

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Viterra Inc., 2010 OHSTC 18

Date: 2010-12-23
Case No.: 2009-34
Rendered at: Ottawa

Between:

Viterra Inc., Appellant

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a
direction issued by a health and safety officer

Decision: The direction is rescinded

Decision rendered by: Mr. Pierre Guénette, Appeals Officer

Language of decision: English

For the appellant: Mr. Peter T. Bergbusch, Counsel, Balfour Moss

For the respondent: There is no respondent in this appeal

REASONS

[1] This is an appeal brought pursuant to subsection 146(1) of the *Canada Labour Code* (the Code) by Mr. Bergbusch on behalf of Viterra Inc. (Viterra) of a direction issued by Health and Safety Officer Patrick Kurtz (HSO Kurtz) on November 26, 2009.

Background

[2] On September 1, 2009, HSO Kurtz conducted an occupational health and safety inspection of the Viterra facility at Warner, Alberta.

[3] Following his inspection of the seven grain elevators of the facility, HSO Kurtz identified multiple violations of the Code. HSO Kurtz received an assurance of voluntary compliance¹ (AVC) from the employer with a compliance date of September 18, 2009.

[4] The employer sent his response to the AVC on September 17, 2009. All items of the AVC were addressed to the satisfaction of HSO Kurtz, except one regarding respiratory protection devices.

[5] On that specific item, the employer replied to HSO Kurtz's AVC as follows:

“...after discussing this issue internally Viterra feels that the existing training and fit testing provided to employees meets the requirements of the CSA standard. Viterra provides training to all employees who may be exposed to dust or chemicals including respiratory fit testing. Disposable dust masks, while considered a respirator, are to be used in situations where very light/nuisance dust load is present. Half masks or full face masks are used when dust levels are higher or when exposed to chemicals. While employees are educated on the use of disposable dust masks during the training process fit testing is not completed because the disposable dust masks do not fit as snugly as half or full face respirators. It is not possible to obtain the same level of secure fit with a disposable dust mask. Also, the disposable dust masks may change shape slightly when worn therefore an employee who passed a fit test may later find that the fitting would no longer pass. This could lead an employee to falsely believe they are protected when they may not be. Accordingly, Viterra only permits the use of disposable dust masks in very low dust environments and beyond that requires to utilize half or full face masks which are fit tested. Please advise if this does not meet the requirement of the regulations. ”

[6] HSO Kurtz reviewed the employer's response to the AVC and Viterra's respiratory protection program he but was still of the view that employees wearing a disposable particulate respirator (dust masks) must be provided with a fit test. He based this on CSA Standard Z94.4-M1982, as well as opinions from a Technical Advisor, an Industrial Hygienist from the Labour Program and 3M Canada, the company who provides the

¹ An assurance of voluntary compliance is the employer's or employee's written commitment to a health and safety officer that a contravention of the *Canada Labour Code* will be corrected within a specified period

disposable dust masks to Viterra.

[7] As the employer believed that fit testing does not need to be done for the disposable dust masks and refused to take corrective measures, HSO Kurtz issued a direction to Viterra on November 26, 2009.

[8] The direction reads:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On September 1, 2009, the undersigned health and safety officer conducted an inspection in the work place operated by VITERRA INC., being an employer subject to the *Canada Labour Code*, Part II, at Elevator Row, Warner, Alberta, T0K 2L0, the said work place being sometimes known as Viterra.

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

No./No: 1

Paragraph 125.(1)(v) – Canada Labour Code Part II, and subsection 12.7(2) – Canada Occupational Health & Safety Regulation.

The employer shall ensure that employees using respiratory protection devices, such as, but not limited to, disposable particulate filtering respirators are trained in the selection, fit and use in accordance with the CSA Standard Z94.4-M1982.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than December 14, 2009.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Calgary, this 26th day of November, 2009.

Patrick Kurtz
Health and Safety Officer
Certificate Number: ON1277

To: VITERRA INC.
Box 426
Warner, Alberta
T0K 2L0

Issue

[9] I have to determine whether HSO Kurtz erred when he issued a direction to Viterra pursuant to subsection 145(1) of the Code.

Appellant's submissions

[10] Mr. Bergbusch, on behalf of Viterra argued that the direction was issued in error and should be rescinded. According to Mr. Bergbusch, HSO Kurtz committed three errors in issuing the direction. First, he failed to determine whether the workplace presented a “hazard of an airborne hazardous substance or an oxygen deficient atmosphere...”, an essential precondition to a determination that any respiratory protective device is required under subsection 12.7(2) of the *Canada Occupational Health and Safety regulations* (the Regulations).

[11] Secondly, Mr. Bergbusch submitted that the direction is overly broad since it encompasses all respiratory protection devices, even though the only concern raised by HSO Kurtz with Viterra involved disposable masks and that this case is only about disposable respiratory protective devices. Moreover, there is no basis for the officer to find that Viterra has contravened its obligations to select, fit, care for and maintain all respiratory protective devices it provides to its employees.

[12] Thirdly, Mr. Bergbusch argued that HSO Kurtz failed to consider Viterra's explanation that it only provides the disposable particulate filtering respirators (dust masks) to employees in circumstances where nuisance dust may constitute an irritant. These masks are not suitable for fit testing and the employees are not permitted to wear them in circumstances where dust concentrations constitute “a hazard of a hazardous airborne substance”.

[13] Grain dust is not a hazard to employees in a workplace unless it is present in concentrations in excess of the prescribed regulatory standards. HSO Kurtz did not have any evidence at the time of his investigation to show that grain dust concentrations at Viterra's Warner grain terminal exceeded the regulatory standards.

