

Indexed as: BCSSAB 39 (1) 2021

**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:

A Company Ltd.

APPELLANT

AND:

British Columbia Safety Authority

RESPONDENT

Safety Standards Appeal Board: David Martin

Representing the Appellant: The Appellant

Representing Technical Safety BC: Audrey Yang

REASONS FOR DECISION

INTRODUCTION

1. The Appellant brings this appeal seeking to set aside or reduce a decision of the Respondent, Technical Safety BC, in issuing Monetary Penalty No. MP-2020-0024 issued on December 17, 2020, in the amount of \$12,000. The Monetary Penalty was issued for the Appellant's failure to comply with Compliance Order No. CO-2016-0105, issued November 4, 2016 (the "Compliance Order"). The Compliance Order was issued after the Respondent's investigation into an incident that occurred on September 13, 2016 at a home in White Rock, where the Appellant was responsible for performing regulated gas work. The Respondent's investigation determined that the regulated gas work was performed without a permit and by an individual who did not possess a gas

certificate qualification and who was not supervised by a qualified person required under the *Safety Standards Act* (the “*Act*”).

2. The Compliance Order required the Appellant to obtain a gas installation permit prior to performing any regulated gas work, to stop authorizing individuals to perform regulated gas work unless it is within the scope of the individual's qualification or the individual is supervised in accordance with the *Act*.
3. The Appellant says there were circumstances at play that should relieve it of the Monetary Penalty or reduce the amount of it.
4. The Respondent is authorized by the *Act* and the *Monetary Penalties Regulation* (the “*MPR*”) to issue a Monetary Penalty.

Issue

5. I must determine whether the decision of the Respondent should be confirmed, varied or set aside. To do this, I must decide whether the Respondent was correct in its finding that the Monetary Penalty should be issued and in assessing the amount.

Background Facts

6. In October 2019, the Respondent released the findings of its Compliance Audit which was conducted to review the Appellant's level of compliance with the *Act* and associated regulations for the gas, boiler and refrigeration technologies. The Compliance Audit found the Appellant was not effective in maintaining compliance with the *Act* and associated regulations. Specifically, the Compliance Audit identified non-compliances that included:
 - (a) performing regulated electrical, gas and refrigeration work without the required installation permits;
 - (b) authorizing individuals who did not possess a certificate of qualification or other training credential recognized by a Provincial Safety Manager to perform regulated electrical and gas work. In particular, the Compliance Audit identified an unqualified individual who had been authorized to perform regulated gas work at a home in Surrey in 2019 and that this individual was also not provided supervision as required by the *Act*; and

- (c) utilizing gas replacement appliance permit decals contrary to the requirements of the Replacement Appliance Decal Program. In particular, the Compliance Audit found gas installation work being performed under the Gas Appliance Replacement Decal Program and there was no evidence of a gas installation permit having been obtained for the work.
- 7. The Compliance Audit identified that, over a 2-year period, the Appellant performed a total of 60 gas installations, four refrigeration installations, and one boiler installation without first obtaining a permit.
- 8. With respect to the unpermitted gas work findings from the Compliance Audit, the Appellant was provided an opportunity by the Respondent to comment on the audit findings and it did not disagree with the findings of the unpermitted gas work.
- 9. With respect to the unpermitted refrigeration work, the Respondent sent to the Appellant a list of refrigeration jobs that were identified as potentially unpermitted work. In January 2020, the Appellant confirmed the four unpermitted refrigeration jobs.
- 10. The Respondent's further investigation showed evidence of the Appellant authorizing an individual to perform regulated gas work without the required qualification and supervision. The work identified included testing of the gas combustion train of a domestic hot water tank. The testing of a gas-fired appliance is considered regulated gas work. The individual who performed this work did not have a gas certificate of qualification.
- 11. Following the Compliance Audit:
 - (a) the Respondent identified another two instances of unpermitted gas work and one instance of unpermitted boiler work. These additional instances of unpermitted work were confirmed by the Appellant;
 - (b) The Appellant confirmed that a gas installation done in January 2018 at a home in Port Coquitlam was performed without a permit;
 - (c) In May 2020, the Appellant confirmed the installation of a heating boiler at a home in Coquitlam was installed and that a boiler permit had not been obtained for the installation; and

