Noteworthy Decision Summary

Decision: WCAT-2007-00316 **Panel**: Teresa White **Decision Date:** January 29, 2007

Duties of an Employer towards its workers even where a worksite injury involves a member of the Public – Section 115(2)(e) of the Workers Compensation Act – Section 3.10 of the Occupational Health and Safety Regulation

This decision is noteworthy because it describes the occupational health and safety responsibilities of an employer towards its workers even when a worksite injury involves a member of the public.

On September 5, 2002, a cyclist, while walking her bike passed a dump truck along a dyke roadway, was struck and seriously injured by the dump truck operated by a subcontractor of the employer, a construction company. The employer was cited as being in violation of section 115(2)(e) of the *Workers Compensation Act* (Act) and section 3.10 of the *Occupational Health and Safety Regulation* (Regulation) by the Workers' Compensation Board, operating as WorkSafeBC (Board).

Section 115(2)(e) of the Act provides that an employer must provide its workers with the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and other workers at the workplace. Section 3.10 of the Regulation states that whenever a person observes what appears to be an unsafe or harmful condition or act the person must report it as soon as possible to a supervisor or to the employer, and the person receiving the report must investigate the reported unsafe condition or act and must ensure that any necessary corrective action is taken without delay. The Board imposed a $66,208.38 administrative penalty on the employer pursuant to section 196 of the Act.

The employer requested a review by the Review Division of the Board (Review Division) of the imposition of an administrative penalty. The Review Division confirmed the imposition of an administrative penalty on the employer. The employer appealed the Review Division decision to the WCAT.

The panel allowed the employer's appeal, in part, by reducing the administrative penalty by 30%. She found that a review of the Act and published policy showed that its application was not restricted, in all situations, to "workers". There were provisions that referred much more broadly to "persons" (see, for example section 107(1) of the Act). Even if it were a correct interpretation of the Act and Regulation to limit their application only to "workers", the pedestrian accident could be taken to bring to light deficiencies in the occupational health and safety program at the worksite that could put workers at risk. The panel concluded that section 115(2)(e) of the Act was not applicable because it was not lack of training in regulatory requirements of the employer's foreman that lead to the accident. It was lack of action once a clearly hazardous situation had been identified. The employer's foreman knew, before the accident occurred, that problems with pedestrian safety had been identified. The employer violated section 3.10 of the Regulation, specifically because no steps were taken to remedy the unsafe situation. The fact that the accident involved a member of the public did not mean that the Board did not have jurisdiction. The accident brought the hazardous situation, which involved everyone on the multi-employer site, to the attention of the employer. The accident

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illustrated the nature and extent of the hazard to which workers, as well as members of the public, were exposed.

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Panel: Teresa White, Vice Chair

Introduction

The appellant (the employer) operates a construction company and was the main contractor for work taking place on land owned by a city, who also employed consulting engineers respecting the project. The work involved construction that affected the use of a public trail along a dyke.

On September 5, 2002, a member of the public was struck and seriously injured by a dump truck operated by a subcontractor of the employer. These appeals flow from the actions taken by the Workers' Compensation Board (Board), operating as WorkSafeBC, against the employer because of the investigation of the accident.

The employer appeals two decisions of the Review Division of the Board to the Workers' Compensation Appeal Tribunal (WCAT). Both decisions are found in the same document, dated May 18, 2005. The Review Division denied the employer's request for review of Board decisions dated March 4, 2003 and May 17, 2004 (supported by a letter of May 20, 2004, providing reasons for the decision).

A March 4, 2003 Inspection Report (IR) (#200312860068), completed by a Board occupational safety officer (OSO), states that failure to have the worksite effectively supervised; the workers and supervisors adequately trained; and, the lack of immediate response to a safety deficiency had resulted in an unsafe situation. A recommendation for sanction "will be warranted." The IR refers to sections 115(2)(e) and 117(1)(b) of the *Workers Compensation Act* (Act) and section 3.10 of the *Occupational Health and Safety Regulation* (Regulation).

The portion of the March 4, 2003 IR relating to section 117(1)(b) was subsequently rescinded by the Board, based on a conclusion that it was "not appropriate to the employer."

The May 17, 2004 Board decision issued an order to impose an administrative penalty on the employer in the amount of $66,208.38 for violations of section 115(2)(e) of the Act and section 3.10 of the Regulation. The order states that it was under section 196 of the Act. The order made under section 117(1)(b) had already been rescinded by the Board. A lengthy explanation of the reasons for the administrative penalty is contained in the Board's letter to the employer of May 20, 2004.

The May 17, 2004 IR imposing the administrative penalty states that the penalty was imposed for the following reasons:

> 1. Non-compliance with the Regulation resulted in a high risk of serious injury or death;
> 2. The Board considers that an administrative penalty is necessary to motivate both the employer receiving the penalty and other employers to comply with the Act and Regulation; and
> 3. The Employer failed to exercise due diligence to prevent the violation to which the penalty relates.
>
> Pursuant to section 196(1) of the Act, the Board is imposing an administrative penalty in the amount of $66,208.38 for violation of s. 3.10 of the Regulation and s. 115(2)(e) of the Act.

The amount of the penalty was determined in accordance with policy item #D12-196-6 in the *Prevention Manual* (Manual), based on the employer's payroll and the nature of the risk, which was determined to be Category A.

There is also an April 16, 2004 submission by an employers' adviser, which was responded to by the OSO in the May 20, 2004 letter.

This appeal is proceeding on the basis of a read and review of the evidence and submissions on file. Counsel for the employer requested that the appeal proceed on the basis of read and review on the notice of appeal. The facts, although complex, are not significantly in dispute, and are very well documented on the file. There are no issues of credibility involved. The outcome of the appeal turns primarily on the application of law and policy to undisputed facts. On that basis, an oral hearing would not be of assistance in resolving this appeal.

