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April 7, 2020

Anne Caldas
Secretary, ANSI Board of Standards
Review ANSI
25 West 43 Street, 4th Floor
New York, NY 10036

Re: The Scaffold & Access Industry Association (SAIA)/ASC A92's response to ANSI BSR Appeals Decision - Response Requested from SAIA on behalf of ASC A92

Dear Ms. Caldas and the ANSI Board of Standards Review (BSR),

**Tutus Appeal**

The BSR determined that the A92 standards as currently written violate the Commercial Terms Policy insofar as they require that modifications or additions to a MEWP be made only with the permission of the manufacturer. Although the standards recognize an exception in the case where the manufacturer is no longer in existence (in which case "modification to a MEWP shall be made under the direction of an engineer with expertise in MEWPs"), the BSR determined that the exception was too narrow and that, in order to come into compliance with the Commercial Terms Policy, the standard would have to be revised to allow for experienced alternatives to perform modifications to the MEWP -- even in the case where the manufacturer is still in existence. Decision at page 7.

The proposed revision, as described in in A92's February 3, 2020 response to Tutus, reads as follows:

***6.2.2 Modifications***

*~~The manual shall state that m~~Modifications ~~or additions~~ to a MEWP ~~shall~~ may be made by the owner, such modifications shall be subject to the applicable requirements set forth in this Standard. The manual shall state that modifications to a MEWP should be made only with prior written permission of the manufacturer/remanufacturer. ~~In case the~~ Where the manufacturer/remanufacturer approval cannot be obtained, permission to perform modifications may be granted by an equivalent entity after analysis and approval of an engineer. ~~no longer exists, modifications to a MEWP shall be made under the direction of an~~*

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~~*engineer with expertise in MEWPs. The owner shall retain written permission and pass it on to any subsequent owner, as applicable.*~~

The language agreed upon by the appellant, submitted and approved by the BSR as part of the resolution plan, and then subject to ballot, public comment, unresolved negatives responded to, and re-balloted with unresolved comments was:

*Equivalent Entity. An organization, agency, company or individual who, by possession of an appropriate technical degree, certificate, professional standing, or skill, and who, by knowledge, training, and/or experience, has demonstrated the ability to deal with the problems relating to the subject matter, the work, or the project.*

*6.2.2 Modifications*
*Modifications to a MEWP may be made by the owner, such modifications shall be subject to the applicable requirements set forth in this Standard. The manual shall state that modifications to a MEWP should be made only with prior written permission of the manufacturer/remanufacturer. Where the manufacturer/remanufacturer's approval cannot be obtained, permission to perform modifications may be granted by an equivalent entity after analysis and approval of an engineer.*

Questions:

Since the revised language still requires "written permission" from the manufacturer, how does it address the concerns raised by the BSR?

The question makes an incorrect assumption. The standard no longer requires written permission of the manufacturer. The first line of 6.2.2 states: “Modifications to a MEWP may be made by the owner, such modifications shall be subject to the applicable requirements set forth in this Standard”. It follows with a requirement that the manual state that modifications should only be made with written permission of the manufacturer. According to the standard “The use of the word “should” is to be understood as advisory, and having the same effect as "recommended." Thus, the standard recommends or advises that written permission be obtained from the manufacturer, it does not require it.

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Given that the manufacturer has the power to veto a requested alternative, does the revised language in fact allow for a meaningful alternative who can perform modifications to the MEWP?

The question makes an incorrect assumption. The manufacturer does not have the power to veto a requested alternative. As stated above, seeking the approval of the manufacturer is a recommendation or advice. The standard does in fact allow for a meaningful alternative. “Where the manufacturer/remanufacturer's approval cannot be obtained,” (by either failure to approve or by denying approval) “permission to perform modifications may be granted by an equivalent entity after analysis and approval of an engineer.”

If the implementer is required to wait for the manufacturer’s permission, then doesn’t the proposed language effectively still give the manufacturer the sole authority to perform modifications?

No. The question makes an incorrect assumption. The owner is not required to wait for the manufacturer’s permission. The owner is recommended or advised to seek the manufacturer’s permission, this is not a requirement. An owner may have valid reasons for using an alternative path to approval such as a manufacturer that is no longer in existence, is unresponsive, or denies a request. They can still modify using and equivalent entity option to approve modifications.

