REVIEW DECISION

Re: **Review Reference #: R0331650**
Board Decision under Review: October 29, 2024

Date: **April 30, 2025**

Review Officer: **Tony Fletcher**

Introduction and Background

The employer is a prime contractor for construction projects. On August 13, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected a worksite where the employer was working as the prime contractor. The work site consisted of new construction of seven residential buildings, including condominium blocks, townhouse blocks, other residential units, and a concrete underground parkade.

The Board officer made a number of observations, and issued orders to the employer for various violations, including with respect to traffic control personnel and duties, unguarded balcony decks, falling object hazards, unsafe stairways and ladders, and unsecured/unguarded objects. The Board officer also found that the employer, as the prime contractor, had not effectively coordinated health and safety at the work site and had failed to implement an effective system or process of occupational health and safety.

In an August 13, 2024 Inspection Report, the Board officer issued 10 orders to the employer under sections 4.32, 4.55(a), 4.62(1)(a), 5.38(2), 12.15(c), 18.4(2), 18.5, 18.6, and 20.25(1) of the *Occupational Health and Safety Regulation* ("*Regulation*"), and section 24(1) of the *Workers Compensation Act* ("*Act*").

In the October 29, 2024 decision under review, the Board imposed an administrative penalty of $32,145.67 against the employer in respect of the August 13, 2024 violations. The penalty amount was increased by 30% for an exceptional circumstances variation.

The employer, through a representative, requests this review and seeks to have the penalty cancelled, reduced to a warning letter, and/or to have the variation multiplier removed. The employer's representative provided written submissions in support of its request. The OSO provided additional comments in an April 3, 2025 memo, which was disclosed to the employer for response. The employer's representative provided a rebuttal on April 21, 2023. There are no other parties participating in this review.

The employer requested that this matter be heard by way of an oral hearing. In a December 6, 2024 letter, a Review Officer advised the employer that the issues on review could be properly resolved through consideration of written submissions and that an oral hearing was not required. I agree that an oral

hearing is not necessary in this case, and I am satisfied that I am able to make my decision on the basis of the information on file and the written submissions.

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 under review is the Board's decision to impose a $32,145.67 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 and I have considered the evidence in the inspection report, including the Board officer's notes and photographs, along with the employer's submissions. Unless otherwise stated, I am satisfied that the Board officer's account of the details of the inspection set out in the August 13, 2024 inspection report and the October 29, 2024 Report for Administrative Penalty ("RAP") is consistent with the evidence in his inspection notes and the photographs taken at the scene. I therefore accept the Board officer's evidence surrounding the details of the inspection.

Section 4.32 of the Regulation

Section 4.32 states that there must be a safe way of entering and leaving each place where work is performed and a worker must not use another way, if the other way is hazardous.

The Board officer wrote in the RAP that at the time of the August 13, 2024 inspection, he observed that access to one of the single-family buildings was provided by way of a short, steep, unsecured job-built ladder and a short steep ramp across the opening of a pit, which was estimated to be 24" deep. The ramp did not have handrails. This access was available to all workers entering and

exiting the building and the Board officer observed a worker using this means of access to exit the building. In another case, access was provided to a unit by way of a short, steep, unsecured job-built wooden ladder that did not even extend to the doorway opening. The Board officer found that safe access into and out of the workplace (and each building) was the responsibility of the employer as the prime contractor.

The employer's representative's primary argument was that this was not a high-risk violation, and I will address whether the various violations, including this violation, were high risk later. However, the representative also argued that the "pit" mentioned by the Board officer was only 19" deep and that the slope of the ramp in question was considered "low", pursuant to a Board Guideline. The representative further argued that the second entrance mentioned was to a mechanical closet, which did not require access and the ladder next to it was only placed there to get it out of the way.

In his April 3, 2025 comments, the Board officer wrote that the second ladder mentioned was placed directly below the door opening to the room, there was no other door opening or access to that room, and there were, as shown in his photos of the scene, materials in the room suggesting that it was being accessed. As for the first entrance, the Board officer found that, as shown in his photographs, it was the main entrance for the building and would have been used frequently, the slope of the access ramp was much steeper than the maximum allowable (20% for ramps, per a Board publication) and crossed a pit made of concrete walls with no handrails.

