



Via E-mail only

May 7, 2020

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Re: Decision of the ANSI Board of Standards Review (BSR) Appeals Panel resolving two separately filed appeals: 1) Tutus Solutions (Tutus) of the approval of A92.20 and A92.22 as American National Standards (ANS); and 2) American Rental Association (ARA) of A92.20, A92.22 and A92.24 (A92 suite of standards) as ANS.

Dated Notice

Dear Appeals Participants -

The ANSI Board of Standards Review (BSR) has considered all of the supplemental documentation¹ submitted to date by all parties to the appeals filed by Tutus and ARA, including submissions permitted after the BSR's original May 31, 2019 appeals decision (Attachment 1). Based on those submissions, the ANSI BSR issues this Supplemental Decision, dated May 7, 2020 ("Supplemental Decision"). Of particular importance to this Supplemental Decision is SAIA's April 7, 2020 response ("SAIA Response") to a final set of questions posed by the BSR on March 23, 2020 (Attachment 2). The SAIA Response is

¹ The BSR notes that two letters of support were submitted by SAIA with its April 7, 2020 response to the BSR. Those letters reflect a substantive misunderstanding of the ANSI BSR's May 31, 2019 appeals decision as well as a mischaracterization of ANSI's role in the ANS process. As both submitters have been provided with the BSR's May 31, 2019 appeals decision, no further action will be taken with respect to those letters.

incorporated by reference here. In the SAIA Response, SAIA provides important explanations, clarifications and commitments.

Based on the SAIA's Response, the BSR believes that the concerns documented in its May 31, 2019 appeals decision have been satisfied and that the original approval of the ANSs at issue, as revised, need not be withdrawn. Under separate cover, approval notices for the related revisions submitted under two separate BSR-9 forms, will be issued and those who concluded the appeals process for those limited revisions, through ASC A92's process, will be notified of the right to appeal the BSR's decision to approve those revisions.

ANSI BSR Understanding of SAIA Response

This Supplemental Decision is based upon the explanations, clarifications and commitments made by SAIA in the SAIA Response, including, among others, the following:

1. The amended A92 standards no longer require written permission of the manufacturer with respect to modifications of a MEWP. According to paragraph 5, page 2 of the SAIA Response, the standards' use of the term "should" is intended to convey discretion such that implementers are not required to seek approval of the manufacturer with respect to MEWP modifications in Section 6.2.2 Modifications, but it is recommended that they in fact do so.
2. There is no requirement that a separate MOR be developed and that, as an alternative, "definitions and requirements" from the standard could be instead contained in the manufacturer's manual.
3. Regarding the standards' requirement that "[a] document containing definitions and requirements mandated in applicable A92 Standards for the following entities..." or the equivalent, the doctrine of "fair use" protects an implementer's use of equivalent definitions and requirements and that a reasonable attempt to avoid a direct copy of the standards will not be challenged by SAIA under its copyrights.
4. The ASC A92 has 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 that when the new Sub-Group has completed its work, it will process any resulting changes as an addendum to existing revisions, as opposed to waiting for a full five-year revision cycle.

Because these and other clarifications, explanations and commitments may not be evident from the face of the revised standards, the BSR directs SAIA to publish the entirety of the SAIA Response either as an annex to its ASC A92 standards or on its website (with some kind of "pointer" imprinted on the face of the standards leading to that website location) so that these clarifications, explanations and commitments are readily available to users of the suite of standards. To that end, SAIA might also add an informative note to the Foreword of the standards that directs users to the SAIA Response.

The BSR also encourages ASC A92 to further sharpen the language at issue in future editions of the ANSs so that the information presented in SAIA's April 7, 2020 Response is readily available to users of the standards without supplementary written assurance.

This Supplemental Decision only addresses the specific issues raised in the ARA and Tutus original appeals.

Notice of the Right to Appeal to the ANSI Appeals Board

Please be advised that **this transmission via E-mail constitutes your official notification of the decision of the BSR.**

Should a party to this appeal wish to file an appeal of this BSR decision with the ANSI Appeals Board, written notice of appeal and all appeals statements and supporting documentation must be filed with the Secretary of the ANSI Appeals Board (the office of the undersigned) by **May 29, 2020**. The appeal shall be accompanied by a filing fee in the amount of \$1200.00. If you require an extension of the deadline date for the filing of an appeal, you must contact the Secretary of the ANSI Appeals Board on or before **May 29, 2020** or you will forfeit your right to further appeal. The appeal must be filed in accordance with the *ANSI Appeals Board Operating Procedures*, a copy of which is attached to the E-mail that transmitted this decision.

