REVIEW DECISION

Re: **Review Reference #: R0331547**
Board Decision under Review: October 17, 2024

Date: **April 23, 2025**

Review Officer: **Carmen Dowhaniuk**

Introduction and Background

The employer is a prime contractor at a construction site. On June 25, 2024, the employer instructed sub-contractors to unload a delivery of materials from a flat bed truck using a crane. The crane instead lifted the back of the truck, causing it to swing into traffic and lose part of its load. The next day, an officer of the Workers' Compensation Board ("Board"), which operates as WorkSafeBC, inspected the worksite. Following this inspection, the Board issued a July 4, 2024 inspection report, citing the employer for violations of section 18.2 of the *Occupational Health and Safety Regulation* ("*Regulation*"), and section 24(1)(a) of the *Workers Compensation Act* ("*Act*").

In the October 17, 2024 decision under review, the Board imposed an administrative penalty of $6,851.29 against the employer. The penalty order was based on violations of sections 18.2 of the *Regulation* and 24(1)(a) of the *Act*.

The employer has requested a review of the penalty order and has provided submissions in support of its request.

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

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

Reasons and Decision

The Violations

The employer did not request a review of the violation orders that the October 17, 2024 penalty was based upon, and I therefore do not have the authority to confirm or cancel these orders. However, in order to determine if a penalty is

warranted, I must consider whether the underlying facts support the imposition of a penalty.

Section 18.2 of the *Regulation*

Part 18 of the *Regulation* addresses traffic control. Section 18.2 provides that the employer must ensure that effective traffic control is provided and implemented whenever traffic could be hazardous to a worker.

As set out in the Report for Administrative Penalty ("RAP"), the employer instructed materials to be unloaded from a truck using a crane. Although the truck was parked on a street, no traffic control was in place. Due to a problem with the crane's rigging, the back end of the truck was lifted instead of the materials, causing the truck to swing into traffic and lose part of its load.

As work was being conducted on a street, I am satisfied that traffic could be hazardous to workers during the rigging of the materials, the incident itself, and during the post-incident clean up. The employer, however, did not have any traffic control measures in place.

I am satisfied that the evidence supports a violation of section 18.2. This provides grounds for the consideration of a penalty.

Section 24(1)(a) of the *Act*

Section 24(1)(a) of the *Act* addresses coordination at multiple-employer workplaces. It provides that the prime contractor of a multiple-employer workplace must ensure that the activities of employer, workers and other persons at the workplace relating to occupational health and safety are coordinated.

As set out in the inspection report and the RAP, the employer, as prime contractor, allowed a delivery of materials from a flat bed truck on a street during a time (after 3:00 pm) when traffic volume was high. The employer had a traffic control plan for deliveries to the workplace and this plan indicated that all deliveries required a full lane closure. However, the employer did not ensure that traffic control plan was used for this delivery or for the post-incident clean up. Nor did the employer coordinate the activities of other workers, such as the crane operator, traffic control persons, and the workers who cleaned up the dropped load, to ensure their safety.

I conclude that the evidence establishes a violation of section 24(1)(a). This provides further grounds for the consideration of a penalty.

I note that section 24(1)(a) imposes a general obligation on an employer, and an employer can meet that obligation where it acted with due diligence in the

circumstances. However, for reasons which I discuss below, I find the employer was not duly diligent.

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.

Policy item P2-95-2, *High Risk Violations*, explains that certain violations are automatically designated high risk because they regularly result in fatalities, serious injuries, and serious illnesses. However, when a violation is not designated as high risk, as is the case here, policy goes on to provide that the Board will determine whether the circumstances are high risk in each case based on the available evidence concerning:

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.

In determining the above, policy refers to the *OHS Guidelines*. Guideline G-P2-95-2 sets out several factors to consider regarding the above two criteria. These factors include the number of workers exposed, the hazards present, and whether the hazard has been effectively controlled.

