DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] The appellant firm is a corporation with substantial experience in the field of road-building, among other things. The incident which is the subject of the current appeal occurred at a highway construction site which ran through a mountainous region in the province. In particular, the area in question involved a section of the highway which ran parallel to the face of a cliff on one side, and ran roughly parallel to a lake, on the other side. The focus of this appeal is on the lake side.

[2] From the edge of the highway on the lake side, the terrain was vegetated and ran downward for a few hundred metres until it reached the water. The firm was working on this portion of the land beside the highway, conducting excavation and levelling. In fact, there was a dirt road which ran through this area, roughly parallel to the highway, but, due to the slope of the hillside, the dirt road was situated approximately four metres below the level of the highway. In other words, if one looked over the edge of the highway on the lake side at the point in question, one would be standing approximately four metres above the level of the dirt road and the construction area below.

[3] On June 21, 2019, an officer of the Workers' Compensation Board, operating as WorkSafeBC (Board), attended this site and observed that an apparently vertical slope had been cut from the edge of the lake side of the highway down to the dirt road and the area of construction below. This vertical slope was approximately 12 feet in height, and was not shored or stabilized in any way. From this point onward, I will refer to this as the "vertical cut face." On the other side of the dirt road (further toward the lake) was another sloped area (also approximately 12 feet in height) which was also not shored or stabilized. From this point forward, I will refer to this area as the "opposite bank." From the photographs before me, the distance between the vertical cut face and the opposite bank was greater than the height of the walls, and the area in between consisted of the dirt road, and various pieces of heavy equipment.

[4] The firm was the prime contractor of this work site. One of the subcontractors (C Company) was also present on this site. At the time of inspection, the officer observed two of C Company's workers standing in the area beside the vertical cut face, approximately six feet away from it. The officer determined that this excavation was not sloped as specified by a professional engineer; was not angled to ensure a stable face; was not benched or supported as specified in writing by a professional engineer; was not supported in accordance with the minimal requirements of section 20.85 of the *Occupational Health and Safety Regulation* (Regulation); and was not supported with trench boxes or shoring cages. The officer determined that the firm,

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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as prime contractor of this site, had failed to live up to its obligations under section 115(1)(a)(ii) of the *Workers Compensation Act* (Act), which is now section 21(1)(a)(ii) of the Act[1]. Specifically, the officer found that, by creating and allowing the vertical cut face to exist as it did, the firm had failed to ensure the health and safety of its own workers as well as the health and safety of other workers present at that work site. Accordingly, the firm, in its capacity as an employer, was cited with a violation of section 21(1)(a)(ii) of the Act.

[5] After further investigation, the Board sent a decision dated September 12, 2019 which imposed an administrative penalty of $153,661.91 against the firm, arising out of this violation order. This penalty was calculated by doubling the initial amount (derived from the employer's 2018 assessable payroll) due to the high-risk nature of the violation. The decision to double the penalty in this way was in accordance with the Board's policy in prevention matters.

[6] The employer requested a review of this penalty decision. In a decision dated March 9, 2020 (*Review Reference #R0255898*), a review officer confirmed the $153,661.91 penalty in its entirety.

[7] The employer then appealed the review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT). There are no other participants in this appeal. An oral hearing was held via teleconference on January 27 and 28, 2021, during which a number of witnesses testified under affirmation on behalf of the firm. The investigating Board officer also testified under affirmation. A Board investigations legal officer (ILO) also attended the proceedings and provided assistance.

Issue(s)

[8] The issue is whether the Board should impose an administrative penalty under section 95(1) of the Act for a violation of section 21(1)(a)(ii) of the Act on June 21, 2019; and if so, how such a penalty should be calculated.

Jurisdiction and Procedure

[9] This appeal was filed with WCAT under section 288(1) of the Act, which provides for the appeal of a final decision by a review officer. Section 308 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

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[1] References to section numbers in the Act throughout my decision may be different from the Review Division decision under appeal. The Act was reorganized and renumbered under the *Statute Revision Act* (RSBC 1996, c. 440) effective April 6, 2020. All references to the Act and applicable Board policy in this decision refer to the *Workers Compensation Act* (RSBC 2019, c. 1). Unless otherwise indicated, it should be noted that, despite the different section numbers, the relevant provisions of the Act, and the applicable legal tests, are the same in both versions.

Workers' Compensation Appeal Tribunal

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Tel: (604) 664-7800 | 1-800-663-2782
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[10] This appeal is a rehearing by WCAT, which means that WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not required to do so. WCAT exercises an independent adjudicative function and has full substitutional authority. It may confirm, vary, or cancel the appealed decision or order.

[11] The standard of proof in this appeal is the balance of probabilities. According to section 303(2) of the Act, a WCAT panel hearing an appeal must make a decision based on the merits and justice of the case, but in so doing, the panel must apply a policy of the Board that is applicable in that case. The applicable policies governing this appeal is found in the *Prevention Manual*.

Background and Evidence

[12] There is a large volume of material in this case. I will not summarize all of it here. Instead, I will only mention a few significant points below, and I will then incorporate my discussion of the relevant background evidence into the body of my decision. Indeed, much of the relevant evidence and information was provided (or repeated) at the oral hearing, and I have found that I can primarily rely upon that evidence in deciding this appeal.

Before the Review Division

[13] The firm's legal counsel provided a detailed submission to the Review Division. Counsel explained that the project at the area in question involved the stabilization of the ground, in order to accommodate the highway expansion. The work involved pile-driving the ground to prepare it for the installation of stabilizing pillars. This task was expected to result in the production of "slurry"—a mixture of liquids and rock dust, which would be pumped into a large box called a "baker box." (The position of the baker box relative to the vertical cut face was an issue of contention at the WCAT hearing, for reasons which will be explained below.)

[14] Counsel described all of the interactions between the firm and C Company regarding excavation work and access to the site. His primary submission was that there had been no violation of section 21(1)(a)(ii) of the Act because the firm's "work" was not being carried on at this site, and its own workers were not working in the area near the vertical cut face. In this regard, counsel distinguished this case from the decision of the BC Court of Appeal in *Petro-Canada v. British Columbia (Workers'* Compensation *Board)*, 2009 BCCA 396. In the alternative, he submitted that the firm discharged its duty under section 21(1)(a)(ii) of the Act because it supervised the site in accordance with the obligations facing the prime contractor, but it was not required to directly and continuously supervise the operations of C Company. Instead, he submitted that the prime contractor was simply required to make reasonable inquiries into the operations of C Company to become satisfied that C Company was able to safely perform its work, which it did.

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[15] In the alternative, counsel took the position that the firm had acted with due diligence. He submitted that the test for due diligence must be limited to the event which gives rise to the penalty consideration, and it has been defined by the courts, most notably in *R v. Sault Ste. Marie*, [1978] 85 DLR 93rd) 161 and *R v. Imperial Oil*, 2000 BCCA 553. In this regard, he asserted that the test in this case was whether the firm took reasonable steps to prevent the specific violation cited, or believed in a mistaken set of facts which, if true, would have prevented the specific incident. Counsel asserted that the firm had acted with due diligence because:

a) it identified the steep slope issue and confirmed that C Company would address it before starting work;

b) it required C Company to adopt a site plan which provided adequate space for workers away from the slope;

c) it developed a safety plan which included rules on excavations;

d) it reviewed C Company's safety talks with its own workers which referenced discussions about excavation safety; and

e) it inspected the site and confirmed compliance with the approved plan days before the inspection.

