WORK SAFE BC

Review Division

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February 17, 2017

Cheryl Nex
Arrow/Zombie/The Flash/The 100 ET AL
Bldg 6 - Suite 240
555 Brookebank Avenue
North Vancouver BC V7J 3S5

Dear Cheryl Nex:

Regarding: Decision on Review Reference #: R0208068
Review of Administrative Penalty Order #: IR201615891031A
RFS#: 201515891079Z
Board Decision under Review: May 9, 2016

I am writing to inform you that I have reached a decision on your request for review.

You requested a review of the decision of the Workers' Compensation Board (the "Board"), which operates as WorkSafeBC, dated May 9, 2016. After giving this matter careful consideration, I have confirmed the Board's decision to impose a penalty of $75,000 (under Category "A") against your company. My decision and reasons are attached.

To ensure privacy, names and other identifying information have not been used in the attached decision. Decisions of the Review Division will be made publicly available through our website at www.worksafebc.com.

My review is now concluded.

Yours truly,

Anand Banerjee
Review Officer
Review Division

AB/rg
Enclosures

PLEASE NOTE:

Decisions by Review Officers are final decisions of WorkSafeBC. Most types of decisions can be appealed to the Workers' Compensation Appeal Tribunal (WCAT). However, some, such as decisions on vocational rehabilitation, commutations, orders (other than penalties) and certain types of pensions are not appealable. The enclosed pamphlet provides further information about which decisions may be appealed and how to initiate an appeal. WCAT decides which decisions can be appealed and you can contact them if you require additional guidance. If you do decide to appeal this decision, you must do so within 30 days of the date of this letter.

REVIEW DECISION

Re: **Review Reference #: R0208068**
Board Decision under Review: May 9, 2016

Date: **February 17, 2017**

Review Officer: **Anand Banerjee**

The employer requests a review of a penalty order of the Workers' Compensation Board (the "Board"), operating as WorkSafeBC, dated May 9, 2016. An affected union is participating in this review.

The employer provided a submission on this review, along with a volume of documents. This material was provided to the union, who then submitted a response. In reply, the employer's counsel provided a brief answer to the union's submission.

Section 113(2.2) of the *Workers Compensation Act* (the *"Act"*) gives me the authority to conduct this review.

Issue

This is review of the Board's decision to impose an administrative penalty of approximately $75,000 (under Category "A") against the employer under section 196(1) of the *Act* for violations of section 115(2)(e) of the *Act* and sections 11.2(1(a), 12.2(b) and 13.33(1) of the *Occupational Health and Safety Regulation* (the "*Regulation*"), relating to three separate instances in which workers on motion picture projects were injured.

Background

The employer is a company that produces motion pictures. It has a number of projects. Each project has slightly different requirements and poses unique safety challenges. This review concerns a single penalty that was imposed for three separate incidents that occurred at two different locations, over the course of a few months in 2015.

Incident Number One: The False Floor Incident

In July 2015, a film crew employed by this company was working at a warehouse location at which a false floor had been built out of Styrofoam and particle board and painted to look like concrete. This false floor had been built approximately 15 feet above the ground floor and it was not designed or intended to support the

weight of any person. The layout of this work space has been described by the investigating officer in his Recommendation for Administrative Penalty as follows:

> ... a barrier guard [was] installed along the full length of the floor opening, a portion of which had been covered by the false floor. The barrier guard ran parallel to – and was offset 6 ½ feet from – the floor opening and false floor's perimeter. The barrier guard was bolted to the concrete floor. The electrical cables that [the workers] were trouble-shooting were laid out closely along the floor opening and false floor's edge and outside the wooden barrier guard. The cables' placement required the workers to move past the wooden barrier guarding.

What happened on this occasion is that a worker (Mr. F) ventured out onto the false floor without the use of fall protection and broke through, falling 15 feet to land on the ground below, sustaining serious injuries. Following the Board's investigation into this incident, a Board officer issued an Inspection Report dated July 31, 2015 which cited the employer with a violation of section 11.2(1)(a) of the *Regulation* for failing to ensure that the workers at that location were using a fall protection system.

Incident Number Two: The Elevating Platform Incident

Three weeks later, on August 21, 2015, at another location, a worker (Mr. L) was in an elevated lift platform. He had been working eight feet above the ground in the platform and wanted to come down. He believed that he could not lower the lift to ground level because there were people working below him, so he asked a co-worker to bring a ladder so he could climb down on his own. Mr. L then removed his fall protection system and stepped out onto the ladder. Unfortunately, the ladder was not held securely and Mr. L fell during his descent, sustaining serious injuries.

