

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146
of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant: Vancouver Wharves Ltd.
North Vancouver, B.C.
Represented by:
Mr. John L. McConchie
Counsel

Interested Parties: For the employees:
International Longshoremen's and
Warehousemen's Union, Local 500
Vancouver, B.C.
Represented by:
Mr. Eugene Jamieson
Counsel

and

For the foremen:
International Longshoremen's and
Warehousemen's Union, Local 514
Vancouver, B.C.
Represented by:
Mr. Bruce Laughton
Counsel

Mis en Cause: Ms. Diana Smith
Safety Officer
Labour Canada

Before: Mr. Serge Cadieux
Regional Safety Officer

An oral hearing was held on January 14, 1993 in Vancouver, B.C.. It was established at the hearing that both Mr. McConchie and Mr. Laughton would argue to have the direction rescinded whereas Mr. Jamieson would argue to have the direction confirmed. In regards to Labour

Canada's intent to prosecute in this matter, it was agreed to keep this issue separate from the review process.

Background

Labour Canada was advised on Saturday, May 9th, 1992 that a serious accident had occurred at Vancouver Wharves Ltd., Vancouver, B.C.. The Emergency Response Officer on duty that day was Ms. Diana Smith. She arrived at the scene of the accident to investigate at approximately 1500 hours that day.

The details of the accident are described, in part, by the safety officer, in the summary report prepared for the hearing in the following manner:

"Kyle Rossiter, a regular work force Greaser at Vancouver Wharves Ltd., had fallen through the construction floor, located inside Stacker Tower #422 at Berth #5, shortly before 1000 hours. He fell approximately 20 feet to the bottom of the tower. He was working alone and without a radio. He climbed up an inside ladder to the construction floor, climbed down the outside of the ladder and lay near the base of the tower until he was noticed by a switchman..."

The safety officer inspected the construction floor of Stacker Tower #422 in the presence of a representative of the employer i.e Mr. Martin Dournovo, superintendent, and a representative of the employees i.e. Mr. Frank Scigliano, Business Agent for the International Longshoremen's and Warehousemen's Union, Local 500. It was pointed out, during the inspection, that Stacker Tower #423 was similarly constructed.

A debriefing meeting took place subsequently to the inspection. The safety officer reported "she said several times during the meeting that no one was to go into Towers #422 and #423, and that everyone was to be prevented access to the two towers until a repair and clean-up plan was approved by Labour Canada. She explained that she wanted to slow things down so that the proper care and attention could be taken to prevent further injury. She said she would return Monday at which time she would bring Ken Prawdzik, the regular SO, if he was available."

Initially, the safety officer had decided to obtain from the employer an Assurance of Voluntary Compliance (AVC)¹ respecting three specific subjects which required action from the employer. The first item on the original AVC was formulated in the following manner:

- (1) Unsafe construction floor in Stacker Tower #422. Until notified by Labour Canada no one is to enter #422 and #423. Stacker Towers to be roped off and signed "DO NOT ENTER"

¹ An Assurance of Voluntary Compliance (AVC) is a formal, written assurance by the person in charge of a workplace that a contravention of Part II will be corrected. It is accepted in situations which do not, under Labour Canada's compliance policy, call for a direction.

In discussing with Mr. Dufresne, a union representative with local 500, the appropriateness of receiving an AVC for that item, the safety officer was persuaded that a direction would be more appropriate under the circumstances. She discarded the original AVC and wrote another AVC which identified the remaining two other subjects. This latter AVC was jointly signed by Mr. Dournovo and the safety officer.

Alternatively, the safety officer then gave Mr. Dournovo an oral direction respecting the first item on the original AVC to the effect "that due to an unsafe construction floor in Stacker Tower #422, access to both #422 and #423 was to be prevented until authorized by Labour Canada." The safety officer arranged a meeting for Monday, May 11, 1992 at 1400 hours, to deliver the written version of the oral direction. The covering letter for this direction, addressed to Mr. Charlie Lawrence, Maintenance Manager for Vancouver Wharves Ltd. clearly states:

"The attached written direction confirms a verbal direction given to you and Martin Dournovo, Duty Superintendent, on the above mentioned date."

