REVIEW DECISION

Re: **Review Reference #: R0327822**
Board Decision under Review: July 29, 2024

Date: **February 7, 2025**

Review Officer: **Christie Ngan**

Introduction and Background

The employer is a roofing contractor that removed and installed a roof on a two level single-family dwelling. The employer hired Company G, another roofing contractor, to assist with completing the job. On June 19, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected the worksite.

As a result of the inspection, the Board officer issued a June 19, 2024 inspection report with orders to the employer for contravening section 11.2(1)(a) of the *Occupational Health and Safety Regulation* ("*Regulation*") and section 21(2)(e) of the *Workers Compensation Act* ("*Act*").

On July 29, 2024, the Board imposed an administrative penalty of $26,178.14 against the employer for the June 19, 2024 violation of section 11.2(1)(a) of the *Regulation*.

The employer requested a review of the penalty order. The employer disagreed with the penalty order, but it did not provide any further submissions.

Section 20(3) of the *Workers Compensation Act* ("*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.

Issue

The issue on this review is the Board's decision to impose an administrative penalty against the employer.

Reasons and Decision

<u>The Violation</u>

The Board imposed the administrative penalty under review based on the employer's violation of section 11.2(1)(a) of the *Regulation*. As the employer did not request a review of that order, I have no jurisdiction to consider whether it

was properly issued and, therefore, it stands. However, I must still be satisfied that the underlying facts of the violation support a penalty against the employer.

Section 11.2(1)(a) provides that, unless elsewhere provided for in the *Regulation*, an employer must ensure that a fall protection system is used when work is being done at a place from which a fall of 3 meters (10 feet) or more may occur.

In the report for administrative penalty, the Board officer indicated that on June 19, 2024, he observed two workers, one employed by the employer (Mr. M) and the other employed by Company G, working on the roof of the dwelling, but neither worker was using a fall protection system. The Board officer also stated that he observed two other workers, employed by Company G, working on the roof of the dwelling, but they were using their fall protection systems incorrectly, namely the lifelines had excessive slack and would not have been effective.

The Board officer noted that the fall protection plan for the workplace and the workers' statements indicated that the roof slope was 5:12 and the potential fall heights the workers were exposed to were approximately 10 to 30 feet. Accordingly, the Board officer determined that the employer contravened section 11.2(1)(a) of the *Regulation*, as a worker of the employer, namely Mr. M, was not using a fall protection system while working on a roof with potential fall risks up to 30 feet.

On review, the employer did not dispute that it had contravened section 11.2(1)(a) of the *Regulation*.

Accordingly, I find that Mr. M was working without a fall protection system on a roof from which a fall of 10 feet or more may have occurred. As such, I am satisfied that the employer was in violation of section 11.2(1)(a) of the *Regulation*.

Therefore, the underlying facts of the violation to support a penalty against the employer is established. The next question I must address is whether the administrative penalty was appropriate and, if so, the amount.

The Administrative Penalty

Criteria for Imposing a Penalty

Section 95(1) of the *Act* gives the Board the authority to impose a penalty on an employer when, among other things, the employer has failed to comply with the *Regulation*. Policy item P2-95-1, *Criteria for Imposing OHS Penalties*, explains that the Board must consider a penalty where at least one of certain criteria apply, including:

- 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.

Policy item P2-95-2, *High Risk Violations*, addresses the question of whether a violation involves a high risk of serious injury, serious illness, or death. Certain violations are automatically designated as high risk violations as they regularly result in serious injuries, or even death, as they generally give workers no opportunity to avoid or minimize serious injury or death. Working at over 10 feet without an effective fall protection system is a designated high risk violation.

In this case, the Board officer noted that Mr. M worked on a roof that was approximately 30 feet above grade, with a large amount of roofing debris and new materials scattered across the roof, and without the benefit of a fall protection system. Under those circumstances, I find that the worker was exposed to an increased risk of a fall and, if a fall had happened, any injury would have likely been serious or even fatal. As such, I find that the violation in question resulted in a high risk of serious injury or death.

Additionally, in the report for administrative penalty, the Board officer indicated that the employer was previously issued orders for violating section 11.2(1)(a) of the *Regulation* in March and December 2023, as well as an administrative warning letter in January 2024 in relation to the December 2023 violation.

Accordingly, given the high risk violation and the employer's previous violations of the same sections of the *Regulation* in 2023, I am satisfied that a penalty must be considered.

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 or non-compliance to which the penalty relates. Policy item 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 to prevent the particular event.

