REVIEW DECISION

Re: **Review Reference #: R0330743**
Board Decision under Review: September 24, 2024

Date: **May 5, 2025**

Review Officer: **Sarah Frost**

Introduction and Background

The employer operates a vegetable growing facility with multiple locations. On June 27, 2024, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected one of the employer's facilities.

As a result of the inspection, on July 4, 2024, the Board issued orders to the employer, including an order under section 3.16(1)(a) of the *Occupational Health and Safety Regulation* ("*Regulation*").

In the September 24, 2024 decision under review, the Board imposed an administrative penalty of $152,309.88 against the employer in respect of the June 27, 2024 violation.

The employer seeks a review of this penalty. It submits that the violation was a location violation, and that the penalty should be reduced accordingly. The employer provided submissions in support of its request. The employer's submissions were sent to the Board officer who issued the order for comment. The Board officer's comments were provided to the employer with an opportunity for rebuttal, and further submissions were received.

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.

Amendments were made to the Occupational First Aid sections of the *Regulation* that came into effect November 1, 2024. As the violation on which the penalty is based occurred prior to this date, the prior version of section 3.16(1)(a) applies to this review.

Issue

The issue on this review is the Board's decision imposing an administrative penalty on the employer for a violation of section 3.16(1)(a) 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 July 4, 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 3.16(a) of the *Regulation* as it read at the time of the June 27, 2024 inspection states that the employer must provide for each workplace such equipment, supplies, facilities, first aid attendants, and services as are adequate and appropriate for promptly rendering first aid to workers if they suffer an injury at work. Schedule 3-A to Part 3 set out the requirements for first aid equipment, supplies, facilities, attendants, and services depending on the hazard rating of the worksite, the number of workers, and the distance to the nearest hospital.

The prior version of Board Guideline G3.18(2), *Availability of first aid attendant*, which applied at the time of the violation, discussed how to ensure that a first aid attendant is available to render first aid promptly, as required by sections 3.16(1) and 3.18(2) of the *Regulation*. It stated that in order to provide effective treatment, first aid must be administered to a worker as soon as practicable after the injury or illness. The principles that applied in determining whether the first aid service has been properly provided included:

- A first aid attendant should actually be present in the area served, during all working hours. This includes periods such as lunch or coffee breaks when workers are on shift and at the workplace but not actually working.

- First aid attendants, equipment, and facilities must be ready to receive the injured worker or to depart to where the worker is situated without delay, usually within 3 to 5 minutes of being summoned.

- The location of the central first aid service should be readily accessible. A service will be readily accessible where the first aid attendant can reach injured workers within 10 minutes' walking time (or driving time) to render first aid.

The Guideline also addressed backups for an absent first aid attendant. It states that first aid attendants' absences may be planned (such as vacations or medical appointments) or unplanned (such as travelling with an injured worker to hospital or being absent because of sickness). The Guideline notes that since it is foreseeable that planned and unplanned absences will occur, the employer will be expected to have a procedure for dealing with them.

Where planned absences may leave on duty fewer than the required number of first aid attendants, the employer should have a substitute first aid attendant available as soon as the absence commences. With regard to unplanned absences, an absence of up to approximately half a shift is permissible until a replacement first aid attendant is in place.

In the Summary of Facts in the Report for Administrative Penalty ("RAP"), the Board officer wrote that during his investigation, he spoke to a grower, Mr. G, and a harvest supervisor, Ms. A, who were available on site at the time of the inspection.

Mr. G advised that a maintenance supervisor, Mr. D, was the first attendant on site. The Board officer asked to speak to Mr. D, but was told that he had left the site to go to a different facility. Following discussion about whether someone could cover first aid responsibilities, Mr. G and Ms. A suggested that they could get the first aid attendant from the employer's facility across the street. However, this was determined to not be a good idea because it would leave the other facility without a first aid attendant.

The Board officer later received a call from Ms. S, the employer's safety manager. Ms. S travelled to the site to assess the situation. Ms. S provided a spreadsheet of current and potential first aid attendants, as well as a paper with pictures of the three first aid attendants. She and the Board officer also examined written first aid procedures for the site, which were outdated, had a date of June 20, 2019, and identified first aid attendants who no longer worked for the employer or whose first aid certificate had expired.

