REVIEW DECISION

Re: **Review Reference #: R0323860**
Board Decision under Review: May 28, 2024

Date: **February 20, 2025**

Review Officer: **Mahan Mafi**

Introduction

The employer is an asbestos removal and abatement contractor registered with the Workers' Compensation Board ("Board"), operating as WorkSafeBC.

On March 13, 2024, a Board officer inspected a worksite where the employer had been contracted to complete abatement of asbestos containing material ("ACM") for a residential home. The Board officer observed one of the employer's workers on the roof of the residential home performing removal of mastic from around the chimney flashing using hand tools. The worker was not wearing any personal protective equipment.

In a March 21, 2024 Inspection Report, the Board issued orders against the employer, including a violation of section 6.7(2) of the *Occupational Health and Safety Regulation* ("*Regulation*"). The employer did not request a review of this order.

In the May 28, 2024 decision letter that is the subject of this review, the Board imposed an administrative penalty of $5,005.02 against the employer for the violation of section 6.7(2) of the *Regulation*.

The employer requests a review of the Board's decision to impose an administrative penalty and requests that the penalty be cancelled. There are no other parties to this review.

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 under review is the Board's decision to impose an administrative penalty against the employer.

Reasons and Decision

Section 95(1) of the *Act* provides the Board the authority to impose a penalty where an employer has failed to comply with the *Act* or *Regulation* and has not established that it exercised due diligence to prevent the circumstances that gave rise to the non-compliance.

The Violation

The employer did not request a review of the March 2024 order issued under section 6.7(2) of the *Regulation* that led to the imposition of the penalty. As a result, I do not have jurisdiction to consider whether the order was properly issued, so it stands. However, I can consider the order to the extent necessary to determine whether the underlying facts provide a basis for imposing a penalty.

Section 6.7(2) of the *Regulation* states that the employer must not allow any work that would disturb asbestos containing material unless necessary precautions have been taken to protect workers.

In the summary of facts containing the request for administrative penalty, the Board officer stated that he inspected the workplace of the employer on March 13, 2024. Prior to arrival, the Board officer noted that he reviewed the Notice of Project – Hazardous Materials (NOP-H) and associated documentation including a pre-demolition hazardous materials inspection report (HMIR) conducted by a consulting firm. In the HMIR, the following materials were listed as asbestos containing:

- Drywall joint compound (DJC)
- Floor tile
- Chimney flashing mastic (presumed to contain asbestos)
- Sink undercoating (presumed to contain asbestos)
- Duct tape (presumed to contain asbestos)

The Board officer advised that when he attended the worksite, he observed a worker on the roof of the house performing removal of mastic from around the chimney flashing using hand tools. The Board officer took pictures of the worker on the roof, which showed that the worker was not wearing any personal protective equipment (PPE) for the asbestos abatement work he was doing.

The Board officer called to the worker and asked him to pause the work and come down off the roof. The worker continued to work and was observed trying to sweep up mastic they had removed from around the chimney area. The Board officer noted that he asked the worker again to come down from the roof and the worker came down. The Board officer asked the worker where his supervisor was; he said the supervisor was off site. The worker called the supervisor and

the supervisor advised that they would be on site in approximately 10-15 minutes.

The supervisor, who is also the employer's principal, arrived on site approximately 10 minutes later. The Board officer discussed his observations of the worker not using any PPE for the asbestos abatement while removing asbestos containing mastic from the roof. The supervisor responded that he was away at lunch and the worker was not supposed to be doing that work. Afterwards, the Board officer reviewed with the supervisor that their work procedures called for moderate risk asbestos work procedures for the removal of the mastic. The supervisor reviewed the setup requirements for moderate risk work for the removal of mastic and the worker geared up for moderate risk removal and cleanup of the asbestos containing mastic.

I note that the supervisor did not dispute that the mastic from around the chimney was presumed to contain asbestos, and that the worker on the roof was attempting to remove the mastic without wearing proper PPE.

