November 5, 2018
Appeal No. SSAB 25-2017

Indexed as: BCSSAB 25 (1) 2017

IN THE MATTER OF THE *SAFETY STANDARDS ACT,*

S.B.C. 2003, Chapter 39

AND IN THE MATTER OF an appeal to the

BRITISH COLUMBIA SAFETY STANDARD APPEAL BOARD

BETWEEN:

An Elevator Maintenance Contractor

APPELLANT

AND:

Technical Safety BC

RESPONDENT

Chair of Board:	**Emily C. Drown**
Member:	**David Martin**
Member:	**Ted Simmons**
Counsel for Appellant:	**Joseph G. Cuenca**
	Mia Chan, articled student
Counsel for Respondent:	**Kimberley Fenwick**

REASONS FOR DECISION

Introduction

[1] This is an appeal of Monetary Penalty No. MP-2016-0040 (the "Monetary Penalty") in the amount of $7,000.00, issued November 14, 2017 by Technical Safety BC (the "Respondent"). The Appellant is an elevator maintenance contractor and seeks to have the Monetary Penalty cancelled and set aside.

[2] The Monetary Penalty was issued under the authority of section 40(1)(d) of the *Safety Standards Act*, SBC 2003, c. 39 (the "Act") as a result of the Appellant's alleged failure to comply with the terms of Safety Order SO-L1 1100225 4 (the "Safety Order") issued by the Respondent on February 25, 2011. The Board notes the term "alleged," as the crux of the issue that the Board must determine in this appeal is whether the Appellant did fail to comply with the terms of the Safety Order and whether the issuance of the Monetary Penalty was therefore warranted.

History of Appeal

[3] This appeal proceeded via written submissions with each party submitting any new evidence and submissions to the Board in writing. However, upon the Appellant's review of the evidence and submissions submitted by the Respondent, the Appellant requested to cross examine the Respondent's witness, a provincial safety manager, on his sworn affidavit evidence. The Respondent did not oppose this request and the Board ordered that the Appellant's counsel be able to cross-examine him. The cross-examination took place on May 7, 2018 in Vancouver, British Columbia before counsel for both parties and this panel of the Board. The Board used this in-person portion of the Appeal to hear the Appellant's Reply submissions orally upon the conclusion of the cross-examination and to ask counsel for both parties questions arising from the evidence and submissions submitted in the Appeal.

Facts

[4] The Safety Order was issued broadly and required all licensed elevating device contractors in the province to take the following actions:

a) Every 12 months perform specified maintenance on all elevators with Driving Machine Brakes; and
b) Every February 25th complete and submit to the Respondent a spreadsheet documenting all Driving Machine Brakes in the contractor's portfolio and the date the required specified maintenance was performed, or if not performed in the preceding year, the reason why the work was not performed.

[5] The Appellant submitted the required spreadsheet to the Respondent on March 6, 2017. There is dispute between the parties as to whether the spreadsheet was

complete when submitted. However, the parties agree that eventually enough information was provided to determine that while the Appellant had completed the specified maintenance on approximately 25% of the units it was responsible for servicing that the Appellant had not performed specified maintenance on 233 units for which the Appellant was responsible.

[6] A review of the Appeal Record indicates that the Appellant indicated to the Respondent that it was unable to perform the specified maintenance for 58 units as they required asbestos testing or abatement, which the Appellant had been unable to arrange in time to comply with the Safety Order. An updated spreadsheet provided by the Appellant in November 2017 sets out slightly different numbers with 67 units being delayed servicing due to asbestos and 162 units not maintained despite not having asbestos present.

[7] Until the oral component of the hearing on May 7, 2018 no rationale was provided by the Appellant or its counsel as to why the specified maintenance had not been performed on the units without asbestos concerns. At the oral component of the hearing, a representative of the Appellant, who was not sworn to give evidence, stated that many of these were maintenance contracts that the Appellant had inherited from other contractors where service had been poor and the Appellant was not able to get all of the prescribed servicing done as required by the Safety Order.

Position of the Parties

Standard of Review

[8] Both parties have raised the issue of standard of review in their submissions. The Appellant submits that a standard of reasonableness ought to apply to consideration of this Appeal and cites the well-known case of *Dunsmuir v. New Brunswick*, 2008 SCC 9 (”Dunsmuir*”)* in support of its position along with *International Brotherhood of Electrical Workers, Provincial Council*, v. *Applied Science Technologists and Technicians of British Columbia*, 2016 BCSC 488 (“IBEW”).

