REVIEW DECISION

Re: **Review Reference #: R0328895**
Board Decision under Review: September 10, 2024

Date: **April 25, 2025**

Review Officer: **Tony Fletcher**

Introduction and Background

The employer is an animal feed manufacturer with a corporate location/head office and three operating locations. On June 26, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected one of the employer's operating locations in the province, a retail store with indoor and outdoor storage areas.

In three inspection reports dated June 26, 2024, the Board issued a number of orders to the employer, including violations of sections 21(1)(a) of the *Workers Compensation Act ("Act"),* and sections 3.2, 3.5, and 3.23(2) of the *Occupational Health and Safety Regulation* ("*Regulation*"). Among other violations, the Board officer determined that the employer had not posted monthly safety meeting minutes, was not completing regular safety inspections of the workplace, had failed to implement a formal new worker orientation and training program, and did not have a bullying and harassment policy or reporting procedures for the worksite.

In the September 10, 2024 decision that is the subject of this review, the Board imposed an administrative penalty of $23,723.13 on the employer in respect of the above-noted violations of the *Act* and *Regulation.* The Board prepared a Report for Administrative Penalty ("RAP") explaining the reasons for the penalty.

The employer seeks a review of this penalty and submits that any penalty should be based on the 2023 payroll for its retail stores rather than its overall payroll of $2,372,313.00, which was used to calculate the penalty.

There are no other parties to this review. At the request of the Review Division, the investigating Board officer provided comments in a December 18, 2024 memo, which was disclosed to the employer representative who did not provide any submissions in response.

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 a $23,723.13 administrative penalty against the employer.

Reasons and Decision

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

The Violations

As the employer did not request a review of the initiating orders set out above, I have no jurisdiction to consider whether the orders were properly issued, and they stand. However, I must still consider whether there is a proper factual basis for imposing the penalty resulting from these orders. I note the employer has indicated in the request for review form that they are not disputing the violations identified by the Board officer on June 26, 2024.

Section 3.2 of the Regulation

Section 3.2 of the *Regulation* states that if any operation where the workforce is less than that referred to in section 3.1(1) the employer must (a) initiate and maintain a less formal program based on regular monthly meetings with workers for discussion of health and safety matters, (b) ensure that meetings are directed to matters concerning the correction of unsafe conditions and practices and the maintenance of cooperative interest in the health and safety of the workforce, and (c) maintain a records of the meetings and the matters discussed.

During the inspection, the Board officer met with the employer's store manager, G, the warehouse manager, M, and a worker representative, C. The Board officer noted that monthly safety minutes were not posted. When the Board officer asked G for records of monthly safety meetings, he was told that monthly safety meetings did not take place at this worksite.

The employer does not dispute this, and I find that the employer's violation of section 3.2 of the *Regulation,* by not having regular monthly safety meetings, is established on the evidence.

Section 3.5 of the Regulation

Section 3.5 of the *Regulation* states that every employer must ensure that regular inspections are made of all workplaces, including buildings, structures, grounds,

excavations, tools, equipment, machinery, and work methods and practices, at intervals that will prevent the development of unsafe working conditions.

During the inspection, the Board officer was given a tour of the warehouse and outside storage areas. The Board officer discussed the storage racking observed on site along with two pieces of mobile equipment. M advised that they were not completing pre-shift inspections on the mobile equipment and the Board officer observed that one of the pieces, a lift truck, was not equipped with a rear-view mirror. Regarding the metal storage racking, M advised that they did not have racking capacities posted and was unaware of the capacity. The Board officer noted that the racking was fully loaded with product. M said that they did not inspect the racking and were unaware of a damaged section of loaded racking, which the Board officer had noticed and pointed out during the inspection. A stop use order was issued until the racking could be repaired or replaced.

G told the Board officer that they did not conduct any regular safety inspections of the site. They were able to provide the Board officer with a draft safety inspection checklist, but advised that it was not being used.

As a result, I am satisfied that the employer's violation of section 3.5 of the *Regulation,* by not conducting regular inspections of the workplace, has been established on the evidence.

Section 3.23(2) of the Regulation

Section 3.23(2) of the *Regulation* states, in part, that a number of topics (including, but not limited to, the name and contact information for the young or new worker's supervisor, workplace health and safety rules, hazards to which the young or new worker may be exposed, working alone or in isolation, violence in the workplace, and emergency procedures) must be included in young or new worker orientation and training.

