DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

WCAT Decision Number: A1607090
WCAT Decision Date: December 11, 2017

Introduction

[1] The employer, a company whose business includes the installation of street lights and traffic signals, is appealing a decision (*Review Reference #R0210303*) concerning an administrative penalty for a violation of the *Occupational Health & Safety Regulation* (Regulation).

[2] A prevention officer from the Workers' Compensation Board (Board)[1] conducted an inspection of one of the employer's work sites on August 31, 2015 and issued an inspection report on September 4, 2015 (the initiating report). The initiating report included an order stating that the employer had violated section 19.24.1 of the Regulation, which concerns the limits of approach for work in the vicinity of power lines. At the time, the employer was carrying out work as a subcontractor that involved the installation of an overhead signalling arm at a city street corner. The officer found that the employer had failed to ensure that the required clearance distance from energized overhead conductors was maintained during the lifting, erection, and installation of the signalling arm. The initiating report also included a second order stating that the employer had violated section 115(1)(a) of the *Workers Compensation Act* (Act) by failing to inform its subcontractor (a firm which provided a crane and crane operator to assist in the installation) was made aware of the voltage of the overhead power line, and failed to ensure that appropriate arrangements and procedures were in place to maintain the minimum approach distance of ten feet from the power line.

[3] The Board issued an inspection report dated June 21, 2016 which included an order imposing an administrative penalty (the penalty order) on the employer in the amount of $49,424.78 for the August 31, 2015 violations. This was communicated to the employer in a June 22, 2016 letter. The employer requested a review of the penalty order.

[4] In the November 25, 2016 decision now under appeal a review officer confirmed the Board's penalty order.

Issue(s)

[5] This appeal raises the following issues:

1. Whether the employer breached its health and safety obligations with respect to section 19.24.1 of the Regulation and section 115(1)(a) of the Act; and,

[1] The Board operates as WorkSafeBC.

2. If so, whether an administrative penalty is warranted, and if so, the appropriate amount of the penalty.

Jurisdiction and Method of Hearing

[6] Section 239 of the Act provides for appeals to the Workers' Compensation Appeal Tribunal (WCAT) of final decisions by review officers regarding administrative penalty orders.

[7] The employer did not request reviews by the Review Division of the two violation orders in the initiating report that were later relied upon to impose the administrative penalty. The review officer, however, confirmed that the violations occurred. Where a decision respecting an order under Part 3 of the Act is later relied upon to impose an administrative penalty, on appeal from a review officer's decision regarding the administrative penalty order, WCAT has jurisdiction over the underlying orders, even though they were not themselves the subject of requests for review[2].

[8] This is an appeal by way of rehearing, in which WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. WCAT has inquiry power, including the discretion to seek further evidence, but is not obliged to do so.

[9] WCAT must make its decision on the merits and justice of the case, but in doing so, must apply a policy of the Board's board of directors that is applicable in the case. The applicable policy respecting occupational health and safety matters is found in the Board's *Prevention Manual*.

[10] The employer is represented by an adviser from the Employers' Advisers Office.

[11] The employer's joint occupational health and safety committee was invited to participate in the appeal, and a representative of the committee advised WCAT that the committee would not participate. The union representing the employer's workers was also invited to participate in the appeal but is not participating.

[12] The Board participated in the appeal at WCAT's invitation pursuant to section 246(2)(i) of the Act.

[13] The employer, the employer's representative, the Board prevention officer who issued the initiating report and penalty order, and an investigation legal officer from the Board attended an oral hearing in Richmond on October 3, 2017. The employer was present in the person of L, a principal of the company and J, another principal and the company's occupational health and safety manager. J and the prevention officer testified at the oral hearing.

[14] At the oral hearing the employer provided a written statement by X, who was the employer's supervisor at the job site on August 31, 2015.

[2] Item #3.2.2.1, WCAT *Manual of Rules of Practice and Procedure*.

Law and Policy

[15] Section 115 of the Act sets out the general obligations of employers with respect to occupational health and safety, including the following[3]:

> **115** (1) Every employer must
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> (a) ensure the health and safety of
>
> (i) all workers working for that employer, and
>
> (ii) any other workers present at a workplace at which that employer's work is being carried out, and
>
> (b) comply with this Part, the regulations and any applicable orders.

[16] Section 196(1) of the Act provides the Board with the discretion to levy administrative penalties. It provides that:

> **196** (1) The Board may, by order, impose on an employer an administrative penalty under this section if the Board is satisfied on a balance of probabilities that
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> (a) the employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
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> (b) the employer has not complied with this Part, the regulations or an applicable order, or
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> (c) the employer's workplace or working conditions are not safe.
>
> …
>
> (3) An administrative penalty under this section must not be imposed on an employer if the employer establishes that the employer exercised due diligence to prevent the circumstances described in subsection (1).

