

Canada Labour Code
Part II
Occupational Health and Safety

Brian Duplessis
applicant

and

Forest Products Terminal Corporation Ltd.
respondent

Decision No.: 05-059
December 23, 2005

This case was heard by Appeals Officer Pierre Guénette, in Saint John, New Brunswick, on October 4, 2005.

Appearances

For the applicant

Brian Duplessis, Stevedore, Forest Products Terminal Corporation Ltd.

Robert Breen, Counsel

Pat Riley, Business Agent, International Longshoremen's Association, Local 273

For the respondent

No appearance at the hearing

Health and safety officer

Ian Rennie, Health and Safety Officer, Transport Canada Marine Safety, Saint John, New Brunswick

- [1] This case concerns an appeal made pursuant to subsection 129(7) of the *Canada Labour Code* (the *Code*), Part II, by Brian Duplessis, an employee of Forest Products Terminal Corporation Ltd. in Saint John, New Brunswick. B. Duplessis appealed the decision of health and safety officer (HSO) Ian Rennie that a danger did not exist for him at the time of his investigation.
- [2] On February 1, 2005, B. Duplessis refused to work based on the fact that wearing a hard hat constitutes a danger when performing his duties as a Lead Hand in the hold of the MV Reefer Prince vessel.

- [3] The statement of the refusal to work of B. Duplessis reads as follows:
- Refused to wear a hard hat while doing the Lead Hand job in the hold of Reefer Prince. All work was being done under the wing of the hatch. 3 ton rolls were being rolled into the wing and I was placing cutting boards to turn the rolls. There is more risk of being jammed between the rolls when being distracted by a hard hat that could fall off the head. For this reason I requested to know what the risk was to my head. Safety Officer refused to view the area where I was working.
- [4] HSO Rennie investigated the refusal to work the same day. On February 2, 2005, he decided that a danger did not exist for B. Duplessis and confirmed his decision in writing.
- [5] I retain the following from HSO Rennie's Investigation Report and Decision, and his testimony at the hearing.
- [6] On February 1, 2005, HSO Rennie was on board the MV Reefer Prince conducting a Port State Control Inspection¹. He noticed that some employees were not wearing their hard hats in the hold of the vessel.
- [7] Following a discussion between HSO Rennie and Gerald Englehart, Superintendent for Forest Products Terminal Corporation Ltd., the employer ordered that all employees wear their hard hats on board the MV Reefer Prince.
- [8] HSO Rennie specified that protective headwear was available to all employees at the work site.
- [9] B. Duplessis refused to comply with the employer's requirement to wear a hard hat while on board vessels and asked G. Englehart to identify the risk of head injury. G. Englehart told him to wear a hard hat or go home. Therefore, B. Duplessis refused to work under section 128 of the Code because he felt that it constituted a danger for him to wear a hard hat when performing his duties as a lead hand in the hold of the MV Reefer Prince.
- [10] On the day of his investigation HSO Rennie did not go into the hold of the MV Reefer Prince to observe the work performed by the employees. Therefore he could not describe the working area under the wing.
- [11] HSO Rennie stated that at the time of his investigation, he was aware of the risk assessment done by the joint health and safety committee, but he did not consider it.
- [12] In his decision, HSO Rennie took into consideration statements from both parties and the decision of Appeals Officer Michèle Beauchamp in the Forest Products Terminal Corporation Ltd. and International Longshoremen's Association² cases. Appeals Officer Beauchamp confirmed the direction issued to the employer as well as both decisions that wearing a hard hat while working did not constitute a danger for employees.

¹ Port State Control (PSC) is a ship inspection program whereby foreign vessels entering a sovereign state's waters are boarded and inspected to ensure compliance with various major international maritime conventions. Transport Canada, Safety and Security, is responsible for all PSC activities within Canada, and foreign ship inspections are carried out at all major ports by ship inspectors of the Marine Safety Branch.

² Forest Products Terminal Corporation Ltd. and International Longshoremen's Association, Appeals Officer Michèle Beauchamp, Decisions 03-13, 03-014, 03-015, dated June 20, 2003.