As was noted by the review officer, there was another IR issued against the employer. That IR was issued on September 10, 2002 before the March 3, 2003 effective date of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Bill 63 substantially amended the review and appeal provisions of the Act. The employer requested a review of that IR, and in a separate decision, a case officer denied the employer's request. The employer has sought reconsideration of that decision, which the review officer did not consider before him. I agree that the September 10, 2002 IR was not before the review officer and is not before me.

On the notice of appeal, counsel for the employer stated that the Review Division decisions are incorrect because they find a violation of section 115(2)(e) of the Act and section 3.10 of the Regulation for a non-worker pedestrian injury; a hazard to workers was not demonstrated; there was no lack no of due diligence, the penalty was imposed under Category A and the penalty was not reduced by 30%.

Issue(s)

The issues are as follows:

1. Did the employer violate section 115(2)(e) of the Act and section 3.10 of the Regulation?

2. If the employer violated the Act or the Regulation, should the Board impose an administrative penalty in this case?

3. If an administrative penalty is appropriate, what should be the quantum of the penalty?

4. If an administrative penalty is not appropriate, what, if any, consequences should result?

Jurisdiction

WCAT's jurisdiction in this appeal arises under section 239(1) of the Act, as an appeal of a final decision of a review officer under section 96.2(1)(c) of the Act confirming a Board order respecting an occupational health and safety matter under Part 3 of the Act.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254).

As the Board's decision to impose an administrative penalty was dated August 3, 2004, the applicable policy is found in the version of the Manual that became effective July 1, 2003.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

The OSO prepared a March 3, 2003 *Recommendation for Sanction*. It states that the employer had failed to adequately and effectively train and supervise workers and correct unsafe conditions promptly. No effective system was in place for the public to pass safely through the construction area, and this resulted in the accident. The foreman had not been effectively trained in his responsibilities and regulatory requirements. The employer did not ensure minimum direction or supervision to the

foreman on site. The superintendent was still completing another project and had not arrived on the site yet. This left the foreman in control and responsible for ensuring the work was completed.

The *Recommendation for Sanction* further states that the city had verbally directed the engineering consultant to have a traffic plan or system implemented, after a city supervisor observed unsafe pedestrian traffic. This was passed along to the employer's foreman on the morning of the accident, but nothing was done to improve the situation and the accident occurred later the same day.

The *Recommendation for Sanction* states that the lack of effective training, direction, and supervision resulted in a hazardous situation and that the accident was completely preventable.

A sanction was recommended to "motivate this employer into maintaining regulatory compliance in the future."

Before setting out the background to this appeal any further, I have decided to provide an overview of the applicable law and policy, so that the facts can be placed in context.

Law and Policy

Part 3 of the Act is titled "Occupational Health and Safety." Division 3 of Part 3 sets out the general duties of employers, workers, and others.

The Board's jurisdiction to impose an administrative penalty is found in section 196. Section 196(1) states that the Board may, by order, impose an administrative penalty on an employer under this section if it considers that:

> (a) the employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,
> (b) the employer has not complied with this Part, the regulations or an applicable order, or
> (c) the employer's workplace or working conditions are not safe.

Section 107(1) sets out the purpose of Part 3, which is expressed as follows:

> The purpose of this Part is to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers **and other persons present at workplaces** from work related risks to their health and safety.
>
> [emphasis added]

Section 107(2) adds additional specific purposes, which include:

- to promote a culture of commitment on the part of employers and workers to a high standard of occupational health and safety;

- to prevent work related accidents, injuries and illnesses;

- to encourage the education of employers, workers and others regarding occupational health and safety;

- to ensure an occupational environment that provides for the health and safety of workers and others;

- to ensure that employers, workers and others who are in a position to affect the occupational health and safety of workers share the responsibility to the extent of each party's authority and ability to do so;

- to foster cooperative and consultative relationships between employers, workers and others regarding occupational health and safety, to promote worker participation in occupational health and safety programs and occupational health and safety processes; and,

- to minimize the social and economic costs of work-related accidents, injuries and illnesses, in order to enhance the quality of life for British Columbians and the competitiveness of British Columbia in the Canadian and world economies.

Section 115 of the Act states that every employer must:

- ensure the health and safety of all workers of that employer, and any other workers present at a workplace at which that employer's work is being carried out; and,

- comply with Part 3, the regulations and any applicable orders.

There are also specific obligations on employers set out in section 115(2).

The scheme of section 115 does not specifically place obligations on employers relating to anyone other than "workers" of the employer and any other workers at which that employer's work is being carried out. Section 115(2)(e), which was specifically referenced in this case, states that a employer must:

> [P]rovide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers carrying out their work and to ensure the health and safety of other workers at the workplace.

Section 116 sets out the obligations of workers. It requires workers to take reasonable care to protect the worker's health and safety and the health and safety of "other persons" who may be affected by the worker's acts or omissions at work.

Section 117 of the Act sets out the general duties of "supervisors." They must, among other things, ensure the health and safety of all workers under the direct supervision of the supervisor, be knowledgeable about, and comply with Part 3 and the regulations applicable to the work. They must also ensure that workers under the supervisor's direct supervision are made aware of "all known or reasonably foreseeable health or safety hazards in the area where they work." There is no reference in section 117 to persons other than workers. However, the obligations are worded in very general terms.

Section 117(1)(b) of the Act states that every supervisor must be knowledgeable about Part 3 of the Act and those regulations application to the work being supervised. (This is the section of the Act for which the Board rescinded the IR/order.)

Section 118 is titled "Coordination at Multiple-Employer Workplaces," which means a workplace where workers of two or more employers are working at the same time. A "prime contractor" means the directing contractor, employer, or other person who enters into a written agreement to be the prime contractor, or, if there is no such agreement, the owner.

The prime contractor of a multiple-employer workplace must ensure that the activities of employers, workers, and "other persons" at the workplace relating to occupational health and safety are coordinated, and do everything that is reasonably practicable to establish and maintain a system or process that will ensure compliance with Part 3 and the regulations.

