Occupational Health and Safety Tribunal Canada

Date: 2016-05-25
Case No.: 2016-10

Between:

Richardson Pioneer Limited, Applicant

Indexed as: *Richardson Pioneer Limited*

Matter:	Application for a stay of a direction issued by an Official delegated by the Minister of Labour.
Decision:	The application is granted and a stay of the direction ordered.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the applicant:	Mr. Sven T. Hombach, Fillmore Riley LLP
Citation:	2016 OHSTC 8

REASONS

[1] On March 29, 2016, Richardson Pioneer Limited filed an appeal against a direction that had been issued to the latter on March 15, 2016, by an Official delegated by the Minister of Labour, Ms. Courtney Wolfe (hereinafter the Ministerial delegate), at the conclusion of the latter's inspection of the work place operated by Richardson Pioneer Limited in Weyburn, Saskatchewan, said work place being referred to sometimes as Richardson Pioneer-Weyburn. That direction had been issued pursuant to subsection 145(1) of the *Canada Labour Code* (Code) relative to contraventions to paragraphs 125(1)(*a*) and 125(1)(*b*) and respectively subsections 2.10(2) and 2.9(2) of the *Canada Occupational Health and Safety Regulations* (Regulations) that link the design, construction and installation of fixed ladders generally and fixed ladders installed in a grain handling facility specifically (Weyburn) to ANSI Standard A14.3-1984 entitled American National Standard for Ladders-Fixed-Safety Requirements, as amended from time to time. Regarding both contraventions noted by the Ministerial delegate in the direction, the violation was specifically described as follows: "there were no protective devices installed at the openings of the rest platforms on the fixed ladders of the Weyburn elevator facility." The direction also set March 29, 2016, as the date of compliance.

[2] The wording of subsection 146(2) of the Code is very clear. The mere filing of an appeal against a direction does not, in and of itself, operate to stay the application and execution of the direction being appealed and thus, the obligation to comply with said direction as formulated. That same provision however clearly specifies that an appeals officer has the authority to order a stay upon application by an employer, employee or trade union. Consideration of a stay application is also conditional upon the employer, employee or trade union having standing to apply for such a stay by being one concerned by the direction. One must also add that unless an appeal has been filed against a direction, no appeals officer may be seized of an application to stay a direction issued by a Ministerial delegate.

[3] Upon filing its appeal, Richardson Pioneer Limited also applied to have the application of the direction stayed pending determination of its appeal on the merits by an appeals officer. Written submissions and supporting evidence in this regard by the applicant were received by the undersigned on April 18, 2016. Oral submissions on behalf of the applicant were also received at a teleconference hearing held on April 19, 2016, and attended by the Ministerial delegate who recognized at that time that the "protective devices" mentioned in the direction were what is referred to as "swing gates". Therefore, it is understood that the direction relates specifically to a requirement to install swing gates at the Weyburn work place. No party sought to act as respondent in the matter and thus no opposing submissions were received.

[4] On April 19, 2016, taking into consideration the submissions and evidence provided on behalf of the applicant, I granted the application for a stay of the

direction until a decision on the merits of the appeal is rendered. Following are the reasons in support of my decision.

[5] An application for a stay is decided by an appeals officer upon consideration of a three-part test or criteria derived from the pronouncements of the Supreme Court of Canada in Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832, (1987) 1 S.C.R. 110, and adapted to the specificity of the matters governed by the Code. It consists of the following:

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

-The applicant must demonstrate that he, she or it would suffer significant harm if the direction is not stayed by an appeals officer.

-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.

[6] I will add that this three-part test must be met in its entirety by the party making the application and that the assessment as to whether the applicant has satisfied the test needs to take into account the circumstances of the case that prevailed at the time of the issuance of the direction by the Ministerial delegate, the circumstances present at the time of the hearing of the application for a stay as well as the nature and extent of the stay sought.

