

Date Issued: July 18, 2018  
Appeal No. SSAB 22-2017

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

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

BETWEEN:

A Property Corporation

APPELLANT

AND:

British Columbia Safety Authority

RESPONDENT

Member, Safety Standards Appeal Board	David Martin
Counsel for the Appellant:	Sasha Gritt
Counsel for the Respondent:	Lisa Picotte-Li

REASONS FOR DECISION

INTRODUCTION

[1] This appeal concerns the Monetary Penalty issued on November 8, 2017 (the “**Monetary Penalty**”) by Provincial Safety Manager of the B.C. Safety Authority (the “**Respondent**”) against a Property Corporation (the “**Appellant**”).

[2] Monetary Penalty No. MP-2017-0034 was issued in the amount of \$15,000.00 for the Appellant’s failure to comply with Compliance Order No. CO-2017-0068 (the “**Compliance Order**”) issued April 12, 2017, and in particular the requirement to correct the non-compliances

identified in the Certificate of Inspection issued subsequent to the electrical inspection performed on January 19, 2017 at the Appellant's Hotel (the "**Hotel**").

[2] The electrical inspection required that the Appellant correct the non-compliance by March 31, 2017. The Compliance Order gave the Appellant to May 13, 2017 to provide a written submission saying that the non-compliance had been corrected. It is conceded that compliance was not achieved by that deadline and the Appellant did not achieve compliance until December 1, 2017.

[3] Counsel for the Appellant submits that the Monetary Penalty should be reduced to \$6,000.00 and submits that an assessment of the criteria set out in the Monetary Penalty Regulation (the "**MPR**") supports this conclusion. Counsel for the Respondent disagrees and submits that the Monetary Penalty is reasonable and there is no basis for the Board to vary it.

## **ISSUE**

[4] The issue on this appeal is whether the amount of the Monetary Penalty should be upheld or varied. To do so I must consider the application of the criteria set out in the MPR. The Respondent has raised the issue of the correct standard of review for the Board on this appeal. Therefore, I must determine the standard of review, and then whether the Monetary Penalty is upheld or varied when that standard of review is applied to the facts and the law in this appeal.

## **BACKGROUND**

[5] By letter of August 29, 2017 from the Safety Manager of the Respondent to the Appellant notification was given of a potential Monetary Penalty. In considering each of the criteria under the MPR, the Safety Manager said the following with respect to the six criteria:

“1. There have been previous enforcement actions under the Act for contraventions of a similar nature by the person: On April 24, 2012, this Property Corporation was issued Compliance Order No. CO-2012-0038 requiring correction of an identified electrical non-compliance in Kelowna, BC.

2. The extent of the harm, or of the degree of risk of harm, to others as a result of the contravention: The Certificate of Inspection that was issued for the location the Hotel indicates a “Moderate” category safety risk. Based on the evidence before me, this assessment of the degree of risk of harm is warranted.

3. Whether the contravention was deliberate: Arrangements to have the non-compliances corrected had not been made even when it became apparent and a request was made to do so. Further, after being served a compliance order arrangements to correct the non-compliances still were not made to do so within the time frame stipulated in the order. Accordingly, I am of the opinion that the Property Corporation was aware of the requirements of the compliance order and the consequences of non-compliance with the order. These findings suggest to me that the contravention was deliberate.

4. Whether the contravention was repeated or continuous: The compliance order required, in part, that you instruct the Field Safety Representative named on your electrical operating permit to provide a written submission to BCSA by May 13, 2017, indicating that the non-compliances had been corrected. To date, there is no evidence of a written submission having been provided to BC Safety Authority.

5. The length of time during which the contravention continued: It has now been seven months since the Certificate of Inspection was issued, and more than three months since the date you were required to comply with the compliance order.

6. Economic benefit was derived from this contravention: I am of the opinion the Property Corporation is saving the costs with having to correct the non-compliances in this circumstance.”

[6] The Appellant’s corporate counsel replied to the letter of August 29, 2017 by a letter dated September 27, 2017. In that reply, the Appellant set out various reasons for the delay in completing the electrical upgrade work that was the subject of the Compliance Order. In the main, the Appellant said that electrical upgrade work that had been done had to be redone and that there was a delay by the new contractor due to other work commitments that the new contractor had.

