Occupational Health and Safety Tribunal Canada

Citation: Nutreco Canada Inc. (Meunerie Shur-Gain Yamachiche), 2012 OHSTC 27

Date: 2012-07-26
Case No.: 2011-34
Rendered at: Ottawa

Between:

Nutreco Canada Inc. (Meunerie Shur-Gain Inc. Yamachiche), Appellant

Matter:	Appeal from two directions issued by a health and safety officer pursuant to subsection 146(1) of the *Canada Labour Code*
Decision:	The directions are rescinded
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	French
For the Appellant:	Maître Jocelyn Roy, Counsel, Roy Laporte Inc.

REASONS

[1] This appeal was brought on June 7, 2011 by Nutreco Canada Inc., also known as Meunerie Shur-Gain Inc. (Nutreco), pursuant to subsection 146(1) of the *Canada Labour Code* (the Code), following a fatal accident on May 18, 2011 in the appellant's work place. The victim of said accident, Mr. Mathieu Lemaire, was employed by Law-Marot Milpro Inc., an enterprise whose services had been retained by the appellant. Mr. Lemaire was employed there as a technician and performed the duties of a team leader. This is an appeal of two directions issued to the appellant by health and safety officer (HSO) Marie-France Carrier on the same day as the accident. One direction was issued pursuant to paragraphs 145(2)(a) and (b) and the other pursuant to subsection 145(1) of the Code. The direction issued pursuant to paragraphs 145(2)(a) and (b) specified that the health and safety officer considered that the work performed at a height of more than 2.4 metres by the sub-contractor Lemaire was dangerous for any employee at work because this sub-contractor [TRANSLATION] "did not wear any fall protection system when working on a silo at a height of approximately 20 feet, causing the death of that person at his work place when he fell from the silo located in the pre-mix room." The officer concluded by ordering the employer to immediately take measures to eliminate the danger and prohibited it from [TRANSLATION] "performing work or tasks at a height of more than 2.4 metres without a fall protection system," thereby apparently establishing in this way a rational link, although not specified in the text of the direction, with paragraph 12.10(1)(a) of the *Canada Occupational Health and Safety Regulations* (Regulations).

[2] The second direction, which was issued this time pursuant to subsection 145(1), specified that HSO Carrier was of the opinion that the circumstances of the accident indicated the appellant had contravened paragraph 125(1)(w) of the Code, as the employer in this case, Nutreco, [TRANSLATION] "did not ensure that any person admitted to the work place or any sub-contractor knew and used according to regulatory provisions the prescribed safety material, equipment, apparatus and clothing, that is, a fall protection system for work at a height of 2.4 metres from the ground," and that in these circumstances the sub-contractor's fall of approximately 20 feet from the silo located in Nutreco's pre-mix room caused said sub-contractor's death. The fact must be underlined that although paragraph 125(1)(w) of the Code refers to regulatory provisions as elements of the contravention, the direction did not mention any.

[3] Because no party appeared or showed its intention to contest this appeal, it is heard without any respondent. In addition, considering these special circumstances, this appeal is processed without a hearing and strictly on the basis of the report of the HSO and on the basis of all the other documents or materials used by her or to which she referred, as requested by the Registrar of the Tribunal in an email dated June 7, 2011 and sent to said officer, as well as on the oral and written arguments submitted by the appellant. Because of these somewhat unusual circumstances and the fact that in practice, at hearings held in a more traditional manner by appeal officers, the health and safety officers usually attend and testify to explain, among other things, the conduct of their inspection and the basis of their decisions, I considered it appropriate to hear HSO Carrier. To do so, I convened a teleconference which was held on April 18, 2012. In

addition to the health and safety officer, Mr. Jocelyn Roy participated in the teleconference on behalf of the appellant. This teleconference showed that HSO Carrier's inspection was limited to the very day of the accident and that her "danger" direction pursuant to subsection 145(2) of the Code concerning a specific situation was based on a death in a federal work place, which according to the officer, showed that there was a danger. It also showed her intention to limit that danger (working at a height) for all employees, even if the victim was not wearing any fall protection system that day and was not employed by the appellant but rather by an entity under provincial jurisdiction. On the day of her inspection, HSO Carrier noted that even if verbal instructions had been given regarding the wearing of a fall protection system, the victim was not wearing his and the appellant was unable to produce a written policy regarding work performed at a height, and this according to HSO Carrier, was a contravention by the appellant of an employer's obligation within the meaning of the Code regarding any person having access to a federal work place. In addition, as far as the second direction about a contravention under the Code (paragraph 125(1)(w) was concerned, the teleconference with HSO Carrier revealed that she knew that the employees of Law-Marot Inc. had to supply their own fall protection system, but she did not see that equipment, she does not know what standards were not respected and she did not personally note on the day of the accident if that equipment was available but was left in the trucks of the sub-contractor Law-Marot Inc. In addition, when her directions were issued, HSO Carrier did not know and did not see any documents establishing that the employees of Law-Marot Inc., including the victim, had been given training regarding work from a height and wearing safety harnesses. According to HSO Carrier, on the day of the accident she noted that the victim was not wearing a fall protection system, and this according to her showed that the appellant had contravened its obligation of ensuring that this equipment was used.