The written direction, which describes specific contraventions, is given under paragraph 145(2)(b) of the Canada Labour Code, Part II and is dated May 11, 1992.

At the Monday meeting, the safety officer learned that, contrary to her order, the accident site had been cleaned up on the week-end and parts of the floor moved to a nearby location. She inspected the site, took photographs and returned the next day with another written direction. This second direction, dated May 12, 1992 is given under subsection 145(1) of the Code. The direction, reproduced hereafter in part, orders Vancouver Wharves Ltd. to immediately cease contravening two provisions of the Code as follow:

"1. An accident site, namely Stacker Tower #422, was disturbed without authorization of a safety officer contrary to the Canada Labour Code subsection 127(1) which states:

"...where an employee is killed or seriously injured in a work place, no person shall, unless authorized to do so by a safety officer, remove or in any way interfere with or disturb any wreckage, article or thing related to the incident except to the extent necessary to

- (a) save a life, prevent injury or relieve human suffering in the vicinity
- (b) maintain an essential public service; or
- (c) prevent unnecessary damage to or loss of property."

2. An oral direction given to Vancouver Wharves Ltd. representative, Martin Dournovo, to make sure the accident site was left undisturbed until a plan to repair or remove the deteriorated floor was approved by Labour Canada was not complied with contrary to the Canada Labour Code subsection 125(w) which states

"...every employer shall...

- (w) comply with every oral or (sic) written direction given to the employer by a safety officer concerning the safety and health of employees."

Vancouver Wharves Ltd. has requested a review of this second direction.

Arguments for the Employer and the Foremen

Mr. McConchie went to great pains to explain the confusion which is likely to arise when a direction is given orally as opposed to being given in writing. Words spoken within the context of an accident investigation, where emotions run high and discussions are often incoherent, can be interpreted differently by different persons. On this basis, Mr. McConchie explains that if any provision of the Code were violated by employer representatives, it was without malice and only because of their concern for safety. The fact that the accident site was cleaned up was the consequence of an ambiguous oral direction.

Mr. McConchie and Mr. Laughton argued that the direction must be given in writing in accordance with subsection 145(2) of the Code. Mr. Laughton explained that the charge levied against the company is a violation of an oral direction which should have been given in writing. The safety officer had no discretion in this matter but to give the direction in writing.

Mr. Laughton is also of the opinion that there was no need for the direction, as specified in subsection 146(3) of the Code, since the towers had been cleaned up without any indication of wilful misconduct. There was no ongoing contravention or ongoing matter and therefore no ongoing need for the direction.

Arguments for the Employees

Mr. Jamieson argued that the oral direction given by the safety officer was understood by everyone in the sense that no one should have access to or disturb the accident site. After all said Mr. Jamieson "How many different ways can you say no access, do not disturb?" Furthermore, the clean-up cannot be justified on the basis of safety since there was no necessity, in terms of business operations of the employer, to have the accident site cleaned up and ready to use.

In respect of the oral direction which should have been given in writing, Mr. Jamieson explained that in a situation of this kind, there is a need for direct decisive action. To support this action, "the legislation clearly authorizes and places a positive obligation on parties under section 125(w) to comply with every oral or written direction given to the employer by a safety officer concerning the safety and health of employees. There is no question that there is a legitimate ability of the officer to give that kind of oral direction and the absence of writing at the time is not a significant factor."

Decision

The responsibility of the Regional Safety Officer to inquire into this matter is found in subsection 146(3) of the Code which stipulates:

146. (3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken. (my underlining)

There are two items in the direction, and therefore two issues to be resolved, which must be dealt with separately. Since Vancouver Wharves Ltd. is directed to stop both contraventions immediately, I must decide for each issue whether a legal basis exists to support each one and, in light of the circumstances, whether there is a need for the direction as it applies to each issue.