[16] Further, counsel submitted that no penalty was appropriate, in any event, because the firm was not aware of the particular hazard associated with the vertical cut face because it had no reason to suspect that C Company would create the vertical cut face, contrary to the established plan. In this regard, counsel took the position that the firm itself did not excavate the vertical cut face and the firm did not even learn about the existence of the vertical cut face until the time of the inspection.

[17] In addition, counsel noted that the firm did not have any prior violations relating to sloping issues. He added that the firm actually has a robust occupational health and safety system in place. He submitted that the interests of general and specific deterrence are not factors in this case and that, at most, a warning letter was appropriate.

[18] On January 20, 2020, the ILO provided a memorandum in answer to the firm's submission. At paragraphs 5 and 6, the ILO stated:

> 5. The mistaken fact the Firm purports to rely on is its belief that workers of another employer on site would not work near the excavation slope hazard. In my submission, that is more properly characterized as an assumption about the conduct of workplace parties, rather than mistake of fact in the context of a due diligence analysis.

> 6. With respect, I submit the question to be determined in relation to due diligence is whether the Firm ought reasonably to have known that workers might, at some point during the work, come within close proximity of the excavation face. If so, it was incumbent on the Firm to take all reasonable precautions to mitigate the hazards of the excavation.

[19] On the same day, the investigating officer provided his own memorandum in response to the employer's submission. He made the following points:

- Traffic was still flowing over the highway above the vertical cut face at the time of inspection, and this traffic added vibration to the top of the vertical cut face.
- His investigation revealed that there were no written instructions from a qualified professional for this excavation.
- In his view, the firm had prepared the vertical cut face, and had not done so in accordance with the safety requirements for such cut faces, including the steps described in section 20.78 of the Regulation.
- He stated that the firm was responsible for traffic control, blasting, and the management of the overall site; therefore, it exercised a degree of control over the entire site.
- The officer stated that, from his observation, the only control to limit the access of workers to the area near the vertical cut face was informal in nature, and relied upon workers to be personally aware that they should not enter this area. The officer noted that, after his inspection, the firm immediately demarcated the area near the vertical cut face as hazardous. In his view, a duly diligent employer would have done this, at least, prior to the inspection.

[20] In a reply submission, the worker's counsel cited *R v. MV Marathassa*, 2019 BCPC 13 for the proposition that a mistake of fact defence can be established on a mistaken assumption. In this case, he reiterated that the firm had discussed sloping issues with C Company and had received assurances from C Company that it would comply with sloping requirements. Therefore, the firm did not merely "assume" that C Company was excavating in accordance with the safety rules – the firm acted in accordance with "an honest and reasonably held belief supported by evidence."

[21] In reply to the officer's comments, counsel submitted that the violation in question was not initially identified as a violation of section 20.78(1)(b) of the Regulation, yet the officer's comments relied upon that section of the Regulation. Therefore, he requested initial disclosure related to this matter.

[22] Counsel noted a Board guideline relating to section 20.78 of the Regulation and suggested that the firm and C Company had complied with it. In the alternative, he submitted that section 20.78(1)(b) of the Regulation does not automatically apply simply because an

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excavation is adjacent to a roadway. Counsel suggested that the interpretation proposed by the officer in this case was at odds with the Board's guidelines and established practice. He denied that this excavation of the vertical cut face in this case was the type of excavation for which certification was required.

[23] Attached to the reply submission was a memorandum from Mr. B, an engineer. The essence of Mr. B's opinion was that he would have approved the vertical cut face, as depicted in the photographs of the scene. With regard to the soil on the opposite bank, Mr. B explained that the type of loose gravel and stones shown in the photographs can only stay on the slope if the slope is less than 35 degrees. Therefore, in this case, the slope was less than 35 degrees, and no additional shoring steps were necessary.

[24] With regard to the vertical cut face, he opined that the slope was more than 35 degrees, but it was closer to 45 degrees than it was to 90 degrees. He explained that the vertical cut face appeared to be sloped at an overall inclination of 3H:4V. After considering the information before him, he expressed the view that he would have approved the vertical cut face as a temporary excavation. In his view, the traffic was far enough away from the edge, and the pile-driving work was far enough away from the end of the area, that the cut face itself would not be hazardous to workers in the area.

[25] In her decision, the review officer was satisfied that the violation of section 21(1)(a)(ii) of the Act had been established on the evidence of this case. She found that the firm faced an obligation to protect its own workers and the workers of other employers on that site. Further, she found that C Company's work was for the benefit of the firm, in the sense that the firm had engaged C Company to do work on this project. Therefore, the firm faced an obligation to ensure the safety of the workers of C Company on the site.

[26] The review officer considered a number of factors and was satisfied that the firm maintained control over the worksite. She acknowledged the submission of the firm's counsel about the steps that the firm took to satisfy itself about the commitment of C Company to excavation safety; however, she was not persuaded by this submission. She noted that the firm did not provide sufficient records to establish that it had adequately trained or supervised workers with regard to excavation safety. She found that, while the firm had experience and awareness of the hazards associated with an unsupported excavation, the firm did not install barriers to prevent access to the hazardous area, and failed to ask C Company to do more to restrict access to the area. Further, at page 4, she stated:

> While the employer provided a site orientation and training to the sub-contractor's workers, it did not sufficiently inspect or monitor the worksite to ensure that the sub-contractor was adequately supervising its workers regarding working near the unsupported excavation. In that regard, the sub-contractor's project supervisor was not present at the worksite at the time of the inspection, and work

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> around or near the unsupported excavation had been allowed to continue for some time, indicating inadequate oversight by the prime contractor.

[27] The review officer found that the firm committed a high risk violation. In this regard, she relied upon the observations and comments of the investigating officer about the proximity of traffic and blasting, and she found there was a strong likelihood that a collapse could occur and that such a collapse would likely cause serious injury or death. In answer to the issue of compliance with section 20.78(1)(b) of the Regulation, and the report from Mr. B, the review officer stated (at page 6):

> I give the Board officer's comments and the engineers' evidence on this matter little weight as the Board has not cited the employer for a violation of the *Regulation* regarding excavation standards. With respect to the engineer's comment regarding vibration I note that she did not provide any explanation to support her conclusion beyond stating that the lack of a slope collapse means that vibrations could not have caused ground movement. In any case, I conclude that the lack of a slope failure does not mean that the hazard was not high risk. The evidence satisfies me that the violation in this case is high risk, and the Board must therefore consider imposing a penalty.

[28] The review officer went on to find that the firm failed to act with due diligence in this matter and that a penalty was appropriate. Having found the violation to be high-risk in nature, she confirmed the Board's decision to double the penalty from the initial amount. She confirmed the penalty, as issued.