[17] Section 19.24.1 of the Regulation sets out minimum approach distances for working close to electrical equipment and conductors. It provides that:

> Subject to section 19.24.2, or unless otherwise permitted by this Part, if exposed electrical equipment or conductors at a workplace have a voltage within a range set out in Column 1 of Table 19-1A, the following must remain at least the distance from the exposed electrical equipment and conductors that is set out in Column 2 opposite that range of voltage:
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> (a) a person working at the workplace;
>
> (b) a tool, a machine, material or equipment at the workplace.

[3] All quotes are reproduced as written, unless otherwise indicated.

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[18] In Table 19-1A the minimum approach distance is 3 metres or 10 feet for work close to exposed electrical equipment or conductors with voltage from 750 V (volts) to 75 kV (kilo-volts) measured phase to phase.

[19] Section 19.25 of the Regulation provides that if the minimum distance in Table 19-1A cannot be maintained because of the circumstances of the work or the inadvertent movement of persons or equipment, an assurance in writing in a form acceptable to the Board and signed by a representative of the owner of the power line must be obtained. The assurance must state the measures that will be taken while the work is being done, such as rerouting the electrical equipment and conductors, isolation and grounding of the electrical equipment, or visually identifying and guarding the electrical equipment.

[20] As explained by the prevention officer, the written assurance in this section is referred to as a "form 30M33."

[21] The Board's discretion to impose administrative penalties must be exercised in accordance with the policies respecting occupational health and safety enforcement that are set out in the Prevention Manual. These include the following: policy item #D12-196-1 (Administrative Penalties – Criteria for Imposing); policy item #D12-196-2 (OHS Penalties – High Risk Violations); policy item #D12-196-3 (Administrative Penalties – Prior Violations and Orders); policy item #D12-196-6 (Amount of Penalty); policy item #D12-196-10 (Administrative Penalties – Due Diligence); and, policy item #D12-196-11 (Occupational Health and Safety ("OHS") Warning Letters).

[22] Policy item #D12-196-6 was amended effective March 1, 2016 and again effective July 4, 2017. Because the violations on which the penalty against the employer is based occurred prior to March 1, 2016, the version of policy item #D12-196-6 which applies to the employer's appeal is the policy as it read before March 1, 2016.

[23] I will address the criteria in the applicable policies in the reasons that follow.

Background and Evidence

[24] The employer has been in business since approximately 1981. A large part of its business involves the installation of street-light standards, traffic-control signal arms, and traffic signals. Some of the employer's jobs involve installations in the vicinity of high voltage power lines. J estimated that this would be about 10% of the installation jobs.

[25] The employer's history includes previous orders issued by the Board with respect to a July 2013 inspection. The orders referred to violations of sections 19.24 and 19.25(1) of the Regulation. The Board's investigation at that time arose from a June 2013 incident in which two workers working on one of the employer's installation jobs sustained electrical burn injuries due to contact between their equipment and a high voltage power line. As a result of those violations the Board issued a warning letter to the employer.

[26] As described by J (the employer's health and safety manager) in her testimony at the oral hearing in the present case, following the violation orders concerning the June 2013 incident the employer undertook a number of steps to comply with the orders. These included changes to

the employer's safety procedures and programs, which became much more detailed in relation to work near power lines. The employer arranged for the Electric Industry Training Institute to provide training to the employer's workers. J stated that the employer achieved compliance with the Board's 2013 orders.

[27] In August 2015 the employer was carrying out work under a contract with a city to install street light standards, traffic control signal arms, and traffic signals at a number of locations. The city required new signals to be installed because of road work, including street widening, new curbs and gutters, and new controlled intersection signals. The city hired an engineering firm to prepare drawings and specifications for the work. The employer subcontracted with another firm to provide a crane and crane operator to facilitate the installation.

[28] The penalty order concerns the employer's work at one of the intersections affected by the road work. According to documents in the record, J's testimony at the oral hearing, and the written statement by X, the following sequence of events preceded the initiating inspection report.

[29] In an August 17, 2015 email, a copy of which was not sent to the employer, the city informed a number of recipients (including the engineering firm) that the company which owns the overhead power lines on the street (O) had just been on the site and had identified a clearance problem with the traffic signal installation plan. O wanted a minimum 2.5-metre clearance, but would have preferred 3 metres. In its email the city noted two possible solutions.

