REVIEW DECISION

Re: **Review Reference #: R0324101**
Board Decision under Review: May 7, 2024

Date: **May 2, 2025**

Review Officer: **Jefferson Rappell**

Introduction and Background

The employer is a home and garden improvement company and registered with the Workers' Compensation Board ("Board"), operating as WorkSafeBC. The employer operates 29 fixed locations in British Columbia. It also owns D which operates three stores in British Columbia that sell building materials. The Board assigned the employer to classification unit 741014, *Home Improvement Centre*. While D has Board coverage under the employer's account, the Board assigned D to classification unit 742010, *Building Material or Packaged Petroleum Product Wholesale*.

On February 6, 2024, a Board officer inspected one of the store locations of D, including the first aid room, warehouse and lumber yard at that location. During the inspection, the Board officer was accompanied by N (the yard manager) and L (a Joint Occupational Health and Safety Committee member). The Board officer noted that N was unable to provide evidence that the workplace had first aid procedures, nor were there any posted first aid procedures. The Board officer also observed that an oxygen tank in the first aid room and empty propane tanks near the refueling station were not secured from falling or rolling. Furthermore, while conducting the inspection, the Board officer observed a forklift driver operating a forklift without a seatbelt.

In a February 9, 2024 Inspection Report ("IR"), the Board issued five orders to the employer, which included orders for violations of sections 3.17(1), 5.38(2) and 16.5(1) of the *Occupational Health and Safety Regulation* ("*Regulation*"). The employer did not request a review of these orders.

In the May 7, 2024 IR that is the subject of this review, the Board imposed an administrative penalty of $391,534.13 against the employer, based on the February 6, 2024 violations of sections 3.17(1), 5.38(2) and 16.5(1) of the *Regulation*.

The employer requests a review of the Board's May 7, 2024 decision and its representative ("ER") submits that the employer does not dispute that an administrative penalty may be appropriate in these circumstances. However, the ER argues that the calculation of the penalty is inconsistent with the applicable law and policy. The ER states that the penalty should be assessed as a location violation because the Board officer did not consider that D operates as a

separate division of the employer and is assigned to a different classification unit than the employer. The ER notes that the employer and D are operated as entirely separate businesses under one organizational entity. The ER submits that while leadership of each business may collaborate from time to time in good faith, they are not obligated to provide resources or assistance to one another. The ER also submits that the administrative penalty should be reduced by the maximum amount permitted considering the penalty is disproportionate to the employer's moral blameworthiness.

The employer's Joint Health and Safety Committee worker representative and the union at the worksite were given notice of this review. The union is participating in this review but did not provide submissions.

I note that the ER's submissions start with a paragraph stating that the submissions contain confidential information and are provided in confidence. It also says that pursuant to section 21(1) of the *Freedom of Information and Protection of Privacy Act* and section 53(5) of the *Act*, "the Head of the Board must refuse to disclose any information contained herein, including this submission, and all the exhibits attached hereto."

I have considered the ER's submissions in this regard, and I note that section 53(1) of the *Act* says that a person must not disclose information with respect to a trade secret, or with respect to a work process, or that is exempted or subject to a claim for exemption as confidential business information in respect of a hazardous substance, *except for the purpose of administering this Act and the regulations or as otherwise required by law*. [emphasis mine] Disclosure of evidence and submissions to the parties on review is a fundamental aspect of natural justice. Furthermore, the ER has not explained what information in its submissions might be a trade secret, work process or exempted as confidential business information in respect of a hazardous substance. As a result, the Review Division disclosed the employer's submissions to the participating union.

In the course of this review, additional comments were requested from the Board. The Review Division subsequently obtained comments from the Board officer and a Board Investigations Legal Officer ("ILO"). These comments were disclosed to the employer, and the ER provided additional 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.

Preliminary Matters

The ER has cited prior decisions of the Review Division and the Workers' Compensation Appeal Tribunal ("WCAT"), as well as case law, in support of the arguments on review. I note that section 339(1) of the *Act* states that the Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent. As a result, while I have considered the ER's submissions, I will only address the reasoning in the prior decisions and case law that I find relevant to the questions of fact and law arising in this case.

