

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: Arnone Transport Ltd.
Thunder Bay, Ontario
Represented by: Mr. Len Arnone
President

Interested Party: Safety and Health Committee
Arnone Transport Ltd.
Thunder Bay, Ontario
Represented by: Ms. Diane Cooper
Co-Chairperson

Mis-en-Cause: Mr. Ted Leindecker
Safety Officer
Labour Canada

Before: Mr. Serge Cadieux
Regional Safety Officer
Labour Canada

A visit of the work site, which is the subject of the direction in the instant case, took place on October 5, 1993, in the presence of the parties. The circumstances of the direction were also discussed in an informal hearing.

Background

In the summary report prepared for this case, the safety officer explained that on October 13, 1993, he proceeded to Arnone Transport Ltd. to conduct a follow-up inspection. Particular attention was given to an earlier complaint made by an ex-employee of the company about several items, including an unguarded grease pit. The pit was surrounded by several orange and red highway pylons.

During the inspection, the safety officer "noted that the pit was not guarded and that there was an obvious difference in floor levels between the garage floor and the floor of the pit." The safety officer also noted that there was no truck or other vehicle over the pit. He advised Mr. Cooper, the Fleet Manager at Arnone Transport Ltd. that the orange and red highway pylons surrounding the pit were unacceptable as a safety measure to protect employees at work.

It was shown that the pit was once guarded but that the guard rail had been removed because it was too cumbersome to move and replace the guard every time a truck was moved in or out over the top of the pit. In measuring the depth of the pit, the safety officer noted that the difference in floor levels was found to be 0.5 cm to 4.0 cm below the required 1.2 meter as specified by subsection 2.4(2) of Part II (Building Safety) of the Canada Occupational Safety and Health Regulations (the Regulations).

On August 17, 1993 the safety officer returned to the site and gave a direction under paragraphs 145(2)(a) and (b) of the Canada Labour Code, Part II (the Code) to Arnone Transport Ltd.. The direction reads, in part, as follows:

"The said safety officer considers that the opening in the floor which is the mechanics' pit in the mechanics' garage constitutes a danger to an employee while at work:

The mechanics' pit in the mechanics' garage is not guarded. There is no guard rail fixed around the pit, which represents for employees working in the garage at anytime a risk of falling into the pit and injuring themselves.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to immediately take measures for guarding the source of danger and to protect any person from the danger.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the Canada Labour Code, Part II, not to use the mechanics' pit in respect of which the notice of danger n° 5599 has been affixed pursuant to subsection 145(3), until this direction has been complied with.

Issued at Thunder Bay, this 17th day of August 1993."

Upon investigating on August 19, 1993 whether the employer complied with the direction, the safety officer was satisfied that compliance was being met and removed the Notice of Danger. The pit was fitted around its unprotected edges with a guard rail and mid-rail.

Submissions of the Employer

Mr. Arnone submitted that the safety officer erred in law as he based his direction on the requirements of Part 9 of the National Building Code of 1985 (NBC 1985). The safety officer stated in the synopsis prepared for this case and also in a previous letter addressed to Mr. Arnone that he was of the opinion that the following provisions of the legislation were being contravened:

Paragraph 122.1, 124 and 125(a),(b),(p),(u) of the Canada Labour Code Part II, and subsection 2.1 of the Canada Occupational Safety and Health Regulations and sentence 9.8.8.1. and 9.8.8.3. of the National Building Code of Canada.

Mr. Arnone is of the view that those provisions, and most specifically the reference to the NBC 1985, do not apply to this situation. They apply to parking garages with ramps to get to different levels.

Mr. Arnone frequently repeated during the hearing that he agreed that safety measures were needed to protect people from falling into the pit. He shared the safety officer's view that it was dangerous to leave the pit unprotected during off hours which he interprets to mean, after a work day, on weekends and during holidays. During those periods, the opening would be blocked either with a guard or by putting a truck over it.

Mr. Arnone also felt it was unreasonable to have to put the guard back into place every time a truck is pulled away. He agreed with the safety officer that driving a truck over the opening or having a person watch the unprotected pit when a truck is moved out would be acceptable safety measures. Those measures would satisfy the requirements of the direction.

Decision

Whether the direction is justified or not is not an issue in the instant case. The parties readily acknowledge that a danger exists whenever the mechanic's maintenance pit is unprotected. Therefore the direction is essentially valid as it stands.

The issue to be decided is whether a guard rail is mandatory given that the safety officer explained that he based his direction on a provision of the National Building Code of 1985 (NBC 1985). Could compliance be achieved in a different manner and satisfy the requirements of the law? The safety officer felt that it could. I agree with this conclusion. However, it is in our reasoning that leads to this conclusion that we disagree.

The mechanics' maintenance pit is a floor opening which is specifically covered by subsection 2.4(2) of the Regulations. That provision stipulates

"2.4 (2) Where an employee has access to a wall opening from which there is a drop of more than 1.2m or to a floor opening, guardrails shall be fitted around the wall opening or floor opening or it shall be covered with materials capable of supporting all loads that may be imposed on it.

The safety officer explained that the direction was based on the NBC 1985 because in measuring the depth of the pit, he noted that the difference in floor levels was found to be 0.5 m to 4.0 m below the required 1.2 meter as specified by subsection 2.4(2) of the Regulations. This difference would exclude the application of the Regulations to the floor opening at Arnone Transport Ltd.. The safety officer concluded that he therefore had to apply the provisions of the NBC 1985 to resolve the problem. I do not agree with that interpretation.

A floor opening is defined in subsection 2.4(1) of the Regulations as follows:

""floor opening" means an opening measuring 300 mm or more in its smallest dimension in a floor, platform, pavement or yard;"

I do not read in subsection 2.4(2) of the Regulations the requirement that there be a drop of more than 1.2 m in the floor opening. That requirement only applies, in my view, to a wall opening. Any floor opening, with the exceptions of those listed at subsection 2.4(4) of the Regulations, would come under the umbrella of this provision as long as it is 300 mm wide or more. Therefore, the mechanics' maintenance pit at Arnone Transport Ltd. falls into this category of openings and consequently, is subject to the application of section 2.4 of the Regulations.

The NBC 1985, which addresses guards in general, is a building standard which is incorporated, in the Regulations, by reference. The NBC 1985 is less specific than the provision for floor opening of the Regulations. As a rule of interpretation, a more specific standard takes precedence over a less specific standard. Therefore, the NBC 1985 must give way to the Regulations in this respect.

Subsection 2.4(2) of the Regulations also specify the means to comply with the legislation. It states that in respect of the floor opening "guardrails shall be fitted around the wall opening or floor opening **or** it shall be covered with materials capable of supporting all loads that may be imposed on it." Clearly then, if Arnone Transport Ltd. decides not to install guardrails, an option which is permitted in the instant case given the use of the word "**or**", it must cover the opening with "materials capable of supporting all loads that may be imposed on it." The material used will also have to be "securely fastened to and supported on structural members" as required by subsection 2.4(3) of the Regulations.

Obviously, compliance with section 2.4 of the Regulations may create much inconvenience in work environments similar to the mechanics' garage at Arnone Transport Ltd.. This may be one of the reasons why some provincial legislations have excluded maintenance pits from the application of those regulatory requirements.

For example, subsection 2.4(2) of the Regulations is unclear as to when exactly must the requirements of that provision have to be complied with. I leave it up to the safety officer, after discussing the matter with Arnone Transport Ltd. and the safety and health committee, to decide which safety measures must be taken, during those short periods of time, when vehicles are being moved in and out of the garage. For those longer periods, when the maintenance pit is not being used during the work day, either of the safety measures specified in subsection 2.4(2) of the Regulations must be adhered to.

Arnone Transport Ltd. should be aware that the Code and the Regulations apply whenever employees are working or are deemed to be at work. Off hours, week-end and holidays, when employees are normally absent, are not covered by the Code. Nevertheless, in terms of personal liability, Arnone Transport Ltd. may still wish to protect the floor opening during those periods to prevent accidents from occurring.

In order to reflect the application of section 2.4 the Regulations to the mechanics' maintenance pit at Arnone Transport Ltd., and the optional means of compliance allowed by that provision, I hereby vary the direction by replacing the following paragraph of the direction, i.e.

"The mechanics' pit in the mechanics' garage is not guarded. There is no guard rail fixed around the pit, which represents for employees working in the garage at anytime a risk of falling into the pit and injuring themselves."

with the following two paragraphs, i.e.

"The mechanics' pit in the mechanics' garage is not protected. There is no guardrail around the pit or material covering the pit capable of supporting all loads that may be imposed on it, which represents for employees working in the garage at anytime a risk of falling into the pit and injuring themselves.

Paragraphs 125 (a), (b) and (p) of the Canada Labour Code, Part II, and section 2.4 of the Canada Occupational Safety and Health Regulations."

Decision rendered on November 9, 1993

Serge Cadieux
Regional Safety Officer