REVIEW DECISION

Re: **Review Reference #: R0326757**
Board Decision under Review: July 16, 2024

Date: **January 10, 2025**

Review Officer: **Sarah Frost**

Introduction and Background

The employer processes and wholesales fish. On May 20, 2024, an incident occurred in its facility resulting in the serious injury of a worker. On May 21, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected the employer's worksite.

As a result of the inspection, on May 27, 2024, the Board issued a number of orders to the employer, including an order under section 4.33(1) of the *Occupational Health and Safety Regulation* ("*Regulation*").

In the July 16, 2024 decision under review, the Board imposed an administrative penalty of $59,416.75 in respect of the above noted violation.

The employer seeks a review of this penalty. It says that it was duly diligent. The chair of the employer's Joint Health and Safety Committee was notified of this review but is not participating.

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 on this review is the Board's decision imposing an administrative penalty against the employer for a violation of section 4.33(1) of the *Regulation*.

Reasons and Decision

The Violation

The Board imposed the administrative penalty under review based on the employer's violation of the above noted section of the *Regulation*. As the employer did not request a review of the May 27, 2024 order, I have no jurisdiction to consider whether it was properly issued, and the order stands.

However, I must still be satisfied that the underlying facts of the violation support a penalty against the employer.

Section 4.33(1) of the *Regulation* states that a work area must be arranged to allow the safe movement of people, equipment, and materials.

In this case, the Board officer attended the employer's worksite on May 21, 2024 after an incident on May 20, 2024 resulted in the serious injury of a worker.

In his inspection report, the Board officer wrote that the employer operates two shifts per day, in the day and afternoon. The employer employs between 155 and 175 workers, and 75 workers were on site at the time of the inspection.

The Board officer said the inspection focused on the operations around the "thawing room", where the injury occurred. He noted that in this area, forklifts are used for loading/unloading and transfer of totes containing fish. Forklifts enter and exit the thawing room where additional workers are on foot inside the thawing room and the surrounding yard. The incident on May 20, 2024 involved a worker on foot being struck by a forklift exiting the northwest side of the bay door.

The Board officer spoke to employer and worker representatives and reviewed photographs provided by the RCMP officer who attended the accident. He determined that the employer had not arranged the work area near the thawing room to allow the safe movement of people, equipment, and materials. Specifically, the Board officer said this was evidenced by:

- A worker was tasked with removing tags from cardboard totes directly outside the northwest corner of the thawing room.
- The cardboard totes were arranged in at least two rows which created a narrow aisle way.
- A forklift was operating between the rows of cardboard totes to load totes on the dumper inside the thawing room.
- A forklift reversing between the rows of totes made contact with a worker's leg causing serious injury.

The Board officer provided further detail in the Summary of Facts in the Report for Administrative Penalty ("RAP"). He said that the plant supervisor and lead hand described that a worker had been removing packing labels from the side of cardboard totes containing frozen fish. These totes had been arranged outside the thawing room in two rows running parallel with the building's west wall. The two rows had been spaced apart in such a manner so as to create a narrow aisle that the forklift would have to transit to load the dumper inside the thawing room.

A second worker was tasked with the loading of the dumper inside the thawing room. This worker was required to operate the forklift between the narrow aisle created by the rows of totes. The plant supervisor and assistant lead hand advised that the worker on foot removing the packing labels had stepped backwards from between the boxes into the narrow aisle and was struck by the reversing forklift exiting the thawing room.

The employer does not dispute the facts of the incident. The information in the Board officer's inspection notes and Summary of Facts is well supported by the photographs on file and his handwritten notes from the date of the inspection. I find that the evidence establishes a violation of section 4.33(1) of the *Regulation*. As the violation upon which the Board based the administrative penalty has been established, the next question before me 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 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 Part 2 of the *Act*, or the employer's workplace or working conditions are not safe.

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*, or the violation involves failure to comply with a previous order within a reasonable time;
- 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 penalty must be considered because the violation was high risk. Policy item P2-95-2, *High Risk Violations*, sets out the following criteria to determine whether a violation is high risk:

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 Board has also issued Guideline G-P2-95-2, *High Risk Violations*. It states that the following should be considered:

> When considering the *likelihood of an incident or exposure occurring*, factors that may be considered are:
>
> - The number of workers exposed.
>
> - The potential hazards that are present in the particular work or task being performed.
>
> - Whether the hazard has been effectively controlled (ineffective controls usually result in one or more violation orders under the *Regulation* or *Act*).
>
> - The circumstances that increase the likelihood of a worker coming into contact with the hazard.
>
> When considering the *likely seriousness of any injury or illness*, factors that may be considered are:
>
> - Whether, in circumstances where an incident or exposure occurs, any resulting injury or illness is likely to be serious, or even fatal, due to the nature of the violation.
>
> - Additional conditions or circumstances at the workplace that would increase the potential outcome of a serious injury, serious illness, or death once the worker is exposed to the hazard.

The Board officer explained that the plant supervisor stated that during a typical day, the dumpster located on the west side of the thawing room is loaded with approximately 60 cardboard totes. On the east side of the thawing room is an outfeed chute for processed fish, which fills approximately 100 plastic totes per day, also delivered and removed by forklift. The thawing room is accessed by workers and forklifts at high frequency and the Board officer did not observe any physical barriers or floor markings to separate pedestrians and mobile equipment. He noted that a single delineator was placed at the entrance to the thawing room with a plastic chain connecting to the dumper frame. However, he determined that this created an awareness barrier within the thawing room but provided no protection to workers on foot.

The Board officer also described forklifts being operated throughout the worksite, using their horns and reverse beepers. Using a NIOSH sound level monitor application, the Board officer observed that the level of background noise in the thawing room was such that, combined with the frequency of signals coming from forklifts, it was unlikely pedestrian workers would take notice of a horn or beeping meant to alert them of an incoming forklift.

The Board officer advised that three serious injuries had occurred from contact between workers and forklifts at the worksite. This included the May 20, 2024 injury, an injury on August 31, 2022 that went unreported to the Board but was discovered in reviewing the employer's claim files, and an April 10, 2017 injury, following the which the employer was issued an administrative penalty by the Board.

Considering the evidence, I find that the violation in question was high risk. I find that the likelihood of an incident occurring was high, given the number of people moving in a relatively small space, the number of forklifts in operation, the noisiness of the area, and the lack of any effective means to separate pedestrians and forklifts within the enclosed space. Given the seriousness of the injuries incurred from being struck by a forklift, I am satisfied that injuries resulting from the failure to arrange the space safely would likely be serious.

As a result, I find that the violation in question was high risk, and a penalty must be considered on that basis.

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 or non-compliance to which the penalty relates. Policy 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 failure, non-compliance, or conditions to which the penalty relates.

The employer wrote in its request for review form that it was duly diligent, but did not provide further submissions. It also did not provide a response to the Board's May 30, 2024 due diligence request.

On my review of the evidence, I am not satisfied that the employer was duly diligent. The hazard and risk of worker and forklift collisions was obvious in this workplace, and a duly diligent employer would have implemented systems to minimize the risk of contact between workers and forklifts, particularly given the enclosed nature of its workspace, the degree of forklift traffic, and the two prior injuries. I acknowledge that the employer took a series of steps after the Board's orders were issued to comply with the *Regulation*. However, steps taken after a violation do not constitute due diligence.

Additional Factors in Deciding Whether to Impose a Penalty

Policy item P2-95-1 also sets out three additional 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.

I have found that the violation was high risk, which weighs in favour of a penalty. I am also satisfied that the employer was or should have been aware of the hazard and that the *Regulation* was being violated, given the past incidents involving collisions between forklifts and workers. In this regard, I note that a penalty was issued for the April 2017 incident referenced above. The fact that no further steps appear to have been taken to prevent such injuries after the April 2017 and 2022 injuries suggest that the employer's health and safety program is not effective in managing such issues. I am satisfied that this is a case where a penalty is required to motivate this and other employers to comply in the future, and another enforcement tool is not more appropriate.

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

The Penalty Amount

The Board imposed a penalty of $59,416.75 on the employer.

Policy item P2-95-5, *OHS Penalty Amounts*, sets out the calculation procedure for administrative penalties. Item 2(a) of 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 amount cannot be less than the minimum amount of $1,250. In this case, the Board calculated that amount to be $29,708.38, which I find accords with the policy.

The policy further provides for the application of multipliers to the initial amount. The Board determined that the multiplier for high-risk violation applied, and therefore multiplied the initial amount by two.

The next step in the calculation of the policy amount is to determine whether any variation factors apply. The policy states that the basic amount of the penalty may be increased or reduced by 30% to account for exceptional circumstances. It further explains that circumstances that are adequately addressed by other parts of the policy are not considered exceptional, and that the policy is designed to ensure that employers of similar size are generally given similar penalties in similar cases. In this case, I am not satisfied that there are any exceptional circumstances such that an upward or downward variation of the penalty is warranted. Accordingly, a variation of the penalty is not warranted.

Having reviewed the evidence and the relevant policy, I have concluded that the employer is required to pay a penalty of $59,416.75. As a result, I deny the employer's request.

Conclusion

As a result of this review, I confirm the Board's July 16, 2024 decision.

Sarah Frost
Review Officer
Review Division