

**Date Issued: March 21, 2019
Appeal No. SSAB 21-2018**

Indexed as: BCSSAB 21 (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 Gas Contractor

APPELLANT

AND:

Technical Safety BC

RESPONDENT

REASONS FOR DECISION

Safety Standards Appeal Board:

Jeffrey Hand

Representing the Appellant:

The Appellant

Technical Safety BC:

Lisa Picotte-Li

INTRODUCTION

[1] The Appellant is a gas contractor carrying on business in the City of Terrace, British Columbia.

[2] This is an appeal from a Monetary Penalty MP-2018-001, dated August 7, 2018 ("Monetary Penalty) levied against the Appellant for failure to comply with Compliance Order CO-2012-0036 dated April 12, 2012 ("Compliance Order").

[3] The Appellant asks that the Monetary Penalty in the amount of \$8,000 be set aside, or alternatively, that it be reduced.

[4] The Safety Manager submits that the Monetary Penalty is reasonable and correct and accordingly should not be set aside or varied.

FACTS

[5] Beginning in 2011 the Respondent was investigating owner complaints at various properties in the City of Terrace regarding the installation of regulated gas appliances. The owners of the properties identified the Appellant as the gas contractor who had performed the work. There was no record of any gas permits having been obtained.

[6] A Safety Officer employed by the Respondent made enquiries with a local supplier of gas products to obtain a list of regulated equipment purchased by the Appellant in the previous two years. When the number of gas appliances purchased exceeded the number of permits obtained the Safety Officer became concerned that the Appellant might be performing regulated work without the necessary permits.

[7] A meeting between the Respondent and the Appellant was convened in March, 2011 to discuss the number of gas installations he had completed in the last two years and to review the apparent discrepancy between the number of gas appliances purchased and the number of permits obtained.

[8] During this meeting the Appellant was reminded of the need for obtaining installation permits prior to performing regulated work and he was asked to check his records and to provide the Safety Officer with a list of any properties where he had performed regulated gas work in the past and for which he had not obtained installation permits. The Safety Officer followed up in the month of June, 2011 with the Appellant in an effort to obtain the requested information.

[9] In the months of August and September, 2011, a Safety Officer conducted inspections at five properties in the City of Terrace where the Appellant had performed regulated gas work. Various non-compliances with the installation code were

identified at each of these properties and Certificates of Inspection were issued to the Appellant rejecting these installations and requiring rectification of the installation errors, including obtaining the necessary permits.

[10] On October 7, 2011 a meeting was held between the Appellant and the Safety Officer to review:

- (a) the outstanding Certificates of Inspection from the five Terrace properties;
- (b) the need to obtain permits for regulated work; and
- (c) the need to stay current with the regulations governing gas installations.

[11] In January, 2012, the Appellant attended a contractor orientation session organized by the Respondent.

[12] The dialogue between the Appellant and Respondent concerning contractor best practices as well as sorting out the need for permits on work done by the Appellant the previous year continued into April, 2012.

[13] A further meeting was held with the Appellant on April 12, 2012 for the purpose of:

- (a) generally reviewing contractor responsibilities when performing regulated work;
- (b) reviewing outstanding unpermitted work and developing a plan to ensure permits were obtained going forward; and
- (c) reviewing outstanding non-compliances and requirements to correct those deficiencies.

[14] At this point in time the Respondent had compiled a list of previous work performed by the Appellant and found that there were four addresses which still required permits.

[15] At this meeting the Compliance Order was delivered to the Appellant. That Order required that the Appellant:

- (a) stop performing regulated gas work unless a gas permit was first obtained;
- (b) correct all non-compliances at the five properties that had received Certificates of Inspection in 2011 and to do so within 45 days; and
- (c) implement a business plan for obtaining permits in the future.

[16] It appears as though the concerns regarding the five Terrace properties were rectified to the Safety Manager's satisfaction by approximately June, 2012.

[17] On July 19, 2017 the Respondent determined that the Appellant had performed the regulated gas work at a property in Terrace, British Columbia, (the "Queensway Property") and that no installation permit had been obtained.

[18] On April 18, 2018 the Respondent determined that the Appellant had performed regulated gas work at another property in Terrace, British Columbia (the "Robin Road Property") and there too the work had been performed without the necessary gas installation permit.

[19] On June 22, 2018 the Safety Manager wrote to the Appellant advising him that a Monetary Penalty in the amount of \$8,000 was under consideration because the failure to obtain permits at the Queensway and Robin Road Properties constituted a breach of the Compliance Order. The Appellant was invited to provide a response to the Safety Manager for his consideration prior to issuing the Monetary Penalty. No submission was received from the Appellant and on August 7, 2018 the Monetary Penalty was issued.

[20] On September 4, 2018 the Appellant filed this appeal.

ANALYSIS

[21] The Respondent submits that the standard of review that the Board should apply to this appeal is reasonableness rather than correctness. Consistent with the Board's

practice, the Board will review the application of the applicable legislation and the determination of facts on a correctness standard. Those decisions of the Safety Manager that fall within discretion granted to him under the legislation and on which the Safety Manager also possesses technical expertise may invite consideration on a reasonableness standard.

[22] The Appellant submits that he understands the importance of obtaining permits but he says that as a small business operator he sometimes falls behind in the administrative tasks of running his business and that permits are sometimes overlooked. He says that the process of obtaining permits online has been confusing to him and the online process, at least when it was first implemented, sometimes did not work. There is an alternative to applying for permits online and that is to obtain them by phone but he says that this can sometimes involve a long wait time. He does not provide any specific details of the difficulties he may have encountered in obtaining permits and he does not describe the length of time he may have waited while endeavouring to obtain permits by phone. Most importantly for this appeal, the Appellant has not explained why permits for the Queensway and Robin Road properties were not obtained prior to performing the work at those properties.

