

Date Issued: October 29, 2018
Appeal No. SSAB 15-2018

Indexed as: BCSSAB 15 (1) 2018

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:

Heating, Cooling and Refrigeration Company

APPELLANT

AND:

British Columbia Safety Authority

RESPONDENT

Safety Standards Appeal Board:

David Martin

Representing the Appellant:

The Appellant

Technical Safety BC:

Kimberley Fenwick

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal of a decision of the Safety Manager of the Technical Safety B.C. (the “Decision”) dated June 6, 2018. The Decision upheld Compliance Order CO-2018–0022 issued on March 13, 2018 (the “**Compliance Order**”) by the Senior Safety Officer which ordered the Appellant to submit to a regulatory compliance audit by Technical Safety BC with respect to regulated work performed between July 23, 2014 and March 13, 2018.

[2] The Compliance Order was issued under Section 38(1)(b)(i) and 38(1)(c) of the *Safety Standards Act*, SBC 2003 c 39, (the “*Act*”), specifically, on the basis that the Appellant failed to comply with Compliance Order CO-2016-0111 requiring a file review to identify unpermitted work and repeatedly failed to comply with its obligation under Section 27 of the *Act* to obtain installation permits for regulated gas work. The Decision was issued in accordance with Sections 49 and 50 of the *Act*.

ISSUE

[3] I must determine whether the Decision should be upheld, varied or set aside. To do this, I must decide whether the Safety Manager was correct in his finding that the decision of the Senior Safety Officer dated March 13, 2018, should be upheld. The Respondent has raised the issue of the correct standard of review for the Board on this Appeal. Therefore, I must determine the standard of review, and then whether the Decision is upheld or varied when that standard of review is applied to the facts and the law in this Appeal.

BACKGROUND FACTS

[4] In June 2014, a Safety Officer identified unpermitted regulated work performed by the Appellant at a property in Fernie BC. The Appellant subsequently obtained permits for this work.

[5] On July 23, 2014, the Safety Officer issued a warning letter to the Appellant and requested that the Appellant perform a review of its records to identify whether other unpermitted work had been performed. The Appellant subsequently declined to perform a records review and said improvements had been made to its permitting procedures.

[6] On April 12, 2016, the Appellant was identified as having performed six unpermitted gas installations at 42, 43, 44, 48, 51, in Elkford, BC.

[7] On November 9, 2016, the Compliance Order CO-2016-0111 was issued in response to the unpermitted work in Elkford, BC. That Order required the Appellant to

perform a review of records, identify any unpermitted work performed between July 30, 2012 and November 9, 2016, obtain permits for any such work, and report the results to Technical Safety BC.

[8] On December 8, 2016, the Appellant submitted a request for a safety manager review of the Compliance Order CO-2016-0111. The Appellant stated that the failure to take out permits was a result of staffing changes and the failure in procedures had been identified and corrected.

[9] On February 27, 2017, a safety manager review of the Compliance Order CO-2016-011 upheld the requirement to complete a records review but provided an extended time frame to complete the review.

[10] On May 15, 2017, the Appellant advised the Respondent that it had completed the required review and identified five locations where the Appellant had previously failed to take out the required permits.

[11] In October/November, 2017, the Safety Officer identified unpermitted work performed by the Appellant at numerous locations at a property in Sparwood, BC.

[12] On March 13, 2018, the Compliance Order was issued requiring the Appellant to submit to a regulatory compliance audit on the basis of the unpermitted work identified at the property in Sparwood, BC..

[13] By letter dated June 6, 2018, following a request for review by the Appellant, the Safety Manager Review upheld the Compliance Order resulting in the appeal to the Board.

POSITION OF THE PARTIES

Appellant

[14] In its appeal to the Board dated July 12, 2018, the Appellant requested that the requirement for an audit be deleted. The Appellant did not file a further submission but does not dispute that it failed to obtain permits for a number of sites.

[15] The Appellant argued that in its 14 years of existence it missed two groups of three homes when the gas permits were not obtained before the gas work was done. The Appellant says that this occurred both during a period of staff transition, and because it is a small company with only eight employees. It argued that it has put into place mechanisms to improve its gas installation procedure and eliminate the possibility of missing permits before work is started.

[16] The Appellant submitted that the Board should hold the Respondent to the same standard that the Appellant is held to, citing the fact that the Respondent terminated its paper system the same day a web system started up and was a “complete disaster” as the whole province could not get gas permits. It also cited the fact that the Respondent was moving offices with no continuity of service and no one available to assist it with the required paperwork.

[17] The Appellant submitted that rather than have an audit ordered, it should be penalized monetarily instead.

Respondent

[18] The Respondent submits that the Appellant has been repeatedly identified as performing regulated gas work without a permit: 2014 – one location of unpermitted work identified; 2016 – six locations of unpermitted work identified; 2017 – three locations of unpermitted work identified (work had been performed prior to August 2016).