According to the RAP, there was a relatively high volume of traffic around the worksite. Without traffic control measures in place, two workers were at risk of being struck by vehicles or crushed by the load during the initial incident, and up to five workers were at risk of being struck by vehicles during the clean up. In addition, the corner coming up the hill to the worksite is relatively blind and a

driver turning right onto this street would have been unable to see the truck. Without traffic control measures, northbound vehicles had to travel into the southbound lane blindly and potentially would have had to swerve into the work zone to avoid a collision. Due to these risks, the traffic control plan required a full lane closure for unloading deliveries in this area, but no such measures were in place at the time of the incident or during subsequent clean up. I am therefore satisfied that there was a high likelihood of an incident such as a collision occurring, and that if an incident occurred it could result in a serious injury or death.

I also note that the employer has previously violated similar sections of the *Regulation* regarding traffic control in 2023, and in 2024 the employer violated section 24(1)(a) of the *Act* regarding coordination at multiple-employer workplaces. Specifically, an order was issued to the employer under section 24(1)(a) for two incidents where it did not ensure that formwork stripping activities of sub-contractors were coordinated to prevent dropped objects.

The employer submits that the current incident should not be considered as high risk based solely on a past incident. From this comment, the employer appears to be referring to the order issued for the two dropped object incidents. However, the June 25, 2024 incident which is the subject of this penalty is not considered high risk due to those prior incidents. As discussed above, this incident is considered high risk because there was a high likelihood of an incident occurring given the lack of any traffic control measures, and because if an incident did occur, it was likely to result in a serious injury or death.

As the violation resulted in a high risk of serious injury and the employer has previously violated similar sections of the *Act* and *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 employer did not provide a submission on due diligence to the Board. For this review, the employer submits that the incident at the worksite was not its fault, and that the penalty does not appropriately reflect the actual level of risk involved in this incident. No further explanation was provided.

According to the traffic control plan, all deliveries to the worksite required a full lane closure. Despite that, Mr. X, a representative of the employer, allowed a delivery of materials without implementing that plan. This created a high risk of an incident occurring which could result in a serious injury to workers or to others near the worksite. Mr. X advised the Board officer that he was aware of the need for traffic control measures as set out in the traffic control plan, but he nevertheless instructed workers to proceed with the delivery without implementing the plan.

The employer was therefore aware of the hazard and had safe work procedures to address the hazard, but it did not coordinate activities to ensure that work was performed according to those procedures. The employer did not coordinate with traffic control persons or other workers before the delivery, or during the clean up process, to ensure that safe work procedures were followed. As the prime contractor, the employer should have had effective systems and processes in place to ensure that safe work procedures were followed. In my view, the employer did not take all reasonable steps to prevent the violation.

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, the incident occurred in an area with a relatively high volume of traffic and without traffic control measures in place, vehicles would have had to travel into the opposite lane blindly and potentially swerve into the work zone to avoid a collision. Furthermore, after the truck was swung into traffic and its load dropped, traffic control measures were not implemented for the clean up process. There was therefore a high risk for a serious injury at the time of the violation.

The employer had a traffic control plan in place which indicates that it was aware of the hazards. An employer representative confirmed that he was aware of the need for traffic control measures during deliveries, but he nevertheless allowed a delivery to occur without implementing any such measures. This further supports that the employer was aware of the hazard and should also have been aware that the *Act* or *Regulation* was being violated.

Moreover, the employer has previously violated similar provisions of the *Act* and *Regulation*. As documented in the RAP, the Board has previously issued orders to the employer for violations of section 18 of the *Regulation* in 2023, and for section 24(1)(a) in 2024.

Given these prior violations, and the fact that the employer did not implement its traffic control plan in circumstances where it knew it should have been used, 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 $6,851.29, 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 $3,425.65.

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 a high risk multiplier. I have already determined that the penalty results from a high risk violation, and I am therefore satisfied that this multiplier was appropriately applied. This raised the penalty amount to $6,851.29

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, and my review of the evidence does not establish any exceptional circumstances which would warrant a variation factor.

I conclude that the administrative penalty of $6,851.29 against the employer for violations of section 18.2 of the *Regulation* and section 24(1)(a) of the *Act* 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 October 17, 2024.

Carmen Dowhaniuk
Review Officer
Review Division