[23] Section 41(b) of the *Safety Standards Act* (the "*Act*") empowers the Safety Manager to impose a Monetary Penalty for a breach of a Compliance Order.

[24] The Compliance Order in this instance required that the Appellant obtain the requisite installation permits prior to performing any regulated gas work. The Compliance Order was issued after it had been determined that there were several installations in or about the town of Terrace performed by the Appellant without the proper permits in place.

[25] The evidence is clear and unrefuted that the regulated gas work performed by the Appellant at Robin Road and Queensway properties was done so without the requisite installation permits. These incidents constitute a clear breach of the Compliance Order and the Board finds that the legislation authorized the Safety Manager to impose a Monetary Penalty.

[26] Turning to the amount of the Monetary Penalty, the Monetary Penalties Regulation BC Reg. 129/2005 ("Regulation") sets out the criteria that the Safety Manager is required to consider before imposing a Monetary Penalty. Those criteria are:

- (a) previous enforcement actions for contraventions of a similar nature;
- (b) the extent of the harm or the degree of risk of harm 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 from the contravention.

[27] In applying the criteria set out in the Regulation, Technical Safety BC 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 Technical Safety BC has further established a range of penalty amount for a given score, although it is not entirely clear how this range is established or what criteria are used to arrive at an amount within the range. The scores, and corresponding penalty cost in each of the six categories is then totalled to arrive at a Monetary Penalty. Each of these will be discussed below.

Previous Enforcement Actions

[28] The regulated work done by the Appellant at the Robin Road and Queensway properties without a gas installation permit is an identical infraction to that which occurred in 2011 which resulted in the Compliance Order. The Regulation clearly contemplates that where individuals have previously committed similar infractions that

have been the subject of enforcement proceedings, like Compliance Orders, this is a consideration for imposing a Monetary Penalty. The Board accepts that it is necessary to impose harsher penalties when these circumstances exist so as to modify this type of behaviour. The interests of public safety justify this approach.

[29] Here the Safety Manager imposed a Monetary Penalty of \$1,500 to account for the previous Compliance Order and the Board agrees with this determination.

Safety Risk

[30] The Safety Manager submits that the safety risk arising from the Robin Road and Queensway property installations was minor. The Safety Manager assigned a \$500 penalty value, being at the lowest end of the range for safety risks according to the guideline used by the Safety Manager. The Board agrees.

Was the Contravention Deliberate?

[31] The Appellant has offered no specific explanation for why the requisite permits were not obtained at Robin Road and Queensway properties. He does not say, for instance, that this was due to inadvertence. His submission that he sometimes overlooks the need for obtaining the permits does not assist him in this regard. It is noteworthy in the Board's view that the Appeal Record contains evidence of a significant history of dialogue between the Appellant and the Safety Authority, dating back to 2011, whereby Safety Officers impressed upon the Appellant the need for obtaining permits prior to performing regulated work and the need for implementing protocols within his office to ensure that this occurred. The Appellant, by all appearances, understood this requirement and indicated that he was indeed taking steps to improve his practice. It is all the more concerning to the Board that the Appellant continued to fail to obtain permits in 2017 and 2018 when there can be no doubt that the Appellant understood the need for, and the importance of, obtaining these permits and he was aware enforcement action could be taken against him for failing to follow these steps.

[32] Moreover, the Appellant's only explanation for failing to obtain the permits appears to be nothing more than he found it inconvenient to do so in all instances.

[33] Given the history of the Appellant's dealings with the Respondent concerning previous instances of performing work without a permit, the Board concludes that the evidence in this case is sufficient to establish that the Appellant deliberately disregarded the permit requirements and in knowing contravention of the Compliance Order. The Safety Manager's decision to impose a \$4,000 Monetary Penalty for this criteria is a correct application of the facts to the Regulation and the Board agrees with this amount.

Whether the Contravention was Repeated or Continuous

[34] The Safety Manager determined that since the Robin Road incident occurred approximately nine months after the Queensway incident, this is evidence of a repeated contravention and warranting of an additional Monetary Penalty in the amount of \$1,500. In other words not only had the Appellant received a Compliance Order in 2012 which he breached in 2017 by proceeding with the work at the Queensway property, this contravention was repeated again in 2018 at Robin Road.

[35] The Board accepts that this evidence displays a pattern of behaviour on the part of the Appellant that should be sanctioned.

Length of Time the Contravention Continued

[36] The evidence does not disclose that the contraventions continued for any significant period of time. The Safety Manager did not levy any penalty in this regard.

Economic Benefit

[37] The Safety Manager submits that the Appellant did not achieve a significant economic benefit and accordingly levied a penalty at the lower end of the range set out in the guideline, being \$500 and the Board accepts this as reasonable on the facts of this appeal.

[38] The Board agrees that a Monetary Penalty of \$8,000 is warranted in the circumstances of this case.

Economic Hardship

[39] Beyond a general statement by the Appellant that he cannot afford to pay a Monetary Penalty of \$8,000 no evidence has been put forward by the Appellant to demonstrate what his financial circumstances are or how a Monetary Penalty of \$8,000 compares to his overall sales and profitability. Without such evidence it is not possible to consider whether this Monetary Penalty presents undue hardship to the Appellant. The Appellant has failed to demonstrate the economic consequences of the Monetary Penalty is a valid reason for either reducing the amount of the Monetary Penalty or setting it aside.

CONCLUSION

[40] The appeal is dismissed.

Signed;

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

Jeffrey Hand, Chair