The Board's inspection into this incident occurred on August 27, 2015. An Inspection Report was written which cited the employer with a number of violations. Relevant to this review is Order Number One, which cited the employer with a violation of section 13.33(1) of the *Regulation* for failing to ensure that a worker who was working from an elevating platform was using a personal fall arrest system at all times. Order Number Six cited the employer with a violation of section 115(2)(e) of the *Act* for failing to adequately provide information, instruction and supervision to its workers, as evidenced by:

1) The fact that the worker was allowed to remove himself and his fall protection system while the platform was in operation and then undertake a highly unsafe descent.

2) The fact that work was allowed to occur immediately below this raised platform, which created the risk of injury from falling items.

Incident Number Three: The Unguarded Power Saw Incident

The third incident occurred in November 2015. On that occasion, a carpenter using a table saw injured his hand in the spinning blade. He was wearing a glove when this happened (contrary to the rules) and the saw in question did not have a blade guard or kickback fingers, contrary to legal requirements. As a result, the Board issued an Inspection Report dated November 12, 2015 which cited the employer with a violation of section 12.2(b) of the *Regulation* for failing to operate a power saw with a blade guard. It also cited the employer with a violation of section 115(2)(e) of the *Act* for failing to provide adequate instruction, training and supervision to workers in the operation of this power saw.

The Penalty

On May 9, 2016, the Board issued the order under review, which imposed a penalty of approximately $75,000, under Category "A", against the employer arising out of the three 2015 accidents combined. The reason for the Category "A" penalty was identified in a letter attached to the order. It described the employer's violations as "high risk" in nature. The order cited the following reasons as the basis for this penalty:

- The employer failed to take sufficient precautions for the prevention of work-related injuries;
- The employer violated section 115(1)(a)(i) of the *Act* and sections 11.2(1)(a), 12.2(b), and 13.33(1) of the *Regulation*;
- The employer had not maintained a safe workplace or working conditions;
- The employer failed to exercise due diligence to prevent the violations to which the penalty relates.

On this review, the employer submits that no penalty should have been imposed against it. Counsel submits that the employer did not intentionally violate any safety rules. He takes the position that in each of the three accidents, the fault lies with the workers in question, all of whom had been properly trained and had unilaterally breached the employer's safety rules. In the alternative, the employer submits that it acted with due diligence, so a penalty is not appropriate. In the alternative that I find that some type of penalty is appropriate, the employer asks that I exercise my discretion and reduce any penalty by 30%.

In response, the union submits that there is no need to find intentional violation on the part of an employer before a penalty can be justified. It asserts that, on these work sites, employees are trained in safety matters at the beginning of their employment, and apart from the signatures of the workers in question, there is no

indication that the injured persons were actually trained in safety procedures. For this reason, the union says that it cannot be assumed that the accidents were the result of the independent actions of workers who had been properly trained and supervised. The union relies upon the provisions of the *Act* that relate to new or young workers in support of its argument.

In reply, the employer submits that it has properly trained and instructed all of its workers, including new and young workers, about safety matters. The employer points to the documents it provided on this review, which include formal policies regarding fall protection and table saw use, which the workers in question signed, indicating their understanding of, and agreement with, the policies in question. The employer maintains that, in each of the three cases, the workers found themselves in a situation that did not have an easy answer; therefore, the proper choice would have been to call a supervisor for assistance, rather than taking matters into their own hands and violating the safety rules. The employer submits that these three workers failed to ask for assistance and thereby acted unilaterally. The employer believes that it should not be penalized for the unilateral actions of the workers.

Decision and Reasons

The penalty under review was based upon the three incidents and violation orders issued in relation to those incidents. It was potentially open to the Board to consider a penalty for each of those incidents but it chose to impose a single penalty for all three. The result is that I must determine whether, individually or cumulatively, these three incidents will justify a penalty. The starting point for this analysis must be to consider each individual violation order associated with each incident. Those violation orders were not reviewed, so they remain binding upon me. Nevertheless, it is open to me in the review of the penalty to determine if the facts of the underlying incidents have been established.

