

Date Issued: October 29, 2018

Appeal No. SSAB14-2018

Index as: BCSSAB 14 (1) 2018

**IN THE MATTER OF THE *SAFETY STANDARDS ACT*,
S.B.C. 2003, Chapter 39**

**AND IN THE MATTER OF an appeal to the
BRITISH COLUMBIA SAFETY STANDARD APPEAL BOARD**

BETWEEN:

A Licenced Electrical Contractor of an Electrical Company

APPELLANT

AND:

Technical Safety BC

RESPONDENT

REASONS FOR DECISION

Safety Standards Appeal Board:

Jeffrey Hand

Representing the Appellant:

The Appellant

Technical Safety BC:

Lisa Picotte-Li

INTRODUCTION

[1] This is an appeal of a Monetary Penalty MP-2018-0006, dated June 6, 2018 in the amount of \$5,500.00 (the "Monetary Penalty") issued by Technical Safety BC ("TSBC") against an Individual, doing business as an Electric Company. The Monetary Penalty arose out of a failure to obtain an electrical Permit in advance of electrical work being performed.

[2] The Appellant submits that the Monetary Penalty is inappropriate and unwarranted in the circumstances of this case and should be set aside. Technical Safety BC ("TSBC") says the Monetary Penalty is appropriate and should be upheld as it is both correct and reasonable.

ISSUES

[3] The issue in this appeal is whether the Monetary Penalty should be upheld, varied or set aside.

FACTS

[4] The Appellant has carried on business as a licenced electrical contractor for approximately 24 years.

[5] In 2010 the Appellant performed electrical work at a property located in Delta, British Columbia, prior to obtaining an electrical permit. TSBC issued a Compliance Order CO20100028, dated June 29, 2010, ("2010 Compliance Order") which required the Appellant to not perform electrical work unless a permit had been obtained prior to performing such work.

[6] The Appellant says that at the time the 2010 Compliance Order was made it was not uncommon in the electrical trade for contractors to perform work and then obtain the permit and request an inspection of the work. He submits this was done in an effort to achieve some efficiency since permit and inspection requests could only be requested in person. Since receiving the Compliance Order in 2010 the Appellant submits that he has altered this practice such that he applies for permits prior to undertaking electrical work. He says he understands the importance of doing so as part of the regulatory scheme in place in this Province.

[7] The Appellant has two employees. He says that in mid-December, 2017 he received a request from a client to upgrade the electrical panels in a 58 suite apartment complex located in Powell River, British Columbia ("Powell River Property"). He had performed similar work for this client in the past. This assignment was received just prior to the Appellant's departure on a holiday which was scheduled to last from

December 25, 2017 to January 15, 2018. The work in Powell River would be performed in his absence and he arranged for his employees to perform the work while he was away. He says that through inadvertence he neglected to obtain the necessary permit before he left on holidays and it was always his intention to obtain the necessary permit. He relies on the fact that he had obtained numerous permits for similar work in the past as evidence of his normal practice.

[8] On January 16, 2018 an inspection at the Powell River property was conducted by a Safety Officer from TSBC who noted the absence of an electrical permit. The following day, January 17, 2018, the Appellant obtained the necessary permit for the Powell River project. The permit fee was \$629.00.

[9] On March 21, 2018 TSBC advised the Appellant that they were considering issuing a Monetary Penalty as a result of the Powell River infraction which TSBC considered to be a failure to comply with the 2010 Compliance Order. At that time a Monetary Penalty of \$10,000.00 was under consideration.

[10] The Appellant responded to the March 21, 2018 letter explaining his vacation absence and denying that it had ever been his intent not to obtain a permit. He referred to his 24 years in the electrical trade during which time he had only two instances of failing to obtain a permit.

[11] The Safety Manager considered these submissions and issued the Monetary Penalty on June 6, 2018 in the amount of \$5,500.00.

[12] On July 6, 2018 the Appellant brought this appeal.

ANALYSIS

[13] Section 41(b) of the *Safety Standards Act* authorizes the Safety Manager to issue a monetary penalty if there has been a failure to comply with a Compliance Order.

[14] The 2010 Compliance Order required that the Appellant not perform regulated electrical work without first obtaining the necessary permit. There is no controversy that work was performed at the Powell River Property in advance of obtaining the electrical

permit. However, the Appellant submits that a Compliance Order from eight years ago ought not to be used to impose a Monetary Penalty in this instance and in any event, the failure to obtain the permit was due to inadvertence on his part.

[15] There is no provision in the *Act* that places any time limit on the application of a compliance order. Neither is there anything in the 2010 Compliance Order itself that indicates that it is limited in time. Rather, the 2010 Compliance Order speaks to responsibilities on the Appellant going forward that he not perform work without first obtaining a permit.

