Date Issued: December 14, 2016
File No. SSAB 7-2016

Indexed as: BCSSAB 7 (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 Standard Appeal Board

BETWEEN:	**AN INVESTMENT INC.**	**Appellant**
AND:	**BRITISH COLUMBIA SAFETY AUTHORITY**	**Respondent**

REASONS FOR DECISION

Vice Chair:	**Jeffrey Hand**
On Behalf of the Appellants:	**The Investments Inc.**
Counsel for British Columbia Safety Authority:	**Kimberly Fenwick**

INTRODUCTION

[1] This is an appeal of a Monetary Penalty Number MP-2016-006, dated March 2, 2016 ("Monetary Penalty") issued by the British Columbia Safety Authority ("Safety Authority") for failure to comply with Safety Order SO-L11012141, dated December 14, 2010 (the "Safety Order").

[2] The Safety Order required building owners with single cylinder elevators to either upgrade those elevators to double cylinders or take them out of service by October 8, 2015. The Safety Authority says the Appellant failed to comply with the Order and issued the Monetary Penalty in the amount of $15,000.

[3] The Appellant submits that it understood that it had complied with the Safety Order and that they received confusing and unclear instructions from the Safety Authority. The Appellant asks that the Monetary Penalty be set aside, or alternatively, that it be varied.

ISSUE

1. Should a Monetary Penalty have been imposed in the circumstance of this case?
2. If so, should that Monetary Penalty be varied or upheld?

FACTS

[4] The Appellant owns a residential apartment building located at on West 70th Avenue, Vancouver (the "Building"). The Building is three stories in height and was serviced by one elevator with a single bottom cylinder.

[5] The Manager is employed by the Appellant and has been managing the Building since 2013.

[6] Beginning in 2010 the Safety Authority determined that single cylinder elevators potentially posed a safety risk because similar single cylinder elevator systems had experience catastrophic failure at various sites across North America. A decision was made to require all property owners with single cylinder elevators to either upgrade them to double cylinder elevators or to take the elevators out of service.

[7] On December 14, 2010, the Safety Authority issued a Safety Order which required all owners of properties containing single cylinder elevators to either upgrade those elevators to double cylinder design or take the elevator out of service. This work was to be completed by October 8, 2015. The Order also required owners to submit a Compliance Plan identifying:

(a) the steps to be taken to comply with the Safety Order;

(b the name of the licensed elevator contractor who would be performing this work; and

(c) the date by which the elevator would be brought into compliance.

[8] The Compliance Plan was to be submitted to the Safety Authority no later than October 8, 2011.

[9] On September 16, 2014, the Safety Authority issued a notice reminding building owners of the need to comply with the Safety Order (the "Reminder Notice").

[10] On April 28, 2015 the Safety Authority contacted The Manager to advise that they had yet to receive the Compliance Plan that had been requested in the Safety Order. The Manager was provided with a copy of the Reminder Notice which included the terms of the Safety Order.

[11] The Manager says this is the first time he became aware of this Safety Order and the need for a Compliance Plan. The Safety Order was issued before The Manager was managing the Building but no explanation has been provided in this Appeal as to whether the Appellant was aware of the Safety Order, and if not, why that was so. In any event, The Manager submitted a Compliance Plan on behalf of the Appellant on July 16, 2015 (the "Compliance Plan").

[12] The Compliance Plan stated that the Appellant's intended method of complying with the Safety Order was to take the elevator out of service by October 8, 2015. The Appellant was intending to redevelop the property and to construct a new building which would contain a double cylinder elevator. The Elevator Maintenance Ltd. was identified as the contractor who would perform the work.

[13] The October 8, 2015 deadline passed without the elevator in the Building being taken out of service. The Appellant did not construct a new building on the property.

[14] On December 15, 2015 the Safety Authority issued a Notice of Non-Compliance to the Appellant, advising that the October 8, 2015 deadline had passed but also stating that the Appellant could have until April 30, 2016 to comply with the Safety Order provided they retain the services of a licensed elevating device contractor to seek a variance for an extension of time to complete the necessary work required under the Safety Order. One of the criteria for obtaining the variance was that the contractor undertake oil loss monitoring inspections of the elevator at intervals of every 2 weeks. The Appellant did not submit a request for variance.

[15] On January 14, 2016 the Safety Authority wrote to The Manager advising that a Monetary Penalty in the amount of $15,000 was then under consideration due to the Appellant's failure to comply with the Safety Order. That correspondence again made reference to the prospect of extending the time for compliance to April 30, 2016, provided a licensed contractor sought a variance by filing the necessary forms with the Safety Authority by January 28, 2016. A Contractor Review Form and Request for Variance form were included with this letter.

