WCAT Decision Number: WCAT-2013-02719
WCAT Decision Date: September 30, 2013
Panel: Warren Hoole, Vice Chair

Introduction

[1] On February 2, 2010, a Workers' Compensation Board (Board) officer inspected the appellant employer's worksite. The officer observed trenching safety contraventions of the *Occupational Health and Safety Regulation* (OHS Regulation). The officer also considered that the employer had breached its training, supervision, and safety coordination obligations under the *Workers Compensation Act* (Act). The officer issued five orders against the employer, as set out in Inspection Report 2010138190042, dated February 3, 2010 (IR 042).

[2] The Board subsequently decided to levy an administrative penalty on the employer in relation to three of the orders set out in IR 042. Consequently, by way of Inspection Report 2011138190168, dated October 19, 2011 (IR 168), the Board fined the employer $75,000.

[3] The employer disagreed and requested a review of IR 168. In *Review Decision #R0137878*, dated September 28, 2012, a review officer confirmed the Board's decision to impose the administrative penalty. The employer now appeals to the Workers' Compensation Appeal Tribunal (WCAT).

[4] The employer requested that its appeal proceed in writing. I have considered the WCAT's *Manual of Rules of Practice and Procedure* and I have reviewed the issues, evidence and submissions in this appeal. I do not consider that the employer's appeal raises credibility concerns, significant factual complexities, or any other issues that might require an oral hearing.

[5] In these circumstances, I find that the employer's disagreement with the review officer's decision can be fully and fairly addressed in writing. I therefore accept the employer's request that its appeal proceed by way of written submissions.

Issue(s)

[6] The employer's appeal raises the following issues:

1. Did the employer breach its occupational health and safety obligations as set out in IR 042?
2. If so, is an administrative penalty warranted?
3. If so, does IR 168 reflect the proper quantum for such a penalty?

Jurisdiction

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

Background and Evidence

[8] A Board officer attended the employer's worksite on February 2, 2010. His observations at the worksite are as follows:

> While driving past this worksite, this Officer observed a worker in a trench excavation that ran the length of an asphalt road and that appeared to be greater than 4 feet in depth.
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> I entered the site and observed that the banks of the excavation were near vertical and no shoring was being used. I asked the worker to come out of the excavation. As he exited the excavation I asked him the depth. He reported that it was 4' [feet] 6" [inches] (later measured to range in depth between 4'6"and 4'10" along its length). I asked him if the excavation had been certified by a professional engineer as being safe for worker entry. He reported that he did not know and that I would need to ask his supervisor.
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> A few moments later the site foreman arrived. When asked, he stated that the excavation had not been certified by a professional engineer and that he was not aware of that being an option. He reported that the plan was for the excavation to be 4'6" in depth with a width of 28" at the bottom of the excavation and 42" al the top. He reported that they wanted to minimize the width of the top of the trench so as to minimize the amount of asphalt removed from the road. He also reported that with the asphalt at the top of the excavation he believed that the excavation was safe. The requirements of the Regulation with respect to excavations were discussed at length….
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> This employer is in the process of installing a new underground duct bank for their utility. It is reported that this employer retained the prime contractor role for this multi employer worksite. ln addition to this employer conducting work, they had subcontracted an excavation contractor, a trucking company and a traffic control company for the project. At the time of this Officer's inspection there were 7 workers of multiple employers on site.
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> SUMMARY REASON(S) FOR RECOMMENDATION….
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> The employer failed to ensure that an excavation was safe, prior to a worker entering it. The employer failed to ensure adequate instruction,

> training and supervision of workers, and failed to have an effective system or process for ensuring compliance as the prime contractor of the worksite.
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> [excerpts reproduced as written]

[9] The officer also took a number of photographs illustrating the site and the trench in question. An engineer attended the worksite the following day and prepared a report, indicating the trench was safe for workers to enter "provided that":

> 1. All heavy equipment and material stockpiles are at least 1.5 laterally from the trench while workers are in the trench;
> 2. The sand and gravel portion of the excavations sides be sloped… where the sand and gravel thickness exceeds 0.6 m;
> 3. The trench is to be backfilled by 5 pm today (Feb 3, 2010).

