

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: United Grain Growers Limited
Represented by: Mr. G.W. Black

Respondent: Grain Workers' Union
Local 333
Represented by: Mr. R. Janes, Employee
Co-Chairperson/Chief Shop Steward

Mis-en-cause: Dale Corrigan
Safety Officer
Human Resources Development Canada

Before: Douglas Malanka
Regional Safety Officer
Human Resources Development Canada

Background:

On April 3, 2000, safety officer Dale Corrigan and safety officer Gerry McCabe conducted an inspection in the workplace operated by United Grain Growers Limited (hereto referred to as UGG) at 1155 Stewart Street, Vancouver, B.C.. Following their investigation, safety officer Corrigan issued an oral direction pursuant to subsection 145.(1) of the Canada Labour Code, Part II, (hereto referred to as the Code or Part II) and confirmed the direction in writing on April 6, 2000. The written direction, a copy of which is attached, included 3 (three) items. Item 1 (one) of the direction instructed UGG to comply with paragraph 125.(p) of the Code and subsection 2.12(2) of the Canada Occupational Safety and Health Regulations (hereto referred to as the COSHRs) by removing unacceptable levels of grain dust from the plant and basement conveyor galleries. Item 2 (two) ordered UGG to comply with paragraph 125.(p) of the Code and subsections 10.4(1) and (2) of the COSHRs and conduct a hazard investigation to determine the frequency of clean-up required to ensure that the levels of grain dust are kept within acceptable limits. Item 3 (three) of the direction instructed UGG to comply with paragraph 125.1(b) of the Code and paragraph 10.5 (b) of the COSHRs to develop a procedure for the regular inspection of the workplace that would ensure that clean-up of grain dust takes place before acceptable levels are exceeded. UGG requested a review of the direction to delete items 2 and 3 from the direction. They held that safety officer Corrigan had orally excused them from complying with items 2 and 3 of the direction when Mr. Caron, Operations Manager, UGG, outlined to him how UGG would be

complying with item 1 of the direction. A review of the direction was held on August 22, 2000 in Vancouver, B.C..

Safety Officer:

A short time after issuing his direction, safety officer Corrigan left on extended leave from Human Resources Development Canada (HRDC) and the file was turned over to safety officer McCabe. Safety officer McCabe provided a chronological report of events that led to the direction under review, and testified at the hearing. Following the hearing, he wrote to the Office of the Regional Safety Officer and provided a copy of the Assurances of Voluntary Compliance (AVCs) and direction referred to at the hearing. I retain the following from his documents and testimony.

Safety officer McCabe stated that the problem of excessive grain dust at the UGG elevator was an ongoing concern. In this regard, he referred to four AVCs that HRDC had previously received from UGG on July 5, 1996, March 25, 1997, September 4, 1997 and December 19, 1997 respecting excessive grain dust in the elevator. He also referred to a direction that safety officer Jim Beynon had issued to UGG on October 28, 1998, directing UGG to remove unacceptable levels of static dust, piles and spills found at the workplace, some of which was in contact with moving parts of machinery. Just prior to that direction, safety officers Jim Beynon and Vince Smith, and Ms. Mary Huitson, Director, HRDC, Surrey, met with Mr. A. Graham, Terminal Manager, UGG, and Mr. B. Green, UGG, on November 20, 1998, to inform UGG that they must take a programmatic approach to inspecting and cleaning up areas within the plant. The direction under review addressed the same concerns regarding excessive grain dust.

Safety officer McCabe testified that he was not party to the April 4, 2000, conversation between safety officer Corrigan and Mr. Caron, wherein Mr. Caron alleged that safety officer Corrigan had told him not to worry about items 2 and 3 of his direction. He acknowledged seeing the letter Mr. Caron sent to safety officer Corrigan on April 18, 2000, confirming his understanding that UGG did not have to comply with items 2 and 3 of the direction. Safety officer McCabe explained that he did not reply to Mr. Caron's letter because Mr. A. Graham wrote on the same day and requested that the direction be reviewed by a Regional Safety Officer. He stated that once a direction is appealed, the matter is then in the hands of the Regional Safety Officer.

He further testified that he would never have agreed to exempt UGG from items 2 and 3 of the direction because the need for a programmatic approach to inspecting and cleaning up areas within the plant was clearly established. On the day of their inspection, he said that he and safety officer Corrigan found excessive grain dust at C3 and C4 belts, at legs 6, 7 and 15, and in the tunnels on the west side of C5 belt. He also testified that C6 belt had to be locked out and cleaned up. Given that this was a long standing problem at UGG, he doubted that anyone at HRDC would have agreed that UGG did not have to comply with items 2 and 3 of the direction because they would only had to return to UGG 3 to 4 months later.