Section 119 of the Act states that every "owner"[1] of a workplace must:

- Provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace;

- Give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace; and,

- comply with Part 3 of the Act, the regulations and any applicable orders.

[1] "Owner" is defined in section 106 to include a trustee, receiver, mortgagee in possession, tenant, lessee, licensee, or occupier of any lands or premises used or to be used as a workplace, and a person who acts for or on behalf of an owner as an agent or delegate.

There are also obligations placed on suppliers by section 120 of the Act. They must ensure that any tool, equipment, machine or device, or any biological, chemical, or physical agent supplied by the supplier is safe when used in accordance with the directions provided. Suppliers also have responsibilities to provide directions for safe use, and labelling.

Section 122 states that a specific obligation imposed by Part 3 or the Regulation does not limit the generality of any other obligation imposed by the Part or the regulations. Section 123 recognizes that if a person has two or more functions, the person must meet the obligations of each function. Section 124 recognizes that a person with an obligation is relieved only if simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense, and the health and safety of persons at the workplace is not put at risk by compliance by only one person.

*S*ection 3.10 of the Regulation states:

> **3.10 Reporting unsafe conditions**
>
> Whenever a person observes what appears to be an unsafe or harmful condition or act the person must report it as soon as possible to a supervisor or to the employer, and the person receiving the report must investigate the reported unsafe condition or act and must ensure that any necessary corrective action is taken without delay.

Section 196 of the Act provides that the Board may impose an administrative penalty on an employer if it considers that:

- the employer has failed to take sufficient precautions for the prevention of work-related injuries or illnesses;
- the employer's workplace or working conditions are unsafe; or,
- the employer has failed to comply with Part 3 of the Act, the Regulation or an applicable order.

Section 196 also provides that the Board must not impose an administrative penalty if an employer exercised due diligence to prevent the unsafe circumstances.

The Regulation provides, in section 4.1 that buildings, structures, excavations, machinery, equipment, tools, and workplaces must be maintained in such a condition that workers will not be endangered.

Section 4.33 of the Regulations states that a work area must be arranged to allow the safe movement of people, equipment, and materials. If, to ensure safety, an aisle or

passageway is designated for pedestrian traffic, the route must be clearly indicated by markings or other effective means and, where practicable, floor or grade markings must be used.

Section 18.2 of the Regulation states that the employer must ensure that effective traffic control is provided and used whenever the uncontrolled movement of vehicle traffic could be hazardous to workers.

Section 18.5 of the Regulation sets out the requirements for traffic control persons. They are required when traffic is required to pass a worker, equipment or other obstruction which may block all or part of the travelled roadway, unless adequate protection for workers is provided by other traffic control devices or procedures, or circumstances allow self-regulating single lane traffic controlled by signs as specified in the Province's *Traffic Control Manual.*

Board policy relating to administrative penalties is found in item D12-196-1 of the Manual. That policy provides that the primary purpose of administrative penalties is to motivate the employer receiving the penalty and other employers to comply with the Act and Regulation. The policy says that the Board will consider imposing an administrative penalty when:

- an employer is found to have committed a violation resulting in high risk of serious injury, serious illness, or death;

- an employer is found in violation of the same section of Part 3 or the Regulation on more than one occasion;

- 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 or the Regulation, and reckless disregard includes where a violation results from ignorance of the Act or Regulation due to a refusal to read them or take other steps to find out an employer's obligation; or,

- the Board considers that the circumstances may warrant an administrative penalty.

Policy item D12-196-1 also provides a list of additional factors that the Board will consider in deciding whether to propose or levy the penalty. They include such matters as:

- whether the employer has an overall, effective program for complying with the Act and the Regulation;

- whether the safety violations resulted from the independent actions of workers who the employer had properly instructed, trained and supervised;

- the potential seriousness of the injury that might have occurred and the number of people at risk;

- the extent to which the employer was aware or should have been aware of the hazard or the fact that the Act and Regulation were being violated; and,

- whether an alternative means of enforcing the Act and Regulation would be more effective.

Manual policy item D12-196-11 provides that if the Board decides that despite the existence of grounds to propose an administrative penalty, the penalty is not warranted at the time of the particular violation, the Board may send a warning letter instead, advising that a penalty will be considered if the violation is repeated.

Manual policy item D12-196-2 deals with the issue of whether a violation involves a high risk of serious injury, serious illness, or death. The policy says that the issue will be determined in each case on the basis of the available evidence concerning the likelihood of an injury, illness or death occurring; the number of workers affected; and the likely seriousness of any injury or illness. The policy sets out a list of 11 violations that are assumed, in the absence of evidence showing the contrary, to be high risk. The policy notes, however, that even though a violation is not on the list, the Board may consider the evidence in a case to illustrate that the violation posed a high risk to workers, and may impose an administrative penalty on that basis. In this case, the Board did proceed to penalty on the basis that the employer's violation involved a violation of a high-risk nature.

Manual policy item D12-196-6 addresses the quantum of administrative penalties. It provides tables for determining the "basic amounts" of penalties. Category A penalties deals with serious injury or illness or death; or high risk of serious injury or illness or death; or non-compliance that was wilful or with reckless disregard. Category B penalties deal with other violations. The basic amount of the penalty is determined on the basis of the employer's assessable payroll for which figures are available at the time the Board issues the penalty notice.

Policy item D12-196-6 also allows for variation factors, whereby the basic penalty amount may be varied by up to 30%, having regard to the circumstances, including the following factors:

(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) whether the employer knew about the situation giving rise to the violation;

(e) the extent of the measures undertaken by the employer to comply;
(f) the extent to which the behaviour of other workplace parties has contributed to the violation;
(g) employer history;
(h) whether the financial impact of the penalty would be unduly harsh in view of the employer's size; and
(i) any other factors relevant to the particular workplace.

