



**Manitoba Labour Board**

Suite 500, 5<sup>th</sup> Floor - 175 Hargrave Street Winnipeg, Manitoba, Canada R3C 3R8  
T 204 945-2089 F 204 945-1296  
www.manitoba.ca/labour/labbrd  
MLBRegistrar@gov.mb.ca

**ORDER NO. 111**

**Case No. 210/19/WSH**

**IN THE MATTER OF: *THE WORKPLACE SAFETY AND HEALTH ACT***

**- and -**

**IN THE MATTER OF: An Appeal by**

**HOLZ CONSTRUCTORS INC.,**

**Appellant,**

**- and -**

**Director, Workplace Safety and Health,**

**Respondent.**

**BEFORE: K. Pelletier, Vice-Chairperson**

**This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.**

**SUBSTANTIVE ORDER**

**BACKGROUND**

1. On October 31, 2019, the Appellant filed an Appeal under Section 53.1(7) of *The Workplace Safety and Health Act* (the “WSHA”) from a Decision of the Director to issue an administrative penalty in the amount of \$2,500.00 (the “Appeal”).
2. On March 28, 2019, the Appellant was issued an Improvement Order for Fall Protection Systems. The Appellant did not appeal the Improvement Order to the Director, Workplace Safety and Health (the “Director”) or to the Manitoba Labour Board (the “Board”) pursuant to Sections 37(2) or 39 of the *WSHA*. The Employer subsequently complied with the Order.
3. On July 25, 2019, the Director issued a Stop Work Order and an Improvement Order for Fall Protection Systems, Guardrail Requirements and Safe Work Procedures.

The Appellant did not appeal the Improvement Order or the Stop Work Order to the Director or to the Board. The Employer subsequently complied with the Order.

4. On September 19, 2019, the Appellant was issued an Improvement Order for Guardrail Requirements and Guardrail Systems. The Appellant did not appeal the Improvement Order to the Director or to the Board. The Employer subsequently complied with the Order.
5. On October 17, 2019, the Director issued a Notice of Administrative Penalty to the Appellant for failing to maintain compliance with an improvement order after initially complying with it. In the covering letter from the Director, she explains that the administrative penalty is imposed, in part, for the following reasons:

“This is the third time that HCI workers have been found without adequate fall protection in the last six months. I note that failing to use fall protection while working at heights continued after a worker fell and sustained injuries.”

“Working at heights above three metres without fall protection is associated with a high risk of imminent serious injury or death. Also, working above three meters without fall protection is a finable offense in Manitoba. As a result, a Notice of Administrative Penalty for \$2,500.00 has been issued pursuant to *The Workplace Safety and Health Act* 53.1(2)(b).”

6. On November 12, 2019, the Director filed its Reply to the Appeal, submitting that the Board should dismiss the Appeal and confirm the Notice of Administrative Penalty.
7. On July 15, 2020, the Board conducted a hearing at which the Appellant and the Director, represented by Counsel, appeared. The parties submitted an Agreed Statement of Facts and Agreed Book of Documents. Additionally, the Appellant presented evidence and argument. Counsel for the Director elected not to call any witnesses, but did make a submission.
8. At the hearing, the Appellant objected to the issuance of the administrative penalty. Many of the Appellant’s concerns related to the issuance of the Improvement Orders and, specifically, the inconsistent and unfair manner in which they were issued by Workplace Safety and Health Officers. The Appellant also argued that the administrative penalty was administered unfairly for a number of reasons; namely:
  - a. The administrative penalty was issued on a presumption of guilt, specifically when considering the second Improvement Order, which involved an investigation that led to an inconclusive finding.
  - b. Prior to the issuance of the second Improvement Order, Workplace Safety and Health had deemed the site safe.