[16] While the passage of time might be a mitigating factor, the failure to comply with a compliance order, even one that is eight years old, is nonetheless a basis for issuing a monetary penalty. The passage of time in of itself, is not a defense. Accordingly, I find that the Safety Manager was authorized to issue a Monetary Penalty for the Appellant's failure to obtain a permit for the Powell River Property.

Amount of the Monetary Penalty

[17] The Appellant submits that the amount of the Monetary Penalty is excessive.

[18] The Monetary Penalty Regulation establishes six criteria that the Safety Manager must consider when imposing a monetary penalty. Section 3 of the Regulation provides:

Before a Safety Manager imposes a monetary penalty on a person, the Safety Manager must consider the following:

- (a) previous enforcement actions under the Act for contraventions of a similar nature by the person;
- (b) the extent of the harm, or 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 in the contravention.

[19] In an effort to apply these criteria, TSBC has created an internal guideline known as the monetary penalty calculator. For each of the six criteria set out in the Regulation, the calculator establishes a scale of zero through five in an attempt to rate the impact for each of those criteria, where zero is the scoring where there is no impact and five is reserved for matters where there is severe impact. For each of those scores it appears as though TSBC has further established a range of penalty amount for given score, although it is not entirely clear how this range is established or what criteria are used to arrive in dollar amount within the range. The scores and corresponding penalty costs in each of the six categories is then totalled to arrive at a monetary penalty.

[20] It must firstly be observed that the criteria for monetary penalties is set out in the Regulation. The monetary penalty calculator does not have the force of law. It is a guideline at best. My review of the Monetary Penalty must consider only the provisions of the Regulation and whether the Penalty in this instance properly applies the criteria in the Regulation.

[21] I will set out below the criteria from the Regulation and discuss those requirements taking into account the use that the Safety Manager has made of the monetary penalty calculator.

Previous Enforcement Actions

[22] The Appellant received the 2010 Compliance Order for failing to obtain a permit so it would seem that the failure to obtain a permit in respect of the Powell River Property is the second infraction of an identical nature, albeit they occurred some eight years apart.

[23] The Safety Manager considered this is a scale two infraction with a value of \$1,500.00. The descriptive wording set out in the monetary penalty calculator for a scale two infraction is as follows:

One previous instance of compliance order activity related to this action

[24] Strangely, the penalty calculator says that even persons who have no previous enforcement actions receive a scale of one, and presumably a penalty, rather than zero as one might expect. In the result persons like the Appellant who have only one previous enforcement action are automatically elevated to scale two rather than scale one.

[25] That said the Appellant does have a previous enforcement infraction and the Regulation clearly requires the Safety Manager to consider previous non-compliance in arriving at the penalty.

[26] I accept that the imposition of a penalty is warranted to ensure that there is compliance going forward and that the penalty amount must be sufficient to act as a general deterrence. There is no explanation offered as to how the \$1,500.00 penalty was arrived at, which is some cause for concern, but I accept the \$1,500.00 amount imposed by the Safety Manager is appropriate for a second infraction.

Extent of Risk

[27] The Safety Manager considers the extent of risk for the Appellant's failure to obtain the electrical permit in advance of performing the work to constitute a moderate risk at scale two and deserving of a \$1,500.00 penalty amount.

[28] The penalty calculator uses this wording for scale two infractions:

The duty holder action has moderate potential for harm (as found condition)

[29] The Appellant challenges the characterization of this risk as moderate. Implicit in that submission is the suggestion that there was no actual risk of harm if there were no significant defects in the work the Appellant performed. He also says that the upgrade to the fuse panels actually improved safety.

[30] The Safety Manager has not provided any evidence of actual defects giving rise to actual harm so I must assume that the Safety Manager has in mind only the potential for harm if work is done without first obtaining a permit.

[31] The evidence relating to the degree of risk is lacking and doing the best with the evidence before me all that can be said is that the risk of harm here is somewhere between minor and moderate. I am unable to conclude that the risk is at either of those two extremes. On the assumption that a minor risk might warrant a \$500.00 penalty and a moderate one of \$1,500.00, as determined by the Safety Manager, I am going to reduce the amount to \$1,000.00.

Was the Contravention Deliberate?

[32] The Safety Manager concluded that there was evidence on which he could find that the Appellant deliberately avoided the requirement to obtain an electrical permit. He classified this as a scale two infraction because the monetary penalty calculator describes scale two as:

Having knowledge through a compliance tool (email or certificate of inspection) yet did not fulfil the requirements.

