Date: May 13, 2014
Appeal No. SSAB 19-2013

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:	REFRIGERATION SERVICE	APPELLANT
AND:	BRITISH COLUMBIA SAFETY AUTHORITY	RESPONDENT

REASONS FOR DECISION

Introduction

[1] This is an appeal of Monetary Penalty No. MP 2013-0015 (the "Monetary Penalty") issued on September 13, 2013 by the British Columbia Safety Authority (the "Respondent") against the Appellant for performing regulated gas work without the required certificate, permission or permit.

History of Appeal

[2] Prior to being served with the Monetary Penalty, the Appellant was the subject of two separate compliance orders from the Respondent, namely Compliance Order No. 1103 and Compliance Order No. CO-2011-0167 (collectively the "Compliance Orders"). Compliance Order No. 1103 (the "First Compliance Order") was issued on April 14, 2010 for performing regulated electrical work without the appropriate license and permit. Compliance Order No. CO-2011-0167 (the "Second Compliance Order") was issued on December 5, 2011 for performing regulated gas work without the appropriate license and permit.

[3] An Appeal Management Conference was held in this appeal on November 18, 2013. At that time, it was ordered that the Appellant was out of time to appeal the Compliance Orders having failed to file an appeal to the Board within the 30 day appeal period for each of the Compliance Orders.

Issues

[4] The sole issue before the Board is whether the Monetary Penalty was appropriately levied by the Respondent.

Position of the Parties

The Appellants' Position

[5] The Appellant provided the Board with written submissions as well as the communication previously provided to the Safety Authority in relation to the Manager's Review of the Monetary Penalty.

[6] The Appellant states that with respect to the work performed on the a Building, which lead to the issuance of the Monetary Penalty, that he was working with the Owner from a Plumbing and Heating Service and that he was certain that a permit had been taken out. He admits that the Owner was not present when he performed the work, but states that the Owner was aware of the fact that he was going to be performing the work in question.

[7] The Appellant admits that he performed the regulated gas work referred to in the Monetary Penalty. However, he submits that, like many other workers, he used the judgment of a professional tradesman to determine whether it was safe for him to do so. In this regard, the Appellant submits that shutting down the gas system required a 24" pipe to move the valve to the off position. He states that the valve was 30 years old and very hard to move. He further states that the system in question was located on a roof top inaccessible by any other mans that the nearly three story roof hatch from within the building itself. The Appellant submits that it would be hard for an individual to access the gas main without climbing up onto the roof and that the person would have to have both motive to tamper with the main and the tools to do so.

[8] The Appellants states that he is aware of a number of situations where tradesman have made similar judgment calls and says that this sort of infraction happens regularly in British Columbia.

[9] The Appellant also relies on a number of instances where he states that sub-standard regulated work has been performed and has not been remedied by the province's safety officers. In this regard, the Appellant submits that there are "two rule books" in use by the province's safety officers.

[10] With respect to the Compliance Orders, the Appellant submits that they were wrongly issued and states that they were based upon assumptions rather than facts. Accordingly, the Appellant submits that the criteria required to be addressed pursuant to the MP Regulation were not properly addressed by the Safety Manager when he issued the Monetary Penalty.

The Respondent's Position

[11] The Respondent submits that because the Compliance Orders were not appealed that the facts set out in the Compliance Orders must be taken as established fact, namely that:

a) The Appellant performed regulated electrical work on or about April 14, 2010 without having the required contractor's license or permit;
b) The Appellant performed regulated gas work on or about December 5, 2011 without having the required contractor's license, certificate of qualification or permit; and
c) The Compliance Orders were duly issued to the Appellant.

[12] Despite what the Respondent states are validly issued Compliance Orders, the Respondent relies on the Affidavit of the Acting Provincial Safety Manager, sworn December 18, 2013 (the "Acting Provincial Safety Manger Affidavit") and submits that the Safety Manager issued the Monetary Penalty not for failure to comply with the Compliance Orders but for performance of regulated work without the required license or certificate of qualification.

[13] The Respondent states that the Appellant does not deny the facts giving rise to the issuance of the Monetary Penalty, namely that:

a) He removed a gas fired rooftop appliance on the a building in Trail, BC on or about June 7, 2013;

b) In the course of doing so he disconnected the gas line and left it open and uncapped;
c) Open, uncapped gas lines represent a safety hazard; and
d) He was not at the material time a licensed gas contractor nor a certified gas fitter, and did not hold nor was eligible to hold a valid installation permit to perform this work.

[14] Further, the Respondent relies on the Owner from the Plumbing and Heating Service, sworn December 16, 2013 (the "the Owner from a Plumbing and Heating Service Affidavit") that deposes that the Appellant was not authorized by his company to perform any gas work and that the Appellant performed the work at issue without his knowledge.

[15] In support of its position the Respondent relies on provisions of the *Safety Standards Act*, S.B.C. 2004, c. 39 (the "Act"), the *Safety Standards General Regulation,* B.C. Reg. 105/2004 (the "SSG Regulation"), the *Gas Safety Regulation*, B.C. Reg 103/2004 (the "GS Regulation") and *Monetary Penalty Regulation*, B.C. Reg 129/2005 (the "MP Regulation"). The Respondent submits that the Appellant does not fall within the categories of persons who are permitted to perform regulated gas work and that the issuance of a Monetary Penalty was appropriate given the circumstances. Further, the Respondent submits that the requirements of the Act and MP Regulation to notify the Appellant that a monetary penalty recommendation has been made and to consider the legislated criteria for assessing a monetary penalty were complied with when the Monetary Penalty was issued.