I also note that in its initial submissions, the ER referred to the employer and D as separate independent businesses, and stated that D is a separate division of the employer. The ER also submitted that the employer had no legal authority to implement health and safety at D's locations. Further, the ER advised that because of the separation between the employer and D, the employer was not made aware of the prior violations that occurred at D's locations.

In the comments on this review, the ILO stated that at all relevant times to this review, the employer was registered with the Board in two separate classification units but it was not divisionally registered, and it had multiple permanent fixed locations. The ILO noted that the ER's submissions do not refer to the employer and D as separate legal entities, but if that were the case, the employer's registration with the Board would need updating. The ILO stated that if they are not separate legal entities, any limits on the employer's authority over D, particularly over its health and safety, would be the result of business decisions for which it should bear the legal consequences.

In the ER's response to the ILO's comments, the ER confirmed that the employer is the sole legal entity and that it bears legal responsibility for the penalty imposed as a result of the violations at one of D's locations. The ER did not dispute that the employer was not registered divisionally.

I am satisfied from the evidence of the ILO, and confirmed by the employer, that D is not a separate legal entity, and that the employer bears legal responsibility for the penalty imposed as a result of violations that occur at D's locations. I am also satisfied that the employer is not divisionally registered.

Issue

The issue on this review is the Board's decision to impose an administrative penalty of $391,534.13 on the employer.

Reasons and Decision

The Violations

The Board imposed the administrative penalty under review based on the employer's February 6, 2024 violations of sections 3.17(1), 5.38(2) and 16.5(1) of the *Regulation*. As the employer did not request a review of these orders, I have no jurisdiction to consider whether these orders were properly issued, and they stand. However, I must still be satisfied that the underlying facts of the violations support a penalty against the employer. I will address below the specific violations upon which the Board based the administrative penalty.

Section 3.17(1) of the *Regulation* concerns occupational first aid. It states that the employer must keep up-to-date written procedures for providing first aid at the workplace including:

(a) the equipment, supplies, facilities, first aid attendants and services available,

(b) the location of, and how to call for, first aid,

(c) how the first aid attendant is to respond to a call for first aid,

(c.i) If there are any barriers to first aid being provided to injured workers, how I injured workers will be accessed and moved,

(d) the authority of the first aid attendant over the treatment of injured workers and the responsibility of the employer to report injuries to the Board,

(e) who is to call for transportation for the injured worker, and the methods of transportation and calling,

(e.i) if emergency transportation is required by section 3 of Schedule 3-A, the location of the method of emergency transportation, and

(f) prearranged routes in and out of the workplace and to medical treatment.

Section 5.38(2) of the *Regulation* concerns substances under pressure. It states 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.

Section 16.5(1) of the *Regulation* concerns the general operating requirements for mobile equipment. It states that authorized riders of mobile equipment must use seat belts whenever the mobile equipment is in motion or engaged in an operation that could cause the mobile equipment to become unstable, if the

mobile equipment has seat belts required under the *Regulation*, another law of British Columbia or a law of Canada, or installed by the manufacturer of the mobile equipment.

In the initiating IR, the Board officer noted that N was unable to provide evidence that the workplace had first aid procedures, nor were there any posted first aid procedures. The Board officer also observed that an oxygen tank in the first aid room and empty propane tanks near the refueling station were not secured from falling or rolling. Furthermore, while conducting the inspection, the Board officer observed a forklift driver operating a forklift without a seatbelt. The employer has not disputed the Board officer's evidence in this regard, and I am satisfied that the underlying facts support a conclusion that the employer was in violation of sections 3.17(1), 5.38(2) and 16.5(1) of the *Regulation*.

I find, therefore, that the violations upon which the Board based the imposition of the administrative penalty have been established. The next question before me is whether the administrative penalty was appropriate, and if so, the amount.

The Administrative 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 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 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;
- The employer violated section 73 of the *Act*;
- The employer violated section 79 of the *Act*;
- The employer violated a stop work order or stop use order; or
- The Board considers that the circumstances warrant a penalty.