I rely on the Board officer's description of the two means of access to places where work was being performed, and find that such means of access were hazardous and not a safe way of entering or leaving the buildings, given the potential for a worker to fall from an unsecured ladder or a ramp without handrails into the pit below. As a result, the violation of section 4.32 of the *Regulation* is established on the evidence.

Section 4.55(a) of the Regulation

Section 4.55(a) states that an area accessible to workers must have guards (where "guard" is defined as including a protective barrier along the open sides of a landing or balcony to prevent a fall to a lower level) or guardrails installed if a raised floor, open-sided floor, mezzanine, gallery, balcony, work platform, ramp, walkway, or runway is four feet or more above the adjacent floor or grade level.

On inspection, the Board officer observed and documented that guardrails had not been installed on multiple balcony decks on various levels that were accessible to workers and were more than four feet above grade or an adjacent floor. The Board officer wrote in the RAP that doors to some of the balcony decks, which were readily accessible to all workers on site, were left wide open

without any barriers to prevent workers from accessing the unguarded balcony decks. The Board officer observed workers access an unguarded fourth floor balcony without the use of personal fall protection systems.

I note from my review of the photos taken by the Board officer at the time of inspection that they show open sliding doors to balconies without guardrails, and I could see no physical guards inside of the sliding patio doors preventing access to the balconies.

The Board officer found that the employer, as the prime contractor, was responsible for ensuring that these balconies were effectively guarded (for example, guardrails installed on the doorway to restrict worker access to the unguarded balcony, and signage advising that fall protection was required beyond that point).

The representative submitted that the employer had warning signs on the glass sliding doors advising that fall protection was required on the balconies. The representative noted that a common problem in construction during periods of hot temperatures is air flow and that trades people continually open doors to get air flow despite the employer's instruction to keep doors closed.

The representative submitted photos taken between May and August 2024, showing various areas under construction that had temporary railing installed and photos of signage and guarding on the interior of patio doors leading to unguarded balconies.

While the employer may have had certain controls, guards, and/or guard rails in place at various areas under construction during different times between May and August 2024, I rely on the Board officer's evidence and photographic documentation that on August 13, 2024, there was unguarded access to balconies more than four feet above an adjacent floor or grade level. Moreover, workers were directly observed accessing an unguarded fourth floor balcony without the use of personal fall protection systems.

I acknowledge that the employer posted signage indicating that workers needed fall protection if they were to access the unguarded balconies. I also acknowledge that the employer said patio doors should have been closed and that their supervisors do continually close the doors and remind workers to keep them closed. However, knowing that, the employer should have ensured that proper guards were installed on the inside of those patio doors. The employer was clearly aware of workers leaving patio doors open, having installed such guards on other patio doors at times during the project. Moreover, warning signs are not a substitute for the requirement under section 4.55(a) that the areas in question must have physical guards in place.

Accordingly, I find that the violation of section 4.55(a) of the *Regulation* is established on the evidence.

Section 4.62(1)(a) of the Regulation

Section 4.62(1)(a) states that stairs with more than four risers must have continuous handrails on any open side of the stairway.

On inspection, the Board officer observed that handrails on multiple access stairways (with more than four risers) to various units had not been installed.

The employer's representative submitted that one of the Board's photos of a set stairs showed it had under four risers and therefore did not fall under section 4.62(1)(a). The representative stated that all other stairs documented in the inspection were short with the longest set having six risers.

In his comments, the Board officer referred to a better photo of the stairway referred to by the employer's representative, which clearly shows stairs with five levels/risers and no handrail on the open side of that stairway. Other photos on the day of inspection similarly showed other stairways with more than four risers without continuous handrails of the open sides.

As such, I find that the violation of section 4.62(1)(a) of the *Regulation* is established on the evidence.

Section 5.38(2) of the Regulation

Section 5.38(2) 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.