[10] The Officer prepared IR 042 and indicated that an administrative penalty would be considered. The officer issued five contravention orders under IR 042:

- Order 1 was for breaching the trenching safety requirements set out in subsection 20.81(1) of the OHS Regulation.
- Order 2 was for the employer's failure to adequately train and supervise its workers in relation to trenching safety requirements, contrary to paragraph 115(2)(e) of the Act.
- Order 3 was for the employer's failure to file a Notice of Project in relation to the excavation work, contrary to paragraph 20.2(1)(f) of the OHS Regulation.
- Order 4 was for the employer's failure as prime contractor at a multi-employer to ensure coordination of health and safety activities, contrary to subparagraph 20.3(2)(a)(i) of the OHS Regulation.
- Order 5 was for the employer's failure as prime contractor of a multi-employer worksite to establish and maintain a process to ensure compliance with the Act and the OHS Regulation, contrary to paragraph 118(2)(b) of the Act.

[11] The officer completed a "recommendation for administrative penalty" setting out his opinion that the employer's safety contraventions required a penalty to motivate compliance. The officer relied in particular on the high risk nature of trenching violations, the employer's repeated training and supervision compliance issues in the past three years, and a lack of due diligence in relation to these issues.

[12] In a July 29, 2011 letter, the Board advised the employer that the officer had recommended an administrative penalty and provided the employer with an opportunity to respond.

[13] The employer filed a response on October 3, 2011. The employer stated, in relevant part:

> The trench was cut through paved road; the top edges were asphalt which sealed the surface from moisture penetration and the bottom half was hard clay. There were no loose materials near or in the trench…. An engineering report from Simpson Geotechnical obtained subsequent to the inspection confirmed that the trench was safe for temporary worker access to enter the trench periodically to complete joints in the ducts. These entries would have been of very short duration and it was understood that if there was any loose material under the pavement in the vicinity of the joint, it would be cleaned and sloped, but only if encountered. In short, this was not a high risk trench and although it is and was acknowledged that no statement relative to the suitability for entry (without conventional sloping or shoring) had been arranged earlier, no workers were at risk.
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> According to the July 29, 2011 letter, the penalty is based primarily on a lack of training…contrary to section 115(2)(e) of the WC [Workers Compensation] Act. It was also indicated that a contravention of the prime contractor section 118(2)(b) had occurred. An email string in the "Enclosure Materials" shows that some of the confusion on the site concerning the role of the supervisor and work coordination was due in part to the fact that the excavation contractor was considered to be a dependent contractor. This meant that the contractor was integrated into the [employer's] crew and therefore subject to a much greater level of supervision and required for a discharge of the obligations under section 118(2)(b).
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> [The employer] accepts its responsibility to ensure that its workers are trained to carry out their work safely and does not deny that the proper paper work was not in place relative to the trench. The workers failed to make the appropriate arrangements to verify and support their assessment of the trench safety in accordance with [the employer's] procedures, but material submitted to [the Board] relative to the training of these workers…demonstrates that the appropriate training is in place. It is also important to note, however, that the evidence in this particular case shows that there was no high risk to workers and therefore the situation does not justify the penalty being proposed. Further, the extent of supervision and control actually exercised in this case exceeded that necessary to discharge responsibility under section 118(2)(b) and section 115. It is submitted that an administrative penalty is not appropriate in these circumstances.

[14] The Board officer provided a response to the employer's submission. The officer stated:

> At page 1 of its response, the [employer] states that an engineering report obtained subsequent to my inspection confirmed that the trench was safe for temporary worker access to enter the trench periodically to complete joints in the ducts. In response, the engineering report specifically states that the observed trench is considered safe for temporary worker access to set the ducts *provided that* the sand and gravel portion of the excavation sides be sloped at 0.5H:lV where the sand and gravel thickness exceeds 0.5 m. The statement by the engineer means that once those sections of the excavation are sloped, then it would be considered safe for worker access.
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> The Firm has not provided any new evidence to change my opinion that an administrative penalty is warranted in this case and it remains my opinion that these were high risk violations.

[15] In light of the officer's comments, the Board concluded that the employer's submission was not persuasive and went on to levy the $75,000 administrative penalty described in IR 168.

[16] The employer filed additional evidence in the subsequent Review Division proceedings, including a statement from Mr. S, the employer's safety manager since 1989. Mr. S indicated that the employer employs about 6500 full-time workers across British Columbia, with about 500 crew trips occurring each day. In this complex context, the employer operates an "extensive and sophisticated" safety program and the employer applies disciplinary measures to workers that do not follow the program. The employer's systems are intended to ensure that hazard assessments must be carried out for all jobs and documented.

