REVIEW DECISION

Re: **Review Reference #: R0327210**
Board Decision under Review: August 1, 2024

Date: **January 29, 2025**

Review Officer: **Tony Fletcher**

Introduction and Background

The employer is a full-service restoration company registered with the Workers' Compensation Board ("Board"), which operates as WorkSafeBC. The employer is also licensed to provide asbestos abatement. The employer was the prime contractor contracted to restore a water-damaged residential property at the time material to this review.

A hazardous materials inspection report ("HMIR") completed by O Company on January 16, 2024, documented that the house on the property in question was contaminated with asbestos-containing material ("ACM"), including a section of the dining room ceiling that had been removed. Drywall and texture debris was also observed scattered on the floor.

In May 2024, a Board Occupational Health Officer ("OHO") initially conducted an inspection via telephone with regard to potential worker exposure to asbestos at the above worksite on January 24 and 30, 2024. The OHO indicated that he attempted to inspect the site on May 6, 2024, but the building was locked and there was no response to the doorbell. In May 2024, the OHO spoke with the employer's general manager, G, joint health and safety committee worker representative, L, and warehouse lead, S.

In a May 16, 2024 Inspection Report, the OHO issued orders to the employer under sections 6.2.2(1)(b) and 20.112(7) of the *Occupational Health and Safety Regulation* ("*Regulation*") for allowing a person to carry out abatement work at the workplace without a valid asbestos certificate, and for carrying out demolition, salvage or renovation work that may disturb hazardous materials without safely containing or removing those materials.

In the same report, the OHO also issued orders to the employer under sections 59.03 and 69(1)(c) of the *Workers Compensation Act ("Act")* for conducting asbestos abatement work without a valid license, and for not conducting a full investigation respecting potential exposure to ACM on January 13 and 24, 2024.

In the August 1, 2024 decision that is the subject of this review, the Board imposed an administrative penalty of $52,056.82 against the employer in respect of the violation of section 20.112(7) of the *Regulation,* as set out in the May 16, 2024 Inspection Report.

The employer, through a representative, requests a review of this penalty order, and seeks to have the penalty cancelled. In the alternative, the employer asks that the penalty be replaced with a warning letter. The OHO provided additional comments in a November 26, 2024 memo, which was disclosed to the employer for a response. The employer's representative provided a response on December 24, 2024. There are no other parties to this review.

Section 20(3) of the *Act* gives me the authority to conduct this review. Section 339(2) of the *Act* requires me to make a decision on the merits and justice of the case, applying the policies of the Board's board of directors applicable in the case. The policies are found in the *Prevention Manual.* The standard of proof that applies to this review is the balance of probabilities.

Preliminary Matter

In their submissions, the employer and its representative provided arguments disputing the Board's May 16, 2024 orders under section 6.2.2(1)(b) of the *Regulation* and sections 59.03 and 69(1)(c) of the *Act.* However, given that the employer did not request a review of the May 16, 2024 decision, and because the August 21, 2024 penalty decision was in respect of the violation of section 20.112(7) of the *Regulation* only, it is not within my jurisdiction to review the other orders set out in the May 16, 2024 decision.

Issue

The issue under review is the Board's decision to impose a $52,056.82 administrative penalty against the employer.

Reasons and Decision

Under section 95(1) of the *Act*, the Board has authority to impose a penalty on an employer when, among other things, the employer has failed to take sufficient precautions to prevent work-related injuries or illnesses, the employer has not complied with the *Act* or *Regulation*, or the employer's workplace or working conditions are not safe.

The Violation

As the employer did not request a review of the initiating order set out above, I do not have the jurisdiction to consider whether the order was properly issued, and it stands. However, I must still consider whether there is a proper factual basis for the order issued and the resulting penalty that was imposed.

Section 20.112 of the *Regulation* addresses the treatment of hazardous materials during demolitions and renovations of buildings or structures. "Hazardous materials" are defined in the *Regulation* as including ACM.

