Date: January 29, 2018
File No. SSAB 14-2017

Index as: BCSSAB 14 (1) 2017

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 Mechanical Company	**APPELLANT**
AND:	British Columbia Safety Authority	**RESPONDENT**

Chair:	**Emily C. Drown**
Vice-Chair:	**Jeffrey A. Hand**
Board Member:	**Ted Simmons**
On Behalf of the Appellant:	**The Appellant**
Counsel for BC Safety Authority:	**Lisa Picotte-Li**

REASONS FOR DECISION

Introduction

[1] This appeal concerns a monetary penalty issued on August 11, 2017 (the "Monetary Penalty") by a Provincial Safety Manger, of the BC Safety Authority (the "Respondent") against a Mechanical Company. (the "Appellant"). Monetary Penalty No. MP-2017-0020 was issued against the Appellant in the amount of $1500.00 for the Appellant's failure to comply with

Compliance Order No. CO-2017-0070 (the “Compliance Order”) and in particular the requirement to conduct a review of all regulated gas work performed by the Appellant between April 20, 2015 and April 20, 2017 and to submit a list of the associated work to the Respondent within 30 days of the issuance of the Compliance Order.

[2] The issue that must be determined is whether the Monetary Penalty ought to be upheld, dismissed or varied. The Respondent has raised the issue of the correct standard of review for the Board on the Appeal of the Monetary Penalty. Accordingly, the Board must determine a) the standard of review and the then b) whether the Monetary Penalty is upheld, dismissed or varied when that standard of review is applied to the facts and law in this appeal.

Background

[3] This facts leading to this appeal began on February 28, 2017 when a gas inspection at a property in Surrey, BC (the “Property”) noted that regulated gas work was performed without a permit. The Safety Officer conducting the inspection issued a Gas Certificate of Inspection on March 1, 2017, which required the Appellant to obtain the appropriate permit and contact the safety officer when it had done so. When a permit was not pulled for the Property by April 20, 2015, the matter was escalated and another safety officer issued the Compliance Order on April 20, 2017. The Compliance Order required the Appellant to do the following:

a) Obtain an installation permit for the regulated gas work performed at the Property;
b) Stop performing regulated gas work, unless able to demonstrate that the work is authorized under a permit or is otherwise exempted from the need for a permit and that a permit has been obtained prior to performing the regulated work;
c) Immediately conduct a review of all regulated gas work performed by the Appellant between April 20, 2015 and April 20, 2017 identifying any work performed where a permit was required and was not obtained and submitting a written list of such work to the Respondent as well as retroactively obtaining the required permits.

[4] The Compliance Order required the review to be completed within 30 days of the date of the receipt of the Compliance Order. The Compliance Order was delivered to the Appellant on April 24, 2017. Accordingly, the review was to be completed and submitted to the Appellant by May 24, 2017. The Appellant did not do so.

[5] The Appellant states that it did obtain a permit as required by the Certificate of Inspection, but inadvertently applied to obtain the permit for a property with a similar address. Accordingly, the Appellant did not have the required permit as per the Compliance Order and in fact did not obtain that permit until June 7, 2017. In any event the Compliance Order was issued and the Appellant did not appeal it nor raise the issue of the incorrect address having been obtained at that time.

[6] The Appellant did not comply with the requirements of the Compliance Order and the Respondent issued the Monetary Penalty. While the Appellant states that it obtained the permit for the incorrect address, it does not deny that it failed to meet the other requirements of the Compliance Order by the time frame allotted nor does it deny the other alleged instances of non-compliance set out in the Appeal Record.

Standard of Review

[7] The Respondent has raised the issue of standard of review and accordingly the Board must deal with this issue before determining the Appeal on its merits. Standard of review refers to the standard the Board must consider when hearing an appeal.

[8] The Respondent submits that the applicable standard of review for appeals before the Board generally, and in particular in this appeal, is reasonableness. The Appellant did not comment on the standard of review. The Respondent relies primarily on *International Brotherhood of Electrical Workers, Provincial Council* v. *Applied Science Technologists and Technicians of British Columbia,* 2017 BCCA 313 ("IBEW"). IBEW is a decision of the British Columbia Court of Appeal and is an appeal of a judicial review of a decision of a Provincial Safety Manager.

[9] The Respondent also submits that the decision of *Investment Industry Regulatory Organization of Canada v. Rahmani*, 2010 BCCA 93 ("Rahmani"), a Court of Appeal of British Columbia decision previously cited by the Board with respect to the issue of standard of review, is distinguishable from appeals heard by the Board.