During the inspection, the Board officer asked to see the employer's young and new worker orientation and training program and was advised that, while they give new workers a tour of the worksite, they do not use a training and orientation checklist. G then went through some paperwork on her desk and found a Board Young and New Worker Orientation and Training checklist, but stated that they were not currently using that checklist.

Again, I am satisfied that the employer's violation of section 3.23(2) of the *Regulation,* by failing to implement a formal young or new worker orientation and training program, has been established on the evidence.

Section 21(1)(a) of the Act

Section 21(1)(a) of the *Act* states that every employer must ensure the health and safety of all workers working for that employer and any other workers present at a workplace at which the employer's work is being carried out.

The Board officer asked the employer representatives if they had a bullying and harassment policy and reporting procedures for their worksite. They advised that they were not aware of a bullying and harassment policy or reporting procedure for the workplace. They also were unable to produce a bullying and harassment procedure.

As a result, I am satisfied that the employer did not ensure the health and safety of all workers on site by not having a bullying and harassment procedure, and a violation of section 21(1)(a) of the *Act* has been established on the evidence.

As 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, 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*;
- 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 number of the orders issued during the June 26, 2024 inspection were high risk. More specifically, the employer was not ensuring the health and safety of workers at the workplace by not conducting regular inspections, which would have showed the damaged and unsafe storage racking.

Policy item P2-95-2, *High Risk Violations*, sets out how the Board will categorize a violation as high risk. Certain violations are automatically designated high risk because they regularly result in fatalities and serious injuries.

The following criteria are used to determine high risk violations for those violations not automatically designated high risk, such as in this case:

- The likelihood of an incident or exposure occurring; and
- The likely seriousness of any injury or illness that could result if that incident or exposure occurs.

The Board also has guidelines to assist in interpreting and applying prevention policies. Guideline G-P2-9-2, *High risk violations,* explains that when considering the likelihood of an incident or exposure occurring, some of the factors that may be considered include the number of workers exposed, the potential hazards that are present in the particular work or task being performed, whether the hazards have been effectively controlled (ineffective controls usually result in one or more violation orders under the *Act* or *Regulation*) and the circumstances that increase the likelihood of a worker coming into contact with the hazard.

In considering the likelihood of an incident occurring, the Board officer noted on inspection that the employer had seven workers on site. Members of the public were also driving past the damaged storage racking. Most of the upper-level storage racking spots in the drive-through warehouse, including the damaged storage racking, were filled with 1,000-kilogram pallets of feed.

The employer was not conducting regular inspections of the storage racking, was not aware of the section of damaged racking, and was not aware of the maximum load capacity of the racking. Therefore, the hazard had not been effectively controlled.

As there were seven workers on site and multiple other people would be driving past and exposed to the damaged storage racking, and given the likelihood of the damaged racking overloaded with product giving away at some point, there was a strong likelihood of an incident occurring at some point.

In terms of the likely seriousness of any injury or illness that could result if exposure occurred, Guideline G-P2-9-2 states that some of the factors that may be considered are: whether, in circumstances where an incident or exposure occurs, any resulting injury or illness is likely to be serious, or even fatal, due to the nature of the violation; and additional conditions or circumstances at the workplace that would increase the potential outcome of a serious injury, serious illness, or death once the worker is exposed to the hazard.

In this case, if the storage racking gave way and any of the feed pallets were to fall on a passing worker, it was highly likely that this would result in serious injury or death.

Accordingly, I am satisfied that the violation resulted in a high risk of serious injury or death.

The Board officer also noted that the employer operates multiple fixed locations in the province and that the Board will normally consider violations at different fixed locations of a multi-site employer together to determine whether there have been repeat violations. However, if the violation is a location violation, the Board will only consider violations at that location to determine whether there are any repeat violations. For reasons I will set out later when determining the penalty amount, I am satisfied that these are not location violations, and I will consider the violations at the employer's various operating locations in the province to determine if there are repeat violations.

The Board determined that the employer had previously violated the same, or substantially similar, sections of the *Act* or *Regulation* at the same location, or other locations in the province.