Thank you for your attention to this matter. If you have any questions, or if I may be of assistance to you, please contact me at (212) 642-4914 or send an E-mail to acaldas@ansi.org.

Sincerely,
Anne

Anne Caldas
Secretary
ANSI Board of Standards Review

cc: P. Griffin, ANSI Senior VP & General Counsel
F. Schrotter, ANSI Senior VP & COO
J. Smith, ANSI Outside Counsel
ANSI Board of Standards Review



Via E-mail only

May 31, 2019

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DeAnna Martin, SAIA
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Re: Decision of the ANSI Board of Standards Review (BSR) Appeals Panel resolving two separately filed appeals: 1) Tutus Solutions (Tutus) of the approval of A92.20 and A92.22 as American National Standards (ANS); and 2) American Rental Association (ARA) of A92.20, A92.22 and A92.24 (A92 suite of standards) as ANS.

Dated Notice

Dear Appeals Participants:

On May 7, 2019, the ANSI Board of Standards Review (“BSR”) heard the above appeals. The decision of the ANSI BSR follows.

Please be advised that **this transmission via E-mail constitutes your official notification of the decision of the BSR.**

Should a party to this appeal wish to file an appeal of this BSR decision with the ANSI Appeals Board, written notice of appeal and all appeals statements and supporting documentation must be filed with the Secretary of the ANSI Appeals Board (the office of the undersigned) by **June 21, 2019**. The appeal shall be accompanied by a filing fee in the amount of \$1200.00. If you require an extension of the deadline date for the filing of an appeal, you must contact the Secretary of the ANSI Appeals Board on or before **June 21, 2019** or you will forfeit your right to further appeal. The appeal must be filed in accordance with the *ANSI Appeals Board Operating Procedures*, a copy of which is attached to the E-mail that transmitted this decision.

Thank you for your attention to this matter. If you have any questions, or if I may be of assistance to you, please contact me at (212) 642-4914 or send an E-mail to acaldas@ansi.org.

Sincerely,
Anne

Anne Caldas
Secretary
ANSI Board of Standards Review

cc: P. Griffin, ANSI Senior VP & General Counsel
F. Schrotter, ANSI Senior VP & COO
J. Smith, ANSI Outside Counsel
ANSI Board of Standards Review

**ANSI BOARD OF STANDARDS REVIEW
SUMMARY DECISION**

Two separate appeals were filed by Tutus Solutions (Tutus) and the American Rental Association (ARA) challenging the ANSI BSR's decision to approve A92.20, A92.22 and A92.24 (the A92 suite of standards) as American National Standards (ANS). These ANSs are sponsored by ASC A92 *Aerial Platforms* for which the Scaffold & Access Industry Association (SAIA) serves as Secretariat (ASC A92). For the reasons set forth below, the BSR grants in part each of the two appeals and directs SAIA to take the timely actions described below if the A92 suite of standards are to retain their status as ANS.

Appellant 1 – Tutus Solutions (Tutus):

Represented by: Forrest Hester, Tutus Solutions
Kevin Jones, Tutus Solutions

Respondent – ASC A92 and SAIA (ASC A92):

Represented by: David Merrifield, A92 Chairman
Jon W. Gilchrist, Payne & Jones, SAIA Legal Counsel
DeAnna Martin, A92 Liaison

Appellant 2 – American Rental Association (ARA):

Represented by: John W. McClelland, Ph.D., ARA
Mike McCann, Spencer Fain, ARA Legal Counsel
Jeff Stachowiak, Sunbelt Rentals

Respondent 2 – ASC A92 and SAIA (ASC A92):

Represented by: Barris Evulich, Evulich and Associates, Chair A92.5
DeAnna Martin, A92 Liaison
David Merrifield, A92 Chairman

Observer:

Josh Van Zuiden, ARA

Hearing Date: May 7, 2019

Hearing Location: ANSI, New York

ANSI Board of Standards Review (BSR) Panel

Teresa Ambrosius
Paul Bralower
Gabriella Davis, Chair
Cristine Fargo
Monica Leslie

Patricia McGillicuddy
Tanisha Meyers-Lisle
Patricia Sena
Michael Wixted
David Zimmerman

ANSI Staff and Counsel

Anne Caldas, Secretary, ANSI BSR
Elizabeth Gonzalez, Recording Secretary, ANSI BSR
Patricia Griffin, ANSI Senior VP & General Counsel
Jeffrey Smith, ANSI Outside Counsel