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

[7] Paragraphs 125(1)(*a*) and (*b*) of the Code make it mandatory for an employer to "ensure that all permanent and temporary buildings and structures meet the prescribed standards" and to "install guards, guard-rails, barricades and fences in accordance with prescribed standards". As previously stated, the prescribed Regulations that the Ministerial delegate attached to the contraventions seen as warranting the direction concern the design, construction and installation of fixed ladders, generally in the case of subsection 2.9(1) of the Regulations, and more specifically relative to grain-handling facilities in the case of subsection 2.10(1) of the same Regulations, in both cases making it an obligation that the design, construction and installation be in accordance with ANSI Standard A14.3-1984, as amended from time to time. In both cases, that obligation is somewhat tempered by subsections (2) of both 2.9 and 2.10 by the insertion of a time frame regarding the installation of said fixed ladders to wit, that where the said installation has occurred "before the coming into force" of said provision, the obligation is reduced to one of "reasonably practicable". In this regard, section 2.9 of the Regulations, which also governs the interpretation and application of section 2.10 of the same Regulations, was added through section 2 of SOR/2000-374 to the Regulations, effective September 28, 2000.

[8] It is with this legislative background that the applicant has argued under the first element of the test that this appeal presents two serious questions to be tried. Initially, the applicant formulated the first question as to whether the Weyburn facility was grandfathered since its design and construction, presented as being in the late 1990s, would predate the applicable regulatory requirement, and thus at that time, no federal technical standard would have existed with respect to the construction of emergency ladders which, according to the applicant, is the type of ladders concerned by the direction as being an exterior fixed ladder part of a secondary exit from floor(s) or roof of a grain handling facility that has a man-lift or ladder providing access to a floor or roof over a grain bin or silo as a primary exit, the end result being that ANSI Standard 14.3-1984 and its most recent amendment in 1992 at the time of the 2000 regulatory amendment would find no application. However, contrarily to what had been originally submitted, I was informed as soon as this information became known to the applicant on April 19, 2016, that the actual design and construction of the Weyburn facility in fact occurred after the coming into force of the 2000 regulatory amendments. Specifically, the applicant informed the undersigned that the drawings for the facility were created in October 2001, the slip was poured in April 2002, at which time the ladders were installed, and the facility was commissioned in October 2002. Considering this, the applicant recognized that since the construction of the facility would have postdated the adoption of ANSI Standard 14.3-1984 through the 2000 regulatory amendment (subsection 2.9 of the Regulations) incorporation by reference, the ladders concerned by the direction would thus be governed by the said Standard.

[9] Notwithstanding the applicant's concession as regards the application of ANSI Standard 14.3, it is the latter's contention that the appeal raises another serious question in that it is claimed that under the regulatory regime governing the facility, there is no requirement for "swing gates". Noting in this regard that the specific requirement for such "swing gates" arose only in ANSI Standard A14.3-2002 carried forward in its most recent 2008 version and where the cross-reference to ANSI Standard 12.1 (guard railings with toe boards) was replaced by section 6.3.3 requiring the installation at ladder openings on elevated platforms of ladder access protective swing gates on new fixed ladder installations, the applicant argued that even if the Regulations should be interpreted as specifying the 2008 version of ANSI Standard 14-3, as opposed to the 1984 version, Richardson would need to be seen in compliance since pre-2008 installations would be exempt from the "swing gate" requirement. From a safety perspective, the applicant has also argued that there is a genuine concern that if "swing gates" were added to the coverage of the impugned sections of the Regulations, safety could be hindered with a risk of individuals becoming trapped behind such gates, and thus the appeal should be heard before any changes are made to the platforms.

[10] Finally, on this first element of the test, the applicant questions the existence under the current regulations of an actual requirement to install "swing gates".

Pointing to differing figures in the text of the applicable 2008 ANSI Standard A14-3, the applicant has submitted that even if the ladders were newly installed, there would be no requirement for "swing gates" since the impugned ladders at the Weyburn facility are offset ladders and although section 6.3.3 of the Standard requires such "swing gates", this requirement clearly refers to straight ladders (Figure 5) and not to offset ladders shown in Figure 6 with no "swing gate", thus suggesting that the standard does not envision such "swing gates" for offset ladder platforms.

[11] This question is complex as it deals with the application and interpretation of standards incorporated by reference in sections 2.9 and 2.10 of the Regulations. Obviously, the scope of the obligations set out in those provisions is a question that is neither frivolous nor vexatious.

