REVIEW DECISION

Re: **Review Reference #: R0330613**
Board Decision under Review: October 29, 2024

Date: **April 7, 2025**

Review Officer: **Vista Trethewey**

Introduction and Background

On August 13, 2024, a Prevention Officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, attended the employer's worksite to conduct an inspection. The employer had been hired by the prime contractor to carry out exterior siding work on a residential six storey wood frame building construction project.

Two workers who were not wearing fall protection were conducting cleaning work on two different balconies. Worker #1 was working on a second storey balcony and Worker #2 was working on a third storey balcony. The Prevention Officer conducted an investigation and as a result of the inspection the Prevention Officer issued an August 20, 2024 order to the employer for contravening section 11.2(1)(a) of the *Occupational Health and Safety Regulation* ("*Regulation*").

On October 29, 2024 the Board imposed an administrative penalty of $2,500 against the employer for the August 13, 2024 violation of section 11.2(1)(a) of the *Regulation.*

The employer, which is represented, has requested a review of the October 29, 2024 penalty. The employer submits that the penalty should not have been issued and that it exercised due diligence.

The employer's submissions were provided to the Board officer who issued the October 29, 2024 order. At the Review Division's request, the officer provided brief comments, which were disclosed to the employer for a response. The employer's representative provided a further submission in reply.

Section 20(3) of the *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 administrative penalty order against the employer in the amount of $2,500.

Reasons and Decision

The Board's Prevention Officer attended the site on August 13, 2024 and conducted an inspection of the work activities on site. The employer provides services in relation to exterior siding installation. The employer was hired by the prime contractor to carry out the exterior siding installation on the six storey wood frame residential building project. The Prevention Officer met on site with the site Superintendent ("A") and observed two workers conducting cleaning activities on balconies. As indicated, Worker #1 was on a second level balcony and Worker #2 was on a third level balcony.

As part of the Prevention Officer's August 20, 2024 Inspection Report, the Prevention Officer noted that when he arrived on site on August 13, 2024, he observed Worker #1 and Worker #2 cleaning off the second and third storey balconies, respectively, without fall protection. The Prevention Officer also noted that A directed that Worker #1 and Worker #2 go back inside the building, and at this time the Prevention Officer contacted a representative from the employer by telephone. The Prevention Officer also recorded that following the phone conversation, the workers were directed by their employer to conduct other work activity on the interior of the building.

The Violation

The Board imposed the administrative penalty under review based on the employer's violation of section 11.2(1)(a) of the *Regulation*. As the employer did not request a review of that order, I have no jurisdiction to consider whether it was properly issued and, therefore, it stands. However, I must still be satisfied that the underlying facts of the violation support a penalty against the employer.

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

In the report for administrative penalty, the Prevention Officer indicated that on August 13, 2024, he observed two workers, one employed by the employer and the other employed by a different company, working on the second and third storey balconies respectively, but neither worker was using a fall protection system.

The Prevention Officer noted that upon measurement, the second storey balcony was 10 feet 9 inches above the ground. Accordingly, the Board officer

determined that the employer contravened section 11.2(1)(a) of the *Regulation*, as a worker of the employer was not using a fall protection system while working at a height of more than 10 feet.

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

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

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

Criteria for Imposing a Penalty

Under section 95(1) of the *Act*, the Board has the authority to impose a penalty on an employer when, among other things, the employer has failed to comply with the *Act*. As 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 a stop work order, or a stop use order; or
- The Board considers that the circumstances warrant a penalty.

Policy item P2-95-2, *High Risk Violations*, states that certain violations are designated high risk because they regularly result in fatalities, serious injuries and serious illness. Working at a height of over 3 metres (10 feet) without an effective fall protection system is a designated high risk violation.