WCAT Evidence and Submissions

[29] At the start of the oral hearing, the firm's counsel stated, for the record, that the firm had abandoned the argument that C Company was not performing the firm's "work" on this site. Further, the firm conceded that the vertical cut face in question had been sloped too steeply. He submitted that the penalty under appeal was based on the vertical cut face. He suggested that the evidence in this case would establish that the firm played no role in the excavation of the vertical cut face, and that it came into existence after the firm's direct work on that site had been completed.

[30] The first witness that the firm called was Mr. R. He was the project superintendent and was the highest-ranking representative of the firm on this project. He explained that the project involved the stabilization of the land around a highway expansion, and this required the installation of 55 piles, along with concrete walls. He explained that pile installation is a specialized task, and the firm does not do this type of work. For this reason, the firm engaged C Company, a company which specializes in this type of work.

[31] Mr. R confirmed that he discussed risks of working with steep slopes with C Company at the start of the project, during the planning phase. There was discussion that the area would be too steep for a wide crane; and C Company chose a crane that was 21.5 feet in length.

[32] Mr. R stated that the firm excavated the land to make room for the crane in early June 2019. This task was completed on or around June 7, 2019. Shortly thereafter, the firm sent its own surveyor to check the slopes of the excavation, and no concerns were noted at the time of the surveyor's inspection. Following the clearance by the surveyor, the site was turned over to C Company. The officer's inspection occurred some weeks later, on June 21, 2019.

[33] Mr. R testified about the firm's excavation crew in June 2019, stating that they were very experienced, and they had full site orientations prior to starting work. He then referred to photographs of the Board officer's investigation and noted the different coloured soil on the "walls" of the excavation. He drew attention to the colour of the soil on the vertical cut face, as contrasted to the colour of the soil on the area which was excavated by the firm's employees before June 7, 2019. In his view, the colour difference in the soil suggested that the vertical cut face was a new excavation (because the soil appeared darker, suggesting that it had not yet air dried), and it was done after the firm's excavation crew had left the site.

[34] It was made clear at the hearing that nobody knew for sure who had excavated the vertical cut face; and the firm's excavation employees were not available to testify at the hearing to confirm or deny whether they had been involved in that excavation. Mr. R explained why he personally believed that none of the firm's workers had been involved in the excavation of the vertical cut face. Mr. R expressed the view that the vertical cut face came into existence after the firm's crew had completed their portion of work on the site on June 7, 2019.

[35] The ILO asked Mr. R about some of the photographs taken by the investigating officer, and the position of the equipment. The ILO suggested that, from the photographs, it looked like it would have been difficult for C Company's equipment to get into position to excavate the cut face. Mr. R agreed that there was not much room, but he believed that an excavator could have gotten into that area.

[36] Mr. R conceded that the firm did not engage a surveyor or engineer to measure the slope of the cut face or of the opposite bank. Mr. R stated that C Company took over the site after the firm's crew had finished its work on June 7, 2019, and it was not anticipated that C Company would excavate a steeper face to the slope that had already been excavated by the firm's crew. Mr. R did not have an explanation about why anyone would have excavated the vertical cut face, or what use it might have served.

[37] The next person to testify was Mr. M, the firm's senior project manager, and the project manager for this particular project. He engaged C Company for the pile-driving task because of C Company's history of expertise.

150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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[38] Mr. M testified that the firm and C Company discussed the challenges of access to the site because of the terrain and the narrowness of the working area. He pointed to a work site layout document and testified about the way that the site was configured. He noted that there was an area for an excavator and a crane—both of which were C Company's equipment.

[39] The next person to testify was Mr. B, the engineer who had provided the report which the firm had submitted to the Review Division. He began by describing his expertise in geotechnical engineering, which is the engineering which takes into account the structure of the earth, rocks, soil, and water. In fact, years before, Mr. B's master's thesis involved the unique factors present in this very stretch of land, and he eventually received an award from the premier for his work on this particular highway, in this particular zone. Suffice it to say, Mr. B was familiar with the soil and slope of the area which is the subject of this appeal, and he has personal experience in the techniques of stabilizing the slopes in this area.

[40] Mr. B conceded that he was not present at the time of the inspection and he did not personally inspect the vertical cut face. The opinion that he provided was based upon his analysis of the large number of photographs taken by the Board and by the employer of the area in question, as well as his personal experience and knowledge of the area, as described above.

[41] Mr. B was shown a photograph of the area of the vertical cut face taken on June 12, 2019—some days after the firm's excavation crew had left the area. This photograph was contrasted with a photograph of the same area taken at the time of the officer's inspection on June 21, 2019. Mr. B expressed the view that the vertical cut face, as depicted in the officer's photograph, appeared steeper than the slope in the photograph of June 12, 2019. Given that the condition of the site on June 12, 2019 was closer in time to the departure of the firm's excavation crew from the site, Mr. B was asked to provide an opinion about the angle and condition of the slope as depicted in that photograph.

[42] Mr. B began by discussing the Board's Guideline 20.81, which was referenced in the submissions to the Review Division. He explained that the Board's standard for excavation is that an area should not be sloped more than the ratio of 4 vertical to 3 horizontal, which he explained is technically called a 53-degree slope.

[43] Mr. B next commented on the Board officer's photograph of the area of the vertical cut face. He explained that the yellowed area depicted on the cut face indicates the texture of the soil, and the white spots on the face represent boulders and cobble. He agreed with Mr. R that the darkness of the vertical cut face, relative to other slopes shown in the photograph, suggests the moisture content of an excavation which was recently cut, including the presence of clay. He noted the consistent tone of the vertical cut face and expressed the view that the vertical cut face had been recently excavated, at the time of the photograph—within the last one to three days. As to whether it might have rained recently (to explain the wet surface of the cut face), Mr. B explained that rain would have washed the dust off the baker box in the same photograph, but the presence of collected dust on that box suggests that it had not rained recently.

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[44] Mr. B also commented about the condition of the slope in the photograph from June 12, 2019. He noted that there was no debris at the bottom of the slope, and no carve marks or cuts in the face itself. He explained that soil is a frictional medium, and depending upon the degree of slope, it can either contain constituent materials, or dislodge them due to the force of gravity. In this case, the absence of debris present at the base of this cut face supported an opinion that the slope of the cut face was "significantly less than 53 degrees." On further questioning, he opined that the total slope of the area of the vertical cut face—as depicted in the June 12, 2019 photograph—was approximately 45 degrees.

[45] Mr. B contrasted the soil on the vertical cut face with that depicted in the photographs of the opposite bank. On the opposite bank, it is clearly apparent from the photographs that the slope was less steep than the slope of the vertical cut face. Nevertheless, there was a clear body of debris at the bottom of the opposite bank, and photographs show that boulders had become dislodged and rolled part way down the slope.

[46] Mr. B explained the apparent discrepancy between the angle of the slope and the amount of debris in this case with reference to soil density and strength. With regard to the vertical cut face, Mr. B explained that the layer of asphalt on the highway at the top of the vertical cut face dramatically improves the stability of the soil below by keeping the soil dry and preventing water dilation. Mr. B opined that the soil in the area of the vertical cut face had considerable tensile strength because of the additional reinforcement of a crush later immediately under the asphalt, which, he explained, acts like a concrete reinforcement.

