

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: International Longshoremen's Association, Local 269
Halifax, Nova Scotia
Represented by: Ronald A. Pink and Ms. Gail Gatchalian

Respondent: Cerescorp Inc.
Halifax, Nova Scotia
Represented by: C. Whidden and Steve Belding

Mis-en-cause: Matthew Tingley
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

A hearing was held on October 20, 1999, in Halifax, Nova Scotia.

Background

On February 28, 1999 an accident relating to longshoring work occurred at the Fairview Cove Container Terminal at the Port of Halifax. An employee of Cerescorp Inc., Mr. Kevin Nolan, was seriously injured when the left back wheel of a trailer (referred to as a chassis) attached to a yard tractor operated by Mr. Paul O'Malley rolled over his right leg. The back wheel of the chassis, which was facing the waterfront at that moment, moved slowly over his toe, forced him to the ground and stripped his right leg causing multiple injuries.

Safety officer Matthew Tingley, accompanied by safety officer Ron Thibault, investigated the accident. Mr. Tingley obtained from Constable Blain Lane of the Halifax Regional Police a written statement given by Mr. Kevin Piper, a longshoreman and only witness to the accident, which statement was obtained almost immediately following the accident. The safety officer obtained Mr. O'Malley's statement on March 1, 1999 in the presence of his union representative. Mr. Nolan's statement was obtained on March 12, 1999 also in the presence of his union representative.

The statement of Mr. O'Malley explains that while waiting for the cranes to come into operation i.e. to position themselves to unload a ship, Messrs. O'Malley, Nolan and Piper walked towards the rear end of the chassis and had a conversation near the left wheel for approximately 5 to 10 minutes. At some point in the conversation, Mr. O'Malley said to his two colleagues "Have a nice day" and walked towards the tractor. Mr. O'Malley asserted that as he walked towards his tractor, his two colleagues walked away from the chassis. He mounted his tractor which was left running in neutral with the brakes on. The tractor has glass windows on both sides, a windshield and a back door which is also made of glass. He entered into the cabin of the tractor through the back door. He placed his foot on the brake pedal, released the emergency brakes, looked into his right mirror to check for oncoming chassis and at the same time moved forward slowly with his foot still on the brakes. He heard someone hollering and as he looked out his back door, he says he saw Mr. Kevin Piper running towards the end of the chassis. He then realized that Mr. Nolan had been run over by the back wheel of the chassis. He stopped his machine and backed it up. Emergency measures were taken at that point to assist Mr. Nolan.

The safety officer noted that the statement of Mr. Piper, which was obtained by a police officer almost immediately following the accident, differs somewhat from that of Mr. O'Malley. Mr. Piper stated that as the crane boomed down and that Mr. O'Malley entered his tractor, "...K. Nolan and myself were standing by the rear of the machine. Paul put the machine into gear and began to pull away and I heard K. Nolan scream..."

Mr. Nolan's statement to the safety officer confirms that all three employees had a conversation at the back wheels of the chassis. He also confirms that Mr. O'Malley left the group in a manner similar to that stated by Mr. O'Malley. However, he added that "...I had my back to him so didn't see where he was going.. Me and Kevin (Piper) were standing there for a minute. The next thing I knew I feel a tug on my toe and I'm sucked under the wheel."

The safety officer submitted a written statement at the hearing in which he describes his finding of facts. They are:

- Mr. Piper, in his statement does not indicate that he or Mr. Nolan left the immediate area of the trailer. He made no reference to running over to Mr. Nolan and spoke of the tractor backing up six feet. When I contacted Mr. Piper, he felt that his statement to Constable Lane was adequate and that he couldn't tell me anything else. We were unable to arrange a mutually satisfactory time to obtain an additional statement prior to the issuance of the direction to Mr. O'Malley.
- Mr. Nolan, in discussion at the hospital and in his statement almost two weeks later, indicated that Mr. O'Malley said "see ya later" and walked away, but did not warn Mr. Nolan or Mr. Piper to move. Mr. Nolan did not indicate that he left the area of the trailer wheels. Mr. Nolan was run over by the trailer wheels.
- Mr. O'Malley was aware of employees being in close proximity to his trailer.
- He did not instruct them to stand clear.
- He did not ever throughout providing his statement or in the meeting of March 22, 1999 indicate that he checked for anything other than vehicle traffic to his right.
- He was a fully trained, experienced operator (Commercial Safety College).
- The accident occurred on a morning when the weather was clear.
- Mr. Nolan was wearing a reflective vest and personal protective equipment.

