REVIEW DECISION

Re: **Review Reference #: R0325229**
Board Decision under Review: July 2, 2024

Date: **January 10, 2025**

Review Officer: **Tony Fletcher**

Introduction and Background

The employer is in the construction industry. On May 6, 2024, an Occupational Safety Officer ("OSO") of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected a worksite where the employer was hired to carry out concrete formwork activities. Upon arrival, the OSO observed a worker located on a work platform stripping formwork without a system of fall protection, and who was exposed to a fall hazard of 11 ½ feet to the grade below. The OSO observed another worker standing on a 2 x 4 falsework brace approximately five feet above the grade below, and two other workers climbing manufactured formwork. The OSO also examined the fall protection equipment for four workers on site and noted a number of deficiencies.

In a May 13, 2024 Inspection Report, the OSO issued orders to the employer under sections 11.2(1)(a), 11.9, and 20.4(1) of the *Occupational Health and Safety Regulation* ("*Regulation*").

In the July 2, 2024 decision under review, the Board imposed an administrative penalty of $6,295.60 against the employer with respect to the violations set out in the May 13, 2024 report.

The employer requests this review and disputes the July 2, 2024 penalty. There are no other parties to this review.

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 under review is the Board's decision to impose an administrative penalty against the employer for violations of sections 11.2(1)(a), 11.9, and 20.4(1) of the *Regulation*.

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 *Regulation*, or the employer's workplace or working conditions are not safe.

The Violations

The Board imposed the administrative penalty under review based on the employer's violation of sections 11.2(1)(a), 11.9, and 20.4(1) of the *Regulation.* As the employer did not request a review of the May 13, 2024 orders, I have no jurisdiction to consider whether the orders were properly issued, and they stand. Nevertheless, I must consider whether there is a proper factual basis for imposing the penalty that is related to the orders.

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

A "fall protection system" is either a fall restraint system that prevents a worker from falling, a fall arrest system which halts a worker's fall before he or she hits the surface below, or work procedures that are acceptable to the Board and minimize the worker's risk of a fall injury.

In the May 13, 2024 Inspection Report, the OSO found that the employer had not complied with section 11.2(1)(a) of the *Regulation,* as the worker who was observed stripping formwork on a work platform without fall protection equipment was exposed to a fall hazard of 11 ½ feet. Therefore, the OSO issued the order under section 11.2(1)(a).

Section 11.9 of the *Regulation* states that equipment used in a fall protection system must be:

> (a) inspected by a qualified person before use on each workshift,
>
> (b) kept free from substances and conditions that could contribute to its deterioration, and
>
> (c) maintained in good working order.

As noted, the OSO also examined the fall protection equipment for four workers on site and found the following deficiencies:

- A lanyard which had no legible CSA or equivalent standard marked on it.

- A harness which had visible wear on its straps compromising its effective use.

- A rope grab in which a component which grabs the rope was visibly worn smooth, rendering the rope grab ineffective were it to have been engaged.

The employer's supervisor, S, removed the identified faulty equipment from service and disposed of it. The employer then provided a complete fall protection system consisting of an anchorage location, rope, rope grab, lanyard and harness. When asked, the employer was unable to describe an effective process, or provide documentation, for the inspection and maintenance of their fall protection equipment used in the course of their work activities.

As a result, the OSO determined that the employer had contravened section 11.9 of the *Regulation.*

Finally, section 20.4(1) of the *Regulation* states that where practicable, suitable ladders, work platforms and scaffolds meeting the requirements of Part 13 (Ladders, Scaffolds and Temporary Work Platforms) must be provided for and used by a worker for activities requiring positioning at elevations above a floor or grade.

As noted, during his inspection, the OSO observed a worker standing on a 2 x 4 falsework brace approximately five feet above the grade below who was stripping free form formwork. The OSO also observed two workers climbing manufactured formwork panels to access the nuts on the ends of bolts for stripping and removal. The OSO determined that suitable ladders or work platforms had not been provided for and/or used by workers on site to position themselves to conduct the work. As a result, the employer was in violation of section 20.4(1) of the *Regulation.*

I am satisfied that the OSO's summary of the facts is supported by his inspection notes and photos he took at the work site, all of which I have reviewed. On review, the employer does not specifically dispute that the violations occurred.

Ultimately, I conclude from the evidence that the employer was in violation of sections 11.2(1)(a), 11.9, and 20.4(1) of the *Regulation.* The violations upon which the Board based the administrative penalty have been established. The next question before me is whether the administrative penalty was 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 in policy, 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 has failed 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. Work over 10 feet without an effective fall protection system is a designated high risk violation. Given the circumstances of 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.

The OSO invited the employer to provide comments on the issue of due diligence. The employer responded and provided a field level hazard assessment for the work that was being done during the inspection on May 6, 2024. However, the OSO noted that it did not cover the work that the OSO observed the employer’s workers carrying out on the day of the inspection.