Factual Background

The contract between the employer and the municipality specified that during the execution of the work, the employer was responsible for maintenance of the travelled roads and parking lots, so that they would be preserved in a reasonable condition and allow continuous public vehicular travel and safe pedestrian movement.

The contract stated that a public trail was located along the dyke, and the contractor was to "note that this trail is to be kept open for the duration of construction. The contractor was to provide and erect temporary fencing and wooden signs for this purpose. During construction, the trail was to be maintained in good condition.

The contract made the employer the "prime contractor" for the project. The contractor was required to provide all first aid requirements. The contractor was also required to prepare an "indoctrination" program for workers, which would include such things as site work procedures, training required, identification of safety hazards, first aid provisions and procedures, and lockout.

Before the work at the accident site started, there was a pre-construction meeting. According to information in the file, the issue of pedestrian safety was discussed at that meeting. The employer's supervisor attended but the foremen who were on site before and at the time of the accident did not. The employer had a safety coordinator but he had not been on the site before the accident. The pre-construction meeting minutes state, among other things, that the contractor (the employer) was to provide clear signage of trucks turning.

The accident took place on a portion of dyke roadway. The chronology states that most of the roadway is narrow, approximately 3.78 metres (just under 12.5 feet) wide. This is not considered wide enough to allow for vehicular traffic in both directions. It is also narrow enough that when larger pieces of mobile equipment are on the roadway, it is not wide enough to allow for foot traffic or cyclists to pass alongside the equipment. The sides of the roadway sloped off steeply on either side, with a river on one side and another waterway on the other.

On the date of the accident, there was a foreman on site but the employer's supervisor was not on site, as he was finishing another job. The foreman told the Board OHO that there had not been a site-specific safety meeting before the accident, and he had not

had any orientation or training. However, an "inspector's daily report" dated in August 2002 and apparently completed by the engineering consultant states that site safety procedures had been reviewed by the foreman, who had been provided with a "WCB checklist." Contractor's responsibility for site safety was also reviewed.

On the date of the accident, a sub-contractor of the employer was operating a dump truck, which accessed the construction site via the dyke roadway. The dump truck, according to the RCMP report, was 2.52 metres wide across the back bumper. According to information in the file, there would have been approximately 63 cm (24.8 inches) of space on either side of the dump truck. I note that 24.8 inches is barely over two feet of clearance. The width of the bicycle handlebars was 60 cm.

The RCMP report concludes that this indicates that there was not enough room for the truck and the cyclist to pass safely. It states that the configuration of the road was a factor. The fact that the accident occurred seems to confirm that conclusion.

There were two signs warning of the construction, but apparently, neither of them was placed so that the injured person would have seen them. The RCMP report contains a drawing, which shows a sign indicating the employer's name and a "construction zone" sign on the roadside of the dyke roadway. According to the chronology, there was no formal plan in place to deal with movement of mobile equipment, workers, and members of the public. The employer told workers to watch for and make eye contact with pedestrians and cyclists. If members of the public were seen moving through the site, workers were to stop and wait.

It is apparent that the cyclist clearly knew that she was entering a construction site. There was a large dump truck parked on the dyke and construction was clearly taking place. She must be taken to have made a decision to try and pass the dump truck by getting off her bike and walking. In her statement, she says that she stopped her bike, and made eye contact with three workers standing next to the truck.

Given the mechanism of the accident, it is also apparent that watching for pedestrians and cyclists, and making "eye contact" was not a workable plan. It did not prevent the accident in question. It is difficult to see how it could have, without additional persons watching for pedestrians/cyclists. In hindsight, had the truck driver walked around the truck, or had someone else been watching for pedestrians/cyclists, the truck driver may have known the cyclist was there. However, none of those precautions were in place. Photographs of the dump truck in the file clearly show that the driver would be sitting much higher than the cyclist's full height, and that his view of her would have been blocked by the front of the truck and/or equipment on the truck. Based on her description of the accident, the cyclist would also have been ahead of the truck's mirrors so they would not be of assistance.

The day before the accident, a representative of the municipality had been at the worksite and had identified concerns about traffic control and the movement of the

public. This was, apparently, the first time these concerns had been identified. They were brought to the attention of the engineering consultant. The municipality's representative directed the engineering consultant to have the employer implement a safe corridor for public traffic.

The engineering consultant did not follow-up on September 4, 2002 but did speak to the employer's foreman some time before the accident on September 5, 2002. The discussion centred on the possibility of a fenced walkway, although the engineering consultant's employee recorded that the employer thought a fence might be impractical and control by flag persons might be used instead. The employer's foreman said they were looking at the narrow part of the dyke and wondering how they could "snow fence it" because there was not enough room for a walkway.

Another of the truck drivers working on the site gave a statement to the Board OHO. He said that he had been instructed to stop and wait for pedestrians and let them go by before continuing. The truck driver said there was pedestrian traffic all day, with people walking their dogs etc.

A document in the file titled with the name of the employer, and "toolbox safety meeting" is dated September 5, 2002. There is no time on the form. Five workers were in attendance. The issues discussed include [reproduced as written]:

- Use extreme caution when working around, overhead services.
- To maintain public's safety, flag persons shall be implemented.
- [Name] and [name] streets shall be swept on a regular basic.

There is documentation in the file, provided by the employer, showing that in April and June 2002, the employer was undertaking training related to occupational health and safety. The individuals working on the project involved in this appeal had not yet received the training.

Because the toolbox safety meeting minutes suggest a discussion about pedestrian safety on the day of the accident, I specifically disclosed it to counsel for the employer and asked for submissions. Her response was that only one person who was present at the meeting could be located. Counsel spoke to that person. He could not recall any details. He said that the meeting may have taken place after the accident, as everyone was quite shaken. It also could have been part of the regular meeting that would have taken place in the morning.

Counsel also said that the former health and safety coordinator for the employer said the meeting entry related to the flag personnel on the other part of the project, which had full-time flaggers. The former coordinator is not available to give this as evidence.

