Occupational Health
and Safety Tribunal Canada

Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Bell Mobility Inc., 2012 OHSTC 4

Date:	2012-02-03
Case No.:	2012-03
Rendered at:	Ottawa

Between:

Bell Mobility Inc., Applicant

Matter:	Application for a stay of two directions
Decision:	The stay request is granted
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the Applicant:	Mr William Hlibchuk, Counsel, Norton Rose OR LLP

Canada

REASONS

[1] On January 12, 2012, Bell Mobility Inc. (Mobility), the employer, presented an appeal, accompanied with an application for a stay, of two directions issued by health and safety officers from Human Resources and Skills Development Canada, Labour Program.

[2] The first direction, outlining a contravention of paragraph 125(1)(z.04) of the *Canada Labour Code* (the Code), was received by Mobility on October 28, 2011. The second direction, outlining a contravention of paragraph 125(1)(x) of the Code, was received by Mobility on January 4, 2012.

[3] The application for stay of these two directions is made pursuant to subsection 146(2) of the Code that reads as follows:

> 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.

Background

September 29, 2011, Rooftop Direction

[4] By way of background, it is important to note that before the appeal of the present two directions was filed, Mobility had appealed a previous direction which relates to the present matter.

[5] That direction, issued on September 29, 2011, by Health Safety Officer (HSO) Marjorie Roelofsen (hereinafter direction #1), was addressed to Mobility pursuant to subsection 145(1) of the Code. Direction #1 concluded that Mobility had failed to provide a fall protection system (FPS) to an employee working on a rooftop, thus contravening paragraph 12.10(1)(a) of the Canada Occupational Health and Safety Regulations (COHSR). That particular requirement deals with the provision of a FPS where the employee works from an unguarded structure above a certain height.

[6] In the case of Mobility, its employees are sometimes required to attend these rooftops to work on its communications equipment.

[7] On November 1, 2011, a stay of direction #1was granted by Appeals Officer Douglas Malanka. In granting the stay, the Appeals Officer noted various factors raised by Mobility, in support of a finding that it would suffer significant harm if the direction was not stayed, namely that:

- Only a handful of Mobility's technicians are trained in the use of FPS;
- in the event of a widespread service disruption, a swift response is required to ensure services to customers which include health and law enforcement officials;
- a failure to restore services would likely cause prejudice to the public in general; and,

- where Mobility could not get permission to install anchors for FPS on certain buildings, they would have to move elsewhere which could further delay matters.

[8] The Appeals Officer also considered whether, if a stay were granted, and pending a determination of the appeal, Mobility had in place measures to protect health and safety. On this point, he noted that Mobility had in place temporary measures that excluded Mobility employees from a 4 meter zone extending from the rooftop edge. He further noted that Mobility was in the process of developing a "Rooftop Accident Prevention Program" (APP) geared to providing written policy on working safely at distances from the rooftop edge. The APP would notably require a raised physical line to visually identify a 2 meter zone where Mobility employees could not enter, and within this 2 meter zone only qualified riggers equipped with FPS could work.

The present appeal and request for stays

[9] On October 28, 2011, HSO Roelofsen issued a subsequent direction to Mobility (direction #2). It referred to paragraph 125.(1)(z.04) of the Code, which in its essence requires an employer to develop, implement and monitor a prescribed program for the prevention of hazards. The direction then identified the specific prescribed steps set out in sections 19.4 and 19.5 of the COHSR which pertain to hazard assessment, and concludes that the employer has failed on demand to provide a job safety analysis and written safe work procedures for its employees who are required to work on an unguarded rooftop.

[10] It is important to note that Mobility provided information to HSO Roelofsen in response to direction #2. Mobility then followed up with HSO Roelofsen to confirm that the information provided was complete. HSO Roelofsen, at that time, was unable to attend to Mobility's submissions given other urgent matters.

[11] On January 4, 2012, HSO Paul Danton issued another direction to Mobility (direction #3) pursuant to subsection 125(1)(x) of the Code, which requires an employer to comply with every oral or written direction given by a health and safety officer. HSO Danton concluded that the employer had failed to provide the directed written safe work procedures as prescribed and as set out in direction #2. Mobility was directed to terminate the contravention immediately.

[12] It is Mobility's understanding that direction #3 was issued in order to allow it to appeal the matter raised in direction #2, given that there had been a delay in responding to the employer's queries regarding the sufficiency of its response to direction #2.

[13] On January 24, 2012, in a separate decision, I granted Mobility's request for an extension of the time for instituting an appeal of direction #2. As noted above, Mobility is now applying for a stay of directions #2 and #3.