For example, the employer, at worksite P in the province, was in violation of section 3.2 of the *Regulation* on May 24, 2023, by not posting the monthly safety minutes. The employer, at worksite B in the province, was in violation of section 3.2(a) of the *Regulation* on May 5, 2021, by not having an informal occupational health and safety program based on regular monthly meetings.

Therefore, the employer has previously violated the same or substantially similar sections of the *Act* or *Regulation.*

As a result, a penalty must be considered in this case.

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 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. 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.

What is reasonable will always depend on the facts of the particular case. Due diligence considers whether reasonable steps were taken before a violation occurs to prevent the violation, and steps taken afterwards are not relevant.

By letter dated July 5, 2024, the Board officer invited the employer to provide information on the matter of due diligence and the employer responded via e-mail on July 30, 2024.

The employer's office manager wrote that they had implemented a health and safety program and educated and trained their managers/supervisors at the various sites. For example, the employer ensures that a manager or supervisor at each of their locations: talks to new workers about safety during orientation; meets regularly with staff to discuss health and safety matters; inspects the workplace areas under their responsibility and promptly responds to unsafe conditions or activities; understands the hazards and takes reasonable measures to control them; uses equipment pre-use checklists and logs; reports any incidents or near-misses for investigation; has policies in place for refusing work, bullying and harassment and the code of conduct. From the evidence, it appears the employer implemented many of these processes after the Board's inspection.

The office manager also provided copies of a number of e-mails and correspondence to the Board that she said proved that the employer acted with due diligence. These included a record of a July 2, 2024 safety meeting, a July 26, 2024 pallet truck pre-use inspection checklist, a July 29, 2024 daily forklift inspection checklist, and a list of employer resources and responsibilities.

While I acknowledge these e-mails and the employer's actions taken after the violations, the onus is on the employer to establish that it took all reasonable steps to ensure the safety of workers before the violations. Evidence regarding actions taken after the violations is not relevant to determining if an employer exercised due diligence to prevent the violations or non-compliance from occurring.

The employer's materials also included a May 29, 2023 e-mail to the various location managers noting the recent inspection at worksite P and reminding managers to, among other things, have monthly safety meetings, conduct regular inspections, follow a new worker orientation and training program, and have a bullying and harassment policy for all workers.

In another e-mail dated April 12, 2024, an employer manager was reminded to have monthly documented safety meetings, ensure that regular inspections were made of the buildings, grounds, tools and equipment, and was advised that bullying and harassment policies and procedures were in place.

The employer made no further due diligence submissions on review.

As noted by the Board officer, a duly diligent employer would have ensured that all of its managers, supervisors and workers implemented the occupational health and safety programs, policies and training required for their worksites. A duly diligent employer would have ensured that documentation for its occupational health and safety programs was current and available for review. A duly diligent employer would have also ensured that storage racking in its retail locations was inspected regularly and was safe for use. Additionally, effective supervisory activities would include not only informing workers and/or location managers of the requirements of the employer's occupational health and safety programs, but would also include supervision and inspection steps to monitor and ensure compliance, as well as a disciplinary component for those workers not in compliance.

The employer has shown that it has not been duly diligent in ensuring its retail locations followed its occupational health and safety programs and had documentation of its policies and programs up to date and available for review. The employer was also not duly diligent in ensuring that its retail locations' storage racking was inspected regularly, and by not having methods of ensuring compliance with its occupational health and safety programs and policies.

In summary, I find that the employer has not demonstrated that it took all reasonable care to prevent the violations under the *Regulation* on which the penalty is based. Accordingly, I find that the employer was not duly diligent.

Additional Factors in Deciding Whether to Impose a Penalty

Policy item 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:

    - 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.

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, in the circumstances, the high potential for serious injury or death from the violations, as already established above. This factor supports a penalty.

I have also considered the likelihood the penalty would motivate the employer to comply in the future, taking into account one or more of the factors listed in policy above. Given that the employer has been in business since 1973, operated at three locations, and has been subject to previous inspections in May 2021 at worksite B and in May 2023 at worksite P, it should have been aware of the hazards of not having regular safety meetings or conducting regular inspections of its warehouses and other areas.

I am also satisfied that the employer was or should have been aware the *Act* or *Regulation* were being violated, given that they knew that monthly safety meetings were required, but did not take place, and that they had safety inspection and new worker orientation checklists, but were not using them.

