

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant: Mr. Don L. White  
Senior Vice-President  
Kleysen Transport Ltd.  
Winnipeg, Manitoba

Mis-en-cause: Dennis Schultz  
Safety Officer  
Human Resources Development Canada

Before: Serge Cadieux  
Regional Safety Officer  
Human Resources Development Canada

This case proceeded by way of written submissions. Mr. White advised the Office of the Regional Safety Officer that the written submissions he made along with the request for review of the direction under appeal were to be considered the final submissions of the company.

**Background**

A Hazardous Occurrence Investigation Report (HOIR) was received on July 20, 1998 in the Winnipeg office of the Labour Program of Human Resources Development Canada. The HOIR described an accident that had occurred on June 7, 1998 to Mr. Allen Cooper, an employee of Kleysen Transport Ltd.. The description reported on the HOIR stipulates that Mr. Cooper “was on top of the tanker and slipped on some grit that was on top of the truck. He fell to the ground hitting his head and back.” The report prompted the safety officer to inquire into the circumstances of the accident.

The safety officer interviewed Mr. Cooper on August 4, 1998. The safety officer’s narrative report describes the content of the interview as follows:

Mr. Cooper reported he had pulled over to the gravel shoulder, for personal reasons, and during this stop he had ascended the bulk trailer access ladder to gain access to the top of the bulk trailer, to ensure, as a precautionary measure, all the hatches on the top of the bulk trailer were properly closed and securely latched. This required his walking on the top of the bulk trailer. There was no fall-protection available or used while on top of the bulk trailer. While preparing to descend the ladder his foot slipped on some “grit” that was on the bulk trailer “step” plate, and he then fell

to the ground, injuring himself. Mr. Cooper further stated, to the best of his knowledge, the accident was not witnessed.

On the same day, the safety officer inspected the trailer involved in the accident in the presence of Mr. Mackan, Manager Eastern Region, Bulk Division, Kleysen Transport Ltd.. The said trailer had been modified as part of the employer's initiative to install fall-protection systems on its fleet. Mr. Mackan advised the safety officer "that various fall-arrest systems were being evaluated and the process was evolving." It appears Mr. Mackan advised the safety officer that he had met with other trucking companies to review systems that were currently in place, with the objective being to find a suitable system.

On August 26, 1998, the safety officer met with several representatives of the company at which time a verbal direction for danger was given to Mr. Mackan. The safety officer advised the parties that a written direction (see ANNEX A) would follow the next day i.e. August 27, 1998. On that day, Ms. Krystyna Bielunska-Perikowski, Director, Compliance, Occupational Safety & Health for the company presented the safety officer with a copy of the employer's draft procedures for personal issue of personal protective equipment and fall-arrest procedures for his comments.

### **Employer's submissions**

Mr. Don L. White wrote on behalf of the company requesting a review of the direction. Mr. White requested that consideration be given to the following three concerns:

1. Fall Protection regulations etc. are presently being addressed by Government, Canadian Trucking Alliance and the carriers involved. This Direction was based on paragraph 145(2)(a) which we understand to be very general in nature - "protect any person from danger immediately". Fall Protection criteria was not referenced.
2. We had a meeting with the Safety Officer prior to receiving the Direction at which time we explained Kleysen Transport Ltd. had concluded policies and procedures with respect to Fall Arrest - Bulk Division and had ordered the safety equipment etc.

No consideration was given to our initiatives.

3. This Direction would have caused us to shutdown our Bulk Operation consisting of 110 drivers, 95 trucks and our customers severely impacted. Most other carriers appear to be behind us with respect to fall protection.

No consideration given. We were very fortunate to have progressed with our initiatives to a point where we were able to continue to service our customers.

In closing, Mr. White stated "This is not dealing with industry in a cooperative manner and we request that this Direction be removed from our record."

## Decision

In my opinion, there is no basis for my varying or rescinding the direction under review in the instant case. The company has not disputed the safety officer's findings of danger and has not argued that the safety officer erred either in law or on the facts in making the direction. There is no challenge to the validity of the direction other than a noted absence to a reference to any fall-protection criteria although some clarification may be in order. It would appear that the company's main grievance is that the investigating safety officer's direction did not consider the efforts made by the company to protect its employees at work and to comply with the legislation. The employer believes it is being aggrieved by the direction and unless I address its concerns, the problem will remain. For the benefit of clarity, I will address these concerns in the following order: CONCERN # 2, CONCERN #1 and CONCERN #3.

### CONCERN #2: Policies and procedures developed prior to issuance of direction

The direction issued by the safety officer is issued under the authority of paragraph 145(2)(a) of the Canada Labour Code, Part II (hereafter the Code). This provision stipulates:

(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  
(emphasis added)

The law is clear: the safety officer "shall...issue directions...to the employer... immediately or within such period of time as the safety officer specifies... That is, from the moment a safety officer forms the opinion that a condition exists in a workplace that constitutes a danger to an employee at work, he/she is obliged to issue a direction for danger to the employer to protect employees. Viewed from the perspective of the Code, the safety officer is strictly applying the law.

