

Decision No. 01-013
April 27, 2001

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Via Rail Canada
applicant

and

Canadian Auto Workers
union

and

Ronald Thibault
safety officer

This case was heard by Michèle Beauchamp, Regional Safety Officer, in Halifax, Nova Scotia, on February 21, 2001.

Appearances:

For the applicant:

Steve Comeau, Senior Officer, Equipment Maintenance East, Via Rail

For the employees:

Robert Bourrier, Health and Safety Representative, Canadian Auto Workers, Local 100
Ralph Keirstead, Health and Safety Representative, Agreement #3, Halifax
John Ethridge, Local Chairperson, Agreement #3, Halifax
Richard Brosseau, Vice-President, CAW, Local 100

[1] This case concerns a request made pursuant to subsection 146(1) of the *Canada Labour Code*, Part II, by Stephen Comeau, Senior Officer, Equipment Maintenance East, on behalf of Via Rail Canada, for a review of a direction (in appendix) issued on July 28, 2000 by Ronald Thibault, safety officer, Labour Program, Human Resources Development Canada.

[2] This request was made on August 3, 2000, before the coming into force of the *Canada Labour Code*, Part II (the Code), as amended, on September 30, 2000. It will consequently be dealt with pursuant to the Code in application before September 30.

[3] Following an investigation into a complaint received on July 10, 2000 from Ralph Keirstead, safety and health committee representative for Via Rail Canada employees in Halifax, to the effect that the employer was not providing employees required to work outside with a sun barrier cream, safety officer Thibault issued to Via Rail Canada, on July 28, 2000, the following direction under subsection 145(1):

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

1. Paragraph 125(j) of the Canada Labour Code, Part II, paragraph 12.9(b) of the Canada Occupational Safety and Health Regulations.

Employees are not being provided with sun barrier cream for their face, neck and ears while working outside during daylight hours.

[4] In his report sent to the parties for the hearing, safety officer Thibault gave the following description of the circumstances that led him to issue the direction:

On July 11, 2000, a meeting was held with Mr. Keirstead and Mr. Comeau in order to discuss this complaint. A review of Section 12.9 of the regulations took place. I explained to Mr. Comeau that employees who had to work outside in the sun had to be protected from the hazards of UV rays. Therefore exposed skin such as the ears, neck and hands had to be protected. I also provided Mr. Comeau with a copy of an RSO decision with regard to this matter. Mr. Comeau stated that this matter would have to be studied further by his management group before a decision would be made because of national implications.

On July 27, 2000, Mr. Keirstead stated that ... Mr. Comeau was unable to provide a date of when a decision would be made on this matter ... I immediately contacted Mr. Comeau and explained Mr. Keirstead concern and my responsibility as safety officer in administering the [C]ode. At this time, Mr. Comeau stated that this item was still being studied and that no decision had yet been made by his management group in Montreal. Mr. Comeau was advised that I required a date for compliance or that I would be required to issue [a] direction ... Mr. Comeau called me back and advised that his management group disagreed with my interpretation of section 12.9 and therefore I would be required to issue [a] direction.

[5] Safety officer Thibault also presented at the hearing additional information from the Canadian Centre for Occupational Health and Safety, which states on its web site that between the months of May and August, UV levels that are between 7 to 9 are considered high, that sunburns and skin damage can occur quickly and that exposure must be minimized and full precautions taken.

[6] Mr. Thibault further provided the parties with UV statistics from July 10 to July 27, 2000 received from Environment Canada. Those statistics revealed that UV levels ranged from 7.4 to 8.5 for 11 of these days.

[7] In his written submission and at the hearing, Mr. Robert Bourrier stated in support of the direction issued by safety officer Thibault that Via Rail employees in Halifax perform their work outdoors. Working as coach cleaners, heavy duty mechanics, specialist mechanics and electricians, they are exposed to a hazard of injury or disease through the skin from the sun's UV radiation. Coach cleaners have a work shift of 5 a.m. to 1 p.m. and are exposed to approximately 2 ¼ hours of direct sunlight. Electricians and specialist and heavy duty mechanics, who work 10-hour shifts from around 7 a.m. to 5 p.m., are potentially exposed to the sun's prime sunlight hours for a full 5 hours.

