March 25, 2019
Appeal No. SSAB 22-2018

Indexed as: BCSSAB 22 (1) 2018

IN THE MATTER OF THE *SAFETY STANDARDS ACT*

SBC 2003, Chapter 39

AND IN THE MATTER OF an appeal to the

British Columbia Safety Standards Appeal Board

BETWEEN:

Geothermal Heating Company

APPELLANT

AND:

British Columbia Safety Authority

RESPONDENT

Safety Standards Appeal Board:	**David Martin**
Representing the Appellant:	**Givon Santos**
Technical Safety BC:	**David Clancy**

REASONS FOR DECISION

INTRODUCTION

[1] This appeal concerns a Monetary Penalty (MP-2018-0013) issued by the Respondent on August 8, 2018 ("the **Monetary Penalty**") in the amount of $5,500.00 to the Appellant.

[2] The Monetary Penalty was issued for a failure to comply with Compliance Order No. CO-2018-0021 dated March 2, 2018 (the "Compliance Order").

[3] The Appellant submits that the Monetary Penalty be cancelled because they mistakenly interpreted the Compliance Order and were working diligently to comply, or alternatively, the Penalty is excessive and should be reduced. The Respondent submits the Monetary Penalty is reasonable and that there is no basis for it to be varied.

FACTS

[4] The Appellant, although incorporated in 2008, was dissolved for failure to file the necessary documents with BC Registry Services. Nevertheless, I will refer to the Appellant as

the Heating Company in these reasons and when the Appellant is referred to it includes the Owner of the Company.

[5] The issue on this appeal arose when the Respondent received a complaint from a homeowner in Mission about electrical work that had been performed by the owner of the Heating Company. An investigation revealed that the Owner of the Company was not certified as an electrician and was therefore not qualified to perform the work that had been done for the homeowner. An inspection of the work performed was completed by a field services leader of the Respondent and he noted a number of ways in which the work did not conform to the Canadian Electrical Code. It was the opinion of the inspector that the non-compliances he found can represent a potential safety hazard to the occupants of a home. It was also noted that there was no permit taken out for the work. The work in issue had been performed by the Heating Company on January 28, 2018. Subsequently, a permit was obtained on February 1, 2018 by an electrical contractor, from an Electric Ltd. The homeowner was charged a fee of $5,500.00 for the work.

[6] On March 2, 2018, the Compliance Order was issued to the Appellant ordering him to:

(a) Stop performing regulated electrical work, unless he was able to demonstrate that he was in possession of a valid electrical contractor licence or that he was otherwise authorized in accordance with the *Safety Standards Act,* SBC 2003 c. 39 (the "*Act*");

(b) Stop performing regulated electrical work, unless he is able to demonstrate that he has obtained the appropriate certificate of qualification or other training credential recognized by a provincial safety manager, or that he is otherwise authorized in accordance with the *Act*;

(c) Stop performing regulated electrical work, unless he is able to demonstrate that the work is authorized under a permit or is otherwise exempted in accordance with the *Act;* and

(d) Immediately conduct a review of all regulated electrical work, performed by him (or his firm), during the period between March 2, 2016 and March 2, 2018 and, within 30 days of receipt of this order, to report the results of this review to Technical Safety BC in writing (the "Review").

[7] The Compliance Order was served on the Owner of the Company on March 30, 2018. The sole issue in this Appeal is the Review.

[8] The evidence of a senior safety officer of the Respondent, is that on April 13, 2018, he told the Owner that the records of unpermitted work must be submitted within 30 days from the date he received the order. The Owner told the Safety Officer that he understood. Further, he told the Owner of the Company of a further action if that was not done in a timely fashion – a potential Monetary Penalty. The Owner of the Company told the Safety Officer that he might need more time. The Safety Officer told him he should contact him for an extension. He did not apply for an extension of time.

[9] The Appellant did not comply with the requirement that he provide a report on the Review of all of the regulated electrical work performed by him or his firm within the required time period.

[10] The Respondent sent to the Owner of the Company a letter dated June 22, 2018 which was to give him notification of a potential Monetary Penalty. That letter set out a preliminary assessment of the alleged facts including a monetary value as determined by the Monetary Penalty Calculator. The letter said that the Respondent was considering imposing a Monetary Penalty in the amount of $5,500.00. That letter gave the Owner of the Comapany the warning that he could reply to the letter and make any submissions with respect to it that he wished to. No reply was made to the letter.

[11] On August 8, 2018, the Respondent issued the Monetary Penalty Notice in the amount of $5,500.00 based upon the failure to comply with the Compliance Order to perform the Review of all regulated electrical work performed.

