DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] On January 30, 2015, a safety officer with the Workers' Compensation Board (Board) inspected the employer's workplace. The officer observed two safety contraventions related to the operation of tractor equipment. The officer therefore issued two contravention orders against the employer by way of an inspection report of the same date (the Contravention Orders).

[2] The officer subsequently decided that an administrative penalty was required in light of the Contravention Orders. The Board therefore levied an administrative penalty of $31,443.22 on the employer by way of an April 20, 2015 inspection report (the Penalty Order).

[3] The employer requested a review. In *Review Decision #R0191710*, dated November 26, 2015 a review officer confirmed the Contravention Orders and the Penalty Order.

[4] The employer now appeals to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

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

1. Did the employer breach its safety obligations as set out in the Contravention Orders?
2. If so, is an administrative penalty warranted?
3. If so, what is the proper quantum of the administrative penalty?

Jurisdiction

[6] The WCAT's jurisdiction in this appeal arises under subsection 239 of the *Workers' Compensation Act* (Act). The Contravention Orders are not appealable to WCAT on their own; however, where a contravention order is relied on to justify a penalty order, the WCAT may address both orders.[1] In this case, the Board relied on the Contravention Orders as the basis for imposing the Penalty Order. I therefore have the necessary jurisdiction to consider both.

Hearing Procedure

[7] The employer requested that the appeal proceed in writing. The employer's appeal does not raise significant credibility concerns, the facts are not particularly complex, and the employer has been able to effectively make its case in writing. I therefore conclude that fairness does not require an oral hearing and I accept the employer's request that its appeal proceed in writing.

[1] See item 3.13 of the WCAT's *Manual of Rules of Practice and Procedure* (MRPP).

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Background and Evidence

[8] The employer operates a landscaping business. It was carrying out landscaping work at a new condominium construction site on January 30, 2015, when a Board safety officer observed what he considered to be two safety violations.

[9] First, the officer observed two of the employer's workers not wearing seatbelts while operating "tractor" excavating equipment. Although the tractors were equipped with rollover cages (known as "ROPS" – rollover protective structures), the officer thought that the terrain posed a rollover hazard such that the operators were also required to wear seatbelts.

[10] The officer therefore considered the employer in violation of section 16.33 of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 (the OHS Regulation), which provides:

> ***16.33 Use***
>
> (1) If mobile equipment has seat belts required by any law in British Columbia, the operator and passengers must use the belts whenever the equipment is in motion, or engaged in an operation which could cause the equipment to become unstable.
>
> (2) The use of a seat belt is not required for
>
> > (a) a road grader operation that requires the operator to stand, in which case, an enclosed cab with closed cab doors or other effective restraining devices must be used,
> >
> > (b) a side boom tractor without a ROPS, or
> >
> > (c) ROPS equipped mobile equipment if the mobile equipment operates in a specific location where there is no significant hazard of rollover, and the surface in the area of operation is maintained free of ground irregularities which might cause a rollover.

[11] The phrases "no significant rollover hazard" and "specific location" are defined in section 16.1 of the OHS Regulation as follows:

> ***16.1 Definitions***
>
> *"no significant hazard of rollover"* means an area in which there are no grades exceeding 10%, no operating areas with open edges, no open ramps, loading docks, ditches or other similar hazards which might cause a rollover;
>
> *"specific location"* means a yard, plant or other clearly defined and limited area in which mobile equipment is operated, but does not include an entire municipality, district, transient forestry operation or construction site.

[12] With respect to the second safety violation, the officer observed the two tractor operators exiting their vehicles and performing work near the mobile equipment while not wearing high visibility clothing. The officer therefore considered the employer in violation of subsection 8.24(3) of the OHS Regulation, which provides:

> ***8.24 High visibility apparel***
>
> (1) …
>
> (3) A worker whose duties on the work site result in exposure to the hazards of mobile equipment must wear high visibility apparel meeting at least the Type 3 criteria of *WCB Standard Personal Protective Equipment Standard 2-1997, High Visibility Garment*.

[13] Additional details of the officer's observations are set out in the "narrative" he attached to the Contravention Orders, as follows, in relevant part:

> …At the time of this inspection the principal and the worker were operating two moving tractors which were fitted with roll over protection. The principal and the worker were not wearing seat belts, which were available on the mobile equipment, while they were engaged in operating the moving equipment. The ground on which the tractors were being operated was very muddy, wet and uneven and the tractors were being operated on sloped ground where there was a high risk of roll over. When not operating the equipment the principal and the worker would get out of the operators seat and unload the front of the tractors, which were being used to transport plants. They would then work around the other moving tractor without wearing high visibility PPE [personal protective equipment]. I stopped the work and spoke with the worker and the principal….

