WORK SAFE BC

Review Division

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Re: **Review Reference #: R0325542**
Board Decision under Review: May 23, 2024

Date: **January 29, 2025**

Review Officer: **Carmen Dowhaniuk**

Introduction and Background

The employer operates a traffic control company. It had been contracted by another company to manage traffic on a highway while a nearby bridge was being repaired. On April 3, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected the worksite. Following this inspection, the Board issued an April 4, 2024 inspection report, citing the employer for violations of sections 18.3.1(3), 18.3.2(2), and 18.3(2) of the *Occupational Health and Safety Regulation* ("*Regulation*").

In the May 23, 2024 decision under review, the Board imposed an administrative penalty of $59,994.04 against the employer. The penalty order was based on violations of sections 18.3.1(3) and 18.3.2(2) of the *Regulation*.

The employer has requested a review of the penalty order. The employer is represented by an Employers' Adviser who has provided submissions in support of its request.

The worker co-chair of the employer's joint health and safety committee was given notice of this review and is not participating.

The Board officer provided comments at the request of the Review Division. These were disclosed to the employer, which provided further submissions.

Section 20(3) of the *Workers Compensation Act* ("*Act*") gives me the authority to conduct this review. Section 339(2) of the *Act* requires me to make a decision on the merits and justice of the case, applying the policies of the Board's board of directors applicable in the case. The policies are found in the *Prevention Manual.* The standard of proof that applies to this review is the balance of probabilities.

Issue

The issue is the Board's order imposing an administrative penalty against the employer.

Reasons and Decision

The Violations

The Employers' Adviser submits that the violation orders should be rescinded. However, the employer did not request a review of the violation orders that the May 23, 2024 penalty was based upon, and I therefore do not have the authority to either confirm or cancel these orders. Nevertheless, in order to determine if a penalty is warranted, I must consider whether the underlying facts support the imposition of a penalty.

Section 18.3.1(3) of the *Regulation*

Section 18.3.1 of the *Regulation* addresses an employer's obligation to conduct risk assessments where workers are engaged in a work activity that may expose them to traffic. Subsection (3) provides that an employer must ensure that the risk assessment is in writing and includes consideration of numerous criteria at a minimum, including:

- Work duration and time of day the work activity is scheduled to occur;
- Whether the nature of the work activity is expected to create a hazard;
- Whether any of the following is expected to create a risk of worker injury:
    - Traffic volume;
    - Lines of sight;
    - Vehicles travelling at the posted speed limits;
    - Configuration of the work zone, including the number of lanes and lane widths;
    - Equipment movement and storage.

As set out in the Board officer's Report for Administrative Penalty ("RAP"), when she attended the worksite, she requested a copy of the risk assessment and traffic management plan from a traffic control person. This person provided a form which did not include all of the above required information. Specifically, it did not include information on the speed of traffic or the number of vehicles travelling on the road in question.

A copy of this form was attached to the RAP, and it indicates that the work activity would occur at night, and that "high traffic" was a potential hazard. This form did not specify what number of vehicles was considered to be "high traffic" and it did not indicate the speed limits in the work zone and whether vehicles travelling at the posted speed limits would be considered a hazard to workers at the site. Without this information, the employer's risk assessment was incomplete and did not meet the requirements of section 18.3.1(3).

While the Employers' Adviser submits that this section does not require information on the speed of traffic, section 18.3.1(3) does require the risk assessment to consider whether vehicles travelling at the posted speed limits are expected to create a risk of worker injury. I therefore accept that the *Regulation* requires that the risk assessment include consideration of the posted speed limits in the work area.

In response to the Board officer's comments that a qualified person did not complete a risk assessment, the Employers' Adviser submits that the traffic control person was in fact qualified to conduct a risk assessment. While section 18.3.1(3) does require a risk assessment completed by a qualified person, the Board did not find a violation of that particular requirement. Instead, as set out above, the Board determined that there was a violation because the employer did not have a complete risk assessment which addressed all the factors required to be addressed by section 18.3.1(3). The qualifications of the traffic control person are therefore not at issue in this case.

As the employer's risk assessment did not meet the minimum requirements set out in section 18.3.1(3) of the *Regulation*, I am satisfied that the evidence supports a violation of section 18.3.1(3). This provides grounds for the consideration of a penalty.

Section 18.3.2(2) of the *Regulation*

Section 18.3.2 of the *Regulation* provides that an employer must ensure that a written traffic control plan is developed based on the risk assessment. Subsection (2) sets out the requirements for a traffic control plan. Under this subsection, a traffic control plan must specify:

- Traffic control measures to mitigate the hazards identified in the risk assessment;
- Instructions for implementation of the traffic control measures;
- Clear statements of roles and responsibilities for implementing the traffic control plan; and
- A schedule, for the traffic control plan, for implementation and regular review and updating.

As set out in the April 4, 2024 inspection report, when the Board officer requested a copy of the employer's traffic control plan, they were simply provided with a risk assessment. The Board officer therefore found that the employer did not have a traffic control plan which met the above requirements.

In particular, the employer did not have a plan which set out the posted speed limits in the area, provided clear instructions on how to create an appropriate taper zone, specified the distance required between the traffic control devices or signs, and provided a clear statement of roles and responsibilities for implementing the traffic control plan.

The Employers' Adviser submits that this was a routine job, so the workers' roles were well known. I acknowledge this submission, but familiarity with job duties does not replace the need to meet the specific obligations set out in section 18.3.2(2) of the *Regulation*.

I conclude that the evidence establishes a violation of section 18.3.2(2) of the *Regulation*. This provides further grounds for the consideration of a penalty.

Criteria for Imposing a Penalty

Under section 95(1) of the *Act*, the Board has the authority to impose a penalty where the employer has failed to comply with the *Act* or *Regulation*. As explained by policy item P2-95-1, *Criteria for Imposing OHS Penalties*, the Board must consider a penalty where at least one of a number of factors apply, including:

- 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
- The Board considers that the circumstances warrant a penalty.

In this case, the Board officer noted that the employer had previously violated the same sections of the *Regulation*. Specifically, a March 3, 2022 inspection report found violations of sections 18.3.1(3) and 18.3.2(2), an August 26, 2022

inspection report found a violation of section 18.3.2(2), and a July 10, 2023 inspection report found a violation of section 18.3.1(3).

Given these prior violations of the same sections of the *Regulation*, the Board must consider imposing a penalty.

Due Diligence and Additional Factors in Deciding Whether to Impose a Penalty

Section 95(3) of the *Act* provides that the Board must not impose an administrative penalty if the employer establishes that it exercised due diligence to prevent the failure or non-compliance to which the penalty relates. This means that the onus of establishing due diligence is on the employer. 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 violation.

The Board invited the employer to provide a due diligence submission, but it did not do so. For this review, the Employers' Adviser submits that the employer had been working on its compliance with occupational health and safety requirements prior to the issuance of a separate July 2023 inspection report. I note that the July 12, 2023 inspection report found similar violations of section 18.3 of the *Regulation*, and on October 26, 2023, the Board issued a penalty to the employer for those violations.

According to the Employers' Adviser, before the July 2023 violations, the employer had hired an Occupational Health and Safety specialist who was to review and revise its safety program and training. However, this person did not meet expectations, and their employment was terminated. A second person was then hired for this position but was also terminated. A third individual has since been hired and two traffic safety plans have since been developed.

The Employers' Adviser submits that one of these traffic control plans was completed before April 2024, which I infer to mean that it was completed before the violations which are the subject of this penalty. These documents were not provided with the submissions. In any case, I find that the evidence does not support that the employer had a risk assessment or traffic control plan for this worksite which met the requirements of the *Regulation* prior to beginning work at this site.

The RAP states that after the traffic control person on site was unable to provide the Board officer with these documents, the Board officer contacted a supervisor for the employer. The supervisor was also unable to provide a traffic control plan or risk assessment which had been completed prior to the work being performed. As the supervisor indicated that the prime contractor had this information, the Board officer contacted the prime contractor who informed them that this was the responsibility of the employer. The Board officer then raised their concerns with the supervisor, and at that time, the supervisor completed a traffic control plan.

In my view, the above evidence supports that the employer did not take reasonable steps to prevent the violations in question. While the employer may have had difficulty in hiring and retaining safety personnel, it is nevertheless the employer's responsibility to identify any hazards and to establish safe work procedures for its workers. The employer, however, did not have a complete risk assessment or traffic control plan prior to allowing work to commence at the worksite.

Submissions from the Employers' Adviser suggest that the employer has since taken further steps to improve its safety program. However, steps taken after the violations occurred do not establish that the employer had been duly diligent in preventing these violations.

I find that the evidence does not support that the employer took reasonable steps to ensure that hazards had been identified and safe work procedures established. Moreover, work commenced at the worksite without a risk assessment or traffic control plan which indicates that the employer's workers were not adequately trained and supervised. As a result, I conclude that the employer was not duly diligent in preventing the violations.

Given that I have found that the employer has not established due diligence, I now turn to whether a penalty should be imposed on the employer. Policy item P2-95-1 sets out three factors that must be considered with regard to the appropriateness of imposing a penalty:

1. The potential for serious injury, illness or death in the circumstances, based on the available information at the time of the violation;

2. The likelihood that the penalty will motivate the employer and other employers to comply in the future, taking into account one or more of the following:

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

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

    c. The compliance history of the employer;

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

    e. Whether other enforcement tools would be more appropriate.

3. Any other relevant circumstances.

As noted, this work was occurring on a highway which the employer's risk assessment indicated would have a high volume of traffic. In addition, the RAP stated that this work was occurring at night and the employer's signs approaching the work area indicated a speed of 70 km/hour. While this is less than the standard highway speed limit, it is still a relatively high rate of speed. In my view, this high rate of speed, combined with a high volume of traffic and reduced visibility at nighttime, created a risk of collision between vehicles and workers. Further, these hazards had not been effectively controlled by the employer as its risk assessment was incomplete and it did not have a written traffic control plan which met the requirements of the *Regulation*. There was thus the potential for serious injury or death at the time of the violations.

Noting that the employer operates a traffic control company, and given its compliance history, it should have been aware of the hazards and that the *Regulation* was being violated. As documented in the RAP, the Board has previously issued orders to the employer for violations of section 18.3 of the *Regulation* in March 2022, August 2022 and July 2023.

Given these prior violations, and the fact that the employer did not have a complete risk assessment and traffic control plan in place prior to work commencing at the worksite, I conclude that the employer does not have an overall effective approach to managing health and safety.

Consequently, I find that other enforcement tools, besides a penalty, would not be more appropriate in this case. I am satisfied that a penalty is appropriate to motivate this employer, and other employers, to comply with health and safety requirements in the future.

The Penalty Amount

The Board imposed a penalty of $59,994.04, calculated under policy item P2-95-5, *OHS Penalty Amounts*. This 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, or an estimate. This amount is calculated by multiplying the penalty payroll by 0.5%, and cannot be less than the minimum amount of $1,250. In this case, the initial amount is $29,997.02.

Policy item P2-95-5 then requires the Board to consider the application of multipliers. Each multiplier results in the initial amount being multiplied by two, and each multiplier is additive. In this case, the Board did not apply any multipliers.

Policy also provides for consideration of variation factors. In exceptional circumstances, the amount of the penalty may be reduced or increased by up to

30%. However, circumstances that are adequately addressed by other parts of this policy are not considered exceptional circumstances.

The Board did not apply a variation factor in this case. The Employers' Adviser submits that the employer's difficulty in hiring and retaining an occupational health and safety specialist, and the short period of time since the prior July 2023 inspection which did not provide the employer with sufficient time to improve its safety program, are special circumstances that warrant reducing the penalty by 30%.

However, my review of the evidence does not establish any exceptional circumstances which would warrant a variation factor. The employer is required to meet its obligations under the *Regulation,* and the fact that it had some challenges in doing so due to personnel issues does not amount to an exceptional circumstance as these were internal matters, within the employer's control. Moreover, the employer has a history of several similar violations, and I am satisfied that this penalty is needed to motivate future compliance.

Finally, policy item P2-95-5 directs the Board to consider whether there are prior similar penalties which would warrant the imposition of a repeat penalty. Policy defines a prior similar penalty as a penalty for the same, or a substantially similar, prior violation; which occurred within three years of the current violation; and at least 14 days prior to the date of violation giving rise to the repeat penalty, the Board had imposed a penalty for the prior violation or provided notice of a potential penalty for the prior violation.

A repeat penalty will be calculated by multiplying the basic amount by 2^n, where n is the number of prior similar penalties. In this case, a penalty was imposed on October 26, 2023 for a violation of several sections of the *Regulation*, including section 18.3.1(3), which had occurred on July 7, 2023. I note that this penalty was confirmed by the Review Division on April 26, 2024. Given this prior similar penalty, the penalty amount was increased to $59,994.04.

The Employers' Adviser requests that the "multiplier" be removed. Since no multipliers had been applied in this case, I interpret this submission to mean that the penalty amount should not have been increased due to the prior similar penalty. However, there is no discretion in Item P2-95-5 regarding the calculation of the penalty amount based on repeat penalties, and the Board has therefore appropriately considered this factor in its calculation.
I conclude that the administrative penalty of $59,994.04 against the employer for violations of sections 18.3.1(3) and 18.3.2(2) of the *Regulation* is supported by the facts, law and policy. As a result, I deny the employer's request.

Conclusion

As a result of this review, I confirm the Board's penalty order of May 23, 2024.

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