When the safety officer met with employer representatives on August 26, 1998, he had already investigated the accident to Mr. Cooper. He had made arrangements on August 25 with Ms. Susan Snyder, Compliance Supervisor, Kleysen Transport Ltd., to meet with Mr. Mackan on August 26, 1998. He informed Ms. Snyder that the purpose of the meeting was to give a verbal direction for danger to the employer regarding the protection of employees. The meeting of August 26 and its stated purpose were confirmed on August 25 by Mr. Mackan. At the August 26 meeting, the safety officer advised the parties that a written direction would follow the next day. It is only at the meeting of August 27 that Ms. Krystyna Bielunska-Perikowski presented the safety officer with a copy of the employer's draft procedures for personal issue of personal protective equipment and fall-arrest procedures for his comments. However, at that point, the safety officer was bound by

law to issue the written direction notwithstanding that policies and procedures were being developed to address the problem. As it turns out, it would have been preferable if the safety officer had given Mr. Mackan a written direction immediately following his finding that danger exists. But since this did not happen, the employer was required to comply with the verbal direction in accordance with paragraph 125(w) of the Code and the safety officer had to follow-up to the verbal direction with a written direction as required by paragraph 145(2)(a) of the Code.

CONCERN #1: Absence of a reference to fall-protection criteria

The safety officer described the danger as follows:

*Employees are required to work on top of bulk trainers at a height greater than 2.4 meters above the nearest permanent safe level which represents a risk of falling and injure (sic) themselves.*

The safety officer identified the problem to be resolved but did not specify the means to achieve this. Hence the safety officer did not specify or refer to any fall-protection criteria which could have been considered useful by the employer to assist it in complying with the law. The absence of such a reference does not, in my opinion, disadvantage the employer. On the contrary, it is to its advantage because it allows the employer to consider a full range of corrective measures without being limited to a specific set of fall-protection criteria. This is particularly true since the company argued that “Fall Protection regulations etc. are presently being addressed by Government, Canadian Trucking Alliance and the carriers involved.” In my opinion, the safety officer was well aware that such discussions were taking place and opted not to interfere with these discussions by imposing his view as to the proper fall-protection criteria that should apply.

While there may be provisions in the Canada Occupational Safety and Health Regulations (the Regulations) that address fall-protection criteria, those criteria would constitute minimum fall-protection criteria and therefore would require the employer to use judgment in choosing the proper fall-protection equipment. In the end, the employer could easily exceed the requirement of the Regulations to eliminate the danger. Also, the safety officer need not mention a specific provision to make a finding of danger. As stated by the Honorable Judge A.M. Linden in *Alberta Wheat Pool vs. Grain Workers’ Union, Local 333*, Decision A-998-91, at page 3:

It was finally argued that the finding of danger was in error. If not based on violations of the Code, counsel says, it is a finding that is perverse and capricious. We do not agree. To find that a danger exists does not require proof of a violation of the Code; a danger can exist without the Code violations mentioned by the safety officer in her direction.

I am satisfied that the safety officer acted properly in the instant case and will not dwell further on this issue.

CONCERN #3: Disregard for economic impact on the employer’s business

I note in reading paragraph 145(2)(a) of the Code that the safety officer had discretion to require compliance with the direction “immediately or within such period of time as the safety officer

specifies". He chose to require compliance immediately. I have no evidence before me indicating that the safety officer should have allowed more time to comply with the direction and for this reason, I can only presume he felt it was necessary to proceed urgently given that an accident had already occurred.

The Regional Safety Officer has the power, under subsection 146(3) of the Code, to vary the direction, when warranted, and extend time limits. Evidence would have to be submitted to support the contention that more time is needed to comply with the direction. However, my reading of Mr. White's written submission is that the company would prefer to have the direction removed from their record. It is not within my powers to grant the employer an unsubstantiated request.

For all the above reasons, **I HEREBY CONFIRM** the direction issued under paragraph 145(2)(a) of the Code on August 27, 1998 by safety officer Dennis Schultz.

Decision rendered on October 22, 1998

Serge Cadieux  
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On August 4<sup>th</sup>, 1998, the undersigned safety officer conducted an inquiry in the work place operated by KLEYSEN TRANSPORT LTD., being an employer subject to the Canada Labour Code, Part II, at 2100 MCGILLIVRAY BLVD., WINNIPEG, MANITOBA.

The said safety officer considers that a condition exists that constitutes a danger to an employee while at work:

*Employees are required to work on top of bulk trailers at a height greater than 2.4 meters above the nearest permanent safe level which represents a risk of falling and injury(sic) themselves.*

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

Issued at Winnipeg, this 27<sup>h</sup> day of August 1998.

Dennis Schultz  
Safety Officer, # 2966

TO: KLEYSEN TRANSPORT LTD.  
KLEYSEN TRANSPORT LTD./TERMINAL  
2100 MCGILLIVRAY BLVD.  
WINNIPEG, MANITOBA  
R3T 3N5

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Kleysen Transport Ltd.

**KEYWORDS**

Bulk trailer, fall-protection, danger, issuance of directions, verbal direction, written direction, discretion to issue direction, fall-protection criteria, danger does not require proof of a violation of the Code, vary time limit.

**PROVISIONS**

Code: 125(w), 145(2)(a), 146(3)

Regulations: n/a

**SUMMARY**

A safety officer gave a direction to the above company following receipt of a Hazardous Occurrence Investigation Report (HOIR). The HOIR indicated that an employee fell to the ground as he climbed to the top of a tanker trailer and injured himself. This prompted the safety officer to carry out an investigation into the accident. The direction was given for danger because the employer required employees to climb on the top of trailers above 2.4 m without fall-protection equipment. The company appealed the direction on grounds that did not raise issues of law or facts. The RSO found that the company's grievance was in reality a displeasure with being given a direction. Although the RSO addressed the company's concerns, he **CONFIRMED** the direction.