

Date Issued: April 6, 2018
Appeal No. SSAB13-2017

Indexed as: BCSSAB 13 (1) 2017

**IN THE MATTER OF THE *SAFETY STANDARDS ACT*,
SBC 2003, Chapter 39**

**AND IN THE MATTER OF an appeal to the
British Columbia Safety Standard Appeal Board**

BETWEEN:

A Vegetable Processing Facility

Appellant

AND:

British Columbia Safety Authority

Respondent

Safety Standards Appeal Board Panel:

**Jeffrey Hand
Ted Simmons
Tim Haaf**

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal of a Monetary Penalty dated July 31, 2017 (the "Monetary Penalty") levied against the Appellant for failing to comply with a Compliance Order, CO-2017-0066 and dated March 31, 2017 ("Compliance Order").

[2] The Compliance Order required the Appellant to correct a number of electrical conformance issues at a vegetable processing facility operated by the Appellant.

[3] The Appellant submits that it was taking steps to achieve compliance with the Compliance Order and had partially completed the work at the time the Monetary Penalty was issued. The Appellant asks that the Monetary Penalty be set aside.

[4] Technical Safety BC says the Monetary Penalty was properly levied in the circumstances of this case and should be upheld.

ISSUE

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

FACTS

[6] The Company is a vegetable processor carrying on business at a facility located at in Mission, British Columbia (the "Facility"). Owing to the presence of regulated electrical equipment in the Facility, the Company held two Electrical Operating Permits, Numbers 3025114 and 5080114. ("Permits").

[7] These Permits required, amongst other things, the designation of a Field Safety Representative ("FSR"). The Operating Permits expired on April 30, 2016 and June 30, 2016 respectively. Technical Safety BC advised the Appellant of the expiration of these Permits and required them to be re-instated by January 13, 2017.

[8] In January, 2017 the Appellant contacted an Electrical Company with a request that they assume the role of FSR on the Facility. An Individual of the Electrical Company asked that they be allowed to perform an inspection of the facility before determining whether they would accept this assignment.

[9] On January 10, 2017, the Appellant sought an extension of the deadline to identify an FSR to February 10, 2017 owing to difficulties they were encountering in retaining an FSR. Technical Safety BC granted this extension.

[10] The February deadline for appointing the FSR passed and thereafter, Technical Safety BC advised the Appellant that they would be performing an electrical inspection at the Facility.

An inspection was performed on March 21, 2017 and a significant amount of non-conforming electrical work was identified. Two Certificates of Inspection, both dated March 21, 2017 were issued. The first consisted of some 16 pages of non-conforming work. The second was six pages in length and was specifically directed to the high voltage installation at the Facility.

[11] In the course of the inspection performed on March 21st, a representative of the Appellant advised Safety Officers from Technical Safety BC that employees of the Appellant had disconnected some of the electrical equipment notwithstanding that they were not qualified electrical contractors.

[12] Shortly thereafter, a Compliance Order dated March 31, 2017 was issued to the Appellant ordering the Appellant to:

1. Stop authorizing, managing, counselling or directing individuals to perform regulated electrical work until such time as you are able to demonstrate that such individuals are qualified to do so in accordance with the *Safety Standards Act*.
2. Correct the non-compliances identified on their Certificates of Inspection issued on March 21, 2017.
3. Obtain Permits for the remedial work and identify a Field Safety Representative to be named on the Permits.
4. Correct all of the non-compliances within 45 days.

[13] On June 26, 2017 the Electrical Company contacted the Safety Officer, advising that he had been hired by the Appellant to correct the non-compliances and that they were still considering whether they would also agree to be named as the new FSR on the Operating Permit. He was advised that work had commenced on correcting the non-compliances but they had not yet been completed. No work had yet been undertaken on the high voltage non-compliance issues. It is not clear on the evidence submitted when the Electrical Company was first instructed by the Appellants to proceed with remedial work. The evidence discloses only that the Electrical Company was first contacted in January, 2017 and that as of June 26, 2017, work was underway.

[14] On July 7, 2017 Technical Safety BC issued a letter to the Appellant advising that they were considering imposing a Monetary Penalty for the failure to comply with the Compliance Order. The Appellant was advised that a Monetary Penalty in the amount of \$23,000 was under

consideration and a request was made for the Appellant to submit any position they might have on whether that Penalty should be issued at all, or any position on the amount of the Penalty under consideration. No written response was provided by the Appellant.

[15] At some point on or about July 24, 2017 the Electrical Company submitted the necessary paperwork to assume responsibility as the Field Safety Representative for the Operating Permits held by the Vegetable Processing Company.

[16] The Safety Officer contacted the Electrical Company on July 27, 2017 to enquire as to the progress of the work in correcting the non-compliances identified on the Certificates of Inspection. He was told that roughly 50% of the non-compliances had been corrected at that time. Another Individual of the Electrical Company indicated that he was "a little overwhelmed" with how many problems they were encountering. He also advised that he was of the view that there were no current safety concerns of the Facility because they had made safe anything they had found that was in an unsafe condition.

[17] On July 31, 2017 the Monetary Penalty in the amount of \$23,000 was issued.

[18] On August 17, 2017 the Safety Officer again spoke with the Electrical Company. They indicated that work was continuing but there were certain requirements on the Certificate of Inspection on which he needed clarification. He indicated that he or others from his office had been working full-time at the facility for the past four weeks. As of that date he indicated that the Electrical Company had completed "most of the con-compliances" and he requested that a Safety Officer meet with him on site to clarify the Authority's requirements on the remaining deficiencies. He declined to do so and requested instead that the Electrical Company complete all of the work and then request a further inspection.

[19] On August 18, 2017 the Electrical Company provided the Safety Officer with a summary of the work that had been completed and a further request for clarification concerning some of the remaining items to be completed. The summary is not included in the evidence.

[20] The Safety Officer responded in a series of emails beginning at the end of August and extending into September, 2017 attaching photographs from the Facility detailing his specific concerns.

[21] As of September, 2017 the Electrical Company had not yet commenced work on the non-compliances related to the high voltage systems.

ANALYSIS

Standard of Review

[22] Technical Safety BC submits that the standard of review to be applied in this appeal is reasonableness and that, accordingly, the Safety Manager's decision to impose a Monetary Penalty is entitled to deference and should not be varied or set aside unless it is unreasonable. The Appellant makes no submissions regarding the standard of review.

[23] This Board has determined in the past that it will generally apply a standard of review of correctness in determining whether any decisions of the Safety Manager correctly applied the *Act and Regulations*, including any decisions to impose Monetary Penalties. Our reasons for doing so are canvassed in previous Board Decisions, but in summary, provide:

- (a) the governing legislation empowers the Safety Standard Appeal Board to have exclusive jurisdiction to determine all matters of fact, law and discretion to be determined in any appeal;
- (b) the Appeal Board has exclusive jurisdiction and its decisions are final and conclusive and not subject to review in any Court; and
- (c) an appeal is conducted as a new hearing.

[24] The Authorities referred to by Technical Safety BC in support of their argument for a reasonableness standard of review are all concerned with judicial reviews and therefore, are only considering the standard to be applied by a Court in performing a judicial review. They are, in the Board's view, inapplicable to this Board which is not performing a judicial review. We are also guided in this regard by a similar sentiment expressed by Madam Justice Rowles in her Decision found in *Investment Industry Organization of Canada v. Rahmani*, 2010 (BCCA) 1993 at paragraph 39:

The argument IIROC wishes to advance on appeal is the that the common law standard of review as elucidated in *Dunsmuir* ought to be applied by the Commission on a review of the decision of an SRO. In my opinion, IIROC's proposed argument ignores the fact that the Commission's review of the IDA hearing Panel's decision is not a judicial review

and that nothing in the legislative scheme for the regulation of the securities industry suggests that the Commission must give significant deference to a decision of an SRO

[25] This Board has held previously that a standard of review based on correctness will be utilized in determining whether the governing legislation has been properly applied and reserving a reasonableness standard for determining issues in which the Safety Manager has specialized expertise and on which the legislation grants the Safety Manager discretion to apply that expertise.

Compliance Order

[26] Section 38 of the *Safety Standards Act* authorizes the Safety Manager to issue a Compliance Order if, in the opinion of the Safety Officer, there is a risk of personal injury or damage to property because regulated work is being carried out in a manner that does not comply with the *Act* and Regulations. The evidence submitted on this appeal confirms that the Appellant was operating the Facility in contravention of at least three requirements under the *Act* and Regulations being:

- (a) expired electrical permits and lack of a field safety representative;
- (b) regulated work was being performed at the Facility by unqualified individuals; and
- (c) there were numerous electrical violations with the electrical installation at the Facility.

[27] The Appellant does not argue anything to the contrary and so it seems clear that the Compliance Order was not only authorized in the circumstances but warranted.

Monetary Penalty

[28] Section 41(b) of the *Act* authorizes the Safety Manager to issue a Monetary Penalty if there has been a failure to comply with a Compliance Order. The Monetary Penalty Regulation establishes the criteria that the Safety Manager must consider when imposing a Monetary Penalty.

[29] Technical Safety BC submits that the Compliance Order was not fully complied with within the 45 day time limit they provided to the Appellant and that this alone is sufficient grounds for imposing a Monetary Penalty.

[30] The Appellant submits that in January of 2017 they began the process of retaining a new Field Safety Representative and following the issuance of the Certificate of Inspection and Compliance Order, began the process of achieving compliance with the Order. They say they were in the midst of doing so when the Monetary Penalty was issued. While the evidence is less than clear it would seem that approximately 50% of the non-compliances were corrected sometime in July, 2017 and that by August, most of the non-compliances had been corrected and no immediate safety concerns were left.

[31] Again, while the evidence submitted by both sides is sparse, it would seem that the remedial work took longer than anticipated. It also appears that not insignificant sums were incurred by the Appellant in its efforts to comply with the Compliance Order. We know only that approximately \$50,000 was apparently incurred by the Appellant up to a point in August, 2017 when "most" of the non-compliances had been corrected. In these circumstances, the Appellant submits that it should not be penalized when it was making efforts to comply, albeit it was taking longer than the 45 days they had been given by Technical Safety to achieve full compliance.

[32] For its part, Technical Safety BC says only that in their view the Appellant could have corrected all of the deficiencies with greater diligence but no specific evidence is put before the Board to substantiate that assertion. Neither is there evidence before us that would reveal with greater specificity which non-compliances were remedied and when, and which of those were deemed to be the most serious in terms of safety concerns.

[33] There is some evidence that the Electrical Company was working full-time at the Facility by July, 2017 but we have no information concerning the size of their work force, the instructions they were receiving from the Appellant, when all of the non-compliances were ultimately corrected, and precisely what costs were being incurred in performing those repairs. There is also no explanation offered from the Appellant as to what was occurring in the time frame between late March, 2017 when, the inspection at the Facility was first performed by Technical Safety BC, and June, 2017 when the Safety Officer first spoke with the Electrical Company to obtain an update on the progress of repairs.

[34] Doing the best with the evidence before the Board, we make the following findings.

[35] The evidence clearly establishes that a Compliance Order was properly issued in the circumstances of this case. The Safety Manager's opinion regarding concerns of public safety at the Facility is well supported by the photographic evidence submitted on this appeal.

[36] The evidence also discloses that full compliance with the Compliance Order was not achieved by May 15, 2017, the deadline imposed by the Order. A Monetary Penalty is not only authorized by the applicable legislation but is also appropriate in circumstances where public safety is potentially at risk. The imposition of a Monetary Penalty is one means available to ensure the ongoing protection of the public but also to deter similar behaviour in the future. The Board finds that the imposition of a Monetary Penalty is appropriate in the circumstances of this case.

[37] Turning lastly to the amount of the Penalty, this requires the consideration of what the Regulation says concerning the criteria for imposing Monetary Penalties.

[38] The Monetary Penalties Regulation; B.C. Reg. 129/2005 ("Regulation") provides at Section 3:

"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;
- (f) any economic benefit derived by the person from the contravention.

[39] In applying the criteria set out in the Regulation, Technical Safety BC 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 Technical Safety BC has further established a range of penalty amount for a given

score, although it is not entirely clear how this range is established or what criteria are used to arrive at an amount within the range. The scores, and corresponding penalty cost in each of the six categories is then totalled to arrive at a Monetary Penalty. Each of these will be discussed below.

Previous Enforcement Actions

[40] The Appeal Record contains mention that the Appellant received a Compliance Order in 2012 relating to the Facility. No other information is provided as to the actual contravention that was the subject of that earlier compliance order. The Safety Manager has given the Appellant the score of 3 and the penalty cost of \$4,000 on the basis that the present contravention is effectively a repeat offense of a similar contravention in the past. Neither the Appellant nor Technical Safety BC has provided any information that allows us to understand what was similar to the present compliance concerns. No information is provided as to why this constitutes a \$4,000 penalty cost.