The False Floor Incident

Workers are not permitted to work at heights of 10 feet or more above grade without the use of a fall protection system. This rule has been codified by section 11.2(1)(a) of the *Regulation* to place a positive obligation upon an employer to "ensure" that "a fall protection system is used" whenever work is being done from which a fall from a height of 10 feet or more may occur.

In this case, it is established that the false floor was more than 10 feet above the ground and that it was not adequate to support the weight of a person, resulting in a serious fall hazard. It has been conceded by the employer that this was a situation in which a fall protection system, as contemplated by the *Regulation*, was legally required to be used. This is because the task of workers on that occasion was to work in close proximity to the false floor. As the officer has

explained, the cables with which the crew was working on that occasion were placed in such a way that workers were required to move past the wooden barrier guarding.

According to the evidence provided by Mr. M, a co-worker, the injured worker (Mr. F), had tied his fall protection harness off to the wooden railing prior to his fall. The officer noted that the railing in question was easily moved and was no way an acceptable anchor point within the meaning of the *Regulation*. Therefore, the fact that Mr. F had been able to do this for some time that he worked establishes that he was not working in accordance with section 11.2(1)(a) of the *Regulation* and that the employer was not supervising him enough to prevent him from working in this unsafe manner.

Next, the investigating officer asked the site production manager if the crew had been using a fall protection system when they walked past the railing, into the danger area. He did not know. This also establishes that the employer's supervision of fall protection was less than adequate on that occasion.

The employer's argument on this review is to assert that, by his training, Mr. F had been instructed that he was required to use an appropriate fall protection system and tie off to an appropriate anchor point every time that he worked at a height greater than 10 feet above grade. This may be the case but it does not establish that on this particular occasion Mr. F was properly instructed or supervised in what he needed to do – or that appropriate anchor points had been provided to him by the employer.

The employer notes that there was a sign nearby indicating that workers had to be tied off if they crossed the guard rail. What is not clear is what, if anything, they were expected to use as an anchor. On this review, the employer's counsel asserts that "there was a piece of heavy equipment in close proximity that was more than adequate to serve as a suitable anchor." He provided a photograph to support this assertion. The problem with this submission is that it is does not answer the key questions necessary. What was this equipment? The photograph shows an object but it does not appear to have any formal anchor points. Additionally, where was this equipment located in proximity to where the workers were required to work? More importantly, was it heavy enough and properly anchored enough to constitute a suitable fall arrest anchor within the meaning of the *Regulation* (assuming that it even had some appropriate tie-off points)? Finally, even assuming that today, with the benefit of hindsight, it might be established that this object was a suitable anchor point, was its use as an anchor point ever discussed or recommended by the employer to the crew prior to Mr. F's accident?

I find it significant that, when asked by the investigating officer, the production manager was unable to identify what particular fall protection system was approved by the employer and in use when workers were required to venture

past the wooden railing. It was open to the employer on this review to answer this question by pointing to something like a site specific fall protection plan that contemplated this particular situation. It did not provide any such evidence, however. Its only answer has been to provide the aforementioned reference to an unidentified piece of "heavy equipment" which might have been a suitable anchor point. As the union has observed, even if one assumes this equipment was suitable, it is not clear that the workers were provided with lanyards that were long enough to use it properly. The employer replies that if the situation was unclear the worker should have asked the employer for guidance before venturing out. In the words of counsel:

> ... if the Worker did not have a lanyard long enough to use to tie off, he should not have performed the work until he either obtained a lanyard that was suitable, and should have notified his supervisor of any problem with the lanyard.

This submission begs the question of whether Mr. F was even instructed to use the "heavy equipment" as a suitable anchor point; that it was, in fact, a legally suitable anchor point; and that he actually attempted to use it. None of these facts are established. In addition, this submission does not address the fact that section 11.2(1) of the *Regulation* places a positive obligation upon employers to take a proactive responsibility to ensure that an appropriate fall protection system is in place for all work activities that workers can be reasonably anticipated to undertake as part of their employment. The implication of the employer's submission is that the obligation is upon workers to ensure that their employers have provided them with adequate fall protection; and employers can be absolved of the failure to provide it if workers have not specifically asked for it. This is not the case, however, as multiple prior decisions of the Review Division and the Workers' Compensation Appeal Tribunal have held.

The evidence before me establishes that this employer did not adequately ensure that Mr. F was using an appropriate fall protection system at the time of his accident. I find that the facts underlying this violation have been established.

