Appeal No. SSAB 16-2016
March 10, 2017

Indexed as: BCSSAB 16 (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:	**An Elevator Maintenance Ltd.**	**APPELLANT**
AND:	**British Columbia Safety Authority**	**RESPONDENT**

Chair of Board:	**Emily C. Drown**
Vice-Chair:	**Jeffrey A. Hand**
Member:	**Ted Simmons**
Counsel for Appellant:	**Derek Young**
Counsel for Respondent:	**Lisa Picotte-Li**

REASONS FOR DECISION

Introduction

[1] This is an appeal of Monetary Penalty No. MP-2016-0013 (the "Monetary Penalty") in the amount of $20,000.00 and Discipline Order DO-2016-003 (the "Discipline Order") that sets out a number of additional terms and conditions on the Appellant's elevating device contractor's license. The Monetary Penalty was issued on June 21, 2016 while the Discipline Order was issued on June 22, 2016.

[2] The Monetary Penalty was issued under the authority of sections 40 and 63(b) of the *Safety Standards Act*, SBC 2003, c. 39 (the "Act") for the Appellant's failure to comply with the terms and conditions of its elevating device contractor's license, specifically the terms respecting the use of certified workers and the supervision of "mechanics-in-training".

[3] The Discipline Order was issued under the authority of section 42 of the Act respecting the same compliance issues as the Monetary Penalty and sets out a number of additional requirements that the Appellant must meet in order to maintain its elevating device contractor's license.

Issues

[4] The issues before the Board are as follows:

a) What is the standard of review for this Appeal?
b) Was the Monetary Penalty appropriately issued by the Respondent?
c) Was the Discipline Order appropriately issued by the Respondent?

History of the Appeal

[5] At an Appeal Management Conference held in this matter, the parties agreed that the appeal would proceed via writing with each party providing the Board with their evidence and written submissions. At that time it was agreed that if any party wished to cross examine the other party's witnesses that the Board would hold an oral component to the hearing for this to occur. Upon receipt of the parties' evidence and written submissions, the Appellant applied to cross-examine the Respondent's witness on her affidavit that had been filed supporting the Respondent's position. The cross-examination took place on January 10, 2017 before this three member panel of the Board, which permitted the Board to not only hear the oral evidence adduced on cross-examine, but to ask the parties questions that arose as a result of a review of the evidence and submissions before the Board.

Facts

[6] Beginning in 2011 the BC Safety Authority began the process of implementing a plan to establish a program for the certification of elevating device mechanics. The objective of the plan, following industry consultation, was to have a regime in place whereby regulated work could only be performed by certified mechanics or by mechanics-in-training ("MIT") registered under the program and who were working to acquire a list of prescribed skills. The skills would be recorded in a Skills Passport held by each individual MIT as the skills were certified and approved so that an MIT's

individual competence could be verified and tracked. All of the foregoing were intended to enhance public safety as well as the safety of workers.

[7] The *Elevating Device Safety Regulation*, B.C. Reg 101/2004 (the "EDSR"), which will be discussed in greater detail later in this decision, required that MITs were only permitted to perform regulated work while under the supervision of a certified mechanic.

[8] During the transition phase of implementing this new certification program, the Respondent held various informational sessions with industry representatives to discuss the program and in particular what the regulations should say about the supervision of MITs.

[9] Beginning in 2013 further sessions were held with elevating device contractors, in the form of "Train the Trainer" seminars to provide information on progressing mechanic trainees through the program so that they might obtain their full certification. Again, there was discussion about what the Respondent expected in terms of the degree of supervision and input and feedback was sought from the industry.

[10] On June 30, 2015 the Respondent issued a draft directive intended to clarify the supervision requirements set out in the EDSR. Following feedback on the draft directive from the industry, the Respondent chose not to issue the Directive and it was never finalized.

[11] The Monetary Penalty and Discipline Order stem out of three separate events in Victoria, British Columbia. The first took place in August 21, 2015 when a Safety Officer of the Respondent received a report of an incident Jutland Road in Victoria, British Columbia after an elevator had been discovered left in an unsafe condition as follows:

a) the elevator had jumper wires on the controller safety circuit to bypass top of car stop switches;
b) the elevator car cab had no functioning lighting;
c) the elevator car escape hatch was not secured; and
d) the elevator had not been locked off and was still accessible for use.

