Decision No: 97-011

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:	Western Stevedoring Company Limited Seaboard International Terminals North Vancouver, British Columbia Represented by: Eric Skowronek Manager, Health and Safety British Columbia Maritime Employers Association
Respondent:	Mr. Al Lemonier Chairperson, Health and Safety Committee International Longshoremen's and Warehousemen's Union Vancouver, Local 500
Mis en cause:	Martin Davey Safety Officer Human Resources Development Canada
Before:	Doug Malanka Regional Safety Officer Human Resources Development Canada

On January 16, 1997, safety officer Martin Davey observed an employee working on top of lumber packages loaded on a rail car. The employee was unhooking chains and cables from the load without a fall-protection system. Pursuant to subsection 145.(2) he ordered that the work cease immediately until a safe procedure was instituted. Shortly thereafter, he returned to his office and issued a written direction to the employer pursuant to subsection 145.(1) of the Code. The employer requested a review of the direction made pursuant to 145.(1), and a hearing was held on May 22, 1997, in Vancouver, British Columbia to review that direction.

Background:

Safety officer Martin Davey testified that on January 16, 1997, he was at the workplace operated by Western Stevedoring Co., Ltd., inquiring into forklift operations when he observed an employee working atop a rail car. The employee was working without a fall-protection system at an unguarded height of approximately 12 feet. He affirmed that the employee was wearing strap-on cork material on his shoes to prevent slipping, but noted that it was windy, the ground was covered

with frost, and the load of lumber was covered with plastic. He was concerned that the plastic covering made it impossible to see any gaps in the load, and that the cables and chains used to secure the load presented a tripping hazard. As a result of the danger, he testified that he stopped the operation pursuant to subsection 145.(2) of the Code and orally directed that the work not be resumed until a safe procedure was instituted. Shortly thereafter, he returned to his office and issued a written direction to the employer pursuant to subsection 145.(1) of the Code. The written direction[1] ordered Mr. Peters to terminate the contravention of section 124 of the Code and to protect any person from the danger no later than January 16, 1997. He confirmed that the employer requested a review of the direction made pursuant to subsection 145.(1).

Safety officer Davey explained that he issued the direction pursuant to subsection 145.(1)[2], instead of subsection 145.(2)[3], because he wanted his direction to apply generally to the workplace and not just to the situation he had observed. He further explained that he cited the contravention under section 124 of the Code, instead of Part XII (Safety Materials, Equipment, Devices and Clothing Regulations)[4] of the Canada Occupational Safety and Health Regulations (COSHRs), on the recommendation of a departmental operations guideline. The guideline cited recommends that safety officers can use section 124 in respect of fall-protection systems and trucks because the

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1 The Direction reads:

The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II are being contravened:

1. s.124 of the Canada Labour Code, Part II - an employee was working from an unguarded surface approximately 4 meters above the ground without fall protection while unhooking chains/cables from the top of lumber packages on rail cars. The employee could trip or loose balance due to the uneven surface, the slippery surface, rail car movement or a gust of wind. This represents a fall hazard to the employee;

Therefore, you are Hereby Directed, pursuant to subsection 145.(1) of the Canada Labour Code, Part II to terminate the contraventions and protect any person from the danger no later than January 16, 1997.

Issued at Vancouver, this 16th day of January 1997.

2 Subsection 145.(1) reads as follows:

"Subsection 145. (1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally."

3 Subsection 145.(2) reads as follows:

"Subsection 145.(2) Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an emploee while at work;

(a) the safety officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer immediately or within such period of time as the safety officer specifies

(i) to take measures for guarding the source of danger, or

(ii) to protect any person from the danger: and …"

4 Paragraph 12.10(1)(a) of Part XII (SOR/86-304) of the COSHRs reads as follows:

"Paragraph 12.10(1)(a) Where a person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), works from

(a) an unguarded structure that is

(i) more than 2.4 m above the nearest permanent safe level, or…,

the employer shall provide a fall-protection system.

Courts[5] have decided that the term "structure" in section 12.10 of the COSHRs does not apply to mobile equipment such as trucks. Safety officer Davey deduced that the interpretation of the Courts would include rail cars.

Employer Position:

Mr. Skowronek submitted a document to the hearing that outlines the employer position concerning the direction in question. The document forms part of the file and will not be repeated here.

In his summary statement at the hearing, Mr. Skowronek told me that the issue in this case is the validity of the direction issued by the safety officer pursuant to section 145.(1) of the Code. He contended that the direction is unlawful because it circumvents the decision of the Courts that trucks and tractor trailers, and by extension rail cars, are exempted from paragraph 12.10(1)(a) of the COSHRs.