[30] In an August 18, 2015 email from the city, a copy of which was sent to the employer (namely to L and X), the city advised that O had confirmed that there was a clearance issue on the southwest corner of the intersection, and that the chosen solution was to install an L-pole with a 10-metre arm and an extension.

[31] In his statement X confirms that he had received the email from the city about the re-design involving the installation of the L-pole with a 10-metre arm and extension on the southeast corner of the intersection (instead of the original design which involved an S-pole on the southeast corner).

[32] X states that when he arrived at the job site on the morning of August 31, 2015 he asked the city's site foreman if the bases (of the poles) had all been installed where they were designed to be, and he confirmed that they were (with the exception of one on the northeast corner, which is not pertinent to the issue in the appeal). X had the crew (including the crane operator) proceed with the installation once the city's foreman confirmed that it was "as per design."

[33] X states that unfortunately he did not confirm the measurements that morning (in accordance with the employer's safe work procedures) because he trusted the information communicated to him and assumed that a solution for the clearance issue had been put in place.

[34] After the traffic signal pole and extension arm had been installed a representative of O attended the site and contacted the Board with respect to a clearance (or limits of approach) issue. The prevention officer attended the work site and spoke to X, who advised that the employer's work crew was made up of two employees of the employer, the subcontracted crane operator, and a subcontracted traffic-control person. X confirmed him that they had erected and installed the

vertical light standard with the horizontal street signal arm on the southeast corner of the intersection.

[35] The prevention officer noted that there were two groups of overhead power lines that ran along the street in a north-south direction. According to information provided by O to the prevention officer, the lower group of energized power lines were secondary conductors carrying 12.4kV of electricity, measured phase to phase. Above them were three energized primary power lines carrying 138kV of electricity. The prevention officer noted that the minimum approach distance to energized 12.4kV power lines as set out in Table 19-1A of the Regulation was 10 feet or 3 metres. He also noted that O (who was onsite along with their subcontractor) was concerned that the signal arm was too close to the power lines.

[36] A power line technician employed by O's subcontractor was directed by O to measure the distance from the 12.4kV power line to the horizontal signal arm. This was done from an elevated work platform using an insulated pole or "hot" stick. The technician marked the distance on the stick using electrical tape, and the distance was measured (in the presence of the prevention officer) once the power line technician returned to the ground. The distance was 7.5 feet.

[37] X informed the prevention officer that he knew that the voltage of the overhead power lines was 12kV. X confirmed that he had not obtained a form 30M33 because he was working from the engineering drawings and he assumed that the drawings took into consideration the location of the overhead power lines. X stated that he had not taken any other steps to confirm the power line voltage or to determine how close to them the horizontal signal arm would be once it was installed.

[38] In the September 4, 2015 inspection report the prevention officer issued two orders stating that on August 31, 2015 the employer had violated section 19.24.1 of the Regulation and section 115(1)(a) of the Act.

[39] The orders required the employer to provide a notice of compliance report to the Board no later than September 18, 2015. In its September 18, 2015 compliance report the employer advised that with respect to the section 19.24.1 order it had amended its safe work procedures to include more clarity on the requirement to confirm distances and voltages prior to the start of work. The safe work procedures now recognized that the employer cannot rely on the information provided by general contractors or engineers concerning the limits of approach to electrical lines. Instead, the employer has an obligation to confirm the distances and voltages. In addition, the amended procedures include more clarity as to when an assurance in writing (30M33) is required and how to proceed should it be deemed that there is potential conflict with the limits of approach. The employer stated that working together with the power line's owner and obtaining a letter of assurance will ensure that it would not contravene section 19.24.1 of the Regulation. The revised safety procedures would be reviewed with all employees and the employer would make clear that failure to follow the new procedures would result in disciplinary action, including possible termination of employment.

[40] With respect to the contravention of section 115(1)(a) the employer reported to the Board that its written safe work procedures now included a statement that all workers of the employer and all subcontractors participating in work in proximity to the limits of approach must be included in

the pre-task plan, have a clear understanding of the safety procedures, and must sign off to confirm their understanding of the procedure and knowledge of power line distances and voltages. In addition, all employees and operators who work with the employer on a regular basis would have a thorough review of the written safe work procedures.

[41] The employer's compliance report included copies of its July 2013 occupational health and safety program pertaining to working around live power lines, and its updated health and safety program, including the September 2015 revised program for work near overhead power lines.

[42] The Board issued a document on November 23, 2015 confirming that the employer had complied with the September 4, 2015 orders. On June 22, 2016 the Board issued the penalty order with respect to the August 31, 2015 violations.

[43] At the oral hearing J testified that the employer's safety improvements since the August 31, 2015 incident included the acquisition of laser devices used to measure the heights of power lines and clearances from power lines. She stated that the employer had insulated measurement sticks on site on August 31, 2015, but acknowledged that they were not used.

[44] In its written submissions to the Review Division in support of its request for review of the penalty order the employer did not dispute the August 31, 2015 violations. The employer noted that although it did not receive the August 17, 2015 email from the city to the engineering firm, it was made aware verbally what was going on. The revised plan was included with the August 18, 2015 email that was sent to the employer. The revised plan reflected O's request that the limit of approach be adjusted to at least 2.5 metres, instead of the minimum 3 metres required by the Regulation. The employer acknowledged that X, its supervisor on site, was aware of the redesign, but did not follow the employer's safe work procedures that required that measurements be taken on the day of the work as measurements can change since the design drawings were made because of temperature changes or user demands.

[45] The employer argued that the mistake by X was not due to a poor safety culture or an individual who had no regard for safety; instead, X made a poor decision because he understood the design had been reworked to allow for the proper amount of clearance. The employer referred to other instances where X was duly diligent and discharged his duties without incident.

[46] The employer disputed the prevention officer's finding that the violations were "high risk," and submitted that it is too simplistic to suggest that the violation would lead to a high risk of serious injury, illness, or death. The employer noted that the prevention officer used the terms "could have" and "could be," and that these indicate that his conclusion about the high risk violation was speculative.

[47] The employer argued that the circumstances of the incident in June 2013 were completely different than what occurred on August 31, 2015. The employer argued that it was necessary to consider the circumstances of the two different incidents, and not simply that both involved section 19.24 of the Regulation.

[48] With respect to due diligence, the employer submitted that the June 2013 incident resulted in significant upgrading of their occupational health and safety program that recognized general

and specific requirements. The employer recognizes the importance of safety and has bolstered their program as outlined in their September 23, 2015 compliance program.

[49] The employer argued that the August 31, 2015 violations occurred as a result of the independent action of X, who had been fully trained and instructed, and that this weighed against imposition of an administrative penalty.

Reasons and Findings

Submissions

[50] The employer acknowledges that it breached section 19.24.1 of the Regulation and section 115(1)(a) of the Act and does not dispute the facts upon which the initiating violation report was based. However, it submits that it acted with due diligence such that it should not be subject to an administrative penalty. In the alternative, the employer seeks to have the amount of the penalty reduced.

[51] The employer provided oral submissions in which it stated that its position is unchanged since its written submissions to the Review Division. The employer submits that the J's testimony, in which she described the changes to the employer's overall safety program after the 2013 violation orders and the employer's commitment to safety, shows that safety is of paramount importance to the employer and that it has an overall level of due diligence with respect to occupational health and safety. However, one supervisor in a particular situation missed a step in the employer's health and safety procedures for working near high voltage power lines.

[52] The employer submitted that the due diligence standard in section the Act is one of reasonableness, not a standard of perfection, which has been recognized in past WCAT decisions. Viewed as a whole, the employer met that standard.

[53] The employer submits that following the September 4, 2015 violation orders it took the necessary steps to comply, and that in light of those steps and its overall health and safety program an administrative penalty is not required to motivate it to comply with its occupational health and safety obligations.

[54] In the alternative, in the event that I find that a penalty is warranted, the employer argues that the criteria for a reduction in the penalty amount under policy item #D12-196-6 are satisfied.

Whether the violations underlying the penalty order occurred

[55] The employer did not dispute that the August 31, 2015 violations set out in the September 4, 2015 report occurred. Having considered the evidence and submissions, I am satisfied that the violations of section 19.24.1 of the Regulation and section 115(1)(a) of the Act did occur.

Is an administrative penalty warranted?

[56] Policy item #D12-196-1 of the Prevention Manual lists six threshold criteria that provide a *prima facie* basis for imposing an administrative penalty. If any one of these six criteria is satisfied, the Board will then go on to consider whether to actually impose an administrative

penalty. Policy item #D12-196-1 therefore applies a two-part analysis to the question of whether or not an administrative penalty should be imposed. I will consider each part in turn.