Similarly, on review, the employer did not raise any objection to the evidence the Board officer had relied on, dispute any of the Board officer's findings, or that it had contravened section 6.7(2) of the *Regulation*. In fact, the employer implicitly acknowledged that its worker had breached the provisions of 6.7(2). The employer stated that it subsequently provided that worker a disciplinary warning letter advising him of the violation and that any future violations would result in termination.

The evidence supports the conclusion that the employer's worker had disturbed asbestos containing material and he had not taken necessary precautions. As such, I am satisfied that the employer was in violation of section 6.7(2) of the *Regulation* at the time of the March 13, 2024 inspection.

The violation upon which the Board based the imposition of the administrative penalty has been established. The next question before me is whether the administrative penalty was appropriate, and if so, the amount.

The Administrative 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 comply with the *Regulation*. Policy item P2-95-1, *Criteria for Imposing OHS Penalties*, explains that the Board must consider a penalty where at least one of the following applies:

- The violation resulted in a high risk of serious injury, serious illness or death;

- The employer previously violated the same, or substantially similar, sections of the *Act* or *Regulation*, or the violation involves failure to comply with a previous order within a reasonable time;

- The employer intentionally committed the violation;

- The employer violated section 73 of the *Act*;

- The employer violated section 79 of the *Act*;

- The employer violated a stop work order or stop use order; or,

- The Board considers that the circumstances warrant a penalty.

Policy P2-95-2, *High Risk Violations*, sets out six violations that are designated as high risk because they regularly result in fatalities, serious injuries, and serious illness. Causing work disturbing material containing asbestos, or potentially containing asbestos, to be performed without necessary precautions to protect workers is one of the designated high risk violations. As the employer's violation is designated high risk, I conclude that the Board had to consider an administrative penalty against the employer.

Due Diligence

Section 95(3) of the *Act* provides that the Board must not impose an administrative penalty if the employer exercised due diligence to prevent the failure or non-compliance to which the penalty relates. Policy item P2-95-9, *OHS Penalties – Due Diligence*, explains that an employer acts with due diligence where the employer shows that it took all reasonable care to prevent the particular event.

The employer's submissions on review noted that following the March 13, 2024 incident, it sent the worker a warning letter and advised him that further violations would result in potential termination of employment. However, due diligence applies to the employer's actions before the incident, as it concerns whether the employer took all reasonable care to prevent the initiating incident. Therefore, the actions the employer took after the violation occurred are not relevant to establishing that the employer took all reasonable steps to prevent the violation.

On review, the employer also noted that it had written and verbal work procedures in place, and that its workers were informed that they needed to wear PPE prior to removing any ACM. However, the evidence shows that prior to the inspection, the employer had not provided its worker with PPE and other forms of protection against exposure to asbestos-contaminated materials.

In the initial inspection report, the Board officer noted that the worker did not have a respirator, disposable impermeable coveralls, or lace less rubber boots. In addition, the work area was not designated, and there were no means for the worker to decontaminate himself. The employer's risk assessment and written work procedures submitted for the project stipulated that removal of mastic from the roof was moderate risk and required the worker to be wearing a half face respirator, disposable impermeable coveralls, and have a work area boundary, as well as a wash station set up for worker decontamination.

In my view, a duly diligent employer would have ensured that its workers, including its supervisor, understood the procedures to be used to safely complete an asbestos abatement. Further, a duly diligent employer would have inspected the site to ensure the correct controls were in place and functioning effectively and followed up with its workers to ensure that their work practices were in compliance with the *Regulation*. In this case, I am not satisfied that the employer had the necessary precautions in place, including a supervisor on site to ensure that its workers did not begin work without the proper PPE.

For those reasons, I find that the employer did not exercise due diligence. Since the employer was not duly diligent, a penalty must be considered.