Under section 20.112(7) of the *Regulation,* all employers responsible for the demolition or salvage of the machinery, equipment, building or structure, or the renovation of the building or structure, must ensure that no demolition, salvage or renovation work that may disturb any previously identified hazardous materials, other than work necessary to safely contain or remove the hazardous materials, is carried out until the hazardous materials are safely contained or removed.

I have reviewed the OHO's inspection reports, his notes, and any other documents/photographs on file along with the employer's submissions.

I have reviewed O Company's January 16, 2024 HMIR, prepared by hazmat staff member AA. The report documented that drywall (joint compound) sampled throughout the home and ceiling texture both tested positive for 1% chrysotile asbestos, and were classified as "High Risk" materials. The ceiling texture, in particular, was noted to be highly friable. AA wrote that prior to their inspection, a section of the ceiling had been removed and drywall and texture debris was observed scattered on the floor. For this reason, the home was considered in poor condition and contaminated with asbestos fibres. In addition, industrial fans had been operational in the house, which likely spread any airborne asbestos fibres throughout the house.

AA wrote that all non-porous materials and contents were to be thoroughly decontaminated prior to removal or allowing regular access to the area. All porous materials or contents that could not be adequately cleaned were to be included in the abatement and disposed of as hazardous waste. If new materials were uncovered that were not referenced in the report, or if the scope of work expanded to include other areas or materials, they were to be handled as a potential source of asbestos until further testing and consultation suggested otherwise.

AA further advised that the Board's Enhanced Moderate to High-Risk procedures were to be followed for the safe and controlled clean-up of the asbestos-containing drywall and texture coat debris. Daily air monitoring was required throughout any high-risk removal activities and an air clearance test achieving satisfactory results was to be completed before risk procedures were downgraded, or regular access to the work area was permitted.

Notably, on May 27, 2024, the employer's representative provided the Board with a copy of a Site Safety Assessment dated January 13, 2024, which categorized the asbestos hazard on site as "H4", where "H" indicates a high asbestos hazard, and "4" indicates the level of control to be implemented through safe work procedures.

I note from my review of the OHO's summary of facts in the August 1, 2024 decision under review that, through his telephone investigations, he learned that multiple workers were not aware of O Company's January 15, 2024 HMIR findings that ACM was present in the house on the worksite.

On January 20, 2024, the employer's Level 3 Abatement Technician attended the worksite to complete a thorough clean-up of the dining room where ceiling damage existed. He confirmed in a written statement that he used all necessary personal protective equipment.

In telephone conversations with G and S, and in an e-mail from G, the OHO was advised that on January 24, 2024, two of the employer's workers attended the worksite to pack and relocate furniture and items located throughout the house. This resulted in the disturbance of hazardous materials that had spread from the dining room to other areas of the house. At least one worker who had not undergone a fit test was allowed to work without appropriate personal protective equipment ("PPE"), such as a respirator and impermeable coveralls, in an asbestos-contaminated work area.

On January 30, 2024, the employer's crews moved furniture from the house. Again, the work was apparently performed without appropriate PPE in an asbestos-contaminated work area.

As set out by the OHO, there was no indication that, as recommended by O Company, a qualified third party company provided daily air-monitoring throughout any high risk removal activities in late January, or that an air clearance test that achieved satisfactory results had been completed before risk procedures were downgraded or regular access to the work area was permitted.

As a result of his investigation, the OHO issued the May 16, 2024 Inspection Report and the four orders, including the order under section 20.112(7) of the *Regulation.* Specifically, the OHO found that the employer had allowed its workers to enter and perform work in an asbestos contaminated area, and did not ensure that all hazardous materials were safely contained or removed before any such renovation work was carried out.

An independent consulting firm, M Ltd, retained by the employer conducted an ACM contamination assessment of the worksite on May 3, 2024, and, after sending 10 samples to an independent laboratory, advised that all samples were negative for asbestos.

In the submissions, the employer's representative acknowledged there were some procedural shortcomings on the employer's part in January 2024 related to their service call. Notably, the project manager for the site acknowledged failing to provide clear instructions during the initial attendance at the job site on January 13, 2024. However, the employer did not feel that any of its workers were actually subjected to a hazardous level of asbestos exposure.