The Board officer advised that he observed an unsecured free-standing compressed gas cylinder leaning precariously on sloped ground outside the buildings on the work site. The Board officer noted that the cylinder was not upright due to the sloped ground.

The employer's representative submitted that the Board officer's photo of the cylinder had to have been taken with the camera/phone at an angle, giving the impression that the cylinder was leaning, when it actually was not. The representative submitted that the one cylinder, which was positioned beside roofing materials to be used with it, was not in a high traffic area, was not in the path of any mobile equipment, and was an anomaly and not a representation of the overall site conditions.

I have viewed the photos and am satisfied that they depict a compressed gas cylinder that sat upright on sloped ground and was leaning to one side. There is no dispute that the cylinder was not secured to prevent falling or rolling. As a result, I am satisfied that the violation of section 5.38(2) of the *Regulation* has been established on the evidence.

Section 12.15(c) of the Regulation

Section 12.15(c) states that effective means of restraint must be used to secure an object from falling and endangering a worker.

On inspection, the Board officer observed glass window and door panels on balcony decks (some of which were unguarded). The panels were leaned vertically on their edges against the exterior walls of the building, which raised their center of gravity and made them more prone to falling over. The panels were not restrained or secured to prevent them from falling. The Board officer wrote that the panels could have fallen on the deck surface or even fallen off the deck on to the grade below as many of the balcony decks were unguarded.

The employer's site superintendent, B, advised the Board officer that the employer had staged the glass window and door panels on the balcony decks for the installers. Given this information, the Board officer wrote in the RAP that the employer was therefore responsible to ensure that the glass panels were secured to prevent them from falling and endangering a worker.

The employer's representative submitted that the day of the Board's inspection was window and door delivery day, and the Board's photos were taken just after delivery and before all of the doors and windows had been secured. Their process was to lift up a basket of windows/doors to the balconies and the workers, safely tied off, would distribute the windows/doors and lean them against the building. Once all the windows/doors had been placed on the balconies, a worker would stay behind and secure them while the rest of the crew would go down and prepare the next lift. The representative also noted that the potential drop area below the doors/windows had racks parked in it, and there was no access path or reason for other workers to be in that area. Moreover, the windows and doors were on a 6'5" deep balcony and, if a piece slid or fell, it would come to rest on the balcony.

The Board officer wrote in his comments that his site inspection lasted approximately four hours and during that time there was no indication that the employer was in the process of securing the doors and windows on the balcony. The Board officer wrote that an appropriate procedure for the employer to follow would have been to secure each glass window or door immediately after placing them on the balcony before moving on to the next balcony. Given the employer's process of having one worker go to each balcony to secure the doors and

windows, a door or window could have fallen and injured a worker in the time that had passed between placing them on the balcony and securing them.

I find that the evidence establishes that the employer had not, at the time of the Board's inspection, used effective means of restraint to secure glass window and door panels on the various balconies to prevent them from falling and endangering a worker. As a result, I am satisfied that the violation of section 12.15(c) of the *Regulation* has been established on the evidence.

Section 18.4(2) of the Regulation

Section 18.4(1) states that an employer must ensure that a qualified supervisor is designated whenever traffic control is required.

Section 18.4(2) states that the employer must ensure that the designated supervisor ensures that a number of requirements are met, including that (a) traffic arrangements or layouts and procedures are implemented in accordance with the traffic control plan set out in section 18.3.2, and (b) the required temporary traffic control devices are in place before the start of work and are removed or covered immediately when they are no longer required.

On the day of inspection, the Board officer observed a traffic control person in the middle of the roadway and no traffic control signs were set up on the street during traffic control operations. There were traffic control signs set up on another street adjacent to the work site. The traffic control person was a temporary employee retained by the employer for traffic control duties and was therefore considered a worker for the employer. The Board officer noted that the designated supervisor, the site superintendent, B, was present on site and permitted traffic control operations to proceed without correcting the unsafe conditions.