[17] Mr. M also provided a statement. He is a field construction manager and has worked for the employer for 37 years. Mr. M noted that the employer's crews all had a supervisor and subforeman in place. With respect to the crew identified in IR 042, Mr. M suggested that the subforeman the Board officer spoke with did not clearly identify this structure because he has a "tendency to go quiet and play dumb" when under stress. Mr. M believes that the Board officer's inspection on February 2, 2010 revealed supervisory deficits that were not in fact present. Mr. M went on to state:

> After the [Board] inspection, I paid particular attention to the work done on this excavation. I was very surprised the crew had not done everything necessary to ensure that the trench was fully compliant with [Board] requirements. All members of the crew – including [Mr. B the supervisor] and [Mr. F the subforeman] – had received excavation training…only two weeks prior to the inspection. [The employer] has a list of the mandatory training carried out each year, and this includes safety. We were in [city]

> for 2 days and our coordinator of safety, [Mr. H], came in and did a session for us. He went over his excavation and shoring refresher. Despite the conclusion of the officer that the training was inadequate and therefore the workers did not understand the need for trench compliance, I am confident that the crew did understand what needed to be done but for whatever reason chose to ignore the requirements of the [Act and OHS Regulation].

[18] Mr. M went on to note that "most" of the work to be done in the trench was performed by machinery and did not require workers to spend "extensive" time in the trench. Mr. M considered that the subforeman was knowledgeable about hazard identification and referenced a tailgate meeting of February 1, 2010, in relation to the job in question. Finally, Mr. M pointed out that it was a simple matter for the employer's crews to secure an engineer's services if the crew had any trenching concerns. Mr. M indicated that the crew was given additional safety training following the events in question.

[19] The Board officer responded to the employer's Review Division submission in a memo dated June 29, 2012. The officer disagreed that the engineer considered the trench safe. He pointed out that the engineer indicated workers could enter the trench only after it was properly sloped. The officer disagreed that the employer's training was duly diligent because the training did not include a testing component to ensure that workers understood the training.

[20] In the course of the WCAT proceedings, the employer filed a June 4, 2013 opinion from Mr. Butler, a geotechnical engineer. Mr. Butler concluded that there was little risk of worker injury in relation to the trenching contravention described in IR 042. He offered the following opinion:

> It is my professional opinion that the hard clayey soil forming the lower portion of the trench excavation has substantial strength and cohesion, such that even a vertical cut within this soil would have a high factor of safety and very low risk of sloughing, slumping or other instabilities of trench excavation. It is also my professional opinion that the presence of this hard and strong clayey soil provided bearing capacity support and resistance to movement or failure of the overlying sand and gravel layer.
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> Similarly, in my professional opinion, the intact asphalt pavement layer above the sand and gravel layer provided confinement and resistance to lateral movements or failure of the sand and gravel layer, effectively acting like an "anchor" at the top of the sand gravel and gravel layer. The presence of this intact asphalt layer at surface also, in my opinion, provided effective protection against infiltration of water from rainfall or runoff from adjacent ground surfaces into the sand and gravel layer.
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> …

> Based on this combination of factors, a) the presence of strong, hard clayey soils over the lower portion of the trench excavation, b) the confining and anchoring effect of the intact asphalt surface layer, c) the lack of groundwater or other seepage from the trench sidewalls, as well as d) the sloping of the trench sidewalls from base width of 28 inches to 42 inches width at top, it is my professional opinion that there was a low risk of trench instability or failure and associated low risk to personnel working within or adjacent to the trench excavation.

[21] Mr. Butler went on to note that in the United States of America the accepted maximum safe unsupported trench depth is 5 feet instead of the 4 feet threshold used in the OHS Regulation. Mr. Butler considered the former to further reinforce his view that the trench identified in IR 042 posed little or no risk to workers.

[22] Mr. Butler's opinion was provided to the Board officer for comment. He replied on July 5, 2012, as follows:

> The engineer was not present to observe the excavation and appears to have based his opinion from photographs and the report prepared by the professional engineer who attended the sit on the day after my inspection. That engineer identified in his report that the excavation required additional sloping prior to it being considered safe for worker entry. This opinion supports high risk.