Where a violation is not designated high risk, policy sets out that the Board will determine whether the circumstances are high risk in each case on the basis of the available evidence concerning:

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

The photographs included in the August 20, 2024 Inspection Report show the second storey balcony that the Prevention Officer observed the worker on while doing some cleaning tasks without fall protection. The picture itself shows different workers on the balcony. The Prevention Officer explained in the February 3, 2025 comments that were provided in response to the employer's submission that on August 13, 2024, he took the picture of the balcony after Worker #1 was back inside the building and measured the height of that second floor balcony where the employer's worker was standing as 10 foot nine inches from grade.

Based on my review of the evidence, I am satisfied that it supports a conclusion that on August 13, 2024 the worker was working at a height of 10 feet or more without an effective fall protection system.

In their submission provided on review the employer does not dispute that their worker was on the balcony that was measured at 10 feet nine inches and conducting some work (sweeping the deck facing the edge of the balcony) without use of a fall protection system. The employer further submits that the worker was only conducting the work activity for a short duration (less than two minutes) on a day when the weather was warm and dry. The employer submits that the balcony floor was level and dry on the date of the inspection and it is their position that therefore there was no risk of tripping or slipping and a low risk of falling.

The employer provided a graph that it indicated was from Board reference material with respect to injury data from 2001 to 2013. It appears that the employer relies on this graph's data to submit that 9% of all workplace incidents between 2001 and 2013 were from falling from a height, and it is the employer's position that a smaller percentage of such injuries involved falling from a height from a dry flat surface. The employer submits that there is a risk of falling from a flat surface if the surface is wet or has frost or ice built up on it, and it takes the position that there was no such risk present on the August 13, 2024 inspection date. The employer further described that the worker on the balcony on August 13, 2024 was wearing safety shoes with good treads

The employer submits that the Prevention Officer did not properly consider the circumstances of the case when concluding that it was a designated high risk violation. The employer also referenced two Workers' Compensation Appeal Tribunal ("WCAT") decisions. Firstly, I note that I am not bound by precedent, and I find the facts of those WCAT decisions distinguishable from this case. In addition, while I am of the view that the policy item referenced above designates the circumstances of this case as automatically of a "high risk" nature, I also find that the nature and height of the potential fall risk and duration of the worker's exposure to the risk would in any event justify a conclusion that the contravention order reflects a "high risk" circumstance.

On review of the Prevention Officer's notes and Inspection Report, I am not satisfied that the weight of the evidence supports that the cleaning work that was conducted on the balconies was for less than two minutes in duration, and I am satisfied that the circumstances of the risk would justify a conclusion that the contravention order reflects a "high risk" circumstance. As a result, even without the mandatory deeming element of the policy, I am satisfied that the circumstances of the contravention are of a "high risk" nature such that it is appropriate to consider imposing an administrative penalty.

I find there 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 item P2-95-9, *OHS Penalties – Due Diligence*, explains that an employer acts with due diligence where the employer shows that it took all reasonable care to prevent the particular event. 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.

In an August 22, 2024 letter, the Prevention Officer invited the employer to provide submissions regarding its due diligence.

The Prevention Officer indicated in the August 20, 2024 Inspection Report that a representative from the prime contractor initially was the one that directed the workers to remove themselves from the balcony and go inside the building. The representative from the prime contractor then contacted the representative from the employer, who instructed the workers to conduct other work activities inside the building which did not require fall protection. The Inspection Report also noted that the Prevention Officer spoke with the representative from the employer by phone, and the representative indicated that their worker had only been on the second floor balcony momentarily and did not reference planning that had been done in advance for the work on the balconies to be conducted with the use of fall protection systems.

In response to the August 22, 2024 letter, the employer sent the Prevention Officer an email that stated they make sure that all their employees wear fall protection when they are above 10 feet. The employer did not provide enclosures with this email. As part of the Inspection Report, the Prevention Officer noted the employer's email response and the lack of any examples of fall protection safety related evidence, including examples of the advance planning that was done or

training that was provided or records with respect to safety, safety meetings and/or inspections.

The employer submits that it has been registered with the Board for several years and has been in good standing for that time. The employer indicated that it provided direction and instruction to their workers (including the worker observed on the second storey balcony on August 13, 2024) to use the fall protection when working at elevation of 10 feet or more. However, the employer did not provide documentary evidence of this instruction and/or training.