On May 14, 2024, the employer provided further evidence to support that it was duly diligent, in the form of excerpts from its health and safety manual, including a Responsibility Extract for Managers and Supervisors, and Employees, Personal Protective Equipment ("PPE") Policy, PPE Training Requirements, another training document, an example of a blank Fall Protection Equipment Inspection Form, and Orientation Safety Training.

The employer also wrote in its e-mail to the OSO that in the past, equipment inspection documentation and responsibilities of supervisors and employees/subcontractors had been discussed verbally in toolbox meetings, during orientations of new employees, and day-to-day. The employer acknowledged that a gap had been identified during the OSO's inspection and the employer had taken steps to establish day-to-day reminders for PPE checks, including the creation of a new form.

On June 6, 2024, the employer also sent the OSO a number of field level hazard assessments that took place in the week prior to his inspection, an April 26, 2024 toolbox talk form related to fall protection on site, and a record of employees who had and had not obtained their fall protection certificate.

The OSO determined that the above information did not establish that the employer had been duly diligent to prevent the failure, non-compliance, or conditions to which the penalty related.

On review, the employer disputed what it stated was the OSO's position that the employer had not provided any due diligence evidence at all, and referred to the documents and e-mails described above.

After review, I am not persuaded that the employer took all reasonable care and steps to prevent the fall protection violations in May 2024. A duly diligent employer would have taken steps to ensure that employees used the functional fall protection system that was on site and available for use on May 6, 2024, rather than the deteriorating equipment available to certain workers for their use. Further, a duly diligent employer would also have ensured that a complete site-specific fall protection plan had been put in place and was on site at the time of the OSO's inspection. Also, not all of the employer's employees had obtained their fall protection certificate. There also appeared to be a gap in the employer's training. When asked, the site supervisor was unable to describe an effective process, or provide documentation, for the inspection and maintenance of the fall protection equipment used in the course of the employer's work activities.

The employer has also acknowledged that at the time of the violations, there was a gap in its training and follow-up procedures, with the employer taking steps to establish daily reminders for PPE checks, including creation of a new form, after the OSO's May 6, 2024 inspection.

This lack of diligence is particularly noteworthy given that the employer had been issued a warning letter on December 13, 2023, (relating to August 2023 fall protection violations) advising of a potential financial penalty if further such violations occurred.

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

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, based on the information available at the time of the violation. As observed by the OSO, one worker engaged in stripping manufactured formwork from a work platform was exposed to a fall hazard of greater than 11 feet. There was, therefore, the potential for serious injury or death if the worker had fallen from this height. As noted, there were other workers who were not provided with safe means of access to their work areas (in the form of ladders, work platforms or scaffolding), which exposed them to potentially serious injuries if they were to fall from the platforms on which they worked.

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. I am satisfied that the employer should have been aware of the safety hazards and the standard requirements when working at heights, given that it is a construction company which was completing concrete formwork on a multi-level building. The employer also had fall protection equipment on site (while not necessarily in use or in good working order at the time), which further supports awareness of the inherent hazards in the job. Perhaps most significantly, I accept that the employer was (or, at the very least, should have been) aware that the *Regulation* was being violated, given that the Board had previously issued orders directly to the employer for violations of section 11.2(1)(a) of the *Regulation* on August 18, 2023 and February 16, 2024, violations of section 20.4(1) on May 12 and August 18, 2023, and a violation of section 11.9 on May 12, 2023.

The employer also received the December 13, 2023 warning letter related to the August 18, 2023 violations and for failing to ensure that workers working above 10 feet were protected with an effective fall protection system. It is evident, therefore, that the employer's overall approach to managing health and safety, particularly with respect to working at heights with proper and fully functional fall protection, has not been effective in recent years.

The employer was advised in the December 13, 2023 letter that future fall protection violations might result in escalating enforcement action, including issuance of a monetary penalty. Given that the employer has already received a warning letter for violations of fall protection regulations in August 2023, further such letters without penalty would likely not be an effective enforcement tool.

Accordingly, I consider that the penalty is the 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 $6,295.60 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 $1,250.00. In this case, the initial penalty amount was $3,147.80.

The policy under item 2(b) further provides for the application of multipliers to the initial amount where the circumstances on which the penalty is based are, among other things, high risk or intentional violations. The Board determined that the

multiplier for a high risk violation applied, and therefore multiplied the initial amount by two, resulting in the basic penalty amount of $6,295.60. I agree with this determination.

The next step in the calculation of the final 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 OSO did not identify any exceptional circumstances that warranted varying the penalty amount, nor has the employer made any submission in support of a reduction of the penalty amount to account for exceptional circumstances. As a result, I do not find that any 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 $6,295.60 against the employer.

Conclusion

As a result of this review, I confirm the Board's decision of July 2, 2024.

Tony Fletcher
Review Officer
Review Division