The employer's representative submitted that the traffic control person in question was not photographed in the middle of the road, but was within a few feet of their "safety zone" with a clear escape route. The representative further submitted that the role of the temporary traffic control person was to provide support for a delivery that required traffic control. However, the delivery was cancelled. Since they were already on site, B decided to keep them to help guide pedestrians if needed and to sweep. As a result, the employer did not need a separate traffic control plan. Any formal traffic control plan which was required would have been under the scope of the civil contractor on site.

As pointed out by the Board officer, it is not clear why the employer would retain the traffic control person to guide pedestrians if they had no delivery that would interfere with traffic and require traffic control. As evidenced by the Board officer's photos, the traffic control person was in the roadway holding up a traffic control paddle, apparently performing traffic control duties with no pedestrians in

sight. While the traffic control person may not have been in the exact middle of the road, the photos show that they were on the road in the line of traffic and not in a safe location.

I am satisfied from the evidence that the employer's site superintendent did not ensure that traffic control procedures from any traffic control plan were implemented. Moreover, the employer did not ensure that traffic control signs were set up on the street in question during traffic control operations. Therefore, a violation of section 18.4(2) of the *Regulation* is established on the evidence.

Section 18.5 of the Regulation

Section 18.5 states, in part, that an employer must ensure that (a) temporary traffic control devices are positioned and used as specified in the traffic control plan.

As described above, traffic control signs were not set up on the street in question during traffic control operations performed by the temporary traffic control person retained by the employer. Therefore, a violation of section 18.5 of the *Regulation* is established on the evidence.

Section 18.6 of the Regulation

Section 18.6 states, in part, that an employer must ensure that (c) traffic control persons are not positioned in an intersection open to traffic flow or the travelled portion of a roadway.

As set out above, I am satisfied that the employer's temporary traffic control person was in the travelled portion of a roadway. Therefore, a violation of section 18.6 of the *Regulation* is established on the evidence.

Section 20.25(1) of the Regulation

Section 20.25(1) states that the employer must ensure that protruding objects that create a risk of injury are removed or effectively guarded.

The Board officer observed an unguarded rebar protruding from the ground adjacent to the open side of a frequently used access stairway with no handrails and issued the order.

The employer's representative submitted that the photo of the rebar was at an angle and did not show that there was a handrail on the adjacent stairs. The handrail stopped a worker from being able to fall directly on the rebar.

I have viewed the photo taken by the Board officer and confirm that there was no handrail or other barrier between the stairway and the protruding rebar.

I am satisfied that a violation of section 20.25(1) of the *Regulation* is established on the evidence.

Section 24(1) of the Act

Section 24(1)(a) of the *Act* states that the prime contractor of a multiple employer workplace must ensure that the activities of employers, workers and other persons at the workplace relating to occupational health and safety are coordinated. Section 24(1)(b) states that the prime contractor must do everything that is reasonably practicable to establish and maintain a system or process that will ensure compliance with the occupational health and safety ("OHS") provisions and regulations in respect of the workplace.
Section 24(1)(a) is a general duty provision and the standard the employer must meet is due diligence.

The Board officer found that the employer, as the prime contractor at the work site, had not effectively coordinated health and safety nor implemented an effective system to ensure compliance with the OHS provisions and regulations.

As set out in more detail above, the Board officer wrote that the evidence for this violation included:

- Multiple balcony decks at various levels accessible to workers of multiple sub-contractors were not protected with guardrails or guards
- Open sides of stairways to multiple units were not protected with handrails and safe access was not provided to multiple units
- A compressed gas cylinder was not secured to prevent falling or rolling
- Glass windows and doors were not restrained on balcony decks
- Rebar protruding from the ground adjacent to the open side of an access stairway without handrails was not guarded
- Traffic control signs were not set up during traffic control operations, the temporary traffic control person was not positioned in a safe location during traffic control operations, and the employer did not ensure that the designated traffic control supervisor fulfilled his obligations

The Board officer also noted that, while he did not issue an order under section 3.5 of the *Regulation* (for the employer failing to conduct regular inspections of the work site to prevent the development of unsafe working conditions), it was evident that the employer was either not conducting workplace inspections, or the inspections were not being conducted effectively.