[12] On the basis of what precedes as well as the complete submissions by the applicant, I have come to the conclusion that there is a serious question to be tried in this case. Consequently, the applicant has satisfied the first element of the test.

Would the applicant suffer significant harm if the direction is not stayed?

[13] The applicant has submitted that it would suffer significant harm for two reasons. First, the applicant has maintained that the installation of swing gate(s) would decrease rather than increase safety because of the configuration of the ladder offset platforms which are not designed to accommodate "swing gates". It is the applicant's view, actually supported by engineering documentation, some emanating from the company that designed the facility, that if "swing gates" were to be installed on such platforms, there would be insufficient room for people to open the gates, causing a risk of becoming trapped behind the gate in an emergency situation. As for the second reason to find significant harm. The applicant notes that complying with the direction involves the requirement to make structural changes to the ladders at the Weyburn facility and that should this happen prior to the appeal being heard, this would cause said appeal to become moot as the changes cannot be feasibly reversed. From a monetary perspective, money would have been spent and a reversal of the installation, should the appeal be granted, would require the expenditure of even more funds. The opinion expressed by the applicant is that the undersigned should consider the impact of a potential mootness finding, particularly since the existing offset ladders have been in place for more than 15 years without incident, are used essentially only for emergency since there are internal ladders and a man-lift at the facility, and there appears to be no urgency.

[14] In view of the argument that the rest platforms might not safely accommodate swing gates and that such devices might actually hinder, rather than assist, the safety of the employees, I find that their installation pending the outcome of the appeal would cause the applicant to suffer great inconvenience. The prospect of the applicant incurring considerable costs to install additional swing gates at the facility on the basis of a finding that it is contesting, only to perhaps have to remove

them for safety reasons if its appeal of the direction is successful, also deserves significant consideration in the specific circumstances of this case.

[15] In sum, upon consideration of the submissions made by the applicant as well as supporting documentation provided in the formulation of those submissions, I have come to the conclusion that significant harm would be suffered by the applicant, should the stay application be denied. The applicant has thus satisfied the second element of the test.

Has the applicant demonstrated that measures will be put in place to protect the health and safety of employees or any person granted access to the work place should the stay be granted?

[16] The applicant initially dealt with this third element of the test from the standpoint of there being no need for additional measures since adequate protection was already in place. In Richardson's view, risk would be increased rather than decreased if swing gates had to be installed. It was the applicant's position that the impugned ladders have been in place for over 15 years without incident and that they do not relate to the day-to-day operations but are emergency escape ladders only and that adequate protection would continue to exist until the appeal could be heard. It was pointed out to the applicant by the undersigned that while this may have been the applicant's opinion, the fact that a direction had been issued evidenced that a contrary opinion existed, one arrived at by a compliance official under the Code, and that this constituted the crux of the issue at appeal. Consequently, to claim that no measure(s), temporary by nature, needed to be put in place pending determination of the issue at appeal would essentially defeat the purpose of this third element of the test and could result in the stay being denied, regardless of the fact that in another decision by an appeals officer (*Bell Canada*, 2011 OHSTC 1), the status quo may have been found adequate in the circumstances of that case. The applicant responded by pointing out the sole emergency nature of the use to be made the said ladders and indicated that it would effectively post signs at every door giving access to the said ladders through what was described as catwalks, indicating the restricted emergency use to be made of the said ladders.

[17] Indeed, the evidence indicates that, following the inspection by the Ministerial delegate, the applicant identified 16 ladders which did not have swing gates and has installed swing gates at seven locations. The remaining nine locations form part of the exterior ladder system of the facility and are described as being for use in emergency situations. As such, it is not common practice for employees to use them.

[18] Having regard to what precedes, I am of the opinion that the applicant has satisfied the third element of the test. I am reinforced in this opinion by the fact that the applicant has agreed to proceed with the hearing of the appeal on the merits within essentially weeks of my hearing this stay application and the rendering of this decision.

Decision

[19] For the reasons set out above, the application for a stay of the direction issued by the Ministerial delegate on March 15, 2016, is granted and the stay ordered.

Jean-Pierre Aubre
Appeals Officer