When determining whether the employer previously violated the same, or substantially similar, sections of the *Act* or *Regulation*, Item P2-95-1 states that the Board will generally consider violations at different fixed locations of

a multi-site employer together to determine whether there have been repeat violations. However, if a violation is a location violation, the Board will only consider violations at that location to determine whether it qualifies as a repeat violation.

Item P2-95-1 also states that a location violation is a violation by an employer with multiple fixed locations who, at the time of the violation, was doing all of the following:

a) effectively communicating with all locations regarding health and safety concerns;

b) providing adequate training to managers and others who implement site health and safety programs;

c) making local management accountable for health and safety; and

d) providing local management with sufficient resources for health and safety.

In the Report for Administrative Penalty, the Board officer considered the requirements of Item P2-95-1 for a location violation. The Board officer determined that while the employer operates multiple fixed locations, the violations were not location violations.

The Board officer determined that the employer has a history of repeat violations that may indicate that there is a communication gap in regard to health and safety. The Board officer advised that the employer has a history of numerous violations of the *Regulation* and *Act* across many locations. The Board officer noted that the employer received a warning letter on October 7, 2021 for repeat seatbelt violations, and an administrative penalty on March 3, 2022 for repeat pallet racking violations.

The Board officer also advised that on February 28, 2024, he and his supervisor met with representatives of the employer and D. The employer representative indicated that the employer and D were operating independently of one another, and that the employer was restructuring its operations as of February 1, 2024. The representative for D advised that in the past, it left management of the health and safety program up to each store manager's discretion, and essentially, for the purposes of health and safety, each workplace was independent of each other.

I have considered the evidence and submissions, and I find that the evidence does not support a conclusion that the employer was effectively communicating with all locations regarding health and safety concerns. In making this finding, I place significant weight on the evidence of the employer representative and the

representative for D at the February 28, 2024 meeting. The employer representative advised that the employer and D had been operating independently of one another. The representative for D confirmed this, noting that it left management of the health and safety program up to each store manager's discretion, and essentially, for the purposes of health and safety, each workplace was independent of each other.

Based on the employer's own evidence that it was operating independently from D, I am satisfied that the employer was not effectively communicating with all locations regarding health and safety concerns. In the submissions, the ER asserted that while leadership of the employer and D may collaborate from time to time in good faith, they are not obliged to provide resources or assistance to one another. Furthermore, the ER advised that because of the separation between the employer and D, the employer was not made aware of the prior violations that occurred at D's locations.

I am satisfied that based on its own evidence, the employer was not involved in the management of the health and safety at the location of the violations, or at the locations of D generally. The first factor in Item P2-95-5 requires that the employer effectively communicates with its locations regarding health and safety. By leaving the management of health and safety to D, and not being made aware of the violations at D's locations, I cannot find that the employer was effectively communicating with its D locations.

I acknowledge that the employer provided some communication to D about health and safety, including a weekly email discussing health and safety best practices, and monthly communications, including a conference call, to discuss safety issues. While I have considered this evidence, I do not find that it is sufficient to determine that the employer was effectively communicating with all of its locations regarding health and safety concerns when it was not made aware of the prior violations that occurred at D's locations. I note, for example, that the yard manager indicated to the Board officer that the employer had an ongoing issue with compliance in wearing seatbelts. If the employer had been effectively communicating with D, it would have been aware that there was an ongoing issue with the use of seatbelts at the worksite, which it could have addressed.

As a result, I find that the evidence strongly supports a conclusion the employer was not effectively communicating with all locations regarding health and safety concerns. As Item P2-95-1 requires an employer to be doing all of the listed requirements, by failing to meet this requirement, the violations cannot be considered location violations. This means the employer's violations at other locations can be considered in determining if the violations before me are repeat violations.

In the Report for Administrative Penalty ("RAP"), the Board officer listed the employer's history of violations of the same or substantially similar sections of the *Regulation*. Going back to November 2019, these included three violations of section 3.17(1), two violations of section 5.38(2) and three violations of section 16.5(1). The Board also issued the employer a warning letter on February 14, 2022 in relation to a September 17, 2021 violation of section 16.5(1) of the *Regulation*. Based on this evidence, I am satisfied that the employer previously violated the same sections of the *Regulation*, and a penalty must be considered in the circumstances.