The Board officer further noted that after multiple inspections, the employer had 23 violations within the previous four years, six of which were repeat violations and three of which were high risk.

It is evident, therefore, that the employer's overall approach to managing health and safety, particularly with respect to conducting regular safety meetings and inspections, has not been effective in recent years.

Therefore, I find 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 $23,723.13 against the employer.

Policy item P2-95-5, *OHS Penalty Amounts*, sets out how the penalty amount is determined. 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 Board applied 0.5% to the employer's total assessable payroll ($2,372,313.00) resulting in the base figure of $11,861.57.

The employer argues that the initial amount should be based on a lower payroll figure and that any violation should be considered a location violation. The employer's officer manager wrote in her July 30, 2024 e-mail to the Board that the results of the Board's inspection of June 24, 2024 should be considered as a location violation, as that location had all the procedures and policies in place, but lacked the documentation to prove they were being implemented.

On review, the employer submits that as an animal feed manufacturer, with a total payroll value of $2,372,313.00, they are federally regulated. However, their feed stores are regulated provincially by the Board and the value of the 2023 payroll for the retail stores was $761,261.20. The employer submits that there was no health and safety violation by the federally regulated component of the employer and that payroll amount should not be used.

Under part 1(b) of the policy, where a firm has more than one permanent location or is divisionally registered (Item AP5-245-1), 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, in part:

(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.

In this case the employer has more than one fixed permanent location as it has a number of retail locations in the province. Therefore, in order for the penalty payroll not to be based on the employer's total payroll, the employer must show that all the criteria in part 1(b)(ii)(A) through (D) have been met.

In terms of criterion (A), as noted under the due diligence analysis above, the employer had sent e-mails to personnel at the various retail locations in May 2023, and April 2024, reminding managers there to conduct monthly safety meetings, regular inspections, new worker orientation and training, and to follow a bullying and harassment policy.

It appears from this limited evidence that the employer was communicating with its locations regarding health and safety requirements. However, no evidence was provided to show that the employer was taking steps to ensure that locations were complying with these requirements.

With respect to criterion (B), the employer advised in the July 30, 2024 e-mail to the Board that they had educated and trained their managers/supervisors at the various sites. However, the employer has not provided specifics of the education or training, or documentation of successful training, such as training records or certifications.

In terms of making local management accountable for health and safety under criterion (C), the employer advised that it ensures that a competent person (manager or supervisor) at each of its retail locations is trained to, among other things, give new worker orientations, conduct regular meetings and inspections, respond to unsafe conditions/activities, use equipment checklists and logs, and be aware of health and safety policies. However, during the inspection, the Board officer noted that the retail location was not holding formal safety meetings, or conducting regular worksite safety inspection, and the employer has not provided evidence to support that the local manager was being held accountable for the location's health and safety and the deficiencies in implementing its policies and procedures, such as through supervision, inspection and/or discipline measures.

Finally, with respect to criterion (D), resources for health and safety can include training, health and safety manuals, first aid supplies and personal protective equipment. The available evidence does not suggest that there were issues with the employer providing local retail locations with sufficient resources for health and safety. Moreso, the issue would appear to be that there was not an effective framework in place to ensure that the employer's health and safety provisions were properly enacted and enforced.

Given that that all the criteria in part 1(b)(ii)(A) through (D) of policy item P2-95-5 have not been met, the employer's penalty payroll cannot be based on the payroll for the retail stores. I find that the violations are not location violations, and the penalty is appropriately calculated based on the employer's full payroll.

I further note from the Board officer's December 18, 2024 memo that a Board investigations legal officer inquired with the Board's Assessment Department as to the appropriate payroll amount to calculate the penalty, and was advised that the payroll figure used ($2,372,313.00) was the correct amount.

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 amount of $23,723.13. As set out above, I confirm that the violations were high risk. I therefore agree with the determination to apply this multiplier and note no other multipliers apply.

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 Board officer did not identify any exceptional circumstances in this case, and the employer has not submitted that any such circumstances exist. As such, I see no basis to apply a variation factor.

In summary, I deny the employer's request on this review, and confirm the Board's decision to impose a penalty of $23,723.13 against the employer.

Conclusion

As a result of this review, I confirm the Board's decision of September 10, 2024.

Tony Fletcher
Review Officer
Review Division