Applicant:

Mr. Black confirmed that UGG officials at the grain elevator agreed with the safety officers that there was the excessive grain dust in the plant and basement conveyor belt on the day of their

inspection. Mr. Caron testified that he called safety officer Corrigan on April 4 to advise him of UGG's clean up activities to comply with item one of the direction. He claimed that, during their conversation, safety officer Corrigan told him not to worry about complying with items 2 and 3 of the direction. In this regard, Mr. Caron proffered a letter that he wrote to safety officer Corrigan on April 18, 2000, which confirmed his understanding that UGG did not have to comply with items 2 and 3 of the direction. Mr. Black said, that with this understanding, Mr. Graham, Terminal Manager, requested a review of the direction pursuant to section 146 of the Code to have items 2 and 3 deleted from the direction. Mr. Black pointed out that no one at HRDC ever replied to or disputed Mr. Caron's understanding that UGG did not have to comply with items 2 and 3 of the direction. Mr. Caron did not dispute safety officer McCabe's contention that the problem of excessive grain dust at the elevator was an on-going concern for several years now.

Respondent:

Mr. Janes testified that, on the day that safety officers Corrigan and McCabe inspected the elevator there was excess grain dust in the corners measuring from 2 inches to 5 feet deep, and under the belts measuring from 2 to 6 inches.

Mr. Foy pointed out, in this regard, that the belts in the elevator basement are very low to the ground and that the tail pulley is only 4 to 5 inches off the ground. Mr. Janes added that the elevator has a history of AVCs for excessive grain dust and that HRDC started issuing directions 2 years ago. He further noted that it has been necessary to shut down some of the belts due to excessive grain dust buildups since safety officer Corrigan issued his direction.

Mr. Foy testified that there is always a lot of airborne grain dust in the air when the elevator is busy and that it's common to have an excess of 1/8th inch of grain dust everywhere, especially in the basement. He and Mr. Janes agreed that a UGG work schedule may indicate that a laborer is assigned to clean up grain dust, but once the shift begins, the person is often moved to another job. As a result, regular daily cleanups are generally not done.

Mr. Janes stated that a program to establish regular and daily cleanup is needed. He said that, over the last decade, cleanups are only carried out after grain dust has accumulated and a belt must be shut down. As a result, all too often, grain dust is up to the belts and tail pulleys are running in grain dust.

Summations:

Mr. Black confirmed that UGG is prepared to comply with the direction if it is confirmed. He said the company only requested that the direction be reviewed and items 2 and 3 be deleted because safety officer Corrigan told Mr. Caron during their telephone conversation on April 4th that compliance with these items was not longer required following UGG's cleanup. He felt that UGG was justified in its belief that compliance with items 2 and 3 of the direction was not required because neither safety officer had followed-up on the direction despite the seriousness of the matter, or responded to Mr. Caron's letter confirming his understanding regarding compliance. Mr. Black suggested that this lack of follow-up was especially inappropriate since safety officer Corrigan had included a "charge of caution" when he issued his oral direction to UGG.

Mr. Janes asked that the direction be confirmed because the elevator has a history of waiting until excessive levels of grain dust have accumulated and only reacting after employees, the union, or member of the safety and health committee has complained to management, or a safety officer from HRDC has ordered a clean-up or accepted an AVC respecting the accumulation of excessive grain dust. He agreed with the direction that a programmatic clean-up program is needed for safety to ensure that grain dust is removed on a daily basis.

Mr. Foy said that most UGG employees want the company to make money, since that's what keeps them employed, they just want a safe area in which to work.

Decision:

Issue:

The issue before me in this case is whether or not to vary the direction as requested by UGG and delete items 2 and 3 of the direction.

Applicable Legislation:

For deciding these questions, it is necessary to review the applicable provisions in Part II and the COSHRs. These include respectively:

- Paragraph 125.(p) of the Code which reads:
*“125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,
(p) ensure, in the manner prescribed, that employees have safe entry to, exit from and occupancy of the work place;*
- Paragraph 125.1(b) of the Code which reads:
*“125.1 Without restricting the generality of section 124 or limiting the duties of an employer under section 125 but subject to such exceptions as may be prescribed, every employer shall, in respect of every place controlled by the employer,
(b) ensure that all hazardous substances in the work place are stored and handled in the manner prescribed”;*
- Subsection 10.4(1) of the COSHRs which reads:
*10.4(1) Where there is a likelihood that the safety or health of an employee in a work place is or may be endangered by exposure to a hazardous substance, the employer shall, without delay,
(a) appoint a qualified person to carry out an investigation in that regard;
and
(b) for the purposes of providing for the participation of the safety and health committee or safety and health representative, if either exists, in the investigation, notify either of the proposed investigation and of the name of the qualified person appointed to carry out that investigation.*