He also maintained that the direction is improper because it cites section 124 in respect of fall-protection systems when the matter is specifically dealt in section 125 and the COSHRs. He argued that employer obligations concerning occupational safety and health are intentionally structured in the Code under sections 124 and 125. According to Mr. Skowronek, section 124, is only a general catchall provision for anything that was not contemplated and prescribed in section 125 of the Code and the COSHRs when they were enacted. On the other hand, he said that section 125 is the principal enforcement tool for the Code because it specifies specific employer obligations and refers to the prescribed standards in the COSHRs which are all inclusive. He argued that, when the Courts ruled that paragraph 12.10 (1)(a) did not apply to mobile equipment, they exempted fall-protection systems in respect of mobile equipment from regulation.

In the instant case, he underscored that employers are required by paragraph 125 to comply with subsection 12.10 of the COSHRs that deals specifically with fall-protection systems. While Mr. Skowronek acknowledged that the Court decisions leave a void in the COSHRs, he suggested that allowing the safety officer to circumvent section 125 is contrary to the enforcement structure in the Code, and gives safety officers more discretionary power than was anticipated by Parliament when it enacted Part II of the Code. In addition, he argued that safety officer Davey's direction citing section 124 did not adequately specify what the employer must do to avoid the contravention.

Mr. Skowronek maintained that, by its actions, the Department has acknowledged that section 125, in conjunction with the COSHRs, is the principal enforcement tool for the Code and that section 12.10 is the proper standard in the instant case. He said that the Department has undertaken to address the decision of the Courts properly by amending Part XII of the COSHRs to address the void. He added however, that although work was started in October and November of 1996, no one has heard from the Department since then. He concluded that the matter must not be a priority for the Department.

5 Ontario Court (Provincial Division) - Her Majesty The Queen vs Transport Provost Inc as heard by His HonourJudge D.M. Stone, decision dated February 2, 1995, and, Ontario Court of Appeal Court file No. 8231-95, Her Majesty The Queen vs Transport Provost Inc. as heard by Justice J.H. Jenkins, decision dated March 18, 1996.

For all of the above reasons, he said that the direction should be rescinded as in the case of Regional Safety Officer decision number 96-008 - Transport Super Rapide Inc.

Employees Position:

Mr. Lemonier argued that the safety officer is empowered by subsection 145.(1) to issue a direction when any provision of Part II of the Code, is contravened. He said that section 124 does not undermine section 125 because section 124 is a general duty requirement and section 125 is a specific duty. He contended that, just because the Courts determined that the term "structure" in paragraph 12.10 does not apply to mobile equipment, this does not preclude safety officers from using other parts of the Code. He remarked that, If Parliament had meant that section 124 cannot be used in the incident case, then it has no value and would not have been included in the Code when it was enacted. In his view, safety officer Davey saw a danger and was correct in citing section 124 in his direction.

Decision:

The issue that I must decide is whether or not the safety officer erred when he issued his direction pursuant to section 145.(1) and directed the employer to terminate the contravention to section 124 of the Code. To answer this, I must address myself to the issues raised by the employer. That is, did safety officer Davey knowingly or otherwise, circumvent the decision of the Courts when he cited section 124 in respect of the contravention, did safety officer Davey's direction contain adequate instruction, and did safety officer Davey exceed his authority under the Code when he issued his direction pursuant to section 124 in respect of the contravention.

To decide the first question, whether the safety officer knowingly or otherwise, circumvented the decision of the Courts when he cited section 124 in respect of the contravention, I must look at the Court decisions cited. In his ruling, the Honourable Judge D.M. Stone (Ontario Court, Provincial Division, - Queen versus Transport Provost Inc.) found that the term "structure" in paragraph 12.10(1)(a) of the COSHRs (SOR/86-304) does not apply to trucks or tank trailers. His finding was confirmed, on appeal, by the Honourable Justice J.H. Jenkins (Ontario Court of Appeal - Queen versus Transport Provost Inc.).

While I would not disagree with Mr. Skowronek that the Court findings probably apply to rail cars (using the argumentation found in the rulings), I do not agree with his interpretation that the effect of the rulings is to exempt trucks, trailers and rail cars from paragraph 12.10(1)(a), or any other part of the Code or COSHRs. In fact, section 125 specifically states that it does not restrict the application of section 124. In my view, the Courts only ruled that paragraph 12.10(1)(a) does not apply to trucks or tank trailer, and by extension rail cars. Thus, I would agree with Mr. Lemonier's argument that the safety officer is empowered by subsection 145.(1) to issue a direction when any provision of Part II of the Code, is contravened and that includes section 124. Therefore it is my decision that the safety officer did not circumvent the decision of the Courts when he cited section 124 in respect of the contravention.