[14] As already noted, these circumstances were such that the officer considered it necessary to impose the Penalty Order on the employer.

[15] In the course of the Review Division proceedings, the employer filed additional evidence, including statements from the two tractor operators, plans of the landscaping and construction site, and evidence regarding the weather conditions at the time of the safety officer's inspection.

[16] With respect to the written statements of the tractor operators, Mr. JB advised that he was a general labourer. He had received safety training, including direction to wear his seatbelt at all times while operating a tractor. He was also advised to wear a high visibility vest at all times. Mr. JB believed the employer was committed to safety and referenced in particular its safety manual and weekly toolbox meetings to discuss safety matters.

[17] Mr. JB then went on to describe his recollection of the Board safety officer's inspection on January 30, 2015. Mr. JB advised that he operated the tractor merely to transport saplings to a staging area from which they would then be planted in an area he described as the "habitat". There was no-one around him while he performed this task. His tractor travelled between 5 and 10 km per hour along flat paths for the most part. Mr. JB stated that there were no slopes on his

route greater than 10 degrees. The ground conditions were flat and not significantly muddy or rutted. He did not believe there was any risk of rollover. Mr. JB said his observations in this regard relied on his 30 years of experience operating mobile equipment.

[18] Mr. JB agreed that he was not wearing his seatbelt for a moment. He said it was inadvertent and likely due to the fact that he was constantly in and out of the tractor while going back and forth delivering the saplings to the staging area for planting in the habitat. He must have forgotten after one of these short trips to re-affix the seatbelt and that was the moment that the Board safety officer observed.

[19] The second tractor operator, Mr. CT, also provided a statement. He advised that he is the employer's director and president. Mr. CT described the employer's safety program and training, including the requirement for using seat belts and wearing high visibility vests. With respect to the landscaping operation in question here, Mr. CT described the "habitat area" as somewhat distant from the condominium development itself.

[20] Regarding the events of January 30, 2015, Mr. CT described assigning Mr. JB to move plants to the staging site next to the habitat area for planting. Mr. CT thought Mr. JB was driving one of the employer's small tractors. He did not recall other mobile equipment on site but conceded there might have been another tractor. Mr. CT helped by moving the saplings from the staging site to the designated spots in the habitat area. There were no other workers around as the habitat area was about 100 feet away from the nearest part of the condominium development.

[21] Mr. CT said the weather was not a problem and that ground conditions were not dangerous. In particular, Mr. CT described the habitat area as mostly flat and with no rollover risk. He observed Mr. JB to drive the tractor without difficulty in a slow and safe manner. When the Board officer attended and advised Mr. CT to put on his high visibility vest and to ensure he wore a seatbelt, Mr. CT immediately complied. Mr. CT concluded by explaining his efforts to ensure the employer was in compliance with its safety obligations. He noted that there have been no injuries at the employer's worksites since January 30, 2015.

[22] The review officer requested additional information from the Board safety officer, particularly in relation to the site conditions he observed, such as the slope of the area in question and weather conditions.

[23] In an October 8, 2015 written statement, the safety officer confirmed that he observed two small tractors on site being operated by Mr. CT and Mr. JB. Both were being driven and then unloaded in the following manner:

> Initially both tractors were in motion and being driven by both the principal and the worker, and then, [Mr. CT and Mr. JB] exited the tractor (at different times) and removed the plants from the buckets of the tractors. Both [Mr. CT and Mr. JB] were exposed to the hazards of moving mobile equipment without the benefit of hi visibility apparel. Both [Mr. CT and Mr. JB] exited the seats of the tractors without having to undo a seatbelt.

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[24] The safety officer also observed at least two other workers in the vicinity of the mobile equipment who were not wearing high visibility apparel. The officer considered the site conditions to be wet and muddy, with heavy ruts and enough slope to pose a rollover hazard.

[25] In a further statement dated October 18, 2015, the Board officer indicated that he was confident the area in question presented a rollover hazard. The officer agreed he did not measure the slope at the time; however, he had attended the condominium project on many occasions and was very familiar with the area, as well as having many years of construction experience.

[26] With respect to the officer's observations of the tractors at the time of the inspection, he recalled that:

> The area where the tractors were working was sloped both parallel and at right angles to the building. I estimate that the average rise over a 25 foot run was approximately 4 feet at this area. This is equal to an approximate ratio of 2/12, or 16% slope. The slope was not consistent and tended to "curl" near the edges. The tractors were operating on this "curl", moving diagonally away from the building and were moving forward on an upwards slope from east to west, that is to say they were on a compound slope both front to back and side to side, exposed to a significant risk of rollover. The roll over hazard was increased by the ruts created by the tractors, they were without a doubt at risk of roll over should the operator have made an error or the soft ground subsided.