Section 95(3) of the *Act* states that an administrative penalty under this section must not be imposed if the employer establishes that it exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. Item P2-95-1 states that due diligence means taking all reasonable steps to comply.

The employer provided due diligence submissions which were considered by the Board officer in the RAP. I will consider whether the employer exercised due diligence for each of the violations upon which the administrative penalty is based, in turn.

Concerning the order under section 3.17(1) of the *Regulation*, in the due diligence submissions, the ER notes that first aid procedures which meet the requirements of section 3.17(1) have now been posted at the location of the violations and its Safety Manual includes its policies that address the required first aid procedures. However, the employer has not disputed that first aid procedures which meet the requirements of section 3.17(1) were not posted at the worksite at the time of the inspection.

I note that due diligence only concerns the employer's actions to prevent the violation, and not any actions it may have been taken after the violation. As a result, posting first aid procedures that meet the requirements of section 3.17(1) after the violation occurred is not evidence of due diligence in preventing the violation.

I have also considered the information in the employer's Safety Manual, but I note that the forms included in the Safety Manual are generic in nature and do not provide information specific to the location at issue, as required under section 3.17(1). For example, these forms do not provide any information about the location of first aid at the violation worksite, any specific names or telephone numbers regarding who to call for first aid, any barriers to first aid at this location, who to call for emergency transportation, and the specific location of emergency transportation with prearranged routes in and out of the workplace and to medical treatment.

While I acknowledge that the employer had generic forms related to first aid procedures in its Safety Manual, I am satisfied that the employer did not ensure that there was information specific to the location posted at the workplace. It is also clear to me that the employer did not take all reasonable steps to comply with section 3.17(1) prior to the violation. For example, the employer did not demonstrate that it had a system in place for ensuring that there were first aid procedures in place that were specific to the worksite.

Furthermore, section 3.17(1) requires that the employer keep “up-to-date” written procedures for providing first aid at the workplace. The employer has not indicated that it has any process in place to ensure that the workplace specific information that should be contained in the first aid procedures are up-to-date. Accordingly, I find that the employer did not exercise due diligence to prevent this violation.

With regard to section 5.38(2) of the *Regulation*, the ER stated that the employer stored cylinders in a secure cage at the location where the violation occurred. Also, the joint health and safety committee conduct regular walk throughs of the entire premises to ensure that hazards are minimized, including ensuring that cylinders are stored in a safe manner. The ER advised that where a cylinder is noted as being stored improperly, the issue is promptly rectified. Also, the Safety Manual requires that all cylinders be stored in an upright position and restrained from falling and the associated checklist also requires that storage areas must be monitored.

I find that the employer did not take all reasonable steps to comply with section 5.38(2). While the employer has indicated that the joint health and safety committee conducted regular walk throughs of the entire premises to ensure that hazards are minimized, including ensuring that cylinders are stored in a safe manner, it has not indicated the regularity of those inspections, or provided sufficient evidence of these inspections such that I can conclude the employer was acting with due diligence. Furthermore, I note, as the Board officer did, that the employer has not provided evidence that it had a plan of corrective actions in place for situations where it found compressed gas cylinders that were non-compliant. Only inspecting for these hazards may identify a violation that has occurred, but without a system of corrective actions, there can be no reasonable expectation that the violations will stop. As a result, I am not satisfied that the employer was duly diligent in these circumstances.

With regard to section 16.5(1) of the *Regulation*, the ER stated that current certification is a prerequisite for operating a forklift, and workers are advised of the importance of wearing a seatbelt during the certification process. It also has its own training and a seatbelt awareness online module. Additionally, supervisors at that location have received specific instruction from management to observe workers using forklifts and ensure seatbelts are being used at all times. Furthermore, immediately following the inspection on February 6, 2024,

management at the violation location issued a written memorandum to all workers in respect of the requirement to utilize a seatbelt while operating a forklift.

