

REVIEW DECISION

Re: Review Reference #: R0190450
Board Decision under Review: February 12, 2015

Date: September 11, 2015

Review Officer: Elizabeth Nicholls

The employer requests a review of a February 12, 2015 order issued by the Workers' Compensation Board ('Board'), which operates as WorkSafeBC. The employer is represented by the Employers' Advisers Office, but has provided its own submissions. The Review Division gave notice of this review to the union which represents the employer's workers. The union is not participating.

Section 113(2.2) of the *Workers Compensation Act* (the 'Act') gives me authority to conduct this review.

Issue

The issue in this review is whether the employer was in breach of section 4.50(1) of the Board's *Occupational Health and Safety Regulation* ('Regulation').

Reasons for Decision

Introduction

The employer is a private non-profit charitable organization which operates an assisted living facility for approximately 150 seniors. In order to permit the residents to age in place, the employer has also developed a complex care unit containing 12 suites. In this unit, some of the residents may require assistance with transfers. At the time of the inspection which led to the order under review, one of the residents was unable to change his position without assistance. In order to prevent skin breakdown, staff members moved him two-to-three times each night, using a slider sheet.

Two Board officers inspected the premises and raised concerns about the risk to workers of musculo-skeletal injury ('MSI') when transferring residents. The Board was particularly concerned about the risk to the two workers who had to move the resident at night. The Board noted that while the employer was using a number of assistive mechanical devices in order to transfer residents, it had not installed overhead lifts, and in particular, had not installed a particular type of lift that would eliminate any risk to workers.

The Board concluded that the employer had not taken all practicable steps to reduce the risk to its workers, and issued an order under section 4.50(1) of the *Regulation*, which provides:

The employer must eliminate or, if that is not practicable, minimize the risk of MSI to workers.

The employer argues that it was not practicable to install overhead lifts and that it has taken all other reasonable measures to minimize the risk to staff.

Evidence

The Board's order specifically focussed on the risks involved to the two workers who had to move the resident at night. It stated that the employer must determine which residents required assistance with bed positioning, and must implement control measures that 'minimize[d]' the risk, 'as far as practicable'.

The Inspection Notes accompanying the order documented that the employer had care plans and in-room instructions for the methods to be used in transferring and repositioning each particular resident. These instructions also noted how much assistance each resident needed for personal care, washing, and dressing. Further, the Inspection Notes documented that the employer had floor lifts and sit-to-stand lifts to transfer residents. The handwritten notes of one of the Board officers stated that after seeing the configuration and size of the rooms herself, she questioned whether installing the lifts would be practicable, but felt that further evidence would be required.

In response, the employer provided the Board with the MSI risk assessment it had prepared in 2012, dealing with administrative and engineering controls to minimize the risk of injury. The employer had also purchased an additional sit-to-stand lift to assist with transfers. The employer maintained that it was not practicable to install overhead lifts, given the cost and configuration of the rooms.

With respect to the resident who had to be moved at night, the employer explained that this was a two-person transfer, that the room was configured for safe access to the resident, that the bed could be raised or lowered to a safe working height, and that a risk assessment was performed each time a resident needed assistance. The employer also pointed out that none of this unit's workers had ever filed a claim for an MSI.

Discussions between the Board and the employer continued. According to the employer's Executive Director, a Board officer told her verbally that she could demonstrate compliance only by installing the particular lifts in question. The Executive Director asked the Board to put this direction in writing, so that she could take it to her Board of Directors for consideration. The Board did not confirm that installing the lifts was the only alternative, but continued to state that the employer had not demonstrated that it had taken all practicable measures.

Under the circumstances, this clearly meant that the employer had not demonstrated that it was impracticable to install the lifts, as it does not appear that the Board had concerns about the adequacy of any of the other measures the employer had taken. Eventually, the Board asked the employer to obtain quotes from vendors in order to determine whether lifts could be installed, and if so, at what cost.

The employer advised the Board on June 29, 2015 that vendors had quoted a cost of \$10,000 for each of the unit's 12 rooms. The employer felt that this was not feasible and not a practicable solution. The employer had also obtained quotes on a different type of overhead lift, but said that because of the style and design of the room, these would also be expensive to install. In addition, the employer had considered a third alternative, but noted that this alternative would not 'eliminate' the risk in question.

On July 20, 2015, the Board emailed the employer to confirm that the employer 'would not be implementing any further measures, apart from those already in place', and that as a result, the Board was considering imposing an administrative penalty. The employer responded with a July 21, 2015 email, providing additional information about the cost of installing the lifts. The quotes the employer had obtained did not include the additional costs of moving and replacing ceiling fans, light fixtures, and door bulkheads. In response to the Board's statement that the employer would not be taking 'any' further measures, the employer confirmed that it was continuing to explore the possibility of installing one type of lift, albeit not the type preferred by the Board. The employer acknowledged the superior safety of the preferred lift, but stated that the cost required to retrofit the building would be prohibitive.

Submissions

In its submissions, the employer reiterates the information it had previously provided to the Board, and again says that it would be impracticable to install the lifts in question.