In the report for administrative penalty, the Board officer indicated that he spoke with Mr. M, who was the designated supervisor for the worksite, regarding why

they were completing work on the roof without a fall protection system when there were fall protection anchors and vertical lifelines set up on the roof and available for use. Mr. M explained that he had not been using a fall protection system because he felt the work they were performing on the roof was minor in nature. The Board officer then advised Mr. M about the requirements to always use a fall protection system when conducting work at 10 feet or more, except when installing the first anchor using procedures acceptable to the Board. Mr. M stated that he was aware of the fall protection requirements and would ensure that a fall protection system was used moving forward. Mr. M further confirmed that a fall protection plan had been developed for the worksite, all the required fall protection equipment was available at the worksite, and he had previously been trained in fall protection.

Having reviewed the evidence, I find it significant that Mr. M was the supervisor for the worksite and he acknowledged that he had previously been trained in fall protection, he was aware of the fall protection requirements, and all required fall protection equipment was available to be used at the worksite. However, Mr. M did not use any fall protection system simply because it was his personal opinion that he did not need to do so. Furthermore, as the supervisor on site, he took no steps to ensure that other workers working under his watch complied with fall protection requirements, despite also being at risk for falling.

On review, the employer did not make submissions regarding the reasonable steps it had taken, if any, to prevent the violation to which the penalty related. It provided no evidence as to what training Mr. M had to be a supervisor, or what processes it had in place to ensure that Mr. M was properly carrying out his supervisor duties, such as complying with health and safety requirements.

In my view, the weight of the evidence does not support a finding that the employer exercised due diligence to prevent the section 11.2(1)(a) violation from occurring.

Factors Warranting Imposition of a Penalty

When considering the appropriateness of a penalty, policy item P2-95-1 outlines some additional factors, including:

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

- The likelihood that the penalty will motivate the employer (specific deterrence) and other employers (general deterrence) to comply in the future, taking into account one or more of the following:

    - the extent to which the employer was or should have been aware of the hazard;

    - the extent to which the employer was or should have been aware that the *Act* or *Regulation* were being violated;
    - the compliance history of the employer;
    - the effectiveness of the employer's overall approach to managing health and safety; and
    - whether other enforcement tools would be more appropriate;
- Any other relevant circumstances.

In terms of the first factor, as discussed above, I have found that the violation in question involved a high potential for serious injury or death, which weighs in favor of a penalty.

With respect to the second factor, I find that the employer was aware or should have been aware that section 11.2(1)(a) of the *Regulation* was being violated, as it is a residential roofing contractor and, as such, working at elevation is an integral part of its regular work activities, and it was the employer's supervisor who committed the violation. Indeed, according to the report for administrative penalty, Mr. M acknowledged that he was aware of the fall protection requirements but he did not use any fall protection system while working on a roof that was at least 10 feet above grade because he felt that the work was minor in nature.

Moreover, the employer was issued orders for violating section 11.2(1)(a) in March and December 2023, as well as an administrative warning letter in January 2024 in relation to its December 2023 violation. The employer's history of similar violations indicate that it does not have an effective overall approach to managing health and safety, and that enforcement action beyond a warning letter is now needed.

For the foregoing reasons, I find that an administrative penalty is the most appropriate means to motivate the employer, and other employers, to comply with the *Act* and *Regulation* in the future.

The Penalty Amount

Policy item P2-95-5, *OHS Penalty Amounts*, provides that a penalty amount is determined based on the employer's assessable payroll for the calendar year immediately prior to the incident that gave rise to the penalty, or an estimate. An initial amount is calculated by multiplying the penalty payroll by 0.5%. This amount cannot be less than the minimum amount of $1,250.00. In this case, the Board calculated the initial amount to be $13,089.07.

Having determined the penalty payroll amount, policy item P2-95-5 then requires the Board to consider the application of multipliers. One multiplier is for a high risk violation. Each multiplier results in the initial amount being multiplied by two, and each multiplier is additive. In this case, the Board applied one multiplier because of its determination that there was a high risk violation. I agree with that determination. As such, I find that the high risk multiplier was appropriately applied, doubling the initial amount to $26,178.14.

According to policy item P2-95-5, the next step in calculating the penalty amount is to consider whether variation factors apply to the amount calculated so far. It states that in exceptional circumstances only, the amount above may be reduced or increased by up to 30%. Circumstances that are adequately addressed by other parts of the policy are not considered exceptional circumstances. In this case, the Board did not find grounds for a variation. On review, the employer did not make submissions in this regard, and I found nothing exceptional in the circumstances supporting a variation.

In conclusion, the administrative penalty of $26,178.14 was appropriately calculated in accordance with the policy.

As a result, I deny the employer's request on this review.

Conclusion

As a result, I confirm the Board's July 29, 2024 administrative penalty order.

Christie Ngan
Review Officer
Review Division