Based on the information gathered, the Board officer determined that the employer had three first aid attendants working in this facility. At the time of the inspection, one was on vacation and two were working offsite. Mr. D was called to return to the site. On his return, he indicated to the Board officer that he was not the first aid attendant on duty that day.

A senior manager, Mr. K, contacted the Board officer and said that the employer was attempting to improve its first aid requirements and planning to train more workers. They were also looking at establishing a white board where workers assigned to do first aid would write their names at the beginning of the shift and a supervisor would monitor the activity for accuracy.

The Board officer determined that at the time of the inspection, there were approximately 26 workers on shift. Given the number of workers, the hazard rating of the employer's classification (moderate), and the location of the workplace as less than 20 minutes from the nearest hospital, the Board officer determined that Schedule 3-A required the employer have at minimum an occupational first aid level 2 attendant, a level 2 first aid kit, and a dressing

station at the worksite. He found that the employer did not have a first aid attendant available on site and had not planned for a first aid attendant to be present.

The employer does not dispute what occurred as described by the Board officer, and the Board officer's narrative is supported by his handwritten notes from the inspection and photographs he took during the inspection. I accept that the events occurred as described above.

The employer submits on review that Mr. D's absence was unplanned and only approximately three hours. It says that during that time, a first aid attendant could have been called from its location across the street, which could be reached at walking speed within five minutes. The employer says that this was less than half of Mr. D's shift, and an unplanned three hour absence was an isolated instance rather than a systemic lack of first aid coverage.

Having reviewed the evidence and submissions, I find that the employer was in violation of section 3.16(1)(a) of the *Regulation* on June 27, 2024. At the time of the Board officer's inspection, there was no first aid attendant on site. The employer's representatives on site who were tasked with dealing with the Board officer were initially unaware that Mr. D was away. Furthermore, there is no evidence that there was a system of tracking and addressing such absences, despite the fact that this particular attendant was responsible for maintenance at three different locations.

While a first aid attendant could have been called from another location, it does not appear there was a plan to facilitate this in the event of an emergency or the absence of this site's first aid attendant, or that the employer had a procedure for planned or unplanned absences of its first aid attendants. Overall, I find that the employer did not provide for its workplace a first aid attendant as required by 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 the 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 officer determined that a penalty must be considered because the employer had prior violations of the same section of the *Regulation*. In coming to this conclusion, the Board officer considered that the employer operates multiple fixed locations and that it had prior violations of section 3.16(1)(a) on February 26, 2024, November 2, 2023, June 21, 2018, and March 21, 2018, at other locations. A warning letter was issued following the February 26, 2024 violation.

Policy item P2-95-1 explains that the Board will generally consider violations at different fixed locations of the employer together to determine whether there have been repeat violations, unless it considers the violation at issue to be a location violation. A location violation is a violation by an employer with multiple fixed locations that, at the time of the violation, was doing all of the following:

- Effectively communicating with all locations regarding health and safety concerns.

- Providing adequate training to managers and others who implement site health and safety programs.

- Making local management accountable for health and safety.

- Providing local management with sufficient resources for health and safety.

The employer submits on review that it has effective communication across its locations, provides comprehensive training for managers and staff, and holds local management accountable. It says it has taken measures to ensure appropriate health and safety resources are available across all locations, and

notes that, within five minutes, the first aid attendant from its location across the street could have provided first aid coverage on the day in question.

The employer provided many documents in support of its submissions. I have reviewed them all and note they include information regarding first aid training and a March 20, 2024 first aid assessment for each location. The March 20, 2024 assessment confirms that the location where the violation occurred requires an occupational first aid level 2 attendant with back up "as per schedule". The materials also relate to supervisor, risk assessment, and other safety training.

In its reply to the Board officer's comments, the employer further submits that it has a structured and proactive approach to workplace safety. It says its approach includes:

- CEO led weekly safety reviews, in which the CEO personally reviews incidents, property damage reports, and near-miss cases with safety management teams across its Canadian locations.

- Data-driven safety monitoring led by the Vice President.

- Weekly safety meetings.

- Weekly proactive first aid compliance checks conducted by management to confirm that first aid attendants are scheduled and available for the upcoming week.

- Regular Joint Health and Safety Committee inspections and meetings.

The employer provided documentation showing examples of these steps, much of which is dated after the incident in question.

An employer must meet all of the requirements in P2-95-1 for a violation to be considered a location violation. In the circumstances of this case, I am not satisfied that the employer provided local management with sufficient resources for health and safety or that the employer effectively communicated with all locations regarding health and safety concerns.