Submissions

[23] The employer has provided lengthy submissions. The employer complains that the Board's penalty order is so vague that it fails to adequately explain the case to be met and therefore breaches the employer's right to procedural fairness.

[24] On the merits, the employer says it acted with due diligence in relation to IR 042 because it has effective safety systems in place and uses trained and experienced supervisors and workers. Indeed, the employer had conducted recent trenching safety training of the very workers and subforeman involved in the circumstances described in IR 042. The employer also notes prior Board inspections confirming that appropriate safety systems were in place in relation to the employer's trenching operations in the same region of BC. The employer therefore argues that it acted with due diligence such that it did not contravene the general duty provisions under the Act.

[25] With respect to the imposition of a penalty, the employer concedes that it failed to comply with its trenching obligation under the OHS Regulation; however, it says that a penalty is not appropriate because of its general due diligence. Further, the employer argues that the trenching violation was only of a technical nature that did not put any workers at risk. In these circumstances, the employer submits that an administrative

penalty is not required. The employer therefore requests that I cancel the orders set out in IR 042 and IR 168.

[26] The Joint Occupational Health and Safety Committee participated in the appeal and supports the employer's position.

Reasons and Findings

Preliminary Issues

[27] The employer raises three preliminary issues.

[28] First, it argues that I should not permit the Board to participate in any manner in its appeal. The employer says that it is improper for a tribunal to defend its decision in later appellate or judicial proceedings. The Board's decision should speak for itself and the Board should not take on an adversarial role in later proceedings related to that decision.

[29] In support of its argument on this point, the employer cites *British Columbia Lottery Corporation v. Skelton*, 2012 BCSC 12, and *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, both of which applied the oft-cited Supreme Court of Canada decisions in *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684, and *Caimaw v. Paccar of Canada Ltd*., [1989] 2 SCR 983.

[30] I agree that the Board has no entitlement to participate in appeals. However, the Board is not playing a role in the current appeal because it has the right to participate in it. Rather, I have asked the Board to participate in a limited way so as to permit me to have a full understanding of the facts underlying the appeal, a task that the Board is capable of performing because its officer was present at the worksite and may have helpful evidence to provide regarding his observations of the circumstances at that worksite. By seeking input from the Board I do not clothe them with the status of a party, I merely seek additional evidence relevant to the appeal before me.

[31] I understand the employer's reference to *Skelton* and *Henthorne*. I am also familiar with the origin of these concerns in *Northwestern Utilities* and *Paccar*, particularly the court's concern regarding the impropriety of an otherwise independent tribunal taking on an adversarial role in relation to its own stakeholders. However, these cases deal with the scope of an administrative tribunal's role in judicial review proceedings before a court. A proceeding before the WCAT is quite different from judicial review. Courts lack the inquiry powers provided to the WCAT under the Act. I therefore doubt that the jurisprudence the employer cites assists it in relation to proceedings before the WCAT.

[32] I also note that, even if these cases were applicable to the WCAT, the employer has not recognized the one-sided nature of prevention appeals. Where there is no respondent, the Courts may permit greater participation by the tribunal in question. For example, in

Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), (2005) 75 O.R. (3d) 309 (C.A.), the court pointed out that the absence of any other respondent is a factor favouring greater tribunal participation in order to assist the court to reach a fully informed decision on the matters before it. At paragraph 44, Goudge J.A. stated:

> The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

[33] Consequently, even if *Northwestern Utilities* and its progeny were applicable to WCAT proceedings, which I doubt, I would not in any event characterize this jurisprudence as automatically precluding a tribunal from taking on a role somewhat akin to a respondent. Such an assertion oversimplifies the case law, particularly as illustrated in *Children's Lawyer*, by failing to recognize the broader scope of tribunal participation that may arise where no other respondent would be present.

[34] Consequently, I see three key difficulties with the employer's argument. First, the WCAT is not a court and many of the concerns identified in *Northwestern Utilities* are simply not present in WCAT proceedings. Second, unlike proceedings before the Court, the Act specifically contemplates WCAT securing evidence from any party it wishes in order to better consider the merits of the appeal. Third, even if I were to ignore the significant differences between WCAT proceedings and court proceedings, it is in any event an oversimplification of the law to assert that a tribunal should never take on a role akin to that of a respondent, particularly where no other party is otherwise available to perform this function.