[4] Nutreco's position regarding the instruction issued to it pursuant to subsection 145(1) is that it contests having contravened paragraph 125(1)(w) of the Code, considering that it ensured that the sub-contractor knew and used the prescribed safety material, equipment and clothing in compliance with the regulations. The appellant is also contesting the direction issued pursuant to paragraphs 145(2)(a) and (b) because it claims that it had already taken measures to ensure that work to be performed by the sub-contractor at a height greater than 2.4 metres would be done without danger to the sub-contractor's employees at work. It may be noted that just like the health and safety officer, the appellant did not question which regulatory provisions should apply.

[5] The appellant was described by the health and safety officer and by Nutreco's counsel as an enterprise (a mill) under federal jurisdiction because it performs activities which are mentioned at subsection 2(h) of the Code. In fact, this paragraph provides that "a work or undertaking that, although wholly situated within a province [which is Nutreco's case], is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces" is subject to Parliament's jurisdiction. This provision of the Code in question clearly does not mention any activity whose nature would subject an enterprise to federal jurisdiction. Although it is correct to qualify the appellant as a federal undertaking, to be more precise it is necessary to specify that this description of the appellant is the result of the interaction of subsection 91(29)

and of paragraph 92(10(c) of the *Constitution Act, 1867*, which provided that, by the effect of a declaration by the Parliament of Canada that works entirely situated within a province are to the general advantage of Canada or of two or more provinces, under subsection 91(29) part of such works become "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" [our emphasis]. The declaration including Nutreco and all other mills is in the federal act known under the name of the *Canadian Wheat Board Act*, R.S.C., c. C-24 and reads as follows:

> Declaration for the general advantage of Canada
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> 76. For greater certainty, but not so as to restrict the generality of any declaration in the Canada Grain Act that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada and, without limiting the generality of the foregoing, every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada.

Background

[6] It is necessary in connection with the content of the two impugned directions to specify the following, considering the intention which HSO Carrier obviously had in issuing these two directions and which was stated in the "Analysis" section of her inspection report that was forwarded to counsel for the appellant on July 26, 2011. This "Analysis" reads as follows:

> [TRANSLATION] I first of all considered it to be essential to issue a danger instruction under paragraphs 145(2)(a) and (b) to prohibit performing work or a task at a height of more than 2.4 metres without a fall protection system. In fact, the performance of such work by a person not using a fall protection system caused his death. My intention when issuing the direction was to prohibit the performance of this work by any person, that is, Shur-Gain's sub-contractors and employees. First of all, because there was no safe procedure in Shur-Gain's health and safety manual for work at a height and also because it is clear in the Canada Labour Code that an employer has obligations to his sub-contractors. Paragraph 125(1)(w) provides that "[every employer shall] ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing." In addition, paragraph 125(1)(y) provides that the employer shall "ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees."
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> I considered it necessary to issue a second direction on May 18, 2011 pursuant to subsection 145(1) of Part II of the Canada Labour Code. In fact, I had enough information to conclude that the employer did not respect his obligation to ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed

> circumstances and manner all prescribed safety materials, equipment, devices and clothing (paragraph 125(1)(w)). Shur-Gain did not ensure that Mr. Lemaire used his fall protection system. Four (4) witnesses confirm that he was not wearing his safety harness when he fell to his death in the pre-mix room. [Our emphasis]

