

Indexed as: BCSSAB 28 (1) 2010

**IN THE MATTER OF THE SAFETY STANDARDS ACT  
SBS 2003, Chapter 39**

**AND IN THE MATTER OF an appeal to the  
British Columbia Safety Standard Appeal Board**

**BETWEEN:**                                      **A Boiler & Pressure Vessel Contractor.**                                      **Appellant**

**AND:**    **BC Safety Authority**    **Respondent**

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**REASONS FOR DECISION  
APPEAL OF THE REVIEW OF A COMPLIANCE ORDER**

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Board Member, Vice-Chair

J. L. Kernaghan

On behalf of the Appellant:

Gordon Grieves

Counsel for the BC Safety Authority:

Mark Guiton

**Introduction**

[1] This appeal was from a Compliance Order. The appellant asked that the compliance order be set aside and any reference to it removed from the registry maintained by the Safety Authority.

## **BACKGROUND TO THE COMPLIANCE ORDER**

[2] In April of 2010, very near the completion of a large expansion to a recreation centre, it was discovered that the contractor had not obtained the necessary boiler installation permits prior to installing the boilers. Immediately upon being made aware of this lapse, the contractor applied for the necessary permit. It was granted on April 9.

[3] On April 14, the safety officer conducted an inspection of the boilers. He advised the contractor that the Canadian Registration Number (CRN) as provided on the installation permit was not correct and that the contractor must provide evidence of design registration before the units could be installed. As the installation had already taken place, the contractor was advised that any further work must cease until this issue was resolved. The contractor was given until April 30 to provide the document.

[4] The contractor immediately sent the safety officer a copy of the shop drawings that included the CSA approval for the boilers. Over the next several days there was additional correspondence between the parties. On May 4 the safety officer confirmed with the contractor that a Manufacturer's Date Report (MDR) was required.

[5] There does not appear to have been any further written communication between the parties until May 26 when, after much effort, the contractor obtained a copy of the MDR and immediately submitted it to the safety officer. The supplier and the supplier's representative had been told that an MDR was not available for this unit. Finally, the representative was able to obtain an MDR from the manufacturer in Italy.

[6] However, by the time the MDR had been provided to the safety officer, the Compliance Order had already been issued on May 25. This order required the contractor to:

[7] 1. Provide copies of the Manufacturer's Data Reports for all boilers and pressure vessels installed at the recreation centre.

[8] 2. If the design registration is not indicated on the Manufacturer's Data Reports, provide evidence of design registration by other approved means.

[9] 3. As the installation of boilers at this site occurred prior to obtaining an installation permit, take the necessary steps to prevent this occurring again.

[10] The parties acknowledge that the contractor complied with items 1 and 2 when it supplied the information on May 26.

[11] However, late in the day on June 10, the safety officer sent the contractor a reminder that item 3 was still outstanding. "As the time allotted has passed, I strongly urge you to take the necessary action to get this done ASAP. If steps have already been taken, please provide evidence of such and the supporting documentation. Otherwise, a simple letter outlining the steps taken will work. Thanks."

[12] The only evidence of the contractor's compliance with item 3 was its assertions during the appeal that it has created a system that requires a specific procedure to be followed each time it is awarded a job and that the responsibility for this procedure had been assigned to a specific person. The contractor stated that this system was started a few years ago and it has been trying to comply with the requirement to obtain installation permits prior to actually doing the installations. It was also stated during the appeal, although this was not acknowledged by the Safety Authority, that the contractor has advised the safety officer of the measures it had taken.

### **CONTRACTOR'S COMPLIANCE RECORD**

[13] The contractor's compliance record is an important element of this appeal. For the purposes of this decision I will only consider the contractor's history in relation to obtaining boiler or refrigeration permits prior to installation.

[14] By a letter dated November 19, 2004, a safety officer advised the contractor that it was "required to take out the proper permitting for the Air Conditioning units which your company has installed at (a retail outlet), as well as any *current* or *future* work for which you are or will be undertaking." The letter also provided additional reminders about the legal obligations of a licensed contractor.

[15] On January 11, 2005, the safety officer became aware that the contractor had installed 11 refrigeration units at a retail outlet without permits.

[16] On January 25, 2005, it was noted that the contractor had not taken out installation permits for 20 rooftop HVAC units. It was also noted that payment of the outstanding fees must be made before license renewal.

[17] On June 28, 2005, the safety officer became aware that a new HVAC unit was being installed at a service station. Upon making inquiries, the officer found that no permit had been obtained. After the safety officer made several telephone calls, sent two e-mails, made a second site visit, and finally threatened to shut down the site, the contractor obtained an installation permit on July 11.

[18] On September 5, 2005, the safety officer sent the contractor a request to take out the permits for the units already installed in a senior's complex. A second reminder had to be sent ten days later.

[19] On September 21, 2005, it was discovered that no refrigeration installation permit had been taken out for an installation at a supermarket.

[20] On October 16, 2005, it was discovered that no refrigeration permit had been taken out for an installation at a restaurant.

[21] In July, 2008, it was discovered that no permit had been taken out for an installation at a car dealership.

[22] Also, in that same month, it was discovered that no installation permit had been taken out for the installation of eight new units at a mall.

[23] With respect to problems relating to boiler permits, the evidence reveals the following omissions:

- April, 2004, five boilers were installed at a retirement village without installation permits.
- May, 2004, two boilers were installed at a retirement village without installation permits.
- November, 2004, two boilers were installed at a retirement village without installation permits.