Counsel submitted that the minutes are not of great probative significance because there were full-time flag personnel on the larger part of the project where the vehicle

traffic was heavier. Even if it does pertain to the area where the accident took place, it does not alter the fundamental fact that the vehicular traffic was very light and other measures, short of flag personnel, were adequate to ensure worker safety.

Based on my review of the document, which includes commentary about working near "overhead services" and sweeping of streets, and which suggests five workers attended, I consider it unlikely that the toolbox safety meeting took place after the accident. The accident is not mentioned in the minutes. I consider it unlikely that, had the worker's involved in the meeting just experienced a serious accident, they would not have mentioned it. The most likely timing was the morning of, but before, the accident. It also appears to have involved the accident site, because the foreman named on the document was the foreman at the site.

The descriptions of the accident itself are very consistent. I have summarized the events in point form, below:

- The accident occurred at approximately 3:30 p.m. when a dump truck struck and hit a cyclist.

- The truck was parked on the dike facing in the direction towards a roadway. The truck was one of approximately five that worked at the construction site on the day of the accident. (However, I note that records relating to the trucking company's invoices show 19 trips, although it is not apparent to me whether all of the trips were to the accident site.)

- The cyclist was walking her bike to the right of the dump truck, which was stationary on the dyke. She was proceeding in the same direction as the truck, towards the road. The cyclist was proceeding, unchallenged and uncontrolled by anyone on the site. According to the cyclist, she had made eye contact with three other workers on site but was received no acknowledgement or direction. The truck started driving forward and the cyclist was hit by the rear wheel/end of the truck.

- There were signs warning of construction ahead posted on an adjacent cul de sac street, and on the dyke. There was also signage regarding the use of hardhats.

- A dump truck had just emptied its load of rip rap material (I note that this is misspelled on several occasions in the statements as "ric rack." As I understand it, rip rap is the material used to create a permanent, erosion-resistant ground cover of large, lose, angular stone. There has been concern raised about the accuracy of the transcripts because of this misspelling. I do not consider that anything turns on this. The misspelling of "rip rap" is understandable, particularly by someone who is not familiar with construction terms. The spoken term "rip rap" on a tape recording could certainly sound to an untrained ear like "ric rack."

- The truck driver had been working at the site for at least two days and had been

working for the trucking sub-contractor for four days.

- Only one truck could access the site at a time because of the narrow road.

- The dump truck driver said he stopped on the dyke to get some papers signed relating to his load. He got out of the truck, but left the engine running. He was there approximately five minutes. He then got in the truck, checked his mirrors and started forward. He stopped the truck when he heard yelling and then realized he had struck the cyclist. The cyclist was apparently in a blind spot created by the air cleaner and vehicle hood.

- The person from the employer who signed the truck driver's papers said he saw the pedestrian during the signing process. She was further along, beside a building. He did not see her again until after the accident.

- The cyclist in her statement to the OHO said that she saw three workers standing beside the truck, on the driver's side. She decided to walk her bike along the passenger side, as it seemed clearer. She had walked past the truck, and had stopped to get back on her bike when the truck moved forward and hit her.

- A representative of the municipality had been on the site and had, before the accident, asked the employer to put up fencing to create a walkway for pedestrians, which was required by the contract. After the accident, it appears that all concerned acknowledge that fencing would not be adequate because of the space limitations.

The employer's internal accident investigation is on a one page form. I states that it was completed at 4:30 pm on the date of the accident. The "recommendation" section states "flag persons to stop pedestrians when trucks moving on Dyke."

A further accident investigation conducted by a safety officer employed by the employer states that during his time on site, 5 to 15 pedestrians or cyclists were on the site, and that unlicensed motorbikes were observed travelling at excessive speeds through the site. Due to conditions, the public must be warned of the hazards they may encounter.

Submissions

I have read and considered all of the submissions but will not repeat each and every one here.

Counsel for the employer provided a January 11, 2006 submission. Counsel pointed out that the Board found violations against the employer, pursuant to section 115(2)(e) and 117(1)(b) (rescinded before the imposition of the administrative penalty), and section 3.10 of the Regulation.

Order #1 refers to violation of section 115(2)(e). The statement of reasons for administrative penalty state that the employer's supervisors on site were not adequately informed, instructed, and trained regarding traffic control issues despite the fact that public access would occur through the site.

Counsel submitted that section 115 does not obligate the employer in relation to persons other than workers, without a work-related connection to the site. The cyclist in this case was not present on the road for a work-related purpose, but for strictly personal reasons. She did not fall within the definition of a worker in section 106. While it may be prudent for the employer to ensure that all those present on the site are conversant with the principles of pedestrian safety, in order to minimize civil liability, this is not an obligation imposed by section 115(2)(e) of the Act.

Counsel submitted that there was adequate supervision on site that the workers were properly trained in health and safety obligations. The accident occurred early in the commencement of work. The employer's site superintendent had not yet arrived, but the on-site foreman depended on advice and guidance from the engineering consultant who was on site every day. There is no requirement in the Regulation that a supervisor be on site at all times. There were regular safety meetings held.

Counsel submitted that a traffic control plan was in place for all phases of the project. It was thought that a full-time flag person was not required at the relevant part of the project, since very few loads, involving one truck and driver, were to be delivered that day. There were signs at the entrance to the park where the work was being done, warning of construction and of trucks turning.

Counsel submitted that the presence of a dump truck on the road was insufficient to establish a hazard. Specific evidence is needed. Counsel referred to the decision in *Brennan Paving & Construction* v. *Ontario (Ministry of Labour)*, 9 COHSC 190 (An appeal to an "Occupational Health and Safety Adjudicator under section 61 of the Ontario Occupational Health and Safety Act"(1990)), as an example of workers found not to be endangered by truck traffic.

