REVIEW DECISION

Re: **Review Reference #: R0328648**
Board Decision under Review: August 22, 2024

Date: **February 11, 2025**

Review Officer: **Sarah Frost**

Introduction and Background

The employer is a cannabis cultivator. On June 7, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected the employer's worksite.

Following the inspection, on June 12, 2024, the Board issued orders to the employer including orders under sections 4.39(1), 4.43(2), 5.10(1), 7.7(1)(b), 4.3(1)(a), and 5.38(2) of the *Occupational Health and Safety Regulation* ("*Regulation*").

In the August 22, 2024 decision under review, the Board imposed an administrative penalty of $87,187.95 against the employer in respect of the June 7, 2024 violations.

The employer has requested a review of the Board's decision. It disputes the Board's orders under sections 5.10(1), 7.7(1)(b), 4.3(1)(a), and 5.38(2) of the *Regulation*. The employer's submissions were sent to the Board officer who issued the order for comment. The Board officer's comments were provided to the employer with an opportunity for rebuttal, but no further submissions were received.

A representative from the employer's Joint Safety Committee is participating in this review, but did not provide 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 imposing an administrative penalty on the employer for violations of sections 4.39(1), 4.43(2), 5.10(1), 7.7(1)(b), 4.3(1)(a), and 5.38(2) of the *Regulation*.

Reasons and Decision

The Violations

The Board imposed the administrative penalty under review based on the employer's violations of the above noted sections of the *Regulation*. As the employer did not request a review of the June 12, 2024 orders, I have no jurisdiction to consider whether it was properly issued, and the orders stand. However, I must still be satisfied that the underlying facts of the violations support a penalty against the employer.

On review, the employer only disputes the Board's orders under sections 4.3(1)(a), 5.10(1), 5.38(2), and 7.7(1)(b) of the *Regulation*. However, I have considered all of the orders cited by the Board officer in determining whether the underlying facts support a penalty.

Section 4.3(1)(a)

Section 4.3(1)(a) of the *Regulation* sets out that the employer must ensure that each tool, machine, and piece of equipment in the workplace is capable of safely performing the functions for which it is used.

In his inspection, the Board officer spoke to an employer representative who he said stated that pipe rail carts were used by workers on the flower room pipe rails, though not on a regular basis. The Board officer observed pipe rails with deficiencies, including two specific locations where the pipe rail support was not contacting the pipe rail. He determined that supports not contacting the rails increased the risk of a picking cart falling over and a worker sustaining a serious injury.

On review, the employer submits that the space between the referenced pipe rails was a few millimeters between where the rails met the floor. It says that its teams confirmed that when carts were placed on the rails and weight was applied, the pipe rails and supports became flush, which made them safe to perform work.

The employer acknowledges that it had previous violations of section 4.3(1)(a) in 2022 for damaged rails. It says that since that time, it has exercised increased due diligence on its pipe rail inspection program, which was originally established in collaboration with AgSafe in 2018. The employer says that its cultivation team has increased the frequency of inspection and recorded all repairs conducted on the rails to ensure they are safe to perform work. The employer provided its Pipe Rail Inspection Program and accompanying records to demonstrate the rigor around the program.

In his comments, the Board officer wrote that although the employer said the rails lowered when the carts were placed on them, the employer did not indicate whether the rails were level. He said that if there is an inclination of 2 degrees or more, then the employer would have to address this deficiency. The Board officer said that in addition, the sampling of a pipe rail inspection log that the employer provided in their submission indicated additional corrective action the employer needed to carry out to address the deficiencies.

I understand the employer's submission to be that it was duly diligent and took all reasonable steps to prevent the violation from occurring. I will consider that submission below.

I acknowledge that the pipe rails may have become flush when weight was put on them. However, the evidence does not establish that the rails were level and safe for operation just because they were flush.

Having reviewed the evidence and submissions, I find that the employer was in violation of section 4.3(1)(a) of the *Regulation* at the time of the June 7, 2024 inspection.

Section 4.39(1)

Section 4.39(1) of the *Regulation* states that floors, platforms, ramps, stairs, and walkways available for use by workers must be maintained in a state of good repair and kept free of slipping and tripping hazards.

In the inspection report, the Board officer wrote six orders under this section. He documented the following six instances:

- An air hose looped out onto a walkway.
- Hoses and a cord at the end of a table were uncovered in an area where workers walked.
- A water hose went under the center of the door from hallway, down the center of a walkway, and through the center of another doorway.
- Two areas of floor had damaged concrete, creating tripping hazards.
- Water was on a smooth concrete floor by a water cooler.
- In one specific room, a long stream of water went across the entire width of the floor.

The employer does not dispute the violations, and they are supported by the Board officer's narrative, his inspection notes, and photographs. I find the employer was in violation of section 4.39(1) of the *Regulation*.

Section 4.43(2)

Section 4.43(2) states that stacked material or containers must be stabilized as necessary by interlocking, strapping, or other effective means of restraint to protect the safety of workers.