[27] Finally, the officer included a small site plan of the condominium project and habitat area in support of his statement.

[28] The employer provided a brief reply. It indicated that the surface conditions were not particularly wet and thus it was unlikely there was significant rutting of the habitat area. The employer provided rainfall and weather records for the month of January 2015 in support of this point. The employer concluded that significant rutting was not present and was unlikely to increase any rollover hazard.

[29] Notwithstanding the employer's concerns, the review office upheld both the Contravention Orders and the Penalty Order, giving rise to the appeal now before me.

[30] In the course of the WCAT proceedings, the employer provided specifications for the tractors in question. It also re-filed the September 14, 2015 statements from Mr. JB and Mr. CT and weather information for the time in question. Finally, the employer provided photographs, and two short video clips of a tractor said to be re-enacting the circumstances described in the Contravention Orders.

[31] I directed that the employer's submission be disclosed to the Board officer for comment. In a response dated July 26, 2016, the officer stated that the video evidence reflected changes that were not present at the time of the inspection. The officer indicated that the videos themselves confirmed that the terrain in question was sloped and rutted. The officer considered the condominium project and the habitat area to be a single construction area and thus not a "separate location" for the purposes of section 16 of the OHS Regulation. Finally, the officer provided his view as to the merits of the employer's submissions. I have disregarded those

comments as the officer's proper role is to confine his comments to evidentiary matters within his knowledge rather than making submissions in defence of his decision to penalize the employer.

[32] The employer received a copy of the Board officer's statement and an opportunity for rebuttal. The employer filed additional plans in support of its position that the planting area was a "separate location" within the meaning of the OHS Regulation.

Submissions

[33] The employer essentially raises four arguments. First, the employer says that the Board should have provided it with an opportunity to make submissions prior to issuing the Penalty Order. The failure to do so reflects a breach of procedural fairness and the employer requests by way of remedy that I cancel the Penalty Order and return the matter to the Board for reconsideration.

[34] Second, the employer says that the Contravention Orders should be cancelled such that the Administrative Penalty must also fail. The basis of the employer's argument here is that no workers were exposed to operating mobile equipment and thus there was no need to wear high visibility clothing. Further, the employer's tractors were operating at a "specific location" with no "significant risk of rollover" such that there was no obligation to wear a seatbelt while operating the tractor. Both elements of the Contravention Orders are therefore said to be invalid.

[35] Third, and in the alternative, the employer argues that an administrative penalty is not in any event appropriate in all the circumstances as none of the criteria for imposing a penalty exists in the employer's case. For this reason, the employer submits that the Penalty Order should be cancelled.

[36] Fourth, and in the further alternative, if a penalty is required, it should be the less costly "category B" penalty because there was no significant risk of serious injury or death and nor did the employer act willfully or with reckless disregard for safety. On a related note, the employer argues that the "variation factors" apply to its circumstances such that the Penalty Order should be further reduced by the maximum permitted amount of 30%.

Reasons and Findings

[37] I find that the Contravention Orders are valid. I further find that an administrative penalty is appropriate in all the circumstances. However, I direct that a "category B" penalty be imposed rather than a "category A" penalty. Finally, I conclude that the penalty amount should not be varied up or down. I set out my reasons for these conclusions below.

[38] Before addressing the merits of the Contravention Orders and the Penalty Order, I note the employer's procedural fairness argument. In my view, that argument does not assist the employer.

[39] I agree that the Board breached the employer's entitlement to procedural fairness by issuing the Penalty Order without notice or an opportunity for the employer to make submissions. Indeed, I question why the Board follows such an obviously unfair process, particularly when substantial

administrative penalties are in issue. It may be that the Board takes this approach in the interests of timeliness, which was an important consideration identified in the Macatee Report[2].

[40] Whatever the explanation, I therefore consider it obvious that the Board breached the employer's basic entitlement to procedural fairness by not permitting the employer an opportunity to comment prior to levying the Penalty Order. Although I agree with this element of the employer's argument, I disagree that any remedy is required. This is because the WCAT proceedings (and likely the Review Division proceedings) "cure" the Board's breach of the employer's right to procedural fairness.

[41] In this regard, WCAT proceedings are a rehearing based both on the existing record and any new evidence a party wishes to file. I have full substitutional authority over appeals. There is no standard of review and no deference due to the underlying decision makers. This means that the employer has a full and unfettered ability to make its case before an independent and impartial WCAT panel. At the end of the day, the employer therefore receives its procedural right to make full submissions about the merits of the Administrative Penalty and the underlying Contravention Orders.