I. Introduction

Each of the A92 suite of standards¹ was approved by the ANSI Board of Standards Review (BSR) as an American National Standard (ANS) on November 20, 2018. Tutus Solutions (Tutus) appeals the approval of A92.20 and A92.22 and the American Rental Association (ARA) appeals the approval of A92.20, A92.22 and A92.24. The essence of both appeals is that the standards (for different reasons) violate section 3.2 *Commercial terms and conditions* of the *ANSI Essential Requirements* (www.ansi.org/essentialrequirements) (hereinafter, the "Commercial Terms Policy"). Each appeal raises certain additional, and in some respects related, arguments as well. A hearing was held before a BSR Panel² on May 7, 2019. For the reasons set forth below, we find that the Commercial Terms Policy has been violated and direct that the A92 suite of standards be withdrawn as ANS, unless SAIA, on behalf of ASC A92, within 30 days of the receipt of this decision, submits a plan for the BSR's approval, demonstrating how the A92 suite of standards will be revised within 6 months of the date of this decision (or as soon thereafter as is possible) to bring them into compliance with the Commercial Terms Policy.

II. Arguments and Analysis

As noted, the thrust of both appeals is that the A92 suite of standards violates the Commercial Terms Policy, which currently provides:

3.2 Commercial terms and conditions

Provisions involving business relations between buyer and seller such as guarantees, warranties, and other commercial terms and conditions shall not be included in an American National Standard. The appearance that a standard endorses any particular products, services or companies must be avoided. Therefore, it generally is not acceptable to include manufacturer lists, service provider lists, or similar material in the text of a standard or in an annex (or the equivalent). Where a sole source exists for essential equipment, materials or services necessary to comply with or to determine compliance with the standard, it is permissible to supply the name and address of the source in a footnote or informative annex as long as the words "or the equivalent" are added to the reference. In connection with standards that relate to the determination of whether products or services conform to one or more standards, the process or criteria for determining conformity can be standardized as long as the description of the process or

¹ The A92 suite of standards under appeal are comprised of the following three standards: (i.) *A92.20 Design, Calculations, Safety Requirements and Test Methods for Mobile Elevating Work Platforms (MEWPs)*; (ii.) *A92.22 Safe Use of Mobile Elevating Work Platforms (MEWPs)*; and (iii.) *A92.24 Training Requirements for the Use, Operation, Inspection, Testing and Maintenance of Mobile Elevating Work Platforms (MEWPs)*.

² At the discretion of the BSR, the BSR or a panel consisting of at least five (5) BSR members, subject to applicable conflict of interest provisions, may conduct the appeals hearing.

criteria is limited to technical and engineering concerns and does not include what would otherwise be a commercial term.³

We address the Appellants' arguments, in turn, below.

A. American Rental Association (ARA) Appeal

ARA claims that the A92 suite of standards is not in compliance with the Commercial Terms Policy because these standards specifically require that a "Manual of Responsibilities (MOR)," a document produced, copyrighted and sold only through SAIA, be attached to every Mobile Elevated Work Platform (MEWP) manufactured under the standards.⁴ Specifically, for example, section 6.1 *General* of standard A92.20 requires "[t]he manufacturer shall provide, at the time of delivery, operation manuals to include at a minimum an operator's manual, and a manual of responsibilities located on the MEWP in a weather-resistant storage location." The term "manual of responsibilities" is defined as "[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." In the related A92.22 standard, section 2.2 *Other Referenced Documents*, the MOR is referred to as "The SAIA Manual of Responsibilities for Dealers, Owners, Users, Supervisors, Operators, Occupants, Lessors, Lessees and Brokers for the Safe Use of Mobile Elevating Work Platforms."

ARA argues that this requirement that the MOR be physically attached to the MEWP violates the Commercial Terms Policy because it effectively endorses a product available only through SAIA, a single source, and does not permit any kind of substitution. This requirement, ARA maintains, violates at least two provisions of the Commercial Terms Policy: (i) the requirement that "[t]he appearance that a standard endorses any particular products, services or companies must be avoided;" and (ii) the direction that "[w]here a sole source exists for essential equipment, materials or services necessary to comply with or to determine compliance with the standard, it is permissible to supply the name and address of the source in a footnote or informative annex as long as the words 'or the equivalent' are added to the reference."⁵

For its part, SAIA maintains that the MOR is necessary for safety reasons and, because it contains verbatim excerpts from the A92 standards, there simply is no "equivalent." SAIA also states that the

³ The BSR takes no position at this time on whether and to what extent other parts of the A92 suite of standards, not raised in these appeals, would conform to the current Commercial Terms Policy or to a revised version of the Commercial Terms Policy that is currently under consideration by the ANSI Executive Standards Council (ExSC).