- c. Workplace Safety and Health does not consider the trauma that is caused following a serious incident, such as the one that led to the issuance of the second Improvement Order. Following the incident, the Appellant testified that he was not thinking of the possibility of appealing the improvement order. Instead, he was focused on the wellbeing of his staff and himself. The Appellant advised that it was unfortunate that Workplace Safety and Health did not have any resources to support employers and their staff when serious incidents occur.
  - d. Following the incident, the Appellant approached a number of individuals, including representatives from Workplace Safety and Health. At no time was he advised of his right to appeal the improvement order.
  - e. Within days of the incident that led to the issuance of the second Improvement Order, the Appellant implemented an improved railing system, which was also in place when the third Improvement Order was issued.
9. Counsel for the Director outlined that many of the Appellant's concerns related to the administration of the improvement orders, of which none were appealed. Counsel advised that the administrative penalty was issued by the Director in accordance with Section 53.1(1). Counsel advised that the administrative penalty was issued as the Appellant failed to maintain compliance, even though he had initially complied.
10. Counsel further claimed that the second Improvement Order was issued on the day of the attendance of the Workplace Safety and Health Officer. The investigation that has resulted in an inconclusive finding was in respect of a criminal investigation, and was unrelated to the issuance of the second Improvement Order.
11. Counsel for the Director argued that the Board's jurisdiction to vary an administrative penalty is dependent upon whether the Board determines that the penalty was not established in accordance with the regulations. On the facts presented, counsel contended that the Appellant was unable to establish that there were any concerns with the manner in which the administrative penalty was issued. Therefore, the Director submitted that the Board should confirm the administrative penalty and dismiss the Appeal.
12. The legislative provisions that apply are the following:

**Administrative penalty**

53.1(1) If a person

...

- (b) has failed to maintain compliance with an improvement order after initially complying with it;

...

the officer shall provide evidence of the matter to the director.

**Imposing a penalty**

53.1(2) When the director determines that a person

...

- (b) has failed to maintain compliance with an improvement order after initially complying with it;

...

the director may issue a notice in writing requiring the person to pay an administrative penalty in the amount set out in the notice.

**When penalty may be imposed**

53.1(3) Notice of an administrative penalty may be issued only after any period for appealing the matter that gave rise to the notice under subsection (2) has expired or, if an appeal has been filed, after a decision has been made on appeal.

**Notice**

53.1(5) A notice of administrative penalty must set out

- (a) the amount of the penalty determined in accordance with the regulations;
- (b) when and how the penalty must be paid; and
- (c) a statement that the person may appeal the matter to the board within 14 days after being served with the notice.

**Decision of the board**

53.1(9) After hearing the appeal, the board shall decide the matter and

- (a) confirm or revoke the administrative penalty; or
- (b) vary the amount of the penalty if the board considers that it was not established in accordance with the regulations.

13. Having regard to the materials filed, evidence and argument presented, the Board has determined:
  - a. The Appellant did not appeal the Improvement Orders or the Stop Work Order. As was discussed at the hearing, the time for appealing those Orders under subsection 39(2) of the *WSHA* has expired. Accordingly, the Board does not consider the validity, appropriateness or necessity of the underlying Improvement or Stop Work orders during a review of an administrative penalty appeal.

- b. At the hearing, it was confirmed that the condition prescribed by subsection 53.1(3) of the *WSHA* for the issuance of a Notice of Administrative Penalty has been met.
  - c. The jurisdiction of the Board on an appeal regarding an administrative penalty is set out in subsection 53.1(9) of the *WSHA*.
  - d. While the Appellant takes exception that an administrative penalty was even issued at all, there was no question at the hearing that the Notice of Administrative Penalty was issued in accordance with subsection 53.1(5) of the *WSHA*, and in accordance with the regulations. The Appellant confirmed receipt of the administrative penalty, affirming that he understood that it had been issued to him as a result of failing to maintain compliance with the Improvement Orders issued, even though he had initially complied.
  - e. While the Board accepts the Appellant's uncontested evidence that his Company made significant strides to ensure compliance with the Improvement Orders and Stop Work Order by implementing an improved railing system, the Board has limited jurisdictional oversight over the issuance of administrative penalties, specifically where an underlying improvement order or stop work order has not been appealed.
  - f. In accordance with Section 53.1(2)(b), the Director exercised her discretion in issuing the Administrative Penalty. The reasons for its issuance were laid out in the Order. While the Appellant may not agree with these reasons, given his failure to appeal the Improvement and Stop Work Orders, and considering that the penalty was issued in accordance with the legislative scheme, the Board is unable to revoke the administrative penalty issued.
14. For these reasons, the administrative penalty issued by the Director on October 17, 2019 is confirmed.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY DISMISSES** the Appeal of Holz Constructors Inc. filed on October 31, 2019.

**DATED** at **WINNIPEG, Manitoba** this 12<sup>th</sup> day of August, 2020, and signed on behalf of the Manitoba Labour Board by

*“Original signed by”*

---

**K. Pelletier, Vice-Chairperson**