[12] The Owner of the Company emailed the Respondent on August 30, 2018 in which he said the following:

(a) That he received the Monetary Penalty Notice on August 15, 2018;
(b) That the original inspector of the Respondent had agreed on a three to six month extension for the Owner of the Company to finish the Review and provide a report; and
(c) He hoped to have the Review completed by September 15, 2018.

[13] Although he did not identify the name of the inspector that granted the extension of time in his email of August 30, 2018, he subsequently, on September 10, 2018 identified the

inspector. In that email, he said that he was still trying to gain access to four of the houses in order to complete the Review and that he hoped that would be done shortly. With that email, The Owner of the Company provided a list of the properties that had been reviewed or had yet to be reviewed.

[14] The Appellant asserts that the safety officer, granted an extension of time to comply with the Compliance Order of from three to six months. The affidavits filed by the Respondent refute that allegation. Significantly, the record shows that the only safety officer that spoke to the Owner of the Company after the Compliance Order was issued was the Safety Officer. Not only does he swear that no extension of time was granted, he told the Owner of the Company that he could apply for an extension if he wished but he never did apply.

[15] The Appellant asserts that he did not receive the letter from the Respondent of June 22, 2018 wherein the possibility of a Monetary Penalty was forewarned. He asserts that this letter was personally served on the Appellant's son who is also has the same name and not on the Appellant, the Owner of the Company. In further support of that assertion, the Appellant submits that he was not at home on the date of the service (July 3, 2018) but that he was away on a vacation. In support of that assertion, he enclosed various pictures and screenshots to, as the Appellant says, show that he was away in early July 2018. Last, the Appellant asserts that by failing to serve the letter upon him he was precluded from making submissions that may have influenced the amount of the Monetary Penalty that was ultimately ordered.

ISSUES TO BE DECIDED

[16] I have determined that the following issues must be resolved in this appeal:

(a) Was an extension of time granted to the Owner of the Company to complete the Review required by the Compliance Order?

(b) Did the letter of June 22, 2018 have to be personally served on Mr. Maragliano and, if so, was it personally served?

(c) Should the Monetary Penalty be confirmed, varied, or set aside?

ANALYSIS OF ISSUES

WAS THE OWNER OF THE COMPANY GIVEN AN EXTENSION OF TIME TO COMPLY WITH THE COMPLIANCE ORDER?

[17] The only evidence in the Record that supports the Appellant's assertion is his email of August 30, 2018 to the Respondent. However, the assertion that he was given an extension of time is refuted by the evidence provided by the Respondent.

[18] Safety Officer swears that he discussed the Compliance Order with the Owner of the Company and told him that he had 30 days to comply. After he said he may need more time, the Safety Officer told him to apply for an extension but he never did apply.

[19] The Record also contains an affidavit from the Inspector who was the only other safety officer (other than the Safety Officer) that was involved in this matter. He swears that he did not speak to the Owner of the Company at all after the Compliance Order was issued.

[20] I have concluded that the weight of the evidence is against the assertion made by the Appellant. The Appellant offers no sworn evidence to back up this assertion and the sworn evidence from the Respondent is to the contrary. Each of the Deponents attaches their note of conversations with the Owner of the Company, which I conclude were made contemporaneously, which support their averments. I accept their evidence. I do not accept the Appellant's argument.

DID THE LETTER OF JUNE 22, 2018 HAVE TO BE PERSONALLY SERVED UPON THE OWNER OF THE COMPANY AND, IF SO, WAS IT PERSONALLY SERVED?

[21] Regretfully, the Respondent provided no submission on this issue. Therefore, I have analyzed the evidence and the Appellant's submissions.

[22] The first issue is to consider if the June 22, 2018 letter had to be personally served upon the Owner of the Company. I believe it was. Section 40(5) of the Act requires service of such a letter as it appears to be a recommendation by a safety officer of a Monetary Penalty. Section 80(1)(c) of the Act requires service to be personal.

[23] Was the Owner of the Company personally served with the letter? On the one hand, the Record has the sworn evidence from the process server deposing that he served the Owner of the Company with the June 22 letter on July 3, 2018. The process server deposes that the Owner of the Company admitted he was the person named in the document served. On the

other hand, there is the submission by the Appellant that he was away on July 3 and offers in support photographs and screenshots.

[24] It is to be noted that the same process server that served the June 22, 2018 letter also served the Owner of the Company with the Monetary Penalty on August 15, 2018. The Appellant admits that he was served with the Monetary Penalty. I find it highly relevant that the process server obtained the same admission on both occasions that the person he was serving was the correct Owner of the Company. If the process server had indeed served two different people he would not have made the averment for each service that the person he served "did admit to me he was the person named therein". As well, if the Owner of the Company's son was served, common sense would lead to the conclusion the son would have told the process server the letter was for his father.

