

Date Issued: August 26, 2021
Appeal No. SSAB 42-2021

Indexed as: BCSSAB 42 (1) 2021

**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 Plumbing Heating & Air Conditioning Ltd.

APPELLANT

AND:

British Columbia Safety Authority

RESPONDENT

REASONS FOR DECISION

Safety Standards Appeal Board Chair:	Jeffrey Hand
Safety Standards Appeal Board Vice-Chair:	Maureen Baird, Q.C.
Safety Standards Appeal Board Member:	David Martin
Representing the Appellant:	Self-represented
British Columbia Safety Authority:	Mollie Clark

INTRODUCTION

[1] This appeal concerns a Monetary Penalty No. MP-2021-0008 issued by Technical Safety BC (TSBC) to A Plumbing Heating & Air Conditioning Ltd. (PH&AC) on February 10, 2021 in the amount of \$7,500 (the “Monetary Penalty”).

[2] The Monetary Penalty was issued to PH&AC as a result of its non-compliance with Compliance Order No CO-2017-0157, issued on September 29, 2017 (“Compliance Order”), pursuant to section 40 of the *Safety Standards Act* (“Act”). The Compliance Order related to three instances of PHAC performing regulated boiler and pressure vessel work without having

obtained the required permit for performing the work. It required that PH&AC not perform regulated boiler and pressure vessel work that was not authorized under a permit.

[3] PH&AC appeals the Monetary Penalty and asks that it be set aside. It says that the Compliance Order is no longer in effect as a result of the operation of a Notice of Settlement between PH&AC and TSBC. It also says that the failure to obtain the required permit was justified. Lastly, it says that the penalty amount is unduly harsh.

FACTS

[4] The following facts are not disputed.

[5] PH&AC is a provider of plumbing, heating and drainage installation and repair services. It has operated in Vancouver since 1956.

[6] In April 2016, TSBC determined that PH&AC had performed regulated gas work at a location in West Vancouver without obtaining the permit required by the Act, *Safety Standards General Regulation*, B.C. Reg. 105/2004 ("SSGR"), and *Gas Safety Regulation*, B.C. Reg. 103/2004. A subsequent review of the records of PH&AC by TSBC identified 3 additional instances where regulated gas work was performed without the required permits. The Compliance Order was issued as a result of these failures. The Compliance Order required that PH&AC stop performing regulated boiler and pressure vessel work unless it could demonstrate that the work was authorized under a permit; not allow work requiring a permit to be done unless a permit had been obtained prior to performing the work and that it submit to a regulatory compliance audit by TSBC with respect to regulated work performed by PH&AC between September 29, 2015 and September 29, 2017.

[7] PH&AC requested a review of the Compliance Order by a Safety Manager. That review was not successful. PH&AC appealed the decision of the Safety Manager to this Board.

[8] PH&AC and TSBC attended a settlement conference in an attempt to resolve PH&AC's appeal of the Compliance Order. On May 11, 2018, a Notice of Settlement was entered into between PH&AC and TSBC which provided:

- a. PH&AC would participate in the regulatory compliance audit process required by the Compliance Order. The audit would be conducted in a manner least disruptive to PH&AC's business operations and subject to the TSBC auditors entering into a confidentiality agreement; and
- b. TSBC agreed that if the audit turned up nothing of significance respecting regulatory non-compliance by PH&AC, the Compliance Order would be struck from PH&AC's compliance record; however, if the audit identified significant regulatory non-compliance, the Compliance Order would remain on PH&AC's compliance record.

[9] Neither party requested the Board to make an order including the terms of settlement in accordance with the Rules of Practice and Procedure of the Appeal Board.

[10] Between July 30, 2018 and August 3, 2018, TSBC conducted the compliance audit by reviewing PH&AC's documented regulated activity from September 29, 2015 to September 29, 2017. On October 25, 2018, TSBC issued Compliance Audit Report No. CA-2018-004 in respect of the audit ("Compliance Audit Report"). The Compliance Audit Report identified 4 findings of non-compliance and one finding of compliance. All four of the findings of non-compliance met the definition of "significant compliance and safety deficiency" established in the Compliance Audit Report. PH&AC responded to the audit findings but did not bring any formal or legal challenge to challenge the accuracy of any of the findings in the Compliance Audit Report. TSBC did not communicate to PH&AC that as a result of the Compliance Audit findings the Compliance Order would remain on PH&AC's record.