[12] The last licensed elevating device contractor to perform work on the elevator before the incident was the Appellant. The employee of the Appellant that performed this work confirmed with the Respondent upon investigation that he left the elevator in such condition. The employee admitted that he was not a certified elevator mechanic nor was he registered as a mechanic-in-training under the EDSR. The employee further confirmed that he performed regulated work on the elevator without any supervision.

[13] The second incident took place on January 11, 2016 at a building located on Caledonia Avenue. The Respondent inspected a worksite where the Appellant was performing regulated work. Four workers in the employ of the Appellant confirmed they were MITs and they confirmed they had been working without the supervision of a certified elevating mechanic. .

[14] A third incident took place at a building located on Quadra Street. During the inspection the Respondent found two MITs on-site and determined that they had performed regulated work earlier in the day without direct supervision of a certified elevating mechanic.

[15] The Appellant does not dispute these three incidents, other than to say that the MITs were supervised, albeit not always directly. No evidence was submitted to explain how this supervision was accomplished.

Position of the Parties

The Appellant's Position

[16] The Appellant seeks to have the Monetary Penalty and Discipline Order canceled and set aside. The Monetary Penalty and Discipline Order were issued by the Respondent in response to the Appellant's alleged breaches of section 3.2(2) and 8(2) of the Elevating Device Safety Regulation, B.C. Reg 101/2004 (the "EDSR"). Section 3.2(2) of the EDSR states:

> An individual must not do regulated work in respect of elevating devices unless one of the following applies:
>
> a) the individual

i) is a certified elevating device mechanic and the regulated work is within the scope of the individual's certificate of qualification, and

ii) is, or is employed by, a licensed elevating device contractor,

b) the individual is a certified elevating device mechanic acting outside the scope of the individual's certificate of qualification, or is a mechanic-in-training, and the regulated work is

i) done under the supervision of a certified elevating device mechanic, and

ii) within the scope of the supervisor's certificate of qualification;

c) the regulated work is described in section 3.3 and is done in accordance with that section.

Section 8.2 of the EDSR states:

> A licensed elevating device contractor must not employ a certified elevating device mechanic or a mechanic-in-training for the purpose of doing regulated work outside the scope of the employed individual's certificate of qualification, unless
>
> a) the employed individual will be supervised by a certified elevating device mechanic who holds a certificate of qualification relevant to the regulated work, and
>
> b) the licensed elevating device contractor verifies that, if a skill in the employed individual's skills passport is signed by the supervising certified elevating device mechanic under section 4.5, the employed individual has successfully demonstrated proficiency in that skill.

[17] In this regard, the Appellant relies primarily on two arguments. First, the Appellant states that the implementation and enforcement of sections 3.2(2) and 8(2) of the EDSR was not procedurally fair due to inadequate consultation on the part of the Respondent. Second, the Appellant says that the Respondent is relying on a more comprehensive definition of the term "supervision" than is found in the EDSR. The more detailed definition of supervision is set out in the Draft Directive proposed by the

Respondent, but the Appellant states that the Draft Directive was never finalized nor issued by the Respondent and accordingly it has no force. The Appellant also states that the Draft Directive is not available to the public.

[18] With respect to the standard of review on Appeal, in its Reply the Appellant submitted that the appropriate standard was one of correctness not reasonableness as it had originally submitted in its written submissions filed with the Board. The Appellant further clarified this at the oral component of the hearing and agreed that the appropriate standard of review for this appeal is one of correctness.

[19] With respect to the issue of procedural fairness raised by the Appellant, the Appellant's counsel submitted that the issue of whether the Respondent's enforcement mechanism is sound must be determined before the Board can determine whether there was adequate supervision on the work site. The Appellant submits that if the enforcement mechanism in question is faulty due to a lack of procedural fairness in its implementation that any sanction stemming from the same must fail automatically without the need to consider the substantive allegations raised. In this regard, the Appellant states that the Respondent failed to engage the public in a meaningful consultation process prior to the adoption of the EDSR provisions and that as a result enforcement of the provisions should not be permitted.