Local management refers to the management of a particular location. In this case, the employer has suggested that the location could, if necessary, borrow first aid resources from another location. However, I am not satisfied that the employer provided each of its locations with sufficient resources for health and safety, particularly where such resources were potentially to be shared.

I further acknowledge that following the February 26, 2024 inspection, after which the Board issued an order under section 3.16(1)(a) and a warning letter, the

employer took steps to improve its health and safety program. These steps included providing first aid training for a number of its workers.

However, in my view the available evidence does not establish effective communication with all locations regarding health and safety concerns, particularly those relating to the first aid requirements of the *Regulation*. In particular, while the first aid attendant requirements were identified, the evidence does not support that they were effectively communicated to each of the employer's locations or actioned appropriately.

I find that this was not a location violation and that the employer's past compliance history across all its locations should be considered. Given the past violations of section 3.16(1)(a) of the *Regulation*, the employer has previously violated the same section of the *Regulation*, and so a penalty must be considered.

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 provided due diligence submissions to the Board. I have reviewed these in conjunction with the submissions on this review. Of note is that the February 26, 2024 order was issued following an incident in which a truck driver was seriously injured from a fall at one of the employer's locations, and first aid services were not available at the time. Following this incident, the employer took a number of steps regarding its first aid procedures, including:

- Hiring Ms. S,
- Conducting a first aid assessment, dated March 20, 2024, which determined the first aid requirements for each of its locations,
- Preparing a first aid poster dated May 29, 2024, although this was not at the worksite on the day of the June 27, 2024 inspection,
- Creating an additional position of Safety Advocate, although this had not yet been filled by June 27, 2024, and
- Providing first aid training to 15 new associates.

The employer took a number of further steps, but these occurred after the incident in question. The further steps included purchasing whiteboards and placing them at the entrance of each facility to advise of first aid coverage each day and a process to ensure appropriate first aid coverage and to track its occupational first aid attendants. However, none of these were in place at the time of the June 27, 2024 inspection, and actions taken following a violation do not constitute due diligence in respect of the violation.

While I acknowledge the employer took a number of steps following the February 26, 2024 work incident, I am not satisfied that it took all reasonable care to prevent the non-compliance to which this penalty relates. In particular, I find that a duly diligent employer would have established a system for tracking its first aid attendants and ensuring coverage was available on site for breaks or unplanned absences, particularly where at least one of its first aid attendants was a supervisor who may be required to attend its other locations on an emergency basis for undetermined periods of times.

In addition, if the employer intended to use first aid attendants from another of its sites to provide backup coverage, it should have established a procedure for this circumstance and ensured that its workers at both locations were advised accordingly in the event such need arose. This is especially the case where the past violation involved the absence of a first aid attendant at the time a serious injury occurred.

As such, I find the employer was not duly diligent and have considered whether a penalty should be imposed.

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.

After weighing the relevant factors, I find that the imposition of a penalty against the employer is warranted. I find that the employer was or should have been aware of the hazard and that the *Regulation* was being violated. This is particularly so, given the recent, February 2024 violation of the same section of the *Regulation*.

While this is not a high risk violation, I also find that there was a potential for serious injury, illness, or death arising from this violation, as illustrated in the employer's February 2024 violation. A delay in getting emergency medical first aid treatment may well result in serious injury or even death, should a worker be injured at work.

The employer's compliance history, as outlined above, also weighs in favour of a penalty. While the employer has made improvements in its approach to managing health and safety, significant gaps in ensuring appropriate first aid coverage remained by the time of the June 27, 2024 inspection.

A warning letter was issued following the February 2024 violation. I am satisfied that a penalty is the appropriate enforcement tool in this case in order to motivate this employer and other employers to comply in the future.

The Penalty Amount

The Board imposed a penalty of $152,309.88 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 $152,309.88, which I find accords with the policy.

I note that policy provides that a smaller payroll could be used if this was a location violation. However, for the reasons set out above, I have determined that this is not the case. Therefore, I find that it is appropriate to use the employer's whole assessable payroll in calculating the penalty.

The Board did not apply any multipliers and I have come to the same conclusions.

The next step in the calculation 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 amount is not warranted.

As a result, I deny the employer's request on this review.

Conclusion

As a result of this review, I confirm the Board's September 24, 2024 decision.

Sarah Frost
Review Officer
Review Division