[7] The Monetary Penalty was then imposed by the Safety Manager in the letter of November 8, 2017 to the Appellant. He concluded that the Appellant had not provided sufficient reason or evidence in support of why the Monetary Penalty should not be imposed or that the Respondent was wrong in its assessment. In the main, his conclusion for the imposition of the Monetary Penalty was that the Appellant had sufficient time to complete the compliance work required.

## **POSITION OF THE PARTIES**

[8] As the parties made submissions on the criteria set out in the MPR, I will address each of the criteria and the parties' position on them.

### **Previous Enforcement Actions**

[9] This criterion allows for a consideration of whether there were previous enforcement actions under the Act for contraventions of a similar nature. The Appellant's position is that there were no such previous enforcement actions, whereas the Respondent takes the position that this criterion does not require the contravention to be a separate incident and that the Compliance Order is an enforcement of a similar nature. The Respondent says further that a compliance order issued to the Appellant in 2012 (CO-2012-0038) was a contravention of a similar nature, as found by the Safety Manager. The Respondent submits that the Appellant has been repeatedly found to be performing regulated electrical work contrary to legislative requirements.

[10] With respect to the prior compliance order the Appellant submits that the non-compliance in issue in the prior order is different in nature from the Compliance Order in that, for the 2012 issue, the Appellant did not have an electrical operating permit and it was required to obtain it within a certain deadline. Further, says the Appellant, the 2012 compliance order was related to a different business establishment owned by the Appellant, i.e. a restaurant located in Kelowna.

### **Potential For Harm**

[11] This criterion allows for a consideration of the extent of the harm, or of the degree of risk of harm, to others as a result of the contravention. The Appellant submits there has been no harm to others as a result of its failure to comply with the Compliance Order.

[12] Further, the Appellant submits that the degree of risk of harm must be considered based on the very long history of the Hotel void of harm to others related to the non-compliances identified in the Certificate of Inspection and, due to the fact that the most urgent repairs in nine rooms of the Hotel were completed in June 2017, there was little risk of harm due to the Appellant's failure to comply with the Compliance Order before May 13, 2017.

[13] With respect to the Safety Manager's finding that the risk of harm as a result of the contravention was "moderate", the Appellant submits that there was no such risk of harm identified in the Certificate of Inspection, and that a rating of three under this criterion is only for significant potential for harm. The Appellant says that the Respondent provided no explanation or evidence with respect to its assessment of risk of harm. The Respondent's position is that actual harm does not need to occur for there to be an assessment of the risk of harm, but concedes that the Respondent erred in identifying the risk of harm as "moderate" and that the Monetary Penalty was based on the risk of harm being "significant" and that this error was a clerical error. The Respondent refers to the Safety Officer and the Safety Manager on the issue of the degree of risk and to show that the degree should have been "significant" but, due to a clerical error, it was stated to be moderate by the Safety Manager. The Appellant's position is that it should have received a rating of two under this criterion with a dollar amount of \$2,000.00.

#### **Was The Contravention Deliberate?**

[14] This criterion allows for the consideration of whether the contravention was deliberate. In submitting that the failure to comply with the Compliance Order was not deliberate, the Appellant relies upon dictionary definitions of the word "deliberate" and that the Appellant did not consciously and intentionally not comply.

[15] The Appellant relies upon the Affidavit of the Hotel's General Manager for the submission that the Appellant was intending in good faith to bring the Hotel in compliance but that various factors outside of the Appellant's control did not allow the Appellant to achieve compliance until December 1, 2017. The Appellant says that a rating of zero under this criteria should have been given.

#### **Was The Contravention Repeated or Continuous?**

[16] This criterion allows for the consideration of whether the contravention was repeated or continuous. The Appellant's position is that a failure to comply with the Compliance Order is not a repeated contravention. However, it concedes that it is continuous by its very nature. Further, it says that it should not be punished for the very nature of the contravention under this criterion as this is already covered under Section 3(e) of the MPR, i.e. the length of time during which the contravention continued. Therefore, a rating of zero should have been assigned for this criterion.

### **Length Of Time The Contravention Continued**

[17] As stated, this criterion allows for consideration of the length of time during which the contravention continued. The Appellant does not dispute a rating of three assigned by the Respondent under this criteria with a dollar amount of \$4,000.00.

### **Economic Benefit Gained**

[18] This criterion allows for a consideration of any economic benefit derived by the Appellant from this contravention. The Appellant submits that it did not derive any economic benefit from the contravention and in fact lost money as it effectively had to pay twice for the work required to fix the non-compliances. Therefore, a rating of zero should have been applied for this criterion.