- An almost identical accident occurred in the Port of Halifax in 1998 at night. The pedestrian worker was killed. Despite several improvements in circumstances a similar event has occurred.
- Almost all literature regarding safe operating procedures for moving machinery emphasizes driver responsibility to be aware of all pedestrians/co-workers.

On the basis of this information, safety officer Tingley issued a direction (ANNEX) under subsection 145(1) of the Canada Labour Code, Part II (the Code) to Mr. O'Malley for failing to visually inspect the surrounding area of his vehicle for pedestrians as is required by paragraph 126(1)(c) of the Code. Mr. O'Malley appealed the direction in a timely fashion.

Testimonies

Ms. Gail Gatchalian had all three employees involved in the incident as well as Mr. Gerry Vigneault, employee safety and health representative for Cerescorp, testify regarding the circumstances of the accident. Their detailed testimonies are on file and will not be repeated here. I retain the following facts from these testimonies.

Mr. O'Malley testified that he received training on yard and ship tractors as well as on front end loaders. He explained that during his training, emphasis was placed on the use of mirrors to move forward or backwards. This is because normally a container would be positioned on the chassis and it would be useless to look through the back door since the view is completely blocked behind the driver by the container. He also emphasized the importance of using mirrors particularly when backing onto a ship or under a gantry crane to position the trailer. As for carrying a walk around inspection of the equipment, Mr. O'Malley explained that such an inspection is only carried out the first time he uses the equipment however, he added he was not trained to do a walk around every time he stops and dismounts the tractor. He reconfirmed the facts of the statement he gave to the safety officer particularly to the effect that both men were walking away from the chassis when he left them.

When asked by Ms. Gatchalian to think about what had happened, Mr. O'Malley speculated that Mr. Nolan had probably returned precipitately to the chassis to retrieve a piece of equipment that had been left on it. He had probably forgot about the piece of equipment and as he was walking away, he probably remembered he had left it there and quickly returned to retrieve it. He said that as he looked into his left mirror he saw no one. The event occurred in a matter of a split second all of which was out of his control. Mr. O'Malley felt he did everything that was necessary in the circumstances.

Mr. Vigneault, who also testified in this case, stated that a walk around inspection is carried out prior to putting the machine to work. A proper walk around would take the operator approximately 5 to 10 minutes. He opined that when Mr. O'Malley walked back to the tractor, he was taking a visual look at the machine and its surroundings. There was no one around so obviously, someone came back into the scene of the accident. Mr. Vigneault explained that the safety and health committee met on March 5, 1999 and reviewed the statements given by Mr. O'Malley, Mr. Kevin Piper and Mr. Kevin Nolan. According to Mr. Vigneault the committee concluded that the direct cause of the hazardous occurrence was "Mans (sic) inattention to moving

chassis”. After confirming to Ms. Gatchalian that he reviewed all three statements, the safety officer pointed out that the statement given by Mr. Kevin Nolan had only been received on March 12, 1999. Therefore, it was impossible for him to have seen and reviewed that document at the March 5, 1999 meeting.

Mr. Piper testified that all three employees had a conversation near the tires of the chassis. At some point during the conversation, the boom of the crane started to proceed down which, he said, is an indication that it is time to go to work. He stated that Mr. O’Malley directed himself towards the yard tractor. He and Kevin Nolan moved away at the same time from the tires and headed towards the ship. He stated that when Kevin Nolan hollered, *“I was past the back of the trailer”*.

He explained that a wrench which is needed for containers and which had been given to him by the lashing foreman ended up on the beam of the chassis. No one had the wrench as they walked away, which could explain Mr. Nolan’s presence at the chassis. He then heard Kevin Nolan holler and returned to help him. He gave a statement to the police within 30 minutes of the accident. Mr. Piper asserts that although it is not stated in his statement to the police, he *“did walk away”*. He added in closing that Mr. O’Malley is a good operator and that he believed that *“Paul looked in both of his mirrors”*.