Provide an example of what is considered an “equivalent" of a manufacturer as referenced in the proposed definition of "equivalent entity" (ARA's 2/3/20 response to Tutus):

***Equivalent Entity:*** *An organization, agency, company or individual who, by possession of an appropriate technical degree, certificate, professional standing, or skill, and who, by knowledge, training, and/or experience, has demonstrated the ability to deal with the problems relating to the subject matter, the work, or the project.*

Although it is not the responsibility of the ASC A92 to identify equivalent entities, in an attempt to answer the question of the BSR, the respondent would note: The A92 series of standards are voluntary standards to which entities designate compliance based upon their own review of the requirements. The forward states “The use of American National Standards is completely voluntary; their existence does not in any respect preclude anyone, whether he has approved the standard or not, from manufacturing, marketing, purchasing, or using products, or

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procedures not conforming to the standards." With that said, the following entities are ASC A92 members and have self-reported themselves as consultants with expertise in the subject matter. Many of the representatives of these entities are also engineers.

Arrowhead Product Development, Inc
Blazing Technologies
Brewington & Company
Eckstine and Associates, Inc
Equipment Consultant Services Unlimited, Inc
Equipment Safety Consultants
Eric A. Schmidt, P.E
Evulich & Associates
Ives Training & Compliance Group Inc
Merrifield Safety Consulting LLC
Reynolds Engineering Services Inc
RLH Consulting LLC
Utility Truck Equipment & Parts LLC
Vollmer-Gray Engineering

How long would someone be expected to wait for the manufacturer/remanufacturer's permission before seeking assistance from an "equivalent" entity?

The owner is not required to wait for the manufacturer's permission. The owner is recommended or advised to seek the manufacturer's permission, this is not a requirement. An owner may have valid reasons for using an alternative path to approval such as using and equivalent entity to approve modifications. Where the owner does seek permission from the manufacturer, they must determine at what point the manufacturer/remanufacturer's approval cannot be obtained, based upon their own needs. The owner can then, or at any time seek permission to perform modifications from an equivalent entity after analysis and approval of an engineer.

How would one know how long to wait for permission from a manufacturer/remanufacturer, before seeking approval from an "equivalent" entity?

It is not required for the ASC A92 to identify a period of time to wait, as seeking the permission of the manufacturer is no longer required, only advised. The A92 series of standards are

voluntary standards to which entities designate compliance based upon their own review of the requirements. The forward states "The use of American National Standards is completely voluntary; their existence does not in any respect preclude anyone, whether he has approved the standard or not, from manufacturing, marketing, purchasing, or using products, or procedures not conforming to the standards." The appellant has provided evidence of circumstances where he believed he waited too long, and where his request was not granted, in his supplemental materials. In both cases the last clause of 6.2.2 appears to be applicable. "Where the manufacturer/remanufacturer's approval cannot be obtained, permission to perform modifications may be granted by an equivalent entity after analysis and approval of an engineer." Language to which the appellant agreed to in June of last year.

In conclusion, the respondent for the ASC A92 would note that there are numerous sections of A92 standards which contain language including "should" advisory clauses. It is the position of the respondent that this is not unusual in ANSI standards and the ASC A92 should not be required to be excessively specific in these particular clauses. Delay of the implementation of a standard based upon advisory language which has reached the required consensus level while following ASC A92 and ANSI procedures is damaging to the industry and stake holders in general.

**ARA Appeal**

The BSR determined that the requirement in one or more of the A92 suite of standards that a copyrighted document be attached to another after-market product (the MEWP) amounts to an "endorsement" of the MOR, in violation of the Commercial Terms Policy. The BSR understands from ARA that, SAIA/ASC A92 is proposing revisions that still require a manufacturer to include a "Manual of Responsibilities" (MOR) that contains *"definitions and requirements mandated in applicable A92 copyrighted standards."* ARA's February 19, 2020 "Final Reply" states in part the following:

*The A92 Standards continue to define "Manual of Responsibilities" as: "A document containing definitions and requirements mandated in applicable A92 Standards…"*

(**Note:** In order for the BSR to review SAIA's response to these questions, SAIA is asked to please provide the complete text of the current proposed definition of "Manual of Responsibilities".)