When I read section 124 in the context of section 122.1[6] and section 125 [7], I see that the obligation on employers to protect employees is to be interpreted broadly. Section 122.1 confirms that the purpose of the legislation is to prevent accidents and injury to health of employees. This is a declaratory provision in Part II of the Code through which all other provisions must be interpreted and applied. Section 124 obliges employers to ensure that the safety and health of every person employed by the employer is protected. That is, the employer must take whatever action to protect the safety and health of employees that a reasonable person having knowledge of the legislation and the workplace and workplace hazards would deem necessary to ensure that the safety and health of every person employed by the employer is protected. The word "ensure", used therein, is defined in the New Shorter Oxford Dictionary (1993) to mean "warrant" or "guarantee", words that establish that the obligation is serious.

In terms of section 125, this section clarifies that, notwithstanding the specificity of the COSHRs, nothing therein limits the application of section 124. This again shows the importance that Parliament assigned to section 124.

In my view, but not limited to the examples, section 124 obliges every employer to ensure that the environment, administration, procedures, materials and tools are designed, established, used, monitored and maintained in a manner that ensures that the health and safety of persons granted access to the workplace is protected. Section 125 provides definition and specification to this requirement to the extent that Parliament was able to anticipate the hazards in the workplace and to the extent it was able to prescribe comprehensive standards. In such cases section 125 applies, but again, the legislation is clear that nothing in section 125 limits the generality of section 124.

While this interpretation would encompass Mr. Skowronek's interpretation that section 124 acts as a catchall for something not specifically addressed in the Code, its application goes beyond his limited interpretation. That is not to say that the obligation on employers in section 124 is absolute with no means of defence, or that section 124 can be used frivolously by safety officers. Specifically, paragraph 148.(6)(e) of the Code states that it is a defence in respect of any alleged violation of section 124 for the person to prove that he or she exercised due care and diligence to ensure the safety and health at work of every person employed by the employer is protected. Therefore, in respect of section 124, the exercise of due care and diligence is the compliance standard that employers must meet as opposed to the specific prescriptions found in the COSHRs for violations under section 125.

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6 Subsection 122.1 reads:

> `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`:

7 Section 125 reads:

> "Section 125. Without restricting the generality of section 124, every employer shall, in respect of every workplace controlled by the employer…"
> (underlined for emphasis)

Given the void in paragraph 12.10(1)(a) concerning mobile equipment, and Mr. Skowronek's confirmation that the employer had not undertaken any fall-protection system measures to protect employees prior to the safety officer's intervention, I am satisfied that it was appropriate for the safety officer to cite section 124 in respect of the contravention and that the level of detail in safety officer Davey's direction is adequate.

I will not comment on Mr. Skowronek's charge that, in light of the lack of recent progress related to modifying Part XII, fall-protection systems concerning mobile equipment must not be a priority for the Department. However, I do not accept his premise that this delay should restrict the enforcement activities of safety officers in the field.

To decide on the third issue, did the safety officer exceed the discretionary power given to him under the Code when he issued his direction, I must look specifically at the wording in section 124 in relationship to other parts of the Code such as section 122.1, subsections 129.(2)[8], 135.(4)[9], 137[10], and 145.(1)[11] (2)[12]. Looking at these sections, it is clear that safety officers are not only

8 Section 129.(2) reads:

> 129.(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not
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> (*a*) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or
>
> (*b*) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),
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> and he shall forthwith notify the employer and the employee of his decision.
>
> (underlined for emphasis)

9 Subsection 135.(4) reads:

> 135(4) Where, pursuant to a collective agreement or any other agreement between an employer and his employees, a committee of persons has been appointed in respect of a work place controlled by an employer and the committee has, in the opinion of a safety officer, a responsibility for matters relating to safety and health in the work place to such an extent that a safety and health committee established under subsection (1) for that work place would not be necessary,
>
> (*a*) the safety officer may, by order, exempt the employer from the requirements of subsection (1) in respect of that work place;…
>
> (underlined for emphasis)

10 Section 137 reads:

> 137. Notwithstanding sections 135 and 136, where an employer controls more than one work place referred to in section 135 or 136 or the size or nature of the operations of the employer or the work place precludes the effective functioning of a single safety and health committee or safety and health representative, as the case may be, for those work places, the employer shall, subject to the approval of or in accordance with the direction of a safety officer, establish or appoint in accordance with section 135 or 136, as the case may require, a safety and health committee or safety and health representative for such of those work places as are specified in the approval or direction.
>
> (underlined for emphasis)

11 Subsection 145.(1) reads:

> 145. (1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally.
>
> (underlined for emphasis)

authorized to use discretion in their decisions, but in the case of subsections129.(2), 145.(1) and (2) of the Code, they are required by law to exercise that discretion when needed. Therefore, it is my finding that safety officer Davey did not exceed his discretion or authority in the Code when he issued his direction.