(2) *In an investigation referred to in subsection (1), the following criteria shall be taken into consideration:*

- (a) *the chemical, biological and physical properties of the hazardous substance;*
- (b) *the routes of exposure to the hazardous substance;*
- (c) *the acute and chronic effects on health of exposure to the hazardous substance;*
- (d) *the quantity of the hazardous substance to be handled;*
- (e) *the manner in which the hazardous substance is stored, used, handled and disposed of;*
- (f) *the control methods used to eliminate or reduce exposure of employees to the hazardous substance;*
- (g) *the concentration or level of the hazardous substance to which an employee is likely to be exposed;*
- (h) *whether the concentration of an airborne chemical agent or the level of ionizing or non-ionizing radiation is likely to exceed 50 per cent of the values referred to in subsection 10.19(1) or the levels referred to in subsection 10.26(3) and (4); and*
- (i) *whether the level referred to in paragraph (g) is likely to exceed or be less than that prescribed in Part VI*

- Paragraph 10.5 (b) of the COSHRs which reads:
10.5 On completion of an investigation referred to in subsection 10.4(1) and after consultation with the safety and health committee or the safety and health representative, if either exists:
 - (b) *the employer shall develop and maintain a written procedure for the control of the concentration or level of the hazardous substance in the work place.*
- Subsection 146.(3) of the Code reads:
“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.” [My underline.]

Rationale:

In this case, UGG requested that I vary the direction and delete items 2 and 3 from it. Mr. Black did not argue that the direction was unnecessary or inappropriate in respect of the excessive grain dust that the safety officers observed the day of their inspection. Rather, UGG requested that items 2 and 3 of the direction be deleted from the direction because Mr. Caron understood from safety officer Corrigan that compliance with these items was not required if UGG complied with item 1 and removed the excess grain dust from the elevator.

For deciding this matter, reference is made to subsection 146.(3) of the Code which establishes two requirements relevant to this review. The first is that subsection 146.(3) authorizes a

Regional Safety Officer to vary, rescind or confirm a direction. This authority is not extended to a safety officer or to any other person. That being the case, even if safety officer Corrigan wanted to vary his direction to delete items 2 and 3 of the direction, he was not authorized to do so.

Notwithstanding this, circumstances may arise where a safety officer subsequently agrees that the direction issued is not needed, or that there is a technical error therein. Where this arises and the direction is appealed by an aggrieved party, subsection 146.(3) authorizes a Regional Safety Officer “...*to inquire into the circumstances of the direction to be reviewed and the need therefor...*”. [My underline.]. In this regard, the Regional Safety Officer seized of the review can hear from the safety officer, and in consideration of all evidence heard, determine the need for the direction and whether to vary, rescind or confirm the direction. In the instant case, I must first determine if safety officer Corrigan, in fact, agreed that the direction should be varied, and if I find in the affirmative, whether to vary, rescind or confirm the direction.

With regard to the first issue being whether safety officer Corrigan agreed that UGG did not have to comply with items 2 and 3 of the direction, I am satisfied that Mr. Caron was a credible witness and that he may have genuinely interpreted his telephone conversation with safety officer Corrigan on April 4, 2000, to mean that UGG did not have to worry about compliance with items 2 and 3 of the direction. Otherwise, it does not make sense that he would have written to safety officer Corrigan on April 18, 2000, to confirm this understanding, or that Mr. A. Graham would have written to HRDC the same day to request that the direction be reviewed by a Regional Safety Officer to delete items 2 and 3 from the direction. That being said, I found the contents Mr. Caron’s April 18 letter to safety officer Corrigan to be ambiguous. In the third paragraph of his letter Mr. Caron wrote:

Paragraph 3: “...You confirmed to me in our telephone conversation that on April 4 our clean-up measures were acceptable to you and that our clean-up measures satisfies the direction. You further indicated to me that the second part to the direction requires no further work on our behalf, however the areas requiring housekeeping improvements have been addressed and proper preventative measures initiated, to maintain acceptable industry levels of dust.”;

and in the fourth paragraph, he wrote:

Paragraph 4: “Having met the requirements of your direction, I informed you that we would proceed to resume normal plant operations.” [My underline.]

