

# Decision of the Review Division

**Number:** 19984  
**Date:** December 17, 2004  
**Review Officer:** Kevin Molnar  
**Subject:** “Due Diligence” Under Part 3

---

The employer requests a review of two orders issued July 14, 2004 by the Workers’ Compensation Board (the “Board”) on Inspection Report #2004111810262. A notice was posted in the workplace to identify potential parties who may have an interest in this review. No other parties directly affected by this review were identified. The employer has provided a submission in support of their request for review.

The Board’s Compliance Section provided a statement of reasons and information from the employer’s prevention file for a one-year period. This information was disclosed to the employer.

Section 96(6) of the *Workers Compensation Act* (the “Act”) gives a review officer authority to conduct this review.

## Issues

There are two issues with respect to this review:

1. The Board’s decision that found the employer in contravention of section 26.82(2) of the Occupational Health and Safety Regulation (the Regulation).
2. The Board’s decision that found the employer in contravention of section 26.82(1) of the Regulation.

## Background

The employer is a large forestry firm involved in logging operations. A Board officer inspected the employer’s workplace on July 14, 2004. The workplace was a forestry service road operated by the employer under permit from the Ministry of Forests and located in an area subject to a tree farm license held by the employer. As a result of his inspection, the Board officer issued two orders finding the employer in contravention of the Regulation.

In the first order the Board officer found the employer failed to remove brush, foliage, and debris from the forest service road that prevented an adequate view of approaching traffic in contravention of section 26.82(2) of the Regulation. In the second order the employer was cited for failing to remove a dangerous tree that was hazardous to road users in contravention of section 26.82(1). The employer disputes the alleged contravention and seeks to have the orders rescinded.

## **Facts and Evidence**

The following are the relevant facts and evidence I have considered in conducting this review:

- In the first order, the Board officer indicates that brush and foliage was preventing an adequate view of approaching traffic on sharp curves. Portions of Traverse main and the upper Traverse roads were not cleared in order to control the hazards created by limited sight distance. The second order indicates that there was a large tree with exposed roots on a steep hillside above the Traverse main hall road which had not been removed. This presented a hazard to logging trucks hauling on the road.
- In the July 23, 2004 request for review, the employer makes a number of arguments why the orders should be cancelled. The employer contends that they have met their due diligence obligation as a brushing machine was moved onto the site July 14, 2004 in preparation for the planned brushing operation of 20 km of road. The employer acknowledges that their logging trucks started hauling in the area on July 8, 2004; however, no complaints had been received by the logging truck drivers. The employer also contends that the dangerous tree identified by the officer was not easy to detect and could be easily missed.
- A “Statement of Reasons” dated September 3, 2004 was provided by the Board’s Compliance Section. The Statement of Reasons indicates that the Board officer determined that log hauling had been underway for at least four days when his inspection occurred. The case officer argues that the employer appears to be conceding both that log hauling commenced in the area as of July 8, 2004 and that brush had not been cleared creating a hazard of limited sight distances especially at sharp curves. The fact that the employer engaged a contractor to do brushing indicates that the employer was aware of the hazard.

The Statement of Reasons also responds to the employer’s contention that the dangerous tree was not easily identified. According to the case officer, the employer does not appear to disagree that the tree posed a hazard. The case officer then explains how the tree came to the officer’s attention and why the tree posed a hazard.

- In the October 25, 2004 submission, the employer notes that they retained a brushing contractor to perform brush removal a month prior to the inspection and 20 km of road had already been completed. In addition, the road systems were scheduled to be brushed early this year and the brushing machine was delivered to the site prior to the orders being written. Further, although the logging trucks had started hauling, they were driving according to road conditions. For example, where brush hindered their view the drivers would operate their vehicles at a slower speed thus controlling the hazard.
- The employer’s Notice of Project to the Workers’ Compensation Board was received in the Nelson office on July 14, 2004. The notice indicates the jobsite location, project, project start date and indicates that a brush cutter is the type of equipment to be used.

## **Law and Policy**

### **The Act**

The law that applies to this review is found in sections 106 and 119 of the Act, and sections 26.82(1) and 26.82(2) of the Regulation.

Section 106 of the Act defines an “owner” as a trustee, receiver, mortgagee in possession, tenant, leasee, licensee or occupier of any lands or premises used or to be used as a workplace.

Section 119 of the Act indicates that every owner of a workplace must provide and maintain the owner’s land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace. An owner must also comply with Part 3 of the Act, the regulations, and any applicable orders.

Section 187(1) of the Act states that the Board may make orders for the carrying out of any matter or thing regulated, controlled, required by this Part or the regulations, and may require that the order be carried out immediately or within the time specified in the order.

### **The Regulation**

Section 26.82(1) of the Regulation requires dangerous trees, loose rocks, stumps, or other unstable materials that are hazardous to road users must be removed or cleared for a safe distance back from the roadsides or roadside banks.

Section 26.82(2) of the Regulation requires brush, foliage, or debris which prevents an adequate view by a vehicle operator of traffic approaching at a roadway intersection or on sharp curves must be cleared and all possible precautions must otherwise be taken to control the hazards created by limited site distance.