Considering the above, the text of the direction pursuant to paragraphs 145(2)(a) and (b) only mentions that a **sub-contractor** was not wearing a safety harness and a study of the complete text of that direction does not allow concluding in any way that the direction rather included **any person**, thereby extending to the appellant's employees. In my opinion, no other interpretation would allow reaching any other conclusion. I accordingly intend to consider this direction only as it applies to a sub-contractor. As far as the second direction is concerned, which was this time issued pursuant to subsection 145(1), and which specified that the employer did not ensure "that every person granted access to the work place by the employer, including a sub-contractor, is familiar with and uses…" [our emphasis], I consider that its drafting leads to the conclusion that it only applies to a sub-contractor, because that is what is specified. In addition, while everyone is unanimous to the effect that the sub-contractor is subject to provincial jurisdiction because it is involved in construction, that under its agreement with the appellant it had to supply its own safety equipment, including the fall protection harnesses, and considering that under paragraph 125(1)(w) it is necessary to ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing, HSO Carrier did not specify in the direction or in her investigation report what regulations governed or should govern the knowledge and use of the equipment supplied by the sub-contractor, precisely considering that the sub-contractor was subject to provincial jurisdiction. She only gave her opinion about the knowledge and use or lack of use of the safety equipment in question which was supplied. I will accordingly consider this appeal only on these points.

[7] As previously mentioned, this appeal is being dealt with only on the basis of the information and written submissions made by the appellant and by the health and safety officer. The facts of this matter may accordingly be inferred from the description given by the appellant's counsel. This description is to a large extent identical to that made by the health and safety officer in her inspection report, which was forwarded to the undersigned and to the appellant. I therefore conclude as follows.

[8] The appellant Nutreco has a mill at Yamachiche, Quebec, which operates under the trade name of Shur-Gain and is of federal jurisdiction. Mr. Mathieu Lemaire, the victim of the work accident which was inspected by the health and safety officer and on which the two impugned directions are based, was employed as a technician and team leader by a separate enterprise under provincial jurisdiction (as admitted by HSO Carrier and in no way contested), that is, **Law-Marot Milpro Inc.** This enterprise of provincial jurisdiction is specialized and is considered to be an expert in the manufacture, maintenance, replacement and installation of equipment in the agrifood industry and more specifically regarding mills. Nutreco had retained the services of this company many times to perform work at the Yamachiche mill and in other mills belonging to the appellant. Part of the work had to be performed at a height. Because Law-Marot Milpro

Inc. had the expertise required and had knowledge of the site, its services were retained by the appellant in September 2010 to reconstruct silos and a dust collector, to erect new silos and to install and replace some equipment, including the dust collector where the accident happened. For the purposes of this work, it appears that Law-Marot Milpro Inc. hired a sub-contractor, an industrial mechanics company called MTE 2000 Inc., the owner of which Mr. Alex Létourneau and an employee, Mr. Hugo Turner, were on site at the time of team leader Lemaire's accident.

[9] According to the information given by counsel for the appellant, the agreements regarding the performance of the work were finalized during the summer of 2010 to start the work at the beginning of the fall of 2010. Mr. Guy Morand, the general foreman of the Yamachiche mill, had been designated as Nutreco's contact person for the various sub-contractors whose services had been retained to perform the work. The victim Lemaire and Mr. Morand were to ensure the coordination of said work and it appears that the representatives of the parties met periodically to ensure this coordination. Mr. Morand would advise Mr. Lemaire about the work to be performed without however telling him "how to do the job," as this was Mr. Lemaire's responsibility. Accordingly, in September 2010, before the beginning of the work, it appears that Mr. Morand telephoned a representative of Law-Marot, Mr. Dominic Lussier, to ensure that the work did not affect Nutreco's production and at that time he asked about the employees' qualifications to perform work at a height. It was confirmed to him at that time that all the employees assigned to the Yamachiche site had the training and the qualifications necessary to perform work at a height and this is confirmed by the documentation in the inspection report (certification by Laptech Enr. dated February 8, 2010) and by Nutreco's "Sub-contractor's hiring form" which was given to HSO Carrier, who specified not knowing "at that time if Law-Marot signed such a form." Mr. Morand apparently met the victim and the other employees of Law-Marot to specify the applicable safety rules and the personal protective equipment which had to be worn on the site, particularly the safety harnesses for working at a height. According to HSO Carrier's inspection report, Mr. Morand and the director Stéphane Lemire told her that the safety instructions had been given verbally to the sub-contractors. The sub-contractors were however responsible for supplying the personal protective equipment to their employees, which was required by Nutreco and by the type of work to be performed. It seems that it was at that point in time when the victim told Mr. Morand that he was the team leader designated by Law-Marot for the performance of the work. As previously mentioned, the work began in the fall of 2010 and, for the purposes of this decision, was still under way on May 18, 2011, on the day of the fatal accident. During this period, for purposes of coordinating the work, Mr. Morand would inform team leader Lemaire about the work to be performed during the day. He would be in charge of planning and supervising the work and the sub-contractors would consult Mr. Morand about the performance of some work which could affect Nutreco's production and about the need to obtain and use some specialized equipment: a crane, for example, to lift some equipment or parts.