[20] In support of its submissions regarding procedural fairness the Appellant relied on the following case law:

a) *Baker v. Canada*, 1999 2 SCR, 817
b) *VAPOR v. British Columbia (Environment)*, 2015 BCSC 1086
c) *Seaspan Ferries Corporation v. BC Ferry Services Inc*, 2013 BCCA 55
d) *Dunsmuir v. New Brunswick*, 2008 SCC 9
e) *Kelly et al v. School District No. 63*, 2005 BCSC 1273

[21] With respect to supervision, the Appellant states, that beyond any need for public consultation, that any adopted regulations or standards must be clearly set out as it is unfair to uphold a sanction levied for breach of unpublished standards. In particular, the Appellant takes issue with the Provincial Safety Manager's differentiation between "general supervision" and "direct supervision" as this distinction is not published

anywhere accessible to the public generally. Further, the Appellant submits that this distinction is not set out in the EDSR nor has it been explained in a finalized directive.

[22] The Appellant states that the circulation of various draft directives with differing definitions of forms of supervision further obfuscates what is required by the EDSR in terms of supervision.

The Respondent's Position

[23] The Respondent seeks to have the Appeal dismissed and states that the Monetary Penalty and Discipline Order were appropriately issued because the Appellant permitted regulated work to be performed on elevating devices by an uncertified individual and unsupervised Mechanics-in-Training contrary to 24(2)(b) of the Act and section 7(2) of the *Safety Standards General Regulation*, B.C. Reg 101/2004 (the "SSGR"), and section 3.2(2) and 8(2) of the EDSR.

[24] In support of this position, the Respondent submits that the Appellant has not provided evidence to challenge the observations of the Respondent's inspectors who found regulated work being performed by individual(s) who were not certified as an elevating device mechanic, nor registered as a mechanic-in-training, in the case of the incident on Jutland Road, or that regulated work was performed by MITs without on-site supervision of a certified elevating device mechanic, in the case of the incidents on Caledonia Avenue and on Quadra Street.

[25] In response to the Appellant's assertion that the Respondent failed to provide adequate consultation prior to the implementation of the EDSR requirements, the Respondent submits that it is a creature of statute and functions within the statutory scheme of the Act. The Appellant says that while it took steps to engage in consultation as a best practice with respect to the implementation of the EDSR, there is no requirement for it to do so.

[26] In the alternative, the Respondent states that if consultation was required that it met this duty through industry consultation prior to the EDSR coming into force and its organization of "train the trainer" sessions to ensure that the elevating industry was aware of the new EDSR provisions.

[27] With respect to industry consultation, the Respondent relies on the consultation process set out in the 143 page report presented by SECOR Consulting to the Respondent summarizing the consultation sessions regarding the elevating devices mechanic certification program proposal dated April 29, 2011 (the "Consultation Report") and states that the Consultation Report outlines an extensive pre-implementation consultative process with industry stakeholders. Further, the Respondent states that on September 30, 2011 it initiated an industry Stakeholder Panel (the "Industry Panel") to provide an external and independent opinion on viable solutions to key issues outlined in the Consultation Report. The Respondent states that Appellant was a member of the Industry Panel.

[28] With respect to the issues regarding the definition of supervision raised by the Appellant, the Respondent states that the Industry Panel identified the "definition of supervision" as an item for discussion at its first meeting held on September 30, 2011. The Respondent states that at a meeting held on October 13, 2011 a revised definition for supervision was also discussed and the requirement of "on-site supervision" for those mechanics-in-training that had not had competencies signed-off in their skills passports was circulated. The Respondent states that on November 24, 2011 it circulated a draft proposal for defining supervision to the Industry Panel, as follows:

- "site supervision" means the general direction, coordination and oversight of on-site work processes;
- The supervisor must be physically present at all times to provide on-site supervision of:
    - Trainees, who do not possess signed skills competency within their elevating device unit as the supervising Certified Elevator Mechanic, and
    - The holder of a Certified Elevator Mechanic A, H, C or MR certificate of qualification who does not possess the same endorsement granted by the provincial safety manager.