[19] The Respondent's position is that the Appellant attempted to save the cost of hiring a licensed and qualified contractor by having its own staff perform the work. With respect to whether the Appellant had to pay twice for the compliance work, this does not detract from the economic benefit that it would have derived and, further, the Appellant did not initially use the first contractor which quoted on the project, presumably to save money.

## **ANALYSIS**

### **Standard of Review**

[20] Before turning to the more substantive issues, I must first determine the standard of review for this appeal as that subject has been raised by the Respondent. For the reasons set out in *A Gas Company v. British Columbia Safety Authority*, SSAB 14 (1), 2016, I find that the standard of review is one of correctness. However, as stated at paragraph 25 of that case:

"While the standard of review is one of correctness, in a case as this where the Board is tasked with determining whether a Provincial Safety Manager correctly exercised the discretion given to him to levy monetary penalties by the Act, the standards of correctness and reasonableness meld as the Provincial Safety Manager would be found to have acted "correctly" if there were appropriate grounds to levy a monetary penalty and the penalty itself was reasonable in light of the evidence before the Board."

[21] The Monetary Penalty issued in this case is \$15,000.00. There is no question that the Provincial Safety Manager had discretion to levy such a penalty. Section 40 of the *Safety*

*Standards Act*, SBC 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 the Regulation made under the Act in circumstances where the legislation states that a Monetary Penalty may be issued for such a contravention.

[22] The Respondent relies on the Monetary Penalty Calculator included in the Appeal Record filed in this matter to reach the calculation that the \$15,000.00 Monetary Penalty is appropriate for the 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 slightly reduced.

[23] 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.

[24] For each of the six criteria set out in the MPR, 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 the Respondent 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 totaled to arrive at a Monetary Penalty. The general principles that underlie the levying of a penalty are set out in the Safety Authority's letters of August 29, 2017 and November 8, 2017 but there is no explanation of how the amount of the penalty was chosen. Each of the categories will be discussed below.

### **Previous Enforcement Actions**

[25] The Calculator has given the Appellant a score of one and a penalty cost of \$1,000.00. There is confusion between the Safety Manager's assessment and what is stated in the Calculator. The Safety Manager relied upon the compliance order in 2012 as a previous enforcement action. The final letter to the Appellant from Jim Fullerton of November 8, 2017

does not refer to this issue. However the description set out in the Calculator is inconsistent with the Safety Manager's assessment, where it states:

"FIRST INSTANCE of compliance activity related to this action, no previous enforcement action."

[26] The Respondent seeks to resolve this apparent inconsistency by submitting that a previous enforcement action need not be a separate incident – that the Compliance Order is in itself an enforcement action of a similar nature. I do not accept this argument. It is clear from Section 3(a) of the MPR that a previous enforcement action must be exactly that – an action separate and apart from the Compliance Order.

[27] However, the evidence before me is that there was a previous enforcement action in 2012 and the Safety Manager relied on that event for his findings of a prior enforcement action in his August 29, 2017 letter and I accept that finding over what is stated in the Calculator.

[28] The remaining issue is whether the prior enforcement action was of a similar nature to the Compliance Order. Although the 2012 issue concerned one of the Appellant's properties other than the Hotel and was a different electrical issue, given the expertise of the Safety Manager, I cannot say his finding was incorrect or unreasonable. As a result, I would not vary the \$1,000 penalty assessed.

### **Potential for Harm**

[29] There is a discrepancy in the assessment given by the Safety Manager and the description as found in the Calculator. The Safety Manager's assessment was that the degree was "moderate" and, later, the Calculator described the degree as "significant". This discrepancy is explained, as a clerical error, in the affidavits filed. The Respondent also refers to reports from a Safety Officer, Safety Manager and Senior Safety Officer to support that the risk of harm was significant. I accept the submission that there was a clerical error as the evidence shows that there was a high level of concern about the Appellant's non-compliance.

[30] On the issue of whether it is necessary for there to be a finding of actual harm based upon the non-compliances, I conclude that actual harm need not be shown under this criterion based on the wording of the MPR. Rather, it is the degree of risk to others that is an issue. I conclude that the degree of risk of harm is adequately explained in the record before me. As well, as this is a matter that is squarely within the expertise of the Safety Manager, I must



assess his finding on a reasonableness basis. I cannot find that the conclusion was unreasonable.