[25] In my view it is significant that the Appellant has provided no sworn evidence to support his assertion, either from himself or, more importantly, from his son. Equally, I see nothing in the photographs and screenshots provided that support in any way the assertion that he was away on July 3. There is no evidence of where the photographs were taken that in any way provides proof he was not at home on July 3. Therefore, on balance I accept that the Owner of the Company was properly served with the letter.

SHOULD THE MONETARY PENALTY BE CONFIRMED, VARIED, OR SET ASIDE?

[26] The analysis of this issue requires an examination of the Monetary Penalty imposed by the Respondent.

MONETARY PENALTY

[27] Section 40(1)(b) of the Act allows the safety manager to issue a Monetary Penalty if there has been non-compliance with the Compliance Order. Accordingly, I must determine whether the Appellant failed to comply with the Compliance Order and, if so, whether the penalty should be upheld or varied.

[28] If a Monetary Penalty is warranted, Section 3 of the Monetary Penalties Regulation sets out the factors the safety manager must consider before imposing a Monetary Penalty.

[29] There is no dispute that the Appellant did not comply with the Compliance Order by conducting the Review and reporting on that within the 30 day time period required.

AMOUNT OF THE MONETARY PENALTY

[30] The amount of the Monetary Penalty has to be considered in light of the foregoing facts.

[31] Section 3 of the Monetary Penalties Regulation sets out the factors that the safety manager must consider in imposing a Monetary Penalty. Only two of those factors are in issue, which are:

(c) Whether the contravention was deliberate; and

(e) The length of time during which the contravention continued.

[32] In an apparent effort to apply the criteria set out in the Regulation, the safety manager has created an internal guideline known as the Monetary Penalty Calculator.

[33] The only evidence before me to explain what use the safety manager made of the Monetary Penalty Calculator is the letter to the Owner of the Company of June 22, 2018 warning of a possible imposition of a Monetary Penalty and the wording in the Monetary Penalty Calculator itself.

[34] In the letter and in the Monetary Penalty Calculator only two of the six criteria from the Monetary Penalties Regulation is identified as having a penalty value which in total amounts to $5,500.00. I consider below the criteria set out in the Regulation, the letter of June 22 and the wording of the Monetary Penalty Calculator itself.

WAS THE CONTRAVENTION DELIBERATE?

[35] The Respondent found that it was deliberate. In the Monetary Penalty Calculator it is stated: “Had knowledge of requirement and informed in writing, but did not comply”. The contravention was found to be at the third level in a maximum of five levels. A scale three was attributable to the contravention amounting to $4,000.00.

[36] There is nothing in the record before me that persuades me that the finding of the Respondent was incorrect. The Appellant submits that it was attempting, in good faith, to comply with the Compliance Order including retaining an Electric Ltd. to obtain the necessary electrical permits but had some difficulty in gaining access to all of the properties in issue. Further, the Appellant submits that the Respondent provided no clarification as to what the Review entailed and that the Appellant misunderstood and misinterpreted the Compliance Order.

[37] With respect to the quantity of the penalty for this contravention, the Appellant also makes a submission based upon a prior Board case *An Alarm and Electric Company*. However, a review of that decision shows that the circumstances were vastly different than the facts of this case. In the prior case, there was a finding that there was a mistake by an inexperienced employee and that the contravention was remedied right away. That case has no similarity to the case before me as the contravention was not remedied "right away" and not for many months after the date set for compliance.

[38] With respect to the issue of whether the Compliance Order needed clarification as to what the Review entailed, there is no evidence before me to suggest that it needed clarification and it appears clear on its face. If the Appellant thought it needed clarifying then he should have asked for it but he did not.

[39] With respect to the submission that the Appellant endeavoured in good faith to conduct a review as required, the Record shows that there were no significant permits taken out until September 2018, whereas compliance was required by April 30, 2018. In all of the circumstances, I do not accept the Appellant's submissions and I agree with the finding of a $4,000.00 penalty for this infraction.

LENGTH OF TIME THE CONTRAVENTION CONTINUED

[40] This contravention was found, by the Monetary Penalty Calculator, to be at level two and attributed a penalty cost of $1,500.00. The Calculator says that the Respondent came to that determination because the contravention "continued for between one and three months from the deadline date". It is clear to me that the contravention continued for the time length set out in the Calculator. Accordingly, I would not disturb the finding of the Respondent under this criteria.

CONCLUSION

[41] For all of the foregoing reasons, the appeal is dismissed.

Member, Safety Standards Appeal Board