The employer points out that the risk identified by the Board involved only one resident, who was near the end of his life at that point, and has since passed away. The employer further provides the weights of all of the residents in the unit who had required repositioning during the previous four years, explaining that none of them was heavy enough to pose a significant risk. With one exception, all of these involved short term placements in the unit. The employer explains that as a private non-profit organization, it receives no government or health authority funding to offset the costs involved in installing the lifts. Finally, the employer also notes that the unit had been inspected by previous Board officers, none of whom considered that the employer was in breach of section 4.50(1).

I provided the employer's submissions to the Board officer who issued the order. She responded with comments dated July 6, 2015. She explains the risk to workers of repositioning residents, and says that current best practice is to use the kind of lift she recommended to the employer. She points out that she has the ergonomic education and experience to determine whether the risk to workers is at an acceptable level.

The Board officer further explains that at the time of her inspection, she did not know whether more than one resident required repositioning at night. Further, it was likely that the health of other residents would deteriorate during their stay in the unit, and there would be an increasing likelihood that they would require assistance with transfers. The Board officer says that the measures being used by the employer did not minimize the risk as far as practicable, because the employer was not using the preferred lifts.

The Board officer concludes:

At the time of the inspection, the employer did not provide evidence that the risk associated with repositioning residents was minimized as far as practicable, as such [the order] was issued. The employer did not provide evidence that an evaluation that considered the installation of overhead lifts was performed. Subsequent to the order being issued, the employer did not demonstrate that the installation of overhead lifts is impracticable.

Analysis and Decision

I have reviewed the evidence, the employer's submissions, and the Board officer's comments. At the outset, I note that there is no doubt that repositioning or transferring residents poses a risk to workers of MSI. Further, I accept that the use of the overhead lifts in question represents the current best practice in the industry. However, it does not follow that an employer is required to use such lifts under all circumstances. While other provisions of the *Regulation* require the employer to use the safest possible means of controlling risk, regardless of any other considerations, that is not the case here.

The *Regulation* says that the word 'practicable' means that which is 'reasonably capable' of being done. The Board assists employers in determining how to comply with the *Regulation* by providing non-binding Guidelines. Guideline G4.50 states that in determining whether elimination of the risk is practicable, the employer should consider the following factors:

- the degree of risk to workers;
- the extent of available information about the risk and means of controlling it;
- availability and suitability of control measures;
- frequency of performing tasks that involve risk factors;

- resources needed to control risk.

G4.50 further states that in general, risk factors for tasks that are performed 'most of the time' should be given priority.

I accept that at the time of the original inspection, the Board officer may not have been aware of all of the steps the employer had already taken to minimize the risk, including its 2012 risk assessment, its continually updated individual care plans, and its universal requirement for two-person transfers. Nonetheless, the evidence shows that the employer had in fact undertaken a number of steps that were in place at the time of the inspection. The Board has not taken issue with the adequacy of those steps, and it is therefore reasonable to assume that, but for the absence of the preferred lifts, the employer had already minimized the risk to the greatest extent possible.

While the onus is on the employer to demonstrate that it has taken all practicable steps, and the Board says that the employer has failed to do so, the effect of this order is to require the employer to install the lifts regardless of the cost. It is clear that the Board regarded nothing short of this as sufficient compliance with the order. The Board has not explained why the employer's evidence with respect to the costs should not be considered.

I note that the employer's evidence is that prior to the inspection, it had considered the possibility of installing overhead lifts, and it appears that it had discussed this with previous Board officers. The employer had concluded that because of the configuration and size of the rooms, it would be extremely expensive to do so. While the employer had not taken the step of obtaining quotes, the quotes obtained as a result of the order confirm the employer's previous assessment of the likely costs.

There is no evidence before me with respect to the employer's annual budget, but I accept that as a private non-profit organization that receives no government funding, the likelihood is that an expenditure of more than \$120,000 would have a significant impact, especially given that the Board apparently required the employer to install the lifts immediately.

In determining practicability, the Guideline states that the employer must have regard to the degree and frequency of the risk, and the resources necessary to control the risk. While I accept that the number of residents requiring repositioning would vary from time to time, the evidence is that at the time of the inspection, only one patient was being repositioned, two-to-three times a night. This cannot be described as a frequent or repetitive work activity. The repositioning involved two workers, and there is no evidence that any injury actually resulted, although I do accept that there was a risk of injury. In prioritizing its expenditures, I consider that it was reasonable for the employer to

consider the frequency of the exposure to this risk, and weigh that risk against the significant cost of eliminating it altogether.

As noted, section 4.50(1) does not require an employer to eliminate risk regardless of any other consideration. In the particular circumstances of this case, I accept the employer's evidence that the cost of installing lifts would be very significant. Further, as the employer appears to have taken other comprehensive steps to identify and minimize the risk to workers, I find that the employer had taken all steps practicable to minimize the risk. Consequently, I allow the employer's request for review.

Conclusion

I cancel the Board's order of February 12, 2015.



Elizabeth Nicholls
Review Officer
Review Division