As noted above, the employer's actions after the violation are not relevant to the issue of whether it acted with due diligence. I accept that the employer required the necessary training for forklift operators, which included information about mandatory seatbelt use. I also accept the employer's evidence that supervisors at that location had received specific instruction from management to observe workers using forklifts and ensure seatbelts were being used at all times. However, the employer has not provided evidence of what steps it took to have workers comply with the seatbelt requirement, such as interventions or discipline it imposed on workers who failed to comply. I find this particularly important given that the yard manager indicated that they had an ongoing issue with compliance in wearing seatbelts.

It does not matter what training a worker receives or how much an employer inspects for seatbelt use if it takes no further steps, such as disciplining workers who fail to comply, so as to impress upon workers the importance of complying with the requirements going forward. In my view, the evidence shows that the employer failed to take all reasonable steps to comply, and it did not exercise due diligence.

In summary, I find that the employer previously violated the same, or substantially similar, sections of the *Regulation*, and it did not exercise due diligence. As a result, a penalty must be considered.

Factors Warranting Imposition of a Penalty

When considering the appropriateness of a penalty, Item P2-95-1 outlines some additional factors that 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 (specific deterrence) and other employers (general deterrence) 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.

The first factor I must consider is the potential for serious injury, illness or death. I am satisfied that in this case, there was the potential for serious injury, given the nature of the employer's violations. Specifically, I am satisfied that not wearing a seatbelt while operating a forklift creates a serious risk of injury in the event of an accident or tip over. I also find that not having the required first aid procedures posted at the worksite could significantly increase the potential for serious injury, illness or death because information such as first aid procedures and the location and best routes to medical treatment would not be readily available in the event of an emergency situation. Any additional time taken to determine these first aid procedures would mean a worker may have to wait for potentially vital medical treatment. I am satisfied, therefore, that the first factor supports the imposition of a penalty.

Considering the second factor, I find that the employer should have been aware of the hazards involved in violations. As noted in the RAP, the employer's five-year compliance history indicates that it has been cited for multiple violations of each of section 3.17(1), 16.5(1) and 5.38(2) of the *Regulation*. The employer is a large, experienced employer and should have been aware of the violations, particularly the lack of proper written first aid procedures, and non-compliance with seatbelt use on forklifts.

I also find that the overall compliance history of the employer supports a conclusion that the penalty is needed to motivate the employer and other employers to comply in the future. In addition to the employer's multiple violations of the sections of the *Regulation* upon which the penalty is based, the employer received a warning letter in 2022 in relation to violations of section 16.5(1) of the *Regulation*. Furthermore, the employer received a penalty in 2022 for violations of the *Regulation* unrelated to the violations that are the subject of this review.

I am satisfied that this compliance history of numerous repeat violations also demonstrates a lack of effectiveness in the employer's overall approach to managing health and safety. I also find that the employer's arrangement to allow its D locations to manage their own health and safety demonstrates a lack of effectiveness in the employer's overall approach to managing health and safety.

As I have discussed above, the employer and D are not separate firms. D is part of the employer firm, and as such, the employer has responsibilities under the *Act* and the *Regulation* for health and safety at all of its locations, including D's. However, allowing D to operate its health and safety program without suitable

oversight, and treating D as an independent entity regarding health and safety matters, resulted in a lack of effectiveness in the employer's overall approach to managing health and safety.

After considering the factors in Item P2-95-1, I find that an administrative penalty is the most appropriate means to encourage the employer, and other employers, to comply with its obligations under the *Act* and *Regulation* in the future.

For these reasons, I confirm the decision to impose an administrative penalty in this instance.

The Administrative Penalty Amount

Item P2-95-5, *OHS Penalty Amounts*, states that to determine the amount of an administrative penalty, the Board will ordinarily first determine the penalty payroll. This 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.

Item P2-95-5 identifies circumstances in which the Board will use less than the total payroll of the employer to determine the penalty payroll. These include where a firm has more than one permanent location, is divisionally registered, or has more than one classification unit. In this case, there is no dispute that the employer has more than one permanent location and it has more than one classification unit.

