

ADMINISTRATIVE PENALTIES AND THE DEFENCE OF DUE DILIGENCE FOR BRITISH COLUMBIA EMPLOYERS

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Following changes to the British Columbia *Workers' Compensation Act* ("Act")^[1] in 2015, employers are now required to conduct preliminary and full incident investigations and provide reports of these investigations following certain workplace incidents. In a [recent bulletin](#), we advised readers of WorkSafeBC's policies respecting the dual reporting requirements and preliminary and full incident investigations. Failure to comply with these policies and corresponding provisions of the Act can result in significant administrative penalties. In limited circumstances, however, employers may rely on the defence of due diligence to avoid liability.

Occupational Health and Safety Penalties

Several policy amendments respecting occupational health and safety penalties ("OHS penalties" or "OHS penalty") came into effect on March 1, 2016.^[2] Non-compliance with the accident investigation or reporting requirements, or other breaches of Part 3 of the Act, may result in OHS penalties, which are administrative penalties.

The purpose of OHS penalties is to motivate the employer receiving the penalty, and other employers, to comply with the Act and the corresponding regulations.

When certain circumstances occur, the Board may impose an OHS penalty if the Board is satisfied on a balance of probabilities that

- a. the employer has failed to take sufficient precautions for the prevention of work related injuries or illness;
- b. the employer has not complied with Part 3 of the Act, which includes the regulations or an applicable order; or
- c. the employer's workplace or working conditions are not safe.

Circumstances when the Board will consider an OHS penalty include a violation which results in a high risk of serious injury, serious illness, or death (such as work in the vicinity of potentially combustible dust without the necessary precautions to protect workers),^[3] recurrent violations of the same or substantially similar sections of the Act or regulations, and where the Board considers that the circumstances warrant a penalty.

In considering whether or not an OHS penalty is appropriate, the Board must consider several factors, which include the potential for serious injury, illness or death and the likelihood that the penalty will motivate the employer to comply in the future.^[4] Although OHS penalty amounts vary, these penalties can be significant as the maximum OHS penalty amount is \$628,034.57.^[5]

Employers have the ability to review administrative penalties within 45 days of the decision to impose the penalty.

Instead of WorkSafeBC issuing an administrative penalty to an employer, the Board may refer the file to the British Columbia Crown Counsel, and Crown Counsel may decide to prosecute the employer in provincial court for a violation of the Act. Prosecutorial activity is undertaken only rarely and in the most egregious cases.

Due Diligence

Employers can defend against OHS penalties where the evidence shows, on a balance of probabilities, that an employer exercised due diligence to prevent the failure or non-compliance or conditions to which the penalty relates.^[6] The onus is on the employer to prove due diligence, which can be established in two ways:

1. the employer took all reasonable care and steps to avoid the particular event; or
2. the employer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.

The Board will look at all of the circumstances of the case and consider what a reasonable person would have done in the same circumstances faced by the employer.

In order to effectively assert the defence of due diligence, it may be advisable for employers potentially facing these administrative penalties to discuss with a lawyer the circumstances of the case and the possibility of establishing the defence of due diligence before raising it with the Board.

Furthermore, employers who receive administrative penalties may want to contact a lawyer in drafting submissions for WorkSafeBC's Review Division.

by Louis J. Zivot and Natalie Cuthill, Student-at-Law

[1] *Workers' Compensation Act*, RSBC 1996, c. 492 at Part 3, Division 10 [Act].

[2] Amended policies include Policy Items D12-196-1 and D12-196-6.

[3] Policy Item D12-196-2.

[4] Policy Item D12-196-1.

[5] Policy Item D12-196-6.

[6] Policy Item D-12-196-10.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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