The representative first argued that the employer did not engage in demolition, salvage or renovation work, such as is described in section 20.112(7). However, I am satisfied that the employer's business as a full-service restoration company,

with a license to provide asbestos abatement, was contracted to repair water damage in the house, including in the damaged ceiling, and that this qualifies as salvaging or renovating parts of the residential building.

The employer also disputed the OHO's apparent assumption that ACM had spread throughout the house (as stated by O Company in the HMIR) at the time workers packed, relocated and moved items and furniture on January 24 and 30, 2024. The employer argued that there was no evidence to prove that the risk of airborne asbestos persisted or that the relocation activities on January 24, 2024 resulted in the disturbance of hazardous materials that spread from the dining room to other areas of the house.

I note that there were no air-testing results or clearance letters confirming that the house was actually clear of ACM between the time of O Company's January 15, 2024 assessment and the work performed on January 24 and 30, 2024. The employer's representative referenced air monitoring results from February 28 and 29, 2024, which were conducted in conjunction with ceiling abatement work that B Ltd, an abatement subcontractor, was performing. The representative submitted that the air monitoring results showed there were very low airborne levels of fibre in several locations of the house. I note, however, that this testing evidence from February 28 and 29, 2024, is not sufficient to show that hazardous materials did not exist on site a month earlier on January 24 and/or 30, 2024.

Again, O Company's January 15, 2024 report required clear air testing prior to the resumption of regular access to the worksite, and the evidence does not establish that this occurred. As a result, I accept that there remained the potential that the employer's salvage/renovation work, involving the packing and moving of furniture that took place on January 24 and 30, 2024, may have disturbed the previously identified hazardous ACM before all such materials had been shown to have been safely contained or removed.

Therefore, I conclude that there is a factual basis for the violation under section 20.112(7) of the *Regulation.* The next questions before me are whether an administrative penalty is appropriate, and if so, the amount.

Criteria for Imposing a Penalty

As explained in policy item P2-95-1, *Criteria for Imposing OHS Penalties*, the Board must consider a penalty where at least one of the listed factors, including the following, applies:

- The violation resulted in a high risk of serious injury, serious illness, or death;

- The employer previously violated the same, or substantially similar, sections of the *Act* or *Regulation*, or the violation involves failure to comply with a previous order within a reasonable time;

- The employer intentionally committed the violation; or

- The Board considers that the circumstances warrant a penalty.

The Board determined that a penalty must be considered because the violation was high risk. Policy item P2-95-2, *High Risk Violations*, explains that certain violations are automatically designated high risk because they regularly result in fatalities and serious injuries. Causing work disturbing material containing asbestos, or potentially containing asbestos, to be performed without necessary precautions to protect workers is a designated high risk violation.

In this case, the employer's workers, on January 24 and 30, 2024, packed and relocated furniture and items throughout the house, and removed furniture from the house, before all identified ACM in the house had been proven to have been safely removed. I find that such actions would likely disturb material containing asbestos, or potentially containing asbestos, and cause any such fibres to become airborne.

In arguing that the violation in question was not high risk, the employer's representative wrote that the relatively small portion of ceiling that became saturated from an accidental water pipe break fell under its own water-logged heavy state on January 13, 2024. The representative submitted that the small amount of saturated material, with low percentage ACM, that was scooped up and bagged on January 13, 2024, would have been a low exposure risk to those involved. The representative further argued that there was no credible evidence, beyond O Company's opinion, to show that the exposure risk was beyond low. Moreover, M Ltd's May 2024 assessment showed that there was no asbestos found in 10 samples taken at that time.

I first note that the employer's own Site Safety Assessment from January 13, 2024, categorized the asbestos hazard on site as high. Moreover, I accept the expert opinion of O Company (which was retained by the employer for the express purpose of conducting a hazardous materials survey of the worksite) that there was high-risk ACM that had likely (or at the very least potentially) been spread through the house.

The OHO noted in his November 26, 2024 memo that water-damaged drywall or ceiling is not a control measure (such as the commonly used asbestos-misting control method), and that when chunks fall, they can splash debris across the area. Asbestos fibres mixed with water can spread further as workers walk through the area with contaminated footwear. Also, as fans blow, wet piles and footprints can dry, releasing fibres into the air.