[29] Further, the Respondent states that at the same time it requested all industry contractors to select one or more trainers to act as a liaison with the Safety Authority to ensure a smooth transition period into the new certification regime. The Respondent

states that it also arranged a “train the trainer” program so that industry representatives could become familiar with the new legislated requirements.

[30] The Respondent states that it held three “train the trainer” programs and that these programs explicitly addressed the issue of supervision and stated clearly that direct supervision would be required as relied upon in the Monetary Penalty and Discipline Order. The Respondent states that the Appellant had a representative in attendance at each session.

[31] After the “train the trainer” programs were held, the Respondent states that it circulated a draft directive (the “Draft Directive) outlining the Respondent’s expectations regarding the definition of supervision under the EDSR as explained at the “train the trainer” sessions. The Respondent admits that the Draft Directive was not formally issued. The Respondent states that this was due to the fact that initial feedback regarding the directive was that its issuance could create confusion regarding whether certified contractors were required to supervise other trades such as electricians when they were performing regulated work on elevating devices. The Respondent submits that the failure to issue the Draft Directive in final form is immaterial to the issues on appeal as it was made clear to industry that direct supervision would be required via the “train the trainer” sessions.

[32] The Respondent states that the definition of “supervision” under the EDSR is clear. In this regard, the Respondent submits that the EDSR requires “direct supervision” of mechanics-in-training prior to them having a competency signed off in their skills passport and states that in the supervisory scheme enforced by the Respondent that “general supervision” only applies if a mechanic-in-training is performing a competency that he or she has already been signed off on by the supervising certified elevator mechanic. The Respondent states that “direct supervision” involves having the supervisor physically present at all times to instruct, observe, and verify the regulated work performed by a mechanic-in-training.

[33] In support of this, the Respondent relies on various dictionary definitions of the word “supervision”. The definitions of “supervision” referred to are:

Merriam-Webster Dictionary: The action, process, or occupation of supervising; especially: a critical watching and directing (as of activities or a course of action)

Cambridge Dictionary: The act of watching a person or activity and making certain that everything is done correctly, safely, etc

Collins Dictionary: The supervising of people, activities, or places

Oxford Dictionary: The action of supervision someone or something

The definitions of "supervise" referred to are:

Merriam-Webster Dictionary: to be in charge of (someone of something): to watch and direct (someone or something)

Cambridge Dictionary: To watch a person or activity to make certain that everything is done correctly, safely, etc

Collins Dictionary: To direct or oversee the performance or operation of; to watch over so as to maintain order, etc

Oxford Dictionary: To observe and direct the execution of (a task or activity); observe and direct the work of (someone); keep watch over (someone) in the interest of their or others' security

[34] The Respondent concedes that "supervision" is not defined in the EDSR or Act. During oral questioning counsel for the Respondent admitted that there are other pieces of provincial legislation where "direct supervision" rather than "supervision" is required.

[35] The Respondent submits that the only elevating device contractor to run afoul of the requirements in questions of the EDSR is the Appellant and states that the interest of public safety requires the Board to support its approach to supervision under the EDSR.

[36] In addition to the submissions set out above, counsel for the Respondent provided detailed written submissions regarding the standards of review on this appeal. In those submissions, counsel submitted that the appropriate standard of review is one of reasonableness, not correctness as recently set out by the Board in *A Builder Inc. v. Homeowner Protection Office*, SSAB 4 (1) 2016. However, during questioning by members of the Board at the oral component in this Appeal counsel for the Appellant conceded that where, as here, the legal issue to be determined was one of statutory interpretation, the Provincial Safety Manager could offer no technical expertise and that

on such matters the standard of correctness is, as counsel for the Respondent submitted on Reply, an appropriate standard for the Board to use.