[10] In this regard, the Respondent relies upon paragraph 62 of the IBEW decision, quoting the statement that there are a "limited range of cases in which a correctness standard may

apply after *Dunsmuir*" and states that a standard of correctness as set out in Rahamni is not applicable to the Board's review of its decisions for the following reasons:

a) There are more applicable decisions;
b) BC Safety Authority is a first-instance administrative decision-maker and is not bound to the Appeal Board by contract; and
c) The statutory scheme and jurisdiction of the BC Safety Authority and the Appeal Board under the legislation are different from the scheme and jurisdiction created by the *Securities Act* considered in Rahmani.

[11] The Board disagrees with the Respondent's position and maintains that the standard of review in most decisions before the Board is one of correctness. Section 53 of the *Safety Standards Act* (the "Act") states "An appeal is a new hearing unless the board otherwise recommends and the parties to the appeal agree." Section 60 of the Act further states:

(1) The Appeal Board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under this Act and to make any order permitted to be made.
(2) A decision or order of the appeal board on a matter in respect of which the appeal board has exclusive jurisdiction is final and conclusive and is not open to question or review in any court. [emphasis added]

[12] It is notable that the legislature specifically included discretion along with questions of fact and law when setting out the Board's jurisdiction in the Act. It is clear that the legislature intended the Board to have jurisdiction over matters of discretion exercised by regulators under the Act.

[13] The Respondent relies strongly on IBEW. The Board finds this case distinguishable from the appeal at hand. The IBEW decision is concerned with the standard of review applicable to a Court when conducting a judicial review. A judicial review, as pointed out in the Rahmani decision, is not applicable to Administrative Tribunals such as this one. Appeals before the Board are new hearings where new evidence can be brought before the Board. There can and should often be different standards of review on an appeal and in a judicial review. On a judicial review of a regulator's decision under the Act there is no strongly worded privative clause like the one found at section 60 of the Act, nor is a judicial review a new hearing with new evidence able to be submitted and considered.

[14] The Board hereby finds that the appropriate standard of review for most appeals, and in particular, this appeal is that of correctness. This is not to say that the Board cannot and does not give deference to the expertise of a regulator in certain circumstances where the legislation clearly gives the regulator, in this case the Provincial Safety Manager, clear discretion.

[15] However, deference can be given on a standard of correctness. For example, in an appeal where the regulator is given discretion to determine the amount of a monetary penalty, the Board would apply the correctness standard; however, the regulator would be found to be correct if there were legislated grounds present for issuing the monetary penalty and the penalty itself was within the range the regulator had been given discretion to levy by the Act. That being said, if a penalty was unusually high or unusually low without extenuating factors to explain such variance the Board would still be permitted to vary the amount of the penalty due to the standard of correctness if it found that there had been a misapplication of discretion by the regulator.

The Monetary Penalty

[16] As stated above, the Appellant submits that the Monetary Penalty ought to be cancelled or varied. The Appellant submits that it applied for the initial permit required but submitted an incorrect address for such permit. While this may well be the case, a review of the appeal record indicates that the Appellant did not raise this discrepancy when the Compliance Order was issued nor did it appeal the Compliance Order. While the initial permit may have been incorrectly pulled based on the Appellant's submission of an incorrect address, a review of the Appeal Record and evidence filed in this appeal indicates that the compliance enforcement process found at least 17 instances of non-compliance in breach of the required safety legislation. Further, despite being alerted to the lack of a permit the Appellant continued to perform regulated work at the subject property without resolving the permit issue in a timely fashion.

[17] The Act and *Monetary Penalties Regulation* permits a Provincial Safety Manager to issue a Monetary Penalty if a Compliance Order has not been complied with. While the Appellant submits that it initially applied for a permit based on an incorrect address, there is no suggestion by the Appellant that it otherwise complied with the requirements of the Compliance Order. The Monetary Penalty issued in this matter is $1500.00. Given that the Act gives the

Provincial Safety Manager discretion to issue penalties up to $100,000.00, the Provincial Safety Manager was well within his discretion to issue this relatively small penalty.

Conclusion

For the reasons set out above, this Appeal is dismissed.

Emily C. Drown
Chair, Safety Standards Appeal Board

Signed;

Jeffrey A. Hand
Vice-Chair, Safety Standards Appeal Board

Ted Simmons

Board Member, Safety Standards Appeal Board