Policy item P2-95-5 states that where a firm has more than one permanent location or is divisionally registered, the Board will determine the penalty payroll based on the lowest applicable amount of the following where the violation occurred:

(i) fixed location,

(ii) division, or

(iii) classification unit,

if the employer promptly provides:

(i) the necessary payroll information for that location, classification or division to the Board (signed by a professional accountant, the President or a senior manager of the employer) and cooperates in any audit that WorkSafeBC considers necessary; and

(ii) sufficient evidence to establish that, at the time of the violation, the employer was doing all of the following at the applicable location, classification or divisional level:

a. effectively communicating with all locations regarding health and safety concerns,

b. providing adequate training to managers and others who implement site health and safety programs,

c. making local management accountable for health and safety, and

d. providing local management with sufficient resources for health and safety.

If I determine that the violations before me are location violations, the penalty should be based on the payroll of the fixed location or the classification unit of D, whichever is smaller. However, I find that these are not location violations, given that the employer has not provided sufficient evidence to establish that at the time of the violation, the employer was effectively communicating with all locations regarding health and safety concerns.

On review, the ER argues that there are two key differences between the language used in Item P2-95-1 and Item P2-95-5. The ER submits that Item P2-95-5 makes reference to “sufficient evidence”, which is indicative of the Board’s intent to set a threshold for evidence that must be supplied by the employer to satisfy the requirements of the policy. Item P2-95-5 also makes reference to “the applicable location, classification or divisional level”, which the ER submits indicates that the employer is entitled to provide evidence in respect of the four listed factors applicable to either the location, classification or divisional level, and all such evidence must be considered by the Board.

I have considered the ER’s argument in this regard. I agree that in this case, because the employer has more than one fixed location, Item P2-95-5 requires the Board to consider the information provided by the employer about payroll and the four factors outlined above.

Concerning the evidentiary requirements of Item P2-95-5, the ER cites a decision of the Workers’ Compensation Appeal Tribunal (WCAT A2101247). In that decision, the Vice Chair considered the matter and found that the applicable standard of proof is the balance of probabilities. The Vice Chair indicated that the word “sufficient” describes the evidence itself, and that there must be adequate evidence, when weighed on a balance of probabilities, to support the conclusion that the employer is meeting all four identified criteria. The Vice Chair interpreted the policy to mean that if an employer’s overall safety program meets the four

hallmark criteria, it has a robust safety program, and the contravention reflects a failure at the local level, rather than company-wide.

I agree with the Vice Chair that the worker "sufficient" describes the evidence itself, and that there must be adequate evidence, when weighed on a balance of probabilities, to support the conclusion that the employer is meeting all four identified criteria. The Vice Chair's analysis of the policy as it relates to the evidentiary requirements of Item P2-95-5 is consistent with my view of the policy, and I adopt the Vice Chair's reasoning in this regard. I also agree with the Vice Chair that an employer's overall safety program must meet the four hallmark criteria in Item P2-95-5 for the contravention to reflect a failure at the local level, rather than company-wide.

I have considered the evidence and the ER's submissions concerning the four criteria outlined in Item P2-95-5. In my view, the employer has not provided adequate evidence, when weighed on a balance of probabilities, to support the conclusion that at the time of the contravention it met all four criteria. More specifically, I find that the evidence does not support a conclusion that, weighed on a balance of probabilities, the employer provided sufficient evidence that it was effectively communicating with all locations regarding health and safety concerns.

As I have noted above, at the February 28, 2024 meeting, the employer representative advised that the employer and D had been operating independently of one another. The representative for D confirmed this, noting that it left management of the health and safety program up to each store manager's discretion, and essentially, for the purposes of health and safety, each workplace was independent of each other. In the submissions, the ER asserted that while leadership of the employer and D may collaborate from time to time in good faith, they are not obliged to provide resources or assistance to one another. Furthermore, the ER advised that because of the separation between the employer and D, the employer was not made aware of the prior violations that occurred at D's locations.