In *Brennan Paving*, the employer was in the paving and construction business and was working on a road construction project which was separated by a concrete wall from any

public thoroughfare or traffic. A surfacing crew was working about 300 feet east of an entrance where trucks carrying asphalt entered the site. The trucks were required to turn around before dumping their load of asphalt. Trucks arrived every 10 to 15 minutes. There was room for only one truck at a time.

It was "established" that there were no workers in the area in which the trucks carrying the asphalt entered or turned around. The supervisor in the area had assigned a worker to assist the trucks in turning around, but the worker did not use a sign.

The employer in *Brennan Paving* was cited for the failure of the worker to use a sign, and because a second worker had not received written instructions.

The adjudicator found that the constant stream of trucks did constitute "traffic," but there was no requirement for a sign. Thus, the order was rescinded.

In the alternative, counsel for the employer submitted that if it is found that section 115(2)(e) extends to non-workers, the evidence shows that measures were in place to deal with pedestrian traffic. Cautionary signage was in place. Counsel submitted that "pedestrians were kept in a holding area until they were told to proceed through verbal or non-verbal signs." (I note that the cyclist involved in this case was not kept in any holding area.) Very limited traffic was planned on the day in question. The measures in place ensured worker safety.

Counsel submitted that the violation of section 115(2)(e), if it occurred, was technical.

Counsel then turned to the issue of violation of section 3.10 of the Regulation, which involves reporting of unsafe conditions.

Counsel submitted that the Regulation cannot be read as extending the Board's jurisdiction to require that members of the general public report something unsafe.

Counsel for the employer submitted that even though an accident occurred, there was no unsafe traffic condition that called for greater measures than those in place.

With regard to due diligence, counsel for the employer submitted that there were extensive plans to ensure that workers and non-workers were safe and that the employer would discharge their health and safety responsibilities. The project took place in four phases and the accident took place on an access road rather than a location where work was actually being done. Very little traffic was expected. "Non-workers were cleared to move through the site with a series of hand and other signals," and a worker of the employer was assigned to accompany the truck. Signage warned of construction activity. Flag persons were used at other areas of the construction. The supervisors were experienced in this type of work and were known as safe and reliable workers.

Counsel submitted that this was not an appropriate case for an administrative penalty. Policy item D12-196-1 in the Manual addresses high risk violations, resulting in a high risk of serious injury, serious illness, or death. Counsel submitted that this section referred to worker injuries. There were only two workers of the employer on site and the likelihood of an accident involving them was remote. Counsel submitted that that the employer had an excellent health and safety plan and an excellent record. There is also no history of a failure to comply with a previous order.

Counsel for the employer submitted that there was no evidence to establish a knowing or reckless disregard for the Act or regulations. The employer employs a full-time safety consultant and has an excellent record of violation-free inspections by the Board.

There were no circumstances to warrant an administrative penalty. The employer was facing a civil action in the courts by the injured pedestrian and this means that the duty of care to the pedestrian will be considered by the courts and need not be considered by proceedings under the Act.

Counsel for the employer submitted that nothing in the conduct of the employer's supervisors contributed to the pedestrian accident.

The union provided an August 31, 2006 submission. The representative referred to section 115(2)(e) of the Act, which compels an employer to provide the employer's workers with information, training, and supervision.

The union's representative pointed to sections 18.1 and 18.2 of the Regulations, relating to traffic control. The representative also referred to the Traffic Control Manual for Roadways, noted that section 1.1 states that where cyclists and/or pedestrians are likely to be present in work zones, due consideration must also be given to their safety requirements. Section 1.1.1 sets out fundamental principles, which point out that work zones can present motorists, cyclists, and pedestrians with unexpected or unusual situations as far as traffic operations are concerned. Traffic safety in construction zones is an integral and high priority element. Had the employer complied with the Regulation and developed a traffic control plan, they would have provided safe conditions for pedestrians, cyclists, and workers.

In a September 18, 2006 submission, counsel for the employer responded to the union's submission stating that sections 18.1 and 18.2 of the Regulation are not in issue. The employer is said to have violated section 115 of the Act and section 3.10 of the Regulation. Discussion of other sections does not advance the union's argument. Section 1.1 of the Regulation is also not relevant. The Board could have written orders under those sections, but did not.

Counsel for the employer submitted that there was no evidence to establish a danger to workers, and any such suggestion is speculative. Counsel submitted there were no workers in the vicinity of the truck at the time of the pedestrian accident, "or any other trips made by the vehicle on the day in question".

Counsel submitted that the Act does not grant the Board jurisdiction to supervise the law of torts as it applies to the relationship between the employer and non-workers. Any such requirement in a Board order would be *ultra vires* the Board's powers. Counsel pointed out that there was an extensive plan for traffic control in place and that traffic control personnel were onsite full time at other locations.

Counsel sought a finding that the Board does not have jurisdiction over non-worker pedestrian accidents; that the evidence did not establish a hazard to workers; that the employer exercised due diligence; that an administrative penalty was not necessary to ensure compliance; and, that a penalty in the full amount under Category A is not warranted in the circumstances.

Findings and Reasons

Did the employer violate section 115(2)(e) of the Act and section 3.10 of the Regulation?

Section 115(2)(e) states that an employer must:

> [P]rovide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers carrying out their work and to ensure the health and safety of other workers at the workplace.

The Board considered that the employer violated section 115(2)(e) because the "site supervisors had no supervisory or regulatory training. Lack of knowledge of these requirements created the situation that led to the accident." Although the employer required weekly reporting from the site on matters including site safety, this was "ineffective" and not supervised effectively.

The second specific violation identified by the Board was section 3.10 of the Regulation, which states that whenever a person observes what appears to be an unsafe or harmful condition or act the person must report it as soon as possible to a supervisor or to the employer. The person receiving the report must investigate the reported unsafe condition or act and must ensure that any necessary corrective action is taken without delay.