Threshold criteria for the imposition of an administrative penalty

[57] The six criteria relevant to establishing a *prima facie* case for imposing an administrative penalty are:

- an employer is found to have committed a violation resulting in a high risk of serious injury, serious illness, or death;
- an employer is found in violation of the same section of Part 3 of the Act or the Regulation on more than one occasion, including where, though a different section is cited, the violation is essentially the same;
- an employer is found in violation of different sections of Part 3 of the Act or the Regulation on more than one occasion, where the number of violations indicates a general lack of commitment to compliance;
- an employer has failed to comply with a previous order within a reasonable time;
- an employer knowingly or with reckless disregard violates one or more sections of Part 3 of the Act or the Regulation.
- the Board considers that the circumstances may warrant an administrative penalty.

[58] The prevention officer who prepared the Recommendation for Penalty found that the first, second, and third of these criteria are established.

- Did the violations result in a high risk of serious injury, serious illness, or death?

[59] Policy item #D12-196-2 (Administrative Penalties – High Risk Violations) of the Prevention Manual indicates that the phrase “high risk of serious injury, serious illness or death” must be assessed in light of three factors:

1) the likelihood of an injury occurring;
2) the number of workers affected; and,
3) the likely seriousness of any injury.

[60] “Risk” is defined in Part 1 of the Regulation as a “chance of injury or occupational disease”. A high risk is therefore a high chance of injury.

[61] It is apparent from the wording of policy item #D12-196-2 that the term “high risk” has a specialized meaning in the context of occupational health and safety. The analysis is not limited to the single question of whether or not there is a statistically or quantifiably high risk of developing a particular disease or suffering a particular injury.

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[62] The Board has a guideline on the meaning of "high risk" (G-D12-196-2). It provides criteria that may be considered, and examples of activities that likely will be considered high risk. The examples include exposure to electrocution hazards (including limits of approach). While not determinative or binding, the guideline provides useful guidance with respect to meaning of "high risk" and I have considered it in deciding whether the August 31, 2015 violations were high risk.

[63] In the Recommendation for Administrative Penalty the prevention officer states that the violation was high risk as a person could suffer a fatal or serious injury by touching the power line or by simply standing near an object to which electricity might jump or arc. The power could flow through a crane energizing the ground and electrocuting any workers standing in this area. There were four workers working close by.

[64] As noted by the review officer, the employer did not dispute that the circumstances described by the prevention officer could occur, but argued that it was too simplistic to suggest that the violation could ultimately lead to serious injury or death, and that it was speculative to say that this could happen.

[65] The Board's occupational health and safety mandate includes preventing things that might happen. Assessing the degree of likelihood of an injury occurring and the seriousness of the possible consequences is required. It is not in the nature of the inquiry to determine with certainty or high probability that the injurious or fatal events would happen. I do not agree with the employer that the prevention officer's conclusions involved speculation. I accept that in the circumstances of the violations there was an actual potential for seriously injurious or fatal consequences, and not merely a remote or speculative possibility. I find that the risk posed by the installation of the pole and extension arm with a crane within the limits of approach set out in Regulation involved a high risk of serious injury or death and the employer's contravention of section 115(1) of the Act and section 19.24 of the Regulation was high risk.

- Repeat Violations

[66] The 2013 violation of the Regulation cited by the prevention officer was an incident in which two workers contacted an electrical conductor to ground while installing a light standard.

[67] The employer argues that it is not enough that the same section of the Regulation was involved in the 2013 violation, and that it necessary to compare the circumstances of the two incidents. The employer submits that the circumstances were different in the two incidents, without describing the material differences.

[68] I note that policy item #D12-196-1 does not expressly state that the circumstances of the two incidents must be considered when the prior and current violations involved the same section of the Regulation or the Act. The policy, however, states that the repeat violation criterion may be satisfied where a different section is cited, but the violation is essentially the same. This would involve consideration of the circumstances of the two violations.

[69] The June 2013 violation of section 19.24 of the Regulation was for failing to inform workers of the location and voltage of high voltage electrical equipment or conductors and the work

arrangements or procedures for complying with Part 1 of the Regulation. The 2013 violation of section 19.25(1) was for failing to take alternative required steps when the minimum distances required by Table 19-1 could not be maintained. The 2015 violation order cited section 19.24.1 of the Regulation which establishes limits of approach when working close to exposed electrical equipment and conductors. I accept that these are two different section numbers in the Regulation, but find that they are so closely connected by subject matter (safety provisions for managing risks inherent in working in proximity to high voltage equipment and conductors) that for the purposes of policy item #D12-196-1 they can be treated as part of the same section of the Regulation.