[35] For all these reasons, I disagree with the employer's concerns regarding my invitation for comment from the Board in relation to this appeal. In my view, the Board has properly responded in a brief manner to matters within the Board officer's knowledge and has not otherwise taken on an unseemly or improper adversarial role. The employer's argument in relation to this preliminary issue is therefore not persuasive.

[36] The employer's second preliminary issue is related to the first. The employer says that, by permitting or requesting participation from the Board, the WCAT demonstrates institutional bias. The employer says that the Board might appear to have "an institutional role" in the proceeding that might be thought to bias the outcome because of a perception of "aligned interests." Again, I am unable to agree.

[37] One of the leading cases on institutional bias is *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919. There, the court described the appropriate test for institutional bias at paragraph 44 as follows:

> As a result of *Lippé*, *supra*, and *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, *inter alia*, the test for institutional impartiality is well established. It is clear that the governing factors are those put forward by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically -- and having thought the matter through – would have a reasonable apprehension of bias in a substantial number of cases. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention.

[38] Here, the Act does not provide any standing for the Board in WCAT proceedings; rather, the Act merely permits the WCAT to secure evidence from any person that the WCAT considers may assist it to more fully evaluate an appeal. There is no oversight of the WCAT by the Board. The Act gives no power to the Board over appointment or retention of WCAT panels. Nor does the Act confer on the Board any authority to set, limit, or otherwise control the remuneration to be paid WCAT panels. I therefore see nothing in the Act to establish any of the concerns over institutional bias found in the jurisprudence.

[39] On the contrary, the Act requires that WCAT members take an oath of office in the form prescribed by the Lieutenant Governor in Council, an oath of office that includes the obligation to act fairly and impartially. This duty is set out both by way of subsection 238(8) of the Act and by way of section 30 of the *Administrative Tribunals Act*, which is in turn incorporated into the Act pursuant to section 245.1. Finally, the Act provides for fixed term appointments for vice chairs of a minimum of two years and a maximum of five years. In my view, these provisions all serve to demonstrate the independence of WCAT vice chairs, particularly at an institutional level.

[40] In all these circumstances, I am unable to conclude that inviting comment, primarily in the context of witness evidence from a Board officer, would lead a well-informed person, viewing the matter realistically and practically – and having thought the matter through – to fear that WCAT proceedings would raise a reasonable apprehension of bias in a substantial number of cases. The employer's argument in relation to this second preliminary issue is therefore not persuasive.

[41] The employer's third preliminary concern relates to the nature of the case it is required to meet and clarity of that case as raised by the Board's disclosure. I give this argument little weight. The Board identified its concerns in IR 042, the recommendation for administrative penalty, and in IR 168. It is obvious to me that the administrative penalty

turns on the trenching contravention and the training or supervision failures that are said to have permitted the contravention to occur. The employer's argument that the case to be met is unclear loses any force in light of the fact that it has responded thoroughly and effectively to the Board orders. The employer's argument in relation to the third preliminary issue is therefore not persuasive.

[42] Having resolved the three preliminary concerns of the employer, I turn now to address the substance of the appeal.

1. Did the employer breach its occupational health and safety obligations as set out in IR 042?

[43] The employer appears to concede that it breached the trenching requirements set out in section 20.81 of the OHS Regulation. The employer does not dispute that the trench was more than four feet deep and that it was therefore required to be sloped, shored, or braced as recommended by a professional engineer. The employer did none of these things and I find that it contravened section 20.81 of the OHS Regulation. I did not understand the employer to seriously dispute this aspect of IR 042.

[44] However, the employer disputes the "general duty" breaches described in IR 042, that is, its failure both as an employer and prime contractor to adequately train and supervise its workers in relation to trenching requirements and to ensure all workers acted in compliance with the Act and OHS Regulation.

[45] The employer's response turns on its view that it acted with due diligence. It submits that the general duty provisions, in this case found in paragraphs 115(2)(e) and 118(2)(b) of the Act are strict liability rather than absolute liability offences such that the offences are not made out if the employer acted with due diligence.

[46] The diligence in question here is said to be the extensive safety systems already in place, systems that the Board had investigated on other occasions and found to be satisfactory. The employer is also said to be diligent because it engaged in training of its workers on a regular basis and in fact only a week before the events described in IR 042. Further, the employer says that its subforeman was very experienced and had supervised many prior trenching jobs without any problem. He was therefore well trained, as were his workers. Finally, the employer points out that it has many engineers readily available to its crews, as evidenced by the speed with which an engineer attended the job site shortly after the Board officer's inspection.

[47] In these circumstances, the employer says that it has systems in place to ensure safety compliance and that it trains and supervises its workers in an effective manner. I agree. I rely particularly on the fact that the employer had sent the workers and subforeman in question to a safety course on trenching just a week prior to the incident. I am further satisfied that the employer has a detailed safety program in place, including auditing of its workers and supervisors. I give additional weight to the very large size of the

employer, the scope of its work throughout the province and the hundreds of crews and projects that are ongoing at any one time.

[48] In my view, it is not enough to simply point to a safety violation in this context and conclude on this basis that an employer has breached its general duties under the Act. Similarly, although the employer has a record of prior safety contraventions, these contraventions are tiny in comparison to the scope of work the employer carries out on a daily basis. To merely conclude that an employer has a poor safety attitude in such circumstances is to ignore the context of the wide array of work and large number of workers operating in the constantly evolving landscape of worker safety. The standard here is not perfection; it is doing everything reasonably practicable in the circumstances.

[49] Here, although I am baffled by the subforeman's failure to identify the trench as engaging section 20.81 of the OHS Regulation, the employer took all reasonable steps to ensure that the subforeman was trained, supervised, and knowledgeable in this regard. Consequently, in relation to the general duty orders, I conclude that the fault for the failure to recognize the trenching and notice requirements that arose once the trench exceeded four feet fell on the subforeman and not on the employer. The employer acted with due diligence and is not at fault for the subforeman's oversight. I would therefore cancel the general duty contraventions identified in IR 042, that is, orders 2 and 5 of IR 042.

[50] There are two remaining orders. Order 3 was for the employer's failure to file a notice of project related to the excavation work, as required by paragraph 20.2(1)(f) of the OHS Regulation. I did not understand the employer to dispute this order and it is in any event indisputable that a notice of project was required but not filed.

[51] The last remaining order is Order 4, which alleges that the employer failed as prime contractor at a multi-employer worksite to ensure coordination of health and safety activities, contrary to subparagraph 20.3(2)(a)(i) of the OHS Regulation. As I understand the employer's position, it appears to suggest that the subforeman was in fact the coordinating supervisor but that, due to some stress or difficulty with authority figures, his responses to the Board officer indicating a lack of such a coordinator were in error. With respect, this argument lacks any air of credibility, particularly as the employer has not provided a statement from the subforeman himself. I understand that the employer treats all its subcontractors on a multi-employer worksite as its own workers; however, the subforeman's failure to identify himself as the safety coordinator is simply fatal to the employer's position in relation to this order and I confirm it.

[52] In summary, I confirm Order 1, 3, and 4 of IR 042. I cancel Order 2 and Order 5 of IR 042.

2. Is an administrative penalty warranted?

[53] Subsection 196(1) of the Act applies to the Board's decision to levy the administrative penalty and provides the Board with a discretionary authority to levy administrative penalties:

> 196 (1) The Board may, by order, impose an administrative penalty on an employer under this section if it considers 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
>
> (c) the employer's workplace or working conditions are not safe.

[54] Subsection 250(2) of the Act requires that I apply policies of the Board. The policies relevant to prevention matters are set out in the *Prevention Manual*. I note in particular policy item D12-196-1 "Administrative Penalties – Criteria for Imposing."

[55] Policy item D12-196-1 assists the Board in exercising its discretionary power to impose administrative penalties pursuant to subsection 196(1) of the Act. The primary purpose of an administrative penalty is to motivate the employer in particular and other employers more generally within the Province to comply with the Act and the OHS Regulation.

[56] Policy item D12-196-1 lists six threshold criteria that justify *prima facie* imposition of an administrative penalty. If any one of these six criteria is satisfied, the Board will then go on to consider whether or not 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.

A. Prima facie case for the imposition of an administrative penalty?

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

- 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 regulations on more than one occasion. This includes 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 or the regulations 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 or the regulations. Reckless disregard includes where a violation results from ignorance of the Act or regulations due to a refusal to read them or take other steps to find out an employer's obligations; or
- the Board considers that the circumstances may warrant an administrative penalty.

[58] In the circumstances of the employer's appeal, I am satisfied that none of the above threshold criteria is present. The Board and the review officer considered that the violations reflected a "high risk" of serious injury, illness, or death.

[59] In this regard, policy item D12-196-2 "Administrative Penalties – High Risk Violations" indicates that the phrase "high risk of serious injury, serous 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] The policy goes on to indicate that there are 11 specific types of safety violations that will be presumed to be "high risk" in the absence of evidence to the contrary. One of the 11 presumed high risk violations is working in an excavation more than four-feet deep without appropriate shoring, sloping, or other permitted safeguards.

[61] On its face then, the trenching contraventions would appear to be of a high risk nature. However, policy D12-196-2 sets out a presumption of high risk but that presumption may be rebutted. Here, I have an expert opinion as to the lack of risk involved in this particular trench. I note in particular that it was only slightly over four feet-deep, it had asphalt on the surface so as to reduce or eliminate water seepage, and there was a thick layer of hard clay such that the trench was highly unlikely to slump or collapse. In addition, few workers were in the trench and even then only for brief periods. The bulk of the work was carried out by machine and the project was only of a few days duration. Finally, I note as a practical matter, that, even if the trench were to collapse completely, it would still be too shallow to pose much risk to any workers standing in the trench.

[62] In all these circumstances, I conclude that this particular trenching contravention, although presumptively high risk, was not in fact high risk in this case. Similarly, I see nothing in the other two remaining contravention orders to demonstrate a high risk within the meaning of the policy item. This factor therefore does not support a *prima facie* case for the imposition of an administrative penalty.

[63] The second and third factors turn on the employer's compliance history. I have already discussed this point earlier in my reasons. Here, I understand that the employer has been the subject of several prior orders over the years. However, this fact must be considered in the context of its large number of workers and the 500 or so worksites it

maintains around the province at any one time. Moreover, as pointed out by the employer, its prior compliance history includes contraventions but also includes instances of Board approval in relation to its trenching safety and training and supervision. In this context I do not consider that the employer's circumstances engage either the second or third criteria for the *prima facie* imposition of an administrative penalty.

[64] The fourth consideration is whether an employer has failed to comply with a previous order within a reasonable time. Here, I see no evidence of the type of failure to comply that would *prima facie* justify the imposition of an administrative penalty.

[65] The fifth consideration is whether an employer knowingly or with reckless disregard violates one or more sections of Part 3 or the regulations. Reckless disregard includes where a violation results from ignorance of the Act or regulations due to a refusal to read them or take other steps to find out an employer's obligations. Here, the employer was aware of and responsive to its safety obligations. Indeed, it provided training to its workers on the very points at issue in this appeal. In such circumstances, I am unable to conclude that the employer intentionally or recklessly disregarded the very safety protocols that it had instructed its workers about only a short time earlier. Again, this factor therefore does not *prima facie* support the imposition of an administrative penalty.

[66] The final consideration is whether there are any other circumstances that may warrant an administrative penalty. Here, the Board officer has referred to later events in relation to a different safety incident. It has long been held that post-contravention compliance efforts will seldom assist an employer to avoid an administrative penalty. Conversely, when deciding whether to impose an administrative penalty, later events should also be given limited weight. In an egregious case it may be appropriate to consider such later conduct; however, this is not such a case. Rather, the decision to impose an administrative penalty is best made in light of the contraventions that form the basis of the penalty. To the extent that later conduct may also be blameworthy, separate administrative penalty proceedings should be taken and resolved in relation to that conduct. I therefore disagree with the Board officer that there are other circumstances that provide *prima facie* support for the imposition of an administrative penalty.

[67] In the absence of a *prima facie* case for the imposition of an administrative penalty, it follows that IR 168 must be cancelled. I need not address the remaining issue of the appropriate quantum for the administrative penalty.

[68] As a result, I allow, in part, the employer's appeal.

Conclusion

[69] I vary *Review Decision #R0137878*. I cancel Order 2 and Order 5 of IR 042. I confirm Order 1, 3, and 4 of IR 042.

[70] With respect to IR 168, I find there is no *prima facie* case for the imposition of an administrative penalty. I therefore cancel IR 168.

[71] The employer did not request reimbursement for appeal expenses. I note that the employer may have incurred expenses in relation to Mr. Butler's opinion. If the employer wishes to pursue the expenses matter, I will remain seized of expenses for three months after this decision and the employer is free to contact the WCAT Registry and file additional submissions within that time. However, at present, I make no order for the reimbursement of appeal expenses.

Warren Hoole
Vice Chair

WH/gw