Finally, I feel compelled to comment on safety officer Davey's testimony at the hearing that, as a result of the danger, he stopped the operation pursuant to subsection 145.(2) of the Code and orally directed that the work not be resumed until a safe procedure was instituted. While the direction made pursuant to subsection 145.(2) was not the subject of my review, nor was it argued by the parties, it is unclear to me how the safety officer directed the work stoppage pursuant to subsection 145.(2) without a written direction. Subsection 145.(2) specifically requires that the direction be in writing. In such cases deviations are not supported in law and could lead to questions of correctness and fairness.

Regarding the direction in question, safety officer Davey testified that he issued his written direction pursuant to subsection 145(1) because he wanted to ensure that measures would be taken generally to protect employees relative to fall-arrest protection and not just to the site he observed. While this rationale was not argued by the parties, and I am not certain that I would agree with the limitation on subsection 145.(2) interpreted by the safety officer, I am nonetheless satisfied that he acted within his authority when he issued his direction pursuant to subsection 145.(1).

Therefore, it is my decision that safety officer is authorised to issue the direction he issued, that the direction contained adequate detail and that it did not circumvent the decision of the Courts in respect of paragraph 12.10.(1)(a).

Notwithstanding this, there is a technical error in safety officer Davey's direction that I must correct. In his January 16, 1997,direction made pursuant to subsection 145.(1), he directed the employer to terminate the contravention and to protect any person from the danger no later than January 16, 1997. Because the direction applies generally, and is not directed to the specific situation of danger initially observed by safety officer Davey, the reference to danger in the direction must be deleted.

For certainty, it is necessary to clarify that, where a safety officer is of the opinion that any provision of the Part is being contravened and that violation constitutes a danger, the safety officer must issue a written direction pursuant to subsection 145.(2) and not 145.(1). If, however, the safety officer is of the opinion that a provision of the Part is being contravened and it does not constitute a danger, the oral or written direction should be made pursuant to subsection 145.(1) and the direction should not refer to the contravention as a danger.

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12 Subsection 145.(2) reads:

> 145.(2**)** Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an employee while at work,
>
> (*a*) the safety officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer immediately or within such period of time as the safety officer specifies
>
> (i) to take measures for guarding the source of danger, or
>
> (ii) to protect any person from the danger; and…

(underlined for emphasis)

For the aforementioned reasons, I **Hereby Vary** the direction by removing the reference to the danger.

The revised direction now reads:

> The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II are being contravened:
>
> s.124 of the Canada Labour Code, Part II
>
> employees working from an unguarded surface approximately 4 meters above the ground without fall-protection systems while unhooking chains/cables from the top of lumber packages on rail cars could trip or loose balance due to the uneven surface, the slippery surface, rail car movement or a gust of wind. This represents a fall hazard to employees.
>
> Therefore you are HEREBY DIRECTED, pursuant to subsection 145.(1) of the Canada Labour Code, Part II to terminate the contravention no later than January 16, 1997.

Decision rendered August 27, 1997.

Doug Malanka
Regional Safety Officer

Decision: 97-011

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Western Stevedoring Company Ltd.
Represented by: Eric Skowronek, Manager, Health and Safety, British Columbia Maritime Employers Association

Respondent: International Longshoreman's and Warehouseman's Union, Vancouver Local 500, Represented by: Al Lemonier, Chairperson, Health and Safety Committee

KEY WORDS

Fall-arrest systems, general duty clause, mobile equipment, rail cars, discretionary powers, stevedoring and longshoring activities, off-loading.

PROVISIONS

Code: 122.1, 124,125,129.(2), 135.(4), 137, 144.(5), 145.(1) & (2), 148.(6).
Canada Occupational Safety and Health Regulations: 12.10.(1)(a)

SUMMARY

On January 16, 1997, safety officer Martin Davey observed an employee working on top of lumber packages loaded on a rail car. The employee was unhooking chains and cables from the load without a fall protection system. He ordered pursuant to subsection 145.(2) that the work cease immediately until a safe procedure was instituted. Shortly thereafter, he returned to his office and issued a written direction to the employer pursuant to subsection 145.(1) of the Code. The employer requested an review of the direction issued pursuant to subsection 145.(1) and a hearing was held on May 22, 1997, in Vancouver, British Columbia to review that direction.

The employer appealed the direction because it circumvents an earlier decision of the Courts relative to mobile equipment and fall-protection systems, because safety officer Davey's direction did not contain adequate instruction, and because safety officer Davey exceeded his authority under the Code when he issued his direction pursuant to section 124 instead.

Upon review, the Regional Safety Officer decided that the safety officer was authorised to issue the direction he issued, that the direction contained adequate detail and that it did not circumvent the decision of the Courts in respect of paragraph 12.10.(1)(a). However, he varied the direction pursuant to subsection 145.(1) because it referred to the specific danger observed by the safety officer. Reference to danger was deleted from the direction.