Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Bell Mobility Inc., 2011 OHSTC 27

Date: 2011-11-01
Case No.: 2011-55
Rendered at: Ottawa

Between:

Bell Mobility Inc., Appellant

Matter: An application for a stay of a direction

Decision: The stay of the direction is granted

Decision rendered by: Mr. Douglas Malanka, Appeals Officer

Decision language: English

For the appellant: Mr. William Hlibchuk, Counsel, Norton Rose OR LLP

REASONS

[1] On October 21, 2011, Mr. Hlibchuk, Counsel for the Bell Mobility Inc. (Mobility), filed a written application for a stay with the Occupational Health and Safety Tribunal Canada. The object of the application for stay was a direction that Health Safety Officer Marjorie Roelofsen issued to Mobility on September 29, 2011 pursuant to subsection 145(1) of the *Canada Labour Code* (the Code). In addition to written submissions, the affidavits of Chuck Mulé, Health and Safety Manager of Mobility, and Daniel Robillard, Director of Wireless Network Field Services and Transport Engineering of Mobility, were also forwarded in support of the application for a stay. A hearing conducted by telephone was held on October 25, 2011. There was no respondent in the matter.

[2] The application for stay of the direction is made pursuant to subsection 146(2) of the Code. That subsection reads as follows:

> 146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

Background

[3] The direction issued to Mobility by HSO Roelofsen states:

> On September 7, 2011, the undersigned health and safety officer conducted an investigation in the work place operated by Bell Mobility Inc., being an employer subject to the *Canada Labour Code*, Part II, at 940 Commissioners Rd. E., London, Ontario N5Z 3J2, the said work place being sometimes known as Bell Mobility Inc. – London.
>
> 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)(l) – Canada Labour Code, Part II, Paragraph 12.10(1)(a) – Canada Occupational Health and Safety Regulation.
>
> 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, provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing.
>
> 12.10(1)(a) Subject to subsection (1.1), every employer shall provide a fall-protection system to any person, other than an employee who is installing or removing a fall-protection system in accordance with the instructions referred to in subsection (5), who works from an unguarded structure or on a vehicle, at a height of more than 2.4 m above the nearest

> permanent safe level or above any moving parts of machinery or any other surface or thing that could cause injury to a person on contact.
>
> **The employer has failed to provide a fall-protection system to the employee working on the roof of 940 Commissioners Road East, London, Ontario where a Bell Mobility Inc. tower is located.**
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the Canada Labour Code, Part II, to terminate the contravention forthwith.
>
> 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 London, Ontario, this 29th day of September, 2011.

[4] Taking into consideration Mr. Hlibchuk's written and oral submissions, I ordered a stay of the direction on October 28 2011, until a decision on the merits of the appeal is rendered by an appeals officer. The following outlines my reasons for granting the stay of direction.

Analysis

[5] The authority for an appeals officer to grant a stay is derived from the above aforementioned subsection 146(2) and the exercise of this discretion must be consistent with the purpose clause of the Code found in section 122.1 and any other applicable provisions.

> S. 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[6] In deciding this stay application, I applied the three part test adopted by the Tribunal. This test requires that:

1) The applicant must satisfy the Appeals Officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.
2) The applicant must demonstrate that significant harm would be suffered if the direction is not stayed.
3) The applicant must demonstrate that measures will be put in place to protect the health and safety of employees or any person granted access to the workplace should the stay be granted.

Is the question to be tried serious as opposed to a frivolous or vexatious?

[7] Mr. Hlibchuk argued that the instant appeal raises the issue of whether or not Mobility's rooftop work constitutes a health and safety hazard and whether the means by which the work is conducted are in conformity with the Code and in particular section 12.10(1)(a) of the Canada Occupational Health and Safety Regulation (COHSR). He urged that this question has serious health and safety implications and, as such, is neither frivolous nor vexatious.