[11] On August 21, 2019, PH&AC presented an estimate for replacement of two existing hot water boilers at a strata building on 57A Avenue, Surrey, BC. The scope of work described in the estimate included "gas and boiler permits with Technical Safety BC.". PH&AC obtained the required gas permit for the installation. An investigation by TSBC in November, 2019 identified that the boiler permit required by the Act, the SSGR, and *Power Engineers, Boiler, Pressure Vessel and Refrigeration Safety Regulation* B.C. Reg. 104/2004 had not been obtained prior to the installation of the hot water boilers on November 22, 2019. PH&AC took out the required boiler installation permit for the installation on December 5, 2019.

[12] On April 1, 2020, TSBC notified PH&AC that an enforcement file had been forwarded to the Provincial Safety Manager for review based on the identified non-compliance with the Compliance Order arising from the unpermitted work performed at 57A Avenue, Surrey, BC in November, 2019.

[13] On or about July 8, 2020, TSBC identified that PH&AC had performed regulated boiler and pressure work at a property on 13th Avenue West, Vancouver, BC without the boiler permit required under the Act, *SSGR* and *Power Engineers, Boiler, Pressure Vessel and Refrigeration Safety Regulation*. The required permit was obtained on July 16, 2020.

[14] On September 9, 2020, TSBC gave written notification to PH&AC of a potential monetary penalty against it as result of its non-compliance with the Compliance Order relating to the work done at 57A Avenue, Surrey, BC. without the required boiler and pressure vessel installation permit. In response to this notice, PH&AC acknowledged that the boiler and pressure vessel permit was taken out “slightly late” for the work performed at 57A Avenue.

[15] The Monetary Penalty in the amount of \$7,500 was issued to PH&AC on February 10, 2021. PH&AC brought this appeal on March 5, 2021.

POSITION OF THE PARTIES

[16] PH&AC says that the Monetary Penalty should be set aside for 3 reasons:

- a. The Compliance Audit Report did not identify significant non-compliance and therefore, in accordance with the terms of the Notice of Settlement, the Compliance Order is no longer on its compliance record. PH&AC says that since the Monetary Penalty is based on the Compliance Order, it cannot stand.
- b. The unpermitted work performed at 57A Avenue, Surrey, BC was justified because it was an emergency and/or for reasons beyond its control it did not have the details necessary for obtaining the required permit prior to the installation. In any event it obtained the permit shortly after installation.
- c. The penalty is harsh because there was never a safety violation, the contravention was not deliberate and no economic benefit was obtained as a result of the contravention.

[17] TSBC says that PH&AC has exhausted the appeal process in respect of the Compliance Order and it never contested the findings of significant non-compliance set out in the Compliance Audit Report and therefore, those findings cannot be challenged in this appeal. Further, TSBC says this Board does not have the jurisdiction to interpret the terms of the Notice of Settlement dated May 11, 2018. Therefore, it says the only matters for this Board to address are the imposition of the Monetary Penalty and the amount of that Penalty. TSBC says that the Monetary Penalty is reasonable and correct, and there is therefore no basis for this Board to vary or set it aside.

[18] In support of its position TSBC provided the affidavit of a Senior Safety Officer made on May 19, 2021 which attests to the steps taken in performing the Compliance Audit and the results of that audit. PH&AC did not provide any affidavit material.

ISSUE

[19] The issue in this case is whether the Monetary Penalty is valid and if so, whether the amount of \$7,500 should be varied.

ANALYSIS

[20] The essential facts of this appeal are not in dispute. The Compliance Order required PH&AC to obtain the permit(s) required under the Act and associated regulations prior to performing any regulated boiler and pressure vessel work. PH&AC does not contest that it performed regulated work at 57A Avenue, Surrey, BC without obtaining a required boiler and pressure vessel installation permit prior to performing the regulated work contrary to the Compliance Order.