The first item of the direction

This item states that Vancouver Wharves Ltd. contravened subsection 127(1) of the Code by disturbing the accident site, namely Stacker Tower #422, without the express authorization of the safety officer. It should be noted that this provision does not require that a safety officer investigate the accident and issue a direction to prevent disturbance of or access to the site. It merely states the obligation of the employer or, as specified in that provision, any person, to obtain an authorization from the safety officer before proceeding with a clean-up of the site.

The exceptions to this provision would not apply in the instant case since the injured employee had been removed and there were no demonstrated business operations of the employer which needed to be conducted or which required the presence of other employees at the site. Furthermore, the safety officer had investigated the accident and ordered the site closed. If there is one thing clear in this case, it is that she did not give an authorization to disturb the site. Even if it could be argued that some clean-up was necessary, it would only be "to the extent necessary to" comply with the exceptions. A total clean-up is not what was envisaged by this provision.

There is no doubt in my mind that subsection 127(1) of the Code was contravened. The accident site was completely cleaned up without the authorization of the safety officer. Having said this, I must ask myself, in light of the direction which orders Vancouver Wharves Ltd. "to immediately cease the contraventions", whether there is a need for this item of the direction. It is manifestly impossible for the employer to comply with the direction as formulated. It is too late. The site is cleaned up and the evidence has been either moved to another location or simply discarded. There was no need for this item of the direction at the time it was given.

This does not mean the employer is absolved of his duty to comply with the legislation and cannot be held responsible for violating the Code. I understand that the safety officer has decided to initiate a prosecution in this matter. I believe a legal action of this nature can proceed without the support of a direction.

Normally, a direction is given under the Code to require that workplace hazards be remedied. Its purpose is, as stated in section 122.1 of the Code, the prevention of accidents and injuries to health. To meet the purpose of a direction, the recipient may have to take actions to protect

employees, to comply with prescribed standards or to put an end to illegal actions. In my view, the recipient of the direction must be in a position to comply with the direction. Otherwise, the direction does not fulfil a legitimate purpose and there is no need for the direction.

I am therefore of the opinion that this item of the direction must be rescinded.

The second item of the direction

The second item of the direction states the employer contravened paragraph 125(w) of the Code by not complying with an oral direction given on Saturday, May 9, 1992 which was subsequently confirmed in writing on May 11, 1992.

I concur with Mr. McConchie and Mr. Laughton on this issue. The direction given under paragraph 145(2)(b) of the Code had to be given in writing. There is no legal basis for an oral direction in these circumstances. If the safety officer decides that access to the site must be prohibited immediately because of the danger it presents, the safety officer can do so by issuing a direction in writing to the employer to this effect. The requirement to give written directions is appropriate and necessary in these circumstances given the seriousness of the situation. Without a clear and unambiguous direction, the life, health and safety of other employees cannot be guaranteed in the instant case.

Assuming it could be argued that a valid written direction, issued under paragraph 145(2)(b) of the Code, has effectively been given and delivered to the employer on May 11, 1992, the direction would have the force of law only from the moment it was given in writing to the employer. At that moment it was also, as noted above for the first item of the direction, too late to be complied with.

I must admit that I am somewhat puzzled with the rationale for issuing a direction for non compliance with another direction. As I indicated above, a direction should fulfil the purpose stated in the Code. In those instances where a direction does not or cannot achieve that purpose, it may be necessary to consider other compliance mechanisms available to the safety officer.

Since the second item of the direction refers to non compliance with an oral direction which has no legal basis, I must also rescind that item of the direction. To do otherwise, I would have to accept that paragraph 125(w) of the Code authorizes a wrong to be used as the basis to justify a right.

To summarize the above, there is no need for the first item of the direction and there is no legal basis for the second item of the direction. For all the above reasons, I hereby rescind the direction issued on May 12, 1992 under subsection 145(1) of the Code by safety officer Diana Smith to Vancouver Wharves Ltd.

Decision rendered this 28th day of January 1993

Serge Cadieux
Regional Safety Officer