I am satisfied on the evidence that the employer had responsibility, as did all the employers operating at the worksite, for the safety of workers, and in particular, for the safety of workers required to be around moving vehicles such as the dump truck

involved in this accident. I am also satisfied that the construction contract required the employer to keep the area open to members of the public, including the cyclist who was injured.

Counsel for the employer submits that the Board does not have jurisdiction over non-worker pedestrian accidents. It is apparent from a review of the Act, and the published policy, that the application of same is not restricted, in all situations, to "workers." There are provisions that refer much more broadly to "persons" (see, for example, section 107(1) of the Act). Even if it were a correct interpretation of the Act and Regulations to limit their application only to "workers," the pedestrian accident could be taken to bring to light deficiencies in the occupational health and safety program at the worksite that could put workers at risk. It is certainly possible, for example, that a worker may decide to try and pass a dump truck parked on the dyke roadway by taking the same route used by the cyclist. Given the narrowness of the roadway, the width of the truck, and the problems with blind spots, the worker would be just as at risk of the truck starting up and running over him or her.

The accident in this case occurred because there was a dump truck parked on a narrow dyke roadway, and the cyclist was allowed to enter the construction site without control. I accept the cyclist's evidence that she stopped, and made eye contact with workers on the site, who did not stop her. She was then free to make her own decisions about proceeding through the construction site.

I agree with the OHO's statements in the file that this accident was entirely preventable. It could have been prevented by proper pedestrian/cyclist control. The injured cyclist should not have had the opportunity to proceed, unchallenged, down the side of the truck. The situation was the proverbial "accident waiting to happen." It was a very dangerous situation in which an accident was very likely. It seems likely that most people would identify the hazardous nature of the situation.

The "supervisor" on the construction site was a foreman, who told the OHO that he had not had any orientation or training. It may well be the case that he did not have any specific orientation or training by the employer in relation to the construction at the accident site, but it appears he did have some orientation and/or training through the supervision of the engineering consultant at the worksite. The inspector's daily report dated in August 2002 states that site safety procedures had been reviewed by the foreman, who had been provided with a "WCB checklist." Contractor's responsibility for site safety was also reviewed.

It is not entirely clear to me which regulatory requirements the Board felt the on-site supervisor had not been trained in. There are extensive statutory and regulatory requirements in the Act and Regulation. It is apparent that the foreman was not familiar with all of them, but he had reviewed site safety requirements and had been provided with the "WCB checklist."

Moreover, the foreman knew, before the accident occurred, that problems with pedestrian safety had been identified. The construction contract itself required that steps be taken to provide safe areas for pedestrian and cyclist traffic to negotiate the site. The foreman had been spoken to on the morning of the day of the accident with respect to the need for control of pedestrian and cyclist traffic. It also appears more likely than not that pedestrian safety and the use of flag persons had been discussed in a toolbox safety meeting earlier on the day of the accident.

It could be said that there is always room for improvement and additional training. Had the foreman experienced specific training with respect to the movement of pedestrians and cyclists through a construction zone, he might have remedied the situation sooner. However, the evidence does not support a conclusion that additional training of the foreman would have prevented the accident, because the hazards of the site for pedestrians and cyclists had already been identified.

Simply put, the hazardous situation had already been identified. The problem was that nothing was done to remedy the situation, and work continued. I have difficulty understanding how additional training would necessarily have caused the foreman to act immediately. He asked that the engineering contractor send a request to the main office. That request seems more in keeping with a problem in administrative procedures, authority, and reporting structures rather than a lack of training on the part of the foreman.

Section 3.10 of the Regulation requires that a person receiving a report of an unsafe condition or act must ensure that any necessary corrective action is taken without delay. I agree that the employer's failure to act on the clearly identified unsafe condition was a violation of section 3.10 of the Regulation. At the very least, those on site should have been watching for pedestrians and cyclists, and stopping them from proceeding across the dyke roadway when it was blocked by a big dump truck.

Counsel submitted that it was thought that flag persons were not necessary because of the low volume of deliveries to the site on the day in question. I have difficulty accepting that even so low a number as five deliveries of rip rap, which consists primarily of large stones, was reason not to put a pedestrian/cyclist control plan into effect. Five dump trucks delivering their loads would mean at least ten trips across the dyke roadway, with ten occasions, *on one day*, arising where an uncontrolled pedestrian could take the unfortunate decision to try and pass alongside a parked truck. There were therefore also ten occasions during which a worker could have found himself on the dyke roadway at the same time as the dump truck, and could be injured in a similar fashion. The size, height, and visibility from the dump truck meant it would be very difficult for the driver to see a pedestrian standing or moving in close proximity to the truck.

I have concluded that the employer did violate section 3.10 of the Regulation, specifically because no steps were taken to remedy the unsafe situation. The employer's response, which was that the engineering consultant should put the concern

in a written memorandum, sent to the office, unduly delayed the remedy for the situation.

I have further concluded that section 115(2)(e) does not have applicability and should not have been relied upon by the Board in imposing an administrative penalty. It was not lack of training in regulatory requirements that lead to the accident. It was lack of action once a clearly hazardous situation had been identified.

In that respect, I do not consider that the fact that the accident involved a member of the public means the Board does not have jurisdiction. The accident brought the hazardous situation, which involved everyone on the multi-employer site, to the attention of the employer. The accident illustrated the nature and extent of the hazard to which workers, as well as members of the public, were exposed.

If the employer violated the Act or the Regulation, should the Board impose an administrative penalty in this case?

The Act provides the Board with the authority to impose an administrative penalty if it considers that the employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses, the employer has not complied with this Part, the regulations or an applicable order, or the employer's workplace or working conditions are not safe.

The situation giving rise to the accident clearly demonstrates that the employer had failed to take sufficient precautions for the prevention of work related injuries.

Published policy sets out, in more detail, the purpose of and situations where an administrative penalty may be imposed. The main purpose of administrative penalties and similar levies is to motivate the employer receiving the penalty and other employers to comply with the *Act* and regulations.