On review, the employer's representative provided copies of extensive documents and correspondence (including daily hazard assessment reports, daily site inspection reports, toolbox meetings, trade meeting minutes, site safety orientations, investigations, employee violations/written warnings, and its OHS Manual) and submitted that this showed that the employer had an effective OHS program and system in place to coordinate the health and safety of workers at the worksite, and was not in violation of section 24(1).

Given the observations of the Board officer during the inspection and the significant number of missteps, oversights and resulting violations listed above relating to coordinating health and safety in the workplace, it is evident that the employer, as the prime contractor, did not do everything reasonably practicable to ensure compliance with the OHS provisions and regulations.

I find that the facts underlying the order are established on the evidence. I note that the employer's representative has submitted evidence to support its position that it was duly diligent. For reasons I will discuss in more detail below when considering whether a penalty should be imposed, I find that the employer was not duly diligent in meeting its obligations under this section.

Accordingly, 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 August 13, 2024 inspection related to high risk violations. Specifically, the Board found that the violations of sections 18.4(2), 18.5, 18.6, 4.55(a), 4.32, 12.15(c), and 20.25(1) of the *Regulation,* and section 24(1) of the *Act* were high risk. The employer disputes that these were high risk violations.

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.

In determining the above, policy refers to the *OHS Guidelines*. Guideline G-P2-95-2, *High Risk Violations,* also lists certain violations that will likely be considered high risk and explains that these violations must still be analyzed using the above two high risk criteria. Notably, the Guideline's list of violations which are likely high risk includes exposure to the risk of being struck by or crushed by material, objects, or mobile equipment, which relates to one of the orders in this case.

Guideline G-P2-95-2 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.

I first note that the violation of section 12.15(c) of the *Regulation,* which states that effective means of restraint must be used to secure an object from falling and endangering a worker, is likely to be considered high risk according to the Guidelines.

In this case, given the employer's process of placing the various glass doors and windows upright and on edge on the various balconies and leaving them there for a period until another worker came along and secured them, there remained a significant risk that the doors and/or windows could have fallen over and injured workers working on the balcony or a worker or workers working or passing below that particular balcony.

The employer argued that the potential drop area below the doors/windows had racks parked in it, and there was no access path or reason for other workers to be in that area.

The Board officer noted that there were, reportedly, about 90 workers from multiple different employers on site on the day of the inspection, and that was a typical number for such a large construction site. The Board officer also noted that the unsecured windows and doors were spread out on various balconies, and that areas below some of the balconies were accessible. In fact, workers of a civil contractor were working in an area below some of these balconies. I accept the Board officer's evidence in this regard, noting that the employer does not specifically dispute this observation.

Therefore, given the hazard of the unsecured glass windows and doors on unguarded balconies, and the potential that workers either working or walking under those balconies could have been exposed, there was a significant risk of an incident where a worker or workers could be struck by falling objects.

In terms of the likely seriousness of any injury that could result if exposure occurred, I conclude that if the unsecured glass windows and doors (which were of considerable weight, according to the Board officer) resting on their edges were to tip over and fall from the balcony on a worker, it was highly likely that this would result in serious injuries such as cuts, broken bones, or even death.

This one high risk violation would be enough for the Board to have to consider a penalty. There were, however, other potential high risk violations identified by the Board.

The Board officer found that with respect to sections 18.4(2), 18.5, and 18.6, without proper temporary traffic control devices in place, and without the assigned traffic control supervisor (the site superintendent) ensuring that the temporary traffic control person was standing in a safe location, there was a strong likelihood that the traffic control person, standing in the travelled portion of the roadway, even with low to moderate traffic flow in the area (at the posted speed limit of 50 km per hour and reduced speed limit of 30 km per hour), could have been struck by a vehicle.

I am satisfied that being struck by a vehicle or heavy equipment on the roadway would likely have resulted in serious injuries, including broken bones, or even death.

Similarly, another high risk activity such as accessing unguarded balconies, particularly if no personal fall protection equipment was used as observed by the Board officer in one case, could result in a fall from height resulting in serious injury or death.