[42] In such circumstances, although it is likely that the Board breached the employer's entitlement to procedural fairness, that breach of procedural fairness is "cured" by the current WCAT proceedings. I therefore do not find the procedural fairness aspect of the employer's argument to require the remedy the employer requests. I turn now to address the substance of the appeal.

1. Are the Contravention Orders valid?

a. The seat belt violation

[43] I have already set out the relevant provisions of the OHS Regulation above. In essence, a worker operating mobile equipment with roll-over protection must also wear a seatbelt, unless the mobile equipment operates in a "specific location" where there is no "significant hazard of rollover". The employer does not dispute that Mr. JB was operating mobile equipment without a seatbelt on January 30, 2015, as alleged by the Board officer. Rather, the employer's position is that it was not necessary for Mr. JB to wear a seatbelt at the time. I disagree.

[44] I conclude that there is sufficient evidence to establish that the area in which Mr. JB operated the tractor included locations where a "significant hazard of rollover" was present. It is not necessary that the entire area involve a rollover hazard as long as such a hazard was present, as here, in some portion of the area in which the tractor operated. This means that Mr. JB was required to wear a seatbelt. He did not do so and therefore was in contravention of section 16.33 of the OHS Regulation.

[45] I reach this finding in light of the Board officer's statements, the topographical map, the photographic evidence provided by the employer, and the video evidence provided by the employer. I take little from the weather conditions in early 2015 because I need not resolve

[2] *WorkSafeBC Review and Action Plan*, July 1, 2014.

whether the terrain was rutted or not. In my view, the weight of the evidence demonstrates that at least some areas involved a 10% grade. I also note the employer's own video evidence, which around the 1.36 minute mark of the first clip shows the tractor negotiating what appears to me and to the Board officer to have been a short stretch of terrain involving a significant risk of rollover.

[46] Indeed, the operator in the video unintentionally emphasizes this concern by stopping the tractor and changing the gearing downwards to increase traction and slow the tractor while negotiating the section of uneven terrain, albeit brief. I note that the employer did not provide a persuasive response to the officer's comment in this regard or to his topographical analysis, despite being provided the opportunity to do so.

[47] Consequently, although much of the area in question likely did not pose a significant hazard of rollover I conclude that at least some portions did pose such a hazard. In reaching this conclusion I have considered the evidence of Mr. JB and Mr. CT; however, overall I give the other evidence referenced above greater weight. I also do not consider it relevant whether Mr. JB was operating the tractor carefully or not. The issue is not whether a rollover would occur but rather whether the terrain posed a significant hazard of rollover.

[48] I therefore find that the mobile equipment in question was operating in an area on January 30, 2015, that comprised, at least in part, terrain posing a "significant hazard of rollover" within the meaning of section 16 of the OHS Regulation. This in turn means that Mr. JB was required to be wearing a seatbelt at the time of the Board officer's inspection. As he was not doing so, it follows that the seat belt violation component of the Contravention Orders is valid.

b. The high visibility apparel violation

[49] I have already set out above section 8.24 of the OHS Regulation. It requires any workers exposed to the "hazards of mobile equipment" to wear high visibility apparel. The employer concedes that neither Mr. JB nor Mr. CT was wearing such apparel. Rather, the employer argues that such apparel was not required. I disagree.

[50] The employer says the tractors were being operated safely such that there was no "hazard" and therefore that no worker was exposed to the "hazards of mobile equipment". I agree with and would adopt as my own the reasoning of the review officer on this point. Simply put, any operating mobile equipment creates an obvious hazard for nearby workers. The equipment need not be operated dangerously itself. Operators of equipment or nearby workers need only a moment of inattention in what might otherwise appear to be innocuous circumstances to result in serious consequences. Wearing high-visibility apparel whenever mobile equipment is present is therefore essential, regardless of the care and attention of the operator and nearby workers.

[51] It follows that I disagree with the employer's argument that section 8.24 of the OHS Regulations requires the equipment to be operated in a hazardous manner. In my view, the equipment is, in itself, hazardous such that its mere presence requires nearby workers to wear high-visibility apparel. Neither Mr. JB nor Mr. CT wore such apparel at the time in question. Consequently, the high-visibility apparel component of the Contravention Orders is also valid.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[52] As a result, I deny the employer's appeal in relation to the Contravention Orders.