I acknowledge M Ltd's May 2024 assessment that there was no ACM in samples tested on site at that time. However, this was four months after the time period in question and is not determinative of whether there was potentially ACM present in January 2024, when the employer's workers were conducting their restoration work and disturbing such material.

Given the findings of O Company and the OHO in this case, I am satisfied this was a high risk violation and the Board had to consider an administrative penalty against the employer.

Due Diligence

Section 95(3) of the *Act* provides that the Board must not impose an administrative penalty if the employer exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. Policy P2-95-9, *OHS Penalties – Due Diligence*, explains that an employer acts with due diligence where the employer shows that it took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. Due diligence will be found if the employer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the employer took all reasonable steps to avoid the particular event.

In a May 23, 2024 letter, the OHO invited the employer to provide information on the issue of due diligence, and the employer responded on May 27 and 31, 2024 with written submissions which included 14 documents. A number of the documents related to standard abatement procedures and compliance processes, most of which were not site-specific. The employer provided further documents relating to the issue of due diligence in a June 18, 2024 e-mail to the OHO.

The employer's representative submitted that the employer takes health and safety seriously, has invested a great deal of time and effort into it, and believes it was duly diligent leading up to, during, and after the events of January 2024. The employer estimated that it spent approximately $10,300.00 on employee training and certification in the past two to three years alone.

The representative submitted that prior to January 2024, the employer had for many years been taking notable actions to educate, train, instruct and supervise its personnel. The employer had a documented asbestos exposure control plan in place prior to the events of January 2024 and the inspection in May 2024. The employer also had an "Employee Handbook", which was updated in August 2023, and which included asbestos exposure control plan information, and a Health and Safety Handbook, updated January 22, 2024. The representative noted that the employer issued Asbestos Certificates to its personnel, and submitted examples of some of these certificates, which were issued in November and December 2023.

According to employer representatives, the employer has expectations that are communicated to workers relating to health and safety, including expectations for working with asbestos. While the employer has provided evidence supporting that certain workers, including abatement workers, were provided with training, there was a lack of evidence to show that non-abatement workers who were exposed to asbestos on January 24 and 30, 2024, received the necessary asbestos-related training or education. The employer did not follow all of its recommended asbestos exposure control procedures in January 2024, and lacked an effective system to supervise its workers and ensure compliance with these procedures. For example, the employer did not ensure that all workers were performing work safely, such as wearing PPE in an environment it knew was potentially contaminated with ACM on January 24 and 30, 2024.

Even though the employer disputed the amount of asbestos in the house when its employees performed work in January 2024, it acknowledged in its submissions that statements were missed in O Company's HMIR regarding the house interior and its contents likely being contaminated with asbestos.

A duly diligent employer, given the information in the HMIR, would have ensured that all of its workers in January 2024 had been provided with the necessary training, equipment, and supervision to work safely packing and moving items and furniture in an environment exposing the workers to ACM. Such compliance could be shown through training records (including new worker orientation and training), or site-specific pictures, and daily checklists for workers on site.

Accordingly, I find that the employer was not duly diligent in preventing the violation.

Additional Factors in Deciding Whether to Impose a Penalty

Policy P2-95-1 sets out some additional factors that must be considered in deciding whether to impose a penalty, which include:

1. The potential for serious injury, illness or death in the circumstances, based on the available information at the time of the violation;

2. The likelihood that the penalty will motivate the employer and other employers to comply in the future, taking into account one or more of the following:

    a. The extent to which the employer was or should have been aware of the hazard;

    b. The extent to which the employer was or should have been aware that the *Act* or *Regulation* were being violated;

    c. The compliance history of the employer;

d. The effectiveness of the employer's overall approach to managing health and safety; and

e. Whether other enforcement tools would be more appropriate.

3. Any other relevant circumstances.

After weighing the relevant factors, I find that the imposition of a penalty against the employer is warranted. First, there was high potential for serious injury or death in the circumstances, as already established above.

