Noteworthy Decision Summary

Decision: WCAT-2014-01756 **Panel**: Warren Hoole **Decision Date:** June 10, 2014

Contravention order – Review officer power to vary – Penalty order

This decision is noteworthy for its discussion of a review officer's authority to issue new contravention orders. The *Workers Compensation Act* (Act) does not grant review officers explicit jurisdiction to substitute one contravention order for another.

The Workers' Compensation Board, operating as WorkSafeBC, investigated an accident at the employer's shipping terminal and concluded via Contravention Order that the employer had breached its safety obligations. The employer requested a review, but the review officer did not resolve the validity of the initial Contravention Order. Instead, the review officer concluded that the employer had breached their regulatory obligations on other regulatory grounds.

The employer appealed to WCAT, objecting to the review officer's failure to address the appeal against the initial order, as well as the review officer's authority to issue a new order.

Based on the purpose of the Act and the grammatical and ordinary meaning of the provisions granting review officers with their authority, the panel found that review officers cannot issue new contravention orders. As well, a reasonable apprehension of bias could be raised by a review officer proposing a new contravention order, then purporting to adjudicate on that order's validity. The panel cancelled the review officer's decision to issue a new contravention order, but upheld the original order.

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Panel: Warren Hoole, Vice Chair

Introduction

[1] On February 16, 2010, a marine boarding ramp at the employer's shipping terminal collapsed and a worker died. The Workers' Compensation Board (Board)[1] investigated the accident. In Inspection Report 2011155440010, dated June 8, 2011 (Contravention Order), the Board concluded that the employer had breached its safety obligations by failing to adequately inspect the ramp.

[2] By way of Inspection Report 2011155440018, dated December 23, 2011 (Penalty Order), the Board levied an administrative penalty of $69,955.75 against the employer in relation to the safety breach identified in the Contravention Order.

[3] The employer disagreed and requested reviews. In *Review Decision #R0131933*, and *Review Decision #R0141252*, both dated November 22, 2012, a review officer confirmed the Contravention Order and the Penalty Order.

[4] The employer now appeals to the Workers' Compensation Appeal Tribunal (WCAT). In its notice of appeal, the employer requested that the appeal proceed by way of written submissions.

[5] I have considered the WCAT's *Manual of Rules of Practice and Procedure* (MRPP) and I have reviewed the issues, evidence and submissions in these appeals. The appeals are of considerable factual complexity; however, the employer has provided extensive submissions responding fully to the issues and evidence in dispute. I do not consider that credibility is a key concern. In these circumstances, I find that an oral hearing is not necessary and I accept the employer's request for the appeal to proceed by way of written submissions.

Issue(s)

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

1. Is the Contravention Order valid?

2. If so, is an administrative penalty warranted?

3. If so, does the Penalty Order set out the proper penalty quantum?

[1] operating as WorkSafeBC

Jurisdiction

[7] The WCAT's jurisdiction in this appeal arises under subsection 239(1) of the *Workers Compensation Act* (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.

Background and Evidence

[8] The circumstances of the February 16, 2010 ramp failure are complex; however, the appeal may be resolved on a relatively narrow point. I therefore intend to summarize the background in general terms only. I will address specific evidentiary conflicts, where necessary, in the course of my reasons.

[9] The boarding ramp in question was originally built around 1968 and used in another part of Canada by a railway company. In the mid-1990's the railway company disassembled the ramp, transported it to its marine terminal in British Columbia, and rebuilt it. A few modifications were made, including filling in the ramp to permit wheeled traffic and lengthening by several feet the mechanism that lowered and raised the ramp. The modifications were carried out with the approval of a professional engineer and the ramp re-entered service in 1995.

[10] In very simple terms, the last seaward segment of the ramp was raised up or down to facilitate the transfer of container traffic between a docked ship and the terminal. The movable segment of the ramp was attached to a tower on each side. Each tower included a lifting system that permitted the movable segment of the ramp to go up or down as necessary to properly align with a docked ship and thus permit the transfer of container traffic. The elevating towers and their attachments to the ramp were intended only to bear the weight of raising or lowering the final segment of the ramp itself. Once the ramp was properly positioned onto the ship, the weight of subsequent traffic on the ramp was borne by the ship, not the elevating structure or its attachments.

[11] A few years later, the employer took over the marine terminal, including the boarding ramp in question, from the railway company. In 2000, the employer retained the same professional engineer who oversaw the rebuilding of the ramp to inspect it. The two-step inspection process involved an initial visual survey and then a non-destructive testing (NDT) survey. Non-destructive testing involves the use of imaging equipment to identify cracks or defects that might not otherwise be visible to the naked eye. The NDT survey was carried out by another contractor and its June 14, 2000 report was provided to the professional engineer.

[12] As a result of these investigations, the professional engineer ultimately identified two small cracks in the steel structure attaching the left side of the ramp to the left

tower's lifting system.[2] The steel structure attaching the right side of the ramp to the right tower's elevating system did not demonstrate any defects.