- a. **Was there a justification for the installation at 57A Avenue prior to obtaining the required permit?**

[21] Section 12(1) of the SSGR requires a person to obtain the appropriate permits before performing regulated work unless exempted from doing so under the Act. Section 12(2) of the SSGR provides that in an emergency or if required to perform regulated work when the permit issuing office is closed, a person is not required to obtain a permit before performing regulated work if the person is authorized to perform the regulated work, and applies for a permit from

TSBC on the first business day following the emergency or the next day that the TSBC office is open.

[22] It is not disputed that PH&AC provided a proposal outlining options for boiler replacement at 57A Avenue, Surrey, BC on August 21, 2019 which was accepted by the customer around October 2, 2019. The estimate noted that the scope of work for replacement of both boilers included "gas and boiler permits with Technical Safety BC".

[23] The installation occurred on November 22, 2019. In the reasons for Monetary Penalty the Provincial Safety Manager determined that the work associated with the installation of the boilers was not an emergency and could have waited until the required permits could have been obtained. PH&AC says that the existing boiler at 57A Avenue was leaking and, in its experience there was the potential for catastrophic failure. Other than this statement, PH&AC provides no evidence in support of this assertion of potential risk. Further it says that the specifics of heating surface area required to obtain the boiler installation permit were not available at the time the boiler was installed and that the permit was obtained as soon afterward as possible. PH&AC admits that at least some of the delay in obtaining the boiler installation permit was a result of administrative error in its office.

[24] Based on the above, the Board agrees with the finding of the Provincial Safety Manager that the installation of the new boilers was not an emergency and could have waited until the required boiler permit was obtained. It is noted that the proposal given to the strata stated that one tank was shut off and there was a leak observed in the operating tank which had not been inspected by a technician. The proposal notes that "... it looks like both boilers may need to be replaced"(emphasis added). The proposal did not mention that there was any emergency or imminent potential for catastrophic failure relating to either tank. If there was the potential for catastrophic failure the Board would have expected to see some warning of this danger to the strata council (customer) on the August 21, 2019 proposal. Further, the Board would expect that a technician would inspect a tank considered to be a threat of failure to assess the risk which was not done here. The Board would also have expected PH&AC to provide evidence of steps taken to expedite the installation. No such evidence was provided that any of these steps were taken. The Board finds that, on the facts, this was not an emergency. In any event, even if this was an emergency situation, section 12(2) of the SSGR requires the permit to be obtained on the first business day following the emergency or the next day that the TSBC office is

open. In this case, the boiler permit was not obtained until December 5, 2019, nine business days after the boilers were installed.

b. Is the Compliance Order void?

[25] The Monetary Penalty is based on “Failure to comply with Compliance Order No. CO-2017-0157; specifically, the failure to obtain the required boiler and pressure vessel installation permit prior to performing regulated boiler and pressure vessel work at ...57A Avenue, Surrey, BC.” Therefore, if the Compliance Order is not in effect, the Monetary Penalty upon which it is based upon it, must fail.

[26] PH&AC says that the Compliance Order is not in effect because of the operation of the Notice of Settlement. The Notice of Settlement states the following:

4. The Respondent agrees that if the audit turns up nothing of significance respecting regulatory non-compliances that Compliance Order No. CO-2017-015 (sic) will be struck from [PH&AC's] compliance record. However, if the audit turns up significant regulatory non-compliances then Compliance Order No. CO-2017-015 (sic) will remain on [PH&AC's] Compliance record.

[27] It is not disputed that the reference to the Compliance Order in the Notice of Settlement is to Compliance Order No. CO-2017-0157.

[28] As PH&AC says that the Compliance Audit did not disclose signification regulatory non-compliance, it is necessary to review the findings of that report in some detail. Page 1 of the Compliance Audit Report explains the categorization of the audit opinions given in the report as follows:

Audit Opinions

Effective opinion is reported when there are no detailed comments to report resulting from the compliance audit performed.

