

2009/12/09-09

THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**RESOLUTION OF THE BOARD OF DIRECTORS****RE: Prevention Policy 12-196-6
Administrative Penalties – Amount of Penalty****WHEREAS:**

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

Section 196 of the *Act* sets out the authority of the Workers' Compensation Board to impose an administrative penalty on an employer;

AND WHEREAS:

Policy D12-196-6 sets out how the amount of an administrative penalty is determined;

AND WHEREAS:

The Board of Directors has been apprised that, in certain circumstances, Policy D12-196-6 may not fully achieve its intended effect;

AND WHEREAS:

There is a typographical error in the Category A Penalties table in Item 1 of Policy D12-196-6;

AND WHEREAS:

The repeat penalty provisions in Item 4 of Policy D12-196-6 may generate results that appear arbitrary or unfair;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The Policy statements in *Prevention Manual* Item D12-196-6 are approved as set out in Appendix A of this resolution, to correct the Category A Penalties table and to clarify when a repeat penalty will be applied;
2. The amendments made to the Policy statements in *Prevention Manual* Item D12-196-6 by this resolution are effective January 2, 2010;
3. This resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, December 9, 2009.

By the Workers' Compensation Board

**DR. ROSLYN KUNIN, CM, ICD.D
CHAIR, BOARD OF DIRECTORS**

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**RE: Administrative Penalties –
Amount of Penalty**

ITEM: D12-196-6

BACKGROUND

1. Explanatory Notes

The Board is authorized to impose administrative penalties on employers for failure to comply with Part 3 of the *Act* and the regulations, and under certain other conditions. Section 196(3) provides that the Board must not impose an administrative penalty where the employer exercised due diligence. Section 196(2) provides that the Board must not impose an administrative penalty greater than \$500,000. Commencing January 1, 2004, this maximum is subject to adjustment under section 25.2 of the *Act* on January 1 of each year.

The *Act* does not specify the amount of an administrative penalty that may be imposed in particular situations.

2. The Act

Section 196(2):

An administrative penalty which is greater than \$500,000 must not be imposed under this section.

POLICY

Amounts of administrative penalties will be determined under this POLICY. No administrative penalty will be imposed where the employer exercised due diligence to prevent the failure, non-compliance or conditions to which the penalty relates.

1. “Basic amount” of the penalty

(a) Tables for determining “basic amounts”

The following tables contain the guidelines used by the Board in determining the “basic amount” of an administrative penalty.



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Category A Penalties - Serious injury or illness or death; or high risk of serious injury or illness or death; or non-compliance was wilful or with reckless disregard

Assessable Payroll Range (\$)	Penalty Amount (\$)
up to 500,000	2.5% of payroll, or 2,500, whichever is greater
500,001 – 1,000,000	12,500 + 2.25% of payroll over 500,000
1,000,001 – 1,500,000	23,750 + 2.0% of payroll over 1,000,000
1,500,001 – 2,000,000	33,750 + 1.75% of payroll over 1,500,000
2,000,001 – 2,500,000	42,500 + 1.5% of payroll over 2,000,000
2,500,001 – 3,000,000	50,000 + 1.25% of payroll over 2,500,000
3,000,001 – 3,500,000	56,250 + 1.0% of payroll over 3,000,000
3,500,001 – 4,000,000	61,250 + .75% of payroll over 3,500,000
4,000,001 – 4,500,000	65,000 + .5% of payroll over 4,000,000
4,500,001 – 5,000,000	67,500 + .25% of payroll over 4,500,000
over 5,000,000	68,250 68,750 + .125% of payroll over 5,000,000, or 75,000, whichever is less

Category B Penalties – Any other violations

Assessable Payroll Range (\$)	Penalty Amount (\$)
up to 500,000	1.0% of payroll, or 1,000, whichever is greater
500,001 – 1,000,000	5,000 + .36% of payroll over 500,000
1,000,001 – 1,500,000	6,800 + .32% of payroll over 1,000,000
1,500,001 – 2,000,000	8,400 + .28% of payroll over 1,500,000
2,000,001 – 2,500,000	9,800 + .24% of payroll over 2,000,000
2,500,001 – 3,000,000	11,000 +.2% of payroll over 2,500,000
3,000,001 – 3,500,001	12,000 +.16% of payroll over 3,000,000
3,500,001 – 4,000,000	12,800 +.12% of payroll over 3,500,000
4,000,001 – 4,500,000	13,400 +.08% of payroll over 4,000,000
4,500,001 – 5,000,000	13,800 +.04% of payroll over 4,500,000
over 5,000,000	14,000 +.02% of payroll over 5,000,000, or 15,000, whichever is less