[70] However, in the event that I am wrong, and they are considered to be two different sections of the Regulation, I would find that the underlying circumstances of the two incidents were essentially the same. Both the 2013 and 2015 violations involved a failure to adequately address the high voltage of the nearby power lines such that work was performed within the limits of approach established in the Regulation. In the 2013 incident this resulted in the equipment operators receiving electric shock injuries, while in the 2015 incident the pole and extension was installed without the crane operator or other workers being injured as a result of contact with, or proximity to, the high voltage overhead power lines. I am satisfied that in terms of the pertinent occupational health and safety concerns the circumstances underlying the two violations, while having some differences, were essentially the same for the purposes of policy item #D12-196-1. I find that the August 31, 2015 incident involved a repeat violation of the same section of the Regulation.

[71] I also find that the circumstances of the August 31, 2015 violations warrant consideration of an administrative penalty. The primary grounds for consideration of an administrative penalty are met.

- Are there additional factors supporting an administrative penalty?

[72] A number of secondary factors set out in policy item #D12-196-1 assist in determining whether to actually impose an administrative penalty. Policy item #D12-196-1 directs consideration of the following:

- whether the employer has an effective, overall program for complying with the Act and the Regulation;
- whether the employer has otherwise exercised due diligence to prevent the failure, non-compliance, or conditions to which the penalty relates;
- whether the violations or other circumstances have resulted from the independent action of workers who have been properly instructed, trained, and supervised;
- the potential seriousness of the injury or illness that might have occurred, the number of people who might have been at risk, and the likelihood of the injury or illness occurring;
- the past compliance history of the employer, including the nature, number, and frequency of violations, and the occurrence of repeat violations;
- the extent to which the employer was aware or should have been aware of the hazard or that the Act or the Regulations were being violated;

- the need to provide an incentive for the employer to comply;
- whether an alternative means of enforcing the Regulations would be more effective; and
- other relevant circumstances.

[73] Having considered all of the above factors, I find that the imposition of an administrative penalty on the employer is appropriate. I will set out my reasoning in relation to each factor in turn.

- Effective Overall Safety Program

[74] While I accept that the employer made significant improvements in its overall safety program following the 2013 violations, including hiring the Electric Industry Training Institute to conduct training on safety measures for work in proximity to power lines, and upgrading its manual of safety standards and procedures, I find that at the time of the August 31, 2015 violations it did not have an overall effective safety program.

[75] I consider the following to show that the employer's safety program was not effective in spite of the contents of its safety manual and the training that its workers, including X, had received. The prevention officer noted that on August 31, 2015 when he asked X if a safety meeting had been held before work started that day, X stated that there had been a meeting, and he had provided the prevention officer with a copy of a two-page document titled "Pre-Task Plan." Although the document identified the hazard of working near live power lines, it did not describe how the hazard would be effectively managed beyond the advice to "keep away from power lines." There is no indication that voltage of the power lines or the limits of approach were reviewed with the work crew.

[76] The prevention officer noted that there was no indication in the records provided by the employer respecting its training, instruction, and supervision of workers that the employer conducted site safety inspections or audits to determine if the local site supervisor (in this case X) was adhering to the employer's health and safety program or the Regulation.

[77] At the oral hearing J stated that the employer has three site supervisors, two in the Lower Mainland and X, who is based in the city where the August 31, 2015 violation occurred. She stated that she is based in the Lower Mainland and gets to the city where X works once per month, unless there is a big project. During her monthly visits to that city she reviews paperwork, visits work sites, and checks on conditions at the work sites, including whether X's office and the work sites are kept clean and tidy. When visiting work sites she usually reviews the drawings for the planned work and checks for safety issues such as overhead power lines, proximity to a school area, or anything that could be a hazard. She did not visit the work site that was the subject of the August 31, 2015 inspection. J stated that aside from monthly trips, she speaks to X daily.

[78] While I accept that as the employer's safety manager J performs office and site visits and reviews paperwork, including project drawings and documentation, her evidence does not lead me to conclude that the prevention officer was wrong about the lack of regular audits or oversight of the work of the three site supervisors to ensure that their practices were consistent with the employer's safety policies and practices and with the Regulation.

[79] Considering the evidence as a whole I do not accept that at the time of the violations the employer had an effective overall safety program.

- Due Diligence

[80] The question of due diligence is a critical factor in determining whether or not to impose an administrative penalty. Section 196(3) of the Act states that an administrative penalty must not be imposed in the face of due diligence by the employer in question. Policy item #D12-196-10 "Administrative Penalties – Due Diligence" states, in relevant part:

> The Board will consider that the employer exercised due diligence if the evidence shows on a balance of probabilities that the employer took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. Due diligence will be found if the employer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the employer took all reasonable steps to avoid the particular event.
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> In determining whether the employer has exercised due diligence under section 196(3), all the circumstances of the case must be considered.