- [13] B. Duplessis testified at the hearing. I retain the following from his testimony.
- [14] At the time of the refusal to work, B. Duplessis was working as a Lead Hand placing the cutting boards under the wing of the hatch. At that time he was not wearing a hard hat.
- [15] B. Duplessis stated that Gary Allport (OSH Committee Employer Co-chair) told him to wear his hard hat on all vessels because it is Forterm's policy since 1997.
- [16] In a written submission, B. Duplessis disagreed with Gary Allport. He wrote that in May 1997 a risk assessment was done by the joint health and safety committee and all companies working on the docks were in agreement that wearing a hard hat is not necessary. The only exception is when an employee is working on container vessels or when general maintenance was being done overhead.
- [17] B. Duplessis enclosed in the written submission a copy of **Port of Saint John – Risk Assessment**, developed in May 14, 1997 and revised in March 14, 2002. The document states that there is a risk of head injuries for employees working as Hold Men (the job performed by B. Duplessis the day of the refusal to work).

However the document specifies the following:

There is a risk of head injuries but there is a greater risk of warring (sic) the hard hat due to visibility.

- [18] During his testimony, B. Duplessis stated that the conclusion of the risk assessment was never disputed by the employer.
- [19] B. Duplessis stated that during HSO Rennie's investigation, he explained to him the work done in the hold of the ship. B. Duplessis also specified to him that there is more risk of wearing the hard hat when an employee works in the hold.
- [20] To support his position B. Duplessis also described to HSO Rennie a previous accident where an employee who was working in the hold of a ship had been pinned between two rolls of paper (weighting approximately 2698 kg each), because he did not have an opportunity to escape quickly enough.
- [21] B. Duplessis said that his tasks of Lead Hand oblige him to bend over between rolls of paper. To prevent being crush by rolls, he needs to have a clear view of any movement of the rolls. He said that the hard hat could fall off his head or move. It could create a distraction that could result in not reacting quickly enough, should a roll of paper move in his direction and crush him between two rolls of paper. He added that wearing a hard hat would obstruct his view and could possibly put him in a situation where he could not see the movement of a roll of paper and be crushed.
- [22] B. Duplessis acknowledged that there was a risk of being struck on the head by a sling strap. But nothing could fall on him because he is under the wing of the hatch, which is mostly a covered hold.

- [23] B. Duplessis stated that without a proper investigation by HSO Rennie, he feels that he is not protected under the Code and could be disciplined accordingly.
- [24] Mr. Duplessis added that a fatality happened in 1979 when an employee who was wearing his hard hat in the hold of a ship, had been crushed by rolls of paper that landed on him after a crane operator stopped the crane and a wire broke. One of the recommendations that was made at the inquest was “that men working in the holds of vessels should have a clear, unobstructed view of all loading or unloading operations going around them”. According to B. Duplessis, the reason for that recommendation was that it had been proven at the inquest that the employee did not see the sling coming down because he was wearing a hard hat. Each roll involved in the accident weighing approximately 4,000 pounds.
- [25] The employer did not submit any written arguments supporting his position and did not attend the hearing. However, Gary Allport wrote an **Employer Health and Safety Committee Co-chair Report** regarding the refusal to work. The employer’s position was the following:
1. The refusal is in violation of established company policy and said policy has been in effect since February of 1997;
 2. Prior to this incident, no known concerns had been raised with respect to company policy in the location and/or job;
 3. Therefore, the safety equipment policy will remain in effect and Mr. Duplessis is to wear the appropriate safety equipment in the appropriate areas as by the policy.
- [26] In his final submissions R. Breen expressed two points that he considered to be of a significant importance in this case.
- [27] In the first point, he complained that HSO Rennie had not conducted a proper investigation in accordance with the Code.
- [28] In that regard, R. Breen referred to sub-section 129 of the Code:
129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person (...)
- [29] He said that this specific sub-section states that the health and safety officer must at least view the work site in question. He also added that it is impossible for a health and safety officer to conduct a complete investigation if he is not aware of important details like the height of the working area, the size of rolls of paper and the particular job in question. Therefore, R. Breen asked me to rescind the decision of no danger made by HSO Rennie and render my own decision.
- [30] The second point that R. Breen made was related to the case law supporting the union’s position that a risk assessment was done.