[13] In his final report, the professional engineer stated that the cracks were not "of any structural concern." The professional engineer indicated that "[otherwise], the ramp facilities, which were built in 1994, appear to be in good shape and well maintained." The professional engineer recommended that the employer set up a general maintenance schedule. The professional engineer also recommended that the employer perform another inspection of the boarding ramp within "a year from now."

[14] Since the 2000 inspection, the employer conducted its own maintenance and inspection of the boarding ramp. The adequacy of those inspections is in dispute. What is not in dispute is that the employer did not carry out a further NDT survey of the boarding ramp between 2000 and its collapse on February 16, 2010. I consider that the employer's failure to carry out any further NDT surveys of the boarding ramp is at the heart of this appeal.

[15] Following the February 16, 2010 accident, both the Board and the employer undertook several investigations into the likely cause of the boarding ramp collapse. The various investigations included video and photographic evidence, witness statements, and engineering reports.

[16] Two separate engineering reports concluded that the cause of the ramp failure was a hidden engineering defect. The essence of these opinions turned on the fact that, at the time of the construction of the ramp in 1994, the lifting "yoke" in each elevating tower was lengthened by approximately four feet from the original design specifications of the 1968 structure. This change was made under the supervision of the professional engineer but was unknown to the employer.

[17] The reports considered that the increased length of the lifting yoke resulted in increased torsional forces on the "cheek plates". The cheek plates were a critical reinforcing element of the attachment system between each lifting tower and the moving segment of the ramp. The increased torsional force eventually caused the cheek plate to fail on the left side. This in turn led to the complete failure of the attachment between the left side of the ramp and the left lifting tower. The two engineering reports therefore attributed the boarding ramp collapse to a hidden engineering defect related to the reconstruction of the boarding ramp in the mid-1990s.

[18] For its part, the Board set out its primary conclusions in a June 3, 2011 incident investigation report. In essence, the Board considered that welding failures in the cheek plate combined with load stresses over time caused a catastrophic failure of the key components connecting the left lifting tower to the left side of the boarding ramp. The

[2] In an effort to simplify the technical complexities of the record, I use "right" and "left" in relation to the perspective of a person at the shore end of the ramp looking down the ramp to its sea end. "Right" therefore corresponds to "upstream", and "left" corresponds to "downstream".

right side of the boarding ramp remained attached to its lifting tower; however, when the left-side attachment failed, the moving portion of the ramp twisted and fell into the water, resulting in the drowning death of a worker.

[19] The Board was of the opinion, on the basis of its own engineer's report, that the deterioration of the cheek plate likely occurred over many months or even years prior to the accident in 2010. The Board considered that proper inspections, including NDT surveys, would likely have revealed the defects well before the accident and likely preserved the worker's life.

[20] The Board referenced the Standards Council of Canada's 2001 CAN/CSA-S826.3-01 "Ferry Boarding Facilities – Inspection" (Standard) as applying to the employer's marine boarding ramps and requiring at least annual inspections, including an NDT survey, of "fracture-critical components and operating systems." Because the employer had failed to carry out such annual inspections, the Board concluded that the employer was in breach of its safety obligations.

[21] In light of its conclusions, the Board issued the Contravention Order under paragraph 4.3(2)(a) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 (Regulation), which states:

> **Safe machinery and equipment**
>
> **4.3** (1) …
>
> (2) Unless otherwise specified by this Regulation, the installation, inspection, testing, repair and maintenance of a tool, machine or piece of equipment must be carried out
>
> (a) in accordance with the manufacturer's instructions and any standard the tool, machine or piece of equipment is required to meet, or
>
> (b) as specified by a professional engineer.

[22] The Board considered the Standard to fall within paragraph 4.3(2)(a) of the Regulation and to mandate an annual NDT survey of the ramp. Because the employer had not conducted any NDT survey of the ramp since 2000, the Board concluded that the employer was in breach of the Standard and consequently in breach of paragraph 4.3(2)(a) of the Regulation.

[23] The thrust of the employer's argument to the Review Division was that it was not subject to the Standard and thus not in breach of paragraph 4.3(2)(a) of the Regulation. The basis of the employer's argument was that the Standard only applied to ferry boarding ramps that facilitated the transfer of commercial passengers between the shore and a vessel. The employer argued that it did not operate a commercial passenger service

and only moved freight between ship and shore. It was therefore not covered by the Standard such that paragraph 4.3(2)(a) of the Regulation was not implicated.

[24] The review officer did not resolve the validity of the Contravention Order. Instead, the review officer concluded that the employer had breached paragraph 4.3(2)(b) of the Regulation because it had not followed the regular inspection schedule specified by the professional engineer. The review officer therefore confirmed that the employer had breached the Regulation and went on to confirm the Penalty Order, leading to the current appeal proceedings.

Submissions

[25] The employer, the employer's union, and the Board have provided extensive submissions both before the WCAT and before the Review Division. As I intend to resolve this appeal on a narrow basis, it is not necessary to summarize these arguments in detail. To the extent that my reasons may not directly answer some of the submissions put to me, those submissions were, with respect, inconsequential to the path of my reasoning.

