

Canada Labour Code
Part II
Occupational Health and Safety

George Smith
applicant

Decision No.: 06-011
April 5th, 2006

This case was heard by appeals officer Douglas Malanka by telephone on March 24, 2006.

Health and Safety Officer

Andrew McKechnie, HRDC Labour Program, Winnipeg, Manitoba

- [1] On October, 2005, a Yale forklift was legally removed from George Smith Trucking Limited for inspection by a qualified person. HSO McKechnie stated in his written report that this action was taken because Mr. Smith had not complied with his written direction and notice of danger issued on June 17, 2004 to in respect of the Yale model forklift. Specifically, HSO McKechnie wrote that Mr. Smith had not complied with the regulatory requirement to repair the forklift truck and to report on its reparation to HSO McKechnie.
- [2] The Yale forklift removed from George Smith Trucking Limited was subsequently taken to Wajax Industries for inspection by a qualified person. On November 4, 2005, Mr. Wes Dyck, Service Manager of Wajax Industries issued a report which reported numerous deficiencies related to the Yale forklift.
- [3] On November 25, 2005, HSO McKechnie communicated with Mr. Dyck by e-mail and asked him to confirm whether or not the Yale forklift was unsafe for use because of the deficiencies. Mr. Dyck responded the same day stating that the Yale forklift was unsafe for use because of the mask trunion and the absence of an overhead guard.
- [4] On January 11, 2006 HSO McKechnie returned the Yale forklift to George Smith Trucking Limited and, at the same time, issued a direction to Mr. Smith pursuant to paragraphs 145(2)(a) and (b) of the *Code*. The direction, stated:

The said health and safety officer considers that the use or operation of a machine constitutes a danger to an employee at work:

Canada Labour Code, Part II, 125(1)(k) and
COHS Regulations 14.29

The employer's forklift manufactured by Yale was determined by a qualified person to be unsafe for use as identified on the attached test report of November 4, 2005

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

You are HEREBY FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the *Canada Labour Code* Part II, not to use or operate the machine in respect of which the NOTICE OF DANGER no. 2736 has been affixed pursuant to subsection 145(3), until this direction has been complied with.

Issued at Winnipeg, this 11 day of January, 2006.

- [5] HSO McKechnie also issued directions to employees of George Smith Trucking Limited pursuant to subsection 145(2.1) directing them to discontinue the use or operation of the Yale forklift until the employer, Mr. Smith had complied with the direction issued to him in respect of the Yale forklift.
- [6] Mr. Smith appealed the direction of HSO McKechnie pursuant to subsection 146 of Part II on January 17, 2006. He maintained that the report by Mr. Dyck of Wajax industries did not state that the deficiencies constituted an unsafe condition.
- [7] A hearing of Mr. Smith's appeal of the direction was held via telephone on March 24, 2006 with his agreement. HSO McKechnie was not available to participate in the hearing and so HSO Alex Kozubal, who had assisted HSO McKechnie in the matter, participated in his place. Also present was Mr. Smith.
- [8] HSO Kozubal summarized events and evidence and was then questioned by Mr. Smith regarding the process followed by the health and safety officers and the finding of Mr. Dyck that the Yale forklift was unsafe.
- [9] Mr. Smith stated that he is not required to ensure the Yale forklift is fitted with an overhead guard because the Yale forklift is never used to lift objects more than 2 feet off the ground. He referred me to section 14.4 of Part XIV, Materials Handling, of the *Canada Occupational Health and Safety Regulations* (COHSR). Section 14.4 states that motorized materials handling equipment must be equipped with a protective structure where the equipment is used in circumstances where the on-board operator may be stuck by a falling object or shifting load. Section 14.4 further specifies that the protective structure must be capable under all foreseeable circumstances of preventing the penetration of an object or load into the operator compartment. Section 14.4 reads as follows:
 - 14.4(1) Where motorized materials handling equipment is used under such circumstances that the onboard operator of the equipment may be struck by a falling object or shifting load, the employer shall equip the motorized

materials handling equipment with a protective structure of such a design, construction and strength that it will, under all foreseeable conditions, prevent the penetration of the object or load into the compartment or position occupied by the operator.