[10] According to the facts stated by counsel on behalf of the appellant, during the fall of 2010 and the winter and spring of 2011, Mr. Morand had to intervene with sub-contractors' employees working on the site who were not respecting the safety rules

regarding the operation of forklifts and the use of tobacco on the mill's grounds. It seems however that during his daily on-site visits he noted each time that the victim and Law-Marot's employees were wearing their safety harness when performing work at a height. In fact, it seems that no Nutreco representative ever noted that the victim or any other employee performed work at a height without wearing a harness. This testimony is identical to the information gathered by the health and safety officer from the three "sub-contractors" who worked with the victim, to the effect that the safety instructions were given to them verbally, and not in writing, by the Nutreco representative who was coordinating the work. These instructions were to the effect that they had to "have their safety equipment (boots and hard hats), obtain their fire permits (permits for hot work for welding), not smoke in the plant but at a specified place, and have their safety harnesses." According to HSO Carrier, these three persons added that it was Nutreco's general foreman, Mr. Morand, who supervised them and came to see them periodically during the day.

[11] As mentioned previously, by referring to the HSO's report and to the description given by counsel for the appellant, the occurrence of the accident may be described as follows. After having performed emergency work all weekend with his team, for another customer, the victim Lemaire met the general foreman Morand on Monday May 16, 2011 to discuss the work to be performed during the coming week so as to avoid hindering the mill's production. At that time, a height of more than 2.4 metres was identified, where the workers were not to work because of the difficulty in accessing equipment once the pre-mix equipment was removed. Mssrs. Morand and Lemaire then agreed that in order to eliminate the dangers inherent in that place, a scissor lift would be rented to perform the work. It appears that at this meeting Mr. Lemaire advised Mr. Morand that he had taken the training to operate such a scissor lift and he showed him his qualification card certifying that he held the required qualifications. In addition to the training for work at a height, Laptech's certification dated February 8, 2010, which was previously mentioned, actually does establish Mr. Lemaire's competency regarding the operation of a scissor lift and a telescopic platform. Mr. Morand checked the same points with another sub-contractor's employee. At that meeting, it appears that the victim and Mr. Morand agreed that the latter would inquire about the availability of an appropriate scissor lift with equipment rental companies in the region and that Mr. Lemaire would notify him when such a lift would be required to perform the work safely.

[12] It seems that Mr. Morand actually did search for an appropriate scissor lift the next day, that is, on May 17, 2011, the day before the accident. On Wednesday, May 18, 2011, on the day of the accident, Mr. Morand arrived at the mill around 7:00 a.m. and he met Mr. Lemaire, who was driving a forklift. He did not at any time mention to Mr. Morand that he intended on performing work at a height that day. In fact, it appears that Mr. Morand visited the work site around 8:00 a.m. and he noted that Law-Marot's employees were performing ground work. No representative from the appellant was at the site of the accident when it happened one hour later. However, when he arrived on the site, the general foreman Morand noted that when he fell to his death, Mr. Lemaire was performing installation work at a height greater than what he and Mr. Morand had identified on the preceding Monday for which a scissor lift would be required. In

addition, Mr. Lemaire was not wearing his safety harness in spite of the fact that he could have easily attached himself to the steel beams to which he was fastening lifting equipment, as was noted by the health and safety officer, and by the officers from the provincial health and safety commission of Quebec (CSST) who arrived on site because the sub-contractor Law-Marot was subject to provincial jurisdiction. On behalf of the appellant, its counsel gave as an explanation of this contravention to safety rules the information subsequently obtained by Nutreco's representatives to the effect that the Law-Marot team led by the victim had to perform emergency work for another customer the preceding week end and sought to finish the week's work earlier, that is, on Thursday, to have a four-day week end, thereby apparently neglecting safety to finish work earlier.