Reasons and Findings

1. Is the Contravention Order valid?

[26] As already noted, the review officer did not address whether the employer violated paragraph 4.3(2)(a) of the Regulation because he was satisfied that the employer violated paragraph 4.3(2)(b) of the Regulation. The employer objects to both potential contraventions. It disagrees that the review officer had the authority to issue the latter and disagrees with the substantive merits of the former. I will address each in turn.

a. Did the employer contravene paragraph 4.3(2)(b) of the Regulation?

[27] In my view, the review officer's substitution of one contravention for another cannot stand. I conclude that a review officer lacks the necessary authority to substitute one contravention for another. That is particularly so where, as here, the two contraventions in question, although found in the same section of the Regulation, involve significantly different criteria.

[28] I reach this conclusion on the basis of the principles of statutory interpretation, as set out, for example, in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27:

> 21 Although much has been written about the interpretation of legislation…. Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament….

[29] I must therefore consider the grammatical and ordinary meaning of the provisions granting a review officer his or her authority, harmoniously with the Act and its objects.

[30] Here, section 1 of the Act defines "review officer" exhaustively as "an officer of the Board who is appointed under section 96.2." The powers of a review officer are set out in subsection 96.4(8) and permit the review officer to confirm, vary, or cancel a decision of the Board. A review officer may also refer a matter back to the Board for further adjudication. There is no explicit authority given to a review officer to add or substitute contravention orders for prevention matters.

[31] The original authority to issue orders for occupational health and safety matters under Part 3 of the Act is attributed under subsection 188(4) to "an officer". However, for the purposes of Part 3, an "officer" is defined exhaustively as meaning "a person appointed as an officer under section 86(1) or a person authorized to act as an officer under section 114."

[32] It would therefore appear that the ordinary and grammatical sense of the Act does not permit review officers to issue new contravention orders under Part 3 of the Act. Nor could such an authority be said to lie in a review officer's power to "vary" a decision. To vary is to modify a Board order, not to eliminate it entirely and replace it with something new.

[33] Further, I see nothing in the purposes of the Act that require me to clothe a review officer with the authority in question. The purpose of Part 3 of the Act in particular is to ensure safe workplaces. The importance of this value is emphasized by section 8 of the *Interpretation Act*. However, I doubt that review officers need the authority to issue new original contravention orders even in the context of fostering the important public purpose of workplace safety.

[34] On the contrary, given the complex and specialized nature of the Regulation and its interaction with the wide variety of workplaces and industrial processes present in British Columbia, it would seem to make more sense for more specialized and expert officers under Part 3 of the Act to have the exclusive authority to police the boundaries of safe work practices.

[35] Further, even if a review officer identifies some oversight and considers that a contravention order should have been issued but was not, it remains open to the review officer to "refer back" that matter to the Board for further adjudication. Through this authority, a review officer may therefore still play a role in ensuring that contravention orders are appropriate to the circumstances if the review officer considers that the

Board officer missed something in his or her initial analysis. Consequently, the purposes of the Act rest comfortably with the ordinary and grammatical reading of the Act that does not confer on review officers the authority to impose new contravention orders.

[36] Finally, I consider that a review officer runs the risk of raising a reasonable apprehension of bias where the officer proposes on his or her own motion a new contravention order and then purports to adjudicate the validity of that same order.

[37] Such circumstances seem to me to raise overlapping function concerns similar to those identified in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919. I understand that fairness concerns may be cured by an appeal to the WCAT; however, bare contravention orders without an associated penalty are not appealable. The possibility of a review officer raising a new contravention order on his or her own motion and then adjudicating its merits, without further appeal, is one that in my view may raise a reasonable apprehension of bias and that therefore further weighs against clothing a review officer with the authority to issue new contravention orders.

[38] For all these reasons, I interpret the Act as limiting a review officer to assessing the merits of an order but not to issuing new orders. The review officer may confirm, vary, or cancel an existing order; however, if he or she considers a new contravention order to be appropriate, the matter must first be referred back to the Board.

[39] It follows that the review officer exceeded his jurisdiction when he found that the employer contravened paragraph 4.3(2)(b) of the Regulation and I cancel this aspect of the review officer's decision.

[40] Having concluded that the employer's contravention of paragraph 4.3(2)(b) of the Regulation cannot be sustained, I turn to consider the validity of the only contravention order properly before me — paragraph 4.3(2)(a) of the Regulation. In this regard, I have also considered the employer's submissions to the Board and the Review Division, which the employer substantially relied on for the WCAT proceedings.

b. Did the employer contravene paragraph 4.3(2)(a) of the Regulation?

[41] Item 4.3.3 of the Standard requires an annual NDT survey for critical load-carrying components of a marine lifting ramp. The Board was of the view that because the employer did not conduct annual NDT surveys the employer breached the Standard and, in turn, paragraph 4.3(2)(a) of the Regulation.

