

**Date Issued: December 5, 2018**  
**Appeal No. SSAB 19-2018**

**Indexed as: BCSSAB 19 (1) 2018**

**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:**

A Plumbing and Heating Inc.

**APPELLANTS**

**AND:**

Technical Safety BC

**RESPONDENT**

**REASONS FOR DECISION**

Safety Standards Appeal Board:

Jeffrey Hand

Representing the Appellant:

The Appellant

Technical Safety BC:

Kimberley Fenwick

**INTRODUCTION**

[1] This is an appeal of a Monetary Penalty No. MP-2018-0007 dated June 28, 2018 ("Monetary Penalty") in the amount of \$4,000. The Monetary Penalty was issued as a result of the Appellant performing regulated gas work without first obtaining a permit. The Appellant submits that the failure to obtain the permit in this instance was inadvertent and asks that the Penalty be set aside, or alternatively that it be reduced.

**FACTS**

[2] The Appellant is a gas contractor who carries on business in Osoyoos, British Columbia.

[3] In or about April, 2016 the Appellant provided a quote to the owner of a home located at a property, Midway, British Columbia (the "Midway Property") to supply and install a gas furnace. The quote for the work included reference to obtaining a provincial gas permit. The gas appliance was installed shortly thereafter and an invoice was rendered to the home owner on May 31, 2016, again referencing a gas permit as part of the scope of the work. However, no gas permit was obtained.

[4] A Safety Officer with Technical Safety BC determined on September 13, 2017 that no gas permit had been taken out for the work in the Midway Property. This was brought to the attention of the Appellant and shortly thereafter on September 19, 2017 the requisite permit was obtained.

[5] The Appellant had received a Compliance Order, CO-2012-0013 dated February 13, 2012 ("2012 Compliance Order") following a determination made in 2012 that work had been done at a home in Osoyoos without the requisite gas permit. The Compliance Order required the Appellant to cease performing regulated work without first obtaining a permit. In addition, the Appellant was required to conduct an audit of work performed between 2010 and 2012 and that audit revealed that there were eight other instances where regulated work had been performed without a permit having been obtained.

[6] Following the 2012 Compliance Order the Appellant performed a review of the company's policy and procedures with respect to ensuring that procedures were put in place to obtain permits for all future work.

[7] On February 28, 2018 the Safety Manager advised the Appellant that he was considering imposing a Monetary Penalty in the amount of \$9,500 because he considered the Midway Property incident to be a failure to abide by the terms of the 2012 Compliance Order. The Appellant responded to the February 28<sup>th</sup> letter, explaining that the failure to obtain a permit for the Midway Property was the result of an administrative error committed by an office staff individual who worked for the company for only a short period of time. The principal of Action was unaware that a permit had not been obtained until this was brought to his attention by a Safety Officer in 2017. With these circumstances in mind the Appellant advised the Safety Manager that he considered the imposition of a Monetary Penalty to be unwarranted.

[8] On June 28, 2018 the Safety Manager issued a Monetary Penalty in the amount of \$4,000. The Appellant filed this appeal on August 5, 2018.

## **ANALYSIS**

[9] The Safety Standards Act authorizes the Safety Manager to impose a Monetary Penalty on a person who fails to comply with a Compliance Order:

Section 40(1) The 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) Compliance Order

[10] The 2012 Compliance Order required the Appellant not to perform regulated work without first obtaining a permit. The failure to obtain the permit for the Midway Property accordingly constitutes a contravention of the Compliance Order and the Act authorizes the Safety Manager to impose a Monetary Penalty.

[11] For its part the Appellant does not contest that a permit was not obtained for the Midway Property or that it does not constitute a contravention of the Compliance Order. Rather, the Appellant says that this contravention was not deliberate but rather arose as a result of an administrative error when an inexperienced staff member failed to obtain the requisite permit. The Appellant says no penalty is warranted. That said, the Appellant agrees that the regulatory scheme requiring the obtaining of permits before the performance of regulated work is an important requirement and one that is necessary in order to enhance public safety.

[12] In order to ensure compliance with this important regulatory function there must be consequences for failing to obtain permits, even through inadvertence, so as to ensure that contractors have in place internal processes that reduce, as much as possible, the risk that permits might inadvertently be missed.

[13] The Appellant also relies on Section 75(1) of the Safety Standards Act which deals with offences committed by corporations and provides a due diligence defence to the corporation if the offence was committed by an employee and without the corporation's knowledge.

[14] This provision has no application to this appeal because it only applies to offences which are brought by summary conviction in the Provincial Court of British Columbia. This appeal is not in relation to an offence.

[15] The Board is satisfied that a Monetary Penalty was not only authorized under the applicable legislation but also that it was warranted in the circumstances of this case.

[16] That leaves the amount of the Monetary Penalty for consideration. The Appellant says that the amount of the Monetary Penalty is excessive and that a fine of this amount would constitute a financial hardship on a small contractor.

[17] Dealing firstly with the Appellant's submission that the amount of the Monetary Penalty would constitute a financial hardship, no specific evidence was provided by the Appellant that would assist in understanding the financial circumstances of the Appellant's business and the corresponding impact that paying a penalty of \$4,000 would have on their operation.