Mr. Kevin Nolan testified that a conversation took place amongst the three employees around the back wheels area of the trailer. When the crane became operational, Mr. O’Malley said he was *“going to turn to now”* which meant he was going to do his job and the employees dispersed themselves as Kevin Piper said they did. He remembers that he and Kevin Piper were walking towards the ship but his memory fails him from that point on. He said he did however vaguely remember reaching over onto the chassis for something and that is when he felt something on his foot. He then described the accident in detail and the thoughts he had at that moment. He remembers that Kevin Piper was getting smaller as he (Piper) was going away from him (Nolan). When Ms. Gatchalian added, in an attempt to clarify what Mr. Nolan had just said, *“he’s walking away from you”* Mr. Nolan quickly replied *“No, no. He’s not walking away, I am being pulled away from him”*. In closing, Mr. Nolan praised Mr. O’Malley’s professionalism and stated he believed Mr. O’Malley’s acted in a safe manner in the circumstances.

Submission for the Employer

Mr. Steve Belding stated that the he would be taking no position and making no submission in this case. Mr. Belding was attending the hearing strictly as an observer.

Submission for the Employee

Ms. Gatchalian’s submission is predicated on the fact that the two employees, Mr. Piper and Mr. Nolan, walked away from the chassis when Mr. O’Malley left them to return to work. Therefore, on this basis, Mr. O’Malley had every reason to believe that the area of the tractor was free of pedestrians. The following excerpt from Ms. Gatchalian’s final arguments represents her position in this case. She said:

“Mr. O’Malley’s training is to the effect that he is to use his mirrors to ascertain that the area is safe however he is not required to conduct a walk around inspection every time he

stops his tractor. Nonetheless, Mr. O'Malley did conduct a visual check of the chassis when he had a conversation at the back of the chassis and as he walked towards his tractor. Since there were no container on the chassis and since he looked into both mirrors, he was able to see the full length of both sides of the chassis to see if any pedestrians were around other than Mr. Nolan and Piper. Mr. O'Malley took all precautions necessary in the circumstances.

In our submission the evidence that we heard today makes it clear that Mr. O'Mally did take all reasonable and necessary precautions to ensure the safety of the other employees in the area of his chassis. First of all we heard that there was no container on the chassis and that Mr. O'Mally and Mr. Nolan and Piper were having a conversation at the back left hand wheel of the chassis and that the chassis only comes up to above waist height on Mr. O'Mally. So he was able to see the full length of both sides of the chassis to see if any pedestrians were around other than Mr. Nolan and Piper.

We also heard that both Mr. Nolan and Piper walked away from the chassis as Mr. O'Malley ended the conversation and returned to his yard tractor. So he had every reason to believe that the area of the chassis was free of pedestrians when he got into his cab. Also we heard that Mr. O'Malley, as he was thought to do and as the training and the practice at Cerescorp, relied on his mirrors to determine whether or not there was anything or anybody in the area of his chassis before he moved the yard tractor forward. We heard that he looked through the left hand mirror, didn't see anybody and then looked through the right window and back to the side of the chassis and didn't see anyone or any vehicles to the right. It is our submissions that in light of those circumstances, especially the fact that Mr. Piper and Mr. Nolan were walking away from the chassis and going to their work area that Mr. O'Mally took all reasonable and necessary steps to make sure that there were no pedestrians in the area of his chassis when he began to pull away.

We heard that the training of yard tractor operators is to do a walk around as a pre-inspection procedure at the beginning of one's shift when one is first getting into the yard tractor and moving it. But it is not the procedure or the training for yard tractor operators to do a walk around every time they stop the yard tractor during the course of the day. On this occasion, Mr. O'Mally happened to be in a conversation at the back of the chassis with the other two gentlemen and in effect did a visual inspection of the area around the chassis. But this is not required by the training that yard tractor operators receive.

Furthermore we heard that the training and the practices at Cerescorp for yard tractor operators and ships tractor operators is to rely on the right hand and left hand mirrors of the yard tractor when operating the yard tractor and not to rely on the back window. This is because we heard that often containers would be on the chassis and working through the back window would be of no use. So yard tractor and ship tractor operators have to learn to rely on their mirrors which is what Mr. O'Mally did in this case.

In our submission, it would be impractical and impossible for a yard tractor operator to continually keep his eyes on both sides of the chassis while pulling away and that even looking from one mirror to the other and then proceeding to move away someone could

come quickly within the vicinity of the wheels of the chassis and get caught underneath the wheels which is what must of happened in this case although Mr. Piper had his back to Mr. Nolan and can't therefore say for sure exactly. Mr. Nolan returned to the chassis and as we heard Mr. Nolan's recollection is foggy about how he ended up back at the chassis after walking away. But he must have returned quite quickly to the back of the chassis because it was only a matter of perhaps a minute between the time that Mr. O'Mally left the back of the chassis and got into his cab and then a few seconds between the time he looked in his left hand mirror and started to move slowly forward. So within a couple of seconds Mr. Nolan must have returned to that area.