Effective except as opinion is reported where the compliance audit finds effective overall compliance but identifies areas for improvement.

Not effective opinion is reported when the compliance audit identifies *significant compliance and safety deficiencies*. (italics added)

[29] The Compliance Audit Report sets out four findings of non-compliance and one finding of compliance as follows:

Finding 1: Plumbing Drainage & Heating Ltd. was identified performing regulated work without the required gas installation permits.

Hazard Rating: High

Audit Opinion: Not effective

Implication – Unpermitted gas work results in Technical Safety BC not being able to review and determine if an inspection is warranted based on types of equipment, gas filter history, contractor behavior, and other associated risks and hazards.

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Note: Approximately 68 sites were identified in Technical Safety BC jurisdiction where regulated gas equipment was installed with no evidence of a permit having been obtained.

Finding 2: Plumbing Drainage & Heating Ltd. was identified utilizing gas replacement appliance permit decals contrary to the requirements stipulated in Directive # D-GA-2012-01 Rev 02.

Hazard Rating: Moderate

Audit Opinion: Not effective

Implication – Improper usage of the replacement appliance permit decal program results in Technical Safety BC receiving incomplete data related to the regulated equipment being installed, impacting Technical Safety BC's ability to accurately risk assess the installation to determine if an inspection is warranted.

Finding 3: Plumbing Drainage & Heating Ltd. was identified as failing to provide written notification to Technical Safety BC of appliances found in an unsafe and/or unrepairable condition.

Hazard Rating: High

Audit Opinion: Not effective

Implication – When notification is not provided to Technical Safety BC for appliances found in an unsafe and/or unrepairable condition, Technical Safety BC is not able to ensure the appliances are properly repaired or replaced creating high safety risk.

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Note: Three cases were identified where employees of Plumbing Drainage & Heating Ltd. identified appliances which were in either a hazardous or unrepairable condition with no evidence of written notification having been provided to Technical Safety BC.

Finding 4: Plumbing Drainage & Heating Ltd. was identified not fulfilling gas contractor responsibilities for gas notification requirements for completion, installation or alteration, (call for inspection requirements)

Hazard Rating: Moderate

Audit Opinion: Not effective

Implication – Until a notice of completion, installation or alteration is submitted, site inspections by Technical Safety BC are not initiated, and no inspection will be scheduled. A gas system that has not had the required notice of completion, installation, or alteration notification submitted to the regulatory authority is not authorized for use.

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Note: At the time the audit was performed Plumbing Drainage & Heating Ltd., had 194 permits in active status with no notification of completion, installation or alternation submitted.

Finding 5: Plumbing Drainage & Heating Ltd. was identified ensuring that only qualified individuals were permitted to perform regulated gas work.

Hazard Rating: N/A

Audit Opinion: Effective

Implication – Permitting only qualified individuals to perform regulated gas work is critical to ensuring that regulated work is performed in a safe and compliant manner.

[30] PH&AC responded to each of these findings in the course of the audit, taking issue with some and justifying others. PH&AC did not make any formal or legal challenge to the audit findings.

[31] Following the audit, TSBC did not advise PH&AC that as a result of the audit findings the Compliance Order would not be struck from its compliance record. This is regrettable because it would have clarified the position of the parties, but the lack of notification by TSBC of its position with respect to the status of the Compliance Order post-audit is not determinative of its status.

[32] TSBC says that this Board does not have the jurisdiction to interpret the terms of the Notice of Settlement. We disagree. The jurisdiction of this Board is established by section 52 of the Act which requires that on hearing appeals it must "... consider the maintenance and enhancement of public safety". Section 53 of the Act provides that an appeal is a new hearing unless the appeal board recommends otherwise and the parties agree. This is an extremely broad jurisdiction. In any event, it is not necessary to interpret the terms of the settlement which are clear on its face. The issue is whether the Compliance Audit Report identified anything

“... of significance respecting regulatory non-compliance”. If it did, then the Compliance Order is still in effect on the record of PH&AC and the Monetary Order which is expressly based on the Compliance Order, together with the non-compliant work at 57A Avenue, should be affirmed subject to a review of its terms.