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The “basic amount” of the administrative penalty will be determined on the basis of the employer’s assessable payroll for the full calendar year immediately preceding the year in which the incident giving rise to the penalty occurred. If the employer had no payroll in the preceding year, or if the preceding year’s assessable payroll is unknown, or based on less than a full calendar year or a Board estimate of payroll, the Board may, for the purpose of calculating the penalty, estimate a value for the employer’s assessable payroll for a full calendar year based on the best information available at the time the penalty is imposed. The estimate will not be less than any estimate made previously by the Board of the employer’s assessable payroll for the calendar year. An estimate will not result in no penalty or a penalty below the minimum amount set out in the tables. The “payroll” for independent operators with Personal Optional Protection is the amount for which they have purchased coverage.

(b) Multi-site employers

Where a firm has more than one location, the Board may, in determining the “basic amount” of the penalty, use the assessable payroll at the location where the violation occurred, provided that:

- the violation has resulted from an occupational health and safety failure at that location rather than a general “program failure” on the part of the employer, and
- the employer provides the necessary payroll information for that location to the Board and cooperates in any audit that the Board considers necessary.

A “program failure” includes failure to:

- effectively communicate with all locations regarding health and safety concerns;
- provide adequate training to managers and others who implement site health and safety programs;
- make local management accountable for health and safety performance; and
- provide local management with sufficient resources for health and safety issues.

(c) Variation factors

In each individual case, the “basic amount” of the penalty may be varied by up to 30%, having regard to the circumstances, including the following factors:



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- (a) nature of the violation;
- (b) nature of the hazard created by the violation;
- (c) degree of actual risk created by the violation;
- (d) whether the employer knew about the situation giving rise to the violation;
- (e) the extent of the measures undertaken by the employer to comply;
- (f) the extent to which the behaviour of other workplace parties has contributed to the violation;
- (g) employer history;
- (h) whether the financial impact of the penalty would be unduly harsh in view of the employer's size; and
- (i) any other factors relevant to the particular workplace.

2. Penalties up to \$250,000

With the approval of the President or delegate, the Board may impose an administrative penalty of up to \$250,000 where:

- (a) the employer has committed a high risk violation wilfully or with reckless disregard; and
- (b) a worker has died or suffered serious permanent impairment as a result.

3. Penalties up to the Statutory Maximum

With the approval of the President or delegate, the Board may impose an administrative penalty up to the statutory maximum where:

- (a) the employer has committed a high risk violation wilfully or with reckless disregard;
- (b) multiple fatalities have occurred or a number of workers have suffered serious permanent impairment as a result of the violation; and
- (c) there is evidence of a systemic disregard by the employer for worker safety, such as a history of serious repeated non-compliance.



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4. Repeat penalties

Where an administrative penalty is imposed within three years of a decision imposing an additional assessment or a prior administrative penalty for the same violation, the penalty will be calculated as a “repeat penalty”. This includes where, though a different section is cited, the violation is essentially the same.

(1) An administrative penalty will be imposed as a “repeat penalty” where:

- (a) it is for a violation that is the same as, or substantially similar to, a prior violation for which a penalty has been imposed;**
- (b) the violations occurred within 3 years of one another; and**
- (c) at least 14 days prior to the date of the violation giving rise to the repeat penalty, the Board**
 - (i) had imposed a penalty for the prior violation, or**
 - (ii) provided notice of a potential penalty for the prior violation.**

(2) For paragraph (1), the date of a violation is the date of the incident.

(3) The Board may provide notice under paragraph (1)(c) verbally or in writing, in person, by telephone, by mail, fax, email or other method.

(4) “Repeat penalties” A “repeat penalty” will be calculated as follows:

- (a) The “basic amount” for the current penalty, including any variation, will be calculated in accordance with 1. “Basic amount of the penalty” above. Calculate the “basic amount” of the penalty, including any variation, using Item 1 of this Policy (D12-196-6).**

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(b) — The “basic amount” for the current penalty, including any variation, will then be increased as follows:

Number of additional assessments or prior penalties imposed during three years preceding penalty notice	Increase to “basic amount”
one	x2
two	x3
three	x6
four	x12
five	x24

(b) Increase the “basic amount” of the penalty for each “prior penalty” as follows (up to the statutory maximum):

Prior penalty	Multiply basic amount by
one	2
two	3
three	6
four	12
five or more	24

For paragraph (3)(b), “prior penalty” means any prior penalty where the requirements of paragraph (1) above are satisfied.