We also heard that back in 1988 there was a fatal accident involving a worker at the Halterm Container Terminal involving similar facts. A chassis with the wheels on the outside and the person was caught by the wheels and there was no guardrail preventing the person from walking in front on the wheels and that as a result of that accident Halterm was ordered to place guards and in fact place metal guards alongside of the chassis so that people would be prevented from walking in the area of the wheel and that despite this fatal accident, and that direction at Halterm, Cerescorp did not install guards on its chassis.

So in our submission Mr. O'Mally did visually inspect the area of the chassis for pedestrians and he did take all reasonable and necessary precautions to ensure the safety of other employees. That there is no basis for the finding that he breached section 126(1)(c) of the Code and that in fact the accident happened as a result of Mr. Nolan quickly turning back towards the chassis and there being no guard or rail to prevent him from walking in the vicinity of the tires."

Decision

The issue to be decided in this case is whether "Mr. Paul O'Malley, yard tractor operator, failed to visually inspect the immediate area of his vehicle for pedestrians" when he moved¹ his tractor. This issue is inextricably linked to the determination of whether Mr. Nolan and Mr. Piper walked away when Mr. O'Malley left them to go back to work.

There are striking inconsistencies between the testimonies of the witnesses that appeared before me and the initial written statements made by the two most important witnesses in this case i.e. Mr. Kevin Piper, the only witness to the accident, and Mr. Kevin Nolan, the victim. The initial written statements that they gave after the accident are inconsistent with the written statement made by Mr. O'Malley while the testimonies that they gave at the hearing are inexplicably consistent with that of Mr. O'Malley.

The declaration made by Mr. Piper to the police officer was made within 30 minutes of the accident. The statement to the effect that "*K. Nolan and myself were standing by the rear of the machine*" is as clear and truthful as one can expect under the circumstances. If there is one thing that I am convinced of in this case, it is that when Mr. O'Malley moved the tractor, Mr. Piper and Mr. Nolan were standing by the rear wheels close to the chassis. The fact that Mr. Piper's

¹ I am deliberately using the term "move" in this case without precisising the direction of the equipment because there has been unsubstantiated allegations that the tractor had been backed up rather than being driven forward.

declaration was given to a police officer within 30 minutes of the accident is particularly important because the time at which the declaration was made and the circumstances under which it was made represents the moment of greater truth. It is difficult, if not impossible, for anyone in a moment of high stress to fabricate a story consistent with the facts, let alone a coherent one, within such a short period of time. Furthermore, Mr. Piper was given an opportunity by the safety officer to clarify or amend the statement he gave to the police officer. Mr. Piper felt that his statement to Constable Lane was adequate. He made no modification to his statement. The declaration of Mr. Piper accurately depicts, in my opinion, what he witnessed when the accident occurred and that is that both employees were standing next to the rear wheels of the chassis when the tractor moved.

My conviction about this fact is reinforced by the declaration made by Mr. Nolan, the victim, who also asserted that "*Me and Kevin (Piper) were standing there for a minute. The next thing I knew I feel a tug on my toe...*" The description given by Mr. Nolan, which is consistent with his initial declaration made to the safety officer at the hospital, is clear. It cannot be misunderstood or misinterpreted by anyone with any level of education. To be "*standing there for a minute*" means not to be in movement. By no stretch of imagination can one conclude to anything different. The picture that comes to mind at the time of the accident regarding these two persons is one of inertia and not one of movement, the two being clear opposites. When Mr. Nolan declared to the safety officer that he was just standing there, he made no mention of coming back to the trailer. Furthermore, Mr. Nolan added that it is while they were standing there that he felt the tire run over his foot, another aspect of his declaration which contradicts the story about Mr. Nolan precipitately coming back to the chassis to retrieve a piece of equipment that had allegedly been forgotten on the chassis.

On the basis of the facts of this case and like the two safety officers before me, I give more weight to the initial written statements given by Mr. Nolan and Mr. Piper than to their testimonies before me.