[47] Mr. B was asked to identify the risk for a collapse of the vertical cut face, and his answer was clear: "Near zero."

[48] With regard to the opposite bank, Mr. B noted that the soil was not as stable as the vertical cut face because it did not have the benefit of a top layer of asphalt followed by a crush layer. Therefore, it would not be possible to drive a truck over the top of the opposite bank without causing some debris to fall.

[49] By the same token, Mr. B explained that if the opposite bank had collapsed, it would have only released a small amount of debris down the slope. By his estimation, the total amount of debris would have been enough to fill up one or two wheelbarrows. He opined that the risk of collapse from the opposite bank was also "almost zero," and if a portion of the opposite bank did collapse, it would not pose a safety risk to persons below.

[50] Mr. B was questioned about a crack in the soil of the opposite bank, as depicted in one of the photographs. He opined that the soil appeared to be well-graded and it was full of big boulders. He opined that when the area was excavated, there were small cascades of debris. Because the soil in this area was not supported by the layer of asphalt and crush like the soil on the other side, water was able to enter the soil and cause dilation, similar to the way a sponge

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expands when it fills with water. In his view, this expansion caused the crack to develop, but it was not an area of concern, from a safety standpoint.

[51] The next person to testify was Mr. H, the firm's safety director. Mr. H overcame a very serious injury and became a motivational speaker before being hired by the subject firm in 2019. He expressed the view that 80% of harmful incidents in workplaces arise from the behaviour of people, rather than from workplace conditions—situations in which workers know the right and wrong way to do things, but choose the wrong way for reasons based upon emotion. Therefore, his philosophy is to engage everyone who works for a company on an emotional level, in order to instill a culture of safety.

[52] Mr. H was hired by the firm around the time period of the incident with the vertical cut face, and he had no knowledge of the incident or involvement in it in any way. Instead, upon his arrival at the firm in the summer of 2019, he created a "road map" of what he wanted to achieve for the firm, and he met with Mr. H2, the firm's principal, to increase the safety budget from $300,000 per year to $2.3 million dollars per year, in order to bring his plans to fruition. Mr. H2 agreed to the budget increase without hesitation, and Mr. H has been able to achieve his goals. The firm already had an enviable record of safety and a modest number of injury incidents prior to Mr. H's arrival. However, since his arrival, the firm has reduced the number of incidents to nearly zero. Therefore, he expressed the view that a penalty for this incident would not have any motivational effect to encourage the firm to comply with the Act and the Regulation because the firm was already motivated at the highest level.

[53] The final witness to testify for the employer was Mr. H2, who explained the family history of the firm. Mr. H2 is the president and CEO of the firm, and he has worked for the firm—his family's business—for essentially all of his working life. He explained that the firm has been involved in a number of major highway projects in this province over the decades, and is recognized as a leader in the field.

[54] With regard to the subject project, Mr. H2 explained that this was an incredibly challenging job because it required crews to work in a narrow section of a road, in the proximity of high rock bluffs and fragmented geology. He estimated that thousands of hours of planning went into this project, and C Company was chosen because it was an established business in the field.

[55] Mr. H2 stated that, for several years, the firm has been certified under the Certificate of Recognition (COR) program, and has passed its audit every year. The audit requires that every staff level have knowledge, and it covers excavation safety. Mr. H2 stated that, as a result of the subject penalty, the firm lost its COR rebate which was $105,000.

[56] Mr. H2 stated that the firm has now implemented a company-wide field level hazard assessment program which requires each employee to identify potential hazards in the workplace and update their list as conditions change. Mr. H2 expressed utmost confidence in the abilities of Mr. H as a leader in workplace safety.

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[57] After the witnesses for the firm had completed their testimony, the investigating Board officer testified. He described what he saw at the time of his inspection and confirmed that he took the photographs in the penalty package and prepared the report for the penalty. He stated that he observed two workers standing behind the baker box. In one of the photographs, the foreground was sloped, but the area behind the baker box had a near vertical incline.

[58] The officer stated that he felt immediate concern for the two workers who were standing near the area of the vertical incline, so he walked around (in order to avoid the area which he believed to be hazardous) and addressed the workers from the other side.

[59] With regard to the opposite bank, the officer stated that it also appeared to be nearly vertical in incline to him, and the soil had a crack, which indicated to him that the material may have been unstable. He noted that there was a wood block placed under a pipe at the base of the opposite bank. This established that some worker had worked in the area, at the base of the area with a crack.

[60] The officer stated that he was accompanied by the firm's site superintendent, who agreed with him that these excavations were "not good," and they approached C Company's crew and directed them to stop working. The officer advised the C Company workers about the rules relating to working in close proximity to excavations greater than four feet in height. They stated that they were aware of this requirement but believed they could enter this zone. They also told the officer that they had not received any orientation from the firm about working near sloped excavations.

[61] The officer compared the position of the baker box relative to different objects in different photographs. He noted that Mr. R had testified that the baker box had been in the same position for a number of days, but the officer expressed the view that, as it sat, the baker box would have precluded the ability of the excavator to get into the area. Therefore, he was of the view that the excavation of the vertical cut face had likely occurred sometime before, when the firm's own crew was operating an excavator in the area. He maintained the view that it was likely the firm's own excavation crew who created the vertical cut face. If not, he maintained the view that the firm, as prime contractor, failed to take adequate steps to mitigate the hazard.

[62] In answer to the evidence about the different colour of the soils, the officer stated that the pile driving operation which was then ongoing created a powerful spray of water which went everywhere. Indeed, the officer himself was sprayed with water from his position on the upper part of the ramp. He also noted that, in one of the photographs, the crane windows were clear, and there was no spray on the ground near the crane. Therefore, it was apparent to him that the force of the spray was focused in a southerly direction—close to the transition between slopes. This is why he disagreed with the suggestion that the fact that the vertical cut face had darker (wetter) soil implied that it was a recent excavation.

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[63] In answer to the evidence of Mr. B that neither the vertical cut face nor the opposite bank actually posed a risk to workers, the officer stated that neither the firm nor C Company had this information or assurance at the time that these activities were occurring. In fact, the firm not obtain this engineer's opinion until several months after the inspection. In his view, a duly diligent employer would have satisfied itself in advance that the excavation of the vertical cut face was safe before allowing workers to enter the area. In answer to one of my questions, he likened this to a situation analogous to cutting into a wall with a saw without first determining if there were live electrical wires behind the wall. If, in such a scenario, the person did not actually cut a live electrical wire, this fact would not diminish the inherent riskiness of the decision to cut into a wall before ensuring that a live wire was not present behind the wall.

[64] On cross-examination, the officer conceded that he did not know the reach to the arm of this particular excavator. He also stated that he had recommended that C Company be issued a penalty arising out of this incident.

[65] The officer confirmed that when he issued the violation order which gave rise to the penalty under appeal, he was of the view that the firm itself had excavated the vertical cut face. He confirmed that the main reason for the violation order was his concern for the safety of the workers present at the site, who had exposed themselves to the vertical cut face or the opposite bank.