5. Recovery of costs saved through non-compliance

The amount of any costs saved or profit made by the employer through committing the violation shall, as far as is known, be added to the penalty amount determined under 1, 2, 3, or 4 above and forms part of the administrative penalty.

6. Statutory maximum

In no case will the Board impose an administrative penalty greater than the statutory maximum then in effect.



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PRACTICE

For any relevant PRACTICE information, readers should consult the Guidelines available on the WorkSafeBC website.

Examples of Application of the Repeat Penalty Provisions

Example 1: You are calculating the penalty to be imposed for a violation that occurred less than 14 days after another similar violation that also resulted in a penalty. The employer has no other prior penalties for the same violation.

Calculate the penalty in accordance with Item 1 of this policy by determining the applicable table amount and applying any variation factors. After applying Item 4 of this policy, you determine that the current penalty is not a “repeat penalty”. The penalty will therefore be imposed based on the table amount with variation plus any amounts added under Item 5 of this policy.

Example 2: You are calculating the penalty to be imposed for a violation that occurred less than 14 days after another similar violation that also resulted in a penalty. The employer has one other prior penalty for the same violation for which more than 14 days notice was given before the current violation.

Calculate the penalty in accordance with Item 1 of this policy by determining the applicable table amount and applying any variation factors. After applying Item 4 of this policy, you determine that the current penalty is a “repeat penalty”. There are two prior similar penalties, however only one meets the requirements to be considered as a “prior penalty”. Using the table under Item 4, you determine that one prior similar penalty will result in the amount that you calculated for the penalty being multiplied by two.

EFFECTIVE DATE:	March 25, 2009 January 2, 2010
AUTHORITY:	s. 196(2), <i>Workers Compensation Act</i>
CROSS REFERENCES:	See also Administrative Penalties – Criteria for Imposing (Item D12-196-1), Administrative Penalties – Prior Violations and Orders (D12-196-3), Administrative Penalties – Due Diligence (Item D12-196-10).
HISTORY:	This Item was originally developed to implement the <i>Workers Compensation (Occupational Health and Safety) Amendment Act, 1998</i> , effective May 1, 2000. Consequential changes were subsequently made throughout the Item to implement the <i>Workers Compensation Amendment Act (No. 2), 2002</i> , on March 3, 2003. Effective July 1, 2003 a minor change was made at number four of the policy, to correct the reference of section 20.22 to section 20.11 of the <i>Occupational Health and Safety Regulation</i> . Effective October 29, 2003, an example referencing section 20.11 of the <i>Occupational Health and Safety</i>

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Regulation in the policy was deleted to reflect the repeal of that section. Effective March 25, 2009 a change was made to base the penalty calculation on the employer's assessable payroll for the full calendar year immediately preceding the year in which the incident that gave rise to the penalty occurred. Effective March 25, 2009 a change was made to allow the Board to estimate payroll in certain situations.

Effective January 2, 2010 a change was made to

- (a) Item 1 to correct a typographical error in the Category A penalty table, and**
- (b) Item 4 so that an administrative penalty will be imposed as a "repeat penalty" where:**
 - (i) it is for a violation that is the same as, or substantially similar to, a prior violation for which a penalty has been imposed;**
 - (ii) the violations occurred within 3 years of one another; and**
 - (iii) at least 14 days prior to the date of the violation giving rise to the repeat penalty, the Board**
 - (1) had imposed a penalty for the prior violation, or**
 - (2) provided notice of a potential penalty for the prior violation.**

APPLICATION:

This policy applies to all decisions to impose administrative penalties on and after October 29, 2003. The amendments made effective March 25, 2009 apply to all decisions, including appellate decisions, made on or after the effective date of the changes. **The amendments made effective January 2, 2010 apply to all penalties where a penalty is imposed on or after the effective date of the changes. Transitional provisions apply to penalties within the appeal period, before Review Division or before WCAT on the effective date.**

Transitional Provision for Repeat Penalty Calculation:

Penalties within the appeal period or under review or appeal on the effective date of the policy change will be subject to the policy in effect when originally imposed, with the additional requirement that a prior penalty will only be used to increase the amount of a repeat penalty, if at least 14 days prior to the date of the violation giving rise to the repeat penalty, the Board

- (a) had imposed a penalty for the prior violation, or**
- (b) provided notice of a potential penalty for the prior violation.**