[13] In her investigation report, HSO Carrier described the facts immediately connected with the accident as follows:

> [TRANSLATION] On the morning of May 18, 2011, the sub-contractors began their work day around 7:00 a.m. Their task was to remove a dust collector in the pre-mix room. Mr. Mathieu Lemaire had climbed up on top of the dust collector using a portable ladder. As he was working on top of the dust collector to install a chain block (lifting equipment required to lift the dust collector), Alexandre Corbeil, also an employee of Law-Marot Milpro Inc., was working on a platform supported by a forklift. Mr. Corbeil was also at a height of more than 2.4 metres without any fall protection system. The two other persons, Mr. Létourneau and Mr. Turner, were working at ground level. According to the four (4) witnesses of the accident, Mr. Lemaire slipped and tried to grab a beam. When he fell, his foot apparently caught in the ladder and he fell on his head and ended up on his stomach. According to the four (4) witnesses, Mr. Lemaire was not wearing his safety harness and did not have it on him. According to Alex Létourneau, the harnesses were in the truck and his was near the silo. According to the sub-contractors, they had no idea where he could have attached himself. However, according to a discussion that I had with Messrs. Tardif and Lemonde from the CSST, it was possible for him to attach himself at the top if this work had been planned.
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> When I asked the three (3) sub-contractors if Shur-Gain had already given them health and safety procedures, they told me that they had not received anything in writing. Instructions were verbal: "have their safety equipment (boots and hard hats), obtain their fire permits (permits for hot work for welding), not smoke in the plant but at a specified place and have their safety harnesses." They added that they were supervised by Mr. Morand, the general foreman for Shur-Gain. He would go and see them periodically during the day. Mr. Lemaire coordinated the work with Guy Morand. Mr. Morand would advise Mr. Lemaire of the work to be performed during the day.
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> Mr. Morand affirmed to me that he was in charge of the work, without saying "how to do the job." When I asked him what the safety procedures were for the sub-contractors, he answered that there was most certainly something by Stéphane Lemire, the mill director, but that there was no written document. [...]
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> Mr. Lemire affirmed to me that the safety instructions described above

were given to the sub-contractors verbally. [...]

Issue

[14] Taking into consideration the facts mentioned in the investigation report by the health and safety officer, as well as those invoked by the appellant in its submissions made by its counsel, and also taking into consideration the analysis in the report of HSO Carrier, as well as the comments made by the undersigned in connection with that analysis, and taking into consideration the fact, which was clearly stated by HSO Carrier, that the two directions under appeal were issued on the basis of the spirit if not the letter of paragraph 125(1)(w) of the Code, the only issue is to determine if either of the directions is well founded.

Appellant's submissions

[15] The appellant establishes as a premise for its submissions that it does not intend to contest that it was necessary to wear a fall protection system to perform the work being done by the victim at the time of the accident on May 18, 2011, as well as to perform any work at a height greater than 2.4 metres in this area of the site of the Yamachiche mill, considering that there was no protected structure at that time. The appellant did however base its submissions mainly if not exclusively on an assessment and an evaluation of the facts of the matter which basically contradicted the analysis of the facts made by HSO Carrier and which led the officer to reach the first conclusion, to the effect that because a man had died, Nutreco's health and safety manual did not contain any procedure for work at a height, and that, still according to the officer, Nutreco had obligations to its sub-contractors under paragraphs 125(1)(w) and (y) of the Code and that the direction pursuant to paragraphs 145(2)(a) and (b) was warranted to prohibit the performance of work without any protection at a height greater than 2.4 metres, and to reach the second conclusion, which warranted the issuance of a direction pursuant to subsection 145(1) for a contravention of paragraph 125(1)(w), as the appellant did not respect its obligation to ensure that the victim used his fall protection system, as four witnesses had confirmed that at the time of his fatal fall, the victim was not wearing his fall protection harness.

[16] According to the appellant, the health and safety officer obviously made an error in the appreciation of the evidence to reach these conclusions, which, according to counsel for the appellant, are not founded on the evidence which was available to the officer or supported by the evidence which may be gleaned from the written submissions and the appended documents submitted by the appellant and which rather contradict the conclusion according to which Nutreco apparently contravened its legal obligations. The appellant submitted that the evidence clearly shows that Nutreco respected its obligations under law, but that on the morning of May 18, 2011, the victim chose not to wear a fall protection system, although he had been trained to do so, had usually used the required protection equipment, had been notified to use the required equipment and had identified with a Nutreco representative the risks inherent in the work to be performed at that place.