- (d) In June 2020, the Respondent received information that the Appellant had installed a 20kw generator at a home in early 2019. The Appellant confirmed it had completed this work and that a permit had not been obtained.
12. On October 23, 2020, the Respondent sent a notification to the Appellant of a potential Monetary Penalty for failure to comply with the Compliance Order, specifically the failure to:
- (a) obtain installations permits for regulated gas, refrigeration and boiler work performed under three contractor licences held by A Company Ltd.; and
 - (b) stop authorizing individuals to perform regulated gas work unless it is within the scope of their certificate of qualification or supervised by a person authorized under the *Act* to provide supervision.
13. That notification stated that the Respondent was considering imposing a Monetary Penalty value of \$29,500. It also said that the Respondent was considering imposing a Monetary Penalty in the amount of \$12,000 as it believed this to be a more appropriate value in recognition of the economic impact of COVID-19. The Appellant was given the chance to respond and it did so. Largely, its response mirrored its position on this appeal.
14. As a result, on December 17, 2020, this Monetary Penalty was issued to the Appellant in the amount of \$12,000.
15. It is from that Monetary Penalty that this appeal is taken.

Position of the Parties

Appellant

16. In its appeal to the Board, the Appellant requested that the Monetary Penalty be dismissed or reduced in amount. The reasons for that request are, generally, the following:
- (a) With respect to why permits had not been obtained for refrigeration and boiler work, these permits were missed based on human error and the failure was not intentional. Specifically, regarding the refrigeration permits, an error was made when attempting to calculate the KW of the rooftop units that were replaced. With respect to the boiler installation at 315 Walker Street in Coquitlam, an

employee of the Appellant was told by the Appellant's supplier that the unit required a permit and was given incorrect information. The Appellant acknowledges that it should have investigated this matter itself and that they have learned from this error.

- (b) With respect to the failure to obtain electrical permits, the employee of the Appellant in charge of ensuring permits were obtained suffered a stroke which, unknown to the Appellant, severely affected his cognitive abilities causing him to fail to ensure permits were taken out prior to the work being done.
- (c) It disputes the finding that unqualified people did the work unsupervised as salaried employees did the supervision.
- (d) During the period of the Respondent's audit in 2019, the Appellant had taken out 1,671 gas permits and decals compared to the number of permits that were missed (60) which amounted to a 3.5% failure rate.
- (e) The Appellant is focused on bringing itself as a company, the people it employs, and other industry members up to a level greater than just compliance. It does not perform unpermitted work intentionally and that it trains its employees to a positive extent.
- (f) The Appellant feels that it has been singled out due to the company's size and that other companies intentionally perform unpermitted work.
- (g) With respect to the incident that caused the issuance of the Compliance Order, this accident was the fault of a manager who had given his notice the very morning the accident occurred and simply did not care about the consequences.
- (h) With respect to the Respondent's audit in 2019, the Appellant stresses that it was cooperative and made this its top priority. It stresses that it paid the Respondent over \$12,000 to do the audit.
- (i) With respect to the various items identified in the Monetary Penalty, the Appellant disputes the reasons for each item set out in the Penalty. Specifically with respect to the finding that it benefited financially from the failure to obtain permits prior to doing the work, the Appellant argues that it did pay for the permits, when

obtained, and in some cases, for the decals paid for unnecessarily. As well, it suffered financially as it did not charge customers for the permits.

- (j) In closing, the Appellant reiterates that the permitting errors that were made were clerical errors.

