Occupational Health and Safety Tribunal Canada

Citation: Fisheries and Oceans Canada - Canadian Coast Guard
2012 OHSTC 13

Date: 2012-04-19
Case No.: 2011-18
Rendered at: Ottawa

Between:

Fisheries and Oceans Canada - Canadian Coast Guard, Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is confirmed
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the Appellant:	Mr Brian LeBlanc, Regional Director, Fleet

REASONS

[1] This concerns an appeal brought under subsection 146(1)of the *Canada Labour Code* (the Code) of a direction issued by Mr Anwar Khurshid, Health and Safety Officer (the HSO), on February 28, 2011.

Background

[2] On February 25, 2011, HSO Khurshid conducted a marine occupational health and safety inspection aboard the vessel CCGF Griffon operated by the appellant while it was docked in Sarnia, Ontario.

[3] In the course of the inspection into the forward cargo hold of the vessel, the HSO noticed a newly installed platform running along both sides of the hold in the fore and aft direction. This platform, called a "catwalk" by the appellant, was noted by the HSO to be approximately 30 ft (9.1 m) long, 14 ft (4.3 m) high and 1.5 ft (.46 m) wide on each side of the hold. The platform was provided with a fall arrest system. This system was in the form of 4 fall arrestors that employees were expected to be hooked up to while wearing a safety harness. However, the platform was without a guardrail.

[4] During the inspection, the HSO indicated that the platform needed a guardrail pursuant to section 16 of the *Maritime Occupational Health and Safety Regulations* (the Regulations) and, in his opinion; this type of fall protection system was not practical and thus would not be used by employees. In response, the appellant asserted that the platform's fall protection system was sufficient to bring the platform into compliance with the Regulations. This was not satisfactory to the HSO who then decided to receive an Assurance of Voluntary Compliance (AVC), which is an administrative compliance practice that is not stated in the Code, in hopes that the appellant would agree to comply voluntarily and therefore make a commitment to attach a guardrail to the platform that would satisfy the requirements of section 16.

[5] The appellant waived the opportunity to voluntarily fit the platform with a guardrail. Consequently, the HSO issued a direction pursuant to subsection 145(1) of the Code dated February 28, 2011. The direction was to have a guardrail installed to the platform of the vessel in order to terminate the appellant's contravention of paragraph 125(1)(b) of the Code and subsection 16(1) of the Regulations. The direction issued stated the following:

> […] Being an employer subject to the Canada Labour Code, Part II [I] noticed that the newly constructed platform in the forward cargo hold did not have guard rails. The Safety Officer is [therefore] of the opinion that the following provisions of the Canada Labour Code Part II and the Maritime Occupational Health and Safety Regulations are being contravened: Canada Labour Code Part II, Subsection 125. (1)(b); Maritime Occupational Health and Safety Regulations, Section 16(1). […]

[6] The cited provisions of the Code are as follows:

> *CANADA LABOUR CODE*
>
> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, […]
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> (*b*) install guards, guard-rails, barricades and fences in accordance with prescribed standards;

MARITIME OCCUPATIONAL HEALTH AND SAFETY REGULATIONS

> 16(1) A raised structure or a deck opening that has a coaming height of less than 900 mm, from which there is a drop of more than 1.2 m, and to which an employee has access, must have a guardrail.

[7] As of April 12, 2011, the appellant has installed a chain railing system to the platform. The fitting and testing of this railing system is noted to have taken place between March 21, 2011, and April 12, 2011.

[8] On September 7, 2011, I requested written submissions and they were provided by the appellant on September 29, 2011.

Issue

[9] I must determine whether the HSO was founded in his decision to issue the appellant with a direction on the basis of a contravention of paragraph 125(1)(b) of the Code and subsection 16(1) of the Regulations.

Appellant's submissions

[10] Despite taking action to fit the platform with a guardrail, the appellant maintains that the direction was not justified due to an apparent conflict in the provisions of the Regulations. This conflict is argued by the appellant to exist between subsection 16(1) concerning "Guardrails and Toe Boards" and article 144(1)(a)(i) regarding "Fall-protection Systems". The latter provision reads as follows.