By way of comment, instead of confirming that safety officer Corrigan exempted UGG from items 2 and 3 of the direction, the letter, especially paragraph 4, appears to confirm that UGG has complied with the direction. Therefore, it is impossible to speculate on what safety officer Corrigan may or may not have said during his conversation with Mr. Caron.

For his part, safety officer McCabe insisted that neither he nor HRDC would ever have agreed with Mr. Caron’s understanding that UGG did not have to comply with items 2 and 3 of the direction. He held that the problem of excess grain dust at UGG was a long term ongoing problem and that the direction was consistent with the Department’s advice to UGG November 20, 1998, that a programmatic cleanup approach was required at the grain elevator. He explained that HRDC did not reply to Mr. Caron’s letter outlining his understanding of the direction because

UGG had appealed the direction to a Regional Safety Officer. While I question HRDC's rationale for not responding to Mr. Caron's letter based on the Code, I believe that this explains Mr. Caron's belief that UGG did not have to comply with items 2 and 3 of the direction. In terms of HRDC's decision not to reply to Mr. Caron, subsection 146.(4) of the Code specifies that a request for review of a direction does not operate as a stay. Subsection 146.(4) reads:

146.(4) A request for a review of a direction under this section shall not operate as a stay of the direction. [My underline.]

Thus, HRDC was not prohibited by the Code from clarifying the situation or for insisting that UGG comply with the direction while the direction was under review. That being the case, I do not understand the Department's inaction, given the amount of grain dust that safety officers Corrigan and safety officer McCabe observed at the elevator the day of their inspection, given the fact that this was the sixth intervention by HRDC in three years for the same issue, and given the potential for death and injury associated with a grain dust explosion in a grain elevator.

In the case at hand, I am satisfied that the direction issued by safety officer Corrigan, including items 2 and 3, was needed. I base my conclusion on the evidence that there were no written procedures for the control of the concentration of grain dust in the elevator. Instead, management routinely tolerated the accumulation of excessive amounts of grain dust, often to the point where equipment had to be halted immediately and cleared. I base my conclusion on Mr. Caron's admission that the accumulation of grain dust in the UGG elevator is a long term ongoing concern. And I base my conclusion on information contained in the AVCs and directions exchanged between UGG and HRDC over the past 4 years. In that regard, the following findings from the previous AVCs and direction are noted:

- 1) *AVC dated July 5, 1996: approximately 6 notations of static grain dust, approximately 15 notations of accumulations of grain or of grain dust and 1 notation where pulley was buried in grain dust; [My underline.]*
- 2) *AVC dated March 25, 1997:: approximately 3 notations of static grain dust, approximately 7 notations of accumulations of grain or of grain dust, 3 notations where pulley was buried in grain dust, and approximately 3 notations regarding broken or damaged rollers, pulleys or belts; [My underline.]*
- 3) *AVC dated September 4, 1997: approximately 15 notations of accumulations of grain or of grain dust, and approximately 6 notations regarding steel/metal rods which could cause sparks; [My underline.]*
- 4) *AVC dated December 19, 1997: which included approximately 1 notation of static grain dust, approximately 3 notations of accumulations of grain or of grain dust and 1 notation where bearing was buried in grain dust; [My underline.] and,*
- 5) *Direction issued October 28, 1998: which cited basement areas of the elevator having unacceptable levels of static dust, piles and spills of product sometimes touching moving parts of machinery. [My underline.]*

The evidence in this case strongly suggests that UGG is reactive in its approach to grain dust maintenance and that cleanup only occurs principally when the accumulation of grain dust becomes hazardous, or even dangerous, when employees, union representatives or safety and health committee members complain to management out of fear for their safety and health, or when the company is inspected by a safety officer. In fact, HRDC's lag in dealing decisively with UGG's failure over the past 4 years to comply with the minimum standards in the Code and COSHRs regarding grain dust may have unintentionally incited UGG to believe that their behaviour is somehow reasonable or defensible. Else, why would UGG officials ever had thought that there was no need to comply with items 2 and 3 of the direction relative to the grain elevator in question. During the review, UGG did not request me to vary the compliance date of the direction should I decide to confirm it. But if they had, I would have declined to do so. UGG's lack of proactive, programmatic and preventative approach to managing grain dust in the elevator, and lack of compliance with the Code and COSHRs provisions specified in the direction, is untenable and I agree entirely with the direction that safety officer Corrigall issued.

Decision:

For all the reasons covered herein, I HEREBY CONFIRM the direction that safety officer Corrigall issued to UGG on April 6, 2000, pursuant to subsection 145.(1) of the Code.