[8] Mr. Bourrier further submitted that Via Rail provides body covering such as pants, long sleeved shirts and hats but, contrary to Via Rail's assertion in its submission to the Regional Safety Officer, the employer does not instruct its employees in the use of that body covering. Via Rail does not use monthly meetings, safety talks or one on one conversations to inform employees on preventive measures to avoid the hazard of injury from the sun's UV rays, and it does not take measures to monitor employees for compliance to appropriate body covering.

[9] Mr. Bourrier mentioned that both CP Rail and CN Rail recognize the health hazards associated with sun exposure. As indicated in the documents sent to the parties for the hearing, CP and CN give guidelines to their employees on how to protect themselves against these hazards and they provide sun screens and sun blocks creams of a minimum skin protection factor of 30 to their employees for use while at work in the sun.

[10] Mr. Bourrier also gave the parties documents from Health Canada, the Ontario Ministry of Labour, Environment Canada, the Federal Provincial Territorial Radiation Protection Committee and the Canadian Dermatology Association. These documents support the need for a sun barrier cream while working outdoors and stress the need of UV protection for the eyes, as well as of a hat with a three inch brim all around to protect the back of the neck and ears, in addition to a sun barrier cream for that area.

[11] Mr. Comeau stated in his written submission and at the hearing that the affected employees' functions consist of inspecting, servicing and cleaning the interior and exterior of railway passengers cars and locomotives. These activities are conducted at the platform level of the Halifax train station, both in and out of the sun.

[12] Via Rail believes that the affected employees are not subject to prolonged sun exposure during their working shift, that they are exposed to ordinary environmental conditions and that the *Canada Labour Code* does not provide for controls to eliminate natural exposure to such elements.

[13] Mr. Comeau further declared that Via Rail is in compliance with the Code's requirements through the following three measures. Employees are required to wear pants and long sleeved shirts; hats are not officially part of the uniform but are provided if necessary. Via Rail also ensures that employees use the appropriate body covering. Monthly meetings, safety talks and one on one conversations do take place on the subject of concentration and levels of UV rays and the general work environment.

[14] Mr. Comeau also confirmed that he had determined, in consultation with Mr. Keirstead, that the average amount of time that an employee in Halifax is exposed to the sunlight, between the hours of 10 a.m. and 13 p.m., is approximately 2 ¼ hours.

[15] The work carried out by the Halifax employees is generally inside cars. Modifications and repairs are done outside and can take on average between 10 minutes to an hour. In the summer, sun exposure may be augmented by about an hour because employees have to disconnect the cars of the Cape Breton train. Mr. Comeau remarked however that employees do not work outside uninterruptedly, that they can stop and go inside at any time and that most of the work is completed by 12:30 p.m.

[16] He stated that Via Rail also provides its employees with UV protected sunglasses. To comply with the direction that was issued by safety officer Thibault, Via Rail is providing sun screen to its employees, to be used in addition to other preventive measures. He is also open to finding work alternatives to avoid chronic sun exposure, like changing the way or the period of time that work is performed.

[17] Mr. Comeau did not dispute the fact that it is the managers' responsibility to ensure that the employees are aware of the sun's hazards. He commented however that employees had not come forward with the issue of UV rays before the safety officer's direction, that they also share the responsibility of protecting themselves from the sun if they feel overexposed and that sun screen is available, as any other personal protective equipment. He nevertheless felt that the employer should not be forced to provide it.

[18] Pursuant to subsections 146(1) and 146(3) of the *Canada Labour Code*, Part II, in application before September 30, 2000, when an employer, an employee or a union request that a direction be reviewed, the regional safety officer conducts a summary inquiry into the circumstances of the direction and the need for this direction, and may vary, rescind or confirm that direction. A written decision is then provided to the parties.

[19] These provisions read:

146(1). Any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated.

146(3). The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken.

[20] Mr. Thibault issued a direction pursuant to subsection 145(1) of the Code, for a contravention to paragraph 125(j) of the Code and paragraph 12.9(b) of the *Canada Occupational Safety and Health Regulations* (COSHR). These provisions read:

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

...

(j) provide every person granted access to the work place by the employer with such safety materials, equipment, devices and clothing as are prescribed;

12.9. Where there is a hazard of injury or disease to or through the skin in a work place, the employer shall provide to every person granted access to the work place

...

(b) a cream to protect the skin; or

...