[42] Paragraph 4.3(2)(a) of the Regulation is of a general nature and simply obliges employers to inspect equipment in accordance with any "applicable" standard the equipment or machinery is required to meet.

[43] The employer says it did not breach paragraph 4.3(2)(a) because the Standard does not apply to its marine boarding ramp, with the result that paragraph 4.3(2)(a) of the

Regulation does not referentially incorporate the Standard. The question, in essence, is therefore whether or not the Standard applies to the employer's marine boarding ramp.

[44] The employer does not appear to dispute the general validity of the Standard itself and I see nothing improper in the Standard. The starting point in this regard is section 32 of the *Canada Shipping Act, 2001*, which empowers the Federal Minister of Transport (Minister) to regulate Canadian shipping anywhere in the world and all shipping and shipping operations anywhere in Canada.

[45] The Minister discharged this authority, in part, by referentially incorporating a variety of Canadian and international standards and conventions regarding shipping and shipping operations. Of particular relevance to this appeal, the Minister adopted the Standard by way of subsection 363(2) of the *Cargo, Fumigation, and Tackle Regulations*, SOR/2007-128, as follows:

> **363.** (1) …
>
> (2) The owner, as defined in CAN/CSA Standards S826.3-01 and S826.4-01, *Ferry Boarding Facilities*, of a shore-based power-operated ramp shall ensure that it is maintained and inspected in accordance with the requirements of those Standards.

[46] In light of the statutory basis for the Standard, I am satisfied that it is a valid expression of the Minister's regulation-making authority and is of general application in Canada so as to at least potentially apply to the employer. Whether the Standard in fact applies to the employer is the key issue in dispute. The employer says the Standard only applies to commercial passenger-carrying ferry operations. Because the employer does not operate a commercial passenger ferry, it says the Standard is therefore inapplicable.

[47] The Standard provides its own application statement at item 1.2 as follows:

> **1.2 Application**
>
> The requirements of this Standard may be applied to all boarding facilities as they relate to
>
> (a) In-service facilities employed for the vessel-to-shore transfer of vehicles and/or passengers; and
>
> (b) Any structural, mechanical, electrical, or other components and equipment forming part, of affecting the safety and reliability, of such a transfer system.

[48] Here, the weight of the evidence establishes that the bulk of the employer's loading operations involve the transfers of trailers and containers between ship and shore. In addition, cars, tractor units, and small trucks are sometimes transferred between ship

and shore; however, I accept that the majority of the traffic is in the form of trailers and containers. I accept that the employer's operations do not involve significant passenger traffic and that it does not operate a commercial passenger ferry.

[49] However, the absence of passenger transfers does not substantially advance the employer's position. Applying the principles of statutory interpretation already noted above, the ordinary and grammatical sense of the application statement is that it captures not only passenger transfers but also vehicle transfers. If the Standard were only intended to apply to the former, it would not have used the phrase "and/or"; rather, it would have simply used the word "and". The ordinary and grammatical sense of the provision is therefore not limited to passenger transfers but also captures vehicle transfers even in the absence of passenger transfers.

[50] Similarly, I am not persuaded that the purpose of the Standard militates against this ordinary and grammatical meaning. On the contrary, item 1.1 of the Standard identifies its purpose as ensuring the "safe, reliable, and prolonged duty life of boarding facilities through the timely identification of…maintenance needs." I see nothing in this purpose that is limited to commercial passenger operations only. Nor is there anything inherent in non-commercial passenger operations that should demand a lower level of maintenance or safety than passenger operations. I therefore conclude that the purpose of the Standard is more consistent with a broader application rather than with the narrow application that the employer prefers. The Standard may therefore apply as long as the employer is engaged in vehicle transfer between ship and shore.

[51] In this regard, although a trailer or container, once transferred on or off the ferry, may be detached from their tractor or locomotive so as to no longer constitute a vehicle, the fact remains that, at the point where the trailer or container moves from shore to ship over the boarding ramp, it is propelled by a tractor trailer or a locomotive. It follows that at the point where the employer's cargo intersects with the boarding ramp the trailers and containers are "vehicles" so as to engage the Standard.

[52] In summary, I find that the Standard is not limited to commercial passenger-ferry operations. Further, I find that the employer is involved in the "vessel-to-shore transfer" of "vehicles". It follows that the Standard is applicable to the employer within the meaning of paragraph 4.3(2)(a) of the Regulation.

[53] I note, as a final point, that both the employer and the Board point to various statements in the record from official at Transport Canada as to the applicability or inapplicability of the Standard to the employer's operations. This evidence is of little relevance, as the applicability of the Standard is a legal question for me to resolve and not a matter to resolve on the basis of expert, or otherwise, opinion evidence. I therefore consider this evidence to be of little assistance and I need not refer to it further.