[17] In addition, the appellant submitted that the victim's passive behaviour must not be a source of legal obligations for Nutreco. In this case, the appellant submitted that

nothing in the evidence may lead to a presumption that Nutreco encouraged this passive behaviour by the victim or the other workers or ignored it, but quite the contrary, this evidence showed that Nutreco insisted on the rules which applied to work at a height in its mill at Yamachiche. Accordingly, notices were given by Nutreco representatives, and the employees of Law-Marot and the other sub-contractors were checked. The appellant submitted that no evidence shows that it may be presumed that Nutreco was negligent in the application of the rules applicable to work at a height and that in addition, nothing could lead one to presume that on May 18, 2011, the victim would ignore the applicable provisions while having respected them in the past for other similar work. According to counsel for the appellant, these arguments are sufficient to permit the appeals officer to allow this appeal and to cancel the directions which are challenged by this appeal.

[18] The appellant did however ask the undersigned to make a ruling on an additional question regarding the constitutional jurisdiction of HSO Carrier to issue the directions challenged by this appeal. According to its attorney, considering the decisions rendered by the CSST's administrative review board regarding Nutreco to the effect that even if Nutreco was an enterprise under federal jurisdiction, the activities surrounding the fatal accident (dismantling of the dust collector) were not part of its inherent activities, but rather a construction activity, thereby justifying the CSST in issuing an order to it as the principal contractor, the appellant would be warranted in asking the undersigned to make a ruling on this issue, as according to the appellant, Nutreco could not be subject to federal and provincial jurisdiction at the same time for the same work.

Analysis

[19] This appeal involves two directions, which are distinct but which concern the same incident. The first one, issued pursuant to paragraphs 145(2)(a) and (b) of the Code, and generally called a "danger direction," identifies a series of facts which constitute a danger and orders the party which is identified in this case as the employer to take corrective measures to prevent or eliminate the danger. A first comment is required considering that corrective measures are ordered without being specified. This means that according to the HSO, there are or were corrective measures to be applied and that because the direction is addressed to the employer Nutreco, which, it is important to repeat, was not the victim's employer, in the opinion of said officer, Nutreco has or had something to correct in its reports or in its way of operating in connection with a person, who, although he was employed by another employer subject to a different jurisdiction, was not the victim's employer but had obtained access to Nutreco's establishment to perform work at a height. To be more precise, the direction only mentions the omission by a sub-contractor to use a fall protection system. The second direction we are dealing with, which was issued pursuant to subsection 145(1) of the Code, identifies among all of the facts, circumstances, acts or omissions described in the inspection report, a contravention of one or several provisions of the Code and orders the party identified as being responsible for that contravention to cease it.

[20] I will first deal with the direction issued pursuant to paragraphs 145(a) and (b). Subsection 122(1) of the Code defines, for the purposes of the legislation, the term or

concept of "danger" without associating this concept to that of employee, but rather to the more general notion of person. Accordingly, under this definition, "danger" means "any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered..." If, however, the definition of "danger" as provided in the Code could, when considered separately, lead someone to think that the legislation could apply more broadly than to an employment relationship within federal jurisdiction because of the use of the word "person," section 122.1 of this same legislation clarifies the situation by specifying that "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" [our emphasis], that is to say, to partially use the terms of section 123 of the Code, employment with an enterprise subject to federal jurisdiction. Because this provision is included in the "Purpose" part of the legislation, it seems to me that any interpretation of the Code must take into consideration this provision of a general scope. It may then be asked how the Code can apply to a situation such as in this appeal in which the victim of the accident, that is, a worker and his employer are not governed by the Code because they are subject to provincial jurisdiction, which is a fact acknowledged by the health and safety officer and is not contested, while the establishment where their services are given, and the party operating that establishment as well as its own employees, are subject to federal jurisdiction and to the application of the Code.

[21] The answer to this question is found in the fact that under the Code, the present situation is exceptional, as in a case like this one where the victim is not employed by a federal employer but rather by an employer subject to provincial jurisdiction, the federal legislator imposed obligations only on the federal employer and not on persons who are not employed by said federal employer, and even less so when those persons are not subject to federal jurisdiction. In general the Code provides for a balance between the obligations of a federal employer and those which also apply to its employees. Accordingly, in addition to section 124 which establishes the general obligation of a federal employer to ensure the protection of its employees in occupational health and safety matters, sections 125 and 125.1 mainly but not exclusively, establish a series of more specific obligations for an employer in connection with his employees. On the other hand, section 126 completes the balance previously mentioned by creating a series of obligations regarding occupational health and safety for employees subject to federal jurisdiction. Paragraphs 126(1)(c) and (d) of the Code provide that an employee at work, in this case, an employee within the meaning of the Code, as mentioned previously, shall "take all reasonable and necessary precautions to ensure the health and safety of the employee" and also to "comply with all instructions from the employer concerning the health and safety of employees." Once again, the term "employer" must be interpreted as being a federal employer. As previously mentioned however, neither Law-Marot Inc, nor the victim Lemaire were subject to federal jurisdiction and no one alleged that. On the other hand, similar shared obligations of the same type as those mentioned above also apply to an employer and an employee who are subject to provincial jurisdiction, as is shown by sections 49 and 51 of *An Act respecting occupational health and safety* of Quebec (R.S.Q. c. S-21). In addition, neither the appellant nor the health and safety