[66] The officer was then asked questions about the evidence of a grey slurry spray in proximity to the baker box in various photographs. It was made clear that the angle of the camera was different in some of the photographs, and this resulted in confusing perceptions of depth and distance.

[67] In his closing written submission, the firm's counsel summarized the evidence in this case. He maintained the view that the firm did not violate section 21(1(a)(ii) of the Act in this case. First, he asserted the evidence supports a conclusion that the firm excavated a compliant slope. In this regard, he noted that, following the firm's excavation, a surveyor inspected the area to ensure that it had been correctly cut, and no issues were identified. Further, the evidence of Mr. B strongly supports an inference that the slopes of both sides were actually compliant with the Board's requirements. Given that neither the officer nor anyone else actually measured the slopes in question, this issue must be decided based upon inference and circumstantial evidence; and the evidence in this case supports an inference that the slopes in question were actually compliant with the Board's slope requirements.

[68] Next, counsel submitted that there was no evidence that the firm had notice of the modification of the vertical cut face. In this regard, counsel conceded that the area of the vertical cut face had been initially excavated by the firm's crew. However, the firm's crew finished by June 7, 2019, and C Company began to work thereafter. Photographs from June 12, 2019 and June 21, 2019 suggest that the vertical section might have been cut in at some point between those dates. Counsel relies upon the evidence of the firm's witnesses regarding the inferences to be

drawn from the different colour of the soils. If the firm did not know that C Company had excavated the vertical cut face, then it cannot be held responsible for the violation in its capacity as an employer.

[69] Next, counsel submitted that, in light of the confusion regarding when the vertical cut face was actually excavated, it is difficult to establish that the existence of the vertical cut face is something that the firm ought to have been aware of, or that the firm should have taken steps to mitigate any hazards associated with it. In this regard, he asserted that the firm made reasonable inquiries that C Company was able to safely perform its work, and that C Company had an adequate safety plan to conduct its work. He also noted that there had been discussions between the Firm and C Company regarding the hazards associated with slopes. Finally, he asserted that nothing that the firm did in this matter actually endangered the workers of C Company.

[70] In the alternative that the violation of section 21(1)(a)(ii) of the Act is made out, counsel submitted that the criteria for imposing a penalty are not present in this case. He suggested that the only reason that a penalty was considered in this matter was because of the officer's determination that the violation created a high risk of injury or death. However, in light of Mr. B's evidence, there was actually no real risk to workers from the vertical cut face or from the opposite bank.

[71] In answer to the officer's suggestion that the actual risk of injury present at the time—as confirmed at a later date—is not determinative, counsel submitted that the officer was not correct. He cited a decision of another panel of this tribunal in *WCAT-2013-02719*, which also involved an excavation. In that case, an expert testified at the WCAT hearing that there was no actual risk of collapse at the site in question, and the panel accepted this evidence and found the violation did not create a high risk of injury.

[72] Similarly, in *WCAT Decision A1703886*, a panel confirmed the violation order but cancelled a penalty on the basis that the high risk basis of the violation had not been established—even though a serious injury occurred as a result of the violation in question.

[73] Finally, in *WCAT Decision A2000353*, a panel rescinded a penalty on the basis that the evidence did not establish that the employer's failure to have an exposure control plan created a high risk. In that case, also, the panel relied upon evidence provided by the employer on appeal to establish that the actual risk of air contamination was not present.

[74] In the event that a high risk violation is established, counsel submitted that the firm exercised due diligence in relation to this matter, so a penalty is not appropriate. He provided a list of factors which largely repeated the points raised for the Review Division. To these, he added that the firm excavated a compliant slope before June 7, 2019 and sent a surveyor to check the slope prior to turning the area over to C Company. In addition, the firm reviewed daily records of

C Company's safety talks with its workers, which confirmed that excavation safety was being actively considered.

[75] In the further alternative, counsel submitted that a penalty was not necessary in this case because there was no potential for serious injury or death; the firm was not aware of the specific hazard and was not aware that the Act or the Regulation were being violated; the firm has no past violations for excavation issues; the firm has an effective overall approach to managing health and safety; other enforcement tools are more appropriate, in all of the circumstances; and penalizing a firm for this incident would not result in the appropriate measure general and specific deterrence.

[76] In the final alternative, counsel submitted that any penalty imposed should be reduced by 30%.

Reasons and Decision

[77] At the outset, I wish to acknowledge the contributions of the firm's legal counsel and the ILO to this appeal. Their conduct at the hearing reflected the highest level of discipline and collegiality associated with senior legal counsel, and their determination to focus only on the relevant legal issues and evidence has left me with a clear pathway to understand what I must decide, and how I must decide it.

[78] Part 2 of the Act sets out the rules relating to occupational health and safety. Sections 17(2)(a) and 75 of the Act specifically empower the Board to conduct inspections of worksites with the goal of, among other things, preventing accidents and injuries and ensuring that employers and other parties comply with the Act and the Regulation.

[79] Section 84 of the Act empowers the Board to make orders "for the carrying out of any matter or thing regulated, controlled or required by the OHS [occupational, health, and safety] provisions or the regulations, and may require that the order be carried out immediately or within the time specified in the order." Section 95(1) of the Act expands this power to allow the Board, by order, to impose an administrative penalty on an employer 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 illnesses,
>
> (b) the employer has not complied with an OHS provision, the regulations or an applicable order, or
>
> (c) the employer's workplace or working conditions are unsafe.

[80] In the penalty decision under appeal, the Board found that all three of the above factors were present and that the employer did not act with due diligence in relation to these matters.

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[81] The penalty order under appeal was based upon the June 21, 2019 inspection described above, and Violation Order Number 1 resulting from that inspection, issued under section 21(1)(a)(ii) of the Act.[2] The underlying violation order was never challenged on review, although the Board's decision to impose a penalty was. Nevertheless, it is open to me in considering the appeal of the penalty to assess the soundness of the underlying violation order. This power has been codified by section 288(2)(b) of the Act, which prohibits WCAT from entertaining an appeal of a decision respecting an order written under Part 2 of the Act, other than an order "relied upon to impose an administrative penalty under section 95(1)." In addition, item 3.2.2.1 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) states:

> Where a decision respecting an order under the OHS provisions is later relied upon to impose an administrative penalty, on appeal from a review officer's decision regarding the administrative penalty, WCAT will also have jurisdiction over the underlying order(s), whether or not they were reviewed by a review officer.

[82] I will therefore begin by considering the underlying violation order.

[83] With regard to the violation of section 21(1)(ii) of the Act, I begin by noting the language of that section requires **every** employer to:

> …ensure the health and safety of all workers working for that employer, and any other workers present at a workplace at which the employer's work is being carried out.

[84] In this case, the firm was the prime contractor of the worksite in question and undoubtedly had broad supervisory authority in that capacity. However, it is important to note that, in relation to this incident, the firm was not cited in its capacity as the prime contractor of the site. Both the Board officer and the review officer conflated the obligations of a prime contractor with the obligations of an employer under section 21 of the Act when deciding this matter. For reasons I will explain below, I do not entirely agree with that analytical process, as it relates to the firm's liability for the violation order that was actually issued. If the Board had intended to cite the firm with a violation of its obligations as prime contractor, it could have done so (and could theoretically still do so). For the sake of clarity, the essential obligations of a prime contractor are described in section 24(1) of the Act as follows:

> The prime contractor of a multiple-employer workplace must

[2] The inspection report cited the firm with a second violation order, in relation to a worker found to be smoking near the work area, but that second order was not a factor in the penalty and is not before me on this appeal.