[16] On January 23, 2016 The Manager contacted the Elevator Maintenance Ltd, who had been servicing the elevator in the Building for several years and he requested that they take steps to take the elevator out of service. The Manager also requested that the Elevator Maintenance Ltd. fill out the Contractor Review Form that had been supplied to him by the Safety Authority so that it could be submitted by the January 28th deadline that the Safety Authority had imposed.

[17] On January 25, 2016 The Manager sent a Safety Officer of the Safety Authority a copy of his email instruction to the Elevator Maintenance Ltd.

[18] On January 26, 2016 The Manager received the Contractor Review Form filled out by the Elevator Maintenance Ltd. and on the same day he sent that document along with the Request for Variance Form to the Safety Manager. The Manager had filled out the Request for Variance Form rather than the Elevator Maintenance Ltd.

[19] Later that same day on January 27th, The Manager received two communications from the Safety Authority, one from an Administrative Assistant for the Safety Authority and the second from the Safety Manager. Both emails advised The Manager that the Safety Authority would not accept the Request for a Variance because it needed to be filed by the Elevator Maintenance Ltd. rather than by The Manager. The Manager forwarded the Safety Manager's email on to the Elevator Maintenance Ltd. and requested they provide the necessary forms to the Safety Authority. The Safety Manager was copied on this correspondence.

[20] The Safety Manager's January 27th email to The Manager requested that the elevator be taken out of service no later than March 15, 2016. No explanation was provided to explain why the previous deadline of April 30, 2016 no longer applied.

[21] The following day, January 28, 2016, The Safety Manager sent The Manager a further email stating
"Your actions do meet the requirements I have laid out for you". (my emphasis added**)**
The Safety Manager goes on to say that he will be assessing a Monetary Penalty.

[22] The Elevator Maintenance Ltd. never submitted a Request for Variance.

[23] On January 28, 2016. The Manager approved a Work Order prepared by the Elevator Maintenance Ltd. for taking the elevator out of service. The Safety Manager was copied on this email to the Elevator Maintenance Ltd. However, this Work Order was subsequently revised by the Elevator Maintenance Ltd. on February 1, 2016 but not approved by The Manager until March 10, 2016. The Manager says this delay was caused by his inadvertence, but he adds that as of January 2016, he understood he had done all that was required by the Safety Authority to meet the March 15, 2016 deadline.

[24] The Elevator Maintenance Ltd. continued to make monthly inspections of the elevator during the months of January, February and March, 2016. It does not appear that increased oil level monitoring was performed.

[25] The Manager gave final approval to the Elevator Maintenance Ltd. to proceed with taking the elevator out of service on March 10, 2016.

[26] On March 16, 2016, the Elevator Maintenance Ltd. permanently decommissioned the elevator.

[27] On March 2, 2016, the Safety Authority issued a Monetary Penalty in the amount of $15,000.00.

ANALYSIS

[28] The Manager has filed an Affidavit in this appeal. In it he states that the first notice he had of the requirements of the Safety Order was not until April 2015 when he received a phone call from the Safety Authority’s Administrative Assistant. No explanation is offered as to why The Manager was unaware of the Order or of the subsequent Reminder Notice before this date.

[29] In the Board's view, nothing material turns on this particular point since the Appellant does not argue that it was not given sufficient time to comply with the Order. The evidence is clear that by at least April 2015 the Appellant was aware of the requirement to either modify the elevator in the Building or take it out of service. The Appellant submitted a Compliance Plan in July 2015 confirming that the Appellant knew of the need to comply with the Safety Order by decommissioning the elevator by October 8, 2015.

[30] No explanation is offered by the Appellant as to why the elevator was not taken out of service in accordance with their stated intentions set out in the Compliance Plan other than to say that the Appellant's plans for redevelopment of the building were delayed. Ultimately, the redevelopment of the Building was cancelled but there is no evidence as to when this occurred.

[31] The October 8, 2015 deadline came and went with no work being done on the elevator. The Safety Authority took no further steps until December 15, 2015 when it brought the non-compliance with the Safety Order to the attention of The Manager.

[32] Up until this point, that is December 2015, the evidence discloses that the Appellant was aware of the Safety Order and the October 8, 2015 deadline. No explanation is offered as to why the Safety Order was not complied with other than it was apparently inconvenient to do so because the Appellant's plans to redevelop the property were delayed. More importantly, there is no evidence that the Appellant took any steps before October 2015 to instruct a contractor to decommission the elevator, regardless of the status of the Appellant's plans for re-development.

