



## Issue

[4] The sole issue before me is whether the Monetary Penalty should be upheld, varied or set aside.

## History of Appeal

[5] An Appeal Management Conference was held on April 29, 2015. At the Appeal Management Conference the Board ordered that the Appeal would proceed via written submissions and set the following schedule for the exchange of evidence and submissions:

- a) The Appellant was to file with the Board and serve the Respondent with the Appellant's written submissions and evidence by 4:00 p.m. on May 27, 2015;
- b) The Respondent was to file with the Board and serve the Appellant with the Respondent's written submissions and evidence by 4:00 p.m. on June 10, 2015;
- c) The Appellant was to file with the Board and serve the Respondent with the Appellant's reply submissions by 4:00 p.m. on June 17, 2015.

[6] In support of its appeal, the Appellant filed written submissions, which enclosed a copy of its Dust Mitigation Plan, a medical certificate for an employee, two WCB inspection reports and an electrical certificate of inspection from the Respondent.

[7] In response, the Respondent filed Affidavit #1 of the Safety Manager along with written submissions outlining the Respondent's position with respect to the Appeal.

## Facts

[8] Upon review of the evidence filed with the Board, I find the following facts:

- a) The Safety Order required the Appellant to return a safety order response form acknowledging the following by September 15, 2013:
  - a. that it had documented a hazardous area classification of its facility;
  - b. that a suitable dust mitigation plan had been developed based on the area classification; and
  - c. that the dust mitigation plan had been implemented to control the risk presented by combustible wood dust.

- b) The Appellants did not submit the Safety Order Response Form by September 15, 2013 as required by the Safety Order;
- c) The Appellant returned the Safety Order Response Form, signed by the mill manager on or about January 22, 2014 indicating that it had fully complied with the Safety Order.
- d) A Safety Officer attended the Appellant's facility on March 27, 2014 to assess compliance with the Safety Order and found that the Appellant was not compliant with the Safety Order and issued a Certificate of Inspection stating that all non-compliances must be resolved by April 30, 2014.
- e) On or about December 17, 2014, Another Safety Officer contacted the Mill Manager and the Mill Manager advised that the Appellant had yet to complete the required wood dust assessment. The Safety Officer gave the Appellant a final deadline of January 4, 2015 to comply with the Compliance Order.
- f) On or about February 11, 2015, the Safety Manager issued a notice to the Appellant advising that a Monetary Penalty was under consideration as a result of the Appellant's failure to comply with the Safety Order. This notice was personally served on the Mill Manager on February 16, 2015. No response was received from the Appellant before the Monetary Penalty was issued.

[9] These facts are not in dispute between the parties.

#### Summary of Appellant's Position

[10] The Appellant states that it is a primary manufacturer of western red cedar roofing shakes and shingles and has been operating as a business for over 30 years without any major incident relating to combustible dust ignition causing loss of life or property. The Appellant does not deny that it failed to comply with the Safety Order when the Monetary Penalty was issued. Instead, the Appellant requests that the Monetary Penalty be waived in light of the fact that since receiving the Monetary Penalty it has become compliant with the Safety Order. In this regard, the Appellant states that since April 9, 2015 that it is has had a working and sustainable Mitigation Plan for the Assessment of Combustible Cedar Fiber Dust in Hazardous Workplace Locations (the "Plan") as required by the Safety Order. The Appellant states further that such waiver of the Monetary Penalty ought to be granted due to the circumstances that led the Appellant to delay complying with the Safety Order.

[11] In support of this position the Appellant sets out the following timeline outlining numerous reasons for its delay in complying with the Safety Order:

- a) the Safety Order did not provide adequate information or direction on how to reference and document hazards and the Appellant requested to work in liason with one of the Respondent's safety officers;
- b) that pursuant to OHSR Regulation 27.43 for Shake and Shingle Mills specific to Part 5 subsection 5.81 (Combustible dust) that the Appellant was in compliance with Workers Compensation Board ("WCB") regulations;
- c) that on March 27, 2014 a visit was made to the Appellant's facility and a safety order inspection was done by three Safety Officers and a meeting with the Mill Manager took place whereby the Mill Manager acknowledged that he understood the Safety Order and indicated that the Appellant would comply with it;
- d) The Mill Manager's other duties precluded him from ensuring compliance with the Safety Order and the task was not assigned to anyone else;
- e) on November 7, 2014 an inspection was done by WorkSafeBC regarding the Appellant's shake and shingle machines and related power transmission components and eight outstanding work orders were issued to bring the Appellant's mill into compliance with WCB regulations with the possibility of the full shut down of the mill and the implementation of fines for non-compliance (the "WCB Work Orders");
- f) the Appellant decided to prioritize the WCB Work Orders over the Safety Order as it felt that they were most important to rectify in terms of the hazard rating to its workers and to ensure that the mill would not be shut down and employment of staff and orders for customers would not be disrupted;
- g) on December 14, 2014 a representative of the Respondent called the Appellant but no message was relayed to the Mill Manager;
- h) a representative of the Respondent advised the Appellant that it must comply with the Safety Order by January 5, 2015;
- i) in January 2015 the Appellant assigned an individual to conduct an inspection of work-site areas and to report to the Mill Manager with his findings; however, he was

diagnosed with a serious medical illness and was unable to complete his assigned task; and

- j) April 9, 2015, the Appellant submitted the required documents to the Respondent to be found in compliance with the Safety Order.