- [31] R. Breen made a reference to a decision of the Canada Industrial Relations Board³ in paragraph 35, that when there is a perception or appearance of a particular danger a risk assessment has to be done and it could be appropriate that it be conducted by the joint health and safety committee.
- [32] R. Breen made reference to the Forest Products Terminal Corporation Ltd., *supra*, decisions used by HSO Rennie in his report. He said that the case that was in dispute in those decisions was related to an employee that was working on a dock and the other employee was hooking up wood pulp bales under the spreader on board a vessel. In both cases, the refusal to work resulted in decisions of no danger by the health and safety officer. The reason being that the wearing of a hard hat does not constitute a danger for employees. Those decisions were confirmed by Appeals Officer Beauchamp. In relation to those decisions, Mr. Breen argued that the circumstances are quite different then in the present case. This case involves a covered area of a vessel where objects cannot fall on the head of employees. As well the hard hat could create a visual obstruction preventing the employee from seeing a roll move, and therefore be crushed by the moving roll.
- [33] R. Breen said that if the Appeals Officer decides that hard hats have to be worn in all areas of a vessel during the handling of cargo operations this could create a hazard.
- [34] The issue to be decided in the present case is whether HSO Rennie erred when he decided that a danger did not exist for B. Duplessis to wear a hard hat at the time of his investigation. To do so, I will have to consider two points that were addressed at the hearing and are related to the Port of Saint John - Risk Assessment. The two points are the following:
1. Risk of head injuries when working as a Lead Hand in the hold of a vessel; and
 2. Hazard related to movement of rolls of paper in the hold of a vessel.
- [35] As for the first point, according to the report of Gary Allport, dated February 1, 2005, the company policy established in February 1997 that employees have to wear a hard hat in the hold of the vessel. In his report, Gary Allport did not make a reference to the risk assessment developed the same year by the joint workplace health and safety committee.
- [36] According to B. Duplessis, he is not aware of that policy and disagrees that the policy replaced the risk assessment. As the employer did not submit a copy of the policy, I cannot comment on its content. However, I did not receive evidence that the employer's policy changed following the development of the risk assessment made in May 1997 and its revision in March 2002.
- [37] As for the risk assessment carried out by the joint work place health and safety committee, it has been identified that there is a risk of head injury for Hold Men when working in the hold of a vessel. In this instance, when an employer receives a report that there is a risk of head injury for certain jobs, he must comply with the Code.

³ Samuel L. McGuire and Forest Products Terminal Corporation Ltd. – Decision no. 28.

- [38] In my view, B. Duplessis acknowledged that there is a risk of head injuries even if the employee is working under the wing. An employee could be struck on the head by the sling straps attached to the roll of paper.
- [39] On that basis, by enforcing the requirement to wear a hard hat, the employer complies with the *Marine Occupational Safety and Health (MOSH) Regulations*, which reads as follows:
- 10.1 Where
- (a) it is not reasonably practicable to eliminate or control a safety or health hazard in a work place within safe limits, and
- (b) the use of protection equipment may prevent or reduce injury from that hazard, every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part. SOR/95-74, s. 58(F).
- [40] With regard to the second point, subsection 10.2 (b) of the MOSH Regulations also specifies that wearing a hard hat shall not create a hazard. It reads as follows:
- 10.2 All protection equipment
- (...)
- (b) shall not in itself create a hazard.
- [41] This was the argument of B. Duplessis. Specifically, he argued that the Port of Saint John – Risk Assessment stated that there is a greater risk of wearing a hard hat for the Lead Hand because of the visual obstruction created by the hard hat. He explained that a clear view is necessary for a Lead hand to be able to jump out of the way in case a roll of paper moves accidentally in his direction. According to B. Duplessis, this occurs during certain movements of the vessel. He added that he always has to be ready to jump out of the area to avoid being struck by a roll of paper.
- [42] Base on this, I am convinced that the movement of rolls of paper in the hold of a vessel is a serious hazard to employees. However, it seems a normal condition of work for B. Duplessis. Nonetheless, shocks are put under the rolls of paper to prevent accidental movements. According to B. Duplessis, this is not always done.
- [43] HSO Rennie never looked at this hazard during his investigation of the refusal to work. HSO Rennie said that he was never involved in his capacity of a health and safety officer to investigate or to take any actions on this particular issue. However, he said that it is a risky job to work in the hold of a vessel.
- [44] In addition, I was not provided with any evidence demonstrating that the employer has ever addressed this issue by taking all precautions to eliminate or control this hazard. As well, B. Duplessis did not recall at the hearing if the employer had since established a safety procedure to secure the rolls of paper in the hold of a vessel.

