

Issue(s) to be Decided

- a. Does the Board have jurisdiction over the appeal against the compliance order?
- b. Does the Board have jurisdiction over the appeal against the monetary penalty order?
- c. Does the Board have jurisdiction over the appeal against the performance review?
- d. Should the Board overturn or vary the monetary penalty order?
- e. Should the Board grant a stay of the monetary penalty order?

Analysis

- a. *Does the Board have jurisdiction over the appeal against the compliance order?*

[2] The compliance order was issued on October 21, 2008. It complied with all of the requirements of section 38(2) of the *Safety Standards Act* (the Act), including a statement that the person may, in writing, request a review by a safety manager under section 49 of the Act or may appeal to the Safety Standards Appeal Board. There was ongoing discussion between the contractor and the Safety Authority that resulted in the contractor being given an extension of time, until January 28, 2009, in which to satisfy the compliance order. The order also advised that failure to comply with the order might result in a monetary penalty and suspension or revocation of licences or permits.

[3] On April 22, 2009, the contractor was notified in writing that failure to comply with the compliance order by May 25, 2009, would result in a recommendation to the Provincial Safety Manager that further action be taken against the contractor including a monetary penalty, revocation of the contractor's licence or calling of the contractor's surety bond.

[4] Finally, on October 13, 2009, the Provincial Safety Manager issued a monetary penalty order. The order was apparently served by registered mail and on November 16, 2009, the contractor filed this appeal.

[5] Section 24(1) of the *Administrative Tribunals Act* (ATA) provides that an appeal must be filed within 30 days of the decision being appealed. The ATA allows an extension of time to file an appeal if the appeal board is satisfied that special

circumstances exist. This time limit is echoed in the *Board's Rules of Practice and Procedure*.

[6] In this case, the appeal against the compliance order was filed more than a year after the order was made. The fact that the Safety Authority did not move onto the next stage of enforcement for many months is not a special circumstance nor is the fact that the parties spent many months trying to resolve the dispute between them. If the contractor was of the view that the compliance order was wrong he had a legal mechanism by which to challenge it. Having chosen not to use that mechanism, he must now live with the consequences of his inaction.

[7] I find that the Board does not have jurisdiction over the compliance order.

b. *Does the Board have jurisdiction over the appeal against the monetary order?*

[8] The appeal against the monetary penalty was filed within thirty days of the order being made. I find that the Board does have jurisdiction over the appeal against the monetary penalty.

c. *Does the Board have jurisdiction over the appeal against the performance review?*

[9] The Safety Authority has notified the contractor of its intention to perform a review of his performance as a Field Safety Representative and as a licensed electrical contractor. The contractor has been invited to submit any material he wants the Safety Authority to consider in the course of their review. There is no evidence whether either side has taken any further steps with respect to this review. Certainly there is no evidence of any order resulting from a review. Until an order is made, there is nothing to appeal.

d. *Should the Board overturn or vary the monetary penalty order?*

[10] Previous decisions of this Board have held that the Board's jurisdiction is limited to determining the reasonableness of the decision.

[11] The Appellant argues that the compliance order requires the contractor to perform work that was not included in the original contract between the owner and the contractor; that the solution authorized by the Safety Authority has not been authorized

by the owners; and that until the owners authorize this additional work, the contractor cannot comply with the compliance order. The Appellant argues that the continuation of the contravention is beyond the control of the contractor and therefore the monetary penalty should be reduced to nil.

[12] The Safety Authority's response to this argument was made in relation to a different issue but is also applicable in this context. It argues that the entire legislative scheme of the Act places responsibility for meeting safety standards and correcting safety deficiencies on the permit holder; not the owner. The Board accepts this statement.

[13] An implicit term of any contract between an owner and a licensed contractor is that the work done will comply with all applicable legislation, building codes and industry standards. The onus is on the contractor to be knowledgeable of these requirements and to factor those costs into the contract price. A licensed contractor who makes an error on this calculation is in the same position as a contractor who submits a quote based on an inaccurate materials cost.

[14] The evidence filed before the Board does not establish that the owners are unwilling to have the Appellant do the work necessary to bring the project into compliance with the legislation; only that they are unwilling to pay the contractor any additional money for the work.

[15] Further, other than a bare assertion by the Appellant, there is no evidence to support his contention that the current situation does not pose a potential hazard to public safety.

[16] The legislation requires a safety manager to consider several factors before imposing a monetary penalty. Not only is the Board satisfied that those factors were considered but that several are applicable to this case, namely:

- there is a potential, although not immediate, risk of harm to others as a result of the contravention;
- the failure to rectify the situation without additional payment from the owners, which is at the heart of the contravention, was deliberate and ongoing; and,

- by refusing to do this work within the context of the original contract, the contractor has, to date, derived an economic benefit.

[17] In addition, the Board notes that the penalty ultimately imposed by the Provincial Safety Manager is substantially less than the amount originally recommended by the safety officer.

[18] All of these factors lead the Board to conclude that the daily penalty imposed by the Safety Authority against the contractor is not unreasonable.

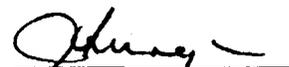
e. Should the Board grant a stay of the monetary penalty order?

[19] However the Board does vary the monetary penalty order in one respect. When parties submit to the jurisdiction of this Board they lose control over the process, including the time that may be required to present evidence and argument before the Board and the time that may elapse before a decision is rendered by the Board. It would be unfair to punish a party for not complying with an order from the Safety Authority while the question of whether the party actually has to comply is being decided. Accordingly, the penalty is suspended from November 13, 2009, the date the appeal was filed, to fifteen days after the date of this decision. On the fifteenth day following the date of this decision, the monetary penalty will again start accruing.

Conclusion

[20] The Applicant's appeal is dismissed. The operation of the monetary penalty is suspended from November 13, 2009, to fifteen days after the date of this decision. Each party is to bear their own costs.

Signed by:


J.L. Kernaghan