[33] The Compliance Audit Report established definitions that would apply to audit findings. The relevant definition for this analysis is “Not effective” which expressly refers to “... significant compliance and safety deficiencies”. This is the same wording as is found in paragraph 4 of the Notice of Settlement. The consistency of the language in the Notice of Settlement and the Compliance Audit Report satisfies the Appeal Board that the condition for striking the Compliance Order from the record of PH&AC was not met. There were significant compliance and safety deficiencies identified in the Compliance Audit Report that were communicated to PH&AC. Therefore, the Compliance Order remains in effect and the two factors underpinning the imposition of the Monetary Penalty are both confirmed.

c. Is the Monetary Penalty reasonable?

[34] Section 40(2) of the Act permits a Provincial Safety Manager to assess the appropriate amount of a monetary penalty and how it will be imposed. Section 40(4) permits the Provincial Safety Manager to impose a monetary penalty of up to \$100,000.

[35] The *Monetary Penalties Regulation* requires that the Provincial Safety Manager, exercise their discretion by considering 6 criteria as prescribed in the Regulation in assessing the quantum of any monetary penalty, including whether there have been previous enforcement actions under the Act for contraventions of a similar nature; the extent of the harm, or of the risk of harm; whether the contravention was deliberate; whether the contravention was repeated or continuous; the length of time during which the contravention continued; and whether economic benefit was derived from the contravention. The assessment is based on the facts considered against each specific criteria. A monetary value is determined by using the Monetary Penalty calculator (“MPC”).

[36] On September 9, 2020 the Provincial Safety Manager sent a Notification of Potential Monetary Penalty to PH&AC outlining the reasons for the monetary penalty and the amounts assessed for each of the 6 criteria applying the MPC.

[37] The MPC is not a statutory document. It is a guideline published by TSBC on its website. The MPC establishes a range of penalty for each of the 6 criteria of the *Monetary Penalties Regulation* based on 5 levels of seriousness, called values, with value 1 being the least serious and having the lowest penalty. For each of the 6 criteria, the penalty range is from \$0 for value 1 to \$16,000 for value 5. The MPC established an amount for each value based on stated criteria. For example, a previous Compliance Order has a defined MPC value and monetary amount as follows:

ONE PREVIOUS INSTANCE of Compliance Order activity related or similar to this action: MPC value 2 - \$1,500

[38] The Provincial Safety Manager applied the MPC for each of the 6 criteria as follows:

1. Previous Enforcement Actions - One previous Compliance Order related to or similar to this action is identified - MPC Value 2 - \$1500.
2. Extent of Harm or degree of risk of harm - the Safety Manager assessed this criteria as minor/administrative and assigned MPC value 2 - \$500.
3. Was the contravention deliberate - the Safety Manager determined that the contravention at 57A Avenue, Surrey, BC was deliberate and assessed the contravention as MPC value 3 - \$4,000.
4. Was the conduct repeated or continuous - the Safety Manager founded that the contravention was repeated by virtue of the failure to obtain a boiler and pressure vessel installation permit prior to performing work in August 2019 at 13th Avenue West, Vancouver, BC and assigned MPC value 2 - \$1,500.
5. The length of time the contravention continued - the Safety Manager found this criteria not to apply and assigned MPC value 0 - \$0.
6. Was economic benefit derived from this contravention. The Provincial Safety Manager found this criteria not to apply and assigned MPC value 0 - \$0.

[39] PH&AC responded to the Notification of Potential Monetary Penalty asking that the penalty be removed as being unfair and unjust based, primarily on its previous record of compliance. It denied that the failure to obtain the permit at 57A Avenue was deliberate and said that at 13th Avenue West the failure to obtain the permit was a result of clerical error. PH&AC's response did not raise the issue of whether the Compliance Order remained in effect. The Safety Manager considered but did not accept PH&AC's submission and the Monetary Penalty issued on February 10, 2021 to be paid within 30 days of receipt of the notice.