Although potentially not as likely to result in serious injury or death, falls from unguarded ramps or from stairways without handrails into open pits and/or on to protruding objects such as rebar could still cause significant injuries.

As a result, I find that the employer committed multiple violations on the day in question resulting in a high risk of serious injury or death to the workers on site. As a result, a penalty must be considered.

In the RAP, the Board officer also referenced repeat violations by the employer under section 4.55(a) of the *Regulation* on July 20, 2023, under section 20.25(1) on July 5, 2023 and December 1, 2022, under section 24(1) on October 20, 2020, and under section 5.38(2) on February 5, 2020 and January 26, 2019. The Board officer also listed 16 other violations by the employer of similar sections of the *Act* or *Regulation* between January 26, 2019 and July 20, 2023.

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

Given the above, 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 e-mail dated August 15, 2024, the Board officer invited the employer to provide information on the matter of due diligence. The Board officer also discussed the request for a due diligence submission with the employer during an in-person meeting on August 21, 2024 and mailed another request on August 22, 2024. However, the employer did not respond.

The Board officer found in the RAP that the employer was not duly diligent for a number of reasons, including, but not limited to:

- Not providing any records of orientation, toolbox talks, or written procedures it provided to the temporary worker it contracted and supervised to perform traffic control duties.

- Not providing any record of inspections it conducted of the traffic control arrangements.

- Not providing evidence that it instructed a crew or its own workers to install guardrails on the balconies and/or handrails on the stairways, or that it instructed workers to stay away from the unguarded areas, or placed signage to restrict worker access to these unguarded areas.

- Not taking sufficient steps, including instruction and supervision, to ensure that the glass windows and doors were secured after staging them on the balconies.

- Not ensuring that a pit across which workers had to traverse was covered, or by instructing workers not to use the hazardous access, or by ensuring there was an alternate safe way to access the building.

- Not providing evidence of how it manages the hazards of protruding objects, or evidence of inspection records confirming it inspected the workplace for such hazards.

- Not providing records of general workplace inspections or shown that it had a system to promptly correct hazards identified during these inspections.

- Not demonstrating that it had a disciplinary policy for workers and sub-contractors violating health and safety requirements.

- Not demonstrating that it had a system for workers to report unsafe conditions.

- Not providing records of health and safety orientation to work crews before they begin work at the site.

- Not providing records of regular site safety meetings.

- Not providing evidence of how it ensures its health and safety coordinators (for example, site superintendent) are adequately and effectively carrying out their roles and responsibilities.

The Board officer also wrote in the RAP that a duly diligent employer would have, among other things, implemented a site-specific health and safety management system ("HSMS") that included: hazard identification and risk assessment; regular workplace inspections; a process for reporting and correcting unsafe conditions; regular safety meetings/toolbox talks; safety orientations for new crews/workers; disciplinary policy for OHS violations; corporate management site safety oversight/audits; and written safety policies, procedures and instructions.

The Board officer determined that the hazards and violations observed during his inspection would not have happened at this site (or would have been quickly identified and corrected) if the prime contractor had effectively implemented the above elements of an HSMS.

The employer has since submitted extensive documentation (summarized briefly above) to show that it has an effective system in place to ensure compliance with the OHS provisions and regulations.

On review, the employer's representative wrote that the employer did not understand that if it did not respond to the Board's invitation to provide information on due diligence, a penalty would be issued. The representative wrote that the employer and its safety coordinator are not experienced with the Board wording and did not realize what the Board was requesting. Furthermore, the employer considered the subsequent notice of compliance issued by the Board to be confirmation that the corrective actions had been accepted.

The Board officer responded in his comments that at no point in his discussions with the employer did they express confusion about the requirements for due diligence information or seek further clarification from him. Moreover, as the Board officer notes, the employer incorrectly assumed that the penalty was imposed based on its failure to provide a due diligence submission. While a due diligence analysis forms part of the consideration of whether a penalty should be issued, the failure to provide a due diligence submission is not a reason for proceeding with an administrative penalty.