[19] A warning letter was issued in 2014 and the Appellant indicated at that time that the non-compliances were the result of staffing issues. The Appellant said that it understood the need to obtain permits and would comply in the future.

[20] The most recent findings of unpermitted work occurred after the Appellant was required to perform a self-review of its records and confirm that all regulated work performed between July 30, 2012 and November 9, 2016 had a permit. The Appellant identified five locations in that time period which did not have permits and subsequently obtained permits for those locations. Following that review, the Respondent identified three further locations of unpermitted work performed by the Appellant during the time period for which the review was performed but which had not been identified during the review.

[20] Accordingly, the Compliance Order was not merely issued as a result of repeated findings of unpermitted work, it was also issued on the basis of evidence that the Appellant failed to disclose unpermitted work during a records review ordered by CO-2016-0111. Failure to disclose those records was a breach of CO-2016-0111 and warranted the decision to perform a compliance audit to verify the scope of unpermitted work performed by the Appellant.

[21] The Respondent submitted that the Decision to uphold the Compliance Order was therefore reasonable, or in the alternative, correct. Accordingly, the Appeal should be dismissed.

ANALYSIS

Standard of Review

[22] Before turning to the more substantive issues, I must first determine the standard of review for this appeal as that subject has been raised by the Respondent. For the reasons set out in *A Gas Company v. British Columbia Safety Authority*, SSAB 14(1), 2016, I find that the standard of review is one of correctness. However, as stated at paragraph 25 of that case:

"[W]hile the standard of review is one of correctness, in a case as this where the Board is tasked with determining whether a Provincial Safety Manager correctly exercised the discretion given to him to levy monetary penalties by the Act, the standards of correctness and reasonableness meld as the Provincial Safety Manager would be found to have acted "correctly" if there were appropriate grounds to levy a monetary penalty and the penalty itself was reasonable in light of the evidence before the Board."

[23] As stated, the Appellant does not dispute that it failed to obtain permits for a number of sites but offers reasons for why permits were not obtained. The Record shows that the background facts as set out in the Decision of June 6, 2018, are established. Those facts are as follows:

- (a) Compliance Order CO-2016-0111 was issued after, in 2016, the Appellant was identified as having performed gas work without a permit at a location in Elkford, B.C. That Compliance Order required the Appellant to conduct a review of its work over approximately four and a half years and to identify any work done without a permit;
- (b) In May 2017, the Appellant submitted a list of work that had been performed without a permit during the time period referenced in the CO-2016-0111;
- (c) In October 2017, further investigation identified three locations in Sparwood B.C. where gas meter installation had been performed without a permit during the time period covered by CO-2016-0111 and not identified in the submission by the Appellant on May 15, 2017.

[24] The ability of the Senior Safety Officer to order the Appellant to submit to a compliance audit comes from Section 18(1) of the *Safety Standards Act* and the Safety Manager upheld the order for a compliance audit on the basis that the Appellant was non-compliant given the repeated findings of unpermitted work. In reviewing the

Decision, the complete Record on the Appeal and the submissions of the parties, I cannot conclude that the Safety Manager was incorrect for the reasons that follow.

[25] Since 2014, numerous sites have been identified where the Appellant failed to obtain permits.

[26] Previous efforts by the Respondent to bring the Appellant into compliance have been unsuccessful. While the Appellant identified five locations where it had performed unpermitted work during the time of its self-review of its records, it failed to identify three locations where work had been performed without a permit. As a result, the Safety Manager was satisfied that a compliance audit was necessary to verify the scope of unpermitted work. I cannot conclude that the Safety Manager's Decision was incorrect.

[27] I would now like to address the specific reasons put forward by the Appellant in arguing that the audit be removed and that a monetary penalty be substituted and to explain why I cannot grant the order requested.

[28] In conceding that it failed to obtain permits, the Appellant explained that this occurred as a result of staff transition and that new procedures were in place to prevent that from happening in the future. It is to be noted that in seeking a review of CO-2016-0111, the Appellant used the same excuse as it makes on the this appeal. I would not disturb the Decision on this basis.

[29] The Appellant argues that the number of unpermitted installations was very low based upon the number of permits it has taken out. While this is impressive, it cannot lead to the conclusion that the audit is unwarranted. Based upon a clear pattern of unpermitted work over the last four years, even if small in comparison to the overall number of permitted installations, I cannot say that the Compliance Order is not warranted.

[30] While I am sympathetic to the Appellant's assertions that certain problems with the Respondent's systems have led to difficulty in compliance, I cannot find that this is a reason to disturb the Compliance Order.

[31] Finally, the Appellant argues for a monetary penalty in substitution of the audit. Based upon the expertise of the Safety Manager, I must conclude that consideration was given to that issue prior to issuing and upholding the Compliance Order and, as a result, it was not deemed to be a suitable alternative. I find no reason to disturb that finding.

[32] Based upon all of the above, this Appeal is dismissed.

Signed:



Member, David Martin
Safety Standards Appeal Board