



Canadian Nuclear
Safety Commission

Commission canadienne
de sûreté nucléaire

Record of Proceedings, Including Reasons for Determination

In the Matter of

Applicant Breton N.D. Testing Incorporated

Subject Request for Commission Review of Notice of
Violation and Administrative Monetary Penalty
Issued on April 2, 2014

Hearing Date September 12, 2014

RECORD OF PROCEEDINGS

Applicant: Breton N.D. Testing Incorporated

Address/Location: 2054 Sydney Road, Reserve Mines NS, B1E 1J8

Purpose: Request for Commission Review of Notice of Violation and Administrative Monetary Penalty Issued on April 2, 2014

Request received: May 25, 2014

Date of hearing: September 12, 2014

Location: Canadian Nuclear Safety Commission (CNSC)
280 Slater St., Ottawa, Ontario, Applicant and CNSC staff on teleconference

Members present: M. Binder, Panel

Secretary: M. Leblanc

Recording Secretary: M. Hornof

General Counsel: L. Thiele

Licensee/Person Named in or Subject to AMP Represented By		Document Number
<ul style="list-style-type: none">• J. McMullin• B. McMullin		CMD 14-H109.1
CNSC staff		Document Number
<ul style="list-style-type: none">• R. Jammal• M. James• A. Régimbald• H. Rabski• H. Tadros	<ul style="list-style-type: none">• J.C. Poirier• K. Heppell-Masys• D. Ben-Reuven• K. Glenn	CMD 14-H109

Administrative Monetary Penalty Amount: Corrected

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1.0 INTRODUCTION

1. Breton N.D. Testing Incorporated (Breton N.D. Testing) holds Canadian Nuclear Safety Commission¹ (CNSC) licence No. 11877-1-14.0. On February 20, 2014, a CNSC inspector issued CNSC Order #426 to Breton to take immediate corrective action as a result of several non-compliances that were observed during an inspection.
2. Pursuant to subsection 34(1) of the *Canadian Nuclear Safety Commission Rules of Procedure*², and subsection 35(3) and paragraph 37(2)(g) of the *Nuclear Safety and Control Act*³ (NSCA), a CNSC Designated Officer confirmed Order #426 on March 12, 2014.
3. On April 2, 2014, in accordance with subsection 65.02(1) of the NSCA, a CNSC Designated Officer issued a Notice of Violation with an associated Administrative Monetary Penalty (AMP), 2014-AMP-03, in the amount of \$6,460.00 to Breton N.D. Testing. As stated in the Notice of Violation, an AMP was issued to the licensee based on the potential safety consequences arising from the violation of paragraph 4(a)(i) of the *Radiation Protection Regulations*⁴ and was considered appropriate to promote future compliance.
4. On May 25, 2014, in accordance with subsection 65.1 of the NSCA, Breton N.D. Testing made a request to the Commission for a review of the facts of the violation and the amount of the AMP (CMD 14-109.1).
5. On August 15, 2014, the CNSC confirmed that Breton N.D. Testing complied with all of the terms and conditions of Order #426 to the satisfaction of CNSC staff.

Issue

6. Pursuant to subsection 65.14(1) of the NSCA, and as per the request made by Breton N.D. Testing, the Commission was required to determine whether Breton N.D. Testing committed the violation as stated in 2014-AMP-03 and whether the amount of the penalty for the violation was determined in accordance with the *Administrative Monetary Penalties Regulations*⁵ (AMPs Regulations).

¹ The *Canadian Nuclear Safety Commission* is referred to as the “CNSC” when referring to the organization and its staff in general, and as the “Commission” when referring to the tribunal component.

² SOR-2000-211.

³ Statutes of Canada (S.C.) 1997, chapter (c.) 9.

⁴ SOR-2000-203.

⁵ SOR-2013-139.

Hearing

7. Pursuant to section 22 of the NSCA, the President of the Commission established a Panel of the Commission to consider the request from Breton N.D. Testing. The Commission, in making its determination, considered information presented for a hearing held on September 12, 2014 with CNSC staff in Ottawa, Ontario and via teleconference from Alberta, and with Breton N.D. Testing staff via teleconference from Alberta. During the hearing, the Commission considered written submissions and heard oral presentations from Breton N.D. Testing (CMD 14-H109.1) and CNSC staff (CMD 14-H109).

2.0 DETERMINATION

8. Based on its consideration of the matter, as described in more detail in the following sections of this *Record of Proceedings*,

the Commission, pursuant to section 65.14(1) of the *Nuclear Safety and Control Act*, determines that Breton N.D. Testing Incorporated committed the violation of *Radiation Protection Regulations*, paragraph 4(a)(i). The Commission also determines that the amount of Administrative Monetary Penalty, 2014-AMP-03, was not determined in accordance with the *Administrative Monetary Penalties Regulations*, and corrects the amount from \$6,460.00 to \$4,900.00.

3.0 ISSUES AND COMMISSION FINDINGS

9. In reviewing the Notice of Violation and AMP under section 65.14 of the NSCA, the Commission considered (1) whether the person committed the violation and (2) whether the amount of the penalty was determined in accordance with the regulations. As per section 65.15 of the NSCA, the burden of proof is on the person who issued the Notice of Violation to show, on a balance of probabilities, that the violation was committed. In this regard, the Commission considered the facts of the violation presented by Breton N.D. Testing and CNSC staff. The Commission also considered the seven factors set out in Section 5 of the AMPs Regulations to determine the correctness of the penalty amount.