> (a) ensure that the activities of employers, workers and other persons at the workplace relating to occupational health and safety are **coordinated**, and
>
> (b) do everything that is reasonably practicable to **establish and maintain a system or process that will ensure compliance with the OHS provisions and the regulations** in respect of the workplace.
>
> [emphasis added]

[85] Since the firm was cited under section 21(1)(a)(ii) of the Act, its obligations relate to the steps it took (or did not take) to "ensure the health and safety of all workers working for that employer, and any other workers present at a workplace." For the purposes of this appeal, the scope of this analysis is limited to the potential hazards associated with the vertical cut face and to the opposite bank, as seen by the officer on June 21, 2019. It is no longer disputed that C Company was performing the firm's "work" on that worksite. Therefore, in order to determine if, in fact, the violation order has been made out, I must necessarily determine what would be required for this firm to "ensure" the health and safety of the workers at that site in relation to the vertical cut face and the opposite bank. This presupposes that there was actually something about the vertical cut face or the opposite bank which was potentially unsafe to the extent that it engaged this obligation.

[86] The foundation of the violation order was contained in the Board officer's Inspection Report, and amplified by his Report for Administrative Penalty, and in his testimony at the hearing. The essence of his finding was that, at the time of inspection, he determined that the firm's crew had excavated the vertical cut face. Therefore, the firm was aware of the existence of the vertical cut face and allowed the workers of C Company to work within the proximity of that face without taking any special precautions relating to excavation safety, and without specifically warning or instructing C Company or its workers about the risks associated with working in that area.

[87] Similarly with regard to the opposite bank, the officer determined that the firm had excavated the area and had allowed its own and other workers to work in close proximity to the opposite bank without taking any precautions and without instructing or warning the workers about potential hazards associated with the slope in question.

[88] But what was it about these excavations which created a hazard which imposed an obligation on the employer to mitigate? The officer's evidence was that he was concerned about the possibility of the excavations collapsing and potentially injuring workers who might have been in the path of such a collapse. It seems clear that the distance between the vertical cut face and the opposite bank was sufficient that it is not possible to characterize the area as a "trench" or as a "hole." Instead, it was simply an area in which there were two walls which might be potentially hazardous.

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[89] The hazards associated with these walls were implied by the investigating officer in his inspection report when he stated that that the walls were not:

a) sloped as specified in writing by a qualified registered professional;

b) sloped at angles, dependent on soil conditions, which will ensure stable faces;

c) benched;

d) supported as specified in writing by a professional engineer;

e) supported in accordance with the minimum requirements of section 20.85 (of the Regulation); or

f) supported by manufactured or prefabricated trench boxes or shoring cages, or other effective means.

[90] The implication is that the officer believes that the nature of these walls was such that the firm had a positive obligation to take the steps identified in items a) to f) above. But where would such an obligation come from, and on what basis did these particular walls meet the criteria that such mitigation steps were required?

[91] The firm was not cited with a violation of section 20.85 of the Regulation, or with any section of the Regulation relating to excavation safety. Nevertheless, it is worth noting that section 20.81 of the Regulation states the following:

> (1) Subject to section 20.78, before a worker enters any excavation over 1.2 m (4 ft) in depth or, while in the excavation, approaches closer to the side or bank than a distance equal to the depth of the excavation, the employer must ensure that the sides of the excavation are
>
> (a) sloped as specified in writing by a qualified registered professional,
>
> (b) sloped at angles, dependent on soil conditions, which will ensure stable faces, but in no case may the slope or combination of vertical cut and slope exceed that shown in Figure 20-1,
>
> (c) benched as shown in Figure 20-2,
>
> (d) supported as specified in writing by a professional engineer,
>
> (e) supported in accordance with the minimum requirements of section 20.85, or
>
> (f) supported by manufactured or prefabricated trench boxes or shoring cages, or other effective means.

[92] In the circumstances, it seems clear that, without stating as much, the officer found that the firm failed to comply with section 20.81 of the Regulation, and he considered this failing to have

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engaged its safety obligations under section 21(1)(a)(ii) of the Act. It would have been preferable for the officer to have also cited the firm with a violation of section 20.81 of the Regulation because doing so would have framed the employer's obligations within a clear context of rules which apply to the situation in question. As it stands, I must work my way through the sections of the Regulation which deal with excavations in order to determine the firm's threshold obligations.

[93] The principles I glean from the figures referenced in section 20.81(1)(b) of the Regulation (and referenced by Mr. B in his testimony) are that, in order to be considered a potentially acceptable slope (one which does not require special trenching, shoring, or support) the ratio should be 3 horizontal to 1 vertical, or shallower. Mr. B explained that this ratio works out to an angle of 53 degrees.

[94] With regard to the opposite bank, Mr. B's opinion, after considering the photographs, and in light of his familiarity with the soil conditions of that particular area, was that the slope was approximately 45 degrees or less. In other words, from its slope, it was within the range considered to be acceptable without the need for special shoring or support obligations under the Regulation. Furthermore, the soil condition was such that there was no need for shoring or support in order to maintain the integrity of the slope, as excavated. Mr. B explained that the factors which caused concern for the investigating officer and the review officer, such as the crack in the soil, did not actually cause him any concern to indicate that the slope was unstable.

[95] The investigating officer did not measure the angle of the slope on the opposite bank himself, and the firm's surveyor presumably did (though his report is not before me). Nevertheless, I am satisfied by Mr. B's opinion that the soil conditions and slope of the opposite bank were such that the obligations of section 20.81(1) of the Regulation were not engaged such that any further steps were needed before workers would be able to work in proximity to the base of the opposite bank.

[96] Having so found, I am not able to conclude that there was anything particularly "unsafe" or "hazardous" about the excavation or configuration of the opposite bank. Therefore, I find that the opposite bank is not a factor in assessing the firm's actions, or its liability under section 21(1)(a)(ii) of the Act.

[97] At the time of the Board officer's inspection, it is conceded that the vertical cut face was, in fact, vertical, and therefore engaged to requirements of section 20.81 of the Regulation. However, the firm maintains that it did not play any role in excavating the vertical cut face. The firm says that it excavated the area to a consistently compliant slope, and that sometime after its crew left the site, another crew excavated into a portion of the slope to create the vertical cut face, for reasons which remain unknown.

[98] Considerable evidence and argument were provided to me at the hearing about what should and should not be inferred about the timing of the creation of the cut face by the position of

equipment and the colour of soil in the photographs. The reason why so much material in this regard was presented is because, to date, neither the Board officer nor any of the firm's witnesses know for certain who excavated the cut face. Though no representative of C Company testified at the hearing, it was conceded by the firm's counsel that C Company denies that any of its workers excavated the vertical cut face. For reasons which are not clear, the excavation workers of the subject firm at the material time were not able to be interviewed, and were not called at the hearing, so they were not able to confirm or deny whether they were the ones who excavated the vertical cut face.

[99] I will say that the photographs before me do not obviously establish when the vertical cut face was excavated. It is also not clear why the vertical cut face was even excavated; it was not contemplated in any of the plans. Therefore, because it did not serve any obvious functional purpose, it is not possible to infer who might have excavated it for operational reasons.

[100] The officer's opinion is that C Company's excavator would not likely have been able to reach the area, due to the position of the baker box and the other equipment; therefore, as a practical matter, the excavation likely occurred sometime before that configuration of equipment. In answer to the suggestion that the darkness of the soil on the vertical cut face implies a recent cut, the officer noted that water was splashing everywhere from the pile driving and may well have sprayed the vertical cut face, giving it the appearance of a recent excavation. When cross-examined about apparent distances between the wet areas and the baker box in some of the photographs, it became clear that the perspective of the camera distorted distances to some extent, and this potentially supported the officer's characterization of what he saw, in contrast to what was depicted in one of his photographs.

[101] Overall, I found the officer's evidence to be reasonable and credible.

[102] However, I also found the evidence of the employer's witnesses reasonable and credible. One of the employer's witnesses suggested that the sharp demarcation of dark soil (on the vertical cut face) and light soil (on the adjoining slope) was not consistent with the type of splashing that the officer postulated. If, in fact, water was splashing everywhere, then it would not seem likely that there would be a clean line demarcating the vertical cut face from the rest of the slope. Instead, the water would likely have splashed unevenly.

[103] Similarly, Mr. R testified that it would have been possible for the excavator to have made the vertical cut face, even with the position of the baker box and other equipment shown in the photographs. In this regard, I am mindful that the Board officer conceded that he did not know the actual reach of the excavator in question. Mr. B testified that the presence of dust on the baker box implied that it had not rained recently. I take notice that this particular construction area was located in one of the wettest regions of the province, and I find Mr. B's inference that it had not rained recently to be reasonable. I accept that the dark appearance of the vertical cut face cannot be attributable to recent rain in the area.

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[104] In the circumstances, I find that it would require some degree of conjecture to conclude that the firm excavated the vertical cut face. Therefore, in the absence of evidence to the contrary, I consider the evidence in support of a finding that the firm excavated the vertical cut face to be uncertain.

[105] I find that the evidence of the employer's witnesses, especially the evidence of Mr. B, supports a stronger chain of inference than the evidence which supports the officer's opinion. I find that this evidence tips the balance in favour of finding that the firm did not play any role in the excavation of the vertical cut face.

[106] Mr. B testified about the angle of the incline in the area of the vertical cut face based upon the photograph of June 12, 2019. He was of the view that the soil conditions and the angles as depicted in the photograph support a conclusion that the angle was less than 53 degrees and closer to 45 degrees, due to the absence of any debris, which would be expected to fall if the slope had been steeper. He also testified that the soil conditions as depicted in the photographs were such that there was no need for shoring, trenching or any of the reinforcements contemplated by the Regulation.

[107] The angle of the vertical cut face at the time of the Board officer's inspection was much steeper, and was closer to being truly vertical. This supports a conclusion that the excavation which deepened the cut face occurred sometime after June 12, 2019, following the departure of the firm's excavators from the site, and during the time when C Company's crew was working on the site.

[108] After considering all of this evidence, I find that the firm's excavation crew did not excavate the vertical cut face. I find that the firm's crew created a slope which was compliant with the requirements of the Regulation, and which did not need any additional steps of shoring or reinforcement. I am satisfied by Mr. B's opinion that the soil conditions and slope of the area which became the vertical cut face were such that the obligations of section 20.81(1) of the Regulation were not engaged. This means that, at the time that the firm's crew finished its work, no further steps were needed before workers would be able to work in proximity to the base of that slope.

[109] Therefore, I find that it is not possible or appropriate to cite the firm with a violation of section 21(1)(a)(ii) of the Act on the basis that it excavated the vertical cut face. The only remaining possibility in which the firm could be liable is if, even though it did not create the vertical cut face, it still faced an obligation in relation to it at the time of the Board officer's inspection.

[110] As noted above, the firm was not cited in its capacity as prime contractor in relation to this incident. Therefore, for the purposes of the penalty under appeal, the firm's obligations remain confined to the obligations appropriate to an employer. At the hearing, I asked the ILO if the firm

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could still be liable as an employer under section 21(1)(a)(ii) of the Act in relation to the vertical cut face if the firm did not have any role in the excavation of the vertical cut face. The ILO conceded that it would be difficult to find the firm liable in such a scenario. I agree with him in this regard.

[111] It is now well established that, in order to be burdened with the safety obligations of an "employer" under section 21 of the Act *vis à vis* workers at a workplace, an employer (as defined in the Act) must exercise a degree of control or supervision of the work or the workplace in question. In this regard, I am mindful that the *Petro-Canada* decision, cited by the firm's counsel, illustrated this principle directly. In that case, which arose from *Review References #R069701 and #R071098*, the facts established that Petro-Canada (the franchisor) maintained strict controls on the operations of a franchisee, to the extent that Petro-Canada owned the premises of its gas stations and the products sold therein, dictated the price of the products (and supplied all of them through an agreement of exclusivity to the franchisees), and—of particular importance in that case—maintained strict controls about what physical structures could be installed on the premises. In that case, the failure to provide protective barriers to protect workers from the risk of violence was a significant factor in the Board's violation order; and the review officer (as I then was) determined that Petro-Canada retained sufficient control in this sphere such that it also retained the safety obligations under what is now section 21(1)(a)(ii) of the Act in relation to the service station in question, even though its own employees did not work on the premises. At page 9 of my decisions, I offered the following analysis about the degree of control over the workplace which may engage the safety obligations of an employer under what is now section 21 of the Act:

> In all cases, the key determinant is the extent of control exerted by the first party in the operations of the second, especially the extent to which that control has a potential impact upon safety concerns. I do not see an expansion of employer responsibility in the case of pure subcontracting where the contractor has absolutely no role or influence in the manner in which the contract is satisfied. …

[112] In the *Petro-Canada* decision, the Court of Appeal accepted (at paragraph 61) that the relevant test is to determine if the employer's "**control over the workplace** to have been such as to show that it failed to take appropriate steps **within its means** to ensure worker safety." [emphasis added]

[113] Following the *Petro-Canada* decision, the Board added language to its prevention policy to build upon the principles of that case. Policy item P2-21-1, *Employer Duty Towards Other Workers*,[3]

[3] I have referenced the current section of policy, which is numbered to correspond with the renumbered section of the Act. However, the substance of this provision is the same as the earlier section of the same policy which was in place in June 2019.

offers the following analysis about the scope and application of the duty under section 21(1)(a)(ii) of the Act:

> **What Does the Duty Require? (Scope of the Duty)**
>
> Once the duty applies, section 21(1)(a)(ii) requires an employer to take all reasonable steps in the circumstances to ensure the health and safety of the *other workers*. Some of those reasonable steps are set out below in items 1 to 3. In each case, the following three factors below (A to C) will affect what must be done:
>
> A. the employer's degree of control,
>
> B. the employer's level of expertise in the work being performed, and
>
> C. the extent to which the employer is aware or ought to be aware of what is occurring in the workplace.
>
> These reasonable steps for the employer include the following:
>
> 1. Making reasonable inquiries prior to a firm doing work on the employer's behalf;
>
>   (a) The employer's expertise in the area may affect the extent of inquiries:
>
>   (i) to determine whether the firm is capable of safely doing the work; and
>
>   (ii) about the firm's plans to safely conduct the work.
>
> 2. Preventing unsafe conditions or work that may affect the other workers and addressing those that arise; and
>
>   (a) The extent to which the employer is aware or ought to be aware of the unsafe conditions or work may affect what must be done.
>
>   *The employer's familiarity with the worksite may affect the ability to identify unsafe conditions or work.*
>
>   (b) The employer's level of expertise may affect the ability to identify the unsafe conditions or work.