Analysis

Standard of Review

[37] Given the concessions of both parties during the submission process, there is no question regarding the standard of review. Both parties conceded that where, as here, the issue at hand is one of non-technical statutory interpretation and application of that interpretation to the facts at hand that the appropriate standard of review is one of correctness. The Board agrees. This is in keeping with the recent decision of this Board in *A Builder Inc.* v. *The Homeowner Protection Office*, BCSSAB 4 (1) 2016 where the Board's Vice-Chair, J. Hand held that the Board will generally apply a standard of correctness when adjudicating appeals and *Property Owners* and *A Holding Company v. British Columbia Safety Authority*, SSAB 6 (1) 2016 that followed the same approach and found that in most appeals before the Board the standard of review would be one of correctness. Both these decisions were guided by the British Columbia Court of Appeal decision in *Investment Industry Regulatory Organization of Canada* v. Rahmani, 2010 BCCA 93. That is not to say that there may be circumstances where the Board will defer to a decision it considers reasonable when there is more than one reasonable interpretation of the facts or law under appeal or in circumstances where the Safety manager has discretion under the legislative scheme to apply his or her technical expertise. However, for the purpose of this appeal the standard of review is that of correctness.

Monetary Penalty

[38] The Appellant submits that the Respondent breached a duty of procedural fairness owed to the Appellant in that the Respondent did not adequately consult with it, nor the elevating industry as a whole, prior to the implementation of the revisions to the EDSR. The EDSR is a provincial regulation legislated under the Act and the duty to consult relied upon by the Appellant in a situation where the legislature has the right to pass legislation is distinguishable from the various cases relied on by the Appellant. In those cases, there was either statutory consultation mandated by the legislation in

question or the processes looked at by the courts were not set out in legislation and/or regulation. The provincial government may amend legislation as it sees fit and the Respondent is tasked with administering such legislation through the Act and the *Safety Authority Act*, SBC 2003, c. 38. There is no duty to consult owed by the Respondent to regulated contractors prior to making legislative changes as they do not draft the legislation and legislative prerogative rests with the elected officials in the legislature. In the event that the Board is wrong in this regard, the Consultation Report summarizes the extensive industry consultation that went into the formation of the EDSR and the Board finds that there was adequate public consultation in any event.

[39] Accordingly, the only issue to be addressed with respect to the Monetary Penalty is what is meant by the term "supervision." The Appellant submits that without the actual issuance of the Draft Directive that the term supervision cannot mean the complex scheme relied upon by the Respondent. As set out above, the Respondent disagrees. While it is clear that a provincial safety manager may issue a directive to assist with the interpretation of pieces of legislation, it is uncontested that the Draft Directive was not formally issued and was only ever circulated in its draft form. While industry representatives, and indeed the Appellant, may have been aware that a more expansive definition of supervision was under consideration, it would be incorrect in the Board's view to treat the draft directive as having the force of law. Accordingly, the Board can only consider what the legislation itself states as an unpublished Draft Directive carries little interpretive weight.

[40] The legislation in question requires that mechanics-in-training be "supervised" by certified elevator device mechanics. There is no mention in the EDSR of a two-tiered approach to supervision. The legislation states "supervised" not "directly supervised" or "generally supervised" or any other combination of supervision. There is no question that the legislated supervisory scheme contemplates mechanics-in-training being supervised while they learn new regulated skills regarding the maintenance of elevating devices and that upon gaining those skills that they are to have each skill signed off by a certified elevator device mechanic in the skills passports issued by the Respondent. However, as drafted and without the issuance of a directive clarifying the interpretation of the supervisory requirements set out in the EDSR, supervise must be taken to have its plain meaning and the Board can think of many situations where a mechanic-in-

training could be supervised without being directly supervised at all times. For example, a mechanic-in-training could do work and then have a supervisor ensure that it had been done correctly prior to turning on the elevating device rather than having the supervisor directly present at all times. Of course, there will also be instances where the type of regulated work being performed by a mechanic-in-training will require direct supervision in order to ensure that such work is performed safely.