## **Reasons and Decision**

### **Issue #1 – The Board’s Decision that Found the Employer in Contravention of Section 26.82(2) of the Regulation**

The issue that must be determined is whether the employer has contravened section 26.82(2) of the Regulation. In their October 25, 2004 submission, the employer indicates that the workplace is in an area subject to their forest license. Section 119 of the Act establishes general duties of an owner which includes a licensee as defined by section 106 of the Act. An owner is obliged to maintain land and premises used as a workplace, in a manner that ensures the health and safety of workers and comply with the Regulation. The forest service road is the sole responsibility of this employer to maintain and the employer must comply with all the provisions of the Regulation including section 26.82(2).

During his inspection, the Board officer observed that there was brush and foliage that prevented an adequate view of oncoming traffic at sharp curves on portions of the Traverse main and upper Traverse roads. The Board officer determined that this constituted a hazard by

creating limited sight distance. There is no evidence submitted by the employer that calls into question the Board officer's findings. Consequently, I accept as fact that a contravention of section 26.82(2) has occurred.

Although the employer does not dispute the facts established by the Board officer, they do argue that the order should be cancelled because they have met their obligation by way of "due diligence." According to the employer, they had already hired a brushing contractor and the brushing machine was low-bedded to the worksite on the day of the Board officer's inspection. In support, the employer provided a road maintenance pre-work form and a Notice of Project sent to the Workers' Compensation Board. In their October 25, 2004 submission, the employer adds that logging trucks were driven according to road conditions, thus controlling the hazard.

The employer's arguments raise a question regarding the relevance of due diligence as a defense when an order is issued pursuant to the Regulation. Board policy D12-196-10 provides direction on how to assess due diligence in relation to the imposition of administrative penalties. If an employer exercises due diligence to prevent non-compliance with the law or regulations, a penalty cannot be imposed. Due diligence is exercised if the evidence shows that the employer took all reasonable steps to avoid the particular event.

The purpose of orders, other than to impose penalties, is to bring the employer's attention to the fact that a contravention has occurred and to motivate the employer to comply. The need to comply exists whether the employer was, or was not at fault. Therefore, there is limited application of due diligence as a defense when orders are issued. Where the Regulation imposes a specific requirement on an industry, activity, or a party, a defense of due diligence does not normally apply. Due diligence may, however, become relevant in some situations.

Prevention Guideline G-D12-187-1 discusses due diligence in relation to orders issued under the general duty provisions of the Act and Regulation. As a general rule, a party will be held accountable for a contravention if they fail to ensure due diligence with respect to their responsibilities. Consequently, due diligence may be an applicable defense where more than one person could be responsible for a contravention, or where a section of the Act or Regulation in question is so general that failure to consider due diligence would place an unreasonable burden on a person (for example, absolutely guaranteeing a safe workplace).

In this case, the employer is solely responsible for maintaining the forestry service road and there is no prospect of another party being found responsible for a contravention of the Regulation. Further, the orders under review are found in Parts 20-33 of the Regulation that impose very specific requirements on an industry and activity. Section 26.82(2) of the Regulation codifies an owner's duty to ensure that the owner's land is being used in a manner that ensures the health and safety of road users. The employer's argument that they have exercised due diligence does not apply.

Even if due diligence applied in this case, I disagree with the employer's contention that they would have met their obligation. It is an undisputed fact that the employer commenced log hauling operations in the area on July 8, 2004 at least one week prior to the commencement of brushing operations in the area. The purpose of preventative regulations is to mitigate against the potential for hazards in the workplace. Since the work commenced prior to the hazard mitigation efforts by the employer, the facts do not support the employer's contention that they

were duly diligent. The limited sight distance on the forestry service road posed a clear and immediate hazard that should have been addressed prior to log hauling in the area. Accordingly, I find the employer has contravened section 26.82(2) of the Regulation.

As a result, I deny the employer's request on this issue.

### **Issue #2 – The Board's Decision that Found the Employer in Contravention of Section 26.82(1) of the Regulation**

In the second order under review, the Board officer found that a large tree with exposed roots on a steep hillside above the road presented a hazard to logging trucks hauling on the road. It appears from the request for review that the Board officer's evidence is largely uncontested. In their submission the employer argues that the danger tree was not easily detected and could have easily been missed. The employer does not provide any evidence in support of their contention. Again, the employer argues that they were duly diligent as they had hired a logging contractor the previous month to engage in dangerous tree removal.

The employer asks that I cancel the order based on their contention that the danger tree was not easily detected and could have been easily missed. With respect, the danger tree was easily detected and not missed by the Board officer. The Board officer is an occupational health and safety expert and his evidence and expertise is not easily disregarded. At a minimum, the employer is obliged to provide some evidence that the Board officer has erred in judgment before I would consider canceling the order. In the absence of such evidence, I defer to the Board officer's judgment in this matter. Accordingly I find that the employer has contravened section 26.82(1) of the Regulation.

As a result, I deny the employer's request on this issue.

### **Conclusion**

As a result of this review, I confirm the orders contained in the Board's July 14, 2004 inspection report #2004111810262.