Potential for Harm

[41] Technical Safety BC considers the non-compliances in this instance to constitute a major potential for harm, giving it a score of 4 and a penalty cost of \$8,000. While the Board can agree that the evidence discloses serious safety concerns, it is difficult to determine on the evidence available what constitutes "significant" as opposed to a "major" safety concern, as those terms are used in the Monetary Penalty Calculator. We pause here to note that the Calculator is an internal guideline only and not part of the governing legislation.

Was the Contravention Deliberate?

[42] Technical Safety BC has scored this criteria as Level 4 out of a possible 5 and assigned a penalty cost of \$8,000. This portion of the Monetary Penalty goes to the main thrust of the Appellant's argument. That is, do the facts of this appeal disclose a deliberate disregard of the Compliance Order warranting a penalty at the uppermost end of the range in this category? The only score available above Level 4 would, according to the guidelines utilized by Technical Safety BC, exist where the Appellant had specifically told the Safety Manager that they did not intend to comply.

[43] As noted above, the evidence here discloses that the Appellant did retain a qualified electrical contractor to correct the non-compliances and incurred costs of approximately \$50,000 in taking steps to comply with the Compliance Order. It is not possible to say based on the evidence submitted whether the repairs could have been completed with greater diligence on the part of the Appellant. There is at least some reason to believe that the work performed by Western Integrated did not begin in earnest until June, or perhaps July, 2017. There is also some evidence that suggests the scope of the work ultimately turned out to be much larger than expected and there were some difficulties in identifying all of the issues of concern set out in the Certificate of Inspection. It is not clear that the May 15, 2017 deadline was a reasonable, or indeed, achievable deadline. Of course, that cannot excuse the Appellant from the consequences of having a Facility in very poor condition but it is evidence that goes some distance to explaining why the repairs took longer than anticipated.

[44] The lapse of the Operating Permits and loss of the FSR is certainly cause for concern and these were to have been rectified by January 13, 2017. The evidence discloses that the Appellant did take steps shortly before that time to secure a new FSR but this too, like the repair work, took additional time. The Appellant should have, in the Board's view, proceeded with greater diligence to reinstate the permits.

[45] But the same cannot be said of the Appellant's efforts to correct deficiencies at the Facility. It is difficult to conclude on the evidence submitted that the failure to achieve full compliance with the Compliance Order within 45 days was deliberate.

Was the Contravention Repeated or Continuous?

[46] Technical Safety BC has scored this at the low end of their scale, being a score of 1 with a penalty cost of \$1,000. They appear to have done so because of the 2012 Compliance Order but there is no evidence that the non-compliances that formed the basis of the Compliance Order at issue are the same as those that existed in 2012. The internal guideline seems to be a misapplication of the criteria set out in the Regulation which must be speaking to the question of whether or not the non-compliance was a single event, and temporary in time, as opposed to continuous. The legislature cannot have contemplated that this be a reference to previous enforcement actions since that criteria is already encompassed in the first element to be considered in imposing a Monetary Penalty.

Length of Time the Contravention Continued?

[47] Technical Safety BC has scored this as a Category 1 with a penalty cost of \$1,000 on the basis that the contravention continued for at least one month but less than three months from the date that compliance was to have been achieved. This seems reasonable on the facts before us.

Economic Benefit Obtained

[48] This has been scored as Category 1 with a penalty cost of \$1,000 on the basis that there was insignificant financial gain to the Appellant. Based on the Appellant's submissions that they had incurred at least \$50,000 in performing some of the repairs, it can only be said that the only economic benefit conceivably achieved is a deferral of remediation expenses rather than an avoidance of them. This analysis cannot be quantified on the evidence before us but we have no reason to conclude that the Safety Manager's conclusions about the lack of economic benefit were inappropriate in these circumstances.

[49] Considering all of the foregoing, the Board is of the view that insufficient consideration was given by the Safety Manager to the steps taken by the Appellant to bring the Facility into conformance with the Compliance Order. That is not to say that the Appellant should be in any way excused for the contraventions of the *Act*. The Compliance Order and subsequent decision to impose a Monetary Penalty was entirely appropriate.

[50] However, the facts as presented do not support a penalty in the amount levied and the Board is ordering that it be reduced to \$19,000. 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
Safety Standards Appeal Board

Ted Simmons

Ted Simmons, Member
Safety Standards Appeal Board



Tim Haaf, Member
Safety Standards Appeal Board