### **Was the Contravention Deliberate?**

[31] The Respondent has scored this criterion as level three and assigned a penalty cost of \$4,000.00. The Appellant's argument on this issue is, essentially, that while it knew of the deadline to comply with the Compliance Order, it was acting in good faith to comply. On the evidence before the Board, there is no issue of the Appellant being mistaken about what was required and by what date. Even though there may have been circumstances outside of the Appellant's control that caused the failure to comply does not mean that the failure was not done consciously or intentionally. The repairs were not completed for about 7 months after the compliance date of May 13, 2017. I would not disturb the finding by the Respondent.

### **Was the Contravention Repeated or Continuous?**

[32] The Respondent scored this at the low end of its scale, being a score of one with a penalty cost of \$1,000.00. The Safety Manager's reason on this issue was based on the fact that the non-compliances were not remedied by the due date of May 13, 2017, and had not been completed by the date of his letter, August 29, 2017, nor by the time of the November 8, 2017 letter. However, I note that the description for this penalty in the Calculator is that there was "a documented history of one relevant non-compliance". Not only is the Calculator's description different from that of the Safety Manager's, a history of non-compliance is a relevant factor under the first criterion as already discussed.

[33] Consistent with my earlier resolution of the inconsistency between the Calculator and the Safety Manager's description, I will accept that the reason for the penalty is as described by the Safety Manager.

[34] That leaves for consideration the issue of whether the contravention was repeated or continuous. It seems evident that in order for it to be "repeated" it would have to be a fresh non-compliance and could not be solely from the failure to comply with the Compliance Order. The only evidence before me is the non-compliance with the Compliance Order and, therefore, it was not repeated.

[35] With respect to whether the non-compliance was continuous, because the non-compliance spanned many months it was, by its very nature, continuous. With respect to the Appellant's argument that the continuing nature of the non-compliance should be considered only under the Section 3(e) criterion, I disagree.

[36] It seems to me that the issue of the length of the non-compliance can be considered under both Section 3(d) and 3(e) with the appropriate degree of penalty assessed according to the length of time under Section 3(e). Here, the Monetary Penalty for Section 3(d) was very low and the length of time during which the contravention occurred was assessed at a higher penalty under Section 3(e). In short, the length of time of the non-compliance was not a factor for the Section 3(d) penalty but only for the Section 3(e) penalty. Therefore, the Appellant had not been penalized twice for the same default. I cannot conclude that the assessment was incorrect.

#### **Length of Time the Contravention Continued**

[37] Here the score was category three with a penalty cost of \$4,000.00 on the basis that the contravention continued until December 1, 2017 which was a significant period of time from the required compliance date. The Appellant does not dispute the assessment based upon this criterion.

#### **Economic Benefit Obtained**

[38] This was given a score of one for a penalty cost of \$1,000.00. Although the cost savings to the Appellant in not performing the compliance work was considered to be an economic benefit by the Safety Manager, by the time it ultimately completed the compliance work the evidence shows that it incurred some substantial costs to effect the compliance. While it is true that the Appellant tried to save money by having its own maintenance employees perform the work, ultimately it paid to have the work finally done.

[39] At the time of the August 29 and November 8 letters from the Safety Manager the compliance work had not been done. Therefore, it was not unreasonable for the Safety Manager to conclude that the Appellant was saving the costs to correct the non-compliance.

[40] However, I have evidence that was not known by the Safety Manager which is contained in the Affidavit of the Hotel's General Manager. That Affidavit shows the cost incurred to

remedy the non-compliance which was not inconsequential. Therefore, there was no eventual cost savings by the Appellant. In the result, I would eliminate this penalty.

[41] Again, I wish to comment on what I see as an anomaly in the descriptions used in the Calculator. The description in the Calculator for a category one is "...actions resulted in insignificant financial gain/benefit - \$0 to \$5,000. Therefore, even if the gain/benefit was zero, there could be an assessment of a category one. Anomalously, for an assessment of "0", the Calculator calls for no actual gain/benefit. Therefore, if the gain/benefit was "zero" the assessment would be in either category.

### **CONCLUSION**

[42] Based upon all of the foregoing, the appeal is allowed to the extent that the Monetary Penalty is reduced to \$14,000.00.

Signed:



David Martin  
Safety Standards Appeal Board