Factors Warranting Imposition of a Penalty

When considering the appropriateness of a penalty, policy item P2-95-1 outlines some additional factors that 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 (specific deterrence) and other employers (general deterrence) 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, the effectiveness of the employer’s overall approach to managing health and safety, and

    d. whether other enforcement tools would be more appropriate;

3. Any other relevant circumstances.

I have already determined, above, that the employer's violation of section 6.7(2) of the *Regulation* exposed workers to a high risk of serious injury or death. This weighs in favour of a penalty.

Concerning the second factor, I find that this is a situation where the employer should have been aware of the requirements of the *Regulation* with regard to the hazards of airborne asbestos and the need to have precautions in place to protect workers. As a hazardous materials abatement contractor, the employer is aware of the hazards of doing asbestos work without PPE. Furthermore, the employer has a level 3 Asbestos Safety Leader certification, and ought to have been aware of the requirements for workers to be protected during asbestos abatement work.

The employer has also been previously cited for violations of section 6.7(2) of the *Regulation* in May 2021 and January 2022. I also note that on March 10, 2022, the employer was issued a penalty for its January 2022 violation of section 6.7(2).

I also considered whether other enforcement tools, such as a warning letter, would have been appropriate. However, the evidence shows that the employer did not act with reasonable care to ensure that its employees working to adjacent to asbestos-contaminated materials were sufficiently protected. Given these deficiencies and the fact that it was previously cited for a violating section 6.7(2), I find that an administrative penalty is the most appropriate means to encourage the employer, and other employers, to comply with its obligations under the *Act* and *Regulation* in the future.

For these reasons, I confirm the decision to impose an administrative penalty in this case.

<u>The Administrative Penalty Amount</u>

Policy item P2-95-5, *OHS Penalty Amounts*, provides that a penalty amount is determined based on the employer's assessable payroll for the calendar year immediately prior to the incident that gave rise to the penalty, or an estimate. An initial amount is calculated by multiplying the penalty payroll by 0.5%. This amount cannot be less than the minimum amount of $1,250. In this case, the Board determined that the initial amount of the penalty, based on the employer's entire penalty payroll, was $1,251.26. I find that the Board appropriately determined this initial amount applied.

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 applied one multiplier because of the high-risk nature of the violations. As discussed above, I have determined the penalty in this case relates to high-risk violations, and accordingly

the multiplier for a high-risk violation should apply. This results in an amount of $2,502.51. The employer does not specifically dispute this amount.

According to policy item P2-95-5, the next step in calculating the penalty amount is to consider whether variation factors apply to the amount calculated so far. It states that in exceptional circumstances only, the amount above may be reduced or increased by up to 30%. In this case, the employer has not submitted that the penalty should be reduced due to exceptional circumstances, and I do not find there are any exceptional circumstances in this case that warrant varying the penalty amount.

The next step is to consider whether this is a repeat penalty. Part 3 of policy item P2-95-5 states that a penalty will be imposed as a “repeat penalty” where there is a prior similar penalty.

In this case, the employer was previously cited for violating section 6.7(2) with respect to a January 20, 2022 incident. The Board later issued the employer an administrate penalty in a March 10, 2022 letter for its violation of 6.7(2). As such, I am satisfied the January 20, 2022 prior violation took place within three years of the March 13, 2024 violation, and notice to the employer that a penalty was being considered for the same or substantially similar violation referenced was provided at least 14 days prior to the March 13, 2024 violation. Therefore, I find that the Board appropriately applied a “repeat penalty” since the employer had a prior similar penalty, and multiplied the basic amount of $2,502.51 by two, resulting in a total penalty amount of $5,005.02.

As a result, I find the administrative penalty of $5,005.02 was appropriately calculated in accordance with the fact, law and policy. Accordingly, I deny the employer’s request.

Conclusion

As a result, I confirm the Board’s decision dated May 28, 2024.

Mahan Mafi
Review Officer
Review Division