officer claim and nothing in the evidence may be seen as supporting the position to the effect that the employer Law-Marot Inc. lost its characteristics of an employer subject to provincial jurisdiction because of its contractual relationship with the appellant Nutreco or that accordingly the victim Lemaire became anything other than an employee of Law Marot Inc. and was therefore not subject to provincial jurisdiction at the time of the accident. In addition, nothing in the evidence adduced from any source whatsoever establishes that one or more of Nutreco's employees worked in any way at a height in connection with this accident. The work seems to have been performed exclusively by the sub-contractors previously mentioned in this decision and they did not perform any other work at a height, obviously excluding Nutreco's representative who ensured the planning and supervision of the work performed by the sub-contractors. The evidence does not however leave me with any doubt that the appellant at various times before the beginning of the work, as well as periodically after that, ensured that the sub-contractors and even specifically their employees assigned to the Nutreco contract had been trained for working at a height, as well as in wearing a fall protection system, that they had this equipment and that they generally used it.

[22] This brings me to take into consideration paragraph 145(2)(a) which grants a health and safety officer authority to issue a "danger direction." The preamble of this provision provides that an officer may issue such a direction to an employer if he "considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work…" [our emphasis]. There is no doubt that, in general, any work performed at a height by any person without taking the required precautions or protection measures constitutes a danger within the general meaning of the term. In my opinion, however, subsection 145(2) must be more specific to warrant the issuance of such a direction and even if a fall, an injury or even a death confirms the general danger inherent in this type of work, this does not warrant the automatic issuance of a danger direction to a specific employer because an accident occurred. In addition, in this case, is it necessary to underline the fact that the victim Lemaire, in his employment relationship with Law-Marot, was performing work for said employer under its service contract it had with the appellant and was not a Nutreco employee. I would add that neither the health and safety officer's inspection report nor her testimony at the teleconference on April 18, 2012 were to the effect that the appellant's employees were performing work at a height where the accident happened or even at any other place in delivering their services for the employer Nutreco. It accordingly seems to me that the direction issued to the appellant pursuant to subsection 145(2) was not based on the existence of a danger to a Nutreco employee at work.

[23] Now, let us deal with the direction issued pursuant to subsection 145(1) of the Code. This second direction is different from the first one in that it deals with an employer's obligation not only regarding an employee but rather in connection with any person to whom he allows access to the work place. I have already cited the text of the direction and it is accordingly not necessary to repeat it here. It is however important to underline the fact that the victim of the accident was not wearing any fall protection harness or system at the time of the accident involving a fall from a height of more than 2.4 metres, while the Code provides in paragraph 125(1)(w) that the employer must

ensure that any person he allows to access the work place knows and uses that equipment. Does that mean that we must reach a conclusion of cause and effect and rule that there was a contravention of this obligation because of the fact that the victim was not wearing a fall protection system? I am not of that opinion.

[24] I previously mentioned the balance that the Code establishes between an employer's and an employee's obligations, as well as the fact that the circumstances of this matter show that the victim was employed by a provincial employer who had not lost this feature and who, like its employees, was subject to obligations which were similar to those of a federal employer. If I rely on her report or on her testimony at the teleconference on April 18, 2012, HSO Carrier does not seem to have taken this into consideration. Obviously, in this case the victim was not the appellant's employee and it could accordingly be alleged that employees' obligations under the Code could not be invoked in this case because Mr. Lemaire was not employed by the appellant Nutreco, and that the issue raised in this appeal does not concern employees' obligations but rather the employer's. It is first of all important to recall that the provision of the Code invoked to support the contravention also requires that the employer respect certain regulatory provisions. That way, for a contravention to be fully stated and to be accordingly complete, as this is required because the direction orders the employer to end the contravention and he must therefore be fully informed of its content, said direction must not merely contain a general text or repeat the text of the paragraph from the Code, but must also specifically refer to the regulatory provisions which were not and which were required to be respected. A mere reading of that direction shows it is clear that no regulatory provision which the employer had to respect to comply with the direction was mentioned. Is this a sufficient ground to cancel the direction? In itself, I do not believe so, for the following reason. Although the text of the direction lacks specifics, not only is the obligation specified by the Code nevertheless mentioned, but also "fall protection from a height of 2.4 metres from the ground," which are words similar to those used in paragraph 12.10(1)(a) of the Regulations. For Nutreco, a federal employer to which the Code and its regulations have applied for several years, it would be useless to invoke ignorance or lack of knowledge of the provisions in question, and in its challenge of said direction, the appellant did not in any way invoke this ground.