[54] Having concluded that the Standard is applicable to the employer, I turn now to consider whether the employer breached the Standard. In this regard, the employer does not dispute that it failed to carry out annual NDT surveys of its marine boarding ramps. It is

apparent from the engineering reports that the component of the ramp that failed was "load-carrying" within the meaning of the Standard. Even if it were not, the fact remains that, regardless of which part of the ramp failed, the employer did not carry out any annual NDT survey of any part of the ramp after 2000 and therefore contravened item 4.3.3 of the Standard. This in turn means that the employer breached paragraph 4.3(2)(a) of the Regulation and I confirm this element of the Board's decision.

c. Ancillary Issues

[55] There are two ancillary issues that I wish to address. First, I asked the parties to file submissions as to the effect, if any, of section 4.4 of the Regulation. This provision appeared relevant to the extent that it may raise retroactivity concerns potentially apparent if the Board were to apply the Standard, which came into force after the ramp was built, to subsequent maintenance or inspection requirements for the ramp. Section 4.4 of the Regulation provides:

> **Conformity to standards**
>
> **4.4** (1) If this Regulation requires that a tool, machine or piece of equipment manufactured before April 15, 1998 must meet a code or standard, the tool, machine or piece of equipment must conform to the edition of the code or standard referred to in this Regulation or the edition of the code or standard published at the time the tool, machine or piece of equipment was manufactured, subject only to the modification or upgrading specified to be necessary in this Regulation or in a directive issued by the Board.

[56] Because the employer's marine loading ramp was both manufactured and installed well before the Standard came into force in 2001, it might be said that section 4.4 of the Regulation excludes the Standard from applying to the employer; however, I have concluded that it does not.

[57] Referring, again, to the principles of statutory interpretation, I conclude that the emphasis in section 4.4 on manufacture, rather than on inspection or maintenance, is of significance. I conclude that the section is intended to relieve employers from having to rebuild or purchase anew tools, machines, or equipment that may no longer comply with current manufacturing requirements but that complied at the time of manufacture. I consider it significant that section 4.4 does not refer to ongoing maintenance or repair obligations. The ordinary and grammatical sense of the provision therefore is to permit employers with old equipment to avoid newer standards of manufacture rather than inspection or maintenance.

[58] This interpretation is consistent with the purposes of the Regulation generally. It would be a considerable hardship for an employer to have to replace equipment that met relevant standards at the time of its purchase. However, in light of the importance of safe workplaces, it is not a hardship, nor is it unfair, for the Board to require that an

employer's maintenance and inspection requirements evolve over time. I see nothing intrinsic to the employer's marine loading ramps that otherwise makes it impossible or unfair to apply evolving inspection requirements to equipment pre-dating those requirements.

[59] Consequently, I conclude that section 4.4 of the Regulation is intended to grandfather manufacturing standards but not to grandfather inspection or maintenance standards for older equipment, such as the employer's boarding ramps. It follows that section 4.4 of the Regulation does not assist the employer in this appeal.

[60] The second issue I wish to raise is a concern regarding the Board's incorporation of standards pursuant to paragraph 4.3(2)(a) of the Regulation. My concern is that this provision is too vague and too broad. It provides no guidance to stakeholders about the specific standards they are required to meet or the obligations imposed under those standards. The Board does not provide a list of the standards that it referentially incorporates. Nor does the Board define what is meant by "applicable". For example, if a piece of equipment is manufactured in another country and the place of manufacture requires a specific form of maintenance that is not required in Canada, is the foreign standard applicable? An employer should not have to resolve constitutional issues or questions of territorial effect in order to understand their obligations under paragraph 4.3(2)(a) of the Regulation. The lack of certainty in this regard is not helpful to stakeholders.

[61] Indeed, it may even be that the broadness and vagueness of paragraph 4.3(2)(a) reflect an excess of the Board's regulation-making authority. Section 230 of the Act, which deals with the Board's authority to adopt standards, might well be read as requiring the Board to specifically identify which standards it referentially incorporates. If so, it may be that paragraph 4.3(2)(a) of the Regulation is *ultra vires* because it is inconsistent with its enabling legislation.

[62] However, I lack the jurisdiction to reach a substantive resolution of this point because of the combined effect of section 44 of the *Administrative Tribunals Act* and subsection 8(3) of the *Constitutional Questions Act*.

[63] I therefore have no authority to make any finding as to the *vires*, or otherwise, of paragraph 4.3(2)(a) of the Regulation. Nevertheless, I consider the provision sufficiently troubling that I suggest for the Board's benefit that it consider providing employers with a clearer and more detailed description of the standards with which they are expected to comply. If the Board does not provide resources to identify applicable standards, one might reasonably ask why the Board should expect employers to do so.

[64] In summary, and notwithstanding these ancillary issues, I find that the employer contravened the Standard and in turn contravened paragraph 4.3(2)(a) of the Regulation. I turn now to consider whether an administrative penalty is warranted.

2. Is an administrative penalty warranted?

[65] I note at the outset that much of the employer's argument, as well as that of the Board and the union, is directed at whether the employer was at fault for the worker's death and whether an NDT survey would have prevented the death. With respect, it is the absence of the NDT survey, regardless of the consequences, which is of most significance. Although the tragic fatality illustrates the importance of complying with safety obligations, the purpose of an administrative penalty is not to punish an employer for a worker's death but rather to encourage overall compliance with safety obligations more generally. Consequently, to the extent that the employer in particular focuses its submissions on whether it was at fault for the fatality and whether the worker's death could have been avoided, those submissions are of little assistance.