[41] While the Board agrees with the Appellant that the detailed supervisory scheme relied upon by the Appellant requiring "direct supervision" is not required absent the final issuance of the Draft Directive, a review of the evidence before the Board indicates that even the lower standard of supervision set out in the EDSR was not met by the Appellant. The Appellant has not provided any evidence in answer to the observations of the Respondent that confirm that regulated work was performed without supervision of any kind. Accepting that the EDSR requires "supervision but not the direct on site supervision that is contemplated in the Draft Directive, it is clear that the Appellant failed to provide even the lesser degree of supervision contemplated by the EDSR. The fact that there is evidence before the Board that this unsupervised work resulted in significant safety concerns for the public only exacerbates the matter. Given the Appellant's failure to submit any evidence that the regulated work in this instance was supervised, the Board finds that the Monetary Penalty was appropriately issued by the Provincial Safety Manager. The Appellant's appeal regarding the issuance of the Monetary Penalty is dismissed.

Discipline Order

[42] The Respondent did not provide detailed submissions regarding the Discipline Order. The Respondent relied on the same arguments submitted with respect to the Monetary Penalty.

[43] Pursuant to section 42 of the Act, a Discipline Order may be issued as follows:

> **42** (1) A provincial safety manager may, in writing, on their own initiative or if requested by a safety officer or local safety manager, issue a discipline order to any person performing regulated work who

(a) is in breach of a condition of, or restriction on, any licence or permission, whether stated in the licence or permission or stated in the regulations,

(b) practises in a discipline under this Act for which the contractor is not licensed, or undertakes regulated work that the individual or contractor is not qualified to undertake,

(c) fails to comply with a compliance order,

(d) fails to comply with a safety order,

(e) fails to comply with a requirement, term or condition of an alternative safety approach, or

(f) is convicted of an offence under this Act.

(2) A discipline order under subsection (1) must

(a) name the person to whom the order is addressed,

(b) state the sanction imposed by the order,

(c) state the reasons for the order,

(d) state that the person affected may appeal the order to the appeal board,

(d.1) be dated the day the order is made,

(e) be signed by the provincial safety manager, and

(f) be served on the person named in the order.

(3) A discipline order under subsection (1) may impose any sanction that the provincial safety manager considers necessary in the circumstances, including any of the following orders:

(a) an order suspending or revoking the licence of a licensed contractor or revoking any permission granted to any person;

(b) an order changing the terms or conditions of, or attaching additional terms or conditions to, the certificate of qualification of an individual or the licence of a licensed contractor;

(c) an order requiring that any person performing regulated work act only under supervision or as directed in the order.

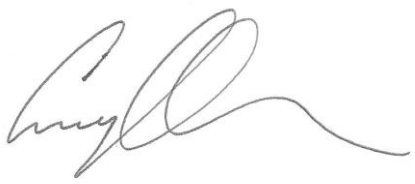
(4) Despite subsection (3), a discipline order may allow a person whose permission to do regulated work has been suspended under this section to

undertake regulated work in order to bring non-complying regulated work into compliance.

[44] As set out above, the Board has found that the Appellant failed to adequately supervise its mechanics-in-training as required by the Act and EDSR. This failure to supervise is a breach of the terms of the Appellant's elevating device license. Section 42 of the Act permits the Provincial Safety Manager to issue a discipline order in such circumstances. Further, section 42 permits the Provincial Safety Manger to attach further additional terms to a contractor's license as part of a Discipline Order, including that a person performing regulated work must work only under supervision or as otherwise directed. The Board notes that the Discipline Order requires direct supervision while the Board has found in this appeal that without final publication of a directive setting out the requirement of direct supervision that the EDSR requires supervision rather than direct supervision. However, based on the evidence before the Board, namely the Appellant's failure to supervise it's mechanics-in-training and to permit non-licensed individuals to perform regulated work as set out above, the Board finds that the Provincial Safety Manager appropriately exercised his power to issue a Discipline Order and that there is legislative authority to require direct supervision in the Discipline Order. Accordingly, the Appellant's appeal with respect to the Discipline Order is also dismissed.

Conclusion

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

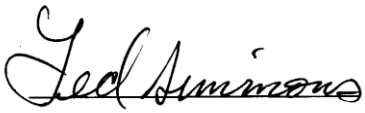


Emily C. Drown
Chair, Safety Standards Appeal Board

Signed;

Jeffrey A. Hand

Vice-Chair, Safety Standards Appeal Board



Ted Simmons, Panel Member