

Date: June 9, 2017
Appeal No. SSAB 15-2016

Indexed as: BCSSAB 15 (1) 2016
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 COMPANY AND AN INDIVIDUAL** APPELLANTS

AND: **BRITISH COLUMBIA SAFETY AUTHORITY** RESPONDENT

REASONS FOR DECISION

Introduction

[1] This is an appeal of Monetary Penalty No. MP 2016-00152013-0015 (the “Monetary Penalty”) in the amount of \$8,500.00, issued on July 13, 2016 by the British Columbia Safety Authority (the “Respondent”) against the Appellants for failure to comply with Compliance Order No. CO-2015-0021 (the “Compliance Order”), specifically the requirement to arrange to have corrected the non-compliances set out in the Certificate of Electrical Inspection No. ELIN-542360-2016 (the “Certificate of Inspection”) for a property located at Lake Country, B.C. (the “Property”).

History of Appeal

[2] Prior to being served with the Monetary Penalty, a representative of the Respondent conducted an electrical safety inspection at the Property on February 18, 2016 (the “Initial Inspection”). The Initial Inspection required the Appellants to rectify a number of electrical non-compliances, which were enumerated in the Certificate of Inspection, by February 26, 2016. The Respondent extended the deadline for compliance to March 8, 2016. The non-compliances were not addressed by the Appellants and the Respondent issued the Compliance Order in an effort to garner compliance. The Compliance Order set a deadline of April 29, 2016 to have the instances of non-compliance rectified. The Appellants did not rectify the instances of

non-compliance by the deadline. The Appellants did not appeal the findings of the Certificate of Inspection or the Compliance Order.

Issues

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

Position of the Parties

The Appellants' Position

[4] The Appellants seek to have the Monetary Penalty cancelled or in the alternative, reduced. In support of this position, counsel for the Appellants filed the Affidavit of the Individual, sworn January 27, 2017 (the "Individual Affidavit"). The Individual is the Company's sole shareholder and director. The Appellants also filed written submissions with the Board.

[5] In support of the Appellants' submission that the Monetary Penalty be cancelled or reduced, counsel for the Appellants relies on the factors required to be considered by the Provincial Safety Manager under the *Monetary Penalties Regulation*, BC Reg 129/2005 and states that:

- a) there was no deliberate contravention of the Compliance Order by the Appellants;
- b) there was no harm or little risk of harm caused by the non-compliances; and
- c) there were no previous contraventions by the Appellants.

[6] With respect to whether the contravention was deliberate, counsel for the Appellants states that the Appellants had not dealt with the Respondent prior to the Initial Inspection and believed the safety officer who attended the Property to be affiliated with the local fire department. Further, the Appellants state that the Individual was confused by the bureaucracy of the Respondent and tried during June 2016 to obtain an operating permit to carry out the necessary work to comply. The Appellants say that they were not aware during this time that an electrical contractor would have to be hired as a field service representative (I take it that the Appellants are referring to a field safety

representative as required by the Electrical Safety Regulation) in order to comply with the Act nor what the time frame for compliance was.

[7] The Appellants state that when they received the Compliance order that the Individual contacted numerous contractors in an attempt to get the noted deficiencies rectified, but that none were available to do the work. The Individual states that it was not until June or July 2016 that he was able to secure a contractor to act as a field safety representative to oversee the work. The Appellants say that as soon as an Electric company agreed to act as their field safety representative that they applied for and obtained the necessary permit to take steps to remedy the non-compliances and the necessary work began in July 2016.

[8] The Appellants state that after work commenced that work proceeded slowly as the electrical contractor devoted insufficient resources to remedying the non-compliances. The Appellants say that the non-compliances are now corrected and that they have requested a final inspection of the Property.

[9] With respect to whether there was harm, counsel for the Appellants state that there was no harm caused by the non-compliances and little risk. In particular, the Individual states that there have not been significant electrical problems for many years and that several of the noted non-compliances relate to parts of the hotel that are not in operation and are closed and therefore pose no risk of harm.

[10] With respect to previous contraventions, counsel for the Appellants states that the Appellants have had no previous contraventions under the Act or Regulations.

The Respondent's Position

[11] Counsel for the Respondent submits that the Board ought to determine this appeal on the standard of review of reasonableness not correctness and provided the Board with detailed submissions regarding the same. I will not set the Respondent's submissions on this point out in detail in this decision as the Board recently dealt with similar submissions from the Respondent on other appeals and has dealt with the matter at length in those reasons for decision. A summary of the Respondent's position with

respect to the issue of the standard of review can be found in *A Gas Contractor v. British Columbia Safety Authority*, SSAB 14(1)2016, paragraphs 12 – 17.

[12] With respect to the issue on appeal, the Respondent states that the Monetary Penalty is authorized by section 40(1)(b) of the Act and was issued as a result of the Appellants' failure to comply with the Compliance Order and ought to be upheld on appeal.

[13] The Respondent states that the Safety Manager considered all of the factors set out in section 3 of the *Monetary Penalties Regulation* when issuing the Monetary Penalty, including the three factors relied upon by the Respondent. With respect to whether the contravention was deliberate, the Respondent submits that the Safety Manager took into account that the Appellants were unaware of the consequences of not complying with the Compliance Order, but that at the same time the Appellants asserted that there was no harm in the work not being completed and note that in the Individual affidavit he deposes that he does not believe that there is any substantial risk of danger due to the deficiencies. The Respondent submits that this belief suggests that the ongoing breach was deliberate.