[66] With this perspective in mind, I turn to address whether an administrative penalty is an appropriate response to the employer's breach of the Standard and in turn its breach of paragraph 4.3(2)(a) of the Regulation.

[67] In this regard, 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
>
> (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.

[68] Section 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."

[69] 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 to comply with the Act and the Regulation.

[70] 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?

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

- an employer is found to have committed a violation resulting in high risk of serious injury, serious illness or death;
- an employer is found in violation of the same section of Part 3 of the Act or the Regulation on more than one occasion. 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 of the Act or the Regulation on more than one occasion, where the number of violations indicates a general lack of commitment to compliance;
- an employer has failed to comply with a previous order within a reasonable time;
- an employer knowingly or with reckless disregard violates one or more sections of Part 3 of the Act or the Regulation. Reckless disregard includes where a violation results from ignorance of the Act or the Regulation 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.

[72] In the circumstances of the employer's appeal, I am satisfied that the violation in question was of a high risk nature.

[73] Policy item D12-196-2 "Administrative Penalties – High Risk Violations" indicates that the phrase "high risk of serious injury, serious illness or death" must be assessed in light of three factors: 1) the likelihood of an injury occurring; 2) the number of workers affected; and 3) the likely seriousness of any injury.

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

[75] The employer does not seriously dispute the likely seriousness of any injury resulting from failure of the marine boarding ramp. Rather, the employer says that there was virtually no likelihood of injury to any worker because engineering reports indicated that the ramp was only at risk of collapse when being raised or lowered. At such times, there are typically no workers on the ramp. Consequently, the employer argues there is little or no risk of worker injury. With respect, I consider that the employer takes too narrow an approach.

[76] In my view, the employer focuses on the actual accident as representing the limits of the risk inherent in inadequate inspection and maintenance of its marine boarding ramps. However, different areas of the marine boarding ramp might suffer different kinds of failures if inadequately inspected. Indeed, in the worst case, it might be that the entire structure would eventually collapse.

[77] Consequently, given the large and heavy nature of the ramp structure materials and the height of the structure, I consider it unduly narrow to define the scope of risk as involving only the collapse of the elevating component of the marine boarding ramp. I consider that a broader perspective is appropriate; one that considers whether the system as a whole could be said to demonstrate a high risk of injury if some or all of its components failed.

[78] From this perspective, although I recognize an absence of expert opinion evidence, common sense dictates that failure of the ramp could create a broad scope of significant risk well beyond the risk that actually materialized in this particular case. With this broader perspective in mind, I have little difficulty concluding that inadequate inspections of equipment such as the employer's marine boarding ramps brings with it a high risk of serious injury to workers, within the meaning of the applicable policy item.

[79] In the alternative even if the issue of risk is assessed only from the narrow perspective of the risk that actually materialized, the evidence suggests that the lifting mechanism was liable to fail for weeks or even months prior to the accident occurring. The employer's argument that this risk would not implicate workers cannot stand given that one of its workers demonstrably came within the scope of this risk and died. Consequently, I would find in any event that, the duration of this particular risk, even if only to a single worker, is sufficient to satisfy the policy requirements for a high risk contravention.

[80] Because I have found that the employer's contravention of paragraph 4.3(2)(a) was a high-risk violation, policy item D12-196-1 directs that there is a *prima facie* case for the imposition of an administrative penalty. The next step is whether to actually impose such a penalty.

b. Are there additional factors supporting an administrative penalty?

[81] A number of secondary factors assist the Board in determining whether or not to actually impose an administrative penalty. In this regard, policy item D12-196-1 directs consideration of the following:

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

- whether the employer has otherwise exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates;

- whether the violations or other circumstances have resulted from the independent action of workers who have been properly instructed, trained and supervised;

- the potential seriousness of the injury or illness that might have occurred, the number of people who might have been at risk and the likelihood of the injury or illness occurring;

- the past compliance history of the employer, including the nature, number and frequency of violations, and the occurrence of repeat violations;

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

- the need to provide an incentive for the employer to comply;

- whether an alternative means of enforcing the regulations would be more effective; and

- other relevant circumstances.

[82] Taking into account all of the above factors, I consider that the imposition of an administrative penalty on the employer is appropriate. I set out my reasoning in relation to each factor in turn.

i. Effective overall safety program?

[83] In my view, the employer has in place an effective safety program. The Board appeared to conclude that the employer did not have an effective safety program because this program did not identify the need for annual NDT analysis of its marine ramps. However, the analysis is directed at the overall safety program, not at the failing that must necessarily already be present in order for an administrative penalty to be considered. If that were not so, there would be no purpose to considering an employer's safety program. Further, there would be no purpose to describing this factor in the policy as relating to the employer's "overall" program.