Respondent

17. The Respondent takes the position that the Monetary Penalty is reasonable and correct, and that there is no basis in law for the Board to vary or set it aside. It submits that the appeal record demonstrates the Compliance Audit findings are accurate and directly supported by information supplied and verified by the Appellant.
18. With respect to unpermitted gas work, the Appellant did not dispute the findings of the Compliance Audit and that all of the unpermitted gas work listed on the "GA Installation Permit Bulk Load" were verified by the Appellant.
19. With respect to unpermitted refrigeration work, the Respondent sent the Appellant a list to confirm that a permit was obtained, or that a permit was not required for the work. In response, the Appellant confirmed four unpermitted refrigeration jobs.
20. The Appeal Record provides evidence of the Appellant authorizing an individual to perform regulated gas work without the required qualification and supervision on a work identified as testing of the gas combustion train of a domestic hot water tank.
21. Following the Compliance Order, the Respondent identified another two instances of unpermitted gas work and one instance of unpermitted boiler work. These were verified by the Appellant.
22. Following the Compliance Audit, the Respondent received information that the Appellant had installed a 20kw generator at a home in 2019. The Appellant confirmed it had completed this work and that a permit had not been obtained.
23. With respect to the Monetary Penalty, the Respondent submits that the Provincial Safety Manager duly considered the factors set out in Section 3 of the *MPR* and that the Monetary Penalty complies with Section 40 of the *Act*. In recognition of the unprecedented times caused by the COVID-19 pandemic, the penalty assessed was \$29,500, but only a penalty in the amount of \$12,000 was imposed.

24. The Appellant's explanation for doing unpermitted work and having unqualified individuals to perform regulated work without proper supervision does not provide an exemption from complying with the Compliance Order, and the Appellant could have and should have taken greater care to ensure compliance with the Compliance Order. Although the Appellant says it does not perform unpermitted work intentionally, this does not negate the fact that it failed to comply with the Compliance Order, as well as permitting requirements of the *Act* and the *Regulation*.

Analysis and Decision

Compliance Order

25. Section 38 of the *Act* authorizes the Safety Manager to issue a Compliance Order if, in the opinion of the Safety Officer, there is a risk of personal injury or damage to property because regulated work is being carried out in a manner that does not comply with the *Act* and *MPR*.
26. Although the Appellant provides an explanation for the matter giving rise to the Compliance Order, it does not effectively argue that the Compliance Order was not properly issued.
27. Following the issue of the Compliance Order, the Respondent identified that the Appellant performed a total of 60 gas installations, four refrigeration installations and one boiler installation without obtaining the appropriate permits and also identified that the Appellant authorized unqualified individuals to perform the work without supervision. Therefore, it appears clear to me that the Compliance Order was not complied with.

Monetary Penalty

28. Section 41(b) of the *Act* authorizes the Safety Manager to issue a Monetary Penalty if there has been a failure to comply with a Compliance Order. The *MPR* establishes the criteria that the Safety Manager must consider when imposing a Monetary Penalty.
29. The evidence establishes that a Compliance Order was properly issued in the circumstances of this case. The evidence also discloses that there was not full compliance with the Compliance Order. A Monetary Penalty is not only authorized by the applicable legislation but is also appropriate in circumstances where public safety is potentially at risk. The imposition of a Monetary Penalty is one means available to ensure the ongoing protection of the public but also to deter similar behavior in the

future. I find that the imposition of a Monetary Penalty is appropriate in the circumstances of this case.

30. Turning to the amount of the penalty, this requires a consideration of what the *MPR* says concerning the criteria for imposing a Monetary Penalty.
31. The *MPR* in Section 3 sets out the factors the Safety Manager must consider in imposing a Monetary Penalty. In applying the criteria set out in the Regulation, the Respondent 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 0 through 5 in an attempt to rate the impact of each of those criteria, where 0 is the scoring where there is "no impact" and 5 is reserved for matters where there is "severe impact". For each of those scores it appears as though the Respondent 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

32. For this criteria, a rating of "2" has been given with a penalty cost of \$1,500. The Monetary Penalty Calculator describes a rating of "2" as "One Previous Instance" of Compliance Order activity related or similar to this action.
33. The Compliance Order was issued due to a previous contravention by the Appellant, and the Monetary Penalty was issued based on the failure to comply with the Compliance Order. The Appellant concedes this point. Therefore I conclude that there was a previous instance of Compliance Order activity related or similar. I would not disturb this finding.

Extent of the Harm or Degree of Risk of Harm to Others as a Result of the Contravention

34. Here a score of "3" has been determined for a cost of \$4,000. Based upon the Calculator such a score is applicable where there is a Significant potential for harm.
35. Based upon the number of unpermitted installations found after the Compliance Order during and after the Compliance Audit, and based upon the fire that resulted from the

2016 incident, I find that the score in this case was not incorrect and I would not disturb it.