Review Hearing

10. On September 12, 2014, the Commission conducted the review under section 65.14 of the NSCA. Specifically, Breton N.D. Testing was given an opportunity to provide the Commission with more information regarding the events that led to the issuance of Order #426, and the Notice of Violation/AMP.

11. In their written submission, Breton N.D. Testing does not dispute the fact that the CNSC inspector observed the violations committed on February 20, 2014. Furthermore, Breton N.D. Testing does not dispute the facts that led to the issuance of Order #426 on February 20, 2014.
12. The Commission enquired about the length of time required to issue the Notice of Violation/AMP after Order #426 was issued. CNSC staff responded that an order is issued by a CSNC inspector to address immediate health and safety concerns. To issue a Notice of Violation/AMP, CNSC staff must first inquire into the incident and determine whether the Notice of Violation/AMP is warranted to promote future compliance. The Commission further enquired whether Breton N.D. Testing had complied with Order #426 by April 2, 2014, when the Notice of Violation and AMP were issued. CNSC staff responded that while Order #426 had been addressed to the satisfaction of the CNSC, prior to the issuance of a Notice of Violation, compliance with an order does not ensure that a Notice of Violation/AMP will not be issued.
13. The Commission asked how the decision to issue an AMP to both the licensee as well as the certified exposure device operator (CEDO) performing the radiography during the inspection was made. CNSC staff explained the methodology that is used to determine when and to whom a Notice of Violation/AMP is issued. CNSC staff noted that an AMP was issued to the CEDO because he failed to meet his obligations under the NSCA and its regulations, and an AMP was also issued to the company because of a lack of management oversight by its representatives.
14. The Commission requested more information on how an AMP is calculated and how the amount was determined in this matter. The Designated Officer explained that compliance history, negligence, harm, and competitive/economic benefit were considered relevant factors in the calculation of this AMP, and provided details of their analysis. The Commission requested more information about how the “competitive or economic benefit” factor was evaluated. CNSC staff responded that Breton N.D. Testing performed an additional exposure to satisfy their client and took shortcuts by not using the appropriate safety equipment and conducting the proper checks. The Breton N.D. Testing representative denied that shortcuts were taken for economic benefit or at the risk of the health and safety of workers and the public. The representative further confirmed that the CEDO performing the radiography was using the required safety equipment for all exposures prior to the one observed by the CNSC inspector.
15. A representative from Breton N.D. Testing stated that, while the violation as stated in the Notice of Violation/AMP was committed, the work practices observed during the inspection were not typical and that the determining factors used in calculation of the AMP were not evaluated fairly. The Breton N.D. Testing representative also stated that the company complied immediately with Order #426 and has always welcomed CNSC inspections.

16. The Commission enquired about who held the permanent Radiation Safety Officer (RSO) position at Breton N.D. Testing. The Breton N.D. Testing representative stated that it was himself, John McMullin, who held the acting, as well as permanent, RSO position. The representative further indicated that he is currently working as both RSO and radiographer for the company, has completed the RSO course, and that the radiographer that he was working with on February 20, 2014 was a CEDO who did not require supervision.
17. Based on the high activity of the source inside the exposure device, the Commission asked why a radiographer would be allowed to work without radiological safety equipment. The Breton N.D. Testing representative responded that it is not allowed. The safety equipment was in the radiographer's jacket and he had forgotten to put his jacket back on prior to performing the exposure.
18. The Commission requested more information about Breton N.D. Testing's non-compliance history. CNSC staff responded that non-compliance with several CNSC requirements was noted in previous inspections. Many of these non-compliances were similar to the non-compliances found in the February 20, 2014 inspection and this showed poor management oversight over work practices. As such, this factor was considered in calculating the AMP. The Breton N.D. Testing representative agreed that several inspections indicated non-compliances but disagreed that the company had a history of poor management oversight over work practices.
19. The Commission enquired whether there was any risk to the public when the licensee was observed performing radiography without survey meters and dosimeters. The Breton N.D. Testing representative indicated that all required safety barriers were up and that there was no risk to the public. He added that the radiographer was a nuclear energy worker and was wearing his thermoluminescent dosimeter.

4.0 CONCLUSION

20. The Commission has considered the information and submissions from Breton N.D. Testing and the Designated Officer, and determines that Breton N.D. Testing committed the violation pursuant to paragraph 4(a)(i) of the *Radiation Protection Regulations*. The evidence showed that Breton N.D. Testing did not show management control over work practices when its employee performed radiography without survey meters and dosimetry in the presence of the company RSO. Furthermore, Breton N.D. Testing acknowledged that the violation occurred.
21. The Commission, however, based on the information that was submitted about the event, is satisfied that there was an error in the determination of the penalty amount. The factor "competitive or economic benefit", paragraph 5(d) of the AMPs Regulations, was assessed as a +1 by the Designated Officer, with the following rationale: "Based on the results of the inspection carried out on February 20, 2014, there may be competitive or economic benefit for the company not committing sufficient time and resources to

effective management oversight. This was considered a factor in determining the penalty amount.” The Commission finds that this factor, whether the person derived a benefit or economic gain from the violation, was not established on a balance of probabilities. As a result, and as per section 65.15 of the NSCA, it corrects the assessed score for this factor to a 0.

22. With this determination, in accordance with 64.14(4) of the NSCA, the Commission directs Breton N.D. Testing Incorporated to submit payment for the 2014-AMP-03 in the amount of \$4,900.00 within 30 days of the date of this determination.
23. In accordance with 65.14(5) of the NSCA, this determination is final and binding.



Michael Binder
President,
Canadian Nuclear Safety Commission

OCT 09 2014

Date