The Board officer wrote in the inspection report that in the employer's warehouse, he observed multiple boxes of material on pallets in storage racks that had not been secured against falling. He determined that the employer failed to ensure that stacked material was stabilized as necessary by interlocking, strapping, or other effective means of restraint to protect the safety of workers.

The employer does not dispute this order. I find it is supported by the Board officer's narrative and his handwritten notes from the date of the inspection. I find that the violation is established.

Section 5.10(1)

Section 5.10(1) of the *Regulation* states that if a hazardous product in a workplace is in a container other than the container in which it was received from a supplier, the employer must ensure that the container has a workplace label applied to it.

The Board officer wrote that in a specific room, he observed a spray bottle with liquid in it. The employer's representative advised that the liquid was likely isopropyl alcohol. The Board officer wrote that the product identifier and precautionary measures information on the bottle were illegible. He further observed that the employer had not ensured that a container of decanted product had a workplace label applied to it.

On review, the employer submits that since a 2022 inspection citing violations of this section, all of it staff have received training on workplace hazards, the safe use of hazardous materials in the workplace, and WHMIS training. The employer says that in this specific case, the label was present and correct, but had been smudged from regular use. It says that in order to mitigate future instances, it has worked closely with its supplier to procure new labels that will prevent smudging. It also has replaced the existing labels with the smudge-free labels and retrained its workers on the importance of re-labelling.

In his comments, the Board officer notes that the employer has confirmed that the label was smudged. He says that most of the actions taken were done after the violation occurred.

While I have considered the employer's submissions, there is no question that the bottle label was smudged and unreadable. A photograph taken by the Board officer is on file and establishes that this was the case. I find that the employer did not ensure that the container had a workplace label applied to it, in violation of section 5.10(1) of the *Regulation*.

Section 5.38(2)

Section 5.38(2) of the *Regulation* requires that a compressed gas cylinder must be secured to prevent falling or rolling during storage, transportation, and use, and where practicable, must be kept in the upright position.

The Board officer wrote in the inspection report that in the employer's first aid storage room, he observed multiple fire extinguishers that were sitting on the floor and not anchored. He determined that the employer failed to ensure that compressed gas cylinders were secured to prevent falling or rolling during storage.

The Board officer also wrote that in the employer's maintenance area, he observed four compressed gas cylinders being stored in the area with a chain in front of them. He said that the chain going around a short gas cylinder created a gap between the chain and a large gas cylinder. This would allow the large gas cylinder to fall forward and strike its regulator against another gas cylinder. The Board officer further observed that the employer failed to ensure that compressed gas cylinders were secured to prevent falling during storage.

On review, the employer submits that the fire extinguishers in the first aid room are stored in a locked closet, only accessible to authorized first aid attendants. It says the risk of the fire extinguishers falling over was minimal, and only authorized workers were present in the room.

In regard to the maintenance area, the employer submits that this room is also authorized only to select employees. It says that the loose chains were addressed immediately and its current process ensures that all of its extinguishers are in closed cages to ensure they are secured and do not fall over.

Regardless of the access to the storage areas, I am satisfied that the employer had not properly secured the compressed gas cylinders as required by section 5.38(2) of the *Regulation*. This is supported by the Board officer's narrative, handwritten inspection notes, and photographs, and the employer only disputes the level of risk in one instance and took corrective actions in the other. I find the evidence supports a violation of this section of the *Regulation*.

Section 7.7(1)(b)

Section 7.7(1)(b) of the *Regulation* states that if it is not practicable to reduce noise levels to or below noise exposure limits, the employer must (a) reduce noise exposure to the lowest level practicable, or (b) post warning signs in the noise hazard areas.

The Board officer wrote in the inspection report that in a particular room, an employer representative stated that a new machine had been added to the room, and testing showed that the room was a noise hazard area. The Board officer observed that the employer failed to post warning signs in a noise hazard area of the workplace.

On review, the employer submits that since its last inspection in 2022, it had improved and established its compliant hearing program, requiring hearing protection to be worn in designated areas, accompanied by signage to confirm the requirements. Additionally, outside each of the rooms requiring hearing protection, there are dispensers with disposable hearing protection.

The employer says that at the time of the inspection, it was in the process of updating all its signage to ensure it was consistent throughout the facility. Through miscommunication, a team removed signage prior to ensuring the new signs were in place. The employer said it discovered this after conducting a thorough inspection after the Board officer's inspection. The employer submits that this situation was immediately resolved by replacing the signage and retraining its workforce to mitigate future risk. It further says that its incident reporting process was updated to include the identification and reporting of safety behaviour issues. Finally, the employer notes that despite the missing signs, all workers were wearing hearing protection in the designated area and all other signs were posted in their designated areas.

In the Board officer's comments, he says that the employer's statement that the signs were not in place due to miscommunication indicates there is a systemic problem.