[8] Mr. Hlibchuk further argued that the information submitted by Mobility in its application for stay establishes a *prima facie* case that Mobility's work methods are safe and in conformity with subsection 12.10(1) of the COHSR. He held that the Direction leads to an absurd conclusion that the use of a fall protection system is required on any building with unguarded edges even if the employee is standing in the middle of the roof metres away from the edge.

[9] Taking all of this into consideration, I am satisfied that there is a serious question to be tried.

Would the Applicant suffer significant harm if the direction is not stayed?

[10] Mr. Hlibchuk held that Mobility will suffer significant harm if a stay of the Direction is not granted.

[11] Mr. Hlibchuk stated that the rooftop work place referred to in the Direction is identical to the thousands of locations that are within the entire Bell network in which Mobility operates. All of these locations would be, in effect, considered work places that would be *de facto* subject to the overly broad scope of the direction as drafted and interpreted by the Health and Safety Officer.

[12] He further maintained that the Direction would effectively paralyse Mobility's activities as only a handful of Mobility's technicians are trained in the use of fall protection systems. He stated that, in the event of a widespread service disruption, a swift response is required to ensure Mobility services used by residential, commercial, institutional and public service customers such as health and law enforcement officials. He added that failure to restore services would likely cause prejudice to the public in general, a point noted in the affidavit of Mr. Robillard.

[13] Mr. Hlibchuk pointed out that Mobility cannot compel building owners who permit Mobility to locate their communication equipment on their rooftops to accept the installation of anchors for fall protection systems or guardrails on their roof. Where Mobility could not get permission to install the devices, it would be forced to relocate its equipment to another building, a process that would take several months without any guarantee of success.

[14] Given the submissions made by Mr. Hlibchuk, I am persuaded that Mobility would suffer significant harm if the direction is not stayed.

What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?

[15] Shortly after the Direction was issued, Mobility issued a Rooftop Safety Directive (RSD) on October 14, 2011. The RSD directed all its technicians to refrain from performing any work within 4 metres of the roof edge. Therefore, the only rooftop work now being completed by Mobility employees is work that can be carried out on antennae and radios that are located 4 meters or more from the rooftop edge. It was noted by Mr. Robillard during the telephone hearing that much of Mobility's critical equipment is within this 4 metre zone.

[16] Since the issuance of the RSD, work in the 4 metre zone proximate to the rooftop edge is now performed by contract workers referred to as Riggers who are equipped with fall protection systems and trained on the use of such systems. However, during the stay application, Mobility expressed a concern with respect to its ability to respond to widespread service outages given the presence of critical equipment in the 4 metre zone and the nature of its contractual arrangements with Riggers.

[17] As a result, Mr. Hlibchuk stated that Mobility is developing a Rooftop Accident Prevention Program (APP) for its own technicians that will provide written policy on working safely at distances from the rooftop edge. Mr. Hlibchuk stated that Mobility's rooftop APP will require the installation of a raised warning line on rooftops when it is issued in the coming weeks. He stated that, once the APP is in place and raised warning lines installed, Mobility employees will be permitted to repair and maintain rooftop equipment that is located at 2 meters or more from the edge. However, all work conducted within 2 metres of the edge will continue to be exclusively conducted by Riggers who are equipped and trained with/on fall protection systems.

[18] Based on the submission, I am satisfied that Mobility's additional prevention measures are appropriate.

Decision

[19] Taking into consideration the above, including the fact that Mobility employees are presently excluded from the 4 metre zone , the fact that once the APP is in place they will still be excluded from the 2 metre zone, and the fact that under the APP a raised physical warning line will visually identify the 2 metre zone, Mobility`s application for a stay of the direction issued by HSO Roelofsen on September 29, 2011 is granted until the case is heard on its merit and a decision is rendered by an appeals officer. I also request that Mobility report to the Tribunal in writing once the Rooftop APP is in place.

Douglas Malanka
Appeals Officer