Analysis

[14] The authority for an appeals officer to grant a stay is derived from the above aforementioned subsection 146(2). The three part test adopted by the Tribunal in regards to a stay application requires that:

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 significant harm would be suffered if the direction is not stayed.
3) The applicant must demonstrate that measures will be put in place to protect the health and safety of employees or any person granted access to the workplace should the stay be granted.

[15] As well, 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.

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

[16] The applicant referred to the submissions provided on the application for a stay of direction #1 before Mr Malanka. It noted the similarity of facts and legal issues between that direction and directions #2 and #3 for which stays are now being sought. In his original submissions, the applicant argued that direction #1 raised the issue of whether or not Mobility's rooftop work constituted a health and safety hazard and whether the means by which the work is conducted are in conformity with the Code and in particular paragraph 12.10(1)(a) of the COHSR. It urged that this question has serious health and safety implications and, as such, is neither frivolous nor vexatious. I note that the second and third directions also pertain to the sufficiency, as prescribed, of Mobility's written safe work procedures surrounding rooftop work.

[17] Taking all of this into consideration, I am satisfied that there is a serious question to be tried.

2) Would the Applicant suffer significant harm if the direction is not stayed?

[18] The applicant urged that it will suffer significant harm if a stay of the directions is not granted. In support of this, it reiterated that Mobility's inability to work on applicable rooftops would effectively paralyse its activities as only a handful of Mobility's technicians are trained in the use of FPS. If a widespread service disruption occured, a swift response would be required to ensure Mobility services used by residential, commercial, institutional and public service customers such as health and law

enforcement officials. A failure to restore services would likely cause prejudice to the public in general.

[19] The applicant pointed out that where Mobility could not get permission to install anchors for FPS devices, it would be forced to relocate its equipment, a process that would take several months without any guarantee of success.

[20] Finally, Mobility raised an inherent contradiction, in its view, which places it in a precarious position. On the one hand, Mobility claimed, the decision to stay direction #1 amounted to a validation of the interim safety measures put in place by Mobility. On the other hand, directions #2 and #3 now take issue with the operating procedures used by Mobility to carry out those very measures. Noting the requirement for consistency, the applicant argued that a stay of those latter two directions are required until the actual subject-matter underlying all three appeals can be heard.

[21] Having considered the submissions made by the applicant, I note the challenging position Mobility finds itself in at this point. On the one hand, a stay of the direction taking issue with its rooftop practices is in effect until the subject-matter of that direction can be addressed on appeal. On the other hand, Mobility is now confronted with two directions which, in effect, find those interim measures to fall short of Code requirements. Further, Mobility must, pursuant to direction #3, address the alleged deficiencies immediately, notwithstanding the stay order. I agree that these circumstances may be seen to have generated substantial uncertainty with respect to the status of Mobility's interim measures pending appeal.

[22] Accordingly, I am persuaded that Mobility would suffer significant harm if the direction is not stayed.

3) What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?

[23] In order to respond to this third part of the test, the applicant relied on the submissions made last October 21, 2011, for the stay application of direction #1. In those submissions, it noted the Mobility Rooftop Safety Directive (RSD) issued on October 14, 2011. The RSD directed all its technicians to refrain from performing any work within 4 metres of the roof edge. The applicant had stated in those submissions that the employer was developing a Rooftop Accident Prevention Program (APP) for its own technicians that would provide written policy on working safely at distances from the rooftop edge.

[24] The applicant has now provided a copy of the employer's written "Flat Rooftop Safety Awareness - Accident Prevention Process", and its "Flat Rooftop Safety Awareness Training Program", which as I understand it has been issued to all employees as of November 18, 2011. This process would allow for Mobility employees to work from 2 to 4 meters from the rooftop edge, but it also requires the installation of a raised warning line to mark the 2 meter distance. All work conducted within 2 metres of the edge will continue to be exclusively conducted by "Riggers" who are equipped and trained with/on fall protection systems.

[25] Based on the applicant's submissions, I am satisfied that should I grant stays of directions #2 and #3, the measures put in place by Mobility are sufficient to protect the health and safety of its employees.

Decision

[26] I therefore order a stay of the direction issued on October 28, 2011, by HSO Roelofsen in regards to a contravention of paragraph 125.(1)(z.04) of the Code. I also order a stay of the direction issued on January 4, 2012, by HSO Danton in regards to a contravention of paragraph 125(1)(x) of the Code. These stays are ordered until the appeal is heard on its merits and a decision is rendered by an appeals officer.

Michael Wiwchar
Appeals Officer