[14] With respect to whether there was harm, the Respondent states the legislation does not require any person to actually be harmed by the contravention but whether there is a risk of harm. The Respondent submits that at no time did the Appellants advise any representative of the Respondent that parts of the hotel were closed and states further that the Appellants have not provided any evidence of such closure or that the non-compliances created a low risk of harm.

[15] With respect to whether there were previous contraventions, the Respondent notes that the Safety Manager was aware that there was no evidence of previous contraventions.

[16] Further, the Respondent states that the certificate of inspection issued after the Initial Inspection required the Appellants to obtain an operating permit and correct 18 non-compliances by February 26, 2016 and that this certificate of inspection was hand-delivered to the Appellants by the Safety Officer, who explained to the Individual what the Appellants were required to do. The Respondent says that even if the Individual was confused by the Safety Officer's instructions that the certificate of inspection clearly

says that he had to obtain a permit by February 26, 2016 and that the Appellants did not do so.

[17] Counsel for the Respondent notes that on an initial assessment of the criteria set out in the *Monetary Penalties Regulation* that the Monetary Penalty was initially assessed at \$17,000.00 but the Provincial Safety Manager reduced the amount of the penalty to \$8,500.00 on the basis that the Appellants had finally applied for the operating permit even though they had not rectified the instances of non-compliance.

Analysis

[18] Before turning to the more substantive issues at hand, I must first determine the standard of review for this Appeal as that subject has been raised in the Respondent's submissions. 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 in paragraph 25 of that case,

[w]hile the standard of review is one of correctness, in a case such as this where the Board is tasked with determining whether the 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 Manger 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.

[19] Turning to the issue on appeal, section 40(1) of the Act and section 2 of the Monetary Penalty Regulation clearly set out that a monetary penalty may be appropriately levied for a first instance of a contravention under the Act. Section 40 of the Act states:

40(1) A safety manager may, in accordance with the regulations, impose a monetary penalty on a person who fails to comply with any of the following:

...
(b) a compliance order;

....

[20] The parties do not dispute that the Compliance Order had not been complied with when the Monetary Penalty was issued. It is clear that the Safety Manager has jurisdiction to issue a Monetary Penalty for failure to comply with a compliance order. In

doing so, he must comply with section 3 of the Monetary Penalty Regulation, which states:

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.

[21] In addition to complying with section 3 of the Monetary Penalty 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. A review of the Appeal Record filed in this appeal indicates that the Safety Manager complied with these notice provisions.

[22] Upon review of the Appeal Record in this Appeal and the further evidence filed with the Board, I find that the Respondent complied with the requirements of the Act and Monetary Penalty Regulation by providing the appropriate notice of intention to issue a monetary penalty and by considering the criteria set out in the Monetary Penalty Regulation. Upon review of all the evidence presented, I see nothing that shows that the Respondent was incorrect in its issuance of the Monetary Penalty. As mentioned above, it is not disputed by either party that the Compliance Order was not complied with. With respect to the three criteria raised by the Appellants, on review of the Appeal Record, namely the Monetary Penalty Calculator printout contained therein, I find that with the Safety Manager considered that there were no previous infractions by the Appellants and that while the non-compliances were not deliberate that they remained ongoing in such a fashion as to become a deliberate non-compliance under the Act. With respect to the criteria regarding the level of hazard, the Appellants stated that many infractions were in areas of the hotel that were closed. However, no detailed evidence in this regard was submitted delineating what non-compliances were in closed portions of the hotel. In any event, I am not certain that would make a difference as the hotel has electrical service and needs to comply to code in any event. Further, the Appellant did not submit independent evidence as to the extent of the harm and with no evidence to the contrary I defer to the findings of the Safety Officer and Safety Manager in this

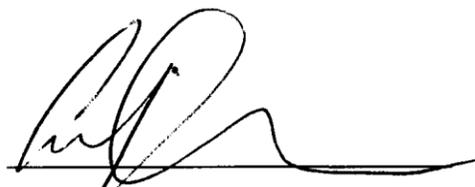
regard. I also note that the Safety Manager reduced the recommended Monetary Penalty amount from the recommended \$17,000.00 to \$8,500.00 as by the time the Monetary Penalty was being issued the Appellants were starting to take steps to comply with the Compliance Order.

[23] Given that the Safety Manager was aware prior to issuing the Monetary Penalty that the Appellant had finally obtained the necessary permit, I am of the view that the Safety Manager perhaps ought to have issued a daily penalty for each day that the contravention continued rather than one larger single amount. This would have highlighted the importance of compliance whilst encouraging the non-compliances to be resolved and would also have permitted the Safety Manager to suspend the accrual of the daily amounts pursuant to section 40(3) of the Act if the Safety Manager felt that the Appellant was taking reasonable measures to bring the regulated work or regulated product into compliance. Unfortunately, hindsight does not let me determine what amount would have accrued had a daily penalty been issued rather than a single amount and the evidence before the Board indicates that the non-compliances were not rectified until several months after the issuance of the Monetary Penalty. Further, the Safety Manager has discretion under the Act to issue either a daily or single amount when issuing a Monetary Penalty and I defer to that discretion. Accordingly, while I would have issued a daily penalty in the amount of \$1000.00 per day (based on the daily amount recommended by the Monetary Penalty Calculator included in the Appeal Record), I cannot find the Respondent incorrect for issuing a single monetary penalty in the amount of \$8,500.00. Given the speed, or lack thereof, with which the Appellant moved to correct the issuances of non-compliance, I find it likely that they would have taken longer than 8.5 days to rectify the non-compliances in any event.

Conclusion

[24] For the reasons set out above, the appeal is dismissed.

Signed:

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long horizontal line extending to the right.