). The same misconduct may attract multiple sanctions. For example, the negligence of a forest license owner in particular factual scenarios could amount to a breach of s. 26.2(1) of the Regulation as well as a "fail[ure] to take sufficient precautions" under s. 196(1) of the Act. Indeed, it was at least partly on this basis that the penalty was initially imposed on West Fraser Mills and deemed appropriate by the Tribunal.

[47] The Tribunal's approach in this regard is supported by prior jurisprudence. In my view, the Tribunal did not err in relying on *Petro-Canada*. *Petro-Canada* held that it was reasonable for the Board to conclude that the corporate employer/owner of various service stations had obligations as an employer under s. 115 of the Act for those diverse workplaces because it exercised sufficient control over them. Here, West Fraser Mills had sufficient knowledge and control over the worksite in question to render it responsible for the safety of the worksite. It was not erroneous for the Tribunal to rely on *Petro-Canada*, which would

> suggest that West Fraser Mills' obligations with respect to the worksite were not limited to concerns about the health and safety of *its own* employees.
>
> [48] It is true that the Tribunal in this case did not find an employment-like relationship between West Fraser Mills and the fatally injured faller, but, as discussed above, it did find a relationship between West Fraser Mills and the safety of the worksite - West Fraser Mills employed an individual whose job it was to monitor the worksite in a manner consistent with West Fraser Mills' duties under the Act. West Fraser Mills' relationship to the safety of the worksite was not solely that of an owner; West Fraser Mills was implicated in the fatality as an "employer". Therefore, it was not "absurd" for the Tribunal to interpret s. 196(1) to apply in this case, and to find that West Fraser Mills failed in its role as an employer under the Act, given both West Fraser Mills' link to the worksite and the factual basis underlying the s. 26.2(1) infraction.

[34] In this case, the fact that West Fraser Mills had control over the license and contract was sufficient, according to the Supreme Court, to establish a nexus between the deceased faller and West Fraser Mills as an employer. The appellant argues that same level of control in this instance, warranting the interpretation that the section 3 was properly used as the basis for the Order.

[35] Having reviewed the evidence in the Appeal Record as well as the testimony of the appellant and witness and considering the arguments made by both parties, I have come to the same conclusion.

[36] In my view, the employer applied sufficient pressure on the contractor to warrant a call to and inspection by a health and safety officer. If the contractor had the ultimate decision in the method of abatement, that call, and ensuing inspection would not have been necessary. Exerting that pressure to perform the abatement contrary to what the contractor, who is an expert in this field, was advising, was tantamount to control by the employer of not only the work site but also the abatement work. In viewing the legislation, the code of practice and the AMP as a whole and in considering the remedial aspect of the legislation, as contemplated by not only section 17 of the *Interpretation Act* but also by *VSL Canada Ltd. v. Workplace Health Safety and Compensation Commission and Duguay et al.*, 2011 NBCA 76, I cannot come to the conclusion that a strict interpretation of sections 3 and 4 of the Regulation is appropriate. The employer in this case was an "employer" within the meaning of section 3 of the Regulation and, thus, the Order issued under that section was properly issued. Had the employer not been involved in advocating one method (drop sheets) over another (full enclosure), then the contractor would have made the decision and completed the work without involvement by the health and safety officer. No order would have needed to be issued.

[37] Furthermore, in accordance with section 37 of the *OHS Act,* the chief compliance officer had the option of varying the Order as opposed to revoking it. He did not do so. His rationale for not varying the Order was that the work had already been conducted and it had been conducted properly. Therefore, the point was moot. Section 37 reads as follows:

> **37**(1) An owner, employer, contracting employer, contractor, sub-contractor, employee or supplier named in any order given by an officer under this Act or the regulations may, within fourteen days after the date the order was served, appeal that order by application to the Chief Compliance Officer who may confirm, vary, revoke or suspend the order appealed as promptly as is practicable.

[38] In my opinion, this sends a mixed message to employers. Varying the Order would not have changed the fact that the work had been conducted in the proper way. But it would have confirmed that the employer's role in "taking every reasonable precaution to ensure the health and safety of his employees" is to be at the forefront of any safety decisions and that the employer retains a duty to comply with the *Act* and its Regulations, especially in situations where the employer is intent on keeping a measure of control over operations such as the abatement operation in this case.

[39] To rely on the fact that the employer hired a contractor in order to shirk that responsibility goes against the very nature of the *OHS Act*. Surely, that cannot be a correct interpretation. The respondent recognized there were gaps in the legislation in that regard that the legislator is looking to correct.

[40] The employer was not only the owner here, but also the "employer" within the meaning of sections 3 and 4 of the Regulation. Order No. 160198 was therefore valid and should be reinstated. Given that the work was already conducted, I recognize that the Order has no practical effect. However, it should not have been revoked, as a matter of principle. The appeal is therefore accepted.

J. NATHALIE THIBAULT
CHAIRPERSON, APPEALS TRIBUNAL

JNT/da