For the same reasons I have cited above in my analysis of Item P2-95-1, I find that on a balance of probabilities the employer did not provide sufficient evidence that it was effectively communicating with all locations regarding health and safety concerns. By absolving itself of its ongoing duties to ensure health and safety at D's locations and leaving the management of health and safety to D, I find that the employer fell well short of providing sufficient evidence that it was effectively communicating with all locations regarding health and safety concerns.

In order for the Board to use the penalty payroll for a location, Item P2-95-5 requires that the employer's overall safety program meets the four hallmark criteria. As I have found that the first criterion was not met, it is appropriate, as

the Board did, to calculate an initial amount of the penalty based on the penalty payroll of the employer as a whole, and not the fixed location or the classification unit where the violation occurred.

Item P2-95-5 then requires the Board to consider the application of multipliers. A multiplier results in the initial amount being multiplied by two, and each multiplier is additive. There were no applicable multipliers in this case.

Item P2-95-5 provides that variation factors should be considered. It states that in exceptional circumstances only, the penalty may be reduced or increased by up to 30%. The policy also provides that circumstances that are adequately addressed by other parts of this policy are not exceptional circumstances.

The employer requests a reduction in the penalty amount, citing exceptional circumstances that it argues warrant a reduction in the penalty amount. The ER submits that the principal of proportionality requires the consideration of the circumstances of the case to determine the degree of "blameworthiness" of the employer and the nature of the violation that is being scrutinized.

In support, the ER has cited a July 21, 2021 decision of the Workers' Compensation Appeal Tribunal (WCAT A2001695) regarding a penalty that was deemed to be grossly disproportionate to the employer's actions. That decision concerned a situation where the employer was clearly aware of the regulatory requirements at issue, and tried to impress upon its crews the necessity of adhering to that section of the *Regulation* prior to the violation. The Vice Chair also accepted that the violation in question involved a fleeting moment of poor judgment on the part of one worker. The Vice Chair determined that "the fact that policy gives the decision-maker discretion to assess the appropriateness of a penalty in a given case, after considering the various factors listed, empowers the decision-maker to consider all of the circumstances, including the 'blameworthiness' of the employer and the seriousness of the infraction, and then determine whether a monetary penalty is appropriate."

I find the circumstances before the Vice Chair were significantly different than those on this review. In that case, the Vice Chair felt that a monetary penalty in the circumstances would be grossly disproportionate to the firm's actions and to the overall "moral blameworthiness" of the employer in the incident, which was minor. In making this decision, the Vice Chair cited the positive steps that the employer had taken to prevent such an incident from occurring, the fleeting nature of the incident, the fact that no person was harmed, and the firm's overall approach to health and safety.

In contrast, I have found above that the employer did not do many things that a diligent employer would have done to prevent the violations at issue. Furthermore, the employer chose to let D be responsible for health and safety at its own locations, with little oversight. Also, in this case, the violations upon which

the penalty is based were not fleeting in nature, and they were all violations for which the employer had received orders in the past five years. In my view, the "moral blameworthiness" of the employer is completely different from that of the employer in the appellate case.

While I acknowledge that the administrative penalty under review is large, the amount is a reflection of the size of the employer's payroll. Item P2-95-5 states that the policy is designed to ensure that employers of similar size generally receive similar penalty amounts in similar cases. I do not find that the amount of the penalty suggests that it was disproportionate to the employer's moral blameworthiness. Rather, based on its failure to exercise due diligence to prevent the violations, and its view that it was not responsible for ensuring health and safety at D's locations, I am satisfied that the employer was sufficiently morally blameworthy to warrant the administrative penalty.

In this case, the Board officer did not find any exceptional circumstances that would warrant reducing or increasing the amount of the penalty. After considering the ER's submissions, I also do not find any exceptional circumstances that would warrant reducing or increasing the amount of the penalty.

As a result, I find the administrative penalty of $391,534.13 was appropriately calculated in accordance with the facts, law and policy.

Accordingly, I deny the employer's request.

Conclusion

As a result, I confirm the Board's decision dated May 7, 2024.

Jefferson Rappell
Review Officer
Review Division