- [45] Given the question regarding the risk assessment and based on the facts established at the hearing, I conclude that HSO Rennie did not erred in his decision. Therefore, I confirm the decision of HSO Rennie that wearing a hard hat while working in the hold of the vessel MV Reefer Prince did not constitute a danger for B. Duplessis.
- [46] However, I must say that HSO Rennie erred in his investigation by not addressing the hazard related to the movement of rolls of paper in the hold of a vessel. Therefore, that hazard must be addressed.
- [47] As authorized by paragraph 146.1(1)(b) of the Code to issue any direction that I consider appropriate under subsection 145(2) of the Code, I hereby direct Forest Products Terminal Corporation Ltd. to develop a risk assessment regarding the hazard of an employee being crushed due to accidental movements of rolls of paper in the hold of a vessel. The risk assessment has to be done by a qualified person. Also, no persons will be authorized to work in the hold of a vessel during loading and unloading operations of rolls of paper until the risk assessment has been completed and the employer has put in place safety procedures to eliminate or control the risk of being crushed in the hold of vessels. This has to be done in consultation with the workplace health and safety committee.
- [48] Therefore, pursuant to subsection 145(5) of the *Canada Labour Code*, the employer shall without delay cause a copy of the direction to be posted and to give a copy of it to the health and safety committee.

Pierre Guénette
Appeals Officer

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPHS 145(2)(a) AND (b)

On October 4, 2005, the undersigned Appeals Officer conducted an inquiry pursuant to section 146.1 of the *Canada Labour Code*, Part II (the *Code*), into the circumstances of the decision of a health and safety officer on a refusal to work from Brian Duplessis, an employee of Forest Products Terminal Corporation Ltd., being an employer subject to the *Canada Labour Code*, Part II, at the Port of Saint John, Saint John, New Brunswick, the said work place being sometimes known as Forest Products Terminal Corporation Ltd.

The undersigned Appeals Officer is of the opinion that the following situation constitutes a danger to an employee working in the hold of a vessel during loading and unloading operations of rolls of paper:

Without a proper safety work procedure, rolls of paper can move accidentally and an employee could be crushed and injured.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Code, to have a risk assessment developed by a qualified person, in consultation with the workplace health and safety committee regarding the hazard of accidental movements of rolls of paper in the hold of a vessel. Following the risk assessment's recommendations, the employer shall put in place safety procedures to protect employees from that hazard.

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code*, Part II, to immediately cease loading and unloading operations of rolls of paper in the hold of a vessel, until this direction has been complied with.

Issued at Ottawa, December 22, 2005.

Pierre Guénette
Appeals Officer

To: Forest Products Terminal Corporation Ltd.
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Summary of Appeals Officer's Decision

Decision No.: 05-059

Applicant: Brian Duplessis

Respondent: Forest Products Terminal Corporation Ltd.

Key words: Lead Hand, hold, vessel, protective equipment, hard hat, under the wing of the hatch, roll of paper, cutting board, loading operation, risk, head injury, risk assessment, refusal to work, hazard and danger.

Provisions: CLC 125(1) (l), 128, 129, 145(2), 146.1.
MOSHR 10.1, 10.2, 10.3, 10.4

Summary

An employee refused to work because he considered that wearing a hard hat while doing his tasks of handling 3 ton rolls of paper in the hold of a vessel constituted a risk of being crushed between rolls of paper. The situation is related to the fact that the employee will not see the roll of paper accidentally moving into his direction because of a distraction by of a hard hat that could fall off his head and cause a visual obstruction.

The health and safety officer who investigated the refusal to work decided that a danger did not exist.

Following the appeal by the employee, the Appeals Officer confirmed the health and safety officer's decision. In addition, a direction was issued to the employer to have a risk assessment made by a qualified person, in consultation with the workplace health and safety committee. Also, until the employer has complied with the direction, no persons will be authorized to work in the hold of a vessel during loading and unloading operations of rolls of paper.