[25] The question which must however be answered regarding this direction is not whether the victim was or was not wearing a fall protection harness, which is held to be the case, but rather if the appellant had acted, took measures or ensured that the persons admitted used the equipment required in the circumstances in the performance of their work. This is why it is necessary to know the scope of the employer's obligation on this matter, that is, what the legislator meant by stating that "...every employer shall ensure... that every person granted access to the work place is familiar with and uses...". In my opinion, especially if we take into consideration the sharing of obligations by the employer and employee which is mentioned above, or at least the resulting intention, in this case this is an obligation of sufficient efforts and means. That way, I do not consider that the obligation under paragraph 125(1)(w) requires that an employer constantly remind employees or workers or be constantly present to guarantee a result, provided that the contraventions not be tolerated when the employer is advised of them. On this point I

agree with the opinion expressed by Justice Cullen of the Federal Court to the effect that an employer was not required to suffer the consequences of contraventions by his employees or, as in this case, persons other than his employees whom he allowed into the work place but who are employed by another entity which is itself subject to similar obligations, if the employer can establish that it acted to ensure compliance with the rules of safety. In *Westcoast Energy Inc. v. Canada (Canada Labour Code, Regional Safety Officer)*, [1995] A.C.F. no 1584, Justice Cullen wrote the following at paragraph 31:

> [TRANSLATION] In my opinion, paragraph 125(v) [now 125(1)(w) of the *Canada Labour Code* and section 12.1 of the Regulations must not be interpreted as imposing legal obligations on an employer for the conduct of employees who acknowledged having acted irresponsibly, namely when nothing proves that the employer encouraged a lack of obedience regarding its safety policy or voluntarily ignored this lack of obedience.

In the present case, I do not consider that the fact the persons concerned were not the appellant's employees should change the scope of the above, especially considering that there is no doubt that the victim was not wearing his fall protection harness and that the other Law-Marot employee admitted not having worn his. The conclusion to be reached on the basis of Justice Cullen's ruling is in my opinion the fact that the work place has obligations for all its participants, no matter in what capacity they participate, and the omission by a party to respect its obligations must not automatically mean that there are consequences for the other participants or that their liability is entailed. The information excerpted from the report of HSO Carrier, from the teleconference on April 18, 2012 as well as the information submitted by the appellant and which is identical to the officer's and which is mentioned in this decision, leads me to conclude that the appellant ensured that it respected its obligation under paragraph 125(1)(w) before and during the performance of the work and that it was voluntarily that the victim and the other workers present did not wear the fall protection harnesses. I accordingly consider that there was no contravention by the appellant.

[26] In its notice of appeal, the appellant also asked me to rule on an additional issue. While asking me to rule on HSO Carrier's "constitutional jurisdiction" to issue the directions involved in this appeal, by determining if the work at the heart of this matter, which was performed in Nutreco's premises, an enterprise subject to federal jurisdiction and included in the ambit of the Code (which was in no way contested), in contracts with parties under provincial jurisdiction (also in no way contested), the real issue raised by the appellant especially concerns the CSST's capacity to issue directions to it under the provincial legislation governing occupational health and safety, which the appellant is obviously contesting and has already unsuccessfully contested before the CSST. I am of the opinion however that considering the conclusions which I reached above, the determination of this appeal does not require me to deal with this issue. I would however add that there is no doubt that the appellant Nutreco is a federal enterprise and that there is no doubt that the Code applies to it. Pursuant to this legislation, a health and safety officer has the authority to issue directions to it and the Code authorizes me to examine them. What the appellant is asking me is actually to re-examine, from the point of view of the jurisdiction granted to a health and safety officer, the conclusions which the CSST reached. As specified above, the determination of this appeal does not require me to rule

on this issue.

Decision

[27] Considering the conclusions I previously reached, the directions issued to the appellant Nutreco on May 18, 2011 are rescinded.

Jean-Pierre Aubre
Appeals Officer