Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Gardewine Group Inc., 2012 OHSTC 1

Date: 2012-01-09
Case No.: 2011-65
Rendered at: Ottawa

Between:

Gardewine Group Inc., Applicant

Matter: Request for an application for a stay of a direction

Decision: The stay request is denied

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the applicant: Mr Doug Witt, Human Resource Manager

REASONS

[1] This concerns an application for a stay of a direction brought under subsection 146(2) of the *Canada Labour Code* (the Code) by Gardewine Group Inc. of a direction issued by Ms Lorretta Magnusson, Health and Safety Officer (HSO), on November 14, 2011.

[2] There was no respondent to the matter.

Background

[3] On July 5, 2011, HSO Magnusson conducted an inspection at the subject work place operated by the applicant.

[4] On July 7, 2011, the HSO received an Assurance of Voluntary Compliance (AVC) from the employer to correct a list of observed contraventions.

[5] On November 14, 2011, a follow up inspection was conducted by the HSO and she issued a direction regarding one alleged contravention stated in the AVC. The direction was issued pursuant to subsection 145(1) of the Code which reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On November 14, 2011, the undersigned health and safety officer conducted a follow up inspection in a work place operated by GARDEWINE GROUP INC., being an employer subject to the *Canada Labour Code*, Part II, at 60 Eagle Drive, Winnipeg, Manitoba, R2R 1V5, the said work place being sometimes known as Gardewine Group - Winnipeg.
>
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> No./No : 1
>
> 125.(1)(p) – Canada Labour Code Part II
> 14.37(2) – Canada Occupational Health & Safety Regulations
>
> The employer has not ensured that the trailers being loaded or unloaded by forklifts are being immobilized and secured against accidental movement by means additional to the vehicle's braking system.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 28, 2011.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, to take steps no later than November 28, 2011, to ensure that the contravention does not continue to reoccur.

Issued at Winnipeg Manitoba, this 14th day of November, 2011.

[HSO Magnusson signed here]

Lorretta Magnusson
Health and Safety Officer
Certificate Number: ON9048

To: GARDEWINE GROUP INC.
60 Eagle Drive
Winnipeg, Manitoba
R2R 1V5

[6] On December 20, 2011, a teleconference was held with Mr Witt, representing the applicant, and HSO Magnusson. Mr Witt presented oral submissions on the matter.

[7] On December 21, 2011, I informed the applicant in writing that the application for the stay of HSO Magnusson's direction was denied. The following outlines the reasons for denying the stay.

Analysis

[8] The Code under subsection 146(2) states the following:

> 146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[9] My authority is derived from the Code. Therefore, I must exercise my discretion in a way that furthers the objective of the legislation which is to protect the health and safety of employees pursuant to section 122.1 that reads as follows:

> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[10] In the exercise of my discretion, I have applied the following criteria:

1) The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.

2) The applicant must demonstrate that he would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

1) Is the question to be tried serious as opposed to frivolous or vexatious?

[11] The applicant provided some background information relating to their operations. There are in excess of 600 trailers moved within the Winnipeg terminal yard every day using yard tractors. On any given day 520 of those are moved in and out of terminal dock doors. On a yearly basis, there are 135,000 moves a year costing in excess of $150,000 in labour costs.

[12] The applicant argued that the issue described in the direction was important and serious because it has an impact on their operations and therefore it was not a frivolous application.

[13] The threshold for this criterion is low; I agree with the applicant that it has been met in the circumstances.

2) Will the applicant suffer significant harm if the direction is not stayed?

[14] Regarding this criterion, the applicant stated that although cost would be a factor it was not the most paramount and this aspect was not elaborated upon further.

[15] Furthermore, the applicant's position is that the safety systems on the vehicles and the safety processes that are presently in place are adequate to prevent the equipment from moving.

[16] The only other factors presented to me pertaining to the significant harm the applicant would suffer were as follows:

> i) there have not been any accidents or injuries causing loss time;
> ii) the present vehicle's braking system is adequate; and
> iii) safety systems and processes are in place to address the situation.

[17] The nature of the harm described above by the applicant is not sufficient to prove that it is significant. The applicant has demonstrated clearly that it is opposed to complying with what is stated in the Regulation that is, to incorporate something additional to the vehicle's braking system to immobilize and secure it against movement which is the essence of the direction. The HSO has obviously not accepted what measures the applicant has proposed to be compliant. However, the mere inconvenience that it may cause to comply with the direction or the fact the applicant disagrees with the Regulation or the HSO's interpretation of it does not constitute significant harm.

[18] Consequently, I am not satisfied that the applicant will suffer significant harm should I not grant a stay of the direction. Having found that the applicant has failed to meet the second criterion and given that this is a tripartite test, it is unnecessary for me to consider the third criterion.

Decision

[19] Therefore, for the aforementioned reasons the application for a stay of the direction issued by HSO Magnusson on November 14, 2011, is denied.

[20] As discussed during the teleconference held on December 20, 2011, in order to expedite a resolution to this issue a hearing will be scheduled forthwith.

Michael Wiwchar
Appeals Officer