⁴ The MOR itself is essentially a condensed version of the standards – an extensive table that contains verbatim excerpts from the standards and designates, with check marks, those parts of the standards that need to be followed by various entities using the MEWPs, such as manufacturers, dealers, owners, users, supervisors, operators, occupants, lessors, lessees, and brokers.

⁵ ARA also raises other related concerns, including that SAIA has a conflict of interest because it benefits financially from the requirement that the SAIA MOR be physically attached to the MEWP, that the MOR is prohibitively expensive because hundreds-of-thousands of MEWPs are subject to the MOR requirement, that the MOR is unnecessary in light of the manufacturer's own operators manual which is more specific and easier to understand and that the requirement that the MOR be physically attached to the MEWP violates antitrust laws. The BSR need not decide these issues in light of its resolution of the argument under the Commercial Terms Policy.

requirements associated with the MOR have been part of the A92 standards since 1999, are well known in the industry and that ARA itself approved prior versions of the standards that relied on the MOR in 2014. Finally, SAIA suggests that ANSI's Executive Standards Council (ExSC) gave tacit support to SAIA's position that its standards did not violate the Commercial Terms Policy.

The BSR agrees with ARA that the MOR violates ANSI's Commercial Terms Policy. The requirement in one or more of the A92 suite of standards that a copyrighted document, which we consider a "product," be attached to another after-market product (the MEWP) amounts to an "endorsement" of the MOR, in violation of the Commercial Terms Policy. Since the MOR is a verbatim restatement of excerpts from the standards – in a slightly different format – no other source could supply this product without violating SAIA's copyright. Accordingly, the only manner in which SAIA can come into compliance with the Commercial Terms Policy is to remove the requirement that the SAIA MOR be attached to the MEWP for the A92 suite of standards. The BSR also agrees with ARA that there has been no showing that the only way to maximize safety is by requiring use of the MOR as opposed to through the use of equivalent materials that do not, for example, directly quote the standards but convey the key points in a different way, as ARA urged. Finally, the advisory opinion issued to SAIA by the ExSC⁶ (without the benefit of a full record) was expressly made subject to the possibility that further study would lead to a different conclusion, given that the matter was one of first impression.

B. Tutus Solutions, Inc. (Tutus) Appeal

Tutus appeals the approval of A92.20 and A92.22 as ANS also based on alleged non-compliance with the Commercial Terms Policy. In Tutus' case, the alleged violation flows from text in the standards that requires all modifications to the MEWP be approved by the manufacturer, for example, section 4.5 *Modifications* of A92.22, states in part:

Modifications or additions to a MEWP shall be made only with prior written permission of the manufacturer. In case the manufacturer no longer exists, modifications to a MEWP shall be made under the direction of an engineer with expertise in MEWPs.⁷

Tutus maintains that this requirement forecloses other engineers with requisite expertise who are "equivalents" under the Commercial Terms Policy from competing with manufacturers for business relating to modifications of MEWPs. Tutus argues that the delegation of authority over modifications to the manufacturer (or remanufacturer) exclusively is exacerbated by the fact that a recent revision to the A92 suite of standards expands the definition of "modification" to include any alteration of equipment under the standard. Tutus also pointed out during the hearing that equivalent international standards do not contain the requirement that modifications be handled exclusively by the manufacturer.

The BSR agrees with Tutus that the requirement that modifications or additions to a MEWP be made only with the permission of the manufacturer violates the Commercial Terms Policy. As the standard

⁶ See Annex A of this decision for the ExSC's February 21, 2017 communication to SAIA and ARA.

⁷ See also section 6.2.2 *Modifications* of A92.20, which states: "The manual shall state that modifications or additions to a MEWP shall be made only with prior written permission of the manufacturer/remanufacturer. In case the manufacturer/remanufacturer no longer exists, modifications to a MEWP shall be made under the direction of an engineer with expertise in MEWPs. The owner shall retain permission and pass it on to any subsequent owner, as applicable."

itself concedes, the manufacturer is not a "sole source" since, in the case where the manufacturer no longer exists, modifications can be carried out "under the direction of an engineer with expertise in MEWPs." Thus, the standard could be adjusted to allow for experienced alternatives to perform modifications to the MEWP even if the manufacturer is still in existence.