[9] The Respondent agrees that the standard of reasonableness ought to apply and submits that the Board must grant deference to the Safety Manager’s decision under review unless it is unreasonable having regard to the legislation. The Respondent

accordingly submits that deference must be given to the Safety Manager's decision to impose the Monetary Penalty and that the decision is warranted on a standard of reasonableness. In light of recent rulings of the Board, which indicated that the standard of review in most cases before the Board is correctness not reasonableness, the Respondent submitted on a without prejudice basis, and in the alternative that the Monetary Penalty and Safety Order were correct and there is no basis to vary it or set it aside.

Monetary Penalty

[10] The Appellant admits that it was unable to comply with the Safety Order. The Appellant's position is that this inability to comply was due to the presence of asbestos in a number of the elevating device units. The Appellant submits that despite its failure to comply with the Safety Order that the Monetary Penalty ought to be set aside as the Respondent failed to adhere to the well-known principles of procedural fairness by failing to reasonably and properly apply the criteria set out in the *Monetary Penalty Regulation*, B.C. Reg. 129/2005 (the "Regulation") and failed to provide the Appellant with an opportunity to perform remedial measures.

[11] With respect to the criteria set out in the Regulation, the Appellant submitted as follows:

a) The first criterion in the Regulation raised by the Appellants is whether there was a significant risk of harm. The Appellant admits that a significant risk of harm was created by failing to comply with the Safety Order. However, the Appellant states that any assessment for a monetary penalty under this criterion should consider the Appellant's reasons for deferring compliance, namely the asbestos brake pads and the need for workplace safety.

b) The second criterion in the Regulation raised by the Appellant is whether the contravention is deliberate. The Appellant states that it did not fail to comply with the Safety Order, but instead took part in ongoing discussions with the Respondent concerning the presence of asbestos and what that meant for the Appellant's ability to comply within the timelines stipulated. The Appellant states that the issue of asbestos was not fully within its control as full compliance rests

with external issues and third parties, such as waiting for findings on the need for abatement for brake pads with asbestos, training of its workers on handling of asbestos and approval of additional funding for clients to pay for the required work.

c) The third criterion in the Regulation raised by the Appellant is whether the contravention is repeated or continuous. The Appellant states that its discussions with the Respondent regarding the safety issue of asbestos in the brake pads cannot be considered a contravention of the Safety Order and should rather be considered evidence of ongoing compliance as it was in the process of complying and was delayed by the presence of asbestos. The Appellant states that accordingly, the Respondent cannot say that the contravention lasted over six months as was stated in the decision to issue the Monetary Penalty.

d) The fourth criterion in the Regulation raised by the Appellant is whether economic benefit was derived from the contravention. The Appellant states that the presence of asbestos actually increased costs as it sent brake samples for laboratory testing on the need for abatement. The Appellant states that the finding of any economic benefit is speculative and without any factual foundation.

[12] With respect to the Appellant's position that the Respondent failed to permit it to take remedial measures prior to issuance of the Monetary Penalty, the Appellant states that in its correspondence it repeatedly emphasized its ongoing and continuous need to carefully assess the asbestos issue in relation to compliance with the Safety Order and the Respondent failed to recognize that the Appellant was making progress in reaching compliance.

[13] In response to the Appellant's position that it had a justifiable reason for its failure to complete the required testing, namely the necessity of addressing the occupational health and safety hazards associated with asbestos brakes, the Respondent states that the need to develop a safety management plan to address brake pads containing asbestos is not new and has been known since at least 2014. Further, the Respondent states that in any event the Safety Manager did consider this challenge and sought feedback from other industry contractors, which led to the Safety Manager concluding

that other contractors in the industry were able to meet the requirements of the Safety Order despite the presence of asbestos. The Respondent states that the Safety Manger reasonably concluded that the Appellant could have completed the required testing while meeting its safety obligations. Further, the Respondent notes that the majority of the units not in compliance did not contain asbestos or require asbestos testing. Finally, the Respondent submits that it is not feasible for it to offer a significant extension of time for compliance when the obligation to test is an annually recurring one. In this regard, the Respondent states that testing completed in 2017 satisfies the Safety Order requirement to test in 2017 but does not cure the 2016 non-compliance.

[14] With respect to the procedural fairness obligations raised by the Appellant the Respondent submits that the Safety Manger satisfied these obligations by asking contractors to provide an explanation for the failure to test particular units and by considering those reasons before proceeding with enforcement action.

Analysis

Standard of Review

[15] Both parties submit that the standard of review on appeal should be that of reasonableness. However, the panel disagrees. In a series of recent decisions, the Board determined that it will generally apply a standard of review of correctness in determining whether decisions of the Safety Manager correctly applied the *Act* and associated regulations, including any decisions to impose monetary penalties and that a reasonableness standard will be reserved 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.