On the date of the inspection, the employer provided the representative from the prime contractor and provided the Prevention Officer with a copy of their due diligence checklist completed July 11, 2024, and a Site Safety Inspection done by the same representative on July 11, 2024 that indicated that the fall protection equipment was “okay” and that fall protection plans were completed. Copies of the fall protection plans were not provided. The employer did not provide any evidence supporting that it discussed fall protection with the worker who was observed by the Prevention Officer on August 13, 2024 on the second storey balcony without fall protection.

The employer submitted that it has a good safety record with the Board and complies with the fall protection requirements, but did not provide specifics with respect to this compliance. The employer did not make submissions regarding the reasonable steps it had taken, if any, to prevent the violation to which the penalty related. It provided no evidence as to what training the worker had with respect to fall protection equipment or what processes it had in place to ensure that the worker was complying with health and safety requirements.

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

I conclude that the employer did not take all reasonable care and was not duly diligent in preventing the violation of section 11.2(1)(a) of the *Regulation* and. I will next consider whether a penalty should be imposed.

Additional Factors in Deciding Whether to Impose a Penalty

Policy P2-95-1 sets out three 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.

I have already determined that there was a violation that had a high risk of serious injury or death, which strongly supports the imposition of a penalty.

Concerning the second factor, I find that the employer was aware or should have been aware that section 11.2(1)(a) of the *Regulation* was being violated, as it is an exterior siding work contractor and, as such, working at elevation is an integral part of its regular work activities. According to the report for administrative penalty, the employer's representative acknowledged that he was aware of the fall protection requirements, but since the balcony was only 9 inches higher than 10 feet, and in light of the other factors (weather, worker's footwear and duration of the work conducted), the representative felt that the risk involved with the work was minor in nature.

With respect to the third factor, the employer has received a prior order from the Board on December 22, 2023 with respect to a violation concerning inadequate fall protection. I accept that the employer was aware of the requirement for fall protection for workers working at a height of over 10 feet. From the employer's history with the Board over the past three years, the employer was also aware of their training obligations specific to fall protection training (including use of fall protection equipment including harnesses, lanyards and lifelines) and the requirement to have the certification available for review. The prior similar order in December 2023 and the lack of documentation with respect to training for the worker indicates to me that the employer's management of their health and safety program is ineffective. While I acknowledge the employer's submission that a warning letter should be issued instead of the penalty, given these factors, I am also of the view that an enforcement tool beyond a warning letter was required.

Accordingly, I consider that the penalty is the appropriate enforcement tool to motivate this particular employer, and other employers in the same situation, to comply with the *Regulation* going forward.

The Administrative Penalty Amount

The employer submits that the fall protection violation was not high risk and I have addressed this argument above. The employer submits that the penalty amount should be set as $1,000.

Policy P2-95-5, *OHS Penalty Amounts*, sets out how a penalty is calculated, and involves several steps. The first step is to take 0.5% of the employer's "penalty payroll," subject to a minimum of $1,250 and a maximum of half the statutory maximum. The "penalty payroll" is the employer's assessable payroll for the full calendar year immediately preceding the year in which the incident giving rise to the penalty occurred. In this case, the initial penalty amount was $1,250.00 based on the employer's penalty payroll.

Policy 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. In this case, the Board applied a multiplier because the violation was high risk. As I have determined above, the employer's violation of section 13.33(1) of the *Regulation* was high risk, and therefore, this multiplier applies, doubling the initial amount the penalty.

Policy P2-95-5 also provides that variation factors should be considered. In exceptional circumstances only, a penalty may be reduced or increased by up to 30%. In this case, the Board did not find any exceptional circumstances to warrant reducing or increasing the amount of the penalty. I find that no variation factors should be applied in this case.

In summary, I deny the employer's request on this review, and confirm the Board's decision to impose a penalty of $2,500 on the employer.

Conclusion

As a result of this review, I confirm the Board's decision of October 29, 2024.

Vista Trethewey
Review Officer
Review Division