> 144(1) The employer must provide a fall-protection system to every person, other than an employee who is installing or removing a fall-protection system, who is granted access to
>
> (*a*) an unguarded work area that is
>
> (i) more than 2.4 m above the nearest permanent safe level,

[11] The appellant seeks from the Appeals Officer clarity on the relationship between the noted provisions because of an apparent conflict that it believes exists between section 16 and article 144(1)(a)(i) of the Regulations.

[12] It is submitted by the appellant that there is a conflict between these two provisions because under section 144, the Regulations permit there to be an "unguarded work area", while on the other hand, section 16 mandates that these "raised structures" be fitted with guardrails.

[13] The appellant further challenged the issued direction by asserting that the strict application of section 16, as presently applied by the HSO, suggests that no raised structures could exist that were not fitted with guardrails. The appellant contended that this is not presently the case, and maintained that where necessary, the unprotected work areas (the constructed platforms) have been fitted with a fall-protection system pursuant to section 144 of the Regulations.

[14] The appellant submitted that the HSO was not justified in issuing his direction because of this apparent conflict between the two provisions of the Regulations.

Analysis

[15] Subsection 146.1(1) of the Code outlines the role of an appeals officer in the following way:

> 146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
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> (*a*) vary, rescind or confirm the decision or direction; and
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> (*b*) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1). [My emphasis]

[16] In this appeal, then, my role is restricted to deciding whether to vary, rescind or confirm the direction that was issued by HSO Khurshid, dated February 28, 2011. I have ultimately decided to confirm the HSO's direction requiring a guardrail to be fastened onto the platforms pursuant to subsection 16(1) of the Regulations for the following reasons.

[17] I am mindful of the appellant's concerns about the apparent conflict between subsection 16(1) (concerning guardrails) and article 144(1)(a)(i) (which concerns fall-protection systems) of the Regulations. As such, I will try to provide some clarification on the relationship between these provisions, specifically as they relate to the present appeal.

[18] While a casual reading of the provisions in question offers clear indication as to why the appellant finds there to be a conflict between the two cited provisions, in my opinion, such a conflict does not actually exist.

[19] For easy reference, I have reproduced the specific sections challenged by the appellant:

> *MARITIME OCCUPATIONAL HEALTH AND SAFETY REGULATIONS*
>
> 16(1) A raised structure or a deck opening that has a coaming height of less than 900 mm, from which there is a drop of more than 1.2 m, and to which an employee has access, must have a guardrail.
>
> And
>
> 144(1) The employer must provide a fall-protection system to every person, other than an employee who is installing or removing a fall-protection system, who is granted access to
>
> (*a*) an unguarded work area that is
>
> i) more than 2.4 m above the nearest permanent safe level, […]

[20] The appellant validly posed the question of how there can be an "unguarded work area" according to paragraph 144(1)(a), when at the same time subsection 16(1) requires these work areas to be guarded, specifically by a guardrail?

[21] I certainly see that there is a basis for wondering how these two provisions can exist simultaneously within the same Regulations without them being in conflict. However, a more complete reading of the provisions demonstrates that they are intended to capture two different domains within the workplace.

[22] While the scope of application of paragraph 144(1)(a) is limited to a "work area", subsection 16(1) is exclusively applicable to "a raised structure or a deck opening".

[23] What constitutes a “raised structure” or “deck opening” within subsection 16(1) can be understood when considered within the plain and ordinary meaning of these words. Subsection 16(1) is specific enough to provide meaningful guidance as to what parts of a work place are targeted for regulation, namely raised structures and deck openings. On the other hand, neither the Code nor the Regulations provide definitive or obvious guidance as to what constitutes a “work area” within the meaning of paragraph 144(1)(a). This absence I believe partially explains the appellant’s confusion.