I have also considered the likelihood the penalty would motivate the employer to comply in the future, taking into account the factors listed in policy above.

The employer, as a full-service restoration company with a license to provide asbestos abatement services, ought to have been aware of the hazards of asbestos and the demolition and removal of ACM. The employer also was, or should have been, aware that the *Act* or *Regulation* were being violated, given that it had the HMIR (which identified that the house was contaminated with ACM) in its possession at least eight days before the employer's workers performed work in the affected areas of the house on January 24 and 30, 2024.

A review of the employer's compliance history also shows that the employer has undergone 25 inspections by the Board in the previous five years and has been cited for 16 violations of the *Act* and/or *Regulation,* including orders relating to the handling of asbestos*.* For example, the Board recently issued orders under section 6.2.2(1)(b) of the *Regulation* and section 59.03 of the *Act* for asbestos certification and asbestos abatement contractor licensing infractions. On October 11, 2023, the employer was issued orders under sections 6.6(1) and 6.8(2) of the *Regulation* for violations regarding risk assessments and safe work procedures for control and handling of asbestos.

The employer's representative argued that nine of the Board's 10 inspections in the last three years in relation to asbestos-compliance issues did not include any violation orders. Therefore, the employer's recent compliance inspectional history should be viewed as being commendable and reflective of its commitment to asbestos requirement compliance. The representative argued that the circumstances in this case were not high risk and were not egregious. Moreover, the employer had received no prior stop work orders, no citations, no administrative warning letters, and no administrative penalties for any asbestos-related inspections. The representative argued that, given the employer's experience with the January 2024 incidents and the numerous changes made since then, a penalty was neither appropriate nor warranted, and a warning letter, at most, would be an appropriate enforcement tool.

Given the potential for serious injury, illness or death in this case, the fact that the employer was or should have been aware of the asbestos hazards and/or that the *Regulation* was being violated, and the compliance history showing similar violations in recent years, it is clear that the employer's overall approach to managing health and safety with respect to addressing asbestos hazards has not been particularly effective.

Accordingly, I conclude that the penalty is the most appropriate enforcement tool to ensure future compliance by the employer and other employers in the same situation.

The Penalty Amount

As noted, the Board imposed a penalty of $52,056.82 against the employer.

Policy item P2-95-5, *OHS Penalty Amounts*, sets out how the penalty amount is determined. Item 2(a) of the policy provides that an initial amount is determined based on the assessable payroll of the employer for the calendar year immediately prior to the incident which gave rise to the penalty. The initial amount is calculated by multiplying the penalty payroll by 0.5%. The amount cannot be less than the minimum amount of $1,250. In this case, the initial penalty amount was $26,028.41.

The policy under item 2(b) further provides for the application of multipliers if any of the circumstances on which the penalty is based:

(i) are high risk
(ii) are intentional
(iii) involve section 79 obstruction
(iv) involve section 73
(v) involve breaching a stop work or stop use order

For each of the above circumstances that apply, the initial penalty amount is multiplied by two and the results added together.

In this case, because the circumstances were high risk, the initial penalty amount of $26,028.41 is properly multiplied by two, bringing the amount of the penalty to $52,056.82.

The next step in the calculation of the penalty amount is to determine whether any variation factors apply. The policy states that the amount above may be increased or reduced by 30% to account for exceptional circumstances. It further explains that circumstances that are adequately addressed by other parts of the policy are not considered exceptional, and that the policy is designed to ensure that employers of similar size are generally given similar penalties in similar cases.

The OHO did not identify any exceptional circumstances that warranted applying a variation factor, and the employer has not provided any submissions on this point. I note from the request for review that the employer stated that the amount of the penalty would cause serious financial hardship for the company. However, the employer did not include evidence regarding its current or long-term finances or its other financial obligations in order to establish hardship. As a result, I am not satisfied that there are any exceptional circumstances such that a variation of the penalty is warranted.

In summary, I deny the employer's request on this review, and confirm the Board's decision to impose a penalty of $52,056.82 against the employer.

Conclusion

As a result of this review, I confirm the Board's decision of August 1, 2024.

Tony Fletcher
Review Officer
Review Division