There is no dispute that the employer did not reduce the noise exposure to the lowest level. While the employer has made efforts in relation to its signage, in this case, due to a miscommunication, the appropriate warning signs were not posted in requirement with the *Regulation*. I find the employer was in violation of section 7.7(1)(b) of the *Regulation* as determined by the Board officer.

As the violations upon which the Board based the administrative penalty have been established, the next question for me to address is whether the administrative penalty was appropriate, and if so, the amount.

Criteria for Imposing a Penalty

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 Part 2 of the *Act*, or the employer's workplace or working conditions are not safe.

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 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 officer determined that a penalty must be considered because the employer had previously violated the same, or substantially similar, sections of the *Regulation*. Specifically, the Board had previously issued the following orders:

- March 17, 2023 inspection: section 4.39(1)
- November 3, 2022 inspection: sections 4.39(1), 5.38(2), 4.43(2), 5.10(1), and 7.7(1)(b).
- November 5, 2020 inspection: sections 4.39(1) and 5.38(2).

Considering the number of the same and substantially similar violations issued by the Board in past inspections, I find 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 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 failure, non-compliance, or conditions to which the penalty relates.

Prior to issuing the penalty that is the subject of this review, the Board requested a due diligence submission from the employer but the employer did not respond. In its submissions on review, the employer addresses steps that it has taken since the 2022 inspection, and further steps since the 2024 inspection.

As an initial point, steps taken after a violation do not demonstrate due diligence in preventing that violation. However, I have considered the employer's submission that it has exercised increased due diligence on its pipe rail inspection program, increased the frequency of inspection, and recorded all repairs conducted on the rails to ensure they are safe to perform work. It further says that since the 2022 inspection it had improved and established a compliant hearing program, requiring hearing protection to be worn in designated areas accompanied by signage to confirm the requirements.

The employer says that at the time of the June 2024 inspection it had updated all personal protective equipment signage to ensure it was consistent throughout the facility, but there was miscommunication and a team removed old signage prior to ensuring the new signs were in place. The employer also submits that since 2022, all staff have received training on workplace hazards, the same use of hazardous materials in the workplace, and WHIMIS training. Since the June 2024 inspection, it has improved its labels further.

I have considered the steps taken by the employer following the 2022 inspection. However, it is significant to me that the employer continued to be in violation of many similar sections of the *Regulation* at the June 2024 inspection. Among other things, there were a significant number of tripping hazards and an increased amount of unsecured goods place on their storage shelves that constituted unaddressed safety hazards. While the employer had a pipe rail inspection program, given the evidence I am not persuaded that the program was sufficient to ensure that deficiencies were identified and corrected in a timely manner.

While the employer made improvements following the 2022 inspection, I find that it did not take all reasonable steps to prevent the violations in question. I find the employer was not duly diligent.

Additional Factors in Deciding Whether to Impose a Penalty

Policy item P2-95-1 also sets out three additional factors that must be considered with regard to the appropriateness of imposing a penalty:

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.

In my view, a penalty is required to motivate this employer and other employers to comply in the future. I find that the employer should have been aware of the hazards and the extent that the *Regulation* was being violated given the past violations of the same sections of the *Regulation*. Furthermore, the issues with slipping and tripping hazards on the floor, stacked materials that were unrestrained, and unsecured gas cylinders, were all obvious safety hazards that the employer should have been aware of. While the employer made improvements to its health and safety program following the November 2022 inspection, given the number of repeat violations in both the March 2023 and June 2024 inspections, I am not satisfied that it has demonstrated that it has an effective overall approach to managing health and safety.

In addition, on December 5, 2022, the Board sent the employer a warning letter regarding the orders arising from the November 2022 inspection. That letter noted the similarity between violations of the *Regulation* observed in the November 2022 inspection and a prior, November 2020 inspection. Despite this, the Board found a number of similar violations in the June 2024 inspection. As such, I am not satisfied that another enforcement tool would be more appropriate.

After weighing the relevant factors, I find that the imposition of a penalty against the employer is warranted.

The Penalty Amount

The Board imposed a penalty of $87,187.95 on the employer.

Policy item P2-95-5, *OHS Penalty Amounts*, sets out the calculation procedure for administrative penalties. 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 amount cannot be less than the minimum amount of $1,250. In this case, the Board calculated that amount to be $87,184.95, which I find accords with the policy.

The policy further provides for the application of multipliers to the initial amount. No multipliers were applied in this case.

The next step in the calculation of the policy amount is to determine whether any variation factors apply. The policy states that the basic amount of the penalty 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. In this case, I am not satisfied that there are any exceptional circumstances such that an upward or downward variation of the penalty is warranted. Accordingly, a variation of the penalty is not warranted.

As a result, I find that the Board properly imposed an administrative penalty of $87,187.95 on the employer on the employer. I deny the employer's request.

Conclusion

As a result of this review, I confirm the Board's August 22, 2024 decision.

Sarah Frost
Review Officer
Review Division