[40] PH&AC says that its contravention at 57A Street, Surrey, BC was not deliberate and therefore the \$4,000 penalty under that heading should not have been assessed. The MPC provides the following basis for awarding a \$4000 penalty:

Was the contravention deliberate? *Safety Standards Act* – Monetary Penalties
Regulation Criteria 3(c): *

Technical Safety BC can demonstrate that the duty holder had knowledge of the requirement(s), and/or understanding of the risk. The duty holder was informed of the requirement in writing through the use of an enforcement tool (e.g., compliance order) or regulatory instrument (e.g., safety order), yet did not fulfill the requirement. **MPC value 3 - \$4,000.00**

[41] In this case, PH&AC had been the subject of the Compliance Order in 2017 and yet failed to obtain a permit it required prior to performing boiler installation at 57A Avenue in Surrey, BC. The Safety Manager's response on February 10, 2021 to PH&AC's objections to the imposition of the Monetary Penalty also referred to a Warning Letter issued to PH&AC in April 2016, a Safety Manager Decision Letter issued by the Provincial Safety Manager on February 16, 2018 and the Compliance Audit as evidence that PH&AC had been advised in writing of the requirement for permits to be obtained prior to performing regulated work. The Board finds that PH&AC did receive notice in writing as to the requirement to obtain required permits before performing regulated work.

[42] In considering whether the failure to obtain the required permit at 57A Avenue, Surrey, BC should be characterized as deliberate rather than as the result of administrative error or for reasons beyond its control, the Board also considered that PH&AC is a very experienced company. This is a factor that was raised by PH&AC as a reason that no penalty or a lower one

should be assessed - that it has had few infractions in the past in comparison to the large number of installations it has performed. However, in the Board's view, this is a factor that weighs against it. With its level of experience it ought to have known that it required the permit before installation of the boilers.

[43] The Board's view is further supported by the documentation which indicated that when contacted by TSBC on November 26, 2019, four days after installation of the boilers at 57A Avenue, PH&AC's response was an untruth. The PH&AC employee told TSBC that he was still trying to get the necessary surface area measurements from the manufacturer, but even if the surface area was such that a BPV permit was required, it was not yet needed because the installation was not complete. This was not true. TSBC contacted the PH&AC gas fitter who did the installation at 57A Avenue, Surrey, BC on November 22, 2019 who confirmed that the boilers were fully installed and in operation on that date. That gas fitter admitted that there should be a boiler permit for the installation.

[44] Further, on November 28, 2019, PH&AC confirmed with TSBC that the surface area of the installed boilers was such that a permit was required. At that time, the PH&AC employee raised for the first time, the issue that the work performed was an emergency repair as the building was without heat. This too was not truthful. The strata manager confirmed to TSBC that at all times the building had heat.

[45] Lastly, although PH&AC knew on November 28, 2019 that the surface area was such that a permit was required, it took until December 5, 2019 for it to be taken out. There is no explanation offered for this delay.

[46] The Board has already concluded that the installation was not an emergency. Based on the above conduct, the Board also concludes that the failure to obtain a boiler permit in these circumstances was deliberate and not administrative error. There is no evidence of a reason why the installation could not have waited for the necessary measurements from the manufacturer which would allow the required permit to have been obtained. It is not open to the license holder to decide when to apply for the permit. The legislation requires that the permit be obtained before installation, which, on the evidence, was well known to PH&AC. If PH&AC did not have the information it required to determine if a boiler permit was required, it needed to wait

for installation until it knew and had obtained any permit that was necessary. Here there is no evidence provided of why it could not have done so.

[47] The Board concludes that PH&AC took a calculated risk in installing the boilers prior to obtaining the necessary permit. It was already under a Compliance Order not to install without the required permits which ought to have caused it to be precise and rigorous in fulfilling this requirement. In these circumstances, the Board finds that the failure to obtain the permit was deliberate.

[48] As a result, the assessment of Monetary Penalty imposed by the Provincial Safety Manager is confirmed and the appeal of PH&AC is dismissed.