- (2) Subsection (1) does not apply to a motorized hand-rider truck unless there is a likelihood of its operator being struck by a falling object or a shifting load.
- (3) A protective structure referred to in subsection (1) shall be
 - (a) constructed of non-combustible or fire-resistant material; and
 - (b) designed to permit quick exit from the motorized materials handling equipment in an emergency.
- (4) Where there is a likelihood that materials, goods or things will shift and endanger employees in a motor vehicle acquired after July 1, 1995 and having a gross vehicle weight of less than 4,500 kg, the employer shall install a bulkhead or other means to protect the employees.

SOR/96-400, s. 1.

[10] HSO Kozubal did not refute Mr. Smith's statement that the Yale forklift was never used to operate loads above two feet in his work place, and there was no evidence in the file that disagreed with Mr. Smith's contention.

[11] With regard to the issue of the trunion mask referred to in Mr. Dyck's report, Mr. Smith argued that the problem lay with a missing trunion bushing and not with the mask itself. He did not agree that the bushing was missing when the Yale forklift was seized for inspection, but conceded that it could have fallen out before the unit was seized. He further conceded to me that it would be unsafe to operate the Yale forklift when the trunion bushing is missing.

[12] HSO Kozubal was not able to advise me further regarding the other deficiencies that Mr. Dyck had noted in his report of November 4, 2005.

[13] The issue in this case is whether or not HSO Andrew McKechnie erred when he decided that a danger existed in respect of the Yale forklift based on the findings of a qualified person, and issued a direction pursuant to section 145(2)(a) and (b) of Part II.

[14] For determining if a danger existed in respect of the Yale forklift, I can only rely on Mr. Dyck's confirmation report to HSO McKechnie on November 25, 2005 that the Yale forklift was unsafe for use due to the mask trunion and the absence of an overhead guard.

There was no evidence in the case to link the other deficiencies that Mr. Dyck referred to in his November 4, 2005 report to a danger and so the deficiencies noted therein are not before me.

- [15] With regard to the issue of the absence of an overhead guard, I agree with Mr. Smith's interpretation of section 14.4 of the COHSR that the requirement for overhead protection only applies where the materials handling equipment is used under circumstances that the onboard operator may be struck by a falling object or shifting load. The evidence of Mr. Smith was that the Yale forklift is never used in his work place to lift objects higher than two feet or less and there is no risk of the operator be struck by the load.
- [16] HSO Kozubal did not refute Mr. Smith's statement and was not able to point to any other evidence in the file to prove otherwise. As a result, there is no basis for me to conclude that there was a necessity under Part II and Part XIV of the COHSR for the Yale forklift to be equipped with an overhead guard.
- [17] In the matter of the trunion bushing, Mr. Smith conceded that the absence of a trunion bushing would render the Yale forklift unsafe. Based on this and the opinion of Mr. Dyck, there is no question in my mind that the absence of the trunion bushing constituted a danger.
- [18] For all the reasons stated, I hereby vary the direction that HSO McKechnie issued to Mr. Smith on January 11, 2006 as follows to clarify that it was the absence of the trunion bushing that constitutes the danger. The revised direction now reads:

A qualified person confirmed in writing on November 25, 2005, that the employer's forklift manufactured by Yale was unsafe due to the absence of a trunion bushing on the trunion mask.

Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 06-011

Applicant: George Smith

Key Words: Direction, forklift, inspection, qualified person, deficiencies, trunion, overhead guard

Provisions: *Code:* 125(1)(k), 145(2)(a), 145(2)(b), 145(2.1)
COHSRs: 14.29, 14.4

Summary:

The applicant appealed a direction issued by a health and safety officer. A forklift was legally removed from the applicant for inspection by a qualified person. The qualified person issued a report which reported numerous deficiencies related to the forklift and stated that the forklift was unsafe for use because of the mask trunion and the absence of overhead guard. The health and safety officer issued his direction to the applicant under paragraphs 146(2)(a) and (b) of the *Code* requesting that the applicant take measures to protect employees or any other person(s) from danger and not to use or operate the machine.

Following his review, the Appeals Officer decided that there was no basis for him to conclude that there was a necessity under Part II of the *Code* and Part XIV of the COHSR for the forklift to be equipped with an overhead guard. The Appeals Officer also concluded that there was no question in his mind that the absence of the trunion bushing constituted a danger. The Appeals Officer then varied the direction of the health and safety officer to clarify that the absence of the trunion bushing constituted the danger.