

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Rogers Communications Inc., 2011 OHSTC 25

Date: 2011-10-28
Case No.: 2011-28
Rendered at: Ottawa

Between:

Rogers Communications 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 confirmed

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the appellant: Mr Dan Black, Counsel - Davis LLP

Canada

REASONS

[1] This case concerns an appeal brought on April 15, 2011, by Rogers Communications Inc. (Rogers), under ss. 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Mr Francesco Misuraca, Health and Safety Officer (HSO), on March 18, 2011.

Background

[2] On November 15, 2010, Mr White, a Service Installation Technician with Rogers, was performing an aerial cable replacement at a customer's house in Innisfil, Ontario. At approximately 10:00 a.m., Mr White was discovered dead at the bottom of his ladder by a citizen. No one witnessed the fall. The coroner diagnosed the cause of death as blunt chest trauma caused by the fall.

[3] Human Resources and Skills Development Canada, Labour Program, was informed of Mr White's death at around 12:00 p.m. on November 15, 2010, by a telephone call from the South Simcoe Police, Bradford, Ontario.

[4] HSO Misuraca and another HSO arrived at the scene of the accident around 1:15 p.m. on November 15, 2010. By that time, the site had been secured by the South Simcoe Police.

[5] The investigation indicated that Mr White's ladder was leaning onto a communication line connecting two utility poles. It was concluded by the HSO that the victim's weight on the ladder snapped the old aerial cable, releasing the tension from the wire, which jolted the victim and threw him from the ladder.

[6] HSO Misuraca concluded that Mr White failed to implement three safety procedures that could have prevented the accident:

- i) The failure to reduce the tension on the old aerial cable;
- ii) the failure to reduce the tension by positioning the ladder properly; and
- iii) the failure to tie off the ladder with a support structure.

[7] The investigation showed that all required safety training and work procedures were well documented and that equipment used had been properly inspected prior to the work being performed. In his *Hazardous Occurrence Narrative Report*, dated April 21, 2011, HSO Misuraca stated that "prosecution is not recommended in this case as I cannot conclude that the employer's actions or failure to act were [sic] resulted in death."

[8] On March 18, 2011, a direction was issued under para. 145(1)(a) of the Code. HSO Misuraca found that para. 125.(1)(z.03) of the Code and ss. 19.5(2) of the *Canada*

Occupational Health and Safety Regulations (the Regulations) had been contravened:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On January 14, 2011, the undersigned health and safety officer conducted an investigation regarding the fatality of Keith White, in the work place operated by Rogers Cable Inc., being an employer subject to the *Canada Labour Code*, Part II, at 244 Newkirk Road, Richmond Hill, Ontario, L4C 3S5, the said work place being sometimes known as Rogers Cable Inc.

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)(z.03) – Canada Labour Code, Part II,
Without restricting the generality of section 124, every employer shall, in respect to 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, develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters.

Subsection 19.5(2) – Canada Occupational Health & Safety Regulation.
As part of the preventative measures, the employer shall develop and implement a preventative maintenance program, in order to avoid failures that could result in hazard to employees.

The employer has failed to implement and monitor their preventative maintenance program for the prevention of hazards. More specifically, the employer has failed to conduct, as part of their Workplace Safety Procedures, field unplanned employee inspections that observe and document unsafe acts or conditions of employees.

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 April 4, 2011.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(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 to reoccur.

Issued at Toronto, this 18th day of March, 2011.

[9] On April 15, 2011, Rogers submitted notice of its appeal. On August 9, 2011 notice of written submissions was given to Rogers. On September 29, 2011 Rogers submitted its appeal submissions.

Issue

[10] I must determine whether HSO Misuraca erred in issuing the direction under para. 145(1)(a) of the Code?

Appellant's submissions

[11] According to the appellant, the direction issued by HSO Misuraca was not substantiated due to the fact that Rogers did not contravene the Code or the Regulations and the fact that Rogers carried out a field unplanned inspection on Mr White three weeks prior to his death.

[12] The appellant argued that para. 125(1)(z.03) of the Code and ss. 19.5(2) of the Regulations do not require it to “conduct...field unplanned employee inspections that observe and document unsafe acts or conditions of employees.” Rogers submits that it went beyond the requirements of the Code and Regulations due to the fact that it carried out field unplanned employee inspections.

[13] In support of these positions, the appellant points to first, the wording of the Code and Regulations; and second, copies of the forms used by a Team Manager to conduct field unplanned employee inspections.

1. The Wording of the Code and Regulations

[14] The appellant argued that the language in para. 125(1)(z.03) of the Code only requires Rogers to “develop, implement and monitor...a prescribed program for the prevention of hazards in the work place...that also provides for the education of employees in health and safety matters.” Rogers contended that this paragraph does not explicitly require Rogers to “conduct...field unplanned employee inspections that observe and document unsafe acts of conditions of employees.”

[15] Similarly, Rogers points to the language in ss. 19.5(2) of the Regulations, which only requires an employer to “develop and implement a preventive program in order to avoid failures that could result in a hazard to employees.” Rogers contended that it did develop and implement a preventative program.