Finally, Tutus raises a number of other alleged process flaws, which taken together, Tutus claims renders the A92 suite of standards unsuitable for national use and ones that should not retain their status as ANS. The BSR does not agree with Tutus' arguments on the other points raised, and finds that: 1) the argument concerning the alleged imbalance of the subcommittees is without merit as the ANSI Executive Standards Council (ExSC) has confirmed in a published interpretation that subcommittees are not bound by the same due process-based requirements as are consensus bodies, unless a developer's procedures explicitly state to the contrary; 2) ANSI's requirements for procedural appeals at the standards developer level do not require some of the characteristics the Appellant desires, for example, in-person hearings or recordings; 3) the A92 standards are not in conflict with one another, as ANSI defines the term, and ANSI's definition of conflict and assessment of the same, does not reach OSHA rulings or requirements – as is also the case for coordination requirements; 4) comments received with a negative vote submitted in response to a recirculation opportunity are not required to be resolved in the current (final) phase of the voting process, rather, the ExSC has stated that such comments may be held for the next revision cycle as only one recirculation opportunity is required – of course, the decision to hold such comments for the next revision cycle is subject to a procedural appeal at the developer level, as was the case here.

III. Conclusion

For the reasons stated above, the BSR grants in part each of the two appeals. Specifically, the BSR grants the portions of both appeals that go to the merits of the arguments related to the Commercial Terms Policy. A requirement that the MOR be purchased solely from SAIA and used with every piece of equipment constitutes an "endorsement" of SAIA's MOR under ANSI's Commercial Terms Policy, and as such is not permissible in an ANS. In addition, the standards' text providing that "[m]odifications or additions to a MEWP shall be made only with prior written permission of the manufacturer" is, in the BSR's view, a commercial term and as such, is not permissible in an ANS. The other procedural arguments raised by Tutus are without merit.

Accordingly, the BSR directs that the A92 suite of standards be withdrawn as ANS, unless ASC A92 within 30 days of the receipt of this decision submits a plan for the BSR's approval, demonstrating how the A92 suite of standards will be revised within 6 months of the date of this decision (or as soon thereafter as is possible) to bring them into compliance with the Commercial Terms Policy.⁸

⁸ This decision is limited to the application of ANSI's Commercial Terms Policy to the particular facts of these appeals and the A92 suite of standards. It does not address or relate to issues of safety or other requirements established by manufacturers in connection with the manufacture or use of equipment or parts or the use of OEM-manuals, decals or the like.

Annex A

From: Anne Caldas

Sent: Tuesday, February 21, 2017 7:34 AM

To: DeAnna Martin <deanna@saiaonline.org>; Tony Conant <Tony.Conant@ararental.org>

Cc: Anne Caldas <acaldas@ansi.org>; James Thompson <Jthompso@ansi.org>

Subject: Request re: ANSI Commercial Terms and Conditions - SAIA

Dear Ms. Martin and Mr. Conant –

At their February 8, 2017 meeting the ANSI Executive Standards Council (ExSC) considered information provided to them by the Scaffold & Access Industry Association (SAIA) as secretary to ASC A92 *Aerial Platforms* or on which ANSI was copied, including correspondence between SAIA and the American Rental Association (ARA). The subject of these documents is ARA's objections to a requirement that a "Manual of Responsibilities (MOR)" produced and made available solely by SAIA would continue to be required for each piece of equipment covered by multiple A92 standards. (See April 3, 2015 ARA letter to SAIA and December 12, 2016 ARA letter to SAIA).

The ANSI ExSC discussed the issue and, noting that it was a matter of first impression under section 3.2 *Commercial terms and conditions* of the *ANSI Essential Requirements: Due process requirements for American National Standards* (www.ansi.org/essentialrequirements), determined that the MOR requirement is not out of compliance based on a plain reading of Section 3.2. Relevant to the ExSC's decision was that the MOR is an embedded document (not unlike normatively referenced documents), modestly priced and reasonably available through SAIA. However, given that section 3.2 doesn't directly address embedded documents like the MOR, the ExSC has formed a Task Group to further consider the meaning and application of section 3.2 in this and related contexts and whether revisions to it are warranted.

The ExSC will let both parties know if changes are made to Section 3.2 such that the opinion and findings presented here changes in the future.

Sincerely,
Anne

Anne Caldas
Secretary, ANSI Executive Standards Council (ExSC)
acaldas@ansi.org
212-642-4914

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

~~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.

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 an 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

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 an 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".)

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

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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