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*Manual of Responsibilities: A document containing definitions and requirements mandated in applicable A92 Standards for the following entities: Manufacturers, Dealers, Owners, Users, Supervisors, Operators, Occupants, Lessors, Lessees and Brokers.*

And, section 2.2 is proposed to be revised as follows

*2.2 Other Referenced Documents*
*This Standard shall be used in conjunction with the following documents:*
*– Manufacturer's make and model operator's manual*
*– The ~~SAIA~~ Manual of Responsibilities, or equivalent of, for Dealers, Owners, Users, Supervisors, Operators, Occupants, Lessors, Lessees and Brokers for the Safe Use of Mobile Elevating Work Platforms*

Further, section 6.1 is proposed as follows:

*6.1 General*
*The manufacturer shall provide, at the time of delivery, operation manuals to include at a minimum an operator's manual, and a manual of responsibilities, or equivalent of, located on the MEWP in a weather-resistant storage location.*

Questions:

1. Since the revised language still requires an MOR that contains *"definitions and requirements mandated in applicable A92 copyrighted standards"* how does it address the concerns raised by the BSR?

The respondent has removed the requirement for a specific "MOR". An "MOR" as written in the question implies a proper noun, as in a specific Manual of Responsibilities as found in the 2018 revision under limited revision. The revised language requires a manual of responsibilities, or equivalent. It does not "still require an MOR that contains "definitions and requirements mandated in applicable A92 copyrighted standards". The standards require "A document containing definitions and requirements mandated in applicable A92 Standards for the following entities…" or equivalent. A manual of responsibilities does not require ***the*** definitions and requirements, that is, it does not require the specific definitions and requirements of the standards. The ASC A92 is entitled to have the definition of a manual of

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responsibilities understood as grammatically written, not as interpreted in the way most advantageous to the Appellant.

Additionally, as written the question excludes the new language requiring the manufacturer provide “a manual of responsibilities, or equivalent”. By allowing something equivalent to a manual of responsibilities, the requirements as written clearly do not require a verbatim use of the language of the standards. The ASC A92 is entitled to have the definition “equivalent” understood in its common English language use and definition, not interpreted in the way most advantageous to the Appellant.

The position of the respondent has been explained to the Appellant in official Committee Correspondence and at the 2019 Fall ASC A92 meeting in open discussion. It has also been communicated in responses to negative comments and circulated to the whole ASC A92 as part of unresolved negatives to Letter Ballot 84 at time of recirculation. The ASC A92 and SAIA have offered to provide a supporting Letter of Interpretation to the Appellant, but a request for interpretation has not been made. Under ANSI and ASC A92 procedures it is the ASC A92 that provides interpretations as to the proper reading of a section of the standard if it is questioned. Any other entity attempting to interpret the intent of the ASC A92 is out of order and merely expressing an opinion.

2. Will this language require an implementer to use parts of the A92 copyrighted standards, such as the "definitions and requirements" contained in the A92 copyrighted standards?

No. A manual of responsibilities must have definitions and requirements, or the equivalent. It does not require the use of parts of the A92 standards themselves.

If so, does SAIA agree that any such use of the “definitions and requirements" would not constitute a copyright infringement and/or that such use would constitute "fair use" under the copyright laws?

As indicated in the answer to Question 2 above, the “definitions and requirements” as specifically written in the standards are not required. However, the respondent and SAIA recognize and accept the fair use doctrine of copyrighted material.

The determination if a particular use of a specific copyrighted material is allowed under the fair use doctrine is a fact specific inquiry. The respondent believes that blatant copying of the

standard verbatim would not be a fair use. However, SAIA has expressed to the Appellant, verbally and in writing, that a reasonable attempt to avoid a direct copy of the standards would not be challenged under its copyrights.

If so, does SAIA agree to make the relevant text of the standards available to implementers at no cost and/or on an electronic "read-only" basis?

As discussed above, the use of copyrighted material is not required.

If SAIA does not permit such fair or free use of the relevant text of the standards, will the implementer be required to purchase the information from SAIA?