[33] After December 2015, however, the Board accepts that there was at least some confusing communications from the Safety Authority. While it is indeed commendable that the Safety Authority was prepared to grant time extensions for compliance with the Safety Order, the manner in which it did so was less than clear. For instance, the December 15, 2015 notice from the Safety Authority refers to extending the time for compliance with the Safety Order until April 30, 2016. However on January 27, 2016 the Safety Authority changes this deadline to March 15, 2016 without any explanation.

[34] Secondly, it seems apparent that the Safety Authority's requirement that only a licenced Contractor could submit the request for variance appears to have been misunderstood by The

Manager. The Appellant appears to have had every intention of seeking a variance but The Manager did so in a manner that was unacceptable to the Safety Authority. The Elevator Maintenance Ltd., who was surely more familiar with the Safety Authority's deadlines and required forms than The Manager, failed to seek the variance after The Manager asked them to do so in January 2016.

[35] Thirdly, Counsel for the Respondent argues that the March 15, 2016 deadline only applied if work was being done to retrofit the elevator and that if the Appellant intended to comply with the Safety Order by taking the elevator out of service, that had to be done immediately. If that is the case, then none of the notices from the Safety Authority make that clear. The Appellant appears to have proceeded on the belief that they had until March 15 to take the elevator out of service and in the belief that once they had instructed the Elevator Maintenance Ltd. there was nothing more required of them.

[36] Lastly, the Safety Manager’s email dated January 28, 2016 mistakenly communicated that The Manager’s actions in fact met the Safety Authority's requirements and this only added to the confusion.

[37] If the Monetary Penalty was imposed solely for the Appellant's actions after January 28, 2016, the Appellant's argument that they were lead to believe that they had in fact complied with the Safety Authority's requirements might have some merit. But the monetary penalty also covers the time period since October 8, 2015 when the evidence is clear that the Appellant failed to comply with the Order and that no steps were taken to seek a variance from the Safety Authority or request that the Elevator Maintenance Ltd. take the elevator out of service.

[38] The Board has held in a previous decision, SSAB 6-2016, dated July 11, 2016, which dealt with precisely the same Safety Order, that it is ultimately the owner of the property containing the elevator that has the responsibility for complying with the Safety Order and not the contractor. The evidence is clear that the Appellant did not begin to issue instructions to the Elevator Maintenance Ltd. until late January, 2016, some three months past the October, 2015 deadline. The Appellant must accept responsibility for its failure to comply with the Safety Order. The Board rejects the Appellant's submission that the Safety Authority was required to coordinate directly with the Elevator Maintenance Ltd. so as to ensure timely compliance with the Safety Order.

[39] The legislation provides that the Safety Manager may levy a penalty on an owner who fails to comply with a Safety Order, and given the potential danger to the public in failing to comply with the Safety Order in this instance, the Board finds it is appropriate that a penalty be issued. The Safety Manager has imposed a $15,000.00 Monetary Penalty on the basis that:

a) The non-compliance was deliberate;
b) the potential safety risk in not complying with the Order was deemed to be high; and
c) the Appellant achieved some financial advantage in failing to comply

[40] Since no explanation was offered by the Appellant to explain its non-compliance with the October 8, 2015 deadline it is reasonable to conclude that non-compliance was initially deliberate. However, after January 2016, it is not clear that the continued non-compliance was deliberate since there is evidence of both an intention to comply on the part of the Appellant and some potentially confusing communication from the Safety Authority.

[41] In terms of public safety, the Board accepts that continued non-compliance with the Safety Order presented a significant safety risk.

[42] In terms of any economic advantage obtained by the Appellant the only evidence before the Board is that the Appellant ultimately incurred a cost of $3,936.00 to take the elevator out of service. This cost was not avoided but rather only deferred a few months. How this amount factored into the decision to impose a $15,000.00 penalty is not in evidence. The Board notes however that the Safety Authority imposed a $7500.00 penalty for a similar non-compliance with precisely the same Safety Order in the previous decision referred to above. The Board reduced that penalty to $4,000.00 on appeal because there was additional evidence not considered when the penalty was issued which the Board found was favourable to the appellant in that case. There is no such additional evidence in this appeal.

[43] The facts in this appeal and the previous decision are similar. Both arise out of the failure to comply with the same Safety Order. In both cases, to varying degrees, the owners made some attempt to comply with the Safety Order by contacting a contractor to perform the necessary work. But ultimately the responsibility for complying with the Safety Order rests with the owner and there must be consequences for failing to comply, especially where public safety is potentially put at risk.

…

CONCLUSION

[44] The Board finds that the Monetary Penalty was warranted in this instance. However there should be some consistency in the amount of that Monetary Penalty where the facts underlying the imposition of the penalty are similar to previous decisions of the Safety Manager.

[45] Accordingly, the Board will reduce the Monetary Penalty in this instance to $7500.00.

Signed;

Jeffrey A. Hand, Vice-Chair