2. Is an administrative penalty warranted?

[53] The purpose of an administrative penalty, if levied, is to encourage the employer, and more generally all employers in British Columbia, to comply with occupational health and safety requirements. With this perspective in mind, I turn to address whether an administrative penalty is an appropriate response to the Contravention Orders.

[54] In this regard, subsection 196(1) of the Act[3] 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.

[55] 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."

[56] 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 OHS Regulation.

[57] 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?

[58] 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;

[3] As it read at the time of inspection.

- 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.

[59] In the circumstances of the employer's appeal, I am satisfied that the high visibility vest component of the Contravention Orders reflects a repeat safety violation. The employer appears to suggest these prior occurrences are too dated to be relevant. I disagree. The general practice in this regard is to consider an employer's prior three-year history. I am not persuaded I should depart from this general practice in the particular circumstances of this appeal. I therefore conclude that the "repeat" nature of the employer's failure to ensure the proper use of high-visibility apparel justifies as a *prima facie* matter the imposition of an administrative penalty.

[60] Unlike the Board and Review Division, I do not consider that either component of the Contravention Orders demonstrates a high risk of serious injury or death within the meaning of policy item D12-196-2 "Administrative Penalties – High Risk Violations". In my view, the failure to wear a seatbelt was more of a technical failing in the particular circumstances of the appeal before me. Although some areas of the worksite included a significant rollover hazard, much of the area did not. In addition, I accept that Mr. JB was an experienced and careful operator and that the tractor traveled at very low speeds. I therefore do not consider the seat belt violation or the high visibility apparel violation, in this particular case, to reflect a high risk of serious injury or death within the meaning of the policy. Finally, I do not consider that any of the other circumstances relevant to the *prima facie* imposition of an administrative penalty are present, other than the repeat violation concern.

[61] This means that it is only the employer's repeated failure to wear high visibility apparel that requires as a *prima facie* matter the imposition of an administrative penalty. The next step in the analysis is to consider whether to actually impose such a penalty.

b. Are there additional factors supporting an administrative penalty?

[62] 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.

[63] Taking into account all of the above factors, I consider that the imposition of an administrative penalty on the employer is appropriate. I need not address this point at length. It will suffice to say that wearing high-visibility apparel is a simple, basic feature of worksite safety. The mere fact that it was the employer's director and president who was not wearing such apparel, particularly in light of prior inspection activity alerting the employer to the importance of such apparel, defies any effort the employer makes to establish due diligence or to otherwise argue a penalty is not an appropriate regulatory response to the employer's conduct.

[64] I therefore find that the employer should be subject to an administrative penalty in light of the high visibility apparel safety violation, as set out in the Contravention Orders. The next step in the analysis is to consider the quantum of such a penalty.

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

[65] Policy item D12-196-6, "Administrative Penalties – Amount of Penalty" creates two methods for calculating administrative penalties.

[66] 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.

[67] 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.

[68] 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?*

[69] In the circumstances of the current appeal, I have already concluded that the Contravention Orders do not reflect a high risk of serious injury or death. I have also concluded that the employer did not act willfully or with reckless disregard as that term has been interpreted in prior WCAT decisions. In such circumstances, the policy requires the imposition of a category B penalty.

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

b. Variation of the Category B penalty?

[71] 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 B penalty:

> (a) nature of the violation;
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> (b) nature of the hazard created by the violation;
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> (c) degree of actual risk created by the violation;
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> (d) whether the employer knew about the situation giving rise to the violation;
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> (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.

[72] Here, I am satisfied that the positive factors the employer references in its submissions are balanced by the negative factors present, particularly my finding that the employer's director and president failed to understand and follow proper safety protocols regarding something as simple and obvious as wearing high-visibility apparel. I therefore conclude that the category B penalty amount should be varied neither up nor down.

[73] In summary, I find that the employer contravened the OHS Regulation as set out in the Contravention Orders. I further find that the employer is properly subject to an administrative penalty for the high-visibility apparel component of the Contravention Orders. However, I find

that the Penalty Order should be calculated as a category B penalty rather than a category A penalty. I find that the resulting penalty should be varied neither up nor down in all the circumstances.

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

Conclusion

[75] I vary *Review Decision #R0191710*. I confirm that the employer violated its safety obligations as set out in the Contravention Orders. I further confirm that an administrative penalty is required in relation to the high-visibility apparel component of the Contravention Orders; however, I direct that the Penalty Order be recalculated on the basis of category B rather than category A, without variation. I leave it to the Board to carry out the necessary recalculation of the Penalty Order.

[76] The employer did not request reimbursement for appeal expenses and none is apparent to me. Consequently, I make no order for the reimbursement of appeal expenses.

Warren Hoole
Vice Chair

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898