Decision rendered July 19, 2001.

Douglas Malanka
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On April 3rd, 2000, the undersigned safety officer conducted an inspection in the work place operated by UNITED GRAIN GROWERS LIMITED, being an employer subject to the Canada Labour Code, Part II, at 1155 STEWART STREET, VANCOUVER, B.C..

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

1. 125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,
 - (p) ensure, in the manner prescribed, that employees have safe entry to, exit from and occupancy of the work place;

2.12(2) All dust, dirt, waste and scrap material in every work place in a building shall be removed as often as is necessary to protect the safety and health of employees and shall be disposed of in such a manner that the safety and health of employees is not endangered.

Unacceptable levels of dust were observed in the plant and basement conveyor galleries.

2. 125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,
 - (p) ensure, in the manner prescribed, that employees have safe entry to, exit from and occupancy of the work place;

10.4(1) Where there is a likelihood that the safety or health of an employee in a work place is or may be endangered by exposure to a hazardous substance, the employer shall, without delay,

- (a) appoint a qualified person to carry out an investigation in that regard; and
 - (b) for the purposes of providing for the participation of the safety and health committee or safety and health representative, if either exists, in the investigation, notify either of the proposed investigation and of the name of the qualified person appointed to carry out that investigation
- (2) In an investigation referred to in subsection (1), the following criteria shall be taken into consideration:
- (a) the chemical, biological and physical properties of the hazardous substance;
 - (b) the routes of exposure to the hazardous substance;

- (c) the acute and chronic effects on health of exposure to the hazardous substance;
- (d) the quantity of the hazardous substance to be handled;
- (e) the manner in which the hazardous substance is stored, used, handled and disposed of;
- (f) the control methods used to eliminate or reduce exposure of employees to the hazardous substance;
- (g) the concentration or level of the hazardous substance to which an employee is likely to be exposed;
- (h) whether the concentration of an airborne chemical agent or the level of ionizing or non-ionizing radiation is likely to exceed 50 per cent of the values referred to in subsection 10.19(1) or the levels referred to in subsection 10.26(3) and (4); and
 - (i) whether the level referred to in paragraph (g) is likely to exceed or be less than that prescribed in Part VI

A hazard investigation needs to be done to determine the frequency of clean-up required to ensure that the levels of dust are kept within acceptable limits.

3. 125.1 Without restricting the generality of section 124 or limiting the duties of an employer under section 125 but subject to such exception as may be prescribed, every employer shall, in respect of every work place controlled by the employer,

- (b) ensure that all hazardous substances in the work place are stored and handled in the manner prescribed;

10.5 On completion of an investigation referred to in subsection 10.4(1) and after consultation with the safety and health committee or the safety and health representative, if either exists:

- (b) the employer shall develop and maintain a written procedure for the control of the concentration or level of the hazardous substance in the work place.

A procedure for the regular inspection of the workplace, that will ensure clean-up of dust takes place before acceptable levels are exceeded, needs to be developed.

Therefore, you are **HEREBY DIRECTED**, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contraventions no later than May 5th, 2000.

Issued at Vancouver, this 6th day of April 2000.

Dale Corrigall
Safety Officer

To: UNITED GRAIN GROWERS
1155 STEWART STREET
VANCOUVER, B.C.
V6A 4H4

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: United Grain Growers Limited

Respondent: Grain Workers' Union

KEY WORDS

grain elevator, grain dust, grain dust accumulations, airborne grain dust, accumulations of grain, hazard investigation, programmatic clean-up,

PROVISIONS

Code: 125(p), 125.1(b), 146.(3) and (4)

Regs: 10.4(1), 10.5(b)

SUMMARY

On April 3, 2000, safety officers conducted an inspection at a grain elevator operated by United Grain Growers in Vancouver, B.C and found several instances where there was an accumulation of grain dust. An oral direction was issued pursuant to subsection 145.(1) and subsequently confirmed in writing. The direction instructed the company to remove all grain dust from the plant and basement conveyor galleries. Because this was an ongoing problem there, the safety officer additionally ordered the company to conduct a hazard investigation to determine the frequency of clean-up required to ensure that the levels of grain dust are kept within acceptable limits and to develop a procedure for the regular inspection of the workplace that would ensure that clean-up of grain dust takes place before acceptable levels are exceeded. UGG requested a review of the direction to delete items 2 and 3 of the direction. They held that safety officer Corrigan had orally excused them from complying with items 2 and 3 of the direction after UGG had outlined how they would be complying with the direction. Following his review of the direction, the Regional Safety Officer confirmed the direction.