[16] To substantiate these points, the appellant argued that the language of the Code is very clear where it specifically intends employers to conduct or permit inspections. The appellant points to para. 135(7)(e) of the Code, which explicitly states that a work place committee shall “participate in all of the inquiries, studies and inspections pertaining to the health and safety of employees...”. Rogers therefore argued that if it was the intent of Parliament to require inspections of workplace programs, it would have explicitly stated that intention in the Code.

2. Field Unplanned Inspections

[17] The appellant submitted it developed, implemented and monitored a program to ensure that health and safety requirements were met. Rogers submitted that Section 3.4 of its *Workplace Inspection Procedures* exceeds the requirements of the Code and Regulations. Section 3.4 states:

“3.4.2 Each manager shall conduct at least one unplanned employee inspection per year, and document it using the Corporate Office / Field Inspection template (Appendix B). All inspections will then be filed into a central Health and Safety filing area for that department.”

[18] The appellant points to the fact that a field unplanned employee inspection of Mr White was carried out three weeks before his death.

[19] Rogers submitted that its Team Manager, Mr Whalen, conducted a field unplanned employee inspection of Mr White at 10:00 am on Monday, October 25, 2010 when Mr White was working. The appellant includes the documentation from the field unplanned employee inspection as Tab 4 in its submissions that consisted of the following statement entered on a spreadsheet by Mr Whalen: “Met Keith at 51 Cityview Barrie start of 10am shift”.

[20] The appellant concluded by arguing that the standards it implemented go above the requirements of both the Code and the Regulations, and that it met its own policy requirements of conducting an unplanned inspection once a year by conducting a field unplanned inspection on Mr White in October, 2010.

Analysis

[21] The issue on appeal concerns the proper interpretation to be given to para. 125(1)(z.03) of the Code and ss. 19.5(2) of the Regulations.

[22] Paragraph 125(1)(z.03) of the Code requires an employer to:

develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters; [emphasis added]

[23] Subsection 19.5(2) of the Regulations states:

As part of the preventative measures, the employer shall develop and implement a preventative maintenance program in order to avoid failures that could result in hazards to employees [emphasis added].

[24] HSO Misuraca's direction to Rogers states that:

“The employer has failed to implement and monitor their preventative maintenance program for the prevention of hazards. More specifically, the employer has failed to conduct, as part of their Workplace Safety Procedures, field unplanned employee inspections that observe and document unsafe acts or conditions of employees.” [emphasis added].

[25] My role as an appeals officer is to determine whether Rogers is in contravention of para. 125(1)(z.03) of the Code and ss.19.5(2) of the Regulations.

[26] The Code and the Regulations are clear in their requirement for an employer to develop a hazards prevention program. Rogers has complied with this element of the Code and Regulations by creating its *Workplace Safety Procedures* Manual.

[27] The only issue that needs to be resolved in this appeal is whether the Code and its Regulations impose a duty to carry out field unplanned employee inspections, in the case of Rogers.

[28] I agree with the appellant's contention that neither the Code nor the Regulations specifically mentions the requirement for field unplanned employee inspections. However, there is an obligation put on an employer to not only develop, but also to implement, their preventative program. Rogers has clearly demonstrated to me and to the HSO that they have complied with the obligation to develop a preventative maintenance program. I now need to determine if their obligation to implement the program has been met.

[29] The Oxford Dictionary defines “implement” as to “complete or execute (a contract etc.); fulfil (an undertaking); put (a decision or plan) into effect.”¹

[30] Given this definition of the word “implement”, the Code and Regulations can reasonably be understood to require an employer to fulfil or execute the workplace safety procedures that it developed.

[31] Field unplanned employee inspections are provided for in article 3.4.2 of the appellant's *Workplace Inspections Procedure*:

Each manager shall conduct at least one unplanned employee inspection per year, and document it using the Corporate Office / Field Inspection template (Appendix B). All inspections will then be filed in to a central Health and Safety filing area for that department.

[32] This requirement for unplanned field employee inspections contains three components:

¹ *The New Shorter Oxford Dictionary* (Toronto, Oxford University Press, 1993) at 1323.

- i) That each manager will conduct at least one unplanned inspection per year;
- ii) the manager will document that inspection using the Corporate Office / Field Inspection template (referred to as Appendix B); and
- iii) that all inspections will be filed to a central Health and Safety filing area.

[33] The appellant submitted that it conducted and documented a field unplanned employee inspection. In its submissions, Rogers included Mr Whalen's observations of Mr White on October 25, 2010 at a work place in Barrie, Ontario.

[34] This submission, however, fails to demonstrate how the appellant complied with its own work place inspections procedures. Rogers provided no evidence of any filled out Appendix B forms and no demonstration of an Appendix B form being submitted to a central Health and Safety filing area, as per the requirements in Section 3.4.2 of its policy manual.

[35] The appellant created a work place safety policy that required it to conduct field unplanned employee inspections once a year, to fill out an Appendix B form, and to submit that form. Rogers has not demonstrated how it has complied with article 3.4.2 of its *Workplace Safety Procedures*.

[36] For that reason, the appellant failed in its obligation to implement this aspect of its preventative program that it developed. Therefore HSO Misuraca was justified in issuing the direction pursuant to para. 125(1)(z.03) of the Code and ss. 19.5(2) of the Regulations.

Decision

[37] For these reasons, the direction issued to Rogers by HSO Misuraca on March 18, 2011, is confirmed.

Michael Wiwchar
Appeals Officer