I am satisfied that Mr. Nolan and Mr. Piper had not walked away when Mr. O'Malley mounted his tractor and moved away. While it is possible that he gave his salutations to the two employees near the rear wheels when he left them, he did not communicate to them clearly that he was going to move the tractor. I believe that he moved the tractor without ascertaining that the perimeter of his equipment was clear and safe to be moved. I also believe that he did not look into his left mirror because if he had, he would have seen the two employees still standing at the rear wheels. He did not look through the back door to ensure no one was in close proximity of his equipment, something he could have done since there were no container on the chassis. He did not conduct a visual inspection of his equipment, which is what the safety officer referred to, to ensure it was free of pedestrians before driving off with it. He merely looked into his right mirror to check for oncoming chassis. As it turns out, that action was insufficient to protect, in this case, Mr. Nolan.

Mr. Nolan and Mr. Piper described Mr. O'Malley as a competent operator and I have no reason to doubt this. However, because he his in charge of operating heavy equipment in an area buzzing with activity, and people, there is a heavy burden placed on him to take all reasonable and necessary precautions to ensure that the safety and health of people working around him is protected. The safety officer chose, appropriately I believe, to give a direction to Mr. O'Malley to correct an unacceptable situation, one that could have caused the death of a colleague of his. In my

opinion, it is only Mr. Nolan's good fortune that prevented a more serious accident from occurring. This direction should be seen as an opportunity for employees to discuss safety rules and the improvements they need to bring to their behavior at work. One of the cardinal rule of safety in the longshoring industry is for employees to stay out of the "bite" of moving equipment. In this respect, Mr. Nolan is not without blame in this case. He placed himself in the "bite" of the tires when he stood so close to the rear wheels of the chassis. Everyone involved should learn from this unfortunate incident and take steps to ensure it does not happen again and result, as it once did, in a tragedy.

For all the above reasons, **I HEREBY CONFIRM** the direction issued on March 22, 1999, under subsection 145(1) of the Code by safety officer Matthew Tingley to Mr. Paul O'Malley.

Decision rendered on November 15, 1999.

Serge Cadieux
Regional Safety Officer

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

DIRECTION TO EMPLOYEE UNDER SUBSECTION 145(1)

On February 28th, 1999, the undersigned safety officer conducted a hazardous occurrence investigation at the work place operated by CERESCORP INC., at FAIRVIEW COVE CONTAINER TERMINAL, HALIFAX, NOVA SCOTIA.

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

Paragraph 126(1)(c) of the Canada Labour Code, Part II

Mr. Paul O'Malley, yard tractor operator, failed to visually inspect the immediate area of his vehicle for pedestrians.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than March 22nd, 1999.

Issued at Halifax, this 22nd day of March 1999.

Matthew Tingley
Safety Officer
1800

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: International Longshoremen's Association
Halifax, Nova Scotia

Respondent: Cerescorp Company
Halifax, Nova Scotia

KEYWORDS

Longshoring accident, trailer, chassis, mirrors, walk around inspection, visual inspection, written statement, inconsistencies between statements and testimonies.

PROVISIONS

Code: 126(1)(c), 145(1)
COSH Regs:

SUMMARY

A safety officer gave a direction to an operator of a tractor trailer (also referred to as a chassis) following an accident that happened to an employee of Cerescorp for failing to take the necessary precautions to prevent an accident from occurring.

The initial written statements given by the employee involved in the accident, the victim, and the only other employee who witnessed the accident, were consistent. These statements indicated that while both employees were standing at the rear end of the chassis, the back wheels of the chassis moved slowly over the victim's toe, forced him to the ground and stripped his right leg causing multiple injuries. However, the statement obtained from the operator of the tractor several weeks later was inconsistent with the initial written statements of the two employees involved in the accident. The operator declared that he had informed the two employees that he was going back to work and asserted he saw them moving away from the chassis. He said he looked into his mirrors and saw no one near the chassis.

The safety officer's investigation revealed that the operator did not conduct a visual inspection of his equipment before driving off. He made this finding on the basis of the initial written statements made by the two employees who declared there were just standing at the rear end of the chassis which meant that the operator did not ascertain that the perimeter of his equipment was safe to be moved and free of pedestrians before driving off. Upon review, the Regional Safety Officer (RSO) noted that the testimonies the two employees gave at the hearing were not consistent with their initial written statements. Their testimonies were however in line with the written statement given by the operator of the equipment. The RSO found the initial written statements were to be given more weight and ruled to CONFIRM the direction.