[84] With this broader perspective in mind, I agree with the employer's representative that the employer has a detailed safety program in place and that the employer takes safety in the workplace seriously. This factor therefore weighs in favour of the employer and against imposing an administrative penalty.

ii. Due diligence?

[85] The question of due diligence is an important factor in determining whether or not to impose an administrative penalty. Indeed, subsection 196(3) of the Act states that an administrative penalty must not be imposed in the face of due diligence by the employer

in question. Policy item D12-196-10 "Administrative Penalties – Due Diligence" states, in relevant part:

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

[86] Here, I am unable to conclude that the employer acted with due diligence in relation to its failure to carry out an annual NDT analysis of its marine boarding ramps. The employer's position is essentially that in 2000 an engineer gave the marine boarding ramps his seal of approval. Further, the engineer specifically referenced a crack that the employer says it was concerned about and indicated that the crack was not a problem. The employer says it reasonably relied on this expert advice and therefore had no indication that it needed to carry out further NDT analysis.

[87] I do not accept this argument because it is directed at the wrong issue. The question is not whether the employer took all reasonable steps to identify the particular defect that led to the boarding ramp collapse. Rather, the question is whether the employer took all reasonable steps to identify its inspection obligations in relation to the marine boarding facilities. I do not consider the engineer's report to meet this requirement. At most, the report was unclear as to the required frequency of NDT analysis and a prudent person should have inquired further as to the precise nature of required NDT analysis and the frequency of such inspections.

[88] I say "at most" because the employer makes much of its belief that it read the engineer's 2000 report as leaving it up to the employer to make inspections; however, I prefer the Board's argument on this point. The engineer's suggestion was to carry out a general inspection "again" within one year. The use of the word "again" in my opinion demonstrates that the engineer was talking about an engineering inspection, including an NDT analysis, of the sort the engineer had just completed. I therefore disagree with the employer that the engineer's report provided it with reasonable grounds to believe that it need not carry out further NDT analysis and that its program of visual inspection was sufficient to discharge its inspection obligations.

[89] This is particularly so given the context of the equipment in question. The marine ramps were composed of components originally built in the 1960s, broken down, transported, and rebuilt in 1995. This was not a new system but rather one that a reasonable person would surely consider required regular NDT analysis to identify metal fatigue or other hidden defects that could reasonably be expected.

[90] Further, the marine loading ramps are large, complex structures carrying heavy traffic between ship and shore. These systems do not represent a minor, tangential, or trivial system. I therefore conclude that a reasonable person would not simply rely on a "clean" NDT analysis in 2000 and a strained interpretation of the engineer's 2000 report as relieving the person from carrying out further NDT analyses. Consequently, I disagree with the employer that it exercised due diligence in relation to its obligation to carry out an annual NDT analysis of its marine boarding ramps.

[91] As a final point, I reiterate that the due diligence in question for this appeal is not concerned with identifying the defect; rather, the due diligence is concerned with the employer's failure to identify the need for and carry out an annual NDT analysis of its marine boarding ramps. Much of the employer's argument regarding due diligence relates to the former rather than the latter and is therefore of little assistance to it.

[92] I therefore find that the employer did not act with due diligence in relation to identifying its obligation to carry out an annual NDT analysis of its marine boarding ramps. This factor weighs in favour of levying an administrative penalty.

iii. Independent action of properly supervised workers?

[93] This factor does not appear relevant and the employer does not rely on it.

iv. Risk of serious injury to workers?

[94] I have already found above that the contravention at issue in this appeal is properly characterized as a "high-risk" violation. For the same reasons, I am satisfied that the violation in question demonstrates a risk of serious injury to workers and I therefore consider that this factor weighs in favour of levying an administrative penalty on the appellant.

v. Past compliance history of the employer?

[95] The employer has a favourable compliance history. This factor weighs against the imposition of an administrative penalty on the employer.

vi. Employer's knowledge or presumed knowledge of violation?

[96] In my view there is insufficient evidence to conclude that the employer had actual or constructive knowledge of its obligation to carry out an annual NDT analysis of its marine boarding ramps. I have earlier concluded that the employer should have known of this obligation; however, that is not the same as having actual or constructive knowledge. Accordingly, this factor does not weigh in favour of levying an administrative penalty on the employer.

vii. Incentive for employer compliance?

[97] Compliance is the underlying goal of policy item D12-196-1 and section 196 of the Act. An administrative penalty is intended not only to motivate a specific employer to comply but also to motivate the employer community at large to comply with its regulatory obligations.

[98] In this case, the employer complied with the annual NDT analysis requirements of the Standard before the Board even imposed the Penalty Order on the employer. It is therefore apparent that the employer is committed to ensuring its marine boarding ramps are inspected in an appropriate manner. It might therefore be said that there is now little specific purpose in levying an administrative penalty on the employer.