Whether the Contravention was Deliberate

36. The Respondent has scored this criteria as Level 3 and assigned the penalty cost of \$4,000. Based upon the Monetary Penalty Calculator such a score is applicable where the Appellant had knowledge of the requirements and was informed of that from the Compliance Order and to the accompanying letter from the Safety Manager.
37. The Appellant argues that the failure to take out permits was a clerical mistake and was due to inadvertence and was not deliberate. Given the number of permits taken out and the failure rate of 3.5%, the Appellant submits is a factor to take into consideration relating to whether the action was deliberate.
38. For this issue I have to ask this question: Does the evidence on this appeal disclose a deliberate disregard of the Compliance Order warranting this penalty? I conclude that it does not.
39. In my view, in order to find that the Appellant's non-compliances were deliberate there must be an element of intention to purposely fail to comply. The only evidence before me is that permits were not taken out due to human error, by a failure of an employee whose responsibility it was to ensure permits were taken out, due to suffering a cognitive deficit, and due to other errors. The record before me convinces me that the Appellant's actions were far from deliberate.
40. Although the Respondent's internal guideline does recognise the increasing seriousness of factors that would be relevant to whether the actions were deliberate, I must consider what the *MPR* says. In Section 3(c), it merely allows for a Monetary Penalty after considering the actions were "deliberate". In my view I do not think the Safety Manager gave sufficient consideration to the Appellant's "human error" explanation. I find that there should be no penalty for this factor.

Whether the Contravention was Repeated or Continuous

41. Here the Safety Manager has rated this contravention a Level 5 with a penalty score of \$16,000. This rating is at the highest level possible based upon the Calculator.

42. The evidence in the Appeal Record supports the Respondent's finding that the Appellant completed 60 gas installations, four refrigeration installations and one boiler installation where permits had not been obtained. However, based upon my finding that the current contraventions were not deliberate and that the permits were inadvertently missed, I conclude that the Appellant was unaware of the growing list of instances when permits were not obtained. That, in my view, affects the seriousness of the non-compliance in this category. I find that some penalty should be set for this factor but not the extremely serious level found by the Safety Manager. I find that a more appropriate penalty is \$4,000.00.

Economic Benefit Derived from this Contravention

43. The Safety Manager gave this score at Level 3 with a penalty cost of \$4,000. Such a rating, based upon the Calculator, applies where the Appellant's actions resulted in a moderate financial gain and provided an advantage to the Appellant in the market of a value of \$10,001 to \$25,000. The Safety Manager apparently determined that the appropriate value of not obtaining permits was over \$11,000 and that in not charging customers the price of the permits provided a competitive advantage over other contractors who obtain permits.
44. It appears from the evidence before me that the Appellant ultimately paid for the permit fee for the permits that were missed and that where a decal was mistakenly utilized rather than a permit, they incurred the cost of the previously paid decal. As well, there is some evidence the Appellant was not able to pass the cost onto customers.
45. Given the position of the Appellant, it appears evident that it did not gain any financial benefit to not initially taking out permits. Therefore, I cannot support the findings of the Safety Manager in this respect. I find that there should be no penalty for this factor.

CONCLUSION

46. Considering all of the foregoing, I am of the view that insufficient consideration was given by the Safety Manager on the issues of whether the Appellant's failures were deliberate, whether the contraventions were repeated or continuous, and on the issue of the economic gain derived by the Appellant and I would reduce the Monetary Penalty. Given that the Safety Manager already reduced the Monetary Penalty by approximately 60% due to COVID-19, I must consider how much the Monetary Penalty should be reduced. Applying an approximate 60% reduction from the amount of the Monetary

Penalty (\$9,500.00) that I have determined to be appropriate, I find the Monetary Penalty is to be reduced to \$4,000.00 This amount should be paid within 30 days of the date of this decision.

A handwritten signature in blue ink, appearing to read 'DM', is positioned above the typed name.

David Martin
Safety Standards Appeal Board