[24] That being said, there is a table that is included in subsection 155(2) of the Regulations which provides some very strong indication as to what the legislators intended when they used the term, “work area”. In this table, the following work spaces are identified as “work areas”: “Office”, “Dry Provision Storage Area”, “Workshop”, “Service Space — at the head of every stairway, ladder and hatchway”, “Galleys”, “Crew Accommodation”, “Sanitary Facilities”, “Dining Area and Recreational Facilities”, “Boiler Rooms”, “Engine Rooms”, and “Generator Rooms”.

[25] There is nothing in the Regulations to indicate that subsection 155(2)’s table is an exhaustive list of what is to be considered a “work area” within the work place. Also absent from the Regulations is an indication that this table is intended to be used to interpret paragraph 144(1)(a) of the Regulations or any other provision therein aside from subsection 155(2).

[26] However, taking the Regulations as a whole and using a broad and liberal interpretation of these Regulations, I am of the opinion that the cited table provides an appropriate guide for understanding the meaning of “work area” within paragraph 144(1)(a).

[27] Thus, while the appellant’s frustration is well understood, I have outlined the above understanding of “raised structure or deck opening” in subsection 16(1), versus that of “work area” in paragraph 144(1)(a) to more clearly illustrate that these provisions are meant to apply to two different kinds of spaces in the work place.

[28] It must be noted that none of the above is to say that a raised structure or deck opening could not possibly serve as a “Service Space” or “Dry Provision Storage Area”, for example (which may be the case of the constructed platforms in the present appeal). This, however, still does not mean that there is a conflict between subsection 16(1) and paragraph 144(1)(a) of the Regulations.

[29] Even where there is overlap and a raised structure or deck opening to which an employee has access also serves as a work area, if that raised structure features a drop of more than 1.2 m, that structure will necessarily be captured by subsection 16(1) and will need to be provided with a guardrail, and thereby become a raised structure that is “guarded”. Therefore, because paragraph 144(1)(a) only concerns “unguarded” work areas, paragraph 144(1)(a) would not apply to this hypothetical raised structure or deck opening that doubles as a work area.

[30] In sum, if a raised structure or deck opening to which an employee has access also serves as a work area, and this raised structure or deck opening allows for a fall of more than 1.2 m, it is automatically covered by subsection 16(1) and thereby required to have a guardrail, ultimately making paragraph 144(1)(a) inapplicable because of its restricted application to unguarded work areas.

[31] While it is understandable that the appellant perceived there to be a conflict between the cited provisions, the above reasons demonstrate why no such conflict exists.

[32] By including a fall-protection system to accompany the construction of the mounted platform, the appellant demonstrated a clear interest and proactive approach to maintaining the safety and security of its employees. It is definitely noteworthy that the appellant's inclusion of a fall-protection system is the kind of measure that indicates to employees that their employer truly makes their health and safety a high priority.

[33] Nevertheless, this fall protection system does not bring the platform in compliance with the Regulations. In particular, the fall-protection system does not negate the fact that the platform is still in need of a guardrail, pursuant to subsection 16(1).

[34] The appellant does not dispute that the platform falls within the meaning of raised structure or deck opening. Nor is there any dispute of the fact that employees had access to this platform. Additionally, the appellant does not contest the HSO's report that attests that the platform is approximately 14 ft or 4.3 m above the ground, thereby offering a drop of the same height.

[35] Subsection 16(1) requires that raised structures like this platform, for example, have a guardrail if the raised structure allows a drop of more than 1.2 m. Therefore, in light of the just mentioned undisputed condition and character of the platform, subsection 16(1) applies. This of course, means that the platform must have a guardrail installed to it.

[36] At the time the direction was issued by the HSO, the platform did not have a guardrail as required by the Regulations. The appellant was thus in contravention of subsection 16(1) at the time of the direction.

Decision

[37] For all the reasons outlined above, I hereby confirm the direction issued and dated February 28, 2011, by HSO Khurshid.

Michael Wiwchar
Appeals Officer