[18] The Monetary Penalties Regulation sets out six criteria that the Safety Manager must consider in arriving at the amount of the Monetary Penalty. Section 3 of the Regulation provides:

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; and
- (f) any economic benefit derived by the person from the contravention.

[19] In an effort to apply these criteria TSBC has created an internal guideline known as the Monetary Penalty Calculator. For each of the six criteria set out in the Regulation, 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 TSBC has further established a range of penalty amount for a given score, although it is not entirely clear this range is established or what criteria are used to arrive at the dollar amount within the range. The scores and corresponding penalty costs in each of the six categories are then totalled to arrive at a Monetary Penalty. I set out below the criteria from the Regulation and the use of the Safety Manager has made of them in reaching a Monetary Penalty.

## **PREVIOUS ENFORCEMENT ACTIONS**

[20] The Appellant received the 2012 Compliance Order for failing to obtain a permit so it would seem that the failure to obtain a permit in respect of the Midway Property is a subsequent infraction of an identical nature, albeit they occurred some four years apart.

[21] The Safety Manager considered this a scale two infraction with a value of \$1,500. The descriptive wording set out in the Monetary Penalty Calculator for a scale two infraction is as follows:

One previous instance of Compliance Order activity related to this action.

[22] I accept that the imposition of a penalty is warranted to ensure that there is compliance going forward and that the penalty amount must be sufficient to act as a general deterrence. There is no explanation offered as to how the \$1,500 Penalty was arrived at, which is some cause for concern, but I accept that the \$1,500 amount imposed by the Safety Manager is appropriate, especially where there is evidence of a similar infraction in 2014, although that one did not appear to result in any Compliance Order or enforcement proceedings.

## **EXTENT OF RISK**

[23] The Safety Manager considered the risk of harm for the Appellant's failure to obtain a permit as constituting a minor risk and deserving of a \$500 penalty amount.

[24] The Appellant does not suggest that there was no risk of harm in this instance. I accept the Safety Manager's assessment that a \$500 penalty is warranted for a minor risk of harm.

### **WAS THE CONTRAVENTION DELIBERATE?**

[25] While the Safety Manager initially considered the failure to obtain a permit on the Midway Property to be deliberate, when the Monetary Penalty was ultimately issued he had concluded that the Appellant had not acted deliberately. Accordingly, no penalty amount was sought on this criteria and this seems appropriate.

### **WAS THE CONTRAVENTION REPEATED OR CONTINUOUS?**

[26] The Monetary Penalty Calculator describes repeated or continuous contraventions as:  
Duty holder has a documented history of one relevant non-compliance

[27] As this Board has previously held, the Monetary Penalty Calculator is incorrectly applying the Regulation as it relates to previous enforcement activity of a similar nature. The Appellant has already been levied a penalty under the first category of the Regulation by reason of the Midway Property constituting a second enforcement action for failing to obtain a permit. By levying an additional penalty for a previous infraction in the fourth category represents a double counting. The legislature would not have intended the first and fourth criteria in the Regulation to refer to the same thing. It must be that the term "repeated or continuous" refers to something other than previous contraventions. It must refer to a contravention that persisted in time or it was repeated over and over again. In this instance, there was only one permit that was not obtained and that situation was corrected within days of the Safety Officer bringing this omission to the attention of the Appellant. The infraction was neither repetitive nor continuous. There being no basis in my view for a penalty to be levied for repeated or continuous circumstances as that phrase is used in the Regulation, the Safety Manager's decision to impose a \$1,500 penalty is duplicative of the penalty applied for a previous enforcement action and accordingly, should be reduced to zero.

### **LENGTH OF TIME**

[28] The descriptive language in the Monetary Penalty Calculator for this criteria, where there is no impact is:

The action was discontinued immediately.

[29] In this instance the Safety Manager found that the lack of permit was corrected immediately and thus there was no penalty imposed for this criteria.

## **ECONOMIC BENEFIT OBTAINED**

[30] The Safety Manager considered that some economic benefit was obtained because the Appellant did not initially incur the permit fee of \$113.

[31] The evidence in this appeal does not disclose that the Appellant intended to avoid paying the modest permit fee. It is also noteworthy in the Board's view that there is no evidence that the Appellant sought to conceal the lack of a permit. Aside from a brief period of deferral, owing to the Appellant's lack of knowledge that a permit had not been obtained, it cannot be said that any actual financial benefit was obtained.

[32] In addition, the Board finds that it is unreasonable to impose a further \$500 in respect of the permit fee deferral in addition to the penalties that have already been levied against the Appellant in categories 1 and 2. The \$500 portion of the Monetary Penalty should be set aside.

[33] In view of the foregoing analysis the Monetary Penalty will be reduced to \$2,000 to account for the previous enforcement action and the minor risk of harm in this instance. This amount should be paid within 30 days of the date of this Decision.

Signed;

A handwritten signature in black ink, appearing to read "Jeffrey Hand", written in a cursive style.

Jeffrey Hand, Chair