The representative submitted that the temporary contracted worker was not contracted to perform traffic control duties on the day of inspection. I note that this was not the case, as the reason they were contracted on that day was to be a traffic control person for a delivery, and the evidence shows they were working as a traffic control person in the roadway.

While the employer has stated, and it is acknowledged here, that there was, on site, a combination of guardrails, guards, signs and fall protection, all relating to access and work on balconies, there is a lack of evidence to support that the employer instructed workers to stay away from the unguarded areas referenced by the Board officer.

As set out above under the violation analyses, the employer did not have a satisfactory process in place for securing materials on the balconies, providing safe access to the building, and addressing hazards such as the protruding rebar and unsecured gas cylinder.

The employer has submitted documentation showing that it has conducted many daily site inspections and hazard assessments, conducted regular toolbox meetings, had weekly trade meetings, and had a system for workers to report unsafe conditions. The employer also provided reports between 2022 and 2025, showing that multiple workers had received violations for unsafe practices. The employer also submitted hundreds of site orientation forms. It also provided a full copy of its 2025 OHS Program.

As pointed out by the Board officer, while the employer has provided records of daily site inspections, the August 13, 2024 site inspection record did not identify or otherwise address the multiple issues he observed during his inspection. This meant that the inspections were either not conducted effectively or remedial actions were not taken promptly.

Similarly, the Board officer acknowledged that the employer had provided minutes of weekly trade meetings to demonstrate that it had a system for workers to report unsafe conditions in those meetings. However, while the trades meeting minutes include discussions of safety issues, they do not include reports of unsafe conditions by workers. Expecting workers to report unsafe conditions in weekly meetings was not an effective approach to managing health and safety, and a duly diligent employer would create a system for reporting unsafe conditions as soon as possible so the employer could take prompt action to address them.

With regard to the Board officer's comment that the employer had not provided evidence of how it ensures that the site superintendent is adequately and effectively carrying out their roles and responsibilities, the representative advised that the current employment shortage made it difficult to employ highly trained safety coordinators. The employer had employed J as a safety coordinator for the project in question. However, in January 2024, J was unable to fully perform his duties and was ultimately removed from the site in August 2024. J's replacement has since also left the site and was replaced by M, but the employer was continuing to search for a qualified safety coordinator.

While this indicates that the site superintendent was not, for whatever reason, effectively carrying out his role and responsibilities, the employer has not set out evidence of what actions it took to address the decline in the safety coordinator's performance before he was ultimately replaced in August 2024, presumably after the Board's inspection.

Ultimately, despite the existence of a formal OHS Program, toolbox meetings, the inspections, the discipline, and other measures taken by the employer, there were clearly gaps in the employer's plan with respect to coordinating activities and ensuring the health and safety of workers at the workplace.

I agree with the Board that the hazards and related violations found on inspection would likely not have resulted had the employer, as the prime contractor, effectively implemented the various elements of an HSMS. Alternatively, had an effective plan been in place, any of those hazards that existed could have been more quickly identified and corrected.

In summary, I find that the employer has not demonstrated that it took all reasonable care to prevent the violations under the *Act* and *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:

    a. The extent to which the employer was or should have been aware of the hazard;

    b. The extent to which the employer was or should have been aware that the Act or Regulation were being violated;

    c. The compliance history of the employer;

    d. The effectiveness of the employer's overall approach to managing health and safety; and

    e. Whether other enforcement tools would be more appropriate.

3. Any other relevant circumstances.

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

First, there was, in the circumstances, the 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 and other employers to comply in the future, taking into account one or more of the factors listed in policy above. The employer has been registered with the Board and operating as a prime contractor in the residential construction industry since October 1, 2007. As a result, the employer ought to have been aware of the hazards of falling objects, unsafe access and egress to the site, and working without proper guards, guardrails, and handrails, as well as its obligations in coordinating and overseeing health and safety at its worksites.

As set out by the Board officer, the Board has conducted multiple inspections of the employer's worksites and has issued multiple orders to the employer for the same or similar violations to those observed during the inspection of August 13, 2024, and some of those violations were from the same workplace.