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For example, a roofing firm subcontracting to another, will have a good understanding of when fall protection is required. A manufacturing employer that engages a roofing contractor to service its plant may not.

(c) The employer's degree of control over the other workers or the site, may affect:

(i) the processes implemented to address safety compliance; and

Where the employer exercises a high degree of control relating to a particular function or activity, the employer will have a higher level of responsibility relating to that activity. This could include stopping the work, if necessary.

(ii) the employer's response to unsafe conditions or work.

Where there is no control, the duty may be satisfied by reporting the situation to a supervisor of the other workers.

As with item (i) above, where the employer exercises a high degree of control relating to a particular function or activity, the employer will have a higher level of responsibility relating to that activity. This could include stopping the work, if necessary.

3. Ensuring that the employer's workers do not put the other workers at risk.

The employer must address any aspects of the employer's work that could create a hazard for other workers. This would include workers coming on to the site after the work day. For example, security guards patrolling in the evening risk injury if hazards are left at the end of the work day.

[114] In the appeal before me today, it is undoubtedly the case that the firm, as the prime contractor, maintained a certain degree of control over the worksite, and that its supervisors have an understanding of the legal requirements to conduct safe excavations. But the question is whether it also maintained a sufficient degree of control over the operations of C Company such that it also retained the safety obligations of "employer" in relation to the operations conducted by C Company. On this question, I accept that, as prime contractor and overall site supervisor, the firm was legally required to stay apprised of developments at the worksite and to regularly monitor the site to ensure that contractors were complying with the safety plans of the site. However, I am not persuaded that it also faced an obligation under section 21(1)(a)(ii) of the Act—on the facts of this case—which made it liable for the safety of all acts of excavation which C Company (or some other unidentified party) might have conducted, especially after the firm's own crew had vacated the site.

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[115] I agree with the firm's counsel that the degree of control exercised by the firm over the site in this case was nowhere near the same as the degree of control exercised by Petro-Canada in relation to its franchised gas stations, as described in the *Petro-Canada* decision. I have found above that the firm was not aware that the vertical cut face had been excavated until the time of the Board inspection. The evidence of the Board officer, confirmed by the evidence of the firm, is that the firm's site superintendent agreed with the Board officer during the inspection that the vertical cut face was "not good." In other words, the firm's site superintendent learned about the existence of the vertical cut face at the same time as the Board officer, and it was immediately apparent to him that this was an unacceptable situation which required immediate action to remedy. These facts satisfy me that if the firm had known about the vertical cut face prior to the Board inspection, it likely would have taken steps to ensure that the hazard was dealt with, and that workers would have been prevented from entering the area until the requirements of the Act and the Regulation had been satisfied. Therefore, the ultimate question is whether the firm **should** have known about the existence of the vertical cut face prior to the Board's inspection, even though the firm played no part in its excavation.

[116] Given that, even at the time of this writing, it is not clear exactly who excavated the vertical cut face, when it was excavated, and for what reason, it is difficult to find that the firm failed in any regard to anticipate it, learn about it, and deal with it prior to the Board inspection. The evidence submitted by the firm at the hearing is that the firm's supervisors regularly monitored the reports of C Company and vetted C Company's safety procedures, specifically as regards to excavation safety. There was nothing in any of that material which suggested that C Company was planning to (or did) excavate the vertical cut face.

[117] For all of the above reasons, I find that the firm cannot be liable for a violation of section 21(1)(a)(ii) of the Act in relation to any aspect of the vertical cut face.

[118] I cancel the underlying violation order.

[119] Having cancelled the underlying violation order, the foundation of the penalty under review has been removed. The penalty under appeal flowed from a determination that the firm did something which potentially failed to ensure the safety of workers, as evidenced by its liability for a violation order. Since I have found that the firm was not liable for any such violation, the conclusion that the firm did something which failed to ensure the safety of workers can no longer be sustained.

[120] Accordingly, I vary the review officer's decision and cancel the penalty in its entirety.

Conclusion

[121] For the reasons set out above, I allow the employer's appeal and vary *Review Reference #R0255898*, dated March 9, 2020 to the following extent: Order Number 1 from the

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Inspection Report of June 21, 2019 is hereby cancelled, and the administrative penalty imposed by the Board on September 12, 2019 is cancelled in its entirety.

Appeal Expenses

[122] The employer has asked to be reimbursed for the cost of obtaining Mr. B's report of July 21, 2020, which was invoiced in the amount of $1,893.94 in support of this request.

[123] Section 7(1) of the *Workers Compensation Act Appeal Regulation* provides that WCAT may order the Board to reimburse a party to an appeal for the expenses associated with obtaining or producing evidence submitted to WCAT. Item #16.1.3. of the MRPP sets out the guidelines by which WCAT will order the reimbursement of expert evidence submitted by a party on an appeal. Reimbursement of the expense incurred in obtaining an expert opinion will be ordered in cases where it was helpful or useful to decide the appeal, or where it was reasonable for the party to have believed the evidence in question would be relevant and beneficial to the appeal.

[124] In this case, I found Mr. B's report was directly relevant to the issues under appeal and it was reasonable for the firm to have obtained it to assist in the case on this appeal. Therefore, I find that this is the type of evidence that justifies reimbursement.

[125] Item #16.1.3.1 of the MRPP explains that WCAT will usually order reimbursement of opinions at the same rate as has been established by the Board for similar expenses. When it comes to reports from engineers, there is no fee schedule which has been formally adopted by WCAT or the Board. However, the Association of Consulting Engineering Companies of BC prepared a fee guideline for 2020. From my review of this document, it seems clear that an engineer with the level of experience and qualification of Mr. B would be able to bill in the range of $200 per hour for his consulting services. Therefore, the invoice submitted by Mr. B would suggest approximately 8 to 8.5 hours of work on his part, which includes the time spent writing his report. In light of the complexity and specialized nature of the issues about which Mr. B commented in his report and in his testimony, I am satisfied that his invoice reflected a reasonable amount of time for a professional of his level of specialization to have spent in formulating and communicating his opinion.

[126] I find that the Board should reimburse the full cost of Mr. B's report.

Anand Banerjee
Vice Chair

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