Published policy sets out that the Board will consider imposing an administrative penalty in a number of specific situations.

The first listed situation is where an employer is found to have committed a violation resulting in high risk of serious injury, serious illness or death. The Board concluded that there was a high risk of serious injury or death. I agree, and rely in particular on the fact that the employer had knowledge of the hazard, which had been pointed out.

The evidence does not demonstrate that the employer had been in violation of the same section of Part 3 or the Regulation on more than one occasion, so that criterion does not apply. I also do not consider that the evidence indicates a general lack of commitment to compliance, or that the employer has failed to comply with a previous order within a reasonable time.

I also do not consider that the employer knowingly or with reckless disregard violated one or more sections of Part 3 or the regulations. Published policy defines reckless disregard as including one that results from ignorance of the Act or Regulations due to a refusal to read them or take other steps to find out the employer's obligations.

Policy then goes on to provide further considerations, "once violations or other circumstances requiring consideration of a penalty have occurred."

Considered at this stage are a number of criteria.

The first is whether the employer has otherwise exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates. Due diligence means that on a balance of probabilities, the employer took all reasonable care.

In the circumstances of this case, I cannot conclude that the employer took all reasonable care. I make specific reference to the failure to act on the hazardous situation leading to the accident, when it had been pointed out.

However, the employer did have a safety program in place and had hired a safety coordinator to implement it.

The next criterion is whether the violations or other circumstances have resulted from the independent action of workers who have been properly instructed, trained and supervised. The facts do not support a conclusion that the employer had properly trained and supervised the workers on the site, who then independently created the violations or circumstances. The failure to remedy the situation was a failure of the employer's systems as opposed to individual workers.

The injury that did occur was very serious. Several employers and numerous persons (including both workers and members of the public) were exposed to the hazard. However, the employer's past compliance history is a favourable consideration.

The employer, through its foreman, was aware of the hazard. As noted above, it seems likely that it was discussed the morning of the accident during a safety meeting. It was certainly discussed by the foreman and the engineering consultant on the morning of the accident.

Whether or not an administrative penalty is needed to provide an incentive for the employer to comply is a more difficult question, which necessarily requires subjective

considerations. Based on the whole of the evidence, I do not consider that this employer would only be motivated to comply by an administrative penalty. The evidence does not suggest that the employer was resistant to or uncooperative with the statutory and regulatory scheme set up by the Act and the Regulations. To the contrary, the employer had a safety coordinator, and training had been ongoing throughout the year before the accident, at various sites in the province. It appears that the employer was making active efforts to improve its safety practices and record.

This is not an instance of an employer who disregards or rejects participation in an occupational health and safety scheme.

The next criterion is whether an alternative means of enforcing the regulations would be more effective. On the evidence before me, I cannot conclude that there is an alternative to an administrative penalty that would be "more effective" as a means of enforcing the regulations.

There are other relevant circumstances. The employer was required by the construction contract to keep the dyke roadway open to members of the public. The breach of that requirement directly contributed to the accident. Although the city and the engineering consultant are not before WCAT, I observe that they also had some responsibility for the accident. There was a complex interplay of events leading up to the accident, commencing with the requirement that the narrow dyke roadway must be kept open despite heavy construction and equipment on the site.

My conclusion is that an administrative penalty was appropriate in the circumstances.

If an administrative penalty is appropriate, what should be the quantum of the penalty?

A "Category A violation," as described in Prevention Manual policy item D12-196-6, is one where there is a serious injury or illness or death; or high risk of serious injury or illness or death. In this case, there was a serious injury (I recognize it was to a non-worker), and before the accident, there was a high risk of serious injury or death had a worker or someone else put themselves in harm's way because of a lack of control of foot and/or cycle traffic.

I agree that Category A is the appropriate category of penalty. The basic amount of the administrative penalty is properly calculated in accordance with Category A.

Policy item #D12-196-6 provides that in an individual case, the "basic amount" of the penalty may be varied by up to 30%, having regard to the circumstances, including a number of factors.

The first three are the "nature of the violation," the "nature of the hazard created by the violation," and the "degree of actual risk" created by the violation. These criteria

essentially echo the "high risk" considerations that apply in deciding whether the violation is "Category A."

The next criterion is whether the employer knew about the situation giving rise to the violation. In this case, the employer was aware of the hazardous situation. No measures had been taken to comply.

Other workplace parties did contribute to the violation. As noted above, the engineering consultant spoke to the foreman. The city required that the dyke roadway be kept open. Both had identified the hazard. There was shared responsibility for the accident.

The evidence and submissions do not suggest that the financial impact of the penalty would be unduly harsh in view of the employer's size.

In this case, the multi-employer workplace, and the various shared responsibilities created by the construction contract have persuaded me that it would be appropriate to reduce the penalty. The review officer pointed out that the employer had the "main responsibility" for traffic control and a safe system for pedestrians to pass through the site. While that may be the case, it is apparent that both the engineering contractor and the city exercised significant control and supervision. For example, the construction contract contains extensive and very detailed specifications regarding the work to be done, how it is done, and the materials used. The city inspected the site regularly. The engineering consultant had an employee dedicated to monitoring the project and ensuring that the employer was doing the work properly and on time. Although the engineering consultant asked the employer to take steps to the fix the problem, nothing was done to ensure a timely response.

The application of policy item #D12-196-6 necessarily involves an exercise of discretion. Under the circumstances, I consider that the administrative penalty should be reduced by 30%, primarily because there was shared responsibility. I consider that the "high risk" nature of the violation is already fully taken into account by the placement of the penalty in Category A.

Conclusion

The appeal is allowed, in part, and the Review Division decision varied.

The employer did not violate section 115(2)(e) of the Act, but did violate section 3.10 of the Regulation.

The Board properly decided to impose an administrative penalty.

The administrative penalty was properly calculated based on Category A, but must be reduced by 30%.

No expenses were claimed and none are awarded.

Teresa White
Vice Chair

TW/jd