<u>The Elevating Platform Incident</u>

Mr. L was using an elevated lift to put up track lighting on a film set. The platform had been raised approximately eight feet above the ground for this purpose. Mr. L had completed his job and was ready to come down. Unfortunately, some people were laying flooring on the ground immediately beneath his lift and he was therefore unable to bring the lift down. This is when he decided to ask a colleague to bring him a ladder so that he could climb down without disturbing the people below. Unfortunately, he fell during his descent due to the instability of the ladder.

At the time of inspection, the Board officer cited this employer with a number of violations in relation to this incident. One of the violations was a breach of section 4.45 of the *Regulation*, which requires that an area which has the potential for items that may be dropped, dumped or spilled must be protected by "adequate covers and guarding". In this case, Mr. L was installing lights with hardware which clearly created the risk that a piece of equipment or a tool could accidentally fall to the ground below during the operation. The fact that this lift was not properly guarded to catch fallen items meant that anyone working on the ground below was at risk of being injured by a falling object.

It was within this backdrop of an already unsafe situation that Mr. L's accident occurred. Because of the presence of persons below his lift (which was an unsafe situation for reasons described above), Mr. L was unable to lower the lift to the ground, which was the only acceptable way for him to dismount it. This is why the Board cited the employer with a violation of section 13.33(1) of the *Regulation*, which requires that a person on an elevating work platform must wear a personal fall arrest system secured to a suitable and substantial anchorage point. When Mr. L fell, he had removed himself from his fall arrest system.

The employer prepared its own investigation report into the causes of this accident and determined that it was due to a) working over employees; b) dismounting an aerial lift by ladder and disengaging fall protection; and c) another employee assisting in this error by providing the ladder in question. All of these facts together supported an inference by the Board officer that the employer did not properly supervise the safe operation of the lift on that occasion. This is why the employer was cited with a violation of section 115(2)(e) of the *Act*, which requires employers to provide their workers with the "information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work..."

In challenging the penalty decision, the employer's counsel notes that Mr. L was a "supervisor and clearly knew or should have known all relevant safety policies and guidelines." This fact does not offer much assistance to the employer on this review because actions of supervisors are generally considered to be the actions of the employer *vis à vis* the workplace. Therefore, to the extent that Mr. L's actions demonstrated a lack of commitment to the fall protection rules and set a poor example for his subordinates, they also demonstrate a lack of effective safety supervision on the work site on the part of the employer, justifying the violation order issued under section 115(2)(e) of the *Act*. When this fact is added to the unsafe operation of the lift in general (allowing persons to work below who might be struck by falling objects) and the clearly and obviously unsafe way in which the ladder was employed in this case, I conclude that the facts underlying this violation order have been established.

The Unguarded Power Saw Incident

The *Regulation*, the employer's policy, and the operating manual of the power saw all make it clear that it is not acceptable to operate this type of table saw with the blade guard removed. It is also clear that it was against the rules to use gloves while operating this saw. Nevertheless, one morning, a carpenter employed by this company operated the saw while wearing gloves after someone had removed the blade guard. In so doing, the carpenter sustained a serious (and foreseeable) hand injury. The Board cited this employer with section 12.2(b) of the *Regulation* which requires employers to ensure that operating equipment is fitted with appropriate safeguards to ensure that workers cannot access the "hazardous point of operation." In this case, the "hazardous point of operation" was the spinning blade. The guard had been removed from the saw at the time of the accident and a worker did, in fact, "access" the spinning blade with this hand. Therefore, it seems clear that the basic facts underlying this violation order have been established.

The greater question is who had removed this blade guard and why was the saw allowed to operate in this condition?

The employer's submission notes that the injured carpenter had been advised by his supervisor on prior occasions not to wear gloves while operating the saw and had agreed to be bound by the safety policy which requires the use of a blade guard at all times. The essence of the employer's argument is that the carpenter, upon seeing the saw with the guard removed, should have notified his supervisor before using it in this unsafe condition. This would have undoubtedly been the preferred course of action, but the failure of the carpenter to raise this issue with his supervisor does not establish that the employer's supervision of that work site was adequate.