[81] The employer emphasizes that this is a standard of reasonableness, not of perfection. I agree.

[82] However, having considered the evidence of the prevention officer and the employer I find that there were reasonable steps that employer could have taken with respect to the work on August 31, 2015 to prevent the violations from occurring, but which it did not take.

[83] The first step would have involved, as the employer has acknowledged, determining the actual clearance between the overhead power lines and the pole and extension that were to be installed. The supervisor's reliance on the engineering drawings was not reasonable in the circumstances, since the front of the drawings included the following warning label written in capital letters:

> OVERHEAD POWERLINE CONFLICTS CONTRACTOR SHALL CONFIRM ON SITE PRIOR TO CONSTRUCTION THAT POLES AND EQUIPMENT WILL MEET WorkSafeBC CLEARANCE REQUIREMENTS FOR OVERHEAD PRIMARY AND SECONDARY LINES. CONTRACTOR TO REPORT ANY CONFLICTS OR DISCREPANCIES TO [NAME OF ENGINEERING FIRM].
>
> [underlining in original]

[84] On the face of it this warning would have resulted in the employer (through its site supervisor) ensuring that the poles and installation equipment met the clearance requirements in the Regulation. I find that a reasonable person would not have relied on the "re-design" contained in the drawings, but would have determined that the limits of approach specified in the Regulation could be maintained while installing the pole and extension. Aside from the label on the engineering drawings, I note that J acknowledged the need to check the actual clearance distances because of the possibility that the distances can change because of temperature changes or changes due user demands.

[85] I accept that the other steps proposed by the prevention officer would have been reasonable once the clearance measurements were confirmed. A reasonable person would have undertaken further planning to determine how the work could be completed in a manner that maintained the regulatory limits of approach, and if that were not possible, would have contacted O to obtain assurances that the precautions required by section 19.25 of the Regulation were in place and had been documented in a form 30M33. In addition, it would have been reasonable for the employer to take steps to instruct its workers and subcontractors about the power line voltages and actual clearance distances, and as to the work arrangements and procedures to be followed to allow the work to be performed safely.

[86] I find that the employer did not exercise due diligence with respect to the hazard posed by installation work in the vicinity of the overhead high voltage power lines.

- Independent Action of a Properly Supervised Worker

[87] The employer emphasizes that although X received training on the regulatory limits of approach when working around power lines and the employer's safety practices, he made a mistake. The employer argues that the violation was due to the actions of X.

[88] While acknowledging the employer's evidence about the training X received, and X's role in the violations, I am not satisfied that the violations were due to independent actions of a properly supervised worker. I place some weight on the fact that as a site supervisor the employer gave considerable responsibility to X in the work he performed in the city where he is based. This included the responsibility to ensure that the work performed by the employer's other workers and subcontractors was performed safely. Although J spoke to X daily, and visited his office once per month, I have already found the employer's supervision of X did not extend to conducting audits to ensure that he was performing his supervisory duties in accordance with the employer's safety program and the Regulation.

[89] The employer's arguments and submissions have focused on X's mistake in failing to determine the actual clearance between the pole and the power lines, but have not addressed other aspects of the paperwork associated with the work on August 31, 2015. While X's role was a key factor that led to the violation, it was not the only factor.

[90] As noted by the prevention officer, the plan to manage the work in proximity to overhead power lines was recorded in the pre-task plan simply as "keep away from power lines." This did not identify relevant details such as the power line voltage, the regulatory limits of approach, the designed clearance, the actual clearance, or steps to be taken to maintain the appropriate clearance or to otherwise manage the hazard. In my view, this was indicative of aspects of the violations beyond simply failing to measure the clearance These shortcomings could have been noted through audits or oversight by the employer of the safety aspects of X's role as a supervisor.

[91] In light of the evidence concerning the communications in August 2015 around the redesign of the project, I have some difficulty with the employer's position that the violations were the simply the result of a mistake on the part of X. I note that the August 18, 2015 email from the city about the changes to the design of the project was copied to both X and L (according to the testimony

of J, L is one of the owners of the company and he oversees the employer's jobs in X's city). While X had the responsibility to supervise the jobs in that city on a day-to-day basis, I am satisfied that one of the principals of the employer, in addition to J, had an oversight role with respect to those jobs and would have been as aware as X on August 18, 2015 that O had identified a power line clearance issue which had required a re-design of part of the installation. Aside from the emails, the employer has acknowledged that although it did not receive the August 17, 2015 email, it was aware of the issue through verbal discussions. The employer has not provided evidence regarding any communication between L and J or between L and X about the clearance issue and the redesign.