Notably, the employer also received a prior administrative penalty in December 2020, related to a violation of section 24(1)(b) of the *Act,* involving an incident at another work site where a worker was fatally injured in a fall.

Therefore, in this instance, the employer was or should have been aware that the *Act* or *Regulation* were being violated in relation to the circumstances observed in August 2024.

The Board officer wrote that the employer's compliance history was poor, and that he observed several violations during the inspection, the majority of which were repeat violations, and the employer did not take steps to correct the hazards despite being present on site and observing the violations daily.

Given this, I find that the employer's overall approach to managing health and safety in this workplace, particularly in coordinating health and safety activities at the worksite and maintaining a system to ensure compliance with health and safety requirements, including preventing falling objects and other higher risk circumstances, has not been effective.

The employer argues that a warning letter should be substituted for the penalty. Given the significant number of violations relating to this inspection alone, the employer's history of same or similar violations, and the previous penalty imposed in December 2020, it is evident that a warning letter in this instance would not be sufficient to motivate the employer to comply in the future.

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 $32,145.67 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 resulting in the base figure of $12,363.72.

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 penalty of $24,727.44. I agree with this determination.

The next step in the calculation of the final penalty amount is to determine whether any variation factors apply. The policy states that the amount above may be increased or reduced by up to 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 found that there were exceptional circumstances that warranted varying the penalty amount and decided that an upward variation of 30% of the penalty was necessary to effectively motivate the employer.

The Board officer's reasoning for the increase was that there were multiple violations, the majority of which were potentially high risk and many of which were repeat or similar violations, resulting in 10 orders being issued to the employer during a single inspection. The Board officer also noted that many of the violations were observable from the sidewalk, were basic to construction, and were easily corrected with minimal effort and cost. The Board officer wrote that the employer was responsible for the overall health and safety at this multi-employer work site. The large number of obvious, potentially high risk hazards at the worksite demonstrated a substantial departure from the reasonable standard of care expected of a prime contractor and a lack of regard for worker health and safety.

The employer's representative reiterated its argument that the majority of the violations were not high risk. The representative also maintained that, since the inspection, the employer was motivated to improve its health and safety practices and has taken steps to update its OHS Program and has hired an experienced manager to implement its Safety Management System. As a result, an additional 30% increase to the penalty was not necessary to motivate change.

After review, I conclude that the basic penalty amount should not be increased by 30%. First, I am satisfied that the issuance of a basic penalty in this case was sufficient to motivate change in the employer's health and safety practices, as evidenced by its prompt compliance with the orders issued, the updates to its OHS Program, and its hire of a new Safety Management System manager.

I also note that certain circumstances the Board officer considered exceptional are adequately addressed by other parts of the policy. Specifically, as set out above, consideration of whether the violations giving rise to the penalty are high risk, and/or are repeat violations, is made when deciding whether or not to issue a penalty in the first instance. Moreover, the Board has already applied the high risk multiplier as directed by policy, multiplying the initial penalty amount by two, which results in the $24,727.44 penalty amount.

I further do not see how the violations being basic to the construction industry, being observable from the sidewalk, and being ones that were easily corrected, amount to exceptional circumstances warranting a significant upward variation of the penalty. The fact is, at the time of the site inspection, the violations resulting in the orders existed, regardless of whether one could have seen them through casual observation, whether they were common to the construction industry, and whether they were easily corrected, and, as such, they formed the fundamental basis in deciding in the first instance whether a penalty was appropriate in this specific case. The Board also already decided that the employer did not exercise due diligence in this case, another factor that is always considered when deciding to impose a penalty. Therefore, these factors should not be considered again when addressing whether there were other more exceptional circumstances meriting an upward variation of the penalty amount.

In summary, I allow the employer's request in part. I find that a variation factor of 30% should not be applied to increase the penalty in this case, and the final penalty amount should be $24,727.44.

Conclusion

As a result of this review, I vary the Board's decision of October 29, 2024, to the extent set out above.

Tony Fletcher
Review Officer
Review Division