[21] The issue to be decided in the present case is whether, when safety officer Thibault issued this direction, it was necessary for the employer to provide a cream to protect the employees against a “hazard of injury or disease to or through the skin”, as required by paragraph 125(j) of the Code and paragraph 12.9(b) of the COSHR.

[22] Section 12.9 of the COSHR contains three different provisions related to skin protection. It states:

12.9. Where there is a hazard of injury or disease to or through the skin in a work place, the employer shall provide to every person granted access to the work place

(a) a shield or a screen;

(b) a cream to protect the skin; OR (my capitalization and bolding)

(c) an appropriate body covering.

[23] The three parts of section 12.9 of the COSHR must be read in conjunction with one another. This means that the employer must provide to his employees either (a) a shield or screen, OR (b) a cream to protect the skin, OR (c) an appropriate body covering.

[24] In the present case, there was ample documentation from official and recognized sources presented at the hearing to confirm that the sun's UV rays represent "a hazard of injury or disease to or through the skin" against which employees must be protected, and nobody at the hearing disputed that documentation.

[25] It also appeared from the testimonies that the employer is in compliance with paragraph 12.9(c) of the COSHR, as far as providing an appropriate body covering. The employees are required to wear long sleeved shirts and pants. The employer is also providing UV protected sunglasses to protect the eyes of his employees. And the employer provides hats if necessary, although he admitted at the hearing that wearing a hat is not mandatory and that the hats do not cover an employee's ears and neck.

[26] It is very well, and in compliance with paragraph 12.9(c) of the COSHR, to require employees to wear an appropriate body covering to protect them against the sun's UV rays.

[27] However, based on the testimonies presented by the employer, the union and the safety officer, I am convinced that there are parts of the body, *i.e.* the hands, the face, the ears and the neck, that are not protected against the "hazard of injury or disease to or through the skin" caused by UV rays, simply because no body covering provided by the employer is appropriate to accomplish this.

[28] Consequently, the way to protect those parts of the employees' bodies left unprotected against the sun's UV rays is to provide a cream to protect the skin, as required by paragraph 12.9(b) of the COSHR. I have no doubt that this is what the direction issued to Via Rail Canada by safety officer Thibault wanted to achieve.

[29] Therefore, for the above mentioned reasons, I hereby confirm the direction issued to Via Rail on July 28, 2000 by safety officer Ronald Thibault.

Michèle Beauchamp
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On July 11th, 2000, the undersigned safety officer conducted an inquiry in the work place operated by VIA RAIL CANADA INC., being an employer subject to the *Canada Labour Code*, Part II, at 1161 HOLLIS STREET, HALIFAX, NOVA SCOTIA, the said work place being sometimes known as VIA Rail.

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

1. Paragraph 125(j) of the Canada Labour Code, Part II, paragraph 12.9(b) of the Canada Occupational Safety and Health Regulations.

Employees are not being provided with sun barrier cream for their face, neck and ears while working outside during daylight hours.

There, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the *Canada Labour Code*, Part II, to terminate the contravention no later than August 11th, 2000.

Issued at Halifax, this 28th, day of July 2000.

R.P. THIBAUT
Safety Officer
2061

To: VIA RAIL CANADA INC.
VIA RAIL CANADA INC.
1161 HOLLIS STREET
HALIFAX, NOVA SCOTIA
B3R 2P6

SUMMARY OF THE REGIONAL SAFETY OFFICER'S DECISION

Applicant: Via Rail Canada
Represented by: Stephen Comeau

Union: Canadian Auto Workers, Rail Division, Local 100
Represented by: Robert Bourrier

Safety officer: Ronald Thibault
Labour Program
Human Resources Development Canada

Before: Michèle Beauchamp
Regional Safety Officer
Human Resources Development Canada

KEYWORDS

Skin protection

PROVISIONS

Code: 125(j), 145(1), 146(1), 146(3)

Regulations: 12.9

SUMMARY

Following an investigation into a complaint, the safety officer issued to Via Rail Canada a direction under subsection 145(1) of the *Canada Labour Code* (the Code), for contravening paragraph 125(j) of the Code and paragraph 12.9(b) of the *Canada occupational Safety and Health Regulations*, by not providing cream to protect his employees against the hazard of injury or disease to or through the skin represented by the sun's UV rays. The employer appealed the direction.

The regional safety officer confirmed the safety officer's direction because, although providing appropriate body covering for the rest of the body, the face, ears and neck were left unprotected against UV rays.