[16] The Respondent submits that as set out in the Zinn Affidavit that the legislated requirement that regulated work be performed by qualified individuals under permit is essential to the province's safety system and that this is clear in the legislation as the imposition of a monetary penalties is authorized for a first instance of performing regulated work without the required permission, in contrast to other situations where penalties can only be imposed for repeated non-compliance.

[17] With respect to the issues raised by the Appellant in this appeal, the Respondent submits that none of them change the fact that the Appellant, contrary to the Act and its'

associated regulations, performed regulated work without the necessary certificate, permission or permit.

Analysis

[18] The Monetary Penalty alleges that the Appellant performed regulated work without the appropriate certification, permissions and permits. Section 4(1) of the GS Regulations states:

> An individual must not perform regulated work in respect of a gas system or gas equipment unless the individual:
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> (a) Holds a certificate of qualification issued under this Part,
> (b) Is authorized to perform regulated work in respect of gas without holding a certificate of qualification,
> (c) Has successfully completed a training program recognized by a provincial safety manger,
> (d) Holds another certificate of qualification to perform limited work in respect of gas under the Act,
> (e) Is a homeowner acting in accordance with section 24, or
> (f) Is permitted to do so in accordance with section 5 of the Safety Standards General Regulation.

[19] Section 5 of the SSG Regulation provides an exemption to the requirement to be certified, but states that an uncertified individual may only perform regulated work if he or she is directly supervised by an individual fully qualified to perform such work and further requires that such individual be present to oversee the performance of the regulated work.

[20] The term “regulated work” is defined in section 1 of the Act and includes removal of a regulated product, which in turn is define din section 2(1)(b) of the Act to include “gas equipment and systems”. “Gas equipment” is further defined in the GS Regulation to mean “anything used or designed to be used in connection with gas”.

[21] The legislation in this matter is clear. Only appropriately certified individuals may perform regulated work. The Respondent alleges that the Appellant performed

regulated gas work without the necessary certification. The Appellant, despite raising a number of other arguments in support of dismissing the appeal, does not deny that he performed regulated work without being properly certified.

[22] I have considered the other arguments raised by the Appellant. However, none of them take away from the fact that he contravened the Act and the GS Regulation. Section 40(1) of the Act and section 2 of the MP Regulation clearly set out that a monetary penalty may be appropriately levied for a first instance of such contravention. Accordingly, whether the Compliance Orders were appropriately levied does not impact whether the Monetary Penalty was appropriately issued, other than when considering the criteria set out in section 3 of the MP Regulation, as a monetary penalty may be issued without any compliance order previously being levied.

[23] Section 3 of the MP Regulation states:

> 3. Before a safety manager imposes a monetary penalty on a person, the safety manger must consider the following:
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> > 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;
> > f) any economic benefit derived by the person from the contravention.

[24] In addition to complying with section 3 of the MP Regulation, a safety manager issuing a monetary penalty must also comply with the notice provisions set out in section 40(7) to 40(9) of the Act.

[25] Upon review of the Acting Provincial Safety Manger Affidavit, I find that the Respondent complied with the requirements of the Act and MP Regulation by providing the appropriate notice of intention to issue a monetary penalty and by considering the criteria set out in the MP Regulation. Upon review of all of the evidence presented, I see

nothing that shows that the Respondent acted unreasonably in issuing the Monetary Penalty.
In fact, based on a review of the Monetary Penalty Checklist, a higher penalty than the one issued may have been appropriate given the circumstances.

[26] While the Appellant takes issue with the accuracy of the facts set out in the Compliance Orders, the fact remains that he did not appeal the Compliance Orders. Accordingly, regardless of the facts they are based upon, the Compliance Orders stand and are appropriately on the Appellant's safety record and it was reasonable for the Respondent to consider this safety record when assessing the criteria for issuing the Monetary Penalty.

[27] As previously held by the Board in *An Excavating Service v. BCSA*, Appeal No. BCSSAB 4-11-12, paragraph 14, a provincial safety manager's decision to impose a monetary penalty is entitled to deference by the Board. Having found that the Safety Manager acted reasonably in assessing the Monetary Penalty, I find that the Monetary Penalty was appropriately issued to the Appellant.

Conclusion

[28] Accordingly, the appeal is dismissed.

[29] While the above concludes the Appeal, I wish to address the Appellant's contention that unlicensed performance of regulated work regularly takes place in British Columbia. While this may be the case (note that the Board did not investigate the merits of such allegation), it must be said that, as set out in the Acting Provincial Safety Manger Affidavit, such unlicensed performance of regulated work is unsafe and puts the public at risk. If just anyone could perform such work, there would be no need for licensed professionals. However, that is not the case. British Columbia has a legislated safety scheme that works to protect both the public and the tradespeople that perform regulated work on oftentimes inherently dangerous equipment. For this safety scheme to work, everyone must follow the legislated rules with respect to the performance of regulated work.

Signed: