Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Case No.: 2006-09
Decision No.: CAO-07-012

Canada Labour Code
Part II
Occupational Health and Safety

David Dosen and
International Longshore and
Warehouse Union, Local 500
appellants

and

TSI Terminal Systems Inc.
respondent

and

British Columbia Maritime
Employers Association
intervener

_____

No.: CAO-07-12
April 5, 2007

This case was decided by Appeals Officer Katia Néron, based on the written submissions provided by the parties and the intervener, and the documents supplied by the health and safety officer.

For the appellants
David Dosen, chairperson, safety committee, International Longshore and Warehouse Union, Local 500
Jeff Conway, counsel

For the respondent
Harvey S. Delaney, counsel, TSI Terminal Systems Inc.

For the intervener
Jason P. Koshman, counsel, British Columbia Maritime Employers Association (BCMEA)

Health and safety officer
Marlene Yemchuk, Labour Program, Human Resources and Social Development Canada (HRSDC), Vancouver, British Columbia

[1] Following the investigation of an accident that occurred, on January 4, 2006, at TSI-Vanterm container terminal, operated by TSI at the Port of Vancouver, and resulted in the death of the operator of TSI rubber tire gantry (RTG) #8, health and safety officer (HSO) Marlene Yemchuk issued, on January 6, 2006, a direction to TSI pursuant to subsection 145(1) of the *Canada Labour Code*, Part II (the *Code*).

[2] The direction stated that TSI had made two violations to the *Code* and ordered the employer to terminate them immediately. The first contravention was to paragraph 125(1)(*n*) of the *Code*. The direction ordered TSI to ensure that the average level of lighting in the area where the accident had occurred be at a minimum of 20 lux, as required by paragraph 125(1)(*n*) of the *Code* and by Part VI, Levels of Lighting, *Canada Occupational Health and Safety Regulations* (COHSR), section 6.6, Schedule III, item 1(*c*)(i). The second contravention was to section 124 of the *Code*. The direction ordered TSI to protect employees when in proximity of moving mobile equipment. HSO Yemchuk's direction reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On January 4, 2006, the undersigned health and safety officer conducted an investigation in the work place operated by TSI TERMINAL SYSTEMS INC., being an employer subject to the *Canada Labour Code*, Part II, at 1300 Stewart Street, Vancouver, British Columbia, V5L 4X5, the said work place being sometimes known as TSI Terminal Systems Inc. – Vanterm.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

1. Paragraph 125.(1)(n) of the *Canada Labour Code*, Part II, paragraph 6.6 of the Canada Occupational Health and Safety Regulations

Minimum level for areas used by persons and mobile equipment in which there is a high or moderate level of activity is 20 lux as per COHSR 6.6 Schedule III 1.(*c*)(i).

During the investigation, a sample of light levels were determined in the laneway intersection East Roadway and Delta. A sample average measurement indicated 14.6 lux which is under the minimum requirement of 20 lux.

2. Section 124 of the *Canada Labour Code* Part II

Employees are to be protected when in proximity of moving mobile equipment.

During the investigation it was determined that an employee was fatally injured while in the proximity of moving mobile equipment.

[3] On January 6, 2006, David Dosen, chairperson of the safety committee of Local 500, International Longshore and Warehouse Union, appealed the first item of the direction pursuant to subsection 146(1) of the *Code*. He submitted that HSO Yemchuk's reference to section 6.6 of the COHSR, Schedule II, item 1(*c*)(i), was incorrectly applied to the area where the accident had occurred. He stated that section 6.5 of the COHSR, Schedule II, item 3(*c*), should have been the provision referred to.

[4] I retain the following from HSO Yemchuk's investigation report.

[5] On January 4, 2006, at approximately 6:30 pm, the RTG #8 operator was walking in the container storage yard, along East Roadway, on the way to his designated gantry, RTG #8, to start his shift. RTG #8 was located in A-East, in the TSI-Vanterm container terminal. At the time, the equipment drivers had the option of waiting for a ride out to their machine or of walking to their equipment through the container terminal, although container handling equipment would be in operation on the terminal premises at the same time.

[6] Instead of opting to wait for a ride out to his designated machine, the operator elected to walk. While en route, he was fatally struck at the corner of East Roadway and Charlie Lane, at the beginning of Delta Lane, by a Fantuzzy rack/sidehandler machine[1]. The duties of the Fantuzzy equipment driver were to pick up empty containers from the East Rail and to move them to the empty container yard on the west side of the yard.

[7] When HSO Yemchuk arrived at the accident scene, she noted that the weather was overcast. She was also informed by the police that the victim had not been wearing a high-visibility vest, nor had there been any reflective material on his jacket, although it was part of the personal protective equipment required by TSI safety work procedures in the container yard, due to the presence of moving equipment.

[8] During her investigation, HSO Yemchuk also conducted a lighting survey around the victim's body and in the vicinity of the accident site.

[9] Because at the laneway intersection of East Roadway and Delta, around the victim's body, the average level of lighting measured 14.6 lux, HSO Yemchuk concluded that this level contravened the requirement established by paragraph 125(1)(*n*) of the *Code* and section 6.6 of the COHSR, Schedule III, item 1(*c*)(i). Section 6.6 requires a minimum average level of lighting of 20 lux in areas used by persons and mobile equipment where there is high or moderate level of activity. It reads:

Lighting – General Areas

6.6 The average level of lighting in an area set out in column I of an item of Schedule III, other then an area referred to in section 6.7 or 6.9, shall not be less than the level set out in column II of that item.

[1] A rack/ sidehandler machine is used to handle containers for transport to other terminal areas.

SCHEDULE III
(*Section 6.6*)

LEVELS OF LIGHTING – GENERAL AREAS

Item	Column I Area	Column II Level in lx
1.	**BUILDING EXTERIORS**	
	(c) Areas used by persons and mobile equipment in which there is:	
	(b) a high or moderate level of activity…….……	20

Appellants' Arguments

[10] I retain the following from the written submissions provided by David Dosen.

[11] D. Dosen believed that the direction should have referred to section 6.5 of the COHSR, Schedule II, item 3(*c*), instead of the one mentioned by HSO Yemchuk. It reads:

Lighting – Industrial Areas

6.5 The average level of lighting in an area set out in column I of an item of Schedule II, other then an area referred to in section 6.7 or 6.9, shall not be less than the level set out in column II of that item.

SCHEDULE II
(*Section 6.5*)

LEVELS OF LIGHTING IN INDUSTRIAL AREAS

Item	Column I Area	Column II Level in lx
3.	**LOADING PLATFORMS, STORAGE ROOMS AND WAREHOUSE**	
	(c) Docks (indoor and outdoor), piers and other locations where packages or containers are loaded or unloaded……	150

[12] D. Dosen based his position on the two following reasons:

- Section 6.5, Schedule II, item 3(*c*), more appropriately defines the area where the fatality occurred, because it applies to "[d]ocks (indoor and outdoor), piers and other locations where packages or containers are loaded or unloaded" and the accident area is only used for loading or unloading containers. Section 6.6, Schedule III, item 1(*c*), which refers to "[building exterior areas] used by persons and mobile equipment in which there is: (i) a high or moderate level of activity", is not applicable given the nature of the container handling activity in such a congested area.
- Because section 6.5, Schedule II, item 3(*c*), specifically refers to other locations where containers are loaded or unloaded and because it is the only reference, in Part VI of the COHSR, to docks used for loading and unloading containers, it should be interpreted to apply to all sections of the TSI dock area where loading and unloading of containers is taking place.

[13] D. Dosen maintained that HSO Yemchuk's choice of section 6.6, Schedule III, item 1(*c*)(i), instead of section 6.5, Schedule II, item 3(*c*), followed a pattern of ambiguities and contradictions set out in previous decisions rendered by Regional Safety Officers (RSO) and Appeal Officers under the *Canada Labour Code*, Part II.

[14] More specifically, D. Dosen referred to the three following tribunal decisions:

- *Cerescorp Inc. and Halterm Limited*[2];
- *St. Lawrence Seaway Management Authority and Canadian Auto Workers Union*[3];
- *Maritimes Employers' Association and Syndicat des débardeurs du port de Montréal*[4].

[15] While I retain the following from D. Dosen's opinions and interpretation of those three decisions, I will remind the parties that I am not bound by any decisions made by other Appeals Officers, however noteworthy these decisions may be.

[16] D. Dosen declared that the *Cerescorp Inc. and Halterm Limited* decision upholds his position that section 6.5 of the COHSR, Schedule II, item 3(*c*), should have been applied to determine the appropriate lighting requirements for the TSI-Vanterm container terminal.

[17] Regarding the *St. Lawrence Seaway Management Authority and Canadian Auto Workers Union* decision, D. Dosen first stated that it demonstrates that the legislation is remedial and, therefore, must be interpreted broadly to give credence to the purpose of the *Code* given in section 122.1, which reads:

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[2] *Cerescorp Inc. and Halterm Limited*, CLCAO Decision No. 00-014, Appeals Officer Serge Cadieux, May 15, 2000

[3] *St. Lawrence Seaway Management Authority and Canadian Auto Workers Union*, CLCAO Decision No. 03-008, Appeals Officer Douglas Malanka, April 4, 2003

[4] *Maritimes Employers' Association and Syndicat des débardeurs du port de Montréal*, CLCSO Decision No. 92-003, Regional Safety Officer Bertrand Southière, March 2, 1992

> 122.1 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.

[18] D. Dosen stated that section 6.5, Schedule II, item 3(*c*), should apply to all sections of TSI-Vanterm container terminal, because:

- All structures and activities are connected with the loading and unloading of cargo to and from ships. Therefore, this renders the entire facility into a "dock" or a "pier". Loading and unloading is performed day and night in all sections and all circumstances where containers are handled need to be addressed equally. The operations were described by D. Dosen as follows:
  - Unloading operations: the dock gantry unloads containers from the vessel and loads them on to bombcarts. Then, the containers are unloaded from bombcarts by rubber tire gantries (RTGs), top picks or side picks (racks). After that, the containers are loaded one on top of the other, in stacks, or loaded on to special railcars designed to accommodate two containers, one on top of the other;
  - Back loading operations to the vessel: the reverse order is followed. Rubber tire gantries, top picks or side picks (racks) load bombcarts that proceed to the dock face, where they are unloaded by the dock gantry, which then loads the container on to the vessel.
- Originally, a considerable number of workers were employed to handle several small loads of cargo. As loading techniques became more mechanized and containers were introduced to consolidate cargo and increase cargo handling efficiency, larger, bigger and heavier volumes became the norm. Although the number of workers declined, the number of workplace hazards increased. Thirty years ago when the terminal opened, container traffic was in its infancy. Light standards were placed high enough to stack containers three high, but today's containers are stacked five high. To prevent accidents, the terms "loaded or unloaded" must be interpreted to include not just the loading and unloading of ships, trains and trucks, but areas of TSI-Vanterm container terminal where containers are moved and stored.
- Workers, foremen, outside contractors, surveyors and employees of Canada Border Services Agency who work at all sections of the container terminal need to be able to check containers for leaks, hazards, damage or other suspicious traits. Thus, there needs to be extra lighting.

[19] D. Dosen also affirmed that, according to the BCMEA 2004 Annual Report, the volume of containers handled in British Columbia ports has doubled in each of the last five years. With the added flow of container traffic through the port, D. Dosen maintained that it is imperative that adequate lighting be provided so that the safety of employees is not compromised.

[20] Second, D. Dosen pointed out that the COHSR does not define "dock" and "pier". Therefore, as demonstrated by the *St. Lawrence Seaway Management Authority and Canadian Auto Workers Union* case, *supra*, the applicable rule is that when terms are not statutory defined, dictionary definitions may help to understand how to apply a specific provision.

[21] So D. Dosen referred to the definitions of “dock” and “to load” found in the *Merriam-Webster's Collegiate Dictionary*[5], *i.e.*:

> Dock – a place (as a wharf or platform) for the loading or unloading of materials. Originating from the Middle English of docke, dock or ditch from the Latin duction or ductio, the act of loading, meaning the docking of a vessel.
>
> To load – 1. a: to put a load in or on (truck);
> 1. b: to place in or on a means of conveyance (freight);
> 2. to put a load on or in a carrier, device, or container.

[22] D. Dosen stated that section 6.5, Schedule II, would seem to apply to structures used for loading or unloading materials not only from trucks, but also from ships.

[23] As to the *Maritimes Employers’ Association and Syndicat des débardeurs du port de Montréal* decision, D. Dosen believed that it made an interpretation and application of the regulations that emphasized the economic capital costs of implementing the regulations over the cost efficiency of the changes and consequent safety and health improvements which would have benefited the employees by providing them with sufficient amount of illumination to do their job productively and safely.

[24] D. Dosen stated that RSO Southière's position in page 9 of his *supra* decision, *i.e.* “I do not believe that a maritime wharf is the same as a loading dock for trucks”, is inaccurate, as in the port of Vancouver alone, today’s maritime wharves see almost one million containers handled. Furthermore, when RSO Southière allowed that the legislation, *i.e.* Schedule II of section 6.5 of the COHSR, was not intended to apply to maritime wharves, it was nevertheless on that section that health and safety officer Pierre Morin based his decision of ordering the 100 lux minimum requirement, which was not disputed by the applicant at the time.

[25] D. Dosen also pointed out that, in the *Maritimes Employers’ Association and Syndicat des débardeurs du port de Montréal* decision, *supra*, the appellant’s arguments were based on Standard RP-7 of the American National Standards Institute that:

- the minimum lighting required increases with age; over the years, the eye loses its sensitivity to light and the level of lighting must be increased to compensate;
- where good visibility is required, a minimum of 200 lux is necessary;
- in most industries, the recommended level for warehouses varies between 50 and 200 lux.

[26] D. Dosen disagreed with RSO Southière that, because the above mentioned standards were "based on levels necessary for efficiency and comfort", the evidence brought by the applicants had insufficient importance to affect his decision. Because the purpose of the

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[5] *Merriam-Webster’s Collegiate Dictionary*, Ninth Edition, Merriam-Webster Inc., 1983, Springfield, USA

Code is to ensure safety for employees and because the safe and efficient handling of containers could be affected by different conditions, these conditions should be taken into account.

[27] D. Dosen referred to the International Labour Organization (ILO) *Encyclopedia of Occupational Health and Safety*[6] to draw attention to the complex and necessary need for considerable illumination to ensure that employees work safely and efficiently. As found on pages 1225 and 1226 of the Encyclopedia, the factors that should be taken into consideration, in addition to the illumination level, are:

i. the reflection of the work object and environment;
ii. the differences in relation to natural daylight;
iii. the necessity of using artificial light during the day;
iv. the age of the persons carrying out the task.

[28] D. Dosen added that the intensity and congestion of traffic at the TSI-Vanterm container terminal during the night of the accident was not unusual. Here is how he describes it:

> One dock gantry can discharge a container every two minutes. Often two dock gantr[ie]s are discharging containers direct to the rail line. Another dock gantry may be discharging containers to be stored near the rail line. Other vessels are working and discharging containers to bombcarts which must enter lane ways from the east to the west which also must travel pass the rail line. Other bombcarts must turn around at the rail line to return to their position in the yard to receive more containers for the rail line, and side picks may be carrying empty containers to be stored near the rail line. Add to this foremen and checkers driving in pickup trucks in this area and the prevention of congestion is only a remote possibility.

[29] Given all of the above arguments, D. Dosen stated that where work of a similar nature is being performed at a different portion of a dock, the semantics of language cannot replace reasonable regard for the health and safety of workers.

Respondent's Arguments

[30] Counsel Harvey S. Delaney responded to the appellants' written submission on behalf of TSI Terminal Systems Inc. I retain the following from his written submission.

[31] Counsel Delaney stated that the area where the accident took place was a laneway intersection, at a building exterior and where both persons and mobile equipment were active. Furthermore, he affirmed that this area was not an area of docks or piers or where any containers were loaded or unloaded. He added that the accident site was specifically where mobile equipment was used.

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[6] *Encyclopedia of Occupational Health and Safety*, Third Revised Edition, Volume 2, International Labour Organization

[32] Counsel Delaney also declared that there was no dispute that the involved area was used by persons and mobile equipment or that it was an area of a high or moderate level of activity. He added that, factually, the whole site occupied by TSI is not deemed to be a "dock" or a "pier" and the appropriate standard has been attributed to the area in issue.

[33] Counsel Delaney also stated that the regulation does not stipulate where a building must be located in order that section 6.6, Schedule III, item 1(*c*), to apply.

[34] In the circumstances, counsel Delaney maintained that section 6.6 of the COHSR was appropriate to indicate the level of lighting in this specific area of the TSI-Vanterm container terminal.

[35] To support his position, counsel Delaney referred to the *Maritimes Employers' Association and Syndicat des débardeurs du port de Montréal* decision, *supra*, in which it was found that section 6.5, Schedule II, item 3(*c*), did not apply to wharfs. Because the decision rendered at the time is directly related to the standards that are in issue in the present case, counsel Delaney believed that there is no reason to deviate from it.

[36] Counsel Delaney declared that there is no lack of clarity in the regulations because, when taken in conjunction with the headings under which they fall, the terms set out in the Schedules of Part VI of the COHSR are clear and the conclusion reached in the *Maritimes Employers' Association and Syndicat des débardeurs du port de Montréal* decision, *supra*, supports this position.

[37] Counsel Delaney referred to the *St. Lawrence Seaway Management Authority and Canadian Auto Workers Union* decision, *supra.* While it was involved in this matter does not use the same terms as Schedule II, which includes only docks and piers. Thus, the present case is distinguishable on its face.

[38] Counsel Delaney added that the drafters of the legislation deemed a difference in lighting standards, depending on the circumstances facing the worker and on the activities taking place. Based on this, counsel Delaney stated that it was clearly not the legislator's intent that there be no need for any differentiation in lighting levels.

[39] Counsel Delaney also declared that the *Maritimes Employers' Association and Syndicat des débardeurs du port de Montréal* decision, *supra,* does not offer any contradictory or ambiguous interpretation of the regulations. RSO Southière interpreted the legislation in a clear way, on the basis of a plain reading of the document, and the findings in this decision are directly on point with the very question that is raised in the present case.

Intervener's Arguments

[40] Counsel Jason P. Koshman responded to the appellants' written submission on behalf of the BCMEA. I retain the following from his written submissions.

[41] Counsel Koshman disagreed with the appellants' argument that section 6.5 of the COHSR, Schedule II, item 3(*c*), must be interpreted to apply to the entire 76 acres of the TSI-Vanterm container terminal, for the following reasons.

[42] Counsel Koshman first stated that the case law leaves no doubt that principles of statutory interpretation developed by the courts apply equally to regulations. He referred to the following jurisprudence:

- Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 3rd ed., (Toronto: Carswell, 2000) at 24, citing *Dubac v. Cite de rouyan*, [1973] C.A. 1128;
- *Hodgkins v. The King* (1921), 20 Ex. C.R. 454;
- *Union Gas Co. of Canada Ltd. v, Township of South Cayuga*, [1952] O.W.N. 201 (Ont. Co. Ct.), 203 (Kinnear J.);
- *McCaffry v. Law Society of Alberta*, [1941] 1 D.L.R. 213 (Alta. A.D.), 222 (McGillivray J.);
- *Martin v. Beef Stabilization Appeal Committee*, (1986), 48 Sask. R. 89 (Sask. Q.B.);
- *C.S.P. Foods v. Canadian Transport Commission*, (1982), 42 N.R. 123 (F.C.A.), 128 (Urie J.).

[43] Counsel Koshman added that it is a rule of statutory interpretation that a heading can inform and constrains the meaning of provisions underneath the heading. He referred to the following jurisprudence:

- Cote, *ibid.* at 63, citing *R. v. Lucas*, [1988] 1 S.C.R. 439, 463;
- *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357;
- *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106;
- *Canadian Pacific Limited v. Attorney General of Canada*, [1986] 1 S.C.R. 678;
- *Robins v. The Queen*, [1982] Que. C.A. 143;
- *Gall v. Canada (A.G.)*, [1995] 2 F.C. 413, 425 (F.C.A.);
- *Canadian Turbo (1993) Ltd. v. Minister of National Revenue* (1997), 206 N.R. 164 (F.C.A.);
- *Re African Lion Safari & Game Farm Ltd.* (1987), 37 D.L.R. (4th) 80 (Ont. C.A.);
- *Lawrie v. Rathburn* (1877), 38 U.C.Q.B. 255;
- *A.-G. Canada v. Jackson*, [1945] 2 D.L.R. 438, 440 (N.B.S.C.) reversed for other reasons [1946] S.C.R. 489;
- *Stephenson v. Parkdale Motors*, [1924] 3 D.L.R. 663, 665 (Ont. S.C.);
- *R. v. Lovis*, [1975] 2 S.C.R. 294;
- *Augers v. Corporation de la Paroisse de St-Paul-l'Ermite*, [1942] Que. K.B. 725;
- *Desrosiers v. The Queen*, [1975] F.C. 91 (T.D.);
- *Re Clearwater Election* (1913), 12 D.L.R. 598 (Alta. S.C.);
- *R. v. Rockert* (1977), 74 D.L.R. (3d) 457 (Ont. C.A.);
- *Re Sam Richman Investments (London)* (1975), 52 D.L.R. (3d) 655 (Ont. H.C.);
- *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47, 64;

- Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham: LexisNexis Canada Inc. (2006) at 306-308, citing *R. v. Lones* (1992), 69 C.C.C. (3d) 289 (S.C.C.);
- *Re Peters and District of Chilliwack* (1987), 43 D.L.R. (4th) 523 (B.C.C.A.).

[44] Given the above jurisprudence, counsel Koshman believed that section 6.5, Schedule II, item 3(*c*), reading "Docks (indoor and outdoor), piers and other locations where packages or containers are loaded or unloaded", must be interpreted in light of the headings found under Schedule II.

[45] According to counsel Koshman, it is obvious that all item headings in Schedule II of section 6.5 concern buildings or similar structures. Consequently, item 3 of Schedule II must be interpreted to be in relation to buildings or similar structures and the reference to "docks, piers and other locations" in item 3(*c*) must be strictly interpreted to be in relation to buildings, *e.g.* a loading dock at the back of a warehouse or a pier attached to a building.

[46] To counsel Koshman's opinion, the above interpretation agrees with the common meaning to be given to "docks" and "loading platform". To support his position, he referred to the *Canadian Dictionary*[7], in which "dock" and "loading dock" are defined as follows:

> "dock"
> *Noun* **1** *N Amer*. A ship's berth, a wharf. **2** an artificially enclosed body of water for the loading, unloading, and repair of ships, **3** (in *pl*.) a range of docks with wharves and offices; a dockyard **4** *N Amer* = LOADING DOCK. **5** = DRY DOCK.
>
> "loading dock"
> *Noun N. Amer*. A raised platform, e.g. at a warehouse etc., from which trucks or railway cars are loaded or unloaded.
>
> [emphasis added]

[47] In addition, even though he maintained that Canadian jurisprudence had moved past the rigid application of dictionary definitions to interpret legislation, counsel Koshman stated that such definitions can and still assist in arriving at the plain meaning of words used in legislation and regulations.

[48] In this regard, counsel Koshman declared that the plain meaning of "loading platform" is a raised level surface that is attached to some sort of building or similar structure, which is used for the purpose of loading and unloading goods. Because the meaning of "docks" or "piers" or "other locations" in item 3(*c*) of Schedule II must be interpreted within parameters set by the heading "Loading Platforms, Storage Rooms and Warehouses", then their plain meaning is the same as that of "loading platform" under the item 3 heading.

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[7] *Oxford Canadian Dictionary*, 2nd edition, Oxford University Press

[49] Counsel Koshman declared that of the three categories set out under the item 3 heading of Schedule II, only “Loading Platforms” can be seen to possibly capture the TSI-Vanterm container terminal, which is a 76-acre, multi-use, outdoor lot.

[50] Counsel Koshman added that the TSI-Vanterm container terminal is obviously not a “storage room” nor is it a “warehouse”. As mentioned above, because it is a rule of statutory interpretation that the heading of item 3 of Schedule II constrains the meaning of the provisions beneath the heading, it cannot be interpreted to be a “loading platform”.

[51] As a result, counsel Koshman believed that the TSI-Vanterm container terminal cannot be construed to fit within the meaning of “docks” or “other locations” for the purposes of the application of item 3(*c*) of Schedule II. Thus, he added, it almost goes without saying that, as a result of TSI-Vanterm container terminal’s exclusion from the subject matter of the item 3 heading, and since this heading informs on the meaning and interpretation to be given to the words of the provisions underneath, the TSI-Vanterm container terminal cannot be a “dock” nor “other locations” as per item 3(*c*) of Schedule II of section 6.5 of the COHSR.

[52] In addition, based on the previously mentioned rule of statutory interpretation that, where a general word follows a list of specific words, the interpretation of the general word must be constrained by the specific words, counsel Koshman maintained that “other locations” in item 3(*c*) of Schedule II cannot be a catchall term that somehow encapsulates something like TSI-Vanterm container terminal, which is not a “dock”. This limitation of “other locations” is especially valid given that the headings in the Schedule limit the phrase. This logical argument was supported by the *Maritimes Employers’ Association and Syndicat des débardeurs du port de Montréal* decision, *supra.*

[53] Counsel Koshman stated that the *St. Lawrence Seaway Management Authority and Canadian Auto Workers Union* decision, *supra*, the legislation was interpreted broadly to ensure that the regulation would extend to circumstances to which the appeals officer believed they were intended to apply. To do otherwise would have resulted in the legislation not covering circumstances that the appeals officer saw the legislation was logically intended to cover.

[54] However, counsel Koshman affirmed that the issue in the present case is which regulatory standard should be applied and that it would be inappropriate in the circumstances for the appeals officer to apply the same rule mentioned above respecting the broad interpretation of remedial legislation.

[55] To counsel Koshman, the terms “loaded or unloaded” in item 3(*c*) of Schedule II do not refer to the type of activities that occur at TSI-Vanterm container terminal because the TSI-Vanterm container terminal is a thoroughfare where containers – already loaded at an external location – arrive, are stored temporarily and then sent on their way.

[56] Based on this, counsel Koshman declared that item 3(*c*) of Schedule II makes no mention of loading “ships”, “trains” or “trucks” and only covers docks where “packages” and “containers” are loaded and unloaded. To his opinion, this phrase is merely a subject with

no direct (or indirect) object and, grammatically, without a direct object, the (un-)loading in item 3(*c*) can only be reflexive, referring to the filling and emptying of "packages" and "containers" themselves.

[57] Counsel Koshman believed, after reviewing the lighting standards in Schedules II and III of the COHSR, that there appears to be a general pattern whereby lighting standards of greater than 100 lux are utilized where the work, by its nature, requires good to excellent scrutiny by workers, and less than 100 lux where the need for close scrutiny is less crucial for effectiveness and safety on the job. As a result, he stated that Schedule II requires 250 lux where packages are frequently checked or sorted but only 30 lux where goods are stored in bulk and only 75 lux where packages are infrequently checked or sorted.

[58] In addition, counsel Koshman wrote that loading or unloading containers and packages from a vessel is more akin in lighting requirements to those activities/places described in the less than 100 lux category versus those activities/places required to employ 150 lux or more. To counsel Koshman's opinion, this means that loading or unloading the contents of packages or containers is very similar to other categories of work to which 150 lux or more has been mandated and that, logically, it is reasonable to interpret that item 3(*c*) of Schedule II applies to the loading and unloading of containers and packages as opposed to the loading and unloading of containers and packages from vessels. Any other interpretation would result in a lighting standard under item 3(*c*) that would not be consistent with the lighting requirements in other parts of Schedule II.

[59] Counsel Koshman also declared that Schedule I and IV were clearly inapplicable to TSI-Vanterm container terminal's operations and nor is Schedule II when examined carefully. Accordingly, Schedule III of section 6.6 of the COHSR, which is aimed at areas of general application, and item 1 thereof, which applies to outdoors areas, is the logical Schedule to apply.

[60] For all the above reasons, counsel Koshman declared that item 1(*c*)(i) of Schedule III of section 6.6 of the COHSR is the minimum standard applicable at TSI-Vanterm container terminal.

Appellants' Rebuttal Arguments

[61] Counsel Jeff Conway replied to the respondent's and intervener's written submissions on behalf D. Dosen. I retain the following from his written rebuttal submissions.

[62] Counsel Conway declared that to argue for the application of item 1(*c*) of Schedule III, that being under the heading "Buildings Exteriors", while also arguing that there are no requirements as to where the "building" is located, would lead to an unreasonable result because the "exterior" of said building would then have an indefinite reach. Consequently, to decide which Schedule is appropriate implicitly requires a reasonable application of "building exterior".

[63] Counsel Conway conceded that a particular loading platform and a general area were evaluated to arrive at the *Maritimes Employers' Association and Syndicat des débardeurs du port de Montréal* decision, *supra*. However, those specific areas should not be considered as a determinant for all questions of appropriate lighting involving loading platforms and other areas. When the Regional Safety Officer held in his decision that, in examining a hypothetical situation where both item3(*c*) of Schedule II and items 1(*c*) and (*d*) of Schedule III are applied, the "less stringent requirement" should be used, this argument was contrary to the objectives of the *Code* and creates a precedent that the present Appeals Officer is not bound to follow.

[64] Counsel Conway agreed that when a plain and ordinary reading is given to the *Code*, docks and piers must come within the meaning of "loading platforms, storage rooms and warehouses". If the area in question is not a dock or a pier, then item 3(*c*) of Schedule II also refers to "other locations", which is evidence of the expansive scope of that item.

[65] In addition, counsel Conway stated that the *Cerescorp Inc. and Halterm Limited* decision, *supra*, is highly relevant to the issue of clarity, because it examined lighting requirements under the *Code* and, at paragraph 11, referred to levels of lighting on terminals that "were generally in compliance with s. 6.5 of the Regulations".

[66] In reply to the intervener's argument that "docks, piers and other locations" under item 3(*c*) of Schedule II must be strictly interpreted as being in relation to buildings, in part because, to counsel Koshman's opinion, all the item headings in Schedule II concern buildings and similar structures, counsel Conway stated that Schedule III references, among other headings, "buildings exteriors", "first aid rooms", "personal service rooms", "boiler rooms" and "lobbies and atria". Consequently, Schedule III would *a fortiori* be related to buildings. He added that it would be illogical that there be little scope in Schedules I through IV to cover lighting in areas that are not connected with buildings, which the legislature arguably did not intend, and, as such, counsel Conway considered that this interpretation is flawed.

[67] Counsel Conway also declared that the interpretation that the "docks, piers and other locations" mentioned in item 3(*c*) of Schedule II are plainly equivalent to the "loading platforms" mentioned under the item 3 heading violates the presumption against tautology, found in paragraph 159 of *R. Sullivan, Driedger on the Construction of Statutes*[8], where one presumes that the legislature avoids superfluous or meaningless words. Thus, to repeat the same concept ("loading platforms") referenced in the heading with different terms below it under item 3(*c*) would be superfluous. One must presume that the terms have different meanings.

Analysis and Decision

[68] The issue to be decided in this case is whether or not HSO Yemchuk's reference to section 6.6 of the COHSR, Schedule III, item 1(*c*)(i), in the first item of her direction was

[8] *R. Sullivan, Driedger on the Construction of Statutes*, 3rd ed.,Vancouver, Butterworths, 1994

incorrectly applied at the time of her investigation to the location where the fatality occurred.

[69] It must be noted that the location where the fatality occurred is the only area where the investigation was conducted and where HSO Yemchuk's tests were done. So my decision will only deal with that area because it is the one covered by HSO Yemchuk's direction.

[70] For deciding this matter, I have to consider the factual evidence in the case, the jurisprudence submitted as well as the relevant legislation.

[71] The evidence shows that the accident occurred in the exterior storage container yard of the TSI-Vanterm container terminal within the port of Vancouver, at an intersection of two passageways or lanes delimited in that yard for motorized container handling equipment traffic. The evidence also shows that, at the time, TSI allowed persons to use these lanes to walk to their work location or to the location of their handling equipment.

[72] The above mentioned area is obviously not an office area subject to section 6.4 of the COHSR, "Lighting – Office Areas", a task position where a visual display terminal (VDT) is used subject to section 6.7, "Lighting - VDT", an aerodrome apron or aircraft stand subject to section 6.8, "Lighting - Aerodrome Aprons and Aircraft Stands", an artefactual exhibit or archival material subject to section6.9, "Lighting – Artefactual Exhibits and Archival Materials". Therefore, the question is whether the area falls under section 6.5, "Lighting - Industrial Areas", and its Schedule II, or under section 6.6, "Lighting - General Areas", and its Schedule III.

[73] Because "industrial areas" are not defined in the *Code* or the COHS Regulations, I will refer to the dictionary meanings to define this term and determine if section 6.5 of the COHSR applies.

[74] *The Dictionary of Canadian Law*[9] defines "industrial undertaking" and "industrial occupancy" as follows:

> INDUSTRIAL UNDERTAKING. 1. Any establishment, work, or undertaking in or about any industry, business, trade, or occupation. 2. Includes (i) mines, quarries, and other works for the extraction of minerals from the earth, (ii) industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which minerals are transformed, including shipbuilding, and the generation, transformation, and transmission of electricity and motive power of any kind, (iii) construction, reconstruction, maintenance, repair, alteration or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gas work, waterwork, or work of construction, as well as the preparation for a laying the foundation of any such work or structure, and (iv) transport of passengers or goods by road or

[9] *The Dictionary of Canadian Law*, 3rd edition, Thomson-Carswell

> rail or inland waterways, including the handling of goods at docks, quays, wharves, and warehouses, but excluding transport by hand.
>
> INDUSTRIAL OCCUPANCY. Occupancy for assembling, fabricating, manufacturing, processing, repairing or storing of goods or materials or for producing, converting, processing or storing of energy, waste or natural resources. Ontario statutes.
>
> [my underline]

[75] Given these definitions, I conclude that, for the purposes of the application of section 6.5 of the COHSR, "Industrial Areas" include an exterior storage of goods or materials area where handling activities are performed.

[76] Moreover, given the same definitions, I conclude that an exterior storage yard where handling activities are performed is not a "general area" and, for this reason, does not fall under section 6.6 of the COHSR.

[77] The location where the accident occurred is evidently not a garage, as referred to in item 1 of Schedule II, section 6.5 of the COHSR, a laboratory, as referred to in item 2, a machine or woodworking shop, as referred to in item 4, a manufacturing and processing area, as referred to in item 5, or a service area as referred to in item 6. Therefore, the other question to decide in the present case is whether or not the location falls under item 3 of Schedule II, "LOADING PLATFORMS, STORAGE ROOMS AND WAREHOUSES".

[78] Because the terms "loading platforms" or "warehouses" are not defined in the *Code* or the COHS Regulations, I will refer to their dictionary meaning to determine if item 3 of Schedule II, section 6.5 of the COHSR, applies.

[79] *The Dictionary of Canadian Law, supra,* defines "loading space" and "warehouse" as follows:

> LOADING SPACE. A space (a) on the same lot with a building or contiguous to a group of buildings, (b) intended for the temporary parking of a commercial vehicle while loading or unloading merchandise or materials, and (c) that abuts upon a street, lane or other means of access. Canada Regulations.
>
> WAREHOUSE. *n.* 1. "… (M)ay be for the purpose of receiving goods on bailment where they would be to the order of the bailer, or a repository for storing large quantities of whole-sale goods or a building holding large quantities of goods or materials and being ancillary to some wholesale or retail business..." *Evans v. British Columbia Electric Railway* (1914), 7 W.W.R. 121 at 122 (B.C.S.C.), Schultz J. 2. Any place, whether house, shed, yard, dock, pond or other place in which goods imported may be lodged, kept and secured without payment of duty. 3. Land that is used as a repository, storehouse or shed for the storage of goods and includes any building or

> structure from which goods are distributed for sale off the premises, but does not include a building or structure, the primary purpose of which is the sale of goods to the public. *Commercial Concentration Tax Act*. R.S.O. 1990, c. C-16, s. 1 as am.
>
> [my underline]

[80] In addition, according to documents submitted by D. Dosen, the *Merriam-Webster's Ninth New Collegiate Dictionary*, *supra*, define the term "to load" as follows:

> To load – 1. a: to put a load in or on (truck);
> 1. b: to place in or on a means of conveyance (freight);
> 2. to put a load on or in a carrier, device, or container.

[81] Counsel Koshman also referred to the *Oxford Canadian Dictionary, supra*, in which "loading dock" is defined as follows:

> "loading dock"
> *Noun N. Amer*. A raised platform, e.g. at a warehouse etc., from which trucks or railway cars are loaded or unloaded.

[82] Given the above definitions, the location where the fatality occurred cannot, in my opinion, be considered to be a "loading platform", especially when the evidence shows, as mentioned previously, that the activities performed in the container storage yard of TSI-Vanterm container terminal are not container loading or unloading activities, but rather container handling activities.

[83] However, the definition of "warehouse" given above includes a land that is used as a repository for the storage of goods or any place, like a yard, in which goods may be lodged or kept. Based on this, I conclude that the term "warehouses" found under section 6.5, Schedule II, item 3, includes an exterior storage container yard like the one where the fatality occurred.

[84] Then the question arises as to under which area of section 6.5, Schedule II, item 3, does the location where the fatality occurred fall?

[85] Looking at the description of the areas under item 3 of Schedule II, I find that "other locations where packages or containers are loaded or unloaded" referred to in item 3(*c*) do not include the location where the fatality occurred, because the activities performed at this specific location relate to container handling, not container loading or unloading.

[86] In addition, I believe neither item 3(*a*), "Active areas in which packages are frequently checked and sorted", item 3(*b*), "Areas in which packages are infrequently checked and sorted", item 3(*d*), "Areas in which grain and granular material is loaded or unloaded in bulk", nor item 3(*f*), "Areas where goods in storage are of different kinds", apply to the location where the accident occurred because there were no packages, no grain and granular material or no goods of different kinds in storage. The fact is that only containers were stored in that area.

[87] For this reason and because this item specifically refers to areas where stored goods are all of one kind and in large quantities, I believe that the location where the accident occurred falls under item 3(*e*) of Schedule II, section 6.5 of the COHSR, being "Areas in which goods are stored in bulk or where goods in storage are all of one kind".

[88] Section 6.5, Schedule II, of Part VI of the COHSR reads as follows:

Lighting – Industrial Areas

6.5 The average level of lighting in an area set out in column I of an item of Schedule II, other then an area referred to in section 6.7 or 6.9, shall not be less than the level set out in column II of that item.

SCHEDULE II
(*Section 6.5*)

LEVELS OF LIGHTING IN INDUSTRIAL AREAS

	Column I	**Column II**
Item	**Area**	**Level in lx**
3.	**LOADING PLATFORMS, STORAGE ROOMS AND WAREHOUSE**	
	(a) Active areas in which packages are frequently checked and sorted……	250
	(b) Areas in which packages are infrequently checked and sorted……	75
	(c) Docks (indoor and outdoor), piers and other locations where packages or containers are loaded or unloaded ……	150
	(d) Areas in which grain and granular material is loaded or unloaded in bulk……	30
	(e) <u>Areas in which goods are stored in bulk orwhere goods in storage are all of one kind</u>……	30
	(f) Areas in which packages are of different kinds……	75
	(g) Any other area……	10

[my underline]

[89] Therefore, I conclude that HSO Yemchuk's reference to section 6.6 of the COHSR, Schedule III, item 1(*c*)(i), in the first item of her direction was incorrectly applied, at the time of her investigation, to the location where the fatality occurred. Section 6.5 of the COHSR, Schedule II, item 3(*e*), should have been the provision referred to instead.

[90] Consequently, as authorized by paragraph 146.1(1) of the *Canada Labour Code*, I am varying the first item of HSO Yemchuk's direction, as indicated in the appended new direction.

[91] I am also asking HSO Yemchuk or another health and safety officer to ensure that TSI complies with the new direction.

_____

Katia Néron
Appeals Officer

APPENDIX

IN THE MATTER OF THE *CANADA LABOUR CODE* PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER PARAGRAPHS 145(1)(*a*) and (*b*)

Following an appeal brought under section 146 of the *Canada Labour Code*, Part II, the undersigned Appeals Officer conducted an inquiry, pursuant to section 146.1, into the first item of the direction issued by health and safety officer Marlene Yemchuk, on January 6, 2006, following her investigation into the workplace fatality of a rubber tire gantry operator employed by TSI Terminal Systems Inc., an employer subject to the *Canada Labour Code*, Part II, at the TSI-Vanterm container terminal located at 1300 Stewart Street, Vancouver, British Columbia, V5L 4X5, a work place operated by the employer.

As a result of the Appeals Officer's inquiry based on the documents submitted by both parties, and intervener and health and safety officer Marlene Yemchuk, the undersigned Appeals Officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:

> Paragraph 125(1)(*n*) of the *Canada Labour Code*, Part II, and section 6.5 of the *Canada Occupational Health and Safety Regulations*, Schedule II, item 3(*e*):
>
> *In the exterior container storage area, the average levels of lighting measured at the main laneway intersection of East Roadway and Charlie Lane, at the beginning of Delta Lane, is under the minimum requirement of 30 lux.*

Therefore, the employer is HEREBY DIRECTED, pursuant to subsection 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than April 16, 2007.

The employer is also HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, to take steps no later than April 16, 2007 to ensure that the contravention does not continue or reoccur.

Furthermore, the employer is HEREBY DIRECTED, pursuant to subsection 145(5) of the *Canada Labour Code*, Part II, to post, without delay, a copy of this direction in a conspicuous location in the work place and to give a copy to the work place health and safety committee.

Issued in Ottawa, on April 5, 2007.

Katia Néron
Appeals Officer

To: TSI Terminal Systems Inc.
1300 Stewart Street
Vancouver, British Columbia
V5L 4X5

Summary of Appeals Officer Decision

Decision: CAO-07-012

Appellant: David Dosen and International Longshore and Warehouse Union, Local 500

Respondent: TSI Terminal Systems Inc.

Intervener: British Columbia Maritime Employers Association

Provisions: *Canada Labour Code*, 145(1), 125(1), 124, 146(1), 122.1,
Canadian Occupational Health and Safety Regulations, 6.6, 6.5, 6.4, 6.9,

Keywords:

Summary:

Following the investigation of an accident that resulted in the death of an operator of TSI rubber tire gantry, HSO Yemcheck issued a direction pursuant to subsection 145(1).

On January 4, 2006, the International Longshore Warehouse Union appealed the first item of the direction.

Further to her analysis, the Appeal Officer varied the first item of the HSO Yemcheck direction.