

Counsel for the Appellant states that the Monetary Penalty should be cancelled or reduced and submits that an assessment of the criteria enumerated in the *Monetary Penalties Regulation*, B.C. Reg. 129/2005 (the “MPR”) supports this conclusion. Counsel for the Respondent disagrees and states that the Monetary Penalty is reasonable and that there is no basis for the Board to vary or set it aside.

[2] The issue that must be determined is whether the Monetary Penalty ought to be upheld, dismissed or varied. To do so I must consider the application of the criteria set out in the MPR.

Position of the Parties

[3] The parties do not dispute that electrical work was performed at the Property without an electrical permit being obtained as required by section 12 of the SSGR. However, counsel for the Appellant submits the following in relation to the nature of the contravention:

- a) The contravention was the result of a single, unrepeatd instance of a new employee mistakenly being unaware of the procedures relevant for obtaining a permit for the type of work in question;
- b) The Appellants have since created additional employment policies to ensure that all new employees will be properly trained and aware of the necessary procedures;
- c) The appellants have met with a local electrical inspector and discussed this matter to be better prepared and diligent;
- d) The specific nature of the electrical work involved was very minor, and only dealt with 16 volts, which does not present a risk of harm to others. The electrical work was conducted at a private residence and was not active; and
- e) There was no economic benefit realized.

Further, counsel for the Appellants states that an assessment of the criteria enumerated in section 3 of the MPR does not support the issuance of the Monetary Penalty. The Respondent disagrees.

[4] The first criterion set out in the MPR is whether there were previous enforcement actions under the Act for contraventions of a similar nature. Counsel for the Appellant states that there is no evidence of previous contraventions of a similar nature resulting in enforcement action and states that the amount of the Monetary Penalty would be more appropriate in circumstances where there had been previous enforcement activity. Counsel for the Respondent states that

the lack of previous enforcement action was taken into account by the Respondent in issuing the Monetary Penalty.

[5] The second criterion set out in the MPR is the extent, or degree or risk, of harm. Counsel for the Appellants submits that there was no harm and no degree of any risk of harm to others as a result of the contravention as the electrical work being performed involved only 16 volts and was not active at the time. Counsel for the Respondent agrees that the degree of risk or harm was minor, but states that there is a possibility of fire if the cabling is damaged during installation.

[6] The third criterion set out in the MPR is the whether the contravention was deliberate. Counsel for the Appellants states that the contravention was not deliberate, but rather the accidental result of a new employee being unaware of the procedure required for obtaining a permit on wired installation work. Counsel for the Respondent states that the Provincial Safety Manger considers the Appellants' failure to obtain a permit deliberate as the Appellant was aware of the obligation to obtain a permit having been previously warned by a safety officer that it must do so several years previously. As further evidence of the deliberate nature of the contravention, counsel for the Respondent states that evidence indicates that the job was within 24 hours of cover and the FSR had not submitted a request for inspection as required at least 48 hours before cover.

[7] The fourth criterion set out in the MPR is whether the contravention was repeated or continuous. Counsel for the Appellants states that the contravention was not repeated nor continuous. Counsel for the Respondent disagrees and states that the Appellant had previously been found performing regulated work without a permit in 2009; making this contravention a second instance of unpermitted work by the Appellant.

[8] The fifth criterion set out in the MPR is the length of time during which the contravention continued. Counsel for the Appellant states that the contravention did not continue or remain unaddressed and that the length of time of non-compliance was very limited and discrete. Counsel for the Respondent agrees with the Appellants regarding this criterion.

[9] The sixth criterion set out in the MPR is whether any economic benefit was derived from the contravention. Counsel for the Appellant states that the Appellants did not derive any

economic benefit from the contravention as it pays an employee to ensure that these sorts of contraventions do not occur. Counsel for the Respondent states that notwithstanding the employee costs incurred by the Appellants that the Appellants saved payment of the permit fee. Further, counsel for the Appellants states that the Safety Manager noted that the savings was minimal and took this into account when making his decision regarding the issuance of the Monetary Penalty.

Analysis

[10] The parties agree to the facts leading up to the issuance of the Monetary Penalty and the fact that the *Act* permits safety officers to issue compliance orders when there are instances of non-compliance with the Act or GSRR. Accordingly, it is only the application of the criteria enumerated in section 3 of the MPR that I must determine.

[11] The Monetary Penalty issued in this matter is \$6000.00. There is no question that the Provincial Safety Manager had discretion to levy such a penalty. Section 40 of the *Safety Standards Act*, S.B.C. 2003, c. 39 (the “Act”) states that a monetary penalty may be issued upon failure of a person to comply with a provision of the Act or a regulation made under the Act in circumstances where the legislation states that a monetary penalty may be issued for such a contravention. The MPR prescribes that failure to obtain a permit as required by section 63(b) of the Act is a contravention that may attract a monetary penalty.

[12] The Respondent relies on the Monetary Penalty checklist included in the Appeal Record filed in this matter to reach the calculation that the \$6000 amount of the Monetary Penalty is appropriate for the specific contravention at issue. However, a detailed review of the criteria enumerated in the MPR and the Monetary Penalty Calculator indicates that the penalty assessed ought to be reduced.

[13] The Monetary Penalty Calculator is a tool used by the Respondent to calculate the amount of monetary penalties issued under the MPR. It is my understanding that it reflects the Respondent’s internal policy regarding how the criteria enumerated in the MPR are considered when issuing a monetary penalty. While such a calculator is certainly helpful to the Respondent, particularly in ensuring consistency amongst penalties levied, it is the MPR that governs not the calculator. Accordingly, in coming to my decision I looked at each of the enumerated criteria as applied to the facts before me in this appeal.

[14] With respect to the first criterion, whether there was previous enforcement action, the parties agree that there was no previous enforcement action relating to the Appellants' failure to obtain a permit. Interestingly, the monetary penalty calculator scores a one on the Respondent's scale of zero to five even though there is no previous enforcement action. Accordingly, it would be impossible for anyone to get a 0 on this criterion in the eyes of the Respondent. I am not persuaded that this should be the case in all circumstances.

[15] With respect to the second criterion, the extent of harm or degree of risk, the parties agree that the degree of harm is minor. I find that due to the small risk of fire if the cabling is damaged prior to being covered that the rating of 1 out of 5 given by the Provincial Safety Manager is appropriate.

[16] With respect to the third criterion, whether the contravention was deliberate, I note that the Respondent's monetary penalty calculator considers whether an individual knew or had been advised of the fact that the requirement contravened existed. The Appellants do not state that they did not know that a permit was required. They admit this. However, they state that the contravention was not deliberate and that their failure to obtain the requisite permit resulted from an inexperienced staff member making an error as opposed to a deliberate action on the Appellant's part. Counsel for the Respondent states that there is evidence that the field safety representative failed to call for an inspection and that this supports the finding that the contravention was deliberate. However, any evidence in this regard is less than clear. A review of the evidence in the Appeal Record supports the Appellants' version of events: immediately upon learning of the contravention, the Appellants accepted responsibility, rectified the error by obtaining the necessary permit and changed their employee procedures to ensure that future errors would not occur. In the circumstances before the Board on this appeal, I find that the monetary penalty calculator does not take into account the possibility of a non-deliberate mistake in circumstances where an individual knows of the statutory requirements but mistakenly fails to comply. Accordingly, I would substitute a zero for the one given to the Appellant for this criterion on the monetary penalty calculator.

[17] With respect to the fourth criterion, whether the contravention was repeated or continuous, a review of the appeal record filed in this appeal indicates that the Appellants had been found performing unpermitted work at least once previously. In fact, a compliance order was issued at that time requiring the Appellants to refrain from performing regulated work

without the necessary permits in place. Accordingly, I accept the Provincial Safety Manager's calculation regarding this criterion.

[18] With respect to the fifth criterion, the length of time, there is no issue as the parties agree that the length of time for the contravention was very short before it was rectified.

[19] With respect to the sixth criterion, whether an economic benefit was derived, a review of the parties' submissions and the appeal record indicates that the Appellants avoided having to pay the initial permit fee. While minor, there was some economic benefit and I find that the Provincial Safety Manager's assessment of this criterion correct.

[20] Using the Respondent's monetary penalty calculator, the Provincial Safety Manager determined that the appropriate range for a monetary penalty was \$6,000 to \$15,000. As set out above, I find that the Appellant's contravention was not deliberate. I also note that there was no previous enforcement activity with respect to this contravention. Accordingly, I find that I cannot uphold the amount of the Monetary Penalty as issued and reduce the penalty from \$6,000 to \$4000.

Conclusion

[21] For the reasons set out above, I vary the amount of the Monetary Penalty from \$6000.00 to \$4000.00. Further, in the event that the Appellants require time to pay the reduced amount of the fine they may apply to the Board for directions regarding time to pay.

A handwritten signature in black ink, appearing to read 'Emily C. Drown', written over a horizontal line.

Emily C. Drown
Chair, Safety Standards Appeal Board