[99] However, the purpose of administrative penalties is also to motivate other employers. In my view, the employer's conduct requires sanction because of the significance of the equipment in issue, the failure to clearly identify required inspection protocols, and the fatality which, as a practical matter, serves to bring public attention to the need for even sophisticated employers such as this one to adequately understand and discharge its inspection obligations for its large infrastructure.

[100] Consequently, although there may now be little specific purpose in levying an administrative penalty on the employer to achieve compliance, I consider that the broader goal of encouraging full regulatory compliance in the general employer community is a factor weighing in favour of levying an administrative penalty on the employer.

vii. Alternative method of enforcing the Regulation?

[101] I see no reasonable alternative to an administrative penalty. A mere warning letter in the overall context of this case would not recognize sufficiently the gravity of encouraging other employers to fully understand and discharge their inspection obligations.

ix. Other circumstances?

[102] The employer has not raised any additional arguments relevant to its position that an administrative penalty ought not to be levied against it. I see no obvious circumstances not already addressed in the preceding analysis under policy item D12-196-1. This final factor therefore is of no consequence.

[103] I am satisfied that the bulk of the above factors weigh in favour of levying an administrative penalty, particularly the employer's failure to exercise due diligence in the context of such a central safety issue as the appropriate inspection of large infrastructure equipment. The added public scrutiny associated with a fatality further emphasizes the need for a penalty. I therefore conclude that the Board was correct to

levy an administrative penalty against the employer in relation to the Contravention Order.

[104] In summary, weighing all the relevant factors set out in policy item D12-196-1, including the issue of due diligence, I agree with the Board's decision to impose an administrative penalty on the employer.

3. Does the Penalty Order set out the proper penalty quantum?

[105] Policy item D12-196-6 "Administrative Penalties – Amount of Penalty" is applicable to this issue and creates two methods for calculating administrative penalties.

[106] The "Category A method" applies to more serious breaches of occupational health and safety obligations while the "Category B method" applies to the less serious situations not captured under Category A. Category B penalties are significantly less costly than Category A penalties.

[107] The basic amount of a Category A or Category B penalty may be varied up or down by as much as 30%, depending on the circumstances of each individual case. Policy item D12-196-6 lists a number of factors relevant to varying a penalty up or down.

[108] The applicable policy therefore sets out a two-step approach to calculating the amount of an administrative penalty. The first step is to classify the penalty as either Category A or Category B. The second step is to consider whether the resulting basic amount of the penalty should be varied up or down.

a. *Is a Category A or Category B penalty appropriate?*

[109] In the circumstances of the current appeal, I have already concluded that the employer's violation of the Standard and therefore paragraph 4.3(2)(a) of the Regulation created a high risk of serious injury or death. In such circumstances, the policy requires the imposition of a Category A penalty.

[110] The next question to consider regarding the proper quantum of the Penalty Order is whether or not the Category A amount should be varied up or down.

b. Variation of the Category A penalty?

[111] Policy item D12-196-6 describes the following as the relevant factors to consider in assessing whether or not to vary the basic amount of a Category A penalty:

(a) nature of the violation;

(b) nature of the hazard created by the violation;

(c) 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.

[112] Many of these factors have already been discussed above in the context of whether or not to impose an administrative penalty. I have already concluded that the violation in question was the result of the employer's failure to identify critical inspection obligations applicable to some of its core infrastructure. I have also indicated that the violation in question created a high risk of serious injury or death and that the employer failed to exercise due diligence in relation to this issue. Finally, although the goal of penalties is not to punish employers for a worker's injury or death, the public scrutiny naturally associated with a death is a further aggravating aspect of the appeal. These factors all weigh in favour of an upward variation of the administrative penalty.

[113] On the other hand, the employer's conduct in relation to the inspection issue appears to me to be somewhat out of character. The employer appears to be generally concerned with the safety of its workers and has made numerous good faith efforts to ensure safe operations. It complied with its NDT analysis obligations as soon as the Board advised that it considered such requirements were applicable to the employer. I take notice that the employer's new program of inspection comes at considerable expense. These factors all weigh in favour of a downward variation in the basic amount of the Category A penalty.

[114] Weighing all the above, I am satisfied that the positive and negative factors largely balance each other. I therefore conclude that the Category A penalty amount should be varied neither up nor down.

[115] In summary, I find that the employer contravened the Standard and in consequence paragraph 4.3(2)(a) of the Regulation, as set out in the Contravention Order. I further find that the employer is properly subject to a Category A administrative penalty without adjustment, as set out in the Penalty Order.

[116] As a result, I deny the employer's appeals.

Conclusion

[117] I vary *Review Decision #R0131933* to the extent that I cancel the review officer's decision to issue a new contravention order under paragraph 4.3(2)(b) of the Regulation; however, I confirm that the employer contravened paragraph 4.3(2)(a) of the Regulation.

[118] I further confirm that the employer is properly subject to a Category A administrative penalty without adjustment, as set out in the Penalty Order.

[119] Neither party requested reimbursement for appeal expenses, nor are any such expenses apparent to me. Consequently, I make no order for the reimbursement of appeal expenses.

Warren Hoole
Vice Chair

WH/jy