[16] The Board's reasons for this standard of review on appeal were succinctly set out in decision SSAB 13-2017 by vice-chair J. Hand as follows:

> (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.

[17] Despite submissions from the parties that a standard of reasonableness is appropriate, the Board sees no reason to depart from its recent findings with respect to the standard of review and holds that the appropriate standard of review for this appeal is that of correctness.

Monetary Penalty

[18] Much was made in the written submissions and oral reply by the Appellant's counsel regarding the fact that the Appellant had a justifiable reason for not performing the specified maintenance, namely that they required asbestos testing or abatement before the specified maintenance could be completed. However, this was the reason given for only 58 out of the 233 units where the specified maintenance had not been completed. The Board recognizes that an updated spreadsheet provided by the Appellants to the Respondent sets out different numbers; however, either way the specified maintenance was not completed on the majority of the units regardless of exact numbers and the Board finds this as fact.

[19] The Appellants did not provide a reason in their written submissions as to why the majority of other units were not maintained as required by the Safety Order. When questioned at the oral component of the hearing with respect to the Appellant's failure to comply with the Safety Order for 175 elevating devices, a representative of the Appellant, who had not been sworn as a witness, stated that many of these were maintenance contracts that the Appellant had inherited from other contractors where service had been poor and the Appellant just was not able to get all of the prescribed servicing done as required by the Safety Order in the timelines required. There is no evidence that this was in any way communicated to the Respondent prior to the oral component of this appeal.

[20] There is evidence in the Appeal Record that hospitals contacted the Respondent and sought an extension for compliance with the Safety Order given the presence of asbestos. This request was denied by the Respondent. However, at no time did the

Appellant or any other client of the Appellant contact the Respondent and seek an extension of the timelines or an extension for compliance with the Safety Order.

[21] Counsel for the Appellant cross-examined the Provincial Safety Manager regarding the evidence he deposed in his affidavit, sworn April 6, 2018 (the "Affidavit"), which was relied on in the Respondent's submissions. Much of the cross-examination centered on what steps the Respondent took prior to issuing the Monetary Penalty, in particular, what contractors the Respondent contacted to determine whether it was possible to comply with the Safety Order in situations where asbestos was present. He advised that out of approximately 14 to 16 elevating device contractors in the province that have maintenance contracts in the province that the Respondent consulted with 3 contractors, all of which were able to comply with the terms of the Safety Order. He indicated that he did not contact any of the four other contractors that were not in compliance as none of them had cited the presence of asbestos as a reason for their non-compliance and he wanted to get a sense of whether the presence of asbestos was in fact a reasonable reason for delay in compliance.

[22] When asked what his purpose was for contacting other contractorsHe indicated that the purpose was not to establish an industry standard but to determine whether compliance could have been achieved. As set out in the Affidavit and the affidavit of a technical coordinator at the Respondent, sworn April 12, 2018, other contractors were able to comply with the Safety Order despite the presence of asbestos and it was not particularly onerous of them to do so, requiring only a few hours of training and 1 to 3 hours longer to conduct the required maintenance when asbestos was present than when it was not.

[23] In any event, the Board finds the issue of asbestos irrelevant to the issue on appeal, namely whether the issuance of Monetary Penalty was warranted. This is because there is scant evidence before the Board as to why the vast majority of units not serviced as required were not serviced as required. Asbestos was only an issue with respect to a small portion of the elevators that did not received the required maintenance. Until the hearing, no reason was given why the majority of the elevators were not inspected and serviced as required.

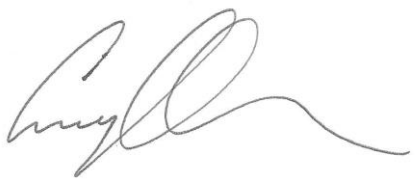
[24] Section 41 of the Act permits Monetary Penalties to be issued by the Provincial Safety Manager for failure to comply with a Safety Order. There is no question that the Safety Order was appropriately issued under section 31 of the Act. Regardless of whether there was delay caused by asbestos, the Appellant's failure to service a very large number of units where asbestos was not present is alone grounds for the issuance of the Monetary Penalty. On the evidence before the Board, it is clear that the Appellant did not comply with the Safety Order. Accordingly, the Board finds that the Provincial Safety Manager was well within his legislated authority to issue the Monetary Penalty.

[25] As the Appellant's arguments regarding procedural fairness all centered around the presence of asbestos, the Board finds no reason to set aside the Monetary Penalty on the grounds that procedural fairness requires it and finds instead that the Provincial Safety Manager properly considered the criteria set out in the Regulations when issuing the Monetary Penalty.

Conclusion

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

Signed:



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