No explanation has been provided to me on this review about how this saw's blade guard and kickback fingers came to be removed, who removed them, and how long the machine had been operating in this way before the accident occurred. The absence of this information raises a problem for the employer on this review. As the employer and supervisor of the work site, this employer faced a positive obligation to ensure that tools were used in accordance with the *Regulation* and with the manufacturer's requirements. If it cannot explain how a fundamental requirement like a blade guard came to be removed from a power saw that its employees were using, and how long this unsafe condition persisted, then a reasonable conclusion to draw is that its safety supervision of that power saw was substantially deficient. For these reasons, I am satisfied that the facts underlying this violation order have been established.

Section 196(1) of the *Act* provides that the Board may impose an administrative penalty if the employer has failed to take sufficient precautions for the prevention of accidents, has not complied with the *Act*, *Regulation* or an order, or if the

employer's working conditions are unsafe. From my discussion above, I have determined that one three occasions, this employer violated the *Act* and/or *Regulation*, resulting in an unsafe workplace and serious accidents did, in fact, occur. Therefore, I am satisfied that the pre-conditions for a penalty have been established and I must now turn to consider whether the criteria for a penalty are present.

Criteria for imposing a penalty

Policy item D12-196-1 of the *Prevention Manual* sets out the factors which must be present before a penalty can be justified. It states that the main purpose of penalties is to motivate the employer receiving the penalty and other employers to comply with the *Act* and *Regulation*. This may be characterized as a principle of both general and specific deterrence of non-compliance.

The factors which will support the imposition of a penalty include:

- An employer has committed a violation which created a high risk of injury or death;
- An employer has repeatedly violated the same or similar provision of the *Act* or *Regulation* on more than one occasion;
- An employer has violated different provisions of the *Act* or *Regulation* on more than one occasion, where the number of violations indicate 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 the *Regulation*;
- Any situation in which the Board considers that the circumstances warrant a penalty.

It is not necessary that all of these factors be present before a penalty may be assessed. Each of these factors is independently capable of supporting a penalty.

I turn now to the factor cited by the Board to justify the imposition of this penalty.

High Risk

Policy item D12-196-2 sets out the criteria to asses which violations are considered to be "high risk". As it read during the time in 2015 when all three incidents occurred, this policy item stated that the Board will assess a violation in relation to the likelihood of an incident occurring and the likely seriousness of any injury that could result if that incident or exposure occurred. It also identified situations in which work at over 10 feet was conducted without an "effective fall

protection system" to be designated high risk. Therefore, the False Floor Incident was high risk in nature.

I find that the other two incidents also involved violations which were high risk in nature. As my discussion above has established, an elevated lift was operated in an unsafe manner by someone with the authority of the supervisor (Mr. L). In addition, Mr. L used an inappropriate and unsafe procedure to exit the lift, resulting in a serious injury to himself. In so doing, he created a risk of serious injury to himself and to everyone working under the lift.

Similarly, the Unguarded Power Saw Incident was inherently high risk in nature because it created an obvious and serious risk that a worker could be catastrophically injured. In this case, a worker was actually injured.

I find, therefore, that all three incidents involved high risk violations, within the meaning of policy item D12-196-2. These violations, individually and cumulatively, would support the imposition of a penalty. I must next consider whether any mitigating factors are present which would weigh against a penalty, or if there are any aggravating factors which would further support a penalty.

Due Diligence

According to section 196(3) of the *Act*, a penalty cannot be imposed if an employer acted with due diligence to prevent a violation from occurring. The standard of due diligence is not that the employer do everything possible to prevent a violation, only that it do all that is reasonable in the circumstances. A duly diligent employer is expected to provide an appropriate degree of supervision to workers, having regard to the nature of the work and the risks to which they may be exposed.

With regard to the False Floor Incident, I find that a minimum standard of due diligence would have required this employer to have some formal plan in place to govern workers who might have to venture out past the wooden railing. Due diligence would have also required supervision of the workers to ensure that they adhered to all of the details and requirements of the fall protection plan. In this case, the employer did neither. It did not formulate a plan to deal with fall protection and appropriate anchor points. It does not appear to have supervised Mr. F adequately to ensure that he was using a fall protection system at the time that he was exposed to the risk of falling. Finally, when asked by the investigating officer, the production manager was not able to explain what the fall protection plan was for Mr. F's work on that occasion – and the employer has not provided that information now on this review. I conclude, therefore, that whatever system was in use on that occasion, it was not enough to protect Mr. F from the obvious risk of falling that he faced while doing that work. For these reasons, I am satisfied that the employer did not act with due diligence with respect to this matter prior to Mr. F's accident.