[14] Finally, Mr Bergbusch argued that while disposable respirators are provided to the employees as a comfort measure when the airborne nuisance grain dust is in non hazardous concentrations, other devices are made available to its employees where grain dust concentrations exceed the regulatory threshold and the employees are trained in their selection, fit and use in accordance with CSA standard Z94.4-M1982.

[15] Documents provided to the HSO show that Viterra has a comprehensive respiratory protection program, which includes various respiratory protection devices, from disposable dust masks to full face masks with cartridges to self-contained breathing apparatuses. The respiratory program contains detailed information for employees regarding the selection, fit and use of non-disposable respiratory protective devices.

Analysis

[16] I must determine whether HSO Kurtz erred in finding that the employer was in contravention of paragraph 125(1) (v) of the Code and subsection 12.7(2) of the Regulations.

[17] Paragraph 125(1)(v) of the Code reads:

125.(1) Without restricting the generality of section 124, every employer, shall in respect of every work place controlled by the employer and in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

...

(v) adopt and implement prescribed safety codes and safety standards;

[18] The safety standards relevant to the present case are specified at subsections 12.7(1) and (2) of the Regulations, which read :

12.7(1) Where there is a hazard of an airborne hazardous substance or an oxygen deficient atmosphere in a work place, the employer shall provide a respiratory protective device that is listed in the NIOSH *Certified Equipment List* published on February 13, 1998 by the National Institute for Occupational Safety and Health as amended from time to time, and that protects against the hazardous substance or oxygen deficiency, as the case may be.

12.7(2) A respiratory protective device referred to in subsection (1) shall be selected, fitted, cared for, used and maintained in accordance with the standards set out in CSA Standard Z94.4-M1982, *Selection, Care and Use of Respirators*, the English version of which is dated May, 1982, as amended to September, 1984 and the French version of which is dated March, 1983, as amended to September, 1984, excluding clauses 6.1.5, 10.3.3.1.2 and 10.3.3.4.2(c).

[19] After a careful review of the documents submitted by HSO Kurtz, particularly all the correspondence between the HSO and the employer prior to the issuance of the direction, I note that HSO Kurtz did not raise any concerns throughout his investigation about any other respiratory devices provided by Viterra other than the disposable dust masks. HSO Kurtz's main concern seems to revolve around the fact that the employer refused to provide a fit test for this type of masks as required by the CSA standard referenced in subsection 12.7(2) of the Regulations.

[20] Moreover, HSO Kurtz did not find the respiratory protection program put in place by the employer, which includes various types of respiratory devices, to be in violation of the Code.

[21] Consequently, I agree with the employer's assertion that HSO Kurtz's direction was too broad in referring to all protective devices. The only respiratory protective device that was in dispute in this case are the disposable dust masks.

[22] HSO Kurtz found that Viterra was in violation of subsection 12.7(2) of the Regulations for providing its employees with disposable dust masks without ensuring that they are trained in the selection, fit and use as prescribed in the Regulations.

[23] I find that HSO Kurtz erred in directing the employer to provide training in the selection, use and fit of the disposable dust masks in accordance with subsection 12.7(2) of the Regulations without first considering whether or not Viterra has a statutory obligation to provide its employees with these masks.

[24] Indeed, Subsection 12.7(2) only applies when an employer is required to provide a respiratory protective device that is listed in the NIOSH *Certified Equipment List* pursuant to subsection 12.7(1).

[25] An employer has a statutory obligation to provide a respiratory protective device listed in the NIOSH *Certified Equipment List* pursuant to subsection 12.7(1) where "there is a hazard of an airborne hazardous substance or an oxygen deficient atmosphere in a work place".

[26] The existence of a hazard of an airborne hazardous substance or an oxygen deficient atmosphere in subsection 12.7(1) is a precondition to the application of subsection 12.7(2).

[27] The employer operates a grain elevator complex and during grain handling operations, the employees may be exposed to different levels of grain dust. The possible hazard that the employees working at the grain elevator complex can be exposed to is airborne grain dust in concentration levels that exceed what is prescribed by Part X of the Regulations titled *Hazardous Substances*.

[28] Subsection 10.19(1)b) of the Regulations reads :

10.19(1) An employee shall be kept free from exposure to a concentration
of
...

(b) airborne grain dust in excess of 10 mg/m³

[29] It follows that when employees are exposed to airborne grain dust in excess of 10 mg/m³, Viterra is required to provide them with a protective respiratory device listed in the NIOSH *Certified Equipment List* and must ensure that they are trained in the selection, use and maintenance in accordance with CSA standard Z94.4-M1982.

[30] On the other hand, when employees are exposed to concentration of airborne grain dust that is under the regulatory prescribed level, Viterra is not required to provide a protective respiratory device and subsection 12.7(2) consequently does not apply.

[31] Accordingly, since Viterra only provides the disposable dust masks to employees as a comfort measure where grain dust concentrations does not exceed the regulatory threshold, there is no regulatory obligation for Viterra to ensure that its employees are trained in the selection, use and fit of those masks. Thus, Viterra is not required to provide a fit test to employees who are using this type of mask when they are exposed to non hazardous concentrations of grain dust.

[32] Nevertheless, after reviewing Viterra's respiratory protection program, I find that it meets the regulatory requirements. The program provides for the identification of hazardous areas through testing. Air quality testing is done to ensure the proper selection of respiratory protective devices. Where grain dust exceeds the regulatory threshold, respiratory devices are made available to the employees that are NIOSH approved and detailed information is provided to employees on the selection, fit and use of the devices in accordance with CSA Standard Z94.4-M1982.

Decision

[33] For these reasons, I rescind the direction issued on November 26, 2009 by HSO Kurtz.

Pierre Guénette
Appeals Officer