The fair use doctrine of copyright law does not require the permission of the copyright holder. However, the standards are copyright protected. It is important to keep in mind that ANSI has long supported the ability of SDO's to copyright the standards created by the organization to fund the administration of the ASC.

If so, how is adding "or equivalent" a meaningful response to the concerns raised by ARA if the implementer must still purchase a product from SAIA in order to comply with the standard?

The implementor can create a manual of responsibilities as discussed above, or it can create something equivalent. There is no requirement to purchase a manual of responsibilities product from SAIA in order to comply with the standard. During the hearing, the Appellant testified to the BSR that the Appellant could create an equivalent if given the opportunity. In fact, the Appellant specifically claimed that it could create an equivalent and would not need the standards.

While the Appellant now claims that creating an equivalent is not possible, the respondent asserts that there are many different ways to create a manual of responsibilities. For example, the implementer can create the list of definitions using its own language. The standard does not require the use of the specific definitions set out in the standard. The implementer can add additional definitions that it thinks would be relevant.

Next, the implementer can organize the responsibilities in a different manner. The SAIA MOR uses a chart format to set out the responsibilities. As an example of an equivalent manual of responsibilities, the implementer could organize the responsibilities in paragraph format (not in

chart format) and explain the responsibilities separately for each category (i.e., manufacturer, dealer, owner, user, supervisor, operator, occupant, lessor, lessee, and broker).

3. Who will decide whether an "MOR" that is not adapted from the "SAIA MOR", is an acceptable equivalent?

The A92 standards are voluntary standards for which entities independently make statements regarding their compliance. There is no provision in these Standards for external compliance verification of any of the A92 requirements. It is not reasonable to require the ASC A92 develop a verification method for this provision alone.

4. Why is a user required to purchase an MOR and attach it to the MEWP? Is the Manufacturer's manual not sufficient?

The "user" is not required to purchase a MOR. The A92.22 Section 4.3.1 requires "Users shall keep and maintain a copy of the operation manuals in a weather resistant compartment on the MEWP…." The ASC A92 has reached consensus in A92.20 Section 6.1 that a manual of responsibilities or equivalent, shall be supplied as part of the operations manuals at time of delivery. A manufacturer can purchase a SAIA manual of responsibilities or obtain a license of the SAIA manual of responsibilities or create an equivalent manual of responsibilities. If the manufacturer asserts that its operating manual contains an equivalent to a manual of responsibilities that would also be sufficient. The standard does not require the manual of responsibilities be a separate document.

5. Are the provisions that relate to the MOR consistent across the three A92 standards under appeal?

Yes, although the appeal is related to just A92.20 and A92.22. The A92.24 standard has no provisions under appeal.

6. Changes are proposed to language that appears outside of the scope of the BSR's appeals decision. Please explain these briefly and whether the changes were made in light of *3.2 Commercial terms and conditions*? For example:

***6.8.39.2*** *On completion of work, the MEWP shall be parked in the designated area with the engine or motor switched off, the work platform lowered to its stowed position and the brakes applied. The MEWP shall not be left unattended in the elevated position unless ~~approved by the manufacturer~~ specifically designed for such use.*

Yes, the ASC A92 made additional changes in consultation with the Appellant Tutus to address potential claims of commercial terms violations. The ASC A92 also approved the formation of a Sub-Group to specifically review all A92 standards for other potential commercial terms violations. The ASC A92 leadership has committed to the Committee that when the new Sub-group has completed its work, to follow procedures to ballot the changes as an addendum to existing revisions, as opposed to waiting for a full five-year revision cycle.

In conclusion, the respondent for the ASC A92 would note that there are numerous sections of A92 standards which require those seeking to comply to take actions subject to their own understanding of how the Standards apply. It is the position of the respondent that this is not unusual in ANSI standards, and the ASC A92 should not be required to be excessively specific in the particular clauses associated with implementing a manual of responsibilities. Delay of the implementation of a standard based upon "or equivalent" language which is found in Section 3.2 Commercial terms and conditions of the ANSI Essential Requirements, and has reached the required consensus level while following ASC A92 and ANSI procedures, is damaging to the industry and stake holders in general.

Respectfully submitted by,

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