[12] As evidence of the above set out timeline the Appellant submitted a copy of its Dust Mitigation Plan, a medical certificate for an employee, two WCB inspection reports and an electrical certificate of inspection from the Respondent.

[13] In summary, the Appellant's position can be boiled down to the submission that the Appellant initially prioritized compliance with the WCB Work Orders over compliance with the Safety Order and then when it went to deal with the Safety Order the individual tasked with this job fell ill and was unable to complete the task by the final deadline of January 5, 2015.

#### Summary of Respondent's Position

[14] The Respondent states that the Monetary Penalty was imposed in compliance with the Act and the *Monetary Penalties Regulation* (the "Regulation") and accordingly there is no basis to vary or set aside the Monetary Penalty. The Respondent relies on section 40(1)(d) of the Act, which states that breach of a safety order is grounds for the Safety Manager to impose a monetary penalty. The Respondent states that the Appellant did not comply with the Safety Order by the final deadline of January 5, 2015 and that it failed to comply with the Safety Order by not completing a hazardous wood dust area assessment and not having the required documents available for review upon request. The Respondent further states that it complied with all requirements of the Act and Regulation including having the Appellant served notice that a monetary penalty was under consideration by the Safety Manager.

[15] In response to the submissions of the Appellant, the Respondent submits that none of the Appellant's submissions form a legal basis on which to set aside the Monetary Penalty. In this regard, the Respondent states that whether or not the Appellant in fact had policies in place to control dust in its facility did not exempt it from the obligation to comply with all of the terms of the Safety Order, both administrative and technical. Similarly, the Respondent states that a shortage of resources and other regulatory demands also does not exempt the Appellant from its obligation to comply with the Safety Order. The Respondent notes that the Appellant had almost 2 years from the date the Safety Order was issued to comply and that the Safety Order

“was issued in response to an acute and catastrophic safety issue and timely compliance by all recipients was essential to prevent further incidents”. Finally, the Respondent submits that compliance after the issuance of the Monetary Penalty has no bearing of the reasonableness of the Monetary Penalty at the time it was issued.

[16] With respect to the standard of review on appeal with the Board, the Respondent submits that the standard is one of reasonableness and that the Monetary Penalty should only be set aside if found to be unreasonable given the circumstances of the case. The Respondent submits that the Monetary Penalty is reasonable as it complies with section 40(1)(d) of the Act, which authorizes the Safety Manager to impose a monetary penalty on a person if they fail to comply with a safety order. Further, the Respondent points to the Appeal Record filed in this appeal and states that the Safety Manager considered the criteria required to be assessed under section 3 of the Regulation and that there is no reason to vary or rescind the Monetary Penalty.

#### Analysis

[17] As submitted by the Respondent, the standard for review of this appeal is reasonableness, which means that the Board must give deference to the discretion the legislation grants to the Safety Manager to enforce the Act and impose monetary penalties.

[18] In addition, pursuant to section 52 of the Act, when considering an appeal, the Board must also consider the maintenance and enhancement of public safety.

[19] Pursuant to section 40(1)(d) of the Act, a safety manager may, in accordance with the regulations, impose a monetary penalty on an individual if they fail to comply with a Safety Order. The Appellant admits that it failed to comply with the Safety Order.

[20] The criteria for the imposition of monetary penalties are set out in section 3 of the *Monetary Penalties Regulation* as follows:

- a) previous enforcement actions under the Act for contraventions of a similar nature by the person;
- b) the extent of the harm, or of the degree of risk of harm, to others as a result of the contravention;

- c) whether the contravention was deliberate;
- d) whether the contravention was repeated or continuous;
- e) the length of time during which the contravention continued; and
- f) any economic benefit derived by the person from the contravention.

[21] The maximum Monetary Penalty permitted under the Act is \$100,000.00.

[22] On the evidence before the Board, the Monetary Penalty in the sum of \$5,000.00 issued by the Provincial Safety Manager appears reasonable. The Appellant had close to two years to bring itself into compliance with the Safety Order and received a number of extensions from the original deadline for doing so. The Appellant's reasons for failing to comply in a timely fashion carry little weight when they received a number of time extensions. This was not a situation where the Appellant faced conflicting requirements under the WCB Work Orders and the Safety Order issued by the Respondent as it was possible to comply with all of the various safety requirements. It is not up to the Appellant to determine which regulatory safety orders take priority. The various legislation applicable to the Appellant, regardless of whether it falls under the umbrella of WCB or the Respondent, requires that all regulatory orders be complied with. Given the urgency of the situation sought to be remedied and the fact that the legislation required compliance with the Safety Order, the Appellant ought to have complied by the original deadline let alone the final deadline given after multiple extensions.

### **Conclusion**

[23] The Monetary Penalty levied by the Safety Manager in the amount of \$5,000.00 should not be set aside or varied. Accordingly, the appeal is dismissed and pursuant to section 40(13) of the *Safety Standards Act*, S.B.C. 2003, c. 39 the Appellant must pay the Monetary Penalty, if it has not already done so, within 30 days.

Signed:

A handwritten signature in black ink, appearing to read 'Emily C. Drown', written in a cursive style.

Emily C. Drown, Chair