When it comes to the Elevating Platform Incident, I am also not persuaded that the employer acted with due diligence. Due diligence would have required the employer to ensure that persons were not working directly below the lift while it was in operation. If that minimal step had been taken in this case, there would have been no problem for Mr. L to lower the lift to the ground and step out.

In addition, the fact that Mr. L was also the supervisor makes it difficult to find due diligence on the part of the employer. As the investigating officer noted, because Mr. L was performing the unsafe action himself, it would have been difficult for subordinates to question his decision, though better training for all workers might have made it clear that this type of action was unacceptable by anyone, including the supervisor.

Finally, with regard to the Unguarded Power Saw Incident, I find that due diligence on the part of the employer would have required some direct supervision of workers to ensure that they were using the safeguards and following the manufacturer's instructions. This incident reflects a serious failure of supervision on the part of the employer. Since the supervision was inadequate, the employer cannot establish due diligence.

Would Something Less Than a Penalty Be Appropriate?

In determining the appropriate response to a violation, the Board must consider the nature of the violation and all of the surrounding circumstances.

Policy D12-196-1 provides a list of mitigating and aggravating factors which, if present, can militate for or against the imposition of a penalty. These factors include:

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

- 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.

As noted above, the essence of the employer's argument on this review is that the violations in question resulted from the independent actions of workers who were properly trained, instructed, and supervised. For reasons explained above, I have not accepted these arguments and have found instead that, in each case, the employer's safety supervision was inadequate.

I accept that the employer's compliance history does not involve any prior penalties, and that it is a sophisticated company with a well established safety program. There is also no suggestion that this employer failed to comply with Board orders in the past. However, these facts are not sufficient to overcome the seriousness of the supervisory failings in this case, and the injuries that resulted. I am also mindful that the three serious incidents has been consolidated into a single penalty. Taken together the cumulative gravity of these violations justifies a penalty, in my view.

Policy item D12-196-6 states that in cases where the violation in question was "high risk" in nature, the penalty shall be a Category "A" penalty. Since I have determined that each of the violations in this case was high risk in nature, it follows that the Board properly imposed a Category "A" penalty.

The penalty under review was based on the employer's 2014 payroll, which is consistent with policy. The result was properly calculated in accordance with policy item D12-196-6 for a Category "A" penalty based on a payroll of this size.

The final question is whether I should exercise discretion under Policy item D12-196-6 (as it read at the time of the 2015 violations), which allowed for some discretion to vary a penalty in exceptional cases. The "basic amount" of the penalty could be varied upwards or downwards by up to 30%, having regard to the circumstances, including the following factors:

(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 measures undertaken by the employer to comply;

(f) the extent to which the behaviour of 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.

The circumstances of how and when discretion should be exercised in accordance with this policy were considered by a Review Officer in Review Reference #R0058376. At page 11 of his decision, he observed that, in the absence of special factors indicating that an employer should receive special treatment, employers of about the same size should receive similar penalties. This is because most of the above factors (a) through (i) have already been considered by the Board when determining whether to impose a penalty. If, after weighing those factors, the decision-maker has determined that a penalty is appropriate, this is a good indication that the basic penalty has been justified. In the interest of maintaining consistency, the basic amount should not be adjusted upward or downward unless there are special circumstances present which suggest that the basic amount is not appropriate or that an exceptional amount is warranted. I agree with and adopt this approach.

In this case, I have considered the factors in my earlier analysis about whether a penalty was appropriate. After weighing them, I was satisfied that a penalty was justified. There is nothing unusual before me in this case to support exercising discretion to vary the penalty downwards. If anything, the cumulative effect of the three separate incidents, each of which reflected a serious safety violation in its own right, might possibly justify increasing the penalty above the base amount. However, this option was open to the Board and it did not pursue it, just as it was open to the Board to impose three separate penalties and it not pursue that option, either. In the circumstances, I will defer to the Board's approach, which has provided a benefit to this employer.

I confirm the decision to impose the basic penalty. As a result, I deny employer's request.

Conclusion

As a result of this review, I confirm the Board's decision of May 9, 2016.

Anand Banerjee
Review Officer
Review Division

Interested Parties List

Re: **Review Reference #: R0208068**
Board Decision under Review: May 9, 2016

Copy provided to the following:

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