[92] In light of the foregoing I am not persuaded that the August 31, 2015 violations can be reasonably characterized as simply the result of the independent actions of a properly supervised worker.

- Employer Incentive to Comply

[93] The employer emphasizes its overall safety program, the steps it has taken to improve the safety program since the 2013 and 2015 violations, as well as its commitment to safety. It argues that a penalty is not required to motivate it.

[94] While I recognize that the employer has taken steps to comply with the regulatory requirements since August 31, 2015, in light of the shortcomings in the employer's safety program and the occurrence of those violations in spite of the warning letter that followed the 2013 violations, I am not persuaded that a penalty is not required to motivate the employer. I note that the employer has acknowledged that the policy on warning letters states that, generally, a second warning letter will not be issued to an employer for the same kind of violation. In addition, I note that one of the purposes of an administrative penalty is to motivate other employers to comply with the Act and Regulation.

- Potential for Serious Injury

[95] As I have concluded the August 31, 2015 violations were high risk, for the same reasons I conclude that they involved a potential for serious injury.

- Employer's Compliance History

[96] The employer's compliance history does not include a large number of previous violations. However, in the June 6, 2013 incident two workers received electric shocks that resulted in burns when they contacted an overhead electrical power line while installing a metal light standard. I have found the underlying circumstances that resulted in the two workers receiving electric shock injuries in June 2013, and the circumstances involved in the August 31, 2015 violations were essentially the same. I find that this weighs in favour of imposing an administrative penalty.

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- Awareness of Hazard

[97] As the employer's business involves the installation of street light standards and traffic control signal arms, and J has acknowledged that this can involve work in proximity to overhead power lines in some of the employer's jobs, and since the employer previously received a warning letter from the Board with respect to the June 2013 incident that resulted in injuries to two workers, I find that the employer was aware of the hazard that is the subject of regulatory limits of approach.

- Other Relevant Circumstances

[98] Neither the prevention officer nor the employer identified other relevant circumstances.

[99] Having considered the evidence, submissions and relevant criteria I find that an administrative penalty is warranted with respect to the employer's August 31, 2015 violations.

Penalty Amount

[100] Policy item #D12-196-6 sets out the criteria used to determine the amount of an administrative penalty. It provides for Category A and B basic penalty amounts. Category A penalties apply to violations involving a serious risk of injury, illness, or death; or a high risk of serious injury or illness or death; or, where non-compliance was willful or with reckless disregard. As I have found that the violations were high risk, I confirm that the penalty amount is determined under Category A.

[101] The basic penalty amount is determined using the employer's assessable payroll for the full calendar year immediately preceding the year in which the violation giving rise to the penalty occurred. Since the violation occurred in 2015, the Board used the employer's 2014 assessable payroll to calculate the basic penalty amount. The employer has not argued that this was incorrect or that the calculation based on that amount included an error. I find that the Board properly determined the basic penalty amount.

[102] The policy provides that the basic amount of the penalty may be varied up to 30%, either upward or downward, having regard to the circumstances. The policy sets out the following factors to consider:

(a) the nature of the violation;
(b) the nature of the hazard created by the violation;
(c) the degree of actual risk created by the violation;
(d) the whether the employer knew about the situation giving rise to each violation;
(e) the extent of the measures undertaken by the employer to comply;
(f) the extent to which the behaviour of the workplace parties has contributed to the violation;
(g) the employer's compliance history;

(h) whether the financial impact of the penalty would be unduly harsh in view of the employer size;

(i) any other factors relevant to the particular workplace.

[103] The employer submitted that if a penalty is imposed, a downward variation of 30% in the penalty amount is appropriate in the circumstances. The employer did not address specific circumstances or factors that warrant a downward variation beyond the factors it addressed with respect to whether a penalty is warranted.

[104] I have considered the employer's submissions and the variation factors in policy item #D12-196-6. I will not set out additional reasons with respect to them. In my view, the circumstances relevant to these factors have been addressed in my reasons with respect to the grounds for imposing an administrative penalty. I do not consider the employer to have identified persuasive reasons for departing from the basic penalty amount. I find that the circumstances do not warrant a variation in the basic penalty amount.

[105] I find that the Board properly determined that a penalty is warranted and the penalty amount.

[106] I deny the employer's appeal.

Conclusion

[107] I confirm the November 25, 2016 review decision (*Review Reference #R0210303*).

[108] The employer did not request reimbursement of any appeal expenses, and accordingly there is no order respecting appeal expenses.

Guy Riecken
Vice Chair

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