[33] The effect of describing deliberate contraventions in this manner is that anyone who fails to comply with a requirement of which they are aware, is deemed to have done so deliberately. The Regulation does not describe deliberate contraventions in this manner. It speaks only of "deliberate contraventions".

[34] In this instance the Appellant describes his failure to obtain the permit as inadvertent and caused by his absence from the office during vacation. He points to an otherwise unblemished record dating back to the 2010 Compliance Order.

[35] I consider the Regulation, when it speaks of deliberate contraventions, to require the Safety Manager to put forward clear and convincing evidence of a deliberate disregard for the Regulation. The Safety Manager's description of the Appellant's motives in this instance is, in my view, incorrect or alternatively, certainly unreasonable on the evidence.

[36] I find that the Safety Manager has not demonstrated that the Appellant acted with deliberate intent, rather than inadvertence. The penalty amount for this criteria should be set aside.

Was the Contravention Repeated or Continuous?

[37] The monetary penalty calculator describes repeated or continuous contraventions in the scale one category as:

Duty holder has a documented history of one relevant non compliance

[38] The 2010 Compliance Order constituted a previous contravention for which the Safety Manager scored this as a scale one infraction and imposed a \$500.00 penalty.

[39] This is an incorrect application of the Regulation. The Appellant has already been levied a penalty under the first category of the Regulation by reason of the Powell River Property constituting a second instance of failing to obtain a permit. By levying an additional penalty for a previous infraction in this category represents a double counting. The legislature would not have intended the first and fourth criteria in the Regulation to refer to the same thing. It must be that the term "repeated or continuous" refers to something other than previous contraventions. It must refer to a contravention that persisted in time or was repeated over and over again. In this instance, there was only one permit that was not obtained and that situation was corrected the day after the inspection was performed at the Powell River Property. The infraction was neither repetitive nor continuous.

[40] There is no basis in my view for a penalty to be levied for repeated or continuous circumstances as that phrase is used in the Regulation on the facts of this case. The \$500.00 Penalty levied in respect of the Powell River Property incident constituting a second instance is duplicative of the Penalty applied for a previous enforcement action and accordingly, should be reduced to zero.

Length of Time

[41] The descriptive language from the monetary penalty calculator for this criteria, where there is no impact is:

The action was discontinued immediately

[42] In this instance the Safety Manager found that the lack of permit was corrected immediately and thus there was no penalty value imposed on this criteria. This is a correct application of the Regulation.

Economic Benefit Obtained

[43] The Safety Manager considered the economic benefit obtained by the Appellant to be insignificant, which he categorized as a Class 1 infraction and with a value of \$500.00. The penalty calculator states:

The duty holder actions resulted in insignificant financial gain/benefit.

Value of zero to \$5,000.00

[44] In contrast, category zero is intended to capture:

The duty holder actions resulted in no actual financial gain/benefit

[45] In this instance there was no actual benefit obtained because the Appellant still incurred the \$629.00 permit fee. The Safety Manager has not demonstrated that it was the Appellant's intention to avoid paying for the permit and therefore obtain some economic benefit, or that the deferral of the permit fee extended over a length of time. I accept the Appellant's evidence that it was always his intention to obtain the permit albeit he failed to do so before he left for holidays.

[46] There is no evidence that the Appellant attempted to conceal the lack of the permit from the Safety Authority in an attempt to avoid incurring the cost of the permit. There is no reasonable basis on which to conclude that the Appellant obtained any actual economic benefit. This portion of the Monetary Penalty should be set aside.

Summary

[47] The monetary penalty calculator should accurately reflect the criteria set out in the Regulation. As set out above, I find that the monetary penalty calculator has created an unwarranted duplication in category one, "Previous Enforcement", and category four, "Repeated or Continuous Contraventions".

[48] Additionally, the criteria set out in the Regulation must be applied after a proper consideration of the evidence. There is an absence of sufficient evidence to find:

- (a) that the Appellant deliberately intended to contravene the permitting requirements;
- (b) that the potential for harm here was moderate; and
- (c) that the Appellant achieved any actual economic benefit.

[49] Applying the Regulation and monetary penalty calculator to the circumstances of this appeal results in the following penalty:

- 1. Previous Enforcement - \$1,500.00
- 2. Extent of Risk - \$1,000.00
- 3. Deliberate Contravention – zero
- 4. Repeated or Continuous Contravention – zero
- 5. Length of time – zero
- 6. Economic Benefit – zero

CONCLUSION

[50] Accordingly, the Monetary Penalty will be reduced to \$2,500.00. This amount should be paid within 30 days of the date of this Decision.

Signed;

A handwritten signature in black ink, appearing to read 'J. Hand', written in a cursive style.

Jeffrey Hand, Vice Chair