[24] The first record of a compliance order being issued in relation to the contractor's failure to obtain an installation permit appears to be dated September 9, 2005. It stated: "All regulated work is to be permitted prior to commencement of this work. Boiler Safety Officer to be notified of all regulated work prior to commencement of that work. Boiler Safety Officer to be notified at commencement of regulated work."

[25] By a letter dated February 16, 2006, the safety officer reminded the contractor of the legal requirement to obtain installation permits prior to performing regulated work or using a regulated product.

[26] On November 6, 2006, the safety officer reminded the contractor that permits were required for boilers already installed at a retirement village, an airport, and a condominium project.

### **APPELLANT'S ARGUMENTS**

[27] In this appeal, the contractor argues that:

- It applied for the installation permit for this job as soon as it was made aware of the oversight.
- An MDR for this particular unit has not typically been requested from it or the supplier in the past.
- It worked diligently to obtain the MDR and supplied it to the safety officer as soon as it was available.

[28] The contractor argues that the issuance of a compliance order in this situation was heavy handed and unnecessary and asks that it be removed from its record.

### **RESPONDENT'S ARGUMENTS**

[29] The Safety Authority argues, among other points, that:

- Obtaining an installation permit is important because this step comprises part of the preventative side of safety enforcement. If no request for an installation permit is made, nothing triggers the Safety Authority that there is something it should be investigating.

- The *Act* allows a compliance order to be issued for the first instance of non-compliance.
- The entire legislative scheme of the *Act* is one of progressive enforcement. “With some exceptions (including notably failure to obtain permits) more significant enforcement actions, such as monetary penalties and discipline orders are not authorized other than as an escalation of enforcement action after issuance of a compliance order. If the Respondent fails to issue a compliance order in response to a non-compliance, it risks being unable to take more significant action in response to recurrent non-compliance.”
- Given the Appellant’s history, the Respondent must consider the possibility that there may be non-compliance in the future. “Failure to document the Appellant’s performance through issuance of a compliance order creates the risk that the future personnel will respond to non-compliances without full knowledge of the Appellant’s history and fail to regulate the Appellant in a manner that is adequate to maintain public safety.”
- Just because a compliance order has been complied with does not mean that the compliance order ceases to exist. Further, item 3 on the compliance order is a continuing obligation.

## **ANALYSIS**

[30] Although the Respondent made submissions about the standard of review to be applied on these appeals, it is not necessary to decide that issue on this particular appeal. I find that whatever standard of review is applied to this situation, the safety officer’s action of issuing the Compliance Order was reasonable.

[31] The contractor has an established record of, advertently or inadvertently, failing to obtain the appropriate installation permit before installing a regulated product. Throughout the years, safety officers have exercised discretion by reminding the contractor in writing of his legal obligations and by reminding the contractor by telephone calls, e-mails, inspection visits, and letters of the need to obtain a permit for an installation that was already complete. Although there have been repeated failures

since 2004, this is only the second compliance order issued against this contractor for failure to obtain a permit as required. At some point, informal methods of enforcement must give way to more formal methods.

[32] While I accept the contractor's assertions that an MDR is not usually required and that it made a genuine and concerted effort to comply with this request as quickly as possible, I do not find the safety officer's action in issuing a compliance order six weeks after the request had first been made unreasonable. The contractor's past behaviour contributed significantly to the safety officer's decision. If the installation permit had been applied for before the installation started, the information could have been obtained with the same degree of urgency felt at the end of a project. Further, the contractor's past history of failing to respond to informal requests for compliance with the legislation would not have engendered any confidence in the safety officer that this request was going to be complied with.

[33] There was no evidence of the administrative measures put in place by the contractor to ensure that permits are obtained as required. If, as the contractor states, this program has been in place for several years and is the result of a concerted effort on its part to meet its legal obligations, it appears from the evidence that the program should be reviewed to ensure that omissions like the one that occurred on this project do not happen again. Finally, instituting and maintaining an administrative procedure of any kind is not a one-time effort but is a continuing and on-going responsibility.

[34] Section 20 of the *Safety Standards Act* obligates the Safety Authority to establish and maintain a registry that records:

- the names of licensed and former licensed contractors;
- each discipline in which each contractor is licensed to do regulated work;
- the nature and scope of the regulated work that the contractor is licensed to do;
- any terms or conditions imposed on the contractor or attached to their licences;
- the status of the licences;

- any compliance orders, monetary penalties or discipline orders issued to them, any convictions for offences under this Act and whether any amounts payable remain outstanding;
- an address for service.

[35] Section 21 allows any member of the public, upon payment of the appropriate fee, to obtain the following information about a contractor:

- the existence of a compliance order and the date of its issue; and,
- the existence of a discipline order, the date of issue, the reason for issuing it and any sanction contained in the order.

[36] The purpose of the registry is explicitly stated in section 20 as being “for the purpose of furthering safety in relation to regulated work and regulated products”. While not stated explicitly, the registry serves two other purposes related to furthering safety: the first is effective enforcement and the second is consumer protection.

[37] Enforcement personnel will change over the years. It is important that their replacements have an accurate historic record to consult when determining how to exercise their discretion.

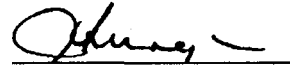
[38] Purchasers of construction services not only rely on their contractor to perform the contracted work in a competent and professional manner, they also rely on their contractor to be knowledgeable about, and comply fully with, all the regulatory requirements applicable to their project. Purchasers and potential purchasers are entitled to know whether any particular contractor has a history of complying with the legislation all of the time, or just some of the time.

## **CONCLUSION**

[39] This appeal is dismissed. The parties will each bear their own costs.



Signed by:

A handwritten signature in black ink, appearing to read "J.L. Kernaghan", written over a horizontal line.

J.L. Kernaghan