REVIEW DECISION

Re: **Review Reference #: R0327866**
Board Decision under Review: August 8, 2024

Date: **February 7, 2025**

Review Officer: **Jefferson Rappell**

Introduction

The employer was the prime contractor at a worksite where an excavation contractor excavated a trench for a waterline. On August 1, 2024, two officers of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, attended the worksite and conducted an investigation following an incident where an excavator inadvertently struck a pressurized ¾" gas line.

After conducting an investigation, the Board officers determined that the employer coordinated the excavation of the trench. However, they found that the employer failed to communicate and ensure that the civil contractor located and marked the existing gas line before the excavation contractor commenced work. Also, the employer was in possession of the BC One Call and did not provide a copy to the excavation company, but relied on another civil contractor to verbally inform the excavation company where the lines were. Furthermore, the employer did not ensure the gas lines were marked at the time of installation to ensure other sub-contractors would be aware of the location of the gas lines.

In the August 8, 2024 Inspection Report ("IR") that is the subject of this review, the Board issued an order to the employer for a violation section 24(1)(a) of the *Workers Compensation Act ("Act")*.

The employer requests a review of this order and submits that the order should be cancelled. The employer submits that it coordinated a meeting between the construction and excavation contractors on August 1, 2024, immediately prior to the work commencing. The employer argues that it had a reasonable expectation that the necessary locating and marking of gas lines would occur, as per the occupational health and safety programs of each contractor. The employer also submits that a BC One Call ticket request as part of planning for the work would not provide the level of detail necessary to safely perform the work, as the construction contractor had not yet provided a final survey to the utility owner for that area. The employer argues that ongoing above grade construction in the area precluded any reasonable practicability of maintaining any such marking of the gas line prior to the day of the incident, and it relied on the contractors to provide the most accurate information regarding underground utilities.

The employer's Joint Health and Safety Committee worker co-chair was given notice of this review and is not participating.

In the course of this review, the Review Division requested additional comments from the Board officer who wrote the order to the employer. These comments were disclosed to the employer who provided additional 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

This is a review of the Board's decision to issue an order to the employer for a violation of section 24(1)(a) of the *Act*.

Reasons and Decision

Section 84 of the *Act* gives the Board the authority to make orders for carrying out matters and things regulated, controlled or required by the *Act*. Section 84(2)(b) gives the Board the authority to make orders requiring persons to take measures to ensure compliance with the *Act* and the *Regulation.* Policy Item P2-84-1, *OHS Compliance Orders,* states that when identifying violations at a workplace, the Board will ordinarily write orders.

In this case, the Board issued an order to the employer for a violation of section 24(1)(a) of the *Act*. This section states that a 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 is a general duty provision and the standard is not one of perfection, but rather reasonableness. This means that due diligence by the employer is a defense to this violation. To be duly diligent, an employer must take all reasonable steps to ensure the health and safety of its workers and other workers at the workplace where the employer's work is being carried out.

In the IR, the Board officer determined that the employer failed to communicate and ensure that the civil contractor located and marked the existing gas line before the excavation contractor commenced work. The Board officer also noted that the employer was in possession of the BC One Call and did not provide a copy to the excavation company, but relied on another civil contractor to verbally inform the excavation company where the lines were. Finally, the Board officer determined that the employer did not ensure the gas lines were marked at the time of installation to ensure other sub-contractors would be aware of the location of the gas lines.

I will first address the employer's argument in its December 17, 2024 submissions that the issuance of an order as a result of a "near miss/close call" type of incident should be limited to when there is either a strict liability, or it is necessary to ensure the employer improves, where a Board officer has legitimate reason to expect it may not have the motivation or expertise to do otherwise.

While I have considered the employer's argument in this regard, I note that it has not cited any authority in support of these limitations on writing orders, and I have found none. Rather, as noted above, Item P2-84-1 states that when identifying violations at a workplace, the Board will ordinarily write orders. The legislation provides none of the limitations on writing orders that the employer suggests. While some of these factors can be applicable where the Board's decision concerns an administrative penalty, they are not relevant to the issuance of an order.

The employer states that it coordinated a meeting between the construction and excavation contractors on August 1, 2024, immediately prior to the work commencing. The employer argues that it had a reasonable expectation that the necessary locating and marking of gas lines would occur, as per the occupational health and safety programs of each contractor.

I accept from the evidence contained in the Investigation Report that the employer coordinated a meeting between the construction and excavation contractors on August 1, 2024. The evidence does not suggest that the employer attended this meeting. The employer submits that it expected the contractors would locate and mark the necessary gas lines before. While the employer might have reasonably expected this to occur, it does not explain why the employer failed to maintain its oversight of the contractors as they were conducting activities at the worksite.

As the prime contractor of a multi-employer worksite, section 24(1)(a) of the *Act* required the employer to ensure that the activities of the contractors were coordinated. I accept that the employer provided some coordination in arranging for the meeting between the construction and excavation contractors. However, this was not the full extent of its obligations under section 24(1)(a), which required it to coordinate the activities of its contractors, not just a meeting between them.

After considering the evidence, I find it does not support a conclusion that the employer ensured the activities of the contractors at the worksite were coordinated. While it may have been reasonable for the employer to assume that the contractors would follow their own health and safety programs, I find that it was not reasonable for the employer to assume its ongoing obligations under section 24(1)(a) had been fulfilled.

Based on its own submissions on this review, the employer was aware of the hazards posed when excavating, including the need to locate and mark the existing gas line before the excavation. Instead of ensuring these excavation activities were coordinated, the employer relied on the contractors to coordinate. It appears that the employer did not even attend the meeting it arranged between the contractors.

Furthermore, the evidence does not suggest that the employer took any actions prior to excavation to ensure that the existing gas line was located and marked, despite having knowledge of this requirement. I do not find it reasonable for the employer to relied on the contractors to follow their own health and safety programs instead of maintaining its ongoing responsibility to ensure that the activities at the workplace were coordinated.

An employer exercising due diligence would have ensured that it was monitoring the activities at the worksite and not simply relying on its contractors to perform the work according to their health and safety programs. If I were to accept the employer's argument on this issue, it would mean that the responsibility prime contractors have over coordinating activities at the worksite would end once it hired contractors with robust health and safety programs. While a robust health and safety is program important, how those contractors actually carry out the work is also important in ensuring health and safety and the worksite.

I acknowledge the employer's argument that the Board officer placed an unreasonable expectation on the employer to have the same level of knowledge and expertise as an employer who specializes in and is contracted for a specific scope of work. However, I do not accept this argument. At no point has the Board required the employer to have the same level of knowledge and expertise as an employer who specializes in and is contracted for a specific scope of work. Rather, the expectation of the employer as the prime contractor at a multi-employer worksite is outlined in section 24(1)(a) of the *Act*. As noted above, this section requires a prime contractor of a multiple-employer workplace to ensure that the activities of employers, workers and other persons at the workplace relating to occupational health and safety are coordinated.

I also note that in support of issuing the order, the Board officer advised that the employer was in possession of the BC One Call and did not provide a copy to the excavation company, but relied on another civil contractor to verbally inform the excavation company where the lines were. In its submissions, the employer argued that the BC One Call ticket request as part of planning for the work would not provide the level of detail necessary to safely perform the work. This was because the construction contractor had not yet provided a final survey to the utility owner for that area. The employer relies on the fact that it coordinated the meeting with the contractors prior to the incident to ensure the excavation contractor would be provided the most accurate information to safely perform the work.

While I have considered this argument, I do not find it convincing because it too relies on the employer foregoing its ongoing responsibility to ensure that activities at the worksite were coordinated. Furthermore, the employer acknowledges that it was aware that the construction contractor had not yet provided a final survey to the utility owner for that area, so there was no up to date BC One Call ticket with sufficient detail necessary to safely perform the work. Rather than provide the oversight necessary to ensure that there was an accurate survey of the worksite before excavation occurred, the employer seems to have left all matters concerning the excavation to the contractors. In my view, this is a violation of the employer's obligation under section 24(1)(a) of the *Act* to coordinate the activities at the worksite.

I have specifically considered whether the employer acted with due diligence, and I find it did not. An employer exercising due diligence will have taken all reasonable care to prevent the particular event.

I acknowledge that in an April 2, 2024 Monthly Safety Bulletin regarding Excavation Safety, the employer included reference to accurately determining underground utilities prior to excavation. The employer notes that this document was posted at the worksite.

While I accept that the employer sent this document and it was posted at the worksite, I note that due diligence requires and employer to have taken all reasonable care to prevent the particular event. In this case, I find that a duly diligent employer would have done more than arrange a meeting between the contractors. An employer exercising due diligence in coordinating the activities at the worksite would have ensured that any underground services were properly identified and marked prior to excavation.

I note as well that the employer' August 30, 2024 Investigation Report of the incident identified the employer's reliance on the expertise of the contractors as a contributing factor. The Report indicated that it seemed likely in this case that the reliance on expertise fed into an assumption that communication between contractors would be fulsome and effective. It was not. The Report noted that the as-built drawing for the area, which was readily available on site, was not reviewed during the meeting between the contractors.

In my view, an employer exercising due diligence would have ensured that BC One Call or as-built drawings were reviewed prior to commencing an excavation. I note as well that the employer identified this in the Report under "Corrective Actions". It states that in an effort to prevent recurrence, the employer will review its collective practices around excavations projects and develop a consistent method of ensuring BC One Call and/or as-built drawings are reviewed by the necessary parties prior to excavating in all its workplaces. Had the employer used such a procedure prior to the incident, it could have avoided this violation.

In summary, I am satisfied that the employer was in violation of section 24(1)(a) of the *Act*.

Accordingly, I deny the employer's request on this review.